

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 NAME OF  
KURT W. BIRD OR JANET E. BIRD

Case No. CV01-20-9661

**RESPONDENT IDWR'S RESPONSE  
BRIEF**

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

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## STATEMENT OF THE CASE

### I. THE NATURE OF THE CASE

This case presents for the Court's review multiple issues involving Idaho's "local public interest" standard. The key question before the Court is whether the Director of the Idaho Department of Water Resources ("IDWR" or "Department") properly applied the local public interest standard to a new application for permit to appropriate water under Idaho law.

In October of 2018 Kurt E. Bird and Janet W. Bird (collectively referred to herein as "Bird") filed an application ("Application") for a permit ("Permit") to appropriate water from Big Timber Creek, in the Lemhi River Basin, for irrigation purposes. The Idaho Water Resource Board ("IWRB") and the Idaho Department of Fish and Game ("IDFG") (collectively "Petitioners") protested the application. Petitioners asserted the Permit was contrary to the local public interest because diversion of water under the Permit would impair ongoing efforts to protect fish species listed as threatened under the Endangered Species Act ("ESA") in the Lemhi River Basin.

The Director issued his *Order on Exceptions; Final Order* ("Final Order") in the matter on May 21, 2020. The Director's Final Order concluded, after weighing and balancing the various local public interests in the record, the permit could issue with protective conditions related to the ESA-listed fish species. The Director conditioned the Permit to protect threshold streamflow volumes that had been shown to be optimal for adult fish passage on Big Timber Creek. The threshold streamflow volumes were based on quantifiable results from a study of streamflow and habitat needs specific to Big Timber Creek. The Director also limited the time of use of the Permit to the annual snowmelt runoff period, a time when there is excess, unappropriated water in Big Timber Creek. The Director ultimately concluded there was

*insufficient* evidence in the record to impose a condition protecting peak, channel-maintaining flows, or a condition related to the use of decreed high flows.

Petitioners disagree with the way the Director conducted the local public interest inquiry. In the *Opening Brief of Petitioners the Idaho Water Resource Board and the Idaho Department of Fish and Game* (“Petitioners’ Opening Brief”), Petitioners attempt to recast or redefine the local public interest inquiry as a simplistic, very narrow test: If the Director recognizes a local public interest, he has an overriding duty to protect it above all other identified local public interests recognized in the record. The Petitioners’ redefined local public interest standard is contrary to Idaho law because it would improperly limit the Director’s discretion and lead to unreasonable outcomes. Idaho’s local public interest standard requires the Director to weigh and balance *all* local public interest criteria identified in the record. Critical to this authority is the ability to determine whether potential harm to an identified interest may be mitigated through reasonable permit conditions.

For the reasons set forth below, the Director asks the Court to recognize and uphold the Director’s authority under Idaho’s local public interest standard as it relates to the appropriation of water under Idaho law. Likewise, the Court should uphold the Director’s determination that the Permit is in the local public interest. The Permit should stand as conditioned in the Director’s Final Order. Any other outcome would mean that once identified, a valid local public interest criteria could not be weighed or balanced against others in the record. Idaho’s local public interest standard is not so narrow as to preclude the Director’s weighing and balancing of local public interest criteria identified in the record.

## II. THE COURSE OF THE PROCEEDINGS.

On October 12, 2018, Bird filed Application for Permit No. 74-16187 with IDWR. The application was protested by, among others, IWRB and IDFG. R. 00044-00046; R. 00047-00050.

On July 30, 2019, Petitioners filed a *Joint Motion by IWRB and IDFG for Partial Summary Judgment* (“Motion”). R. 00227-00238. On August 13, 2019, Bird filed *Applicant’s Response to Joint Motion by IWRB and IDFG for Partial Summary Judgment*. R. 01103-01121. The Hearing Officer, James Cefalo, granted the *Motion*, in part, on August 21, 2019, and adopted three conclusions of law related to local public interest factors. R. 01169.

On August 28 and 29, 2019, the Hearing Officer conducted an administrative hearing for the protested application in Salmon, Idaho. R. 00095-00099. Many witnesses testified and a variety of exhibits were entered into the record by the parties and by official notice. R. 01506-01507. Bird and the Petitioners, among others, filed post-hearing briefs. R. 01184-01220; R. 01221-01247; R. 01248-01284.

On January 9, 2020, the hearing officer issued a *Preliminary Order Approving Application* (“Preliminary Order”). R. 01301-01335. The Preliminary Order approved the Permit with conditions. Three of the conditions relevant to this matter are known informally as the “bypass flow” conditions, the “peak flow” condition, and the “high flows” condition. R. 01320, 01323, 01328, 01330, 01332.

On January 23, 2020, Bird filed *Applicant’s Petition for Reconsideration*. R. 01336-01378. Also, on January 23, 2020, Petitioners filed *IWRB’s & IDFG’s Joint Petition for Clarification or in the Alternative Reconsideration*. R. 01379-01390. These petitions were



granted, in part, resulting in an *Amended Preliminary Order Approving Application* (“Amended Preliminary Order”) issued February 6, 2020. R. 01418-01455.

On February 20, 2020, Petitioners submitted *IWRB’s and IDFG’s Exceptions to Amended Preliminary Order Approving Application and Memorandum in Support* (“Agencies’ Exceptions”) with the Director. R. 01470-01492. On March 5, 2020, Bird filed the *Applicant’s Response to Exceptions* with the Director. R. 01493-01501.

The Director reviewed the Agencies’ Exceptions, and Bird’s response, and adopted many of the hearing officer’s findings of fact and conclusions of law and issued the *Order on Exceptions; Final Order* on May 21, 2020 (“Final Order”). R. 01506-01547. Specifically, the Final Order affirmed the bypass flow conditions (Conditions 8 and 9) but removed the peak flow (Condition 10) and high flows (Condition 12) conditions. R. 01511, 01534-39, 01542-43. In sum, the Director concluded: (1) the bypass flow conditions, Condition 8 and Condition 9, which prohibited diversion under the Permit unless flows in Reaches 1 and 5<sup>1</sup> of Big Timber Creek are at least 18 cfs and 54 cfs, respectively, represented reasonable and quantifiable conditions in the local public interest (R. 01541); (2) there was insufficient and indeterminable evidence in the record to quantify and condition the permit to allow periodic peak flow, channel maintaining events (R. 01511); and (3) no high flow condition should attach to the Permit because questions of when water users may divert high flows are questions of administration (R. 01512-01513).

On June 18, 2020, Petitioners filed a joint notice of appeal and petition for judicial review in Ada County District Court, Fourth Judicial District (the “Court”). R. 01548. On July 2, 2020,

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<sup>1</sup> Reach 1 is the lowest portion of Big Timber Creek, as defined in the U.S. Bureau of Reclamation’s *Flow Characterization Study: Instream Flow Assessment, Big Timber Creek, Idaho* (2004) and includes the confluence of Big Timber Creek and the Lemhi River. R. 01509; R. 01521. Reach 5 is upstream and includes the Permit point of diversion. *Id.*

Bird filed a *Cross-Appeal and Cross Petition for Judicial Review of Final Agency Action* with the Court.

### **III. THE FACTS OF THE CASE.**

#### **A. The Application.**

The Permit sought to divert 6.4 cfs from Big Timber Creek for the irrigation of 320 acres. R. 01517; Ex. IDWR1. The proposed point of diversion is an existing ditch and is an authorized point of diversion for Bird's four existing water rights 74-32, 74-34, 74-7165 and 74-15930. Ex. 309. The authorized combined place of use for Bird's water rights 74-32, 74-34, 74-7165, and 74-15926 through 74-15931 includes a portion of the proposed place of use described in the application for permit. Ex. 309. If the Permit is ultimately approved, Bird will move the existing water rights from the proposed place of use prior to development of the Permit. R. 01517.

Water rights on Big Timber Creek are administered by the watermaster for Water District 74W. Ex. 13 at Att. B; Ex. 28. The relevant point of diversion for the Permit is equipped with a lockable headgate and measuring device. Exs. 23 and 24. The Permit would be the most junior water right on Big Timber Creek and only be available during times of high springtime flows due to snowmelt runoff. Exs. 10 and IDWR19.

Bird proposed to irrigate, with pivots and sprinklers, pasture grass for cattle grazing. This, Bird submitted, would augment natural precipitation and increase productivity of the pasture area allowing Bird to keep cattle on their property later in the year, thereby reducing or eliminating the need to rent pasture ground from neighboring landowners. R. 01517; Exs. 2-4.

#### **B. The ESA and Big Timber Creek.**

Big Timber Creek is important habitat for Snake River steelhead, spring Chinook salmon and Columbia River bull trout. Ex. 210 at 1-2; Ex. 201 at 1. These species are currently listed as

“threatened” under the Endangered Species Act (“ESA”). *Id.* Under Section 6 of the ESA, local landowners can enter into a conservation agreement (“Section 6 Agreement”) resulting in protection from ESA enforcement actions by NOAA Fisheries. R. 01518.

