

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR)	
PERMIT NO. 74-16008 IN THE NAME OF)	FINAL ORDER
<u>LYNN HERBST AND ROBIN HERBST</u>)	ISSUING PERMIT

PROCEDURAL HISTORY

On December 4, 2013, Lynn Herbst and Robin Herbst (collectively referred to herein as “Herbst”) filed Application for Permit No. 74-16008 with the Idaho Department of Water Resources (“Department”). The Department published notice of the application in the Recorder Herald (Lemhi County) on January 2 and 9, 2014. Protests were filed by Idaho Department of Fish & Game (“IDFG”), the Idaho Water Resource Board (“IWRB”), and Lemhi Irrigation District (“LID”).

Herbst filed an amended application on June 26, 2015, increasing the proposed diversion rate and changing the proposed place of use. Herbst filed a second amended application on October 13, 2015, rearranging (but not increasing) the proposed irrigation place of use. Application 74-16008 (as amended) proposes to divert 5.76 cfs from springs tributary to Agency Creek for irrigation of 186.2 acres. Ex. 102. The proposed place of use is already identified as a place of use by Herbsts’ existing Lemhi River irrigation water rights 74-740, 74-741, 74-742 and 74-7147. The Department published notice of the second amended application on October 22 and 29, 2015. No additional protests were filed.

IDFG and LID withdrew their protests through a *Stipulation for Withdrawal of Protests* (“Stipulation”). Ex. 113. The protest filed by the IWRB remained active. A Department hearing officer conducted an administrative hearing on July 14, 2016, in Idaho Falls, Idaho.

During the hearing, the parties asked to file post-hearing briefs to address legal issues central to this contested case. The request was granted and Herbst and the IWRB filed post-hearing briefs.

On August 30, 2016, the Department issued a *Preliminary Order Granting Permit* (“Preliminary Order”). The hearing officer determined that Herbst satisfied their burden of proof for the criteria set forth in Idaho Code § 42-203A(5) and issued Permit 74-16008 with limiting conditions. *Preliminary Order* at 16-17.

On September 13, 2016, the IWRB timely filed *Idaho Water Resource Board’s Petition for Director to Review Preliminary Order Granting Permit* and *Idaho Water Resource Board’s Exceptions to Preliminary Order Granting Permit* (“Exceptions”) requesting the Director of the Department (“Director”) review the Preliminary Order and issue a final order consistent with the

IWRB's arguments. *Exceptions* at 23. On September 27, 2016, Herbst timely filed the *Applicant's Response to the Board's Exceptions to the Preliminary Order* ("Response").

EXCEPTIONS TO PRELIMINARY ORDER

1. The Director Will Strike Finding of Fact 25 and the Preliminary Order's Discussion Concerning Forum and Timing Questions.

On August 20, 2004, a *Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees* ("Wild and Scenic Stipulation") was filed with the Snake River Basin Adjudication ("SRBA") Court, settling objections filed against claims made by the United States Forest Service for appropriations under the Wild and Scenic Rivers Act. Ex. 209. On November 16, 2004, the presiding judge for the SRBA Court issued an *Order Approving Stipulation and Entry of Partial Decrees*. Ex. 210. A joint partial decree for water rights 75-13316 and 77-11941 was issued that same day ("Wild and Scenic Decree"). Ex. 114. Water rights 75-13316 and 77-11941 bear a priority date of July 23, 1980, and describe the instream flows in the Salmon River under the Wild and Scenic Rivers Act. *Id.* at 3.

The IWRB asserts that Finding of Fact 25 in the Preliminary Order "incorrectly narrows the scope of Section 3.f(6) and Section 4 of the [Wild and Scenic Stipulation]" and "should be amended." *Exceptions* at 2-3. The IWRB also challenges the hearing officer's discussion in the Preliminary Order under the heading "Forum and Timing Questions" related to Section 3.f(6) and Section 4. *Id.* at 19-20.

Section 3.f(6) of the Wild and Scenic Stipulation states:

Any party may contact IDWR at any time to request additional information concerning the matters described above or to inform IDWR of concerns raised by IDWR's proposed determination with respect to any permit, license, partial decree, abandonment, forfeiture, or lapsing of a water right or any municipal connection in excess of 2 cfs. Any party may request reconsideration or explanation by IDWR of implementation or proposed implementation of any subordination provision at any time and the parties agree to make a good faith effort to resolve questions and reach agreement regarding implementation of the subordination provisions.

Ex. 210 at 15 of *Wild and Scenic Stipulation*. Section 4 of the Wild and Scenic Stipulation states:

Resolution of Disputes Concerning Implementation of Stipulation. The parties and IDWR agree to make good faith efforts to resolve any disputes which arise concerning IDWR's implementation of this Stipulation. IDWR will provide any party requested information concerning the subject matter of any such disputes. In the event the parties are unable to resolve any such disputes, any party may seek review of IDWR's implementation and enforcement of this Stipulation and administration of the water rights confirmed by the Partial Decrees, including, but not limited to, administration of the subordination provisions of the Partial Decrees, in the SRBA Court or any successor state court with jurisdiction to enforce the final

decree issued by the SRBA Court. Review shall be de novo and any disputed factual issues shall be decided based upon a preponderance of the evidence. Judicial review must be brought within six months of the challenged action, or within six months of the notification of the challenged action (if notice is required under the terms of the Stipulation), whichever is later.

Id. Finding of Fact 25 describes Section 3.f(6) and Section 4 of the Wild and Scenic Decree as follows: “The [Wild and Scenic Stipulation] includes provisions setting forth a dispute resolution process if a disagreement arises about the inclusion of a certain water right in the subordination protection database or about the diversion rates or irrigated acres assigned to a water right. Ex. 209, page 15, ¶ 3.f(6) and ¶ 4.” *Preliminary Order* at 5.

While Section 3.f(6) and Section 4 of the Wild and Scenic Stipulation may describe additional processes not fully characterized in Finding of Fact 25, the hearing officer’s general characterization of Section 3.f(6) and Section 4 is not inaccurate. In addition, the hearing officer quotes Section 3.f(6) and Section 4 in full under the heading “Forum and Timing Questions.” *Preliminary Order* at 15. The Preliminary Order does not narrow the scope of Section 3.f(6) and Section 4 as the IWRB contends. However, discussion of Section 3.f(6) and Section 4 is not necessary to the outcome in this matter. Therefore, the Director will strike Finding of Fact 25 and the hearing officer’s discussion related to Section 3.f(6) and Section 4 under the heading “Forum and Timing Questions.”

