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DEPARTMENT OF
WATER RESOURCES

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

IN THE MATTER OF APPLICATION	)	
FOR PERMIT NO. 74-16008 (Herbst)	)	
	)	IDAHO WATER RESOURCE BOARD'S
	)	EXCEPTIONS TO PRELIMINARY
	)	ORDER GRANTING PERMIT
	)	
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The Idaho Water Resource Board ("IWRB"), by and through its attorneys of record, hereby submits its exceptions to the *Preliminary Order Granting Permit* ("Preliminary Order") issued in this matter by Hearing Officer James Cefalo on August 30, 2016. These exceptions are submitted to the Director of the Idaho Department of Water Resources, Gary Spackman ("Director"), pursuant to I.C. § 67-5245(3) and IDAPA 37..01.01.730.b-d., and are offered in

support of *Idaho Water Resources Board's Petition for the Director to Review Preliminary Order Granting Permit* filed contemporaneously herewith.

STANDARD OF REVIEW

A Preliminary Order, as defined by IDAPA 37.01.01.730.01, is an order “issued by a person other than the agency head that will become a final order of the agency unless reviewed by the agency head . . . pursuant to Section 67-5245, Idaho Code.” Any party may appeal or take exceptions to a preliminary order within 14 days after service of the preliminary order. IDAPA 37.01.01.730.02.c. Idaho Code Section 67-5245(7) provides that the Director is not bound by the fact-finding and analysis of the Hearing Officer in the Preliminary Order. The Director “shall exercise all of the decision-making power that he would have had if the agency head had presided over the hearing.” I.C. § 67-5245(7). The Director’s review is, therefore, *de novo*.

STATEMENT OF EXCEPTIONS TO THE PRELIMINARY ORDER

1. Finding of Fact 25:

Finding of Fact 25 incorrectly narrows the scope of Section 3.f.(6) and Section 4 of the Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees (“Wild and Scenic Stipulation”) (Exhibit 209). Section 3.f.(6) allows any party to the Wild and Scenic Stipulation to “request additional information” concerning 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.*” Wild and Scenic Stipulation at 15 (emphasis added). It also allows any party to “request reconsideration or explanation by IDWR of implementation or proposed implementation of any subordination provision at any time” and requires the “parties” to “make good faith efforts to resolve questions

and reach agreement regarding implementation of the subordination provisions.” Wild and Scenic Stipulation at 15.

Section 4 provides that the “parties and IDWR agree to make good faith efforts to resolve *any* disputes which arise concerning IDWR’s implementation of this Stipulation.” Wild and Scenic Stipulation at 15 (emphasis added). It goes on to provides a dispute resolution process that applies “[i]n 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 or any successor state court.” Wild and Scenic Stipulation at 15 (emphasis added). 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.” Wild and Scenic Stipulation at 15.

Thus Section 3.f.(6) and Section 4 are not narrowly limited to “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.” Preliminary Order at 5, Finding of Fact 25. Finding of Fact 25 should be amended to correctly characterize Section 3.f.(6) and Section 4 of the Wild and Scenic Stipulation.

2. Evaluation Criteria/Analysis:

a. Conservation of Water Resources/Proposed Diversion Rate

The IWRB does not take exception to the Hearing Officer’s limitation of Mr. Herbst’s water right to 3.72 cfs (0.02 cfs per acre x 186.2 acres). However, the IWRB does take

exception to the Hearing Officer's conclusion 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." Preliminary Order at 9. This 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 July 7, 2016 ("Purcell Order"). In the Purcell Order the Director states:

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 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 at 5 (emphasis added). Thus, under the Purcell Order, the Hearing Officer must engage in a two-part analysis with regard to the conservation of water resources portion of I.C. § 42-203A(5). 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 Wild and Scenic Partial Decrees, 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.

The Hearing Officer correctly applied the first portion of the Purcell Order when he determined that Mr. Herbst failed to present adequate evidence at the hearing demonstrating he needed more than 0.02 cfs of water per acre. However, the Hearing Officer ignored the precedent set forth in the Purcell Order by failing to analyze whether Mr. Herbst's water right is contrary to the conservation of water resources vis-à-vis the Wild and Scenic Stipulation and Partial Decrees. The Purcell Order clearly states that approval of a "*supplemental*" water right "when existing irrigation rights already exceed 0.02 cfs per acre" is "contrary to the conservation of water resources" because it seeks to "appropriate the limited supply of water available for *new development*" made available under the Wild and Scenic Partial Decrees. Purcell Order at 5 (emphasis added). The Purcell Order also finds that before such an "unsubordinated" water right may be approved the applicant must first "demonstrate efficient use of water through modern irrigation practices." Purcell Order at 5.

