

Robert L. Harris, Esq. (ISB #7018)
D. Andrew Rawlings (ISB #9569)
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
1000 Riverwalk Dr., Ste. 200
P.O. Box 50130
Idaho Falls, Idaho 83405
Telephone: (208) 523-0620
Facsimile: (208) 523-9518
Email: rharris@holdenlegal.com
arawlings@holdenlegal.com

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SEP 27 2016

**DEPARTMENT OF
WATER RESOURCES**

Attorneys for Lynn and Robin Herbst

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION FOR
PERMIT NO. 74-16008 AND APPLICATION
FOR TRANSFER NO. 80150 IN THE NAME
OF LYNN AND ROBIN HERBST

**APPLICANT'S RESPONSE TO THE
BOARD'S EXCEPTIONS TO THE
PRELIMINARY ORDER**

Lynn Herbst and Robin Herbst (hereinafter collectively the "Applicant"), by and through their attorneys of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby submit *Applicant's Response to the Board's Exceptions to the Preliminary Order*.

I. INTRODUCTION

Ultimately, the *Preliminary Order* should be sustained because the final order in the Purcell matter is not binding or useful precedent to guide this case. Additionally, issues mooted by the determinations of the *Preliminary Order* are moot and should not be decided (even though such a determination may be useful to the Board), and the federal water rights decree providing certain subordination benefits are not ambiguous and, by their terms, encompass this water permit. Some issues raised by the Board have been waived by the Board's failure to contest them at the administrative hearing which will result in prejudice to Applicant; however, even on the merits, the Board's arguments are unavailing.

A. Factual Background

Applicant filed Application for Permit No. 74-16008 (“74-16008”) with the Idaho Department of Water Resources (“IDWR”) on December 4, 2013, which was later amended. The intent of the Applicant in filing 74-16008 related to the Applicant’s use of spring water which flows into L-31 while this ditch transports water diverted pursuant to Applicant’s Lemhi River water rights. 74-16008 is the application the Applicant submitted to officially appropriate this spring water after the Applicant was threatened with a notice of violation from IDWR.

The application was protested by the Idaho Department of Fish & Game (“IDFG”), the Lemhi Irrigation District (“LID”), and the Idaho Water Resource Board (the “Board”). Applicant later amended the application for 74-16008 to make it supplemental to the Applicant’s existing Lemhi River water rights consistent with a settlement agreement reached between the parties. Eventually, Applicant entered into a stipulation (the “Withdrawal Stipulation,” contained in the record as Exhibit 113) with IDFG and LID that resolved their protests. However, the Board did not execute the Withdrawal Stipulation after deciding to raise a subordination issue with 74-16008, which became the sole issue addressed at the hearing.

An important aspect of 74-16008 is its relation to certain federal water rights in the Salmon River basin. The *Partial Decree for Federal Reserved Water Rights 75-13316 and 77-11941* (the “W&S Decree”) reserves federal instream flows subject to numerous conditions. The provisions of the *W&S Decree* were reached between the federal government, the state of Idaho (represented by the Board), and others by agreement (the “W&S Agreement”), which specified some of the terms that would be included in the *W&S Decree*. One important term provided that the federal rights would be subordinated to certain future water rights. See, e.g., *W&S Decree*, ¶ 10.b.(6).(A).(i). If a water right does not enjoy these subordination benefits, and has no other

basis for priority (e.g., a domestic use), it is very unlikely to ever come into priority. It is undisputed that if 74-16008 was subject to priority administration from the *W&S Decree*, it would virtually never be available, particularly where 74-16008 would be used only when one or more of the Applicant's Lemhi River base water rights were curtailed under priority administration later in the irrigation season. For that reason, it has been important for Applicant to ensure that 74-16008 enjoyed these subordination benefits so that it could be useful for supplementing Applicant's irrigation rights. This was also the sole basis of the Board's protest: the Board opposed 74-16008 because it was meant to supplement the irrigation of already-irrigated acres and the Board felt (and continues to feel) that only irrigation of previously non-irrigated lands from any source should enjoy the subordination benefits provided in the *W&S Decree*.

B. Procedural History

The contested case hearing was held on July 14, 2016, before hearing officer James Cefalo. At the hearing, the Board stipulated that they were in favor of issuance of a permit for 74-16008 consistent with the terms of the Withdrawal Stipulation, with one additional provision—that 74-16008 should also include a condition excepting it from the subordination provisions found in the *W&S Decree*. Accordingly, the Board's position at the hearing was that, under the local public interest criterion found at Idaho Code § 42-203A(5)(e), 74-16008 should be excepted from the subordination provisions in the *W&S Decree*. Applicant presented evidence accordingly to address the subordination issue raised by the Board. To provide additional legal arguments regarding this subordination issue to the Hearing Officer, Applicant, and the Board submitted post-hearing briefs.