2. The Purcell Order Does Not Control the Outcome of Application 74-16008.

The IWRB challenges the hearing officer’s conclusion on page nine of the Preliminary Order that, “[a]s long as the approved permit is limited to 0.02 cfs/acre (3.72 cfs), there is no evidence in the record that the proposed permit is inconsistent with the conservation of water resources within the state of Idaho.” *Exceptions* at 3-4. Specifically, the IWRB contends “[t]his statement is in contradiction to the *Final Order Approving in Part and Rejecting in Part Application for Permit*, In the Matter of Application for Permit No. 74-16004 in the Name of Allan and/or Betty Purcell issued by Director Spackman” on December 31, 2015 (“Purcell Order”). *Id.* at 4.

In the Purcell Order, the Director addressed the July 15, 2013, Application 74-16004 filed by Allan and Betty Purcell, which sought a permit to divert 5.76 cfs from Timber Creek for irrigation of 293 acres and for stockwater. Ex. 216 at 2. The application was protested by IDFG and the IWRB, but the protests were later withdrawn without condition. *Id.* at 1.

In considering the proposed irrigation component of Application 74-16004, the Director found that Purcell’s proposed place of use was “already identified as a place of use by irrigation water rights 74-398, 74-399, 74-2335 and a portion of 74-1834.” *Id.* at 2. The Director also found that water rights 74-398, 74-399, 74-2335, and portion of water right 74-1834 “do not limit the combined diversion rates when the water rights are exercised in combination” and “do not limit Purcell to a diversion rate of 0.02 cfs per acre.” *Id.* The Director concluded the “records of the Department establish that Purcell already has a full irrigation water supply at the proposed place of use” and his “existing water rights, in combination, authorize the diversion of 8.73 cfs for the irrigation of the 293-acre proposed place of use (0.03 cfs per acre).” *Id.* at 4. The Director rejected

the irrigation component of Application 74-16004 because “Purcell did not adequately demonstrate the need for irrigation water above and beyond the amounts authorized under his existing rights” in accordance with Idaho Code § 42-202(6).

The Director also rejected the irrigation component of Application 74-16004 based on conservation of water resources concerns:

It is not consistent with the conservation of water resources in Idaho to approve irrigation water rights exceeding 0.02 cfs per acre without substantial justification based on soil types, crop types and irrigation methods. Furthermore, it is contrary to the conservation of water resources to appropriate the limited supply of water available for new development from the Main Salmon River and its tributaries for the supplemental irrigation use sought by Purcell especially when existing irrigation rights already exceed 0.02 cfs per acre and such supplemental irrigation use is already authorized by a general provision. Proposals seeking an unsubordinated application for permit for increased beneficial use on existing acres must first demonstrate efficient use of water through modern irrigation practices before they can be approved.

Ex. 216 at 5.¹

The IWRB argues the Purcell Order requires that the Director conclude Application 74-16008 “is contrary to the conservation of water resources” because, among other things, Herbst “did not demonstrate his efficient use of water through modern irrigation practices.” *Exceptions* at 5.² However, as the hearing officer determined, the Purcell Order “does not determine the outcome” of Herbsts’ Application 74-16008. *Preliminary Order* at 14. Application 74-16008 is factually distinguishable from the application at issue in the Purcell Order. As discussed above, Purcell sought a permit to appropriate high flows in the Lemhi basin when his “existing irrigation rights already exceed 0.02 cfs per acre and such supplemental irrigation use is already authorized by a general provision.” Ex. 216 at 5. In other words, Purcell sought additional water to irrigate acres that already had a full water supply and the additional irrigation use was already authorized by a general provision. Under these factual circumstances, the Director concluded it would be contrary to the conservation of water resources within the state of Idaho to grant the irrigation component of Application 74-16004.

In contrast, Herbsts’ Application 74-16008 seeks a water right to supplement Herbsts’ water supply when their existing rights on the Lemhi River are curtailed and Herbst would

¹ The Director also rejected the irrigation component of Application 74-16004 based on local public interest concerns. Ex. 216 at 4.

² Herbst argues the IWRB’s “protest of Application 74-16008 was very narrow . . . and ought to be solely considered within the local public interest criterion.” *Response* at 5. Herbst contends the IWRB has “waived all of its arguments . . . relative to the issues related to the conservation of water resources criterion.” *Id.* at 6. However, in its post-hearing brief and *Exceptions*, the IWRB cites to the Purcell Order’s discussion of both the local public interest and conservation of water resources criteria of Idaho Code § 42-203A(5). *IWRB’s Post-Hearing Brief* at 8-9; *Exceptions* at 4-6, 14. The Director will consider IWRB’s arguments under both the local public interest and conservation of water resources criteria.

otherwise have to dry up acres associated with the curtailed rights. Because of these distinguishing facts, the Purcell Order is not controlling precedent that determines the outcome of Application 74-16008.

3. **The Issue of Competing Views Over Section 10.b(6)(A)(i) of the Wild and Scenic Decree is Moot.**

Water rights 75-13316 and 77-11941 bear a priority date of July 23, 1980, and would be senior to Herbsts' Permit 74-16008. Ex. 114 at 3. Certain water rights junior to July 23, 1980, cannot be diverted if the instream flows described in water rights 75-13316 and 77-11941 are not satisfied. *Id.* at 2, ¶ 3.e. However, the Wild and Scenic Decree specifically subordinates water rights 75-13316 and 77-11941 to certain junior water rights (including future water rights). The relevant provision in this matter is Section 10.b(6)(A)(i) which subordinates water rights 75-13316 and 77-11941 to water rights claimed or applied for after September 1, 2003, "with a total combined diversion of 150 cfs (including not more than 5,000 acres of irrigation with a maximum diversion rate of 0.02 cfs/acre), when the mean daily discharge at the Shoup gage is <1,280 cfs." *Id.* at 6.

At the hearing, the IWRB and Herbst presented competing views interpreting the above-quoted language of Section 10.b(6)(A)(i). The hearing officer characterized these competing views as follows:

IWRB contends the proposed permit does not qualify for protection under the subordination provisions of water right 75-13316 because the total proposed diversion rate exceeds 0.02 cfs/acre. Herbst contends the 0.02 cfs/acre limit only applies to 100 cfs of the 150 cfs total future supply; the remaining 50 cfs is available for applications seeking higher diversion rates.

Preliminary Order at 12.