Under the precedent set forth in the Purcell Order, Mr. Herbst's water right is contrary to the conservation of water resources because (1) it is a supplemental water right, (2) it will be used on lands already covered by existing water rights that exceed 0.02 cfs of water per acre, (3) it does not seek to develop new acres of irrigation, and (4) Mr. Herbst did not demonstrate his efficient use of water through modern irrigation practices. At the hearing, Mr. Herbst testified that his water right will be "supplemental" to his existing Lemhi River water rights because it will be used only as his Lemhi River water rights go out of priority. Finding of Fact 17. Mr. Herbst also testified that his existing Lemhi River water rights "already exceed 0.02 cfs per acre." Finding of Fact 12. Mr. Herbst further testified that he is seeking "increased beneficial use on existing acres" and is not going to develop "new" acres. Testimony of Lynn Herbst. Mr.

Herbst testified that he sprinkler irrigates some of his land, but that the majority of the place of use is flood irrigated. Testimony of Lynn Herbst. Mr. Herbst did not present any evidence demonstrating that his current irrigation practices constitute the “efficient use of water through modern irrigation practices.” *See* Hearing Transcript. Thus, Mr. Herbst failed to present evidence at the hearing demonstrating that his water right was not contrary to the conservation of water resources with regard to the Wild and Scenic subordination set aside.

The IWRB provided evidence at the hearing demonstrating that the subordination set aside of Section 10.b.(6).(A).(i)¹ was conceived of as the last chance for the State of Idaho to secure a source of water for *new* development that would be reliable enough to encourage financial investment in new irrigation projects. Testimony of Dave Shaw. The State fiercely negotiated the subordination set aside to ensure that new agricultural economic development could continue to occur in the Salmon River basin. Testimony of Dave Shaw. The IWRB also presented evidence demonstrating that the Section 10.b.(6).(A).(i) subordination set aside is a precious resource that should be husbanded to ensure that those seeking to put in new irrigation projects in the future have a secure source of water available to them. Testimony of Dave Shaw. Thus, the IWRB presented substantial evidence demonstrating that allowing Mr. Herbst’s water right to enjoy the subordination protections of Section 10.b.(6).(A).(i) would be contrary to the conservation of water resources in Idaho to use the limited supply of subordination water on a water right that does not result in new development.

The Hearing Officer failed to analyze or even address the conservation of water resource issues with regard to the Wild and Scenic Stipulation and Partial Decrees. Therefore, the

¹ For brevity this brief will discuss only the 150 cfs provisions of Section 10.b.6.(A).(i). However, the analysis set forth throughout this brief also applies to the 250 cfs subordination set aside found in Section 10.b.6.(A).(ii).

Hearing Officer incorrectly found that approval of Mr. Herbst's water right would not be contrary to the conservation of water resources within the State of Idaho.

b. Subordination Limited to Water Rights Less than 0.02 cfs/acre:

Section 10.b.(6).(A).(i) of the Wild and Scenic Partial Decrees subordinates water rights 75-13316 and 77-11941 to water rights with an effective date after the date of the Wild and Scenic Stipulation "with a combined diversion of 150 cfs (including not more than 5,000 cfs of irrigation with a maximum diversion rate of 0.02 cfs/acre)." The parties offered competing interpretation of this language for resolution by the Hearing Officer. The Hearing Officer recognized these arguments and characterized them 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 that 0.02 cfs/acre limit only applies to 100 cfs of the 150 cfs total future supply; the remaining 50 cfs is available for application seeking higher diversions rates."

Preliminary Order at 12. Despite recognizing the parties' arguments concerning the 100 cfs and 50 cfs portions of the subordination set aside, the Hearing Officer found that limiting permit 74-16008 to a diversion rate of 0.02 cfs of water per acre "renders the competing arguments on this point moot." Preliminary Order at 12. He goes on to state that "[p]ermit 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 W&S Decree and is entitled to the subordination protections offered to future water rights by that provision." Preliminary Order at 12.

The Hearing Officer's finding with regard to whether Section 10.b.(6).(A).(i) requires that an irrigation right have a "maximum diversion rate of 0.02 cfs" is ambiguous at best and leaves undecided an important controversy that was brought for resolution by the parties. While

the Hearing Officer acknowledges that the parties have competing arguments regarding the 100 cfs and 50 cfs portions of the 150 cfs subordination set aside, the Findings of Fact are devoid of any description of what the 100 cfs and 50 cfs portions are. The IWRB provided extensive testimony at the hearing regarding these numbers including where they came from and how they are calculated. Testimony of Dave Shaw. Despite this factual development at the hearing, the Hearing Officer provides no factual context for the parties' arguments or for his ultimate conclusions that Mr. Herbst's water right "falls squarely" into the subordination protection of Section 10.b.(6).(A).(i). Preliminary Order at 12.