On August 30, 2016, the hearing officer issued the *Preliminary Order Granting Permit* (the "Preliminary Order"). The *Preliminary Order* approved 74-16008 and adjudicated two

important issues. First, the *Preliminary Order* limited 74-16008 to 0.02 cfs per acre, even though Applicant sought 0.03 cfs per acre consistent with Applicant's base water rights, which are decreed at 0.03 cfs per acre. Second, the *Preliminary Order* found that 74-16008 was entitled to enjoy the subordination benefits of the *W&S Decree* because it met all of the criteria.

On September 13, 2016, the Board timely filed the *Idaho Water Resource Board's Exceptions to Preliminary Order Granting Permit* (the "Exceptions"). Applicant did not file any exceptions. The Board requests that Gary Spackman, Director of the IDWR (the "Director"), review the *Preliminary Order* and change it in certain respects. However, as described herein, the *Preliminary Order*, while not providing Applicant with everything sought, is legally correct and should be sustained.

II. ARGUMENT

Applicant provides argument in the following sections, and will address the Board's assignments of error in a point-by-point manner in the conclusion of this objection.

A. **The Board has Waived Arguments relating to Issues not Addressed or Contested before the Hearing Officer Below.**

As an initial matter, it is important to note that the issue contested by the Board before the hearing officer was very narrow. The *Preliminary Order* explains:

The hearing was conducted for the **limited purpose** of addressing an unresolved issue of whether a limiting condition should be included on the permit. Specifically, [the Board] asserts that a condition should be added to Permit 74-16008 stating that the permit does not enjoy the subordination protections described in Paragraph 10.b of water right 75-13316.

Preliminary Order, p. 1 (underlining in original, bold emphasis added). Additionally, the hearing officer explained:

The arguments raised by [the Board] related to the Wild & Scenic water rights fit within the local public interest review. [The Board]

contends it is not in the local public interest to use the limited amount of water reserved for future appropriation under the W&S Decree for a supplemental irrigation supply on acres already covered by existing irrigation water rights.

Preliminary Order, p. 9 (emphasis added). Together, the record, the *Preliminary Order*, and the Board's inaction challenging these provisions all demonstrate that these statements are correct. The Board's protest of 74-16008 was very narrow, limited to the issue of subordination benefits in the *W&S Decree*, and ought to be solely considered within the local public interest criterion. In fact, the Board stipulated that they were in favor of issuance of a permit for 74-16008 consistent with the terms of the Withdrawal Stipulation, with only one additional provision relating to the subordination benefits of the *W&S Decree*.

The Idaho Supreme Court has been very clear in this regard for judicial appeals. That Court's "longstanding rule is that it will not consider issues raised for the first time on appeal." *Unifund CCR, LLC v. Lowe*, 159 Idaho 750, 755, 367 P.3d 145, 150 (2016) (citation omitted). Thus, to preserve an issue for consideration on appeal, a party must present it below. *Id.*; see also *Kugler v. Nelson*, 160 Idaho 408, 415, 374 P.3d 571, 578 (2016). The only exceptions are issues of jurisdiction. *Zylstra v. State*, 157 Idaho 457, 461, 337 P.3d 616, 620 (2014). The rationale for this rule is that the decision-maker below should have the opportunity to rule on an issue before that decision can be reviewed. The rule is supported by the prejudice that may occur to the opposing party, since evidence cannot be introduced on appeal to contradict an issue or argument raised there for the first time.

Likewise, these same rationales apply in this administrative proceeding. As a result of the narrow issue presented by the Board's protest, Applicant presented evidence at the hearing sufficient for IDWR to determine all of the factors for 74-16008, but focused on the single, narrow

issue challenged by the Board. To allow the Board to now contest other issues, when Applicant cannot present additional evidence in response, is improper. For that reason, the Board has waived all of its arguments not relating to the interpretation and application of the subordination benefits under the *W&S Decree*. This includes the Board's arguments relative to the issues related to the conservation of water resources criterion. However, Applicant will nevertheless address those issues, so that an adverse conclusion may not be reached based on Applicant's non-response.

B. The Board's Exceptions to the *Preliminary Order's* Statements Relating to the Forum and Timing of the Board's Actions are Not a Substantive Determination of the Board's Rights and Create Absolutely No Prejudice.