The hearing officer concluded that, "[d]ue to the restrictions of Idaho Code § 42-202(6) and the lack of technical evidence on soil/water demands at the proposed place of use, Permit 74-16008 cannot be issued for a rate greater than 0.02 cfs/acre." *Id.* Accordingly, the hearing officer concluded the parties' competing arguments regarding Section 10.b(6)(A)(i) were rendered moot. *Id.* The hearing officer also concluded that "Permit 74-16008 (limited to 3.72 cfs and 186.2 acres) falls squarely within the definition set forth in Paragraph 10.b(6)(A)(i) of the [Wild and Scenic] Decree and is entitled to the subordination protections offered to future water rights by that provision." *Id.*

The IWRB asserts the hearing officer left "undecided an important controversy that was brought for resolution by the parties" and erred by not determining which competing argument regarding Section 10.b(6)(A)(i) prevails. *Exceptions at 7, 11.* The IWRB also asserts the hearing officer created "ambiguity rather than clarity" by "refusing to provide any analysis in support of his conclusion that [Herbsts'] water right 'falls squarely' within Section 10.b.(6).(A).(i)." *Exceptions at 8.*

The hearing officer correctly determined that the issue of competing interpretations of Section 10.b(6)(A)(i) was rendered moot because Permit 74-16008 would be limited to 0.02

cfs/acre. Therefore, the hearing officer did not err by declining to decide the issue of which competing interpretation prevails. *See Comm. for Rational Predator Mgmt. v. Dep't of Agric., State of Idaho*, 129 Idaho 670, 672, 931 P.2d 1188, 1190 (1997) (“It is well-established that this Court does not decide moot cases.”). Further, the IWRB raises no exception to the mootness doctrine that would allow the Director to consider the issue. *See id.* The Director will not consider which competing interpretation of the language of Section 10.b(6)(A)(i) prevails.

In addition, the hearing officer did not refuse to provide any analysis in support of his conclusion. The hearing officer explained that, because Permit 74-16008 cannot “be issued for a rate greater than 0.02 cfs/acre,” the permit “falls squarely within the definition set forth in [Section 10.b(6)(A)(i)].” *Preliminary Order* at 12. The definition set forth in Section 10.b(6)(A)(i) subordinates water rights 75-13316 and 77-11941 to water rights claimed or applied for after September 1, 2003, “with a total combined diversion of 150 cfs (including not more than 5,000 acres of irrigation with a maximum diversion rate of 0.02 cfs/acre), when the mean daily discharge at the Shoup gage is <1,280 cfs.” Ex. 114 at 6 (emphasis added). Because Permit 74-16008 is limited to 0.02 cfs/acre for 186.2 acres of irrigation, the permit falls within the definition set forth in Section 10.b(6)(A)(i). The hearing officer’s analysis in support of his conclusion that Permit 74-16008 is entitled to the subordination protections in Section 10.b(6)(A)(i) does not create ambiguity.

4. The Subordination Benefit in Section 10.b(6)(A)(i) is Not Limited to New Acres.

The IWRB asserted at the hearing that, “to enjoy the benefit of subordination under Section 10.b(6)(A)(i), an irrigation water right must irrigate new acres that have not been previously irrigated.” *Exceptions* at 11. In support of this argument, the IWRB argued “that an ambiguity exists as to the term ‘irrigation’ found in Section 10.b(6)(A)(i) and that, because the term irrigation is ambiguous it was appropriate for the hearing officer to look to the parol evidence offered in the testimony of Mr. Shaw to determine the meaning of ‘irrigation.’” *Id.*

The hearing officer rejected the IWRB’s argument, concluding that the “IWRB seeks to create ambiguity where there is none.” *Preliminary Order* at 12. The hearing officer determined that “[n]either the [Wild and Scenic] Decree nor the [Wild and Scenic Stipulation] limit the subordination protections to new acres” and that “[t]he subordination benefits described in [Section] 10.b(6)(A) are not limited to new acres.” *Id.* The hearing officer concluded that “[s]upplemental water rights may also enjoy the benefits of subordination.” *Id.*

The IWRB now asserts “that a latent ambiguity exists with regard to the term ‘irrigation’ found in Section 10.b(6)(A)(i).” *Exceptions* at 11. Therefore, the IWRB urges the Director to consider extrinsic evidence regarding the intent of the parties to the Wild and Scenic Stipulation to determine the hearing officer erred by concluding Permit 74-16008 may “enjoy the benefits of subordination under Section 10.b(6)(A)(i).”

Water right decrees are interpreted “using the same interpretation rules that apply to contracts.” *Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 367 P.3d 193, 202 (2016). “Whether an ambiguity exists in a legal instrument is a question of law.” *Knipe Land Co. v. Robertson*, 151 Idaho 449, 455, 259 P.3d 595, 601 (2011). “A latent ambiguity exists where an instrument is clear on its face, but loses that clarity when applied to the facts as they exist.” *Id.* Idaho law permits “[f]irst, the introduction of extrinsic evidence to show that the latent ambiguity

actually existed; and, second, the introduction of extrinsic evidence to explain what was intended by the ambiguous statement.” *Snoderly v. Bower*, 30 Idaho 484, 487, 166 P. 265, 265 (1917).

The IWRB states three bases that establish a latent ambiguity for the term “irrigation” found in Section 10.b(6)(A)(i): (1) the hearing officer’s statements distinguishing Herbsts’ Application 74-16008 from the application at issue in Purcell, (2) the Purcell Order, and (3) testimony of Mr. Shaw interpreting the term “irrigation” in Section 10.b(6)(A)(i) according to the intent of the parties to the Wild and Scenic Stipulation. *Exceptions* at 11-18.

The hearing officer did not distinguish between the irrigation water uses sought by Herbst and Purcell in determining whether the uses could enjoy the subordination benefits set forth in Section 10.b(6)(A)(i). Rather, the hearing officer distinguished Herbsts’ application from Purcell’s based on the factual circumstances of the matters to support the conclusion that the Purcell Order “does not determine the outcome of” Application 74-16008. *Preliminary Order* at 13-14. Indeed, as discussed above, it is because of these distinguishing factual circumstances that the Purcell Order does not determine the outcome of Application 74-16008. In sum, the hearing officer’s statements do not relate to the question of the meaning of the term “irrigation” found in Section 10.b(6)(A)(i) and the Purcell Order is not controlling precedent. Thus, neither the hearing officer’s statements nor the Purcell Order establish a latent ambiguity with regard to the term “irrigation” found in Section 10.b(6)(A)(i) of the Wild and Scenic Decree.

In addition, as described above, Idaho law permits “[f]irst, the introduction of extrinsic evidence to show that the latent ambiguity actually existed; and, second, the introduction of extrinsic evidence to explain what was intended by the ambiguous statement.” *Snoderly*, 30 Idaho at 487, 166 P. at 265. The Director cannot consider Mr. Shaw’s testimony about the intent of the parties to the Wild and Scenic Stipulation regarding meaning of the term “irrigation” in Section 10.b(6)(A)(i) unless and until other extrinsic evidence shows a latent ambiguity actually exists with respect to the term. As discussed above, neither the hearing officer’s distinguishing statements nor the Purcell Order establish a latent ambiguity for the term “irrigation” found in Section 10.b(6)(A)(i). Because the IWRB has not presented sufficient evidence to establish the existence of a latent ambiguity, the Director will not consider Mr. Shaw’s testimony.