In the early 2000’s, the State of Idaho, local Lemhi River Basin water users, and NOAA Fisheries attempted to negotiate a Section 6 Agreement in the Lemhi River Basin. R. 01518. Negotiations failed due to disagreements related to instream flows needed to recover the ESA-listed species. *Id.* In the absence of a Section 6 Agreement, local water users remain at risk of enforcement under the ESA if there is a take of an ESA-listed species. *Id.* As part of the Section 6 Agreement negotiations, the parties to those proceedings prepared a set of conservation measures to be included in the agreement. Ex. 198 (draft conservation measures dated Sep. 7, 2007). IDFG and IWRB, in coordination with other state agencies, have subsequently implemented some of the draft conservation measures even though the Section 6 Agreement was never finalized. Tr. Vol. II, p. 382-383; p. 392.

### **C. Big Timber Creek Fish Habitat.**

Big Timber Creek is tributary to the Lemhi River and flows into it near the town of Leadore, Idaho. Ex. 202 at 5. Big Timber Creek has unique characteristics (substrate composition, woody debris, wood cover, limited solar exposure, temperature) that make the creek ideal habitat for multiple life stages of ESA-listed fish species. Ex. 201 at 7, 11-15; Ex. 202 at 9.

The quality and quantity of fish habitat is directly correlated to streamflow. Ex. 201 at 8-9. Depleted stream flows are the main reason for the lack of suitable fish habitat on Big Timber Creek. Tr. Vol. II, p. 440.

“Magnitude and timing of flows can influence instream and riparian habitat, and natural flow regimes are important in formation and maintenance of instream and floodplain habitats.” Ex.

198 at 4 (citations omitted). Periodic peak flows or high volume flows help “maintain the complexity of stream channels important for fish spawning, rearing, and survival by creating riffles and pools, depositional zones, and undercut banks.” *Id.* at 40. However, the high flow events needed to maintain optimum stream channel characteristics for Big Timber Creek have not been defined or developed. Tr. Vol. II, p. 466.

**D. The WTP.**

IWRB administers Idaho’s Water Transactions Program (“WTP”) to facilitate projects that “improve flows to tributary streams and rivers in the Upper Salmon River Basin.” Ex. 212. The WTP reconnects tributaries to the Lemhi River that have been functionally disconnected from the river during the summer months. *Id.* Reconnecting tributary streams provides benefits to both anadromous and resident fish species. Ex. 198 at 10-11. During the irrigation season (3/15 – 11/15), most of the total flow in Big Timber Creek is diverted for irrigation use. Ex. 202 at 10, 15; Exs. 10 and IDWR18. Authorized diversion rates under existing water rights exceed the total flow in Big Timber Creek *except* during the snowmelt runoff period. *Id.*

In recent years, the WTP has facilitated projects on Big Timber Creek which have moved points of diversion for Big Timber Creek irrigation water rights to pumping stations on the Lemhi River. Exs. 17 and 18. These projects have reconnected Big Timber Creek to the Lemhi River at the confluence of Big Timber Creek and the Lemhi River during the irrigation season and generally restored a flow of 7.3 cfs in lower Big Timber Creek. Ex. 201 at 21.

**E. The USBR Study.**

In June 2004, the U.S. Bureau of Reclamation’s *Flow Characterization Study: Instream Flow Assessment, Big Timber Creek, Idaho* (“USBR Study”) was released. Ex. 202. The USBR Study was completed to identify the streamflow needed to support the relevant life stages of spring

Chinook salmon, steelhead and bull trout in Big Timber Creek. *Id.* at 2. To support USBR's efforts, NOAA Fisheries provided passage and screening criteria "and one or more methodologies for determining instream flows that will satisfy ESA requirement[s]." *Id.* The USBR Study "may be used by the public, State, and Federal agencies to direct management actions addressing stream flow needs of ESA-listed anadromous and resident native fish." *Id.* at 2-3.

The USBR Study area "encompassed the mainstem Big Timber Creek from its confluence with the Lemhi River upstream to Basin Creek." Ex. 202 at 4. The study area was divided into seven reaches based on "differences in stream channel morphology and locations of major [irrigation] diversions." *Id.* at 4-7. The seven reaches were situated in numerical order from Reach 1 (the most downstream reach, "[extending] from the confluence with the Lemhi River upstream to the first major diversion") to Reach 7 (the most upstream reach, extending upstream of the uppermost large diversion on Big Timber Creek). *Id.*

USBR used a physical habitat simulation model ("PHABSIM") to evaluate the flow requirements at each of the seven designated stream reaches. Ex. 202 at 15-26. PHABSIM is generally recognized as a quality modeling tool, and currently the only method used to describe flow conditions and needs on Big Timber Creek. Tr. Vol. II at 441, 415. For each of the reaches, the USBR determined "the discharge at which habitat is optimized for adult, spawning, or juvenile life stages for the fish species analyzed in this study (salmon, steelhead, and bull trout)." *Id.* at 25.

The USBR Study summarized the recommended flow rates for 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. *Id.* at 41-43. The flows identified in the USBR Study are the "points above which greater amounts of flow only provide minor gains in usable habitat." Ex. 202 at 25.

The Permit's proposed point of diversion is located within the stream section identified as Reach 5 in the USBR Study. *Id.* at 6. The stream section identified as Reach 1 in the USBR Study contains the point of confluence between Big Timber Creek and the Lemhi River upstream to the first major diversion on Big Timber Creek. *Id.* at 6.

The USBR Study determined a flow of 54 cfs is required to maintain passage for adult salmon, steelhead and bull trout through Reach 5. Ex. 202 at 42. If the water rights with authorized points of diversion between the uppermost Big Timber Creek stream gage ("Upper BTC Gage") and Reach 5 were diverted at their full authorized rate, and assuming no instream losses, there would need to be at least 118 cfs to maintain 54 cfs of flow in Reach 5. *Id.* at 17-18. According to the USBR Study, a flow of 18 cfs is required to provide the optimum level of habitat for adult salmonids in Reach 1 (the most downstream reach of Big Timber Creek). Ex. 202 at 41.

**F. High Flow Use.**

On April 3, 2012, the then presiding judge in the Snake River Basin Adjudication ("SRBA") issued a partial decree for the General Provisions in Basin 74 ("Basin 74 General Provisions"). Ex. 11. Basin 74 is comprised of the Lemhi River and its tributaries.

Water users on Big Timber Creek, including Bird, and water users on the Lemhi River divert so-called "high flows" when the available water supply exceeds the demand under existing water rights. R. 01526. Diversion of the high flows, or flood waters, for irrigation purposes is used to hold or store water underground within the basin, which later supplements the flow of the streams and river during the latter portion of the irrigation season. Ex. 189 at 7.

Streamflow in the Lemhi River and its tributary creeks generally peaks in early June as a result of snowmelt runoff. R. 01527. Peak discharge may only last two weeks, but higher than normal flows may last for ten to twelve weeks. *Id.*; Ex. 18.

## ISSUES PRESENTED ON APPEAL

1. Whether the Director properly applied Idaho's local public interest standard;
2. Whether the Director properly applied the local public interest burdens of proof;
3. Whether the bypass flow conditions were sufficient to meet the local public interest;
4. Whether the Director properly conditioned the Permit with bypass flows;
5. Whether the record supported imposition of a peak flow condition on the Permit;
6. Whether the use of high flows on the Permit place of use should have been conditioned in the Permit;
7. Whether the Final Order is consistent with the State Water Plan; and
8. Whether the Permit can be effectively administered at the point of diversion.

## ARGUMENT

### I. STANDARD OF REVIEW.

Judicial review of a final decision by the Department is governed by the IDAPA, Idaho Code § 67-5201 *et seq.*<sup>1</sup>, and Idaho Code § 42-1701A(4). Pursuant to IDAPA, courts undertake judicial review of agency decision making based on the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The Court must affirm the agency decision unless the court finds 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. Idaho Code § 67-5279(3); *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). If the agency action is not affirmed, it must be set aside, in whole or in part, and remanded for further proceedings as necessary. *Idaho Power Co. v. Idaho Dep't of Water Res.*, 151 Idaho 266, 272, 255 P.3d 1152, 1158 (2011).

The Court exercises free review over questions of law. *City of Blackfoot v. Spackman*, 162 Idaho 302, 305, 396 P.3d 1184, 1187 (2017). The Court does not substitute its judgment as to the weight of the evidence presented (Idaho Code § 67-5279(1)) but instead defers to the agency's findings of fact unless they are clearly erroneous. *Chisholm v. Twin Falls County*, 139

Idaho 131, 132, 75 P.3d 185, 187 (2003). “A strong presumption of validity favors an agency’s actions.” *Young Elec. Sign Co. v. State ex rel. Winder*, 135 Idaho 804, 807, 25 P.3d 117, 120 (2001). When conflicting evidence is presented, the agency’s findings must be sustained on appeal, as long as they are supported by substantial and competent evidence, regardless of whether the court might have reached a different conclusion. *Barron*, 135 Idaho at 417, 18 P.3d at 222.

“Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion.” *Jarvis v. Rexburg Nursing Ctr.*, 136 Idaho 579, 583, 38 P.3d 617, 621 (2001). Substantial evidence need not be uncontradicted, nor does it need to necessarily lead to a certain conclusion; it need only be of such sufficient quantity and probative value that reasonable minds could reach the same conclusion as the fact finder. *See Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 736, 518 P.2d 1194, 1198 (1974).

The petitioner for judicial review bears the burden of proving there was not substantial evidence in the record to support the agency’s decision. *Payette River Property Owners Ass’n v. Bd. Of Comm’rs*, 132 Idaho 551, 976 P.2d 477 (1999).

## **II. THE DIRECTOR PROPERLY APPLIED IDAHO’S LOCAL PUBLIC INTEREST STANDARD IN THE FINAL ORDER.**

The critical issue for the Court’s decision relates to the Director’s ability to weigh various, sometimes conflicting, local public interest values identified in water right applications, and balance the same to address the local public interest. Idaho Code § 42-203A(5). Petitioners argue because the Director recognized one particular local public interest factor—in this case the recovery of ESA-listed fish species on Big Timber Creek—the Director has an absolute duty to protect that interest to the exclusion of all other local public interest values. *Petitioners’ Opening Brief* at 21.



The Director disagrees with the Petitioners' narrow view of the local public interest standard. The Director must instead weigh, and balance *all* recognized local public interests identified in the record. Conditions that may mitigate potential effects to an identified local public interest must be reasonable and based on substantial and competent evidence in the record. The authority to weigh and balance the local public interests is vested with the Director and, therefore, the Court must uphold the Final Order.

**A. The Director Properly Stated and Applied Idaho's Local Public Interest Standard.**

Idaho Code § 42-203A(5) governs the Director's review of the local public interest in water right applications, and states, in pertinent part, that an application's proposed use will not "conflict with the local public interest as defined in section 42-202B, Idaho Code . . . ." The term "local public interest" is statutorily defined as "the interests that the people in the area directly affected by a proposed water use have and the effects of such use on the public water resource." Idaho Code § 42-202B(3).<sup>2</sup>

Idaho Code § 42-203A assigns the Director the affirmative duty to assess the public interest. *Shokal v. Dunn*, 109 Idaho 330, 337, 707 P.2d 441, 448 (1985). "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. "The determination of what elements of the public interest are impacted, and what the public interest requires, is committed to the [Director's] sound discretion." *Id.* Permit conditions arising from the local public interest

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<sup>2</sup> While IDWR's Water Appropriation Rules (IDAPA 37.03.08) contain rules related to the Director's local public interest inquiry (IDAPA 37.03.08.45.e.i-iii ("Rule 45e"), the rules have not been updated to reflect the legislature's 2003 statutory amendments, including the definition of the "local public interest" at Idaho Code § 42-202B(3). At this time, as Rule 45e has not been updated to incorporate the updated definition of "local public interest," Rule 45e is not used in the Director's local public interest inquiry.

review should be based on specific information in the record, not on speculation or assertions of indeterminate impacts. See *Hardy v. Higginson*, 123 Idaho 485, 491, 849 P.2d 946, 952 (1993).

Underlying this inquiry is an inherent standard of reasonableness. In *Chisholm v. Idaho Dept. of Water Resources*, the Idaho Supreme Court considered the breadth of the Director's local public interest inquiry. In that case the appellants argued there was no evidence in the record that the proposed dairy *would not add* to the existing odor problem in the Jerome area, and, therefore, the local public interest would be harmed by additional dairy odor, and a permit could not issue. The Supreme Court disagreed, concluding "this is too strict a standard; *there must only be evidence that the odors emitted will be reasonable and at such level as to satisfy the local public interest when balanced with other factors.*" *Chisholm v. Idaho Dept. of Water Resources*, 142 Idaho 159, 160-61, 125 P.3d 515, 517-18 (Idaho 2005) (emphasis added). Therefore, potential negative effects on a local public interest value may still be reasonable, when balanced with other conflicting local public interest factors.

In summary, Idaho's local public interest standard involves application of the Director's discretion through the weighing and balancing of relevant, albeit potentially conflicting, factors in the record. Conditions resulting therefrom must be reasonable and based on substantial, competent evidence in the record and not on speculation or assertion. The balancing test does not require the Director to eradicate or disallow *all* potential effects on a recognized local public interest.

**B. The Director Properly Applied the Relevant Local Public Interest Burdens of Proof.**

The burdens of proof specifically related to the local public interest inquiry are unique in their application. IDWR's Water Appropriation Rules (IDAPA 37.03.08) address the burdens

as applied to the local public interest inquiry. Rule 40.04.b.ii (IDAPA 37.03.08.40.04.b.ii) states:

The applicant shall bear the initial burden of coming forward with evidence for the evaluation of criterion (e) of Section 42-203A(5), Idaho Code [the local public interest], as to any factor affecting local public interest of which he is knowledgeable or reasonably can be expected to be knowledgeable. The protestant shall 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 than the applicant.

The Idaho Supreme Court frames it this way: First, “[t]hose applying for permits and those challenging the application bear the burden of demonstrating which elements of the public interest are impacted and to what degree.” *Shokal*, 109 Idaho at 339, 70 P.2d at 450. This burden lies with the party that has knowledge “peculiar to himself,” which the Idaho Supreme Court explained as:

For example, the designer of a fish facility has particularized knowledge of the safeguards or their lack concerning the numbers of fish that may escape and the amount of fecal material that will be discharged into the river. As to such information the applicant should have the burden of going forward and ultimately the burden of proof on the impact on the local public interest. On the other hand, a protestant who claims a harm peculiar to himself should have the burden of going forward to establish that harm.

*Id.* Protestants to an application do not have to establish that the underlying project is not in the local public interest. *Id.* The applicant has the burden of showing that the project is either in the local public interest *or* there are factors that outweigh the local public interest which is in opposition to the project. *Id.* Thereafter, the Director may condition the permit to mitigate potential effects to the identified local public interests. Idaho Code § 42-203A(5).

In this case, Petitioners introduced evidence related to their particularized knowledge of the protection and recovery of the ESA-listed fish species. This was their burden as protestants. In particular IDFG is more cognizant than Bird of actions needed to protect and ultimately

recover the relevant ESA-listed fish species. As a result, Bird bore the ultimate burden to either show that the Permit is in the local public interest *or* to demonstrate factors that outweigh the local public interests introduced by Petitioners. Bird introduced a variety of evidence related to the local public interests of irrigation, economic benefit, and the benefits of incidental recharge. Bird also agreed to be bound by bypass flow conditions already established on James Whittaker's Water Right No. 74-15613. Therefore, there was sufficient evidence in the record to allow the Director to properly weigh and balance the local public interest evidence and to condition the permit in order to mitigate potential effects on the ESA-listed fish species.

**C. The Director Properly Conducted His Local Public Interest Review.**

The Director's local public interest analysis included a balancing and weighing of the following local public interest criteria identified in the record:

- Diversion of water for irrigation is in the local public interest because irrigation of agricultural lands supports and aids in the survival of rural communities and their economies (R. 01534);
- The Applicant will derive real and substantial benefit from irrigating the proposed place of use (R. 01534);
- High flow irrigation on the Bird property leads to gains in the Lemhi River later in the season (Tr. Vol. I, p. 70-71);
- The Wild and Scenic Agreement explicitly allows for, and protects, future appropriations on Big Timber Creek (*Id.*);
- Maintenance of anadromous fisheries in Big Timber Creek and the Lemhi River drainage is in the local public interest (R. 01541);
- Contributing to the development of cooperative conservation agreements, including protecting local water users from ESA incidental take liability, is in the local public interest (R. 01541);
- Reconnection of Big Timber Creek to the Lemhi River to recover ESA-listed fish species is in the local public interest;

- Maintenance of a portion of the unappropriated water in streams supporting anadromous fish for the protection of their habitats is in the local public interest (R. 01541); and
- Protecting streamflow and habitat needed to recover ESA-listed fish species is in the local public interest (R. 01541).