In two locations, the Board takes issue with the *Preliminary Order's* mention, citing the *W&S Agreement*, relating to the forum and timing of the Board's challenge to Applicant's application. *Exceptions*, pp. 2-3, 19. The *Preliminary Order* mentions "Paragraphs 3.f(6) and 4 of the *W&S Agreement*," and broadly characterizing it as "setting forth a dispute resolution process." *Preliminary Order*, pp. 15, 5 (Findings of Fact, ¶ 25). The Board was therefore displeased by "vague implication[s]" it reads into these statements. *Exceptions*, p. 19. However, the Board provides no right that has been prejudiced by these statements. Idaho courts "must disregard all errors and defects that do not affect any party's substantial rights." Idaho Rule of Civil Procedure 61. Likewise, anyone seeking judicial review from an agency action must show that their "substantial rights ... have been prejudiced." Idaho Code § 67-5279(4). This is simply because to require resolution or remedy, errors must substantively affect a party. The Board has pointed to no prejudice to any of its rights, but merely conveys its dissatisfaction at the way the hearing officer termed his description of these sections of the *W&S Agreement*. There has been no such prejudice—the *Preliminary Order* considers all of the issues raised by the Board. Thus,

there is no legal basis for the Board to take these exceptions to the *Preliminary Order*.

C. The *Preliminary Order* Correctly Found that the *Purcell Order* does not Provide Helpful Precedent that is Determinative of Applicant's Application.

Throughout its exceptions, the Board repeatedly attempts to use 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 (filed December 31, 2015) (the "*Purcell Order*") to generate "a two-part analysis" it asserts is applicable to 74-16008. *Exceptions*, p. 4. The second part of this purported analysis, for which no authority beside the *Purcell Order* is ever cited, would require the determination of "whether the water right is contrary to the conservation of water resources with regard to the limited amount of water available under the Wild and Scenic subordination protections." *Exceptions*, p. 4. As the Board's argument progresses, it drops analytical pretense and forthrightly says what it means: the second part of the analysis requires that in order to enjoy the subordination benefits of the *W&S Decree*, a water right must "develop 'new' acres of irrigation." *Exceptions*, p. 14 (citing *Purcell Order*, pp. 4, 5).

The facts underlying the *Purcell Order* distinguish it from this case which eliminates any precedential value. First, the Purcells already possessed more than sufficient water for their needs. Under their existing water rights, the Purcells could already divert up to "8.73 cfs to irrigate 293 acres (0.03 cfs per acre or 1½ miners inches per acre)." *Purcell Order*, p. 2 (Findings of Fact, ¶ 4). Additionally, the Purcells indicated that the additional water they were seeking was "high flow" water, even though the SRBA Court had already decreed that:

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.

Purcell Order, p. 2 (Findings of Fact, ¶ 7). The Purcells provided, in their pre-hearing disclosures, three reasons why IDWR should approve their application:

- 1) I cannot make a decent hay crop without the use of the high water for the [two] or three weeks that it is available when the snowpack is normal.
- 2) I need the high water to raise the sub in my field to have stockwater for my cattle.
- 3) This additional water helps the [aquifer] and springs downstream and the Lemhi River System.

Purcell Order, p. 3 (Findings of Fact, ¶ 8) (brackets in original). Given these facts, the *Purcell Order* concluded that “Purcell already has a full irrigation water supply at the proposed place of use” and that “Purcell did not submit sufficient documentation establishing that a diversion rate of more than 0.03 cfs per acre is needed to accomplish the beneficial use of irrigation at the proposed place of use.” *Purcell Order*, p. 4 (Analysis, ¶¶ 2, 3). The facts that the Purcells already had sufficient water and that the Purcells made no showing that more water was required to beneficially use their irrigation rights were determinative of both the local public interest and conservation of water resources considerations. *See Purcell Order*, pp. 4-5.

Importantly, however, the *Purcell Order* also points out that the Purcells may still “continue to divert and use water consistent with the decreed general provision authorizing the practice of diverting high flows in the Lemhi basin.” *Purcell Order*, p. 5 (Conclusions of Law, ¶ 2). The Purcells were seeking a formal water right for the diversion of “high flows,” when the right to divert “high flows” was already authorized under the Lemhi River general provisions.

The facts of 74-16008 are different. Rather than seeking to add more water on the same acres or to appropriate “high flows”—as the Purcells attempted—74-16008 seeks to appropriate water when Applicant’s other, existing water rights are administratively curtailed or otherwise not available and therefore not providing sufficient water to Applicant’s property. The *Preliminary*

Order limited the total amount to no more than 0.02 cfs per acre. *Preliminary Order*, p. 17 (Permit Conditions 7, 8, and 9). Further, in contrast to the Purcells, Applicant's purposes cannot be accomplished merely by the use of high flows. Thus, none of the facts, reasoning, or rationale of the *Purcell Order* provide adequate guidance to the consideration of 74-16008.

Second, contrary to the Board's argument, the *Purcell Order* does not create a two-part analysis for water rights on the Salmon River and its tributaries. See *Exceptions*, p. 4. The Board proposes that, because of the *Purcell Order*, IDWR must analyze:

First, if the applicant is seeking more than 0.02 cfs of water per acre, the Hearing Officer must determine if they have adequately demonstrated that a greater amount of water is necessary for their purposes. Second, if the applicant is also seeking to enjoy subordination under the [*W&S Decree*], the Hearing Officer must determine whether the water right is contrary to the conservation of water resources with regard to the limited amount of water available under the Wild and Scenic subordination protections.