Further, the term “irrigation” does not lose clarity when applied to the facts in the record for this matter. Again, Section 10.b(6)(A)(i) of the Wild and Scenic Decree subordinates water rights 75-13316 and 77-11941 to water rights claimed or applied for after September 1, 2003, “with a total combined diversion of 150 cfs (including not more than 5,000 acres of irrigation with a maximum diversion rate of 0.02 cfs/acre), when the mean daily discharge at the Shoup gage is <1,280 cfs.” Ex. 114 at 6. As the hearing officer determined, neither the Wild and Scenic Decree nor the Wild and Scenic Stipulation limit the subordination protections of Section 10.b(6)(A)(i) to only *new* acres of irrigation. The Wild and Scenic Decree simply uses the term “irrigation.” The term “irrigation” is plain and unambiguous. Adopting the IWRB’s argument that the term “irrigation” means only one type of irrigation (i.e. irrigation of only new acres) would render the Wild and Scenic Decree less, rather than more clear by inserting a qualifying term that would limit the scope of the decree inconsistent with the plain language of the decree. The Director agrees with the hearing officer that “[i]ncorporating such a limit would have been very simple and could have been done in a single sentence or even a single word.” *Preliminary Order* at 12. The IWRB has not established the existence of a latent ambiguity in the Wild and Scenic Decree. *See Rangen, Inc.*, 159 Idaho at

_____, 367 P.3d at 203. The subordination benefit set forth in Section 10.b(6)(A)(i) does not only apply to water rights seeking to irrigate new acres.

5. The Director Will Not Reconsider Administrator’s Memorandum—Application Processing No. 70.

The IWRB asserts that the Department’s October 30, 2009, Administrator’s Memorandum-Application Processing No. 70 (“Memo 70”) (Ex. 213) addressing the Wild and Scenic Stipulation and Wild and Scenic Decree “should be reconsidered” because “any water right that does not seek to irrigate new acres should not qualify for the subordination protections of Section 10.b(6)(A)(i).” *Exceptions* at 18. As described above, the subordination benefit set forth in Section 10.b(6)(A)(i) of the Wild and Scenic Decree does not only apply to water rights seeking to irrigate new acres. The Director will not consider Memo 70 in this proceeding.

6. The Director Will Amend Conditions 7 & 8.

i. Condition 5

The IWRB asserts Condition No. 5 “states that Mr. Herbst has only one point of diversion out of Agency Creek” but “evidence at the hearing demonstrated he has two points of diversion out of Agency Creek.” *Exceptions* at 20. The IWRB concludes “Condition 5 should be amended to reflect these two points of diversion.” *Id.*

Condition 5 states: “This right authorizes the diversion of water from springs, injection of diverted water into Agency Creek, and a point of diversion of the injected water from Agency Creek.” *Preliminary Order* at 17. As the hearing officer stated in Findings of Fact 4 & 5:

4. Application 74-16008 includes a point of injection into and a point of diversion from Agency Creek (both points located in the SWNESW, Sec. 20, T19N, R24E). Ex. 102.

5. Herbst has two points of diversion from Agency Creek: (1) The L-31 Ditch (located in the SWNESW, Sec. 20, T19N, R24E) used to irrigate most of the proposed place of use, and (2) a small diversion (located in the NWSW, Sec. 20, T19N, R24E) used to irrigate approximately seven acres west of the highway. Ex. 104. Application 74-16008 only lists the L-31 point of diversion from Agency Creek (SWNESW, Sec. 20, T19N, R24E).

Preliminary Order at 2.

Idaho Code authorizes the Department to partially approve an application for permit for less than was requested, but it does not authorize the Department to approve more than was requested. *See* Idaho Code §§ 42-203A(5) and 42-204. Herbsts’ Application 74-16008 only includes one point of diversion from Agency Creek. *Preliminary Order* at 2; Ex. 102. The Department’s Water Appropriation Rules reinforce that, for Permit 74-16008 to include two points of diversion from Agency Creek, Herbst must file an amended application for permit. *See* IDAPA 37.03.08.035.01.a. The Director will not amend Condition 5.

ii. Conditions 7 & 8

The IWRB asserts that “Conditions No. 7 and 8 do not adequately describe the supplemental nature of [Herbsts’] water right and may create confusion regarding administration of his rights.” *Exceptions* at 21-22.

Condition 7 states: “Rights 74-740, 74-741, 74-742, 74-7147 and 74-16008 when combined shall not exceed a total diversion rate of 5.35 cfs and the irrigation of 186.2 acres.” Condition 8 states: “Prior to diverting water under this right, the right holder shall make full beneficial use of water rights 74-740, 74-741, 74-742, and 74-7147 for irrigation of any of the same lands authorized to be irrigated under this right.”

The Director agrees that Condition 7 and Condition 8 should be amended to more adequately describe the nature of Herbsts’ water right, which is limited to a maximum diversion rate of 0.02 cfs per irrigated acre as stated in Condition 10. The combined limit of 5.35 cfs described in Condition 7 reflects the fact that 74-740, 74-741, and 74-742 are limited to 0.03 cfs per acre. When Rights 74-740, 74-741, and 74-742 are not available for use, Herbst can rely on Right 74-16008, but only up to 0.02 cfs per acre, or two-thirds of the amount authorized by Rights 74-740, 74-741, and 74-742. Accordingly, the Director will amend Condition 7 to read:

Rights 74-740, 74-741, 74-742, 74-7147, and 74-16008 when combined shall not exceed a total diversion rate of 5.35 cfs and the irrigation of 186.2 acres. However, when Rights 74-740, 74-741, and/or 74-742 are completely or partially unavailable for use, Right 74-16008 shall provide only two-thirds (0.67%) of the diversion rate unavailable from those rights.

The Director will amend Condition 8 to read: “The right holder shall limit the diversion of water under this right to those times when Rights 74-740, 74-741, 74-742, and 74-7147 are not available or reasonably sufficient to irrigate the place of use authorized under this right.”

iii. Conditions on water rights 74-740, 74-741, 74-742, and 74-7147.

The IWRB asserts “the conditions on water rights” 74-740, 74-741, 74-742, and 74-7147 “should be amended to reflect the new combined diversion rates and place of use.” *Exceptions* at 22. The Director will not amend the conditions on water rights 74-740, 74-741, 74-742, and 74-7147 in this proceeding. The appropriate forum to change the conditions on water rights 74-740, 74-741, 74-742, and 74-7147 is Herbsts’ pending Application for Transfer 80150 proposing to create a 186.2-acre combined place of use for water rights 74-740, 74-741, 74-742 and 74-7147. *See* Ex. 206; Idaho Code § 42-222.