After weighing these criteria, the Director concluded the local public interest associated with recovery of ESA-listed species outweighed the local public interest associated with irrigation under the Permit. R. 01541. The Director reached this conclusion because the State of Idaho and its citizenry have invested a significant amount of money and resources toward recovery of the ESA-listed fish species. *Id.* Until the relevant ESA-listed fish species reach population recovery thresholds, the Director concluded local people in the Lemhi River Basin, and more specifically, water users holding Big Timber Creek water rights, are under threat of ESA enforcement action. *Id.* Therefore, the Director concluded, in the absence of permit conditions to protect habitat and stream passage of ESA-listed fish species, the proposed permit would have been denied. *Id.*

The Director concluded there *was* sufficient, competent evidence to quantify streamflows that will promote and reasonably protect ESA-listed fish habitat and passage on Big Timber Creek. *Id.* The Permit could be both limited to a specific portion of the irrigation season and conditioned to prevent diversion below specific streamflow rates on Big Timber Creek. R. 01508. The Director reasoned the Permit could be conditioned to limit water availability to times of flow at the Lower BTC Gage of at least 18 cfs and flow at the proposed Bird Gage of at least 54 cfs. R. 01541. The Director concluded these flows would sufficiently support habitat and fish passage for adult salmonids throughout Big Timber Creek. *Id.* In other words, the Director concluded that, when the Permit is exercised, the amount of water available for diversion on Big Timber Creek would be reduced by 18 cfs during certain times of the early

irrigation season. *Id.* The Director concluded this would allow water to flow out of the Big Timber Creek drainage and increase streamflow and fish habitat in the upper Lemhi River, a reach that can experience reduced flows during the period of use attached to the Permit. *Id.*

### **III. THE DIRECTOR REASONABLY AND PROPERLY CONDITIONED THE PERMIT.**

Based on the Director's weighing of the local public interest, as described above, the Director conditioned the Permit. Relevant here are the following conditions:

**Condition 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.

**Condition 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.

**Condition 10.** To facilitate delivery of this right, the right holder 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. Any measurement device or structures must satisfy federal and state fish passage standards. Measurement data must be available to the watermaster on a real-time basis. The right holder may rely on streamflow data collected for state or federal agencies to satisfy this measurement condition.

R. 01542-01543. Petitioners take issue with certain conditions on the Permit and the Director responds to each below.

#### **A. Reasonable Conditions on the Permit Can Allow Conflicting Local Public Interests to Co-Occur.**

Petitioners argue that because the Director concluded it is in the local public interest to:

(a) recover ESA-listed fish species to afford protection to local water users from ESA enforcement; and (b) protect streamflow and habitat needed to recover ESA-listed species, then Idaho Code § 42-203A(5)(e) imposes on the Director the affirmative duty to protect these same

local public interests by concluding there is no water available in the Lemhi River Basin “from a recovery perspective.”<sup>3</sup> *Petitioners’ Opening Brief* at 21-22.

The core problem with Petitioners’ conclusion that no water is available for appropriation in the Lemhi River Basin “from a[n] [ESA] recovery perspective,” is that Petitioners “misunderstand the contours of the local public interest and the standard required to find that a proposed water right” satisfies the local public interest inquiry. *Chisholm*, 142 Idaho 160-61, 125 P.3d 517-18. Petitioners attempt to equate one issue—ESA-listed fish recovery—as the sole and overriding local public interest factor relevant to the Permit. As a result, Petitioners appear to argue that because the Director *recognized* the local public interest of promoting recovery of the ESA-listed fish species on Big Timber Creek, he is now duty-bound to protect those interests *above all else*. Petitioners’ approach is unreasonably narrow. Idaho’s local public interest standard does not mandate the Director promote one interest above all others, or worse, ignore other factors, especially where reasonable conditions can be imposed.

The appellants in *Chisholm* similarly argued that because odor—any level of additional odor—would be emitted from a proposed dairy a water right transfer<sup>4</sup> could in no way “comport with the local public interest standard.” *Chisholm*, 142 Idaho 160-61, 125 P.3d 517-18. In other words, the appellants argued for the sole reason that the proposed dairy would emit odor, the local area would be ill-served, and, therefore, the local public interest could not be protected.

The Supreme Court disagreed, concluding

[a]ppellants misunderstand the contours of the local public interest. [Appellants] equate[] one narrow issue—the odor and its related negative effects—as the local

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<sup>3</sup> Petitioners do not challenge the Director’s conclusion that there is sufficient water, “for an adequate time interval and in sufficient quantities,” on Big Timber Creek from a water appropriation perspective. R. 01531; Tr. Vol II, p. 441.

<sup>4</sup> Analysis of the local public interest in water permit applications and water right transfers are the same. See Idaho Code § 42-203A(5)(e) and Idaho Code § 42-222.

public interest. This is too narrow a definition; the local public interest has many elements and the determination of which local public interest are impacted and balancing those impacts is left to the sound discretion of [the Director].

*Id.* at 164-65, 520-21.<sup>5</sup>

The Idaho Supreme Court concluded the appellants were asking it “to reweigh the evidence and mandate on remand that IDWR not approve this *or additional transfer applications for dairies in the future.*” *Id.* (emphasis added). The Supreme Court declined to adopt a local public interest standard that would foreclose *any* dairy emitting *any* odor in the Magic Valley, now and into the future. *Id.* Based on this analysis and the fact the dairy would have an odor management plan, as well as evidence in the record which showed a reduction in odor under the plan and minimal impacts on the local area, the Supreme Court determined the hearing officer’s conclusions were supported by substantial and competent evidence. *Id.* The fact that the appellants disagreed with the conclusion reached by the hearing officer related to odor did not change the fact that the hearing officer specifically considered the existing odor problems. *Id.*

Similarly, here, by arguing that *all* of the remaining unappropriated water in Big Timber Creek, at all times of the year, is required to maintain and improve fish passage and fish habitat,<sup>6</sup> based on an ESA recovery perspective, Petitioners would have the Court recognize only one overriding local public interest factor: Recovery of ESA-listed fish species in the Lemhi River Basin. This outcome is too narrow, as it prevents the Director from weighing and balancing the local public interest factors identified in the record or reasonably conditioning the permit to mitigate potential negative effects.

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<sup>5</sup> *Chisholm* was decided prior to the 2003 legislative amendments to the local public interest standard. However, while the wording of the local public interest definition and standard was amended in 2003, the fact that the inquiry involves weighing any and all relevant local public interests in the record, not simply one, did not change.

<sup>6</sup> Tr. Vol. II, p. 441-42.



In this case the Director properly applied the local public interest standard. The Director recognized that it is in the local public interest to allow irrigators to divert unappropriated water, even if just during times of spring runoff. R. 01517; 01533. Authorizing irrigation also benefits both Bird and the Lemhi River Basin generally as normal irrigation losses applied high in the system return as additional flow to the river. R. 01527. The Director also recognized the local public interest to protect ESA-listed fish species habitat and streamflow for passage and ESA recovery. R. 01534.

As a threshold matter, the Director concluded the local public interest of protecting streamflow and habitat of the ESA-listed fish species to promote ESA recovery outweighed Bird's irrigation interest. Petitioners would have this end the Director's inquiry. However, the Director properly applied the entirety of the local public interest standard. After weighing and balancing the conflicting local public interests, the Director *disagreed* with the Petitioners that no further appropriation of Big Timber Creek should be allowed because of ongoing ESA-listed fish recovery efforts. Instead, the Director concluded that based on substantial and competent evidence in the record, reasonable conditioning could attach to the Permit to mitigate negative effects the Permit may otherwise have had on ESA-listed fish species passage and habitat needs. By protecting the most important aspect of ESA-listed fish recovery efforts—streamflow—the Director concluded the local public interest was met.

Simply because the Director recognized the valuable and important efforts in the Lemhi River Basin related to ESA-listed fish recovery does not mean all unappropriated water on Big Timber Creek may not be diverted for a beneficial use. All local public interests must be analyzed, including whether, as here, conditions may be imposed to protect the interest that may otherwise be negatively affected.

**B. Permit Conditions 8 and 9 Are Based on Substantial and Competent Evidence and Should Be Maintained.**

As described above, the Director conditioned the permit to promote optimum fish habitat for adult populations of ESA-listed species by disallowing Bird to divert under the Permit if: (1) flows in Reach 1 are less than 18 cfs; and (2) flows of less than 54 cfs at the critical Reach 5 gage. R. 01543. These conditions were based on substantial, competent evidence in the record—in the form of the USBR Study—and should be maintained.

***1. The USBR Study is Reliable, Substantial, and Competence Evidence.***

The USBR Study “identif[ies] stream flow needs to support relevant life history stages of [the ESA-listed fish species].” Ex. 202 at 1. In it, the USBR “characterized flow needs for various life stages of the selected species in Big Timber Creek using the Physical Habitat Simulation (PHABSIM) model at each study site.” *Id.* USBR explicitly stated its objective:

[T]o conduct habitat studies on the highest priority stream, Big Timber Creek, to identify stream flow needs to support relevant life history stages of summer steelhead . . . spring chinook . . . [and] bull trout. Information obtained from this study may be used by the public, State, and Federal agencies to direct management actions addressing stream flow needs of ESA-listed anadromous and resident native fish. Study results can be used to help determine target flow objectives to improve passage, spawning, and rearing conditions for salmon, steelhead, and bull trout.

*Id.* at 2-3. The USBR Study further states: “A reliable identification of stream flow needs for these fish will provide a basis that the public, and Federal, State, Tribal, and local parties can use to determine how to make the available water supply meet both the needs of ESA-listed fish and the needs of the people who live in these areas.” *Id.* at 3. The USBR Study also states that while USBR is the lead agency for implementing the objectives outlined by the study, “[t]o support this work, [NOAA Fisheries] will supply [USBR] with passage and screening criteria and one or more methodologies for determining instream flows that will satisfy ESA requirement[s].” *Id.* at 2.