In addition to a lack of factual findings, the Hearing Officer provides no analysis at all regarding how Mr. Herbst's water right interacts with the 50 cfs and the 100 cfs. The Hearing Officer finds only that Mr. Herbst's water right "falls squarely within the definition set forth in Paragraph 10.b.(6).(A).(i)" Preliminary Order at 12. As noted by the parties, and as demonstrated by evidence at the hearing, there is more than one "definition" set forth in Section 10.b.(6).(A).(i) for uses that can enjoy subordination. Testimony of Dave Shaw. One definition is for irrigation uses that fall within the 100 cfs portion of the combined diversion rate and the other definition is for non-irrigation water uses that fall within the 50 cfs portion of the combined diversion rate. Testimony of Dave Shaw. By failing to make any findings of fact regarding how the 150 cfs combined diversion rate is defined and refusing to provide any analysis in support of his conclusion that Mr. Herbst's water right "falls squarely" within Section 10.b.(6).(A).(i), the Hearing Officer creates ambiguity rather than clarity. Preliminary Order at 12.

The Hearing Officer's finding also 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 protections of Section 10.b.(6).(A).(i) *under any circumstances*. The IWRB's contention is that the plain language of Section 10.b.(6).(A).(i) requires that an irrigation right must have a maximum diversion rate of 0.02 cfs of water per acre to enjoy the subordination protections of that section and that any irrigation water right seeking to divert more than 0.02 cfs of water per acre is categorically precluded from enjoying subordination protection under *any* portion of the 150 cfs set aside. IWRB's Post-Hearing Brief at 3, n.3.

The 150 cfs subordination set aside is a "combined diversion rate." Wild and Scenic Partial Decree Section 10.b.(6).(A).(i). The plain meaning of "combined diversion rate" is that it must include at least two separate categories of diversion rates that total 150 cfs. The parenthetical information "(including not more than 5,000 acres of irrigation with a maximum diversion rate of 0.02 cfs/acre)" makes clear that a portion of the "combined diversion rate" includes "irrigation" uses totaling 100 cfs, which is calculated by taking "5,000 acres . . . with a maximum diversion rate of 0.02 cfs/acre." Wild and Scenic Partial Decree Section 10.b.(6).(A).(i); *see also* Testimony of Dave Shaw. The remainder of the "combined diversion rate" is calculated by subtracting the 100 cfs of irrigation use from the 150 cfs total combined rate to come to 50 cfs. Testimony of Dave Shaw. The 50 cfs portion of the combined diversion rate must be for *non-irrigation* uses that are not "described in paragraphs (3) through (5)" of Section 10.b.

This conclusion is supported by a plain reading of the language of Section 10.b.(6).(A).(i), as well as by the testimony of Mr. Shaw. Section 10.b.(6).(A) begins by defining that it will cover "water rights" that have not been dealt with in Sections 10.b.(3)–(5). The Section goes on to further describe the "water rights" in subsection (i). Subsection (i)

includes generally “water rights . . . with a total combined diversion of 150 cfs.” Subsection (i) then further delineates the 150 cfs by stating it should include “(not more than 5,000 acres of irrigation with a maximum diversion rate of 0.02 cfs/acre.)” The term “irrigation” is contained within parentheses. The parentheses set the term “irrigation” off from all the other “water rights” that are described in Section 10.b.(6).(A).(i) and creates two categories of “water rights” that may qualify for subordination protection under that section: (1) irrigation water rights which may use 100 cfs of the 150 cfs, and (2) non-irrigation water rights that are not described in Section 10.b.(3)–(5) which may use 50 cfs of the 150 cfs. Thus, the plain language of Section 10.b.(6).(A).(i) makes clear that irrigation water rights of any kind can be included only in the 100 cfs portion of the 150 cfs set aside. I

In addition, Mr. Shaw’s testimony demonstrated that the parties to the Wild and Scenic Stipulation did not want all the 150 cfs subordination set aside water to be used up by irrigation. Testimony of Dave Shaw. The parties wanted to ensure that some non-agricultural economic development would also be promoted by the Wild and Scenic Stipulation and so they held aside 50 cfs of the 150 cfs to cover non-irrigation uses. Testimony of Dave Shaw. Thus, to include irrigation rights diverting more than 0.02 cfs of water per acre in the 50 cfs portion of the subordination set aside would be contrary to the parties purpose in creating two categories of subordination set-aside water in Section 10.b.(6).(A).(i).