Based upon and consistent with the foregoing, the Director finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Application 74-16008 (as amended) proposes to divert 5.76 cfs from springs tributary to Agency Creek for irrigation of 186.2 acres. Ex. 102.

2. Application 74-16008 seeks a permit to authorize an existing diversion and use of water. The spring channels described in the application are currently intercepted and diverted by an existing ditch, L-31, and conveyed through the L-31 ditch to the proposed place of use. The proposed points of diversion are located in the NWSESW of Section 20 and the SWNENW of Section 29, T19N, E24E, the locations where water from the two largest spring channels enters the L-31 ditch. Ex. 102. Water from the springs is sufficient to satisfy the irrigation use proposed in Application 74-16008. Testimony of Lynn Herbst; Ex. 105.

3. Herbst described the proposal in the first and second amended applications as follows:

The water applied for enters L-31 on Applicant's property as L-31 traverses Applicant's property. L-31 injects water into Agency Creek for only a few feet before it is diverted into another headgate for L-31 to continue to Applicant's property. The spring water sought to be appropriated is tributary to Agency Creek, and therefore, within Water District 74-M. This amended application for permit is being made to resolve protests to the original application, and it also increases the diversion rate and irrigated acres to match the total diversion rate and irrigated acres of the base rights.

Ex. 102 at 2.

4. Application 74-16008 includes a point of injection into and a point of rediversion from Agency Creek (both points located in the SWNESW, Sec. 20, T19N, R24E). Ex. 102.

5. Herbst has two points of rediversion from Agency Creek: (1) the L-31 Ditch (located in the SWNESW, Sec. 20, T19N, R24E) used to irrigate most of the proposed place of use, and (2) a small diversion (located in the NWSW, Sec. 20, T19N, R24E) used to irrigate approximately seven acres west of the highway. Ex. 104. Application 74-16008 only lists the L-31 point of rediversion from Agency Creek (SWNESW, Sec. 20, T19N, R24E).

6. The proposed place of use is already identified as a place of use by irrigation water rights 74-740, 74-741, 74-742 and 74-7147. These water rights all authorize diversion of water from the Lemhi River through the L-31 Ditch. The pertinent elements of the Lemhi River rights are as follows:

Water Right	Priority Date	Rate (cfs)	Acres
74-742	6/1/1871	0.38	12.5
74-741	1/8/1908	4.30	143.1
74-740	4/1/1961	0.20	7.0
74-7147	11/16/1981	0.88	44.1
		Total: 5.76 (5.35)	206.7 (186.2)

7. In their current state, the Lemhi River rights do not share a common place of use except for a 20.5-acre overlap between water rights 74-741 and 74-7147. Therefore, in total, the four water rights authorize 186.2 acres of irrigation (206.7 acres – 20.5 acres).

8. On June 4, 2015, Herbst filed Application for Transfer 80150 proposing to create a 186.2-acre combined place of use for water rights 74-740, 74-741, 74-742 and 74-7147. Ex. 206. The place of use proposed in Transfer Application 80150 matches the place of use proposed in the first amended Application 74-16008.

9. The second amended Application 74-16008 made slight adjustments to the 186.2-acre place of use. Herbst has not yet amended the proposed place of use in Transfer Application 80150 to match second amended Application 74-16008.

10. The Department published notice of Transfer Application 80150 in the Recorder Herald (Lemhi County) on June 18 and 25, 2015. The IWRB filed a protest. The IWRB's protest states: "This protest is intended to allow the IWRB to participate in ensuring that any authorized transfer is consistent with a final settlement of the protest on Application 74-16008."

11. Transfer Application 80150 and the associated protest filed by IWRB are still pending before the Department. No action will be taken on the contested transfer application until Application 74-16008 reaches a final outcome.

12. Three of Herbsts' water rights (74-740, 74-741 and 74-742) authorize a diversion rate of 0.03 cfs per acre. Water right 74-7147, the most junior of the four Lemhi River water rights, authorizes a diversion rate of 0.02 cfs per acre.

13. On November 16, 1981, John Herbst filed Application 74-7147, seeking a permit to divert 1.56 cfs from the Lemhi River for the irrigation of 78 acres. A permit for the proposed development was issued on January 5, 1982.

14. The Department conducted a field exam for Permit 74-7147 on June 26, 1987. The examiner measured a diversion rate of 4.44 cfs for the irrigation of 44.1 acres. On November 28, 1989, the Department issued a license for water right 74-7147, authorizing a diversion rate of 0.88 cfs and the irrigation of 44.1 acres. License 74-7147 included the following condition: "This right when combined with all other rights shall provide no more than .02 cfs per acre nor more than 3.0 afa per acre for the lands above."

15. A partial decree for water right 74-7147 was issued in the SRBA on January 12, 2009 and included the following condition: "This right when combined with all other rights shall provide no more than .02 cfs per acre nor more than 3.0 afa per acre for irrigation of the lands above."

16. Herbst contends that water rights 74-740, 74-741, 74-742 and 74-7147 in combination authorize a diversion rate of 5.76 cfs. Ex. 113. Given the 20.5 acre overlap between water rights 74-741 and 74-7147 and the 0.02 cfs per acre combined limit included on the partial decree for water right 74-7147, the actual combined diversion rate for water right 74-740, 74-741, 74-742 and 74-7147 is 5.35 cfs. This diversion rate is calculated by subtracting the overlapping portion of water right 74-7147 from 5.76 cfs ($5.76 \text{ cfs} - (20.5 \text{ acres} \times 0.02 \text{ cfs/acre}) = 5.35 \text{ cfs}$).

17. In June 2016, Herbst, IDFG and LID entered into the Stipulation to resolve the protests filed by IDFG and LID. Ex. 113. The IDFG and LID protests were withdrawn provided the

following conditions, or conditions in substantially the same form, would be included on any permit issued by the Department:

- (1) Proof of application of water to beneficial use shall be submitted on or before [DATE].
- (2) Subject to all prior rights.
- (3) This right does not grant any right of way [or] easement across the land of another.
- (4) This right does not authorize the irrigation of land not previously irrigated.
- (5) This right authorizes the diversion of water from springs, injection of diverted water into Agency Creek, and two points of redirection of the injected water from Agency Creek.
- (6) The right holder shall maintain the lockable control structure currently located at the Agency Creek point of diversion east of Hwy 28. Prior to diversion of water under this right, the right holder shall install and/or maintain a measuring device and lockable control structure at the following locations: 1) on the point of redirection from Agency Creek located west of Hwy 28, and 2) on the L-31 ditch where L-31 crosses Tendoy Lane at a location that can be easily viewed by the watermaster.
- (7) The right holder shall be entitled to a combined diversion rate of 5.76 cfs as measured at the Tendoy Lane measuring device and the measuring device for the point of redirection located west of Hwy 28 for water rights 74-740, 74-741, 74-742, 74-7147, and 74-16008. Prior to diverting water under this right, the right holder shall make full beneficial use of water rights 74-740, 74-741, 74-742, and 74-7147 for irrigation of any of the same lands authorized to be irrigated under this right. When water rights 74-740, 74-741, 74-742, and 74-7147, or any portion thereof, are out of priority the right holder may divert up to 5.76 cfs of water under this right to fulfill the portion out of priority.
- (8) If water right 74-740, 74-741, 74-742, and 74-7147 are abandoned, forfeited, sold, transferred, leased, or used on any other place of use, right 74-16008 shall not be used.