The plain and explicit language of the USBR Study states that it is meant to provide the State of Idaho with information related to flow and habitat of the ESA-listed fish species so that the needs of the fish and the needs of the people living in the area can both be met. *Id.* It further states that NOAA Fisheries would supply to USBR methodologies to determined instream flows *that will satisfy* ESA requirements. Therefore, the Director reasonably concluded the USBR Study represents instream flows that satisfy the ESA.

The validity and utility of the USBR Study for purposes of the local public interest inquiry is bolstered by Petitioner IDFG's reliance on it in its Expert Report and in live testimony. IDFG's Expert Report states explicitly:

[i]nstream flow studies by the [USBR] using Physical Habitat Simulation (PHABSIM) methods suggests that adult steelhead, Chinook salmon, and Bull Trout need a minimum of 13 cfs of flow in the lower reaches of Big Timber Creek for sufficient fish passage.

Ex. 201 at 9. In its recognition of the limited effect of the similarly conditioned Whittaker right (Water Right No. 74-15613) IDFG's Expert Report also implicitly recognized that periods of high water are present on Big Timber Creek, stating:

while existing water right no. 74-15613 has a condition that requires a minimum 13 cfs of flow in Big Timber Creek [citations omitted], this is a relatively junior application and the 13 cfs condition would be typically pertinent for only a few weeks in late May through June during the period of high water. Thus, during most of the irrigation season flow in Big Timber Creek returns to the 7.3 cfs level provided by the water right transactions, which is insufficient to provide quality rearing capacity to support growth and survival of juveniles in Big Timber Creek, or for maintaining suitable conditions for all adult migrating fish.

*Id.* While this passage states that 7.3 cfs is insufficient to provide quality rearing capacity to support growth and survival of juveniles or maintain suitable conditions for migrating adults, it *does not* state what level would be sufficient. Instead, IDFG's Expert Report refers back to the USBR Study. *Id.* ("Instream flow studies by [USBR] . . . suggests that adult steelhead, Chinook

salmon, and Bull Trout need a minimum of 13 cfs of flow in the lower reaches of Big Timber Creek for sufficient fish passage.”).

IDFG’s expert, Jeff Diluccia, also testified about his reliance on the USBR Study at hearing, stating first that while USBR does not make decisions related to recovery decisions under the ESA, it funds and undertake studies to provide technical assistance to cooperating governmental entities, in this case, NOAA Fisheries. Tr. Vol. II, p. 345. Diluccia continued, under questioning from IDFG counsel:

Q: Okay. And I believe when I was reviewing this document [the USBR Study], you were discussing it with me, I believe you told me you generally think it’s a good study, something along that line?

A: Yeah, it’s a good attempt, it’s a good study, to try to, you, again, establish flow needs. I mean it’s--the physical habitat simulation modeling is a well--known, you know, sound scientific approach to try and evaluate the habitat condition and how much water you got to put in that condition to meet the needs of the fish.

T. at 414-15. Therefore, IDFG’s expert explicitly states the USBR Study is a good, scientific approach to evaluate how much water should be put in a condition to meet the flow needs of the ESA-listed fish.

IDFG’s expert was further questioned on cross-examination by counsel for Bird in relation to flow requirements and the USBR Study:

Q: [ . . . ] So at least based on the water right record, Mr. Bird’s application would not be probably diverted after early July.

A: Correct.

Q: So do you think this application would have any direct effect on flows during the spawning time period?

A: *I don’t*, other than you know – and it’s really hard to get a handle on any type of consumptive use.

Q: And so is – do you believe that you’d need as high as 49 cfs for juvenile bull trout?

A: It's difficult to answer. With the science that we've completed lately, *we're not there yet as far as really coming in on – on flow needs relative to life stages, so I have to depend on PHABSIM, [the USBR Study] and I'm just going off their numbers.*

Tr. Vol. II, p. 511 (emphasis added). Therefore, IDFG's expert testified under oath that the Permit would have no direct impact on the spawning period for the ESA-listed fish species (other than an unknown consumptive amount). More critically, IDFG's expert testified that IDFG has no other relevant evidence to offer the Director to inform the local public interest inquiry as it relates to a determination of flow needs. Instead, IDFG, as the Director reasonably did in this case, relies on the USBR Study.

The USBR Study is substantial, competent, quantifiable, scientific evidence pertaining to the flows needs of the ESA-listed species specific to Big Timber Creek. The USBR Study further represents analysis undertaken using methodologies to determine instream flows to satisfy the ESA, as determined by NOAA Fisheries. The Director properly concluded the USBR Study, as quantitative analysis, undertaken in a cooperative effort with NOAA Fisheries, and introduced into evidence by IDFG, was sufficient to support the reasonable conditioning of the Permit's bypass flow conditions. While Petitioners may desire a different conclusion, it is reasonable for the Director to rely on IDFG's own substantial, competent testimony in the record for purposes of conditioning the Permit related to flow.

***2. The Director Properly Utilized the USBR Study to Condition the Permit with Bypass Flows.***

The USBR Study represents analysis undertaken by USBR using methodologies to determine instream flows to satisfy the ESA, as determined by NOAA Fisheries. The USBR Study further concluded the flows identified in it are the "points above which greater amounts of flow *only provide minor gains in usable habitat.*" Ex. 202 at 25 (emphasis added). Therefore,

the Director concluded “if the [Permit] is conditioned to not infringe on the discrete streamflows set forth in the USBR Study, the proposed permit will have little or no impact on fish habitat or fish passage for ESA-listed species on Big Timber Creek.” R. 01535. If streamflow, which Petitioners argue is the main reason for the lack of suitable fish habitat<sup>7</sup>, can be reasonably protected, then the competing local public interest of irrigation by Bird may also be allowed.

The USBR Study plays an obvious and critical role in aiding the recovery of ESA-listed fish species in the Lemhi River Basin. In preparation of the USBR Study, and in ESA recovery activities generally, the USBR participates

with many other Federal, State, local, Tribal, and private parties in Endangered Species Act (ESA)-listed anadromous fish protection and restoration activities in selected parts of the Upper Salmon River Basin.

...

Action 149 of the BiOp states [USBR] obligations related to stream flow issues: “USBR” shall initiate programs in three priority sub-basins . . . per year over five years, in coordination with NMFS, Fish and Wildlife Service (FWS), the states and others, to address all flow, passage, and screening problems in each sub-basin over ten years.”

...

The objective of this action is to restore flows needed to avoid jeopardy to listed species, screen all diversions, and resolve all passage obstructions . . . . [USBR] is the lead agency for these initiatives and will facilitate their implementation.

Ex. 202 at 2-3. The USBR Study further explicitly states its objective:

The objective of this study was to conduct habitat studies on the highest priority stream, Big Timber Creek, to identify stream flow needs to support relevant life history stages of [steelhead, chinook salmon, and bull trout].

...

Information obtained from this study may be used by the public, State, and Federal agencies to direct management actions addressing stream flow needs of ESA-listed anadromous and resident native fish. Study results can be used to help determine target flow objectives to improve passage, spawning, and rearing conditions for salmon, steelhead, and bull trout.

*Id.*

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<sup>7</sup> *Petitioners’ Opening Brief* at 17.

The Director used the USBR Study according to its stated intent: to help the State of Idaho determine target flow objectives to improve passage and habitat for the ESA-listed species. The USBR Study is substantial and competent, quantifiable, scientific evidence in the record pertaining to the flow “needs” of the ESA-listed species.

The Director conditioned the permit to promote optimum streamflow for habitat of adult populations of ESA-listed species by disallowing Bird to divert under the Permit if: (1) flows in Reach 1 are less than 18 cfs; and (2) flows of less than 54 cfs at the critical Reach 5 gage. R. 01543. Conditions 8 and 9—the bypass flow conditions—were imposed pursuant to the USBR Study, which is substantial, competent evidence. Conditions 8 and 9 should be maintained.

**C. The Final Order’s Bypass Flow Conditions Are Not Meant to Dictate “Recovery” of the ESA-Listed Fish Species and Are Not Contrary to the USBR Study and the Final Order’s Factual Findings.**

***1. The Director’s Local Public Interest Inquiry is Distinct from NOAA’s ESA Recovery and Delisting Determinations.***

Petitioners argue NOAA is the federal agency with authority to make recovery and delisting determinations under the ESA. *Petitioner’s Brief* at 22. Petitioners argue because NOAA is the responsible federal agency, the USBR Study is insufficient to establish recovery standards related to streamflow and habitat needs of ESA-listed species. *Petitioner’s Opening Brief* at 22 quoting R. 01541. Petitioners argue the submittal of extensive, un rebutted evidence of NOAA Fisheries’ recovery standards leads to the conclusion that, from a recovery perspective, “there is no water available in the Lemhi River Basin for new irrigation diversions.” *Petitioners’ Opening Brief* at 22. Petitioners argue “[t]he USBR Study does not state or imply that it defines, informs, interprets, or implements the standards for making ESA recovery or delisting determinations for the listed fish species.” *Petitioners’ Opening Brief* at 25 (emphasis in original).