The question of whether an irrigation water right with a diversion rate of more than 0.02 cfs per acre may come within *any* portion of the Section 10.b.(6).(A).(i) subordination set aside was addressed by evidence presented at the hearing and by the parties in their post-hearing briefing. The evidence presented at the hearing, and the plain language of Section

10.b.(6).(A).(i), demonstrate that a water right with a maximum diversion rate of more than 0.02 cfs per acre may never enjoy subordination under Section 10.b.(6).(A).(i). The Hearing Officer erred in not addressing this question with factual findings and a full analysis of the controversy presented by the parties.

c. Subordination Limited to New Acres and the Purcell Order

The IWRB also asserted at the hearing that, to enjoy the benefits of subordination under Section 10.b.(6).(A).(i), an irrigation water right must irrigate new acres that have not been previously irrigated. The IWRB asserted in its post-hearing briefing 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.” IWRB’s Post-Hearing Brief at 5–8. In the Preliminary Order, the Hearing officer states that he finds IWRB’s argument that the subordination protections of Section 10.b.6.(A).(i) should apply only to new acres to be “unpersuasive” and that the “IWRB seeks to create an ambiguity where there is none.” Preliminary Order at 12. The Hearing Officer concludes that the Wild and Scenic Partial Decrees and Stipulation do not “limit the subordination protections to new acres” and that they “are not ambiguous on this point.” He concludes by finding “*supplemental* water rights may also enjoy the benefits of subordination.” Preliminary Order at 12.

The Hearing Officer’s finding, when coupled with the Purcell Order and the evidence presented at the hearing, demonstrate that a latent ambiguity exists with regard to the term “irrigation” found in Section 10.b.6.(A).(i). The Hearing Officer concluded that “supplemental” water rights may enjoy the benefits of subordination under Section 10.b.6.(A).(i). In the Purcell

Order, the Director found that “supplemental” irrigation uses “that do not result in actual new development” should not enjoy the benefits of subordination under Section 10.b.(6).(A).(i).

Purcell Order at 4. The Hearing Officer does not find that there were any errors in the Purcell Order. Rather, he attempts to distinguish Mr. Herbst’s “supplemental” water use from Mr. Purcell’s “supplemental” water use.

The Hearing Officer states that Purcell had a “full water supply” and was seeking an additional water right to be used when his existing water rights were “in priority.” Preliminary Order at 14. By contrast, the Hearing Officer states that Mr. Herbst is seeking a water right to “supplement” his water supply when his existing rights are not in priority. Preliminary Order at 14. The Hearing Officer finds that Mr. Herbst’s “supplemental” water use will provide an “increase in beneficial use because Herbst can extend their [sic] irrigation season, increasing crop yields.” Preliminary Order at 14. By contrast, the Hearing Officer implies that Purcell was not seeking to increase his beneficial use but “was simply seeking additional water from the Lemhi River on existing acres during times when his existing Lemhi River rights were in priority and fully deliverable.”² Preliminary Order at 14.

Thus, the Hearing Officer seems to conclude that there are really *two types* of supplemental water use: (1) Supplemental water that will be used on lands already fully covered by existing water right(s) when the existing water right(s) are in priority, and (2) Supplemental water that will be used on lands already fully covered by existing water right(s) when the

² The IWRB notes that Mr. Purcell’s existing water rights, as well as his water right application, were from Big Timber Creek, not the Lemhi River.

existing water right(s) are not in priority. According to the Hearing Officer, the first type of “supplemental” water rights should not enjoy subordination, while the second type should.³

The Hearing Officer’s attempt to distinguish Mr. Purcell’s “supplemental” water use from Mr. Herbst’s “supplemental” water use is unpersuasive. Whether the supplemental water is used while existing water rights are curtailed or in priority⁴ is immaterial, as is whether the supplemental water right will extend beneficial use and increase crop yields.⁵ The Director’s

³ The Hearing Officer’s conclusion that “supplemental water right may also enjoy the benefits of subordination” does not make a distinction between a Purcell-type supplemental use and a Herbst-type supplemental use. Preliminary Order at 12. Given his other findings and analysis, using the term “supplemental” broadly creates confusion.