Ex. 113 at 2-3.

18. Water right 74-14993, held by the IWRB, bears a priority date of April 12, 2001, and describes a minimum stream flow of 35 cfs on the Lemhi River. The reach of river encompassing the minimum stream flow is located more than ten miles downstream of the confluence of Agency Creek and the Lemhi River.

19. On August 20, 2004, the Wild and Scenic Stipulation was filed with the SRBA Court, settling objections filed against certain claims made by the United States Forest Service for appropriations under the Wild and Scenic Rivers Act. Ex. 209. The State of Idaho was a party to the Wild and Scenic Stipulation. *Id.* at 1. Idaho Attorney General Lawrence Wasden signed the Wild and Scenic Stipulation on behalf of the State of Idaho and the IWRB. *Id.* at 21.

20. On November 16, 2004, the presiding judge for the SRBA Court issued an *Order Approving Stipulation and Entry of Partial Decrees*. Ex. 211. The Wild and Scenic Decree was issued that same day. Ex. 212.

21. Water rights 75-13316 and 77-11941 bear a priority date of July 23, 1980, and describe the instream flows in the Salmon River under the Wild and Scenic Rivers Act. Ex. 114 at 3. The point of measurement for water rights 75-13316 and 77-11941 is located downstream of the confluence of Lemhi River and Salmon River. Therefore, junior water rights within the Lemhi River drainage (IDWR Administrative Basin 74) may be curtailed to deliver water to water rights 75-13316 and 77-11941. Ex. 114 at 2, ¶ 3.d.

22. Certain water rights junior to July 23, 1980, cannot be diverted if the instream flows described in water rights 75-13316 and 77-11941 are not satisfied. Ex. 114 at 2, ¶ 3.e. However, the Wild and Scenic Decree specifically subordinates water rights 75-13316 and 77-11941 to certain junior water rights (including future water rights) as set forth in Paragraph 10.b. of the decree. *Id.* at 4-7.

23. A junior water right that does not qualify for protection from curtailment under the subordination language of water rights 75-13316 and 77-11941 would generally only be in priority and allowed to divert water during short time periods during the early summer. *See* Exs. 118 and 119.

24. Pursuant to Section 3.e of the Wild and Scenic Stipulation, the Department maintains a database (list) of junior water rights enjoying the subordination protections described in water rights 75-13316 and 77-11941. Ex. 209, page 10. The database identifies “the diversion rate, and for irrigation rights, the number of irrigated acres, decreed, permitted or licensed, including any reductions in permitted amounts as licensed, to be credited to the applicable future use subordination.” *Id.* at 11, ¶ 3.e(4).

EVALUATION CRITERIA / ANALYSIS

Idaho Code § 42-203A(5) states in pertinent part:

In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho . . . the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

The applicant bears the burden of proof regarding all factors set forth in Idaho Code § 42-203A(5). See IDAPA 37.03.08.40.04.

Reduction to Existing Water Rights

Rule 45.01.a of the Department's Water Appropriation Rules sets forth the criteria used to determine whether a proposed use of water will reduce the quantity of water under an existing water right:

A proposed use will be determined to reduce the quantity of water under an existing water right (i.e., injure another water right) if:

- i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less.

IDAPA 37.03.08.45.01.a

On April 3, 2012, the SRBA Court issued a decree establishing the general provisions for Administrative Basin 74 ("Basin 74 Decree"). Ex. 115. The Basin 74 Decree states: "[W]ater rights from the following sources of water in Basin 74 shall be administered separately from all other water rights in Basin 74 in accordance with the prior appropriation doctrine as established by Idaho law" *Id.* The Basin 74 Decree identifies 27 creeks in Basin 74, including "Agency Creek and tributaries," to be administered separately from other sources in the basin. *Id.* The language describing separate administration of water rights within Basin 74 is commonly referred to as the "separate streams provision."

The Basin 74 Decree also explains how the separate streams provision applies to future appropriations in the basin: "Future appropriations of water on the above streams are not considered to be subject to prior downstream rights on the Lemhi River proper." Ex. 115. The separate streams provision only applies to administration of water rights within the Lemhi River drainage. *Id.* Water rights authorizing diversion of water from the designated separate streams are still subject to priority date curtailment, to deliver water for downstream senior water rights outside of the Lemhi River basin, including water right 75-13316. Ex. 209 at 3, ¶ 2.a.

In this case, Herbst asserts that the springs to be diverted are tributary to Agency Creek and are not subject to Lemhi River priority date curtailment. There is no evidence in the record refuting that assertion. Protestant LID, which is comprised of various water users on the main stem of the Lemhi River, withdrew its protest on the condition that the proposed permit is supplemental to Herbsts' existing water rights from the Lemhi River. LID's withdrawal of protest suggests that its concerns about injury to water rights on the Lemhi River were resolved through the Stipulation.

At the hearing, the IWRB confirmed its support of the Stipulation reached between Herbst and the other protestants. The IWRB did not contend that the springs proposed to be appropriated

are not tributary to Agency Creek. Nor did the IWRB contend that the proposed permit will reduce the quantity of water available to fill its Lemhi River minimum stream flow water right (74-14993).

The evidence in the record suggests that the proposed permit will not reduce the quantity of water available for water rights on Agency Creek.

Sufficiency of Water Supply

Rule 45.01.b of the Department's Water Appropriation Rules sets forth the criteria for determining whether the water supply is sufficient for a proposed project: "The water supply will be determined to be insufficient for the proposed use if water is not available for an adequate time interval in quantities sufficient to make the project economically feasible" IDAPA 37.03.08.45.01.b.

The evidence in the record suggests that the proposed spring sources of water produce sufficient water to satisfy the proposed permit. Ex. 105; Testimony of Lynn Herbst.

Lack of Good Faith / Speculation

Rule 45.01.c of the Department's Water Appropriation Rules sets forth the criteria for determining whether an application is filed in good faith and not for speculative purposes. An applicant must have "legal access to the property necessary to construct and operate the proposed project." IDAPA 37.03.08.45.01.c.i. An applicant must also demonstrate that it is "in the process of obtaining other permits needed to construct and operate the project" and that there are "no obvious legal impediments" to prevent successful completion of the project. IDAPA 37.03.08.45.01.c.ii-iii.