Exceptions, p. 4. However, the *Purcell Order* provides:

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.

Purcell Order, p. 5 (Analysis, ¶ 9). The facts of Purcell are, again, vital to this outcome. The *Purcell Order* stands for the proposition that before additional water can be applied to acres already supplied with water at a rate in excess of 0.02 cfs per acre, particularly where the applicant seeks the subordination benefits of the *W&S Decree*, the applicant must show that a greater amount is necessary, as required by Idaho Code § 42-202(6) and noted in the *Purcell Order*, p. 3 (Evaluation Criteria, ¶ 1, and Analysis, ¶ 1). Idaho Code § 42-202(6) effectively creates a

presumption that a permit for 0.02 cfs per acre is what is generally necessary for irrigation. That is all that was granted to Applicant in the *Preliminary Order*. However, the Board's proposed analysis takes the *Purcell Order* to an extreme that would put the State of Idaho in the position of determining what projects and uses of water in the Salmon River basin are worthy and deserving of the subordination benefits of the *W&S Decree*. Applicant's position is that the subordination benefits of the *W&S Decree*, like all water rights, are based on the priority of first use and the statutory presumption of the reasonableness of 0.02 cfs per acre for irrigation. The *Purcell Order* has not changed that analysis.

Third, the Board's argument that the *Preliminary Order* improperly creates "two types of 'supplemental' irrigation uses (one type that enjoys subordination and the other type that does not)" is not availing. *Exceptions*, p. 14. The Board incorrectly attempts to treat "supplemental" as a term of art in water law. Throughout Title 42 of the Idaho Code, dealing with "Irrigation and Drainage – Water Rights and Reclamation," IDWR's administrative rules, and Idaho case law a "supplemental water right" is never defined, and only limited references to a "supplemental water right" exist. For instance, the statute that creates the Water Supply Bank, which the Board must operate, provides that one purpose of the Water Supply Bank is to "provide a source of adequate water supplies to benefit new and **supplemental water uses.**" Idaho Code § 42-1761 (emphasis added); *see also* IDAPA 37.02.03.001.02 (using this same language in the Water Supply Bank Rules). This statute and rule are the most instructive and clear, because its plural use indicates that there are multiple uses that will supplement a water right. However, there are other statutes and rules are consistent with that understanding. *See* Idaho Code § 42-2211 (allowing an operating company "to secure additional water for the irrigation of the lands of its stockholders to supplement their natural flow rights" and imposing certain restrictions); Idaho Code § 42-2805

(requiring the Director to report to a county on the effects of a proposed water-related project, including “the probable area that is likely to be irrigated or drained or provided with a supplemental water supply” thereby); IDAPA 37.03.01.035.02 (providing examples of fees, using a claims for “a supplemental water right” in two examples); IDAPA 37.03.08.045.03.f.vii (providing that one factor the Director must consider in regard to “the promotion of full economic and multiple use development of the water resources of the state of Idaho” is whether it “[p]rovides supplemental water supplies for existing uses with inadequate supplies”).

The point of this exposition is that the term “supplemental” is not defined anywhere. Rather, it is used with its general meaning, “[s]upplying something additional; adding what is lacking.” BLACK’S LAW DICTIONARY 1577 (9th ed. 2009). There are indeed several ways to supplement a water right. Each method presents its own, unique considerations. It is for that reason that the “supplemental” water rights at issue in the *Purcell Order* and in this case are distinct, which allows for divergent outcomes and, for the reasons described above, Applicant’s supplemental irrigation right should be approved even though the *Purcell Order* denied the supplemental irrigation right sought there. Even the Board’s own expert, David Shaw, testified that there are multiple meanings for the word “supplemental.”

Fourth, to the extent the *Purcell Order* influences the outcome of this case, the *Purcell Order* does not apply as the Board argues. The Board emphasizes the use of the word “new” in the *Purcell Order* to bolster its argument that only the “develop[ment] of new acres of irrigation” is eligible for the subordination benefits under the *W&S Decree*. *Exceptions*, p. 14 (emphasis omitted). However, **the *Purcell Order* never uses the term “new acres.”** See *Purcell Order*, pp. 4-5 (the only pages cited by the Board). The Board emphasizes the word “new” and seizes on the conclusion of the *Purcell Order* without looking at the reasoning, which is omitted on page 14

of the *Exceptions* by ellipsis and pre-terminating the sentence. See *Exceptions*, p. 14. The reasoning for the denial of the Purcells irrigation application is helpful:

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 [authorizing the practice of diverting high flows in the Lemhi basin].