⁴ The Hearing Officer states that Mr. Purcell’s supplemental water right would have been used “when [his] existing water rights were in priority” and “fully deliverable.” Preliminary Order at 14. The Purcell Order made no factual determinations regarding when Mr. Purcell’s water right would be deliverable vis-à-vis his existing water rights. *See* Purcell Order. The Hearing Officer’s conclusion that Mr. Purcell’s water right would be deliverable when his other rights are “in priority and fully deliverable” does not take into account all the nuances of water right administration on Big Timber Creek. As the most junior right on Big Timber Creek, Mr. Purcell’s water right would likely have been available for only a short time during the very early part of the irrigation season when “high flows” are available. During high flows, there is no priority administration and all users take as much water as they can under the Basin 74 General Provision. As soon as a senior Big Timber Creek water right holder cannot get a full supply under their senior water right, the water master begins to incrementally shut down general provision high flow use to make the senior water right holder whole. When shutting off all general provision high flow use no longer results in getting enough water to the senior water right holder, the watermaster would begin priority administration of all the water rights on Big Timber Creek. As the most junior water right on Big Timber Creek, Mr. Purcell’s right would have been turned off first. Thus, there would have been very little, if any, time during which Mr. Purcell’s new water right would have been delivered at the same time that his existing water rights were “in priority” because priority administration of water rights does not occur until all general provision high flow use is shut off. Therefore, arguably Mr. Purcell’s supplemental right would not have been usable when his existing rights were “in priority” and “fully deliverable.” Therefore, distinguishing the two right on this basis is unpersuasive.

⁵ The Hearing Officer seems to imply that Mr. Herbst’ water right is distinguishable from Mr. Purcell’s water right because, unlike Mr. Purcell, Mr. Herbst will be able to “extend [his] irrigation season, increasing crop yields,” and “[i]n contrast, Purcell was simply seeking additional water from the Lemhi River on existing acres . . .” Preliminary Order at 14. The Hearing Officer supposes that Mr. Purcell was making a water grab that would not have resulted in any increased beneficial use. Mr. Purcell never put on evidence to prove that the water right he sought would increase his beneficial use, nor did the Director make a finding regarding whether it would increase his beneficial use. Purcell Order at 4–5. Thus, there simply is no evidence in the Purcell case to provide a basis for distinguishing the two water rights on the basis of increased beneficial use.

decision in the Purcell Order hangs on the word “new.” The Director found “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 . . . supplemental irrigation use.” Purcell Order at 5 (emphasis added). The Director also found “it is not in the local public interest to allocate the limited water reserved for future development . . . 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 at 4 (emphasis added).

Thus, what is important is that supplemental water rights do not develop *new* acres of irrigation. The term “new” means not existing before; it does not mean “continue to irrigate” acres or “extend their irrigation season.” Preliminary Order at 14. Mr. Purcell’s supplemental water right did not qualify to enjoy the subordination protections of Section 10.b.(6).(A).(i) because he was not proposing to irrigate ground that had never been irrigated. Purcell Order at 4, 5. And the undisputed evidence presented at the hearing showed that Mr. Herbst is not going to irrigate ground that has never been irrigated before. Testimony of Lynn Herbst, Finding of Fact 7–11. In other words, both Mr. Purcell and Mr. Herbst’s supplemental water rights are not “new” development. Therefore, neither meets the criteria for an irrigation right seeking to enjoy subordination under Section 10.b.(6).(A).(i), which is that the water right have a “maximum diversion rate of 0.02 cfs,” Wild and Scenic Partial Decree Section 10.b.(6).(A).(i), *and* that it develop “new” acres of irrigation. Purcell Order at 4, 5.

The Hearing Officer’s conclusion that there are really two types of “supplemental” irrigation uses (one type that enjoys subordination and the other type that does not) undercuts his conclusion that the term “irrigation” in Section 10.b.(6).(A).(i) is not ambiguous. If the term

“irrigation” is not ambiguous it should be taken under its plain meaning. Idaho courts interpret water decrees using the same interpretation rules that apply to contracts. *Rangen Inc. v. Idaho Dept. of Water Res.*, 159 Idaho 798, 807, 367 P.3d 193, 202 (2016). Interpretation of a contract must begin with the plain language of the document. *Knipe Land Co. v. Robertson*, 151 Idaho 449, 454–455, 259 P.3d 595, 600–601 (2011). “The document must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument.” *Id.* If the term “irrigation” is not ambiguous it should include all types of irrigation including both the Purcell-type supplemental irrigation, and the Herbst-type supplemental irrigation. The fact the Hearing Officer is distinguishing between Mr. Herbst’s supplemental irrigation and Mr. Purcell’s supplemental irrigation demonstrates that the term “irrigation” is not plain when applied to different factual scenarios.