There is no evidence in the record suggesting that Herbst did not file Application 74-16008 in good faith or that Herbst filed the application for speculative purposes. The proposed points of diversion and place of use are on property owned by Herbst. The proposed permit is for an existing irrigation system. Herbst filed Application 74-16008 in good faith.

Sufficient Financial Resources

Rule 45.01.d of the Department's Water Appropriation Rules (IDAPA 37.03.08) sets forth criteria for determining whether an applicant has sufficient financial resources to complete a project. "An applicant will be found to have sufficient financial resources upon a showing that it is reasonably probable that funding is or will be available for project construction or upon a financial commitment letter acceptable to the Director." IDAPA 37.03.08.45.01.d.ii.

There is no evidence in the record suggesting that Herbst lacks sufficient financial resources to complete the proposed project. Most of the infrastructure for the proposed project is already in place. The proposed spring sources flow directly into the L-31 Ditch and can be conveyed to the proposed place of use through existing ditches. Herbst will be required to install measuring devices at locations downstream of where L-31 flows into Agency Creek, but the expense of the measuring devices would be negligible.

Conservation of Water Resources and Local Public Interest

Water rights 75-13316 and 77-11941 bear a priority date of July 23, 1980, and would be senior to Herbst's Permit 74-16008. Ex. 212. The separate streams provision of the Basin 74 Decree does not apply to downstream water rights outside of Basin 74 and does not shield Permit 74-16008 from curtailment to deliver water for water rights 75-13316 and 77-11941. However, the Wild and Scenic Decree includes specific language subordinating water rights 75-13316 and 77-11941 to certain upstream junior water rights. The relevant provision in this matter is Section 10.b(6)(A)(i) of the Wild and Scenic Decree which subordinates water rights 75-13316 and 77-11941 to water rights claimed or applied for after September 1, 2003, "with a total combined diversion of 150 cfs (including not more than 5,000 acres of irrigation with a maximum diversion rate of 0.02 cfs/acre), when the mean daily discharge at the Shoup gage is <1,280 cfs." Ex. 114 at 6.

The IWRB sets forth two arguments why approval of Application 74-16008 with the subordination protections of Section 10(b)(6)(A)(i) of the Wild and Scenic Decree is contrary to the conservation of water resources within the state of Idaho and contrary to the local public interest.

First, the IWRB argues that approval of Permit 74-16008 with the subordination protections of Section 10(b)(6)(A)(i) is contrary to the conservation of water resources within the state of Idaho and contrary to the local public interest "[u]nder the precedent set forth in the Purcell Order." *Exceptions* at 3-6, 14; *IWRB's Post-Hearing Brief* at 8-9. However, as described above, the Purcell Order is not controlling precedent that determines the outcome of Application 74-16008.

Second, the IWRB argues the subordination protections in Section 10(b)(6)(A)(i) only apply to applications for "new" irrigated acres. *Exceptions* at 14. Because the proposed place of use in Application 74-16008 is already identified by Herbst's existing Lemhi River water rights, the IWRB contends it is contrary to the conservation of water resources and local public interest to approve the proposed permit with the subordination protection of Section 10(b)(6)(A)(i). *Id.* In support of this argument, the IWRB asserts "the term 'irrigation' in Section 10.b.(6).(A).(i) is latently ambiguous." *Exceptions* at 15. However, as described above, the IWRB has not established the existence of a latent ambiguity in the Wild and Scenic Decree and the subordination benefit set forth in Section 10.b(6)(A)(i) does not only apply to water rights seeking to irrigate new acres.

Application 74-16008 may be approved with the subordination protection of Section 10(b)(6)(A)(i) consistent with the conservation of water resources within the state of Idaho. Idaho Code § 42-202(6) states, in pertinent part:

[N]o one shall be authorized to divert for irrigation purposes more than one (1) cubic foot of water per second of the normal flow for each fifty (50) acres of land to be so irrigated [0.02 cfs/acre] . . . unless it can be shown to the satisfaction of the department of water resources that a greater amount is necessary.

If a water user proposes a diversion rate greater than 0.02 cfs per acre, the water user must submit site specific information justifying the higher rate per acre. This would generally include

information about the water holding capacity of the soils, field slopes, consumptive use requirements, and the proposed methods of irrigation. The water user (or the water user's consultant) would also need to calculate the amount of water needed to fill the soil profile, the frequency of watering needed to maintain an ideal percentage of water in the soil profile, and the efficiency of water delivery.

Application 74-16008, as amended, proposes a diversion rate of 5.76 cfs and the irrigation of 186.2 acres. This equates to 0.03 cfs/acre. Herbst has not submitted any analyses or other technical information supporting the necessity of more than 0.02 cfs/acre. If the Permit 74-16008 were limited to 0.02 cfs/acre, the maximum diversion rate would be 3.72 cfs (0.02 cfs per acre x 186.2 acres). There is no technical evidence in the administrative record supporting a diversion rate per acre higher than the standard 0.02 cfs/acre set forth in Idaho Code. Therefore, Permit 74-16008 must be limited to 3.72 cfs (0.02 cfs/acre) and can only provide a water supply up to 0.02 cfs per acre when used in place of existing water rights which have been curtailed. If diversion authorized by Permit 74-16008 is limited to 0.02 cfs/acre (3.72 cfs), approval of Application 74-16008 is consistent with the conservation of water resources within the state of Idaho.³

Application 74-16008 may also be approved with the subordination protection of Section 10(b)(6)(A)(i) consistent with the local public interest criterion of Idaho Code § 42-203A(5). The local public interest analysis under Idaho Code § 42-203A(5)(e) is meant to be separate and distinct from the injury analysis under § 42-203A(5)(a). Local public interest is defined as "the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource." Idaho Code § 42-202B(3). It is consistent with the local public interest to allow water reserved for future appropriation in the Wild and Scenic Decree to be appropriated for the irrigation use sought by Application 74-16008 that will allow Herbst to supplement their water supply when their existing rights on the Lemhi River are curtailed and they would otherwise have to dry up acres associated with the curtailed rights.

Replacement Water Right

Section 10.b(6)(C) of the Wild and Scenic Decree states that "replacement water rights shall not be deducted from the subordination amounts identified . . . for future rights." Ex. 114 at 7. Herbst argues Permit 74-16008 qualifies under Section 10.b(6)(C) and, therefore, does not count against the 150 cfs subordination cap set forth in Section 10(b)(6)(A)(i).