Here again, Petitioners misinterpret the local public interest standard. The Director is not attempting to somehow define ESA recovery; he is attempting to weigh and balance substantial, competent evidence in the record in order to determine whether reasonable conditions may be attached to the Permit to mitigate negative effects on the ESA recovery local public interest. The Director concluded that by using what the USBR Study—a study undertaken using one or more methodologies supplied by NOAA Fisheries “that will satisfy ESA requirement[s]”—determined to be sufficient streamflow needs for adult ESA-listed fish passage. Ex. 202 at 2.

Further, ESA recovery, as otherwise determined and defined by NOAA Fisheries, does not bind water appropriations where such appropriation can take place under reasonable conditions to mitigate potential effects to another identified local public interest. NOAA Fisheries conceded this point, stating:

Improving streamflow in the mainstem Lemhi River and tributary streams is a high priority for recovery of the Lemhi River Chinook salmon and steelhead populations. Toward that end, there are a variety of completed, ongoing, and planned future streamflow restoration projects that are made possible by collaborative efforts among private landowners and a variety of natural resource agencies. [NOAA Fisheries] feels that approval of water right application 74-16187, *without provisions to protect fishes and their habitat*, would reduce value of completed and ongoing habitat restoration, and would likely impair future restoration efforts.

Ex. 205 at 1-2 (emphasis added). Therefore, NOAA Fisheries, the agency responsible for making ESA recovery and delisting determinations, concluded that with conditions (or “provisions”) in place to protect the ESA-listed fish species and their habitat, the Permit may issue.

Thus, Petitioners, in effect, take a stronger stance here than the federal agency who actually defines recovery and delisting under the ESA. Petitioners claim that regardless of the evidence presented, regardless of potential reasonable conditions to mitigate potential effects to



streamflow for fish passage and habitat, regardless of the sufficiency of water, regardless of their acknowledgment of the validity of the USBR Study: No water is available for appropriation from Big Timber Creek because ESA-listed fish recovery is ongoing. Again, this stance is too narrow as it pertains to the local public interest standard.

Petitioners' stance is problematic for the additional reason that Petitioner IDFG protested the Permit with the following stated intent:

The purpose of this protest is to assist [IDWR] by providing technical information addressing potential effects on anadromous fish and *how any adverse effects might be mitigated*. Big Timber Creek and Lemhi River are known spawning and rearing streams for [the ESA-Listed Fish Species]. [ . . . ]. IDFG does not support or oppose the application, but is rather filing this protest to assist IDWR in the decision-making process.

Ex. 3 at 2 (emphasis added). IDFG *did* submit evidence that might allow the Director to address mitigation of adverse effects—the USBR Study—and its argument on appeal that the USBR Study cannot be validly utilized to condition the Permit is unreasonable. At base, Petitioners seem to ignore the distinction between NOAA Fisheries' *legal authority* to determine and define recovery thresholds of ESA-listed fish species, and the Director's *discretionary function* in determining and defining Idaho's local public interest standard related to water appropriation.

To reiterate, the Director did not conclude the conditioned Permit was sufficient to “recover” ESA-listed species. Rather, the Director concluded it was in the local public interest to support and protect quantifiable passage and habitat threshold flows that reasonably protect and promote fish habitat and flow, thereby supporting the recovery effort in the Lemhi River basin. The Director explicitly stated:

The proposed permit should be conditioned to only be available when the flow at the Lower BTC Gage is at least 18 cfs and flow at the proposed Bird Gage is at least 54 cfs. ***These flow thresholds will support the streamflow needed to provide optimum habitat and fish passage for adult salmonids throughout Big Timber Creek.***

R. 01541 (emphasis added). The Director's stated goal was to provide support through conditions that would promote the collaborative effort to recover ESA-listed fish species in the Lemhi River Basin. The Director accomplished this goal by preserving a level of scientifically quantified streamflow for fish passage—flows developed by USBR using one or more methodologies for determining instream flows that will satisfy the ESA—through reasonable bypass flow conditions.

Petitioners would impose an unreasonable standard on the Director by requiring NOAA Fisheries' authority and responsibility to define and implement recovery of the ESA-listed fish species to dictate the local public interest on Big Timber Creek. Petitioners ignore or disregard IDWR's authority and role in determining and defining the contours of Idaho's local public interest inquiry.

In this case, the Director balanced local public interests identified in the record. The Director weighed the evidence submitted by NOAA Fisheries, OSC, and IDFG, and any other relevant evidence related to ESA-listed fish recovery. The Director simply disagreed that the valid and cooperative efforts ongoing over the past few decades related to recovery of the ESA-listed fish species may only be advanced by prevention of *any* appropriation on Big Timber Creek. As described in depth above, the Director instead determined reasonable conditioning could allow the interests of both the ESA-listed fish species, and the interest of Bird in increased irrigation, to co-occur.

***2. The Director Reasonably Concluded Flows Above Certain Thresholds in the USBR Study Provide Only Minor Gains in Usable Habitat.***

Petitioners argue the Final Order improperly used the USBR Study to determine streamflows required for optimum fish habitat and passage, and that any flows higher than the

USBR Study threshold flows “provide only minor gains in usable habitat.” *Petitioners’ Opening Brief* at 25 quoting R. 01521, 01535. Again, Petitioners’ argument fails because it ignores the distinction between NOAA Fisheries’ recovery and delisting determinations and the Director’s local public interest inquiry under Idaho law.

The USBR Study analyzed optimum flow for ESA-listed fish species in Big Timber Creek at various life stages. Ex. 202 at 3. It is reasonable to conclude that a fish species would have flow and habitat scenarios that will be ideal, or optimal, for various life stages. The Director’s conclusion merely reflects that at certain times of the year, and in this case the only time period Bird would be diverting water under the Permit, there is typically so much spring runoff flows on Big Timber Creek that Bird’s use under the Permit should not impact the minimum threshold flows needed during periods of scarcity. Bird’s Permit will be operative annually until, at the latest, July 31, and will be unavailable when flows in Big Timber Creek are below the threshold streamflow levels established by the USBR Study for optimum adult fish passage and habitat. R. 01524.

***3. The Permit’s Bypass Flow Conditions and the Limited Time of Use Will Further the Goals of ESA Recovery on Big Timber Creek.***

Petitioners argue the Final Order actually makes the case that streamflows and habitat capacity must *increase* to support recovery goals, not maintain the status quo. Petitioners’ Opening Brief at 29. Further, Petitioners argue the record shows that approval of new water rights to divert from Big Timber Creek will adversely impact existing efforts to recover listed species. *Id.*

Petitioner’s arguments here again subvert the Director’s local public interest inquiry to the ESA recovery process. Recovery of the ESA-listed fish species on Big Timber Creek, and the environs, has been ongoing for at least 3 decades. Ex. 202 at 3. The recovery process is a

difficult, large scale, complex, collaborative partnership-based process. *Id.* The Director supports the goals of ESA recovery based on unambiguous recognition of the local public interest of recovery in the Final Order. R. 01541. Petitioners here again attempt to imbue certain language of the Final Order with more legal or authoritative power than the Director has. The Director agrees that both protecting what has been accomplished over the decades in the Lemhi River Basin, and specifically Big Timber Creek, should be maintained and the ESA recovery process should continue forward and improve. The Director simply disagrees with Petitioners' arguments the Final Order, and conditions on the Permit, do not do enough to protect the local public interest of the ESA-listed fish species on Big Timber Creek.

By reasonably conditioning the Permit, the Director protected the *determinable* local public interest aspects of the record. He balanced and protected the competing local public interests utilizing reasonably determinable evidence. It is not the Director's responsibility through the local public interest inquiry to determine the characteristics of ESA recovery; the Director must consider reasonable, determinable evidence, as available, to condition permits under the local public interest standard. The Final Order validly recognized that for a relatively brief period of time in the spring and early summer Bird can divert high water spring runoff flows under the Permit without diminishing the habitat and stream flow passage thresholds of the ESA-listed fish species in Big Timber Creek. R. 01541. This outcome does not adversely harm efforts toward recovery of the ESA-listed fish species, rather it aids in the protective efforts by protecting discrete threshold streamflows determined to be optimal for ESA-listed adult fish passage and habitat.

**4. The Director Properly Included the WTP Reconnect Flows in Calculating the Bypass Flow Conditions.**

Petitioners argue the Director improperly discounted the importance of the WTP in the Final Order. *Petitioners' Opening Brief* at 37. They argue the Director discounted the WTP's relevance, which is contrary to the Final Order's express factual findings and the record. *Id.* Petitioners further argue the Final Order erred in concluding the WTP reconnect flows should be "counted towards" the Reach 1 bypass flow. *Id.*

The Director's Final Order recognized Petitioners' efforts to protect Big Timber Creek flows through the WTP, but refocused the issue:

Requiring Bird not to divert until there is 18 cfs plus an additional amount equal to what the Agencies have secured in the river [through the WTP] is not supported by the record. The USBR Study establishes that 18 cfs is necessary. Protection of a flow in excess of, or separate from, 18 cfs is not supported in the record.

