

MEMORANDUM

To: File
From: Chris Bromley, Deputy Attorney General
Date: April 1, 2004

Re: Idaho Fish and Game Contract with Lynn Herbst

Following a request from Roxanne Brown, I reviewed an agreement entered into between Lynn Herbst and the Idaho Department of Fish and Game (IDFG) regarding the L-30AO point of diversion in Basin 74. After my review, I discussed the agreement with Roxanne.

The agreement specifies that, in exchange for \$23,000, IDFG became entitled to remove the headgate at L-30AO and fill the opening to prevent further diversion by Herbst. The contract was signed March 28, 2000, and scheduled to terminate June 30, 2000.

Roxanne confirmed that the headgate has been removed and the point of diversion is no longer used. Therefore, it appears that Herbst has voluntarily abandoned the L-30AO point of diversion. Forfeiture does not appear applicable in this case as fewer than five years have passed since the agreement was signed. Idaho Code § 42-222(2).

The agreement does not appear to address whether Herbst may install a new point of diversion and continue to use his water right. While the agreement does mention "ditch closure" in Article 1 § 5, the title of the agreement states that it was entered into for elimination of the "L-30AO Diversion." In conjunction with a reading of the remainder of the document, the agreement appears ambiguous regarding any intent to cease Herbst's use of the water right.

Further ambiguity exists in whether Herbst may install a new point of diversion. Article 1 § 1 states that a purpose of the agreement is "[e]limination of the L-30AO gravity diversion from the Lemhi River." Article 3 describes the exact location of L-30AO, "This diversion is located in SW1/4, NW1/4, Sec. 20, T19N, R24E, and is the portion of A74-07147 water right taken from the west side of the Lemhi River." However, no mention is made in the agreement that Herbst cannot install a pump or excavate another gravity point of diversion.

The approximate three-month duration of the agreement also raises ambiguities regarding Herbst's ability to continue irrigating lands that were serviced by L-30AO. Article 9 states that the "agreement will be in force through June 30, 2000. This agreement is terminated on this date. This agreement may be terminated or extended in writing, if agreed to by all parties at any time before June 30, 2000."

Finally, the agreement does not contemplate whether the agreement between Herbst and IDFG is binding on subsequent purchasers.