Herbst's reading of Section (6)(C) is not correct. The proposal to use the springs as a purely supplemental supply (that the springs will only be used when Lemhi River rights are curtailed)

³ Herbst offered multiple exhibits into the record relating to Permit 74-16010 issued by the Department in July 2015 to Lamar Cockrell & Sons LLC ("Cockrell"). Cockrell's application is similar to Herbst's, because Cockrell was also seeking a permit to use water from spring channels intercepted by its Lemhi River ditch (L-9). Permit 74-16010 authorizes the diversion of 2.24 cfs and the irrigation of 79.9 acres (0.028 cfs/acre), which exceeds the 0.02 cfs/acre standard set forth in Idaho Code §42-202(6). Cockrell's underlying Lemhi River water rights (74-1835 and 74-2047L) authorize the diversion of 11.00 cfs and the irrigation of 399.8 acres (0.028 cfs/acre). Cockrell did not provide technical evidence supporting a diversion demand greater than 0.02 cfs/acre. However, Permit 74-16010 was still issued for the full proposed diversion rate. It appears the Department erred in not limiting Permit 74-16010 to 1.60 cfs (0.02 cfs per acre) during times when Cockrell's Lemhi River rights are curtailed. The Department's error in the Cockrell Permit does not justify committing the same error in this matter.

violates one of the primary elements of the “replacement water right” definition. “To be considered a replacement water right: . . . iii) the replacement water right cannot be used when water would not be legally and physically available under the original water right.” Ex. 114, page 7, ¶ 10.b(6)(C). One of the primary reasons Herbst is pursuing Permit 74-16008 is to create a supplemental water supply when their Lemhi River rights are curtailed.

If Herbst proposed to divert spring water only to the extent water was available under their Lemhi River rights, then Permit 74-16008 may qualify as a replacement water right. However, Condition #7 of the Stipulation makes it clear that Herbst intends to divert water under Permit 74-16008 only during times when their Lemhi River rights (the original water rights) are curtailed (physically and legally not available). Ex. 113. The replacement water provisions of the Wild and Scenic Decree do not apply to Permit 74-16008.

CONCLUSIONS OF LAW

Herbst have satisfied their burden of proof for the criteria set forth in Idaho Code § 42-203A(5). Therefore, Permit 74-16008 may be approved with limiting conditions. Based on the standards set forth in Idaho Code § 42-202(6), Permit 74-16008 must be limited to 3.72 cfs (0.02 cfs/acre) and, when used in place of existing water rights, cannot exceed a diversion rate of 0.02 cfs/acre. Further, the conditions on Permit 74-16008 should be revised to be consistent with this order.

The arguments raised by the IWRB relating to the Wild and Scenic Agreement and Wild and Scenic Decree are not persuasive. The subordination protections described in Section 10(b)(6)(A)(i) of the Wild and Scenic Decree are not limited to new acres and can be extended to Permit 74-16008. Further, limiting Permit 74-16008 to 0.02 cfs per acre (as required by Idaho Code § 42-202) means Permit 74-6008 fits squarely within Section 10(b)(6)(A)(i).

ORDER

IT IS HEREBY ORDERED that Application for Permit No. 74-16008 in the name of Lynn Herbst and Robin Herbst is GRANTED. Permit 74-16008 is ISSUED with the following elements and conditions:

Priority Date: June 26, 2015
Source: Springs tributary to Agency Creek
Season of Use: 3/15 – 11/15
Beneficial Use: Irrigation
Diversion Rate: 3.72 cfs

Points of Diversion: SWNENW, Sec. 29, T19N, R24E
NWSESW, Sec. 20, T19N, R24E
SWNESW, Sec. 20, T19N, R24E (Injection)
SWNESW, Sec. 20, T19N, R24E (Rediversion)

Place of Use: 186.2 acres

T19N, R24E Section 17

SWNE	0.2 acres
SENE	17.4
NESW	31.4
SESW	36.1
NWSE	3.2
SWSE	1.6

T19N, R24E, Section 20

NENW	33.9 acres
NWNW	15.0
SWNW	12.1
SENE	27.9
NESW	6.2
NWSW	1.2

Permit Conditions

1. Proof of application of water to beneficial use shall be submitted on or before **September 1, 2017**.
2. Subject to all prior water rights.
3. This right does not grant any right of way or easement across the land of another.
4. This right does not authorize the irrigation of land not previously irrigated.
5. This right authorizes the diversion of water from springs, injection of diverted water into Agency Creek, and a point of redirection of the injected water from Agency Creek.
6. The right holder shall maintain the lockable control structure currently located at the Agency Creek point of diversion east of Hwy 28. Prior to diversion of water under this right, the right holder shall install and/or maintain a measuring device and lockable control structure at the following locations: 1) on the point of redirection from Agency Creek located west of Hwy 28, and 2) on the L-31 ditch where L-31 crosses Tendoy Lane at a location that can be easily viewed by the watermaster.
7. Rights 74-740, 74-741, 74-742, 74-7147, and 74-16008 when combined shall not exceed a total diversion rate of 5.35 cfs and the irrigation of 186.2 acres. However, when Rights 74-740, 74-741, and/or 74-742 are completely or partially unavailable for use, Right 74-16008 shall provide only two-thirds (0.67%) of the diversion rate unavailable from those rights.
8. The right holder shall limit the diversion of water under this right to those times when Rights 74-740, 74-741, 74-742, and 74-7147 are not available or reasonably sufficient to irrigate the place of use authorized under this right.
9. If water rights 74-740, 74-741, 74-742, or 74-7147 are abandoned, forfeited, sold, transferred, leased, or used on any other place of use, right 74-16008 shall not be used.
10. This right is limited to a maximum diversion rate of 0.02 cfs per acre.
11. Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water

district. At the time of this approval, this water right is within State Water District Nos. 74 and 74-M.

Dated this 22nd day of November 2016.



Gary Spackman
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of November 2016, a true and correct copy of the document described below was served by placing a copy of the same with the United States Postal Service, certified with return receipt requested, postage prepaid and properly addressed, to the following:

Document Served: Final Order Issuing Permit (74-16008)

Holden Kidwell Hahn & Crapo
Robert Harris
PO Box 50130
Idaho Falls, ID 83405-0130

Lynn and Robin Herbst
PO Box 21
Tendoy, ID 83468

Ann Vonde
Deputy Attorney General
PO Box 83720
Boise, ID 83720-0010

Courtesy Copy sent via US Mail:

Lemhi Irrigation District
c/o R.J. Smith
260 Withington Creek Road
Salmon, ID 83467

Water District 74
Rick Sager - Watermaster
985 Highway 28
Salmon, ID 83467

US Dept of Commerce
National Marine and Fisheries Service
William W. Stelle Jr.
7600 Sand Point Way N.E. Bldg 1
Seattle, WA 98115


Deborah J. Gibson
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
- (2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.
- (3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.
- (4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
- (5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
 - (a) The petition for reconsideration is disposed of; or
 - (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.
- (6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.
- (7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days: a) of the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.