R. 01509-01510. If the proposed permit is conditioned to not deplete the streamflows set forth in the USBR Study when Bird is exercising the Permit, the Director concluded the local public interest requirement of the Permit is achieved. R. 01509-01510. For the reasons so stated above, the Director maintains this is the proper outcome. The Director's decision is an expression of his discretion under the local public interest inquiry. It is a legal determination based on a balancing of the various local public interests identified in the record. Petitioner's efforts and the intent of the WTP, while substantial, are not the only relevant local public interests deserving consideration on Big Timber Creek.

Petitioners ask that the current 7.3 cfs of WTP reconnect flows be protected using the local public interest inquiry because the Director has recognized the local public interest of the WTP flows. *Petitioners' Opening Brief* at 37. However, this outcome is unreasonable. The Director's authority to condition a water right is limited to substantial, competent evidence in the

record. The Director determined the WTP's 7.3 cfs of reconnect flows would be protected by the bypass flow conditions. This is a fact: the Permit may not be exercised at any flow below 18 cfs in Reach 1 and 54 cfs in Reach 5 of Big Timber Creek. This allowed the threshold flows identified as optimum in the USBR Study—defined in the study using one or more methodologies developed by NOAA Fisheries to determine instream flows to satisfy ESA requirements—for the ESA-listed fish species to be met. Ex. 202 at 2. The Director, therefore, both recognized the local public interest garnered from the WTP's reconnect flows and reasonably conditioned the Permit to protect that interest.

The critical factor for defining the bypass flow conditions is how much water is present in Big Timber Creek and at what time of year. If the Director were to have separated out the WTP reconnect flows, he would still have had to require 18 cfs of bypass flow in Reach 1 and 54 cfs in Reach 5 for flow and habitat. This would leave the 7.3 cfs reconnect flows to exist outside of the local public interest inquiry. The Director is unaware of any authority that would allow him to count the WTP flows as something other than what they are: water flowing in a stream. While the reconnect flows are obviously beneficial in reconnecting Big Timber Creek to the Lemhi River, assigning them a special status is outside of the Director's discretion. Again, the Director simply disagrees with Petitioners that having recognized the local public interest of the WTP reconnect flows means he is duty-bound to somehow protect them outside of his authority under the local public interest standard. The Director's duty is to balance and weigh the various local public interests in the record.

The IWRB's efforts in this regard, to continue to offset and remedy the effects of existing irrigation diversions, will not be undermined by the Permit. Petitioners argue allowing Bird's new diversion to "piggyback" on the WTP's efforts makes Bird "an economic beneficiary

of the WTP” and “could also lead the WTP to lose funding . . . .” *Petitioner’s Opening Brief* at 40. The Director again believes Petitioners take the effect of the Permit too far. The Permit will *only* be available at a time when both: (a) the threshold streamflows levels for optimum fish passage and habitat are protected; and (b) the effect of diversion cannot affect flows secured by the WTP. The Permit is reasonably conditioned to be available only during spring high flow runoff periods on Big Timber Creek. The Permit will be turned on and off at times that have no relevance to the WTP’s reconnect flows.

The following exchange occurred at hearing between the Hearing Officer and IDWR’s Amy Cassel related to Whittaker’s similarly conditioned Water Right No. 74-15613:

Q: You know, each year is very different as you look at the hydrographs for each year. There’s a lot of variability between both the river and the creek. But I mean the first one, which was 2011.

A: Yes.

Q: As you can see, you know, there’s a – there’s a line on the Big Timber Creek that indicates when say Mr. Whittaker’s right would be available, that junior right on Big Timber Creek, he could only divert as long as there was 13 cfs in the creek. And as, you know, you look at that time period, it looks like that would have been from maybe – I don’t know – the 5<sup>th</sup> of June to the 15<sup>th</sup> of July, somewhere in there . . . flows on the Lemhi River of course during that time period are at 500, 600 cfs; right? . . . So during that time period the [WTP] transactions really aren’t even in play?

A: **No.**

Tr. V. II, p. 615-616 (emphasis added). This outcome is the same for the Permit. Diversion under the Permit would be turned off *before* Whittaker’s Water Right No. 74-15613. The Permit has been conditioned so the WTP reconnect flows cannot reasonably be affected its exercise.

**D. A Peak Flow Condition Was Not Supported by Substantial and Competent Evidence in the Record.**

The Amended Preliminary Order included the following Condition 10:

The right holder shall cease diversion under this right when the flow at the Bird Gage is greater than 217 cfs. Diversion under this right may resume when the flow at the Bird Gage drops below 217 cfs or has exceeded 217 for at least ten days in the current irrigation season.

R. 01451. The Director, on exceptions, removed Condition 10 from the Final Order because “the record lacks sufficient technical evidence to support a conclusion that a high flow of 284<sup>8</sup> cfs or greater is necessary for channel shaping and channel gravel recruitment to sustain anadromous fisheries habitat in Big Timber Creek.” R. 01511.

Petitioners argue removal of Condition 10 from the Final Order was in error. *Petitioners Opening Brief* at 32. Petitioners argue

[t]he Amended Preliminary Order defined the “peak flow” events to be protected based on the unrebutted testimony of IDFG’s expert witness, R. 01441-42, and the exceedance flows set forth in the USBR Study—a study the Final Order otherwise relied upon as “reliable, convincing scientific evidence” and “technical data.”

*Id.* at 33 quoting R. 01509, 01535.

The Hearing Officer utilized the USBR Study’s “Monthly exceedance flows on Big Timber Creek using USGS regional regression equations” to conclude that 284 cfs was “the peak flow needed to maintain the stream channel.” R. 01425. However, the Director determined this was error as the USBR Study “did not ‘estimate flow or habitat needs of downstream migrants or spring runoff conditions necessary for maintenance of channel morphology or riparian zone functions.’” R. 01537 quoting Ex. 202 at 26. The USBR Study went further, stating “high

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<sup>8</sup> The 284 cfs flow amount comes from the USBR Study and represents an exceedance flow measurements taken at Reach 7 of Big Timber Creek. Ex. 202 at 11. Bird’s Permit point of diversion is in Reach 5. Therefore, the Hearing Officer subtracted 67 cfs of existing water rights between Reach 7 and Reach 5 to arrive at 217 cfs for purposes of Condition 10. R. 01433.



spring flows that mimic the natural hydrograph should be a consideration in managing streamflows *outside* PHABSIM analysis.” *Id.* (emphasis added). In other words, the USBR Study’s exceedance flows are not relevant to peak, channel maintaining, flows.

Further, Diluccia, testified that “IDFG has not quantified the high flow events needed to maintain optimum stream channel characteristics for Big Timber Creek,” nor had they determined a required or optimal frequency. R. 01519; Tr. Vol. II at 466. Therefore, while Diluccia testified qualitatively about the benefit of channel maintaining peak flow events, he testified openly that a quantified flow had not been studied or determined.

The Director reasonably concluded there was insufficient substantial, competent evidence in the record to attach such a condition based solely on Diluccia’s experiential testimony coupled with exceedance regressions from a study that explicitly denied its relevance to peak flow events. The Director may not impose a condition on the Permit without sufficient, competent evidence to support the condition. Neither the USBR Study, nor Diluccia’s experience in 2009 while walking a portion of Big Timber Creek, represent a sufficient analysis of high spring flows that mimic the natural hydrograph to establish “spring runoff conditions necessary for maintenance of channel morphology or riparian zone functions.” Ex. 202 at 26.

Conditioning must be based on substantial, competent evidence, and not on speculation or indeterminable assertion. *See Hardy v. Higginson*, 123 Idaho at 492, 849 P.2d at 953 (condition based on a right-of-way agreement, and not on quantifiable measurements, was not supported by sufficient in the record and rejected). There is insufficient competent evidence in the record to support a peak flow condition. The Director properly concluded a peak flow condition would be based on speculative, indeterminable, evidence, and, therefore, unreasonable and improper.

**E. The Lack of a Peak Flow Condition Did Not Warrant Denial or Remand of the Permit.**

Petitioners argue a peak flow condition is “absolutely necessary ‘to protect the streamflow and habitat needed to recover ESA-listed species.’” *Petitioners’ Opening Brief* at 33 *quoting* R. 01541 (emphasis in original). Petitioners argue that if the Director could not attach a peak flow condition to the Permit, it should have been denied, or, at the least, remanded to the hearing officer for additional hearings on that narrow issue. *Id.*

The Director was not required to deny the Permit simply because he recognized a local public interest factor that cannot yet be quantitatively described or otherwise defined, and, therefore, implemented and administered. Instead, the Director properly and reasonably balanced *all* of the local public interests in the record. The weight of the evidence led the Director to conclude the bypass flow conditions were sufficient, under this specific set of facts, to balance out potential effects the Permit might have on the local public interest of the ESA-listed fish species. This is not error, this is the result of the practical application of Idaho’s local public interest standard. Petitioner’s desired local public interest standard would narrow the inquiry to the point where each factor by itself is determinative of the outcome of the inquiry. Therefore, the lack of a peak flow condition on the Permit did not require its denial.