Thus, the Hearing Officer has illustrated the IWRB’s argument that, when applied to specific facts, the term “irrigation” in Section 10.b.(6).(A).(i) is latently ambiguous. When an ambiguity exists in the wording of the contract, a court may use evidence outside the four corners of the document to interpret the contract. Parol evidence may be used to determine the meaning of an ambiguous term. Parol evidence is “any . . . written or oral agreements or understandings . . . made prior to or contemporaneously with the written contract.” *Bilow v. Preco, Inc.*, 132 Idaho 23, 28, 966 P.2d 23, 28 (1998). If a contract term is ambiguous, “interpretation of the contract is a question of fact.” *Weisel v. Beaver Springs Owners Ass’n, Inc.*, 152 Idaho 519, 528, 272 P.3d 491, 500 (2012). Where the terms of a contract are ambiguous, the main objective is to give effect to the intent of the parties to the agreement. *Navarrete v. City of Caldwell*, 130 Idaho 849, 851, 949 P.2d 597, 599 (Ct. App. 1997). The

parties' interpretation of the terms of the Partial Decree should be given "great weight" by the hearing officer. *Cottle v. Or. Mut. Life Ins. Co.*, 60 Idaho 628, 631, 94 P.2d 1079, 1080 (1939).

As noted in its post-hearing brief, the IWRB presented evidence at the hearing demonstrating the parties' intent with regard to the meaning of the term "irrigation" in Section 10.b.(6).(A).(i) in the form of testimony by Mr. Shaw who personally participated in the negotiation of the Wild and Scenic Stipulation and who also drafted portions of the Wild and Scenic Stipulation and Partial Decrees. Testimony of Dave Shaw. Mr. Shaw's testimony stated that it was the intent of the parties that the subordination protections of Section 10.b.6 should apply to water users irrigating new acres that had not been previously irrigated. Testimony of Dave Shaw. Mr. Shaw's personal knowledge of the intent of the parties is based on conversations he participated in or heard during the negotiation process and on his experience drafting the Partial Decree and stipulation. Testimony of Dave Shaw. Mr. Shaw testified that the subordination protections of Section 10.b.6 were the result of a hard-fought negotiation. Testimony of Dave Shaw. It was extremely important to the State of Idaho that it preserve water for future agriculture economic development in the Salmon River basin. Testimony of Dave Shaw. The State of Idaho recognized the subordination set aside in Section 10.b.6 was a precious resource that would provide a secure source of water for water users seeking to invest in new irrigation projects in the future. Testimony of Dave Shaw. The State of Idaho understood that, without the subordination protections of Section 10.b.6, future water users would be unwilling to make the significant financial outlays necessary to irrigate new lands. Testimony of Dave Shaw. The State of Idaho did not contemplate use of the subordination set aside for water users whose lands were adequately covered by existing water rights. Testimony of Dave Shaw. Therefore,

Mr. Shaw's testimony shows that the State of Idaho intended the subordination protections for future irrigation use found in Section 10.b.6 would be for water users developing new acres of irrigation.

Mr. Shaw also testified about the technical analysis he performed to help the parties develop the subordination set-aside quantities listed in Section 10.b.6. Testimony of Dave Shaw. The technical analysis he performed elucidates the parties' intent that the Section 10.b.6 subordination protections were meant to apply to new lands only. While the 150 cfs was ultimately a negotiated quantity, its roots were in the number of new acres that could be developed for irrigation in the future. Testimony of Dave Shaw. Mr. Shaw testified that the 150 cfs quantity was developed through a technical analysis of lands not irrigated at the time of the agreement but that were susceptible of irrigation because of their slope and proximity to an available water source. Testimony of Dave Shaw. If the parties had intended the subordination protection of Section 10.b.6 to apply to supplemental water for lands already covered by existing water rights the technical analysis would not have focused solely on undeveloped acres. Testimony of Dave Shaw. This technical analysis demonstrates that it was the intent of the parties that the subordination set aside was for new development only.

The Hearing Officer erred by finding the term "irrigation" as used in Section 10.b.(6).(A).(i) is not ambiguous. He further erred by not considering the parol evidence presented by the IWRB which demonstrates that the intent of the parties was that only future water rights seeking to develop *new* beneficial uses should qualify for subordination under Section 10.b.(6).(A).(i). Thus, the Hearing Officer's finding that Mr. Herbst's water right may enjoy the benefits of subordination under Section 10.b.(6).(A).(i) is in error, as his is finding that

“supplemental water rights may also enjoy the benefits of subordination.” Preliminary Order at 12, 16.

d. Administrator’s Memorandum—Application Processing No. 70.