Purcell Order, p. 5 (emphasis added). Similarly, under the consideration of the local public interest, the *Purcell Order* found that “[i]t is not in the local public interest to allocate the limited water reserved for future development in the [*W&S Agreement*] for supplemental irrigation uses that do not result in actual new development of irrigation projects or other new beneficial uses in the basin.” *Purcell Order*, p. 4 (emphasis added). Even to the extent it provides any guidance in this case, the *Purcell Order* never requires that irrigation break new acres to enjoy the subordination benefits of the *W&S Agreement*. Rather, the facts—that the Purcells wanted to add, in priority, to the water that was already being applied to their acres in excess of 0.02 cfs per acre and where they were already authorized under the general provisions to divert “high flows”—were determinative there.

Here, the facts dictate a different outcome. Where the Purcells applied to supplement their water rights with the addition of more water to the same acres *early* in the season, Applicant in the present matter intends only to use this water right to supply water when the existing water rights are, for whatever reason, unavailable *during* the irrigation season.¹ Thus, even accepting

¹ That is the reason for conditions 7, 8, and 9 in the *Preliminary Order*. These conditions, respectively, limit

the *Purcell Order* as useful precedent, the *Preliminary Order* should be sustained in this regard. As to the conservation of water resources, under the *Preliminary Order*, Applicant will only receive a maximum of 0.02 cfs per acre to the extent the existing water rights cannot provide that amount and that supplemental use is not already authorized. *Compare Purcell Order*, p. 5. Further, as to the local public interest, Applicant's use of this supplemental water right is a new beneficial use, in that it will provide water to continue growing crops that otherwise, without this supplemental right, would go un-watered—which stands in stark contrast to the Purcells' purpose of adding additional water to the same crops early in the season to build up subwater and benefit the local aquifer. For these reasons, the *Purcell Order*, to whatever extent it may apply, does not require the denial of 74-16008.

D. The *Preliminary Order* Correctly Found that the Issue of Further Defining the 150 cfs preserved in the *W&S Decree* for Future Development is Moot.

The *Preliminary Order* states:

Paragraph 10.b(6)(A)(i) of the W&S Decree subordinates [the federal water rights] to the future development of “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).” [The Board] contends the proposed permit does not qualify for protection under the subordination provisions of [the federal water rights] because the total proposed diversion rate exceeds 0.02 cfs/acre. [Applicant] contends the 0.02 cfs/acre limit only applies to 100 cfs [or 0.02 cfs/acre × 5,000 acres] of the 150 cfs total future supply; the remaining 50 cfs is available for applications seeking higher diversion rates.

Due 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. This renders the competing arguments on this point moot. Permit 74-16008 (limited to 3.72 cfs and 186.2 acres) falls squarely within the definition set

Applicant to a combined “total diversion rate of 5.35 cfs and the irrigation of 186.2 acres,” requires Applicant to “make full beneficial use” of the existing water rights before using this supplemental water right, and prohibits the use of this supplemental water right if the Applicant's existing water rights “are abandoned, forfeited, sold, transferred, leased, or used on any other place of use.” *Preliminary Order*, p. 17.

forth in Paragraph 10.b(6)(A)(i) of the W&S Decree and is entitled to the subordination protections offered to future water rights by that provision.

Preliminary Order, p. 12. The Board contests the finding of mootness, arguing that the conclusion is “ambiguous at best and leaves undecided an important controversy that was brought for resolution by the parties.” *Exceptions*, p. 7. Neither point is sufficient to address the issue of interpretation that was mooted by the *Preliminary Order*. The Board’s arguments run together, namely that by finding that the 0.02 cfs per acre limitation imposed by the *Preliminary Order* “falls squarely” within Section 10.b.(6).(A).(i), “the Hearing Officer creates ambiguity rather than clarity,” apparently because it “leaves open the controversy raised by both parties as to whether an irrigation right that has a diversion rate greater than 0.02 cfs of water per acre may qualify for the subordination benefits of Section 10.b.(6).(A).(i) *under any circumstances*.” *Exceptions*, pp. 8-9 (italics in original).

The error in this argument is that it does not do anything to make the issue anything other than moot. The text of the *W&S Decree* provides that 5,000 acres of irrigation rights, with a rate no higher than 0.02 cfs per acre, are entitled to enjoy the subordination benefits of the *W&S Decree*. *W&S Decree*, ¶ 10.b.(6).(A).(i). The *Preliminary Order* imposes the limitation of 0.02 cfs per acre on Applicant’s water right, which—regardless of the arguments propounded by either Applicant or the Board—is within the defined 5,000 acres that may enjoy the subordination benefits of the *W&S Decree*. Because the parties’ arguments and, consequently, any determination of those arguments cannot effect this outcome, it is moot. Simply, moot means moot. While both parties continue to believe their position is correct, the resolution—limiting Applicant’s water right to 0.02 cfs per acre—determines the outcome—the applicability of the subordination benefits—without respect to the position of the parties or even the issue the parties

argued. Asking the Director to, nevertheless, determine this moot issue is seeking an advisory opinion, which is not the role of a contested case such as this. The controversy has been resolved and the moot issues are thereby rendered moot.