Neither is the Director required to remand the case to the hearing officer for additional hearings on the peak flow condition. The Director reasonably concluded insufficient substantial and competent evidence was in the record to attach a peak flow condition. The Director cannot condition something he cannot reasonably define based on competent evidence in the record. The Director has the authority to remand a preliminary order for additional fact-finding or hearings, but, in this case, under this set of facts, the Director determined the bypass flow

conditions were sufficient to protect the local public interest. Therefore, no remand was necessary.

**F. Burdens of Proof Related to the Peak Flow Evidence Were Properly Applied.**

Petitioners allege “[t]he Final Order’s removal of the ‘peak flow’ condition was also contrary to *Shokal*’s holding that the applicant has the ultimate burden of proof regarding the local public interest . . . . A protestant, in contrast, only has the ‘burden of going forward’ to establish a claimed harm ‘peculiar to himself.’” *Petitioners’ Opening Brief* at 34 (citations omitted). Petitioners argue they met the burden of going forward by establishing at least a portion of peak flows should be protected in order to protect the local public interest in recovering the ESA-listed fish species. *Id.* Petitioners argue an additional burden was imposed by the Final Order, “a requirement of coming forward with quantitative evidence specifically defining the magnitude, duration and frequency of the ‘peak flow’ events, such as a ‘flow characterization study.’” *Id.* at 34-35 quoting R. 01511, 01536-37. Petitioners argue this is a significant increase in the burden, contrary to *Shokal* and to IDWR’s procedural rules. *Id.* at 35.

In this case Petitioners introduced evidence related to the particularized knowledge they have of the protection and recovery of ESA-listed fish species. This was their burden, as protestants, particularly IDFG, because they are more cognizant than the applicant of ESA-listed fish species protection and recovery. IDAPA 37.03.08.40.04.b.ii. However, according to *Shokal*, Petitioners’ burden is more than merely “going forward.” Petitioners’ burden under the local public interest standard is to “establish” the harm claimed. *Shokal*, 109 Idaho at 339, 70 P.2d at 450. In this case, establishing that the peak flows are beneficial is not the same as establishing the harm claimed.

The Director determined there was insufficient evidence in the record to establish a peak flow condition would actually promote channel maintenance. Counsel for Bird garnered testimony from Diluccia that questioned his expertise related to knowing how best peak flows might operate to aid Big Timber Creek ESA-listed fish habitat. The following exchange took place on cross examination between Bird’s counsel and Diluccia:

Q: Is that enough, in your view [variable annual flows up to 300 cfs for habitat management], or do you think every third year you need something like that or every fifth year? Is there a number?

A: *Well let me qualify that by saying that we haven’t done it yet.*

Hr. Tr. Vol. II, p. 465-466 (emphasis added). Diluccia admits no peak flow analysis or study exists. Therefore, the only evidence in the record related to peak flows was based on Diluccia’s experience in 2009. R. 01511, 01537. The Director simply concluded Diluccia’s limited experiential testimony was not sufficient to justify imposition of a peak flow condition on the Permit.

**G. A High Flow Condition on the Permit is Unnecessary.**

The Amended Preliminary Order included a condition related to the use of “high flows” on the proposed place of use on the Permit. R. 01451. That condition 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.” *Id.*

The Basin 74 General Provisions state, in relevant part,

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.

Ex. 11; R. 01429. The Hearing Officer concluded “[t]he language of the Basin 74 General Provisions is broad enough that Bird might be able to irrigate the proposed place of use with high flow diversions even when the proposed permit is not available (because the flow thresholds are not met).” R. 01447.

On exceptions, the Director removed the condition, and the language related to the use of high flows on the proposed place of use, because “questions related to when water users are questions of administration and not properly before the hearing officer.” R. 01516.

Petitioners argue the Director did not address the impacts of high flow diversions on the local public interest. *Petitioner’s Opening Brief* at 41-42. Petitioners argue the Director simply deleted the high flow condition from the *Amended Preliminary Order* on the grounds that questions of “‘high flow’ uses are ‘questions of administration’ that had no place in this permitting proceeding.” *Id.* at 43. Petitioners argue the Director’s conclusion is contrary to the local public interest associated with recovering the listed fish species, “including whether Bird’s continued diversions of ‘high flows’ onto the place of use would ‘circumvent’ the ‘bypass flows’ and ‘peak flow’ conditions.” *Id.*

The Director properly concluded that because the Court has *decreed* the use of high flows in the Lemhi River Basin, including on Big Timber Creek, he does not have the authority to alter or amend the decreed use. The Director does not have the authority to prevent Bird from using high flows, as decreed. Questions related to administration of high flows should be raised in a separate proceeding as the Director has no authority to alter a decreed use of water under the Lemhi Decree and the General Provisions in Basin 74. R. 01526-01527.

#### **IV. THE FINAL ORDER IS CONSISTENT WITH THE STATE WATER PLAN.**

Petitioners argue the Director's grant of the Permit must comply with the State Water Plan. *Petitioner's Opening Brief* at 45-46. Petitioners assert the State Water Plan requires the Director to comply with the following policies when issuing a permit: (1) recovery of listed species in the Lemhi River Basin; (2) development of Section 6 Agreements; and (3) protection of the State's sovereign authority to manage its water resources. *Id.* at 46. Petitioners argue "[w]hile the Final Order's determination of the local public interests in recovering the ESA-listed fish species is consistent with the State Water Plan, the Final Order's determination that the 'bypass flow' conditions alone protect these local public interests is not . . . ." *Id.*

For all of the reasons stated above, the Director properly undertook the local public interest inquiry pursuant to his discretion under Idaho law. The Director explicitly recognized the validity and importance of the State Water Plan policies cited to by Petitioners. However, the Director also weighed and balanced these local public interests with all others identified in the record. This is the Director's duty and authority, not to single out certain interests as inherently superior or subjugate the appropriation of water based on insufficient, indeterminable evidence in the record. The Director properly considered the policies identified in the State Water Plan within the local public interest inquiry and determined these valid interests could be mitigated under the Permit as conditioned.

#### **V. THE FINAL ORDER DID NOT ERR WHEN IT DENIED ADMINISTRATION AT THE FIELD HEADGATE.**

As described above, because the Petitioners conclude the Permit "requires" the addition of peak and high flow conditions, "the conditions protecting these local public interests associated with recovering the listed fish species should be administered at the field headgate." *Petitioners' Opening Brief* at 47-48. In other words, Petitioners suggest that because the Permit will use the

same point of diversion as Bird's existing water rights, the Permit cannot be properly administered at the same point of diversion and must be administered at the field headgate. *Id.* at 47.

The Director concluded the Water District 74W watermaster is capable of administering Proposed Permit 74-16187 properly and in priority. R. 01512. He concluded there is precedent on Big Timber Creek for administration of a water right conditioned with bypass flows, namely, Whittaker's Water Right No. 74-15613. *Id.* Again, Water Right No. 74-15613 has a 13 cfs bypass flow condition which has been successfully administered by the Water District 74W watermaster since 2011. *Id.* As the relevant point of diversion is already equipped with measuring devices and monitored and regulated by the watermaster during the irrigation season, the Director concluded no additional monitoring need be in place. *Id.* The Director concluded:

Proposed Permit 74-16187 will be administered as any other water right. 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.

*Order on Exceptions; Final Order at 7-8.*

The Director has no affirmative duty to impose a condition requiring monitoring at the field headgate based on speculation that Bird may attempt to circumvent the local public interest conditions of the permit. Petitioners' fail to point to a sufficient legal or factual justification for overturning the Director's conclusion that Water District 74W watermaster is capable of administering the Permit at the point of diversion properly and in priority. There is simply no evidence that Bird will act outside the bounds of the Permit. Any condition related to potential future, unknowable, actions of Bird would be unduly speculative. Petitioners' argument on this issue also must fail.

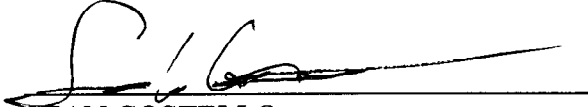
**CONCLUSION.**

The Director properly applied Idaho's local public interest standard to the Permit. The Director's Final Order is: (1) consistent with all applicable statutory provisions; (2) not in excess of statutory authority; (3) supported by substantial evidence on the record as a whole; (4) made upon lawful procedure; and (5) is not arbitrary or capricious. Petitioners have failed to prove there was insubstantial evidence in the record to support the agency's decision. The Court should affirm the Director's *Order on Exceptions; Final Order* and affirm the Permit No. 74-16187, as conditioned therein.

DATED this 7<sup>th</sup> day of November, 2020.

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 9<sup>th</sup>, 2020, I served a true and correct copy of the foregoing **RESPONDENT IDWR'S RESPONSE BRIEF** to be filed with the Court and served on the persons listed below by the methods indicated below:

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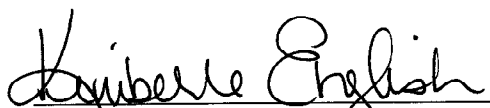
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