The Hearing Officer found that Administrator’s Memorandum No. 70 (“Memo No. 70”) is in error to the extent that it “states that new permits, where the total combined diversion rate of all water rights at the proposed place of use exceeds 0.02 cfs/acre, are excluded from the subordination protections described in the W&S Decree, even if the new permit is limited to 0.02 cfs.” Preliminary Order at 13. The IWRB agrees that this portion of Memo No. 70 should be reconsidered, but for different reasons than posited by the Hearing Officer. As outlined above, if a new water right seeks more than 0.02 cfs of water per acre it is per se disqualified from enjoying subordination under Section 10.b.(6).(A).(i). As also outlined above, 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). Thus, Memo No. 70’s statement that “[p]ermits for irrigation of existing irrigated acres that result in an overall diversion rate of more than 0.02 cfs/acre will not enjoy subordination This applies even if the new license authorizes 0.02 cfs/acre or less, as long as the total diversion rate . . . exceeds 0.02 cfs/acre” is correct in its conclusion but not in its reasoning. The new water right described in this section of Memo No. 70 cannot enjoy subordination, not because the overall diversion rate of all the rights appurtenant to the place of use is more than 0.02 cfs of water per acre, but because it seeks “irrigation of existing irrigated acres” rather than new irrigation. The IWRB notes, there are other portions of Memo No. 70 that may benefit from review based on the outcome of this case.

e. Forum and Timing Question

The Hearing Officer includes a lengthy section in the Preliminary Order entitled “Forum and Timing Question” dealing with Section 3.f.(6) and Section 4 of the Wild and Scenic Stipulation. The Hearing Officer states “Although IWRB chose to challenge the implementation of the subordination provision of the W&S Decree by filing a protest against an application for permit, there are other forums available to IWRB to raise such a challenge.” Preliminary Order at 15. The Hearing Officer then goes on to describe Section 3.f.(6) and 4 and states that “[t]here are distinct advantages to waiting until a final water right license is issued before challenging the inclusion or exclusion of a water right from the subordination list.” Preliminary Order at 15.

The Hearing Officer does not make any conclusions of law or fact in this section. Rather, there is only a vague implication that the IWRB should not have brought up its concerns regarding implementation of the Wild and Scenic Partial Decrees within the context of this water right protest. The IWRB asserts that nothing in Section 3.f.(6) or 4 precludes it from bringing up concerns about a water right enjoying the benefits of subordination in the context of a water right protest. Nowhere in those sections is it stated that those are the *only* avenues available for review of implementation of the subordination provisions of the Wild and Scenic Partial Decrees.

In fact, the Wild and Scenic Stipulation specifically contemplates that enjoyment of subordination is an issue that could arise within the water right protest context. Section 3.f.(1) requires IDWR to “include in the public notice of any application for permit that IDWR has determined will enjoy the benefit of subordination provisions” The purpose of publishing notice that includes information regarding the Wild and Scenic is to make water users (including

but not limited to the parties to the Wild and Scenic Stipulation) aware that the Wild and Scenic subordination protection is an issue for that application so that they can protest on that basis if they want. If, as urged by the Hearing Officer, a water user waited until the license was issued to contest a right's enjoyment of the subordination protections they would be left without a forum to voice their concerns. Further, the Wild and Scenic Stipulation provides that: "This Stipulation does not affect the right of any party to protest any application for permit to appropriate water filed with IDWR." Wild and Scenic Stipulation at 16, Section 6.b.

Therefore, the Hearing Officer erred by implying in this section (1) that the IWRB was precluded by Sections 3.f.6 and 4 from bringing the issue of the Wild and Scenic subordination protections up within the context of a water right protest, and (2) suggesting that the most appropriate way for water users and parties to the Wild and Scenic Stipulation to deal with the question of whether a new application should enjoy subordination protections is to wait until the water right is licensed or to pursue the alternative dispute resolution processes of Section 3.f.6 and 4.

f. Permit Conditions

The Hearing Officer includes a list of conditions for inclusion on Mr. Herbst's permit. There is an error in Condition No. 5. It states that Mr. Herbst has only one point of diversion out of Agency Creek. Preliminary Order at 17. However, the evidence at the hearing demonstrated that he has two points of diversion out of Agency Creek, one on the east side of Highway 28 and one on the west side of Highway 28. Condition 5 should be amended to reflect these two points of diversion.

In addition, Conditions No. 7 and 8 do not adequately describe the supplemental nature of Mr. Herbst's water right and may create confusion regarding administration of his rights.