E. The *Preliminary Order* Correctly Found that there was No Ambiguity—either Patent or Latent—in the *W&S Decree* and Correctly Interpreted the *W&S Decree*.

The Board continues to argue that there is an ambiguity in the *W&S Decree*. The Board made these arguments to the hearing officer, who considered them but nonetheless concluded:

[The Board] seeks to create ambiguity where there is none. IWRB's argument that the term "irrigation" might actually mean "irrigation of new acres" is not reasonable. Neither the *W&S Decree* nor the *W&S Agreement* limit the subordination protections to new acres. Incorporating such a limit would have been very simple and could have been done in a single sentence or even a single word. The hearing officer finds that the *W&S Agreement* and the *W&S Decree* are not ambiguous on this point. The subordination benefits described in Paragraph 10.b(6)(A) are not limited to new acres. Supplemental water rights may also enjoy the benefits of subordination.

Preliminary Order, p. 12. However, the Board continues to make significant and unsupported inferential leaps from the text of the *W&S Decree* in order to change the *W&S Decree* to mean what the Board wants it to mean. First, the Board contends that "a latent ambiguity exists with regard to the term 'irrigation' found in Section 10.b.6.(A).(i)" of the *W&S Decree*. *Exceptions*, p. 11. Second, the Board divides the 150 cfs that may enjoy subordination benefits under the *W&S Decree* into 100 cfs of irrigation (with some limits not usually mentioned by the Board²) and 50 cfs of "non-irrigation water rights," which has absolutely no textual support in the *W&S Decree*. *Exceptions*, p. 10.³ However, both arguments are not persuasive and neither creates any

² 100 cfs is arrived at by multiplying 5,000 acres by the 0.02 cfs per acre limit, both of which are imposed in the text of the *W&S Decree*, ¶ 10.b.(6).(A).(i).

³ Although Applicant believes that this point has been rendered moot, as pointed out in the *Preliminary Order*, Applicant addresses it for the sake completeness of the argument.

ambiguity in the *W&S Decree*.

Before addressing each of the Board's contentions, it is important to note the evidence the Board relies upon. The Board relies extensively on the testimony of David Shaw—its only witness at the hearing—and also, to a lesser extent, on the guidance provided by Application Processing No. 70 ("Memo 70"). Both of these sources of evidence are extrinsic to the *W&S Decree* (which is the operative document to be interpreted). David Shaw's testimony is parol evidence. See BLACK'S LAW DICTIONARY 638 (9th ed. 2009). Parol evidence cannot be considered when the document is unambiguous. *Steel Farms, Inc. v. Croft & Reed, Inc.*, 154 Idaho 259, 264-66, 297 P.3d 222, 227-29 (2012) (a court must "enforce the language of a contract [or decree] where that language is plain and unambiguous" without reference to parol evidence, which can only "be considered to aid a trial court in determining the intent of the drafter of a document if an ambiguity exists"). Similarly, the hearing officer correctly noted that Memo 70 may "guide" the decision in the *Preliminary Order*, but "it does not constitute binding precedent for a hearing officer." *Preliminary Order*, p. 13.

Simply, the *Preliminary Order* was correct that the *W&S Decree* was unambiguous. The term "irrigation," without any further qualification, means all types of irrigation. However, the Board argues that "a latent ambiguity exists" when the term "irrigation" is applied here. *Exceptions*, p. 11. It is important to note the predicate that the Board attaches to this assertion: the circumstances of this case, "**when coupled with the *Purcell Order* and the evidence presented at the hearing**, demonstrate that a latent ambiguity exists." *Exceptions*, p. 11 (italics and emphasis added). The Board argues that a latent ambiguity exists **only when** the *Purcell Order* (which is not useful precedent to guide this case, see Section II.C., *supra*) and the evidence presented at the hearing (*i.e.*, the testimony of David Shaw) are both considered with the

Preliminary Order. Exceptions, p. 11. The Board’s analysis—and therefore its argued conclusion—are incorrect.

The Idaho Supreme Court has explained:

A latent ambiguity exists where an instrument is clear on its face, but loses that clarity when applied to the facts as they exist. Although parol evidence generally cannot be submitted to contradict, vary, add or subtract from the terms of a written agreement that is deemed unambiguous on its face, there is an exception to this general rule where a latent ambiguity appears. Where the facts in existence reveal a latent ambiguity in a contract, the court seeks to determine what the intent of the parties was at the time they entered into the contract.

Knipe Land Co. v. Robertson, 151 Idaho 449, 455, 259 P.3d 595, 601 (2011). “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.’” *Rangen, Inc. v. Idaho Dep’t of Water Res.*, 159 Idaho 798, 367 P.3d 193, 202 (2016) (quoting *Snoderly v. Bower*, 30 Idaho 484, 487, 166 P. 265, 265 (1917)) (brackets in original). However, extrinsic evidence is not the same as parol evidence. See BLACK’S LAW DICTIONARY 637, 638 (9th ed. 2009). Determining that a latent ambiguity depends upon the **application** of terms “to the facts as they exist.” *Robertson*, 151 Idaho at 455, 259 P.3d at 601. It is only after that analytical hurdle is cleared that a court is asked to determine the intent of the parties. *Id.* The intent of the parties cannot create an ambiguity in the application of a term to the facts as they exist. The extrinsic evidence that may be introduced to demonstrate a latent ambiguity must demonstrate ambiguity in the application of a term, and **then** the court will determine the parties’ intent. The Board seeks to use testimony of a subjective intent to create objective latent ambiguity in order to have the court resort to that intent to interpret the provision. In other words, David Shaw’s testimony (which does not describe the application of the term “irrigation”) cannot

create an ambiguity that would necessitate consulting David Shaw's testimony to determine the intent of the parties. The Board's analysis is circular—which is not supported by Idaho Supreme Court precedent.

As to Memo 70, the hearing officer was correct that “[t]here is no support ... in the W&S Agreement or the W&S Decree” for the limitation proposed in Memo 70, that any new permit cannot enjoy the subordination benefits if “the total combined diversion rate of all water rights at the proposed place of use exceeds 0.02 cfs/acre.” *Preliminary Order*, p. 13. Memo 70 is not binding authority and, as the hearing officer's analysis demonstrates (and even the Board appears to agree) Memo 70 is in error on this point. However, the Board believes the error lies in the fact that the dispositive issue is whether the irrigation occurs on new acres. *Exceptions*, p. 18. This conclusion, again, over-relies and over-extends the *Purcell Order*. There is **absolutely nothing** in the *W&S Decree* to even suggest that “irrigation” means the “irrigation of new acres.” The hearing officer correctly concluded that the issue, for purposes of the *W&S Decree*'s subordination benefits, is the definition and limitation provided in the *W&S Decree* itself. Because the *Preliminary Order* limits 74-16008 to 0.02 cfs per acre, 74-16008 fits within the defined category of water rights that may enjoy those subordination benefits.

The Board makes a second attempt to introduce an ambiguity, or at least to characterize the *W&S Decree* in terms it finds acceptable, which is to divide the 150 cfs that may enjoy subordination benefits under the *W&S Decree* into 100 cfs of irrigation and 50 cfs of “non-irrigation water rights.” *Exceptions*, p. 10. There is absolutely no textual support in the *W&S Decree*. The relevant provision provides for subordination benefits for future water rights “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).” *W&S Decree*, ¶ 10.b.(6).(A).(i). There is no

indication that the 50 cfs not limited to “irrigation with a maximum diversion rate of 0.02 cfs/acre” is limited in any way other than being a “[w]ater right[] other than those described in paragraph (3) through (5) above.” See *W&S Decree*, ¶ 10.b.(6).(A).

III. PERMIT CONDITIONS

The Board also takes issue with some of the conditions imposed in the *Preliminary Order*, to which Applicant desires to respond.

First, the Boards asks that “Condition 5 [] be amended to reflect [Applicant’s] two point of rediversion.” *Exceptions*, p. 20. However, there is no basis to require listing any points of rediversion, since Idaho Code § 42-222 does not mention points of re-diversion. Further, Idaho Code § 42-105 allows the use of natural waterways to deliver already-diverted water and is silent as to any requirement to add points of rediversion to a water right to exercise the rights granted under this statute. As a result, there is no legal requirement under Idaho law to list any point of re-division utilized by Applicant.

Second, the Board argues that “Conditions No. 7 and 8 do not adequately describe the supplemental nature of [Applicant’s] water right and may create confusion regarding the administration of [Applicant’s] rights.” *Exceptions*, p. 21. The Board proposes language from the Withdrawal Stipulation—to which it was not a party—instead of the language used in the *Preliminary Order*. *Exceptions*, p. 21, n. 6. Applicant believes that Conditions 7 and 8 in the *Preliminary Order*, although not identical to the Withdrawal Stipulation language, provide sufficient detail and clarity for the administration of Applicant’s water rights. The Board is seeking different words that have no distinctive purpose and provide no additional clarity. Admittedly, the administration of Applicant’s water rights may be slightly more complicated than

typical water rights, but the terms suggested by the Board do not clarify the issues or simplify the administration.