Condition No. 8 reads: "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 rights." Preliminary Order at 17. This condition is inadequate for two reasons. First, the condition does not clearly describe that water right 74-16008 may only be used in proportion to the amount of water under 74-740, 74-741, 74-742, and 74-7147 that is out of priority. Given the complexity of Mr. Herbst's five water rights, and how they will work together, a more detailed condition (similar to the one laid out in the *Stipulation for Withdrawal of Protests* dated June 22, 2016 (Exhibit 208))⁶ describing the nature of Mr. Herbst's supplemental use is warranted.

Second, this Condition No. 8 does not adequately describe how water rights 74-16008, 74-7147, 74-740, 74-741, and 74-742 should be administered together. Water rights 74-16008 and 74-7147 have a maximum diversion rate of 0.02 cfs of water per acre. Water rights 74-740, 74-741, 74-742 have a maximum diversion rate of 0.03 cfs of water per acre. If water right 74-16008 it to be supplemental to water rights 74-7147, 74-740, 74-741, and 74-742 then it must be

⁶ The condition, as drafted in the stipulation withdrawing the protests, reads:

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 rediversion 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.

made clear on the face of the water right how the differing diversion rates work together; otherwise reducing water right 74-16008 to 0.02 cfs per acre will have been to no effect.⁷

Mr. Herbst's Lemhi River water rights are as follows:

Water Right	Priority Date	Rate (cfs)	Diversion Rate Per Acre
74-7147	11/16/1981	0.88 cfs	0.02 cfs/acre
74-740	4/1/1961	0.20 cfs	0.03 cfs/acre
74-741	1/8/1908	4.30 cfs	0.03 cfs/acre
74-742	6/1/1871	0.38 cfs	0.03 cfs/acre

See Finding of Fact 6, 12, and 14. Water right 74-16008 is to be supplemental to these water rights. Finding of Fact 17. Thus, when the most junior water right 74-7147 (or any portion thereof) is curtailed, Mr. Herbst may use water right 74-16008 to fill in the portion curtailed. Because 74-7147 has a diversion rate of 0.02 cfs per acre, the watermaster may directly correlate the amount curtailed with the amount that may be filled by 74-16008. So, for example if 0.8 cfs of water right 74-7147 is curtailed then Mr. Herbst may divert 0.8 cfs of water under water right 74-16008. Once more than 0.88 cfs is curtailed, however, the watermaster will need to begin to calculate a proportion of the amount curtailed that can be filled by water right 74-16008. The proportion will be calculated based on the difference between 0.03 cfs of water per acre allowed under water rights 74-740, 74-741, and 74-742, and the 0.02 cfs of water per acre allowed under water right 74-16008. If the watermaster allows Mr. Herbst to divert water under water right 74-16008 at the same rate as what is curtailed under water rights 74-740, 74-741, 74-742 then he will be allowing Mr. Herbst to use 0.03 cfs of water per acre under water right 74-16008.

⁷ In addition, the conditions on water rights 74-7147, 74-740, 74-741, and 74-742 should also be amended to reflect the new combined diversion rates and place of use.

Because of the complexity of Mr. Herbst water rights it is important that the supplemental nature of water rights 74-16008 be adequately described in the conditions on the face of the right. Given the differing diversion rates attached to the rights, the conditions also need to contain enough clarity so that any watermaster looking at this right in the future will be able to properly administer it in conjunction with Mr. Herbst's Lemhi River rights. The conditions set forth by the Hearing Officer, especially Condition No. 8, do not provide adequate clarity for purpose of administration of water right 74-16008.

CONCLUSION

The Preliminary Order was in error with regard to Finding of Fact 25. The Hearing Officer's analysis and conclusions of law were in error with regard to the conservation of water resources, local public interest, Memo No. 70, the Purcell Order, the Forum and Timing Question, and the Permit Conditions. The IWRB seeks an order granting its Petition for Director to Review Preliminary Order Granting Permit and a Final Order from the Director consistent with the arguments outlined above.

DATED this 13th day of September, 2016.



ANN Y. VONDE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of September 2016, I caused to be served a true and correct copy of the foregoing document by placing a copy thereof in the manner listed below:

1. Original to:

Gary Spackman Director, Idaho Dept. of Water Resources PO Box 83720 Boise ID 83720-0098	☐ U.S. Mail, postage prepaid ☒ Hand Delivery ☐ Federal Express ☐ Facsimile: _____ ☐ Email: _____
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2. Copies to

Rob Harris Holden, Kidwell, Hahn & Crapo PLLC P.O. Box 50130 1000 Riverwalk Dr., Ste. 200 Idaho Falls ID 83405	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Federal Express ☐ Facsimile: _____ ☒ Email: rharris@holdenlegal.com
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ANN Y. VONDE
Deputy Attorney General