IV. CONCLUSION

The Board has not shown error in the *Preliminary Order* and has not provided any reason for the Director alter the *Preliminary Order*. The Board's attempt to raise new issues now, when it stipulated that the only issue for hearing was the application of the *W&S Decree* under the local public interest criterion, is prejudicial to Applicant, who could have introduced additional evidence as to those issues, but felt no need, since the Board stipulated. Consequently, the Director should not address those waived arguments. Further, the *Purcell Order* is not binding and, because of the factual differences, it is not useful as persuasive authority to guide this determination. Despite the Board's desire to have the Director definitively render its opinion regarding the entire interpretation and application of the *W&S Decree*, that issue has been rendered moot by the *Preliminary Order*'s limitation of 74-16008 to 0.02 cfs per acre. The Director, like the hearing officer, should not opine in an advisory capacity on moot issues. The *W&S Decree* is not ambiguous. The Board's efforts have not shown that "irrigation" only means the "irrigation of new acres." Its introduction of parol evidence does not create a latent ambiguity that would necessitate consideration of parol evidence; only extrinsic evidence demonstrating that the application of the term "irrigation" is ambiguous (which has never been submitted by the Board) could do so. Specifically, Applicant responds to each of the Board's exceptions as follows:

- Finding of Fact 25 (*Exceptions*, pp. 2-3). The Board takes exception to an issue that has not prejudiced it in any way, and therefore no change should be made by the Director. See Section II.B., *supra*.

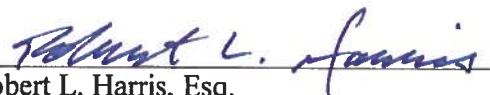
- Conservation of Water Resources/Proposed Diversion Rate (*Exceptions*, pp. 3-7). The Board incorrectly attempts to apply the *Purcell Order* to his case to create a two-step analysis, when the circumstances of the Purcell matter are factually distinguishable, no such two-step analysis is required, and the hearing officer correctly found that a use of 0.02 cfs per acre is consistent with the conservation of water resources (and their efficient use) within the state of Idaho. *Preliminary Order*, pp. 8-9; *see also* Section II.C., *supra*.
- Subordination Limited to Water Rights Less than 0.02 cfs/acre (*Exceptions*, pp. 7-11). The Board asks the Director to adjudicate an issue which the *Preliminary Order*'s determination (limiting 74-16008 to 0.02 cfs per acre), if sustained, renders moot—which the Director should not do. *See, e.g.*, Section II.D., *supra*.
- Subordination Limited to New Acres and the Purcell Order (*Exceptions*, pp. 11-18). The Board attempts to create ambiguity in the *W&S Decree* where there is none because subjective intention cannot muddy the waters of language that can only be applied in one way. Thus, the hearing officer did not err by not considering the Board's parol evidence because there was no extrinsic evidence demonstrating an ambiguity. *See* Section II.E., *supra*.
- Administrator's Memorandum—Application Processing No. 70 (*Exceptions*, p. 18). Nowhere in the *W&S Decree* is there a basis to limit "irrigation" to mean "irrigation of new acres" and the Board has not demonstrated any ambiguity that would allow the consideration of its parol evidence relating to David Shaw's intent. *See* Section II.E., *supra*.
- Forum and Timing Question (*Exceptions*, pp. 19-20). Again, the Board takes

exception to an issue that has not prejudiced it in any way, assigning errors to implications allegedly made by the hearing officer. As a result, no change should be made by the Director. *See* Section II.B., *supra*.

- Permit Conditions (*Exceptions*, pp. 20-23). The Board intends to make the *Preliminary Order* clearer and administration easier. However, the proposed changes do not accomplish those goals—these are, simply and unavoidably, complex water rights—rendering the Board’s proposals merely a distinction without a difference. *See* Section III., *supra*.

For these reasons, and those further argued above, the Director should sustain the *Preliminary Order* and deny the Board’s requests to change it.

Dated this 27th day of September, 2016.


Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
Attorneys for Lynn and Robin Herbst

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of September, 2016, I served a true and correct copy of the document listed below on the persons listed below by the method indicated.

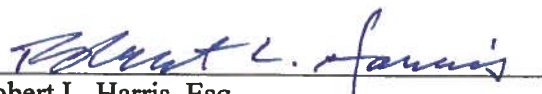
DOCUMENT SERVED: **APPLICANT'S RESPONSE TO THE BOARD'S
EXCEPTIONS TO THE PRELIMINARY ORDER**

ORIGINAL TO: Director Gary Spackman
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098

ATTORNEYS AND/OR INDIVIDUALS SERVED:

Ann Y. Vonde
Deputy Attorney General
P.O. Box 83720
Boise, Idaho 83720-0010
Fax: 208-854-8072
ann.vonde@ag.idaho.gov

(☒) First Class Mail
() Overnight Mail
() Facsimile
(☒) Email
() FedEx


Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

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