

**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)	PRELIMINARY ORDER
<u>LYNN HERBST AND ROBIN HERBST</u>)	GRANTING PERMIT

PROCEDURAL HISTORY

On December 4, 2013, Lynn Herbst and Robin Herbst ("Herbst" or "Applicants") filed Application for Permit No. 74-16008 with the Idaho Department of Water Resources ("Department" or "IDWR"). 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"), 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. The Department published notice of the second amended application on October 22 and 29, 2015. No additional protests were filed against the application.

IDFG and LID withdrew their protests through stipulation. Ex. 113. The protest filed by IWRB remained active. An administrative hearing was conducted on July 14, 2016 in Idaho Falls, Idaho. Applicants were represented by attorney Rob Harris. IWRB was represented by deputy attorney general Ann Vonde.

Exhibits 100-110 and 113-133 offered by Herbst and exhibits 200-222 offered by IWRB were admitted into the administrative record without objection. Applicants called Lynn Herbst as a witness and Cynthia Bridge-Clark as an adverse witness. IWRB called David Shaw as an expert witness.

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, IWRB 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.

During the hearing, the parties asked for the opportunity to file post-hearing briefs to address the legal issues central to this contested case. The request was granted and Herbst and IWRB filed post-hearing briefs on August 5, 2016. After carefully considering the evidence in the record, the Department 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 the irrigation of 186.2 acres. Ex. 102.

2. Application 74-16008 seeks a permit to cover 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 provided the following description of the proposal in the first amended application. Ex. 102. The same language was included in the second amended application. *Id.*

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.

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

5. Herbst has two points of redirection 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 redirection from Agency Creek (SWNESW, Sec. 20, T19N, R24E).

6. The proposed place of use is already covered by irrigation water rights 74-740, 74-741, 74-742 and 74-7147. All of these rights are diverted 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. 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. A protest was filed by IWRB. The IWRB 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 Herbst's 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 Snake River Basin Adjudication ("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 a Stipulation for Withdrawal of Protests ("Stipulation") to resolve the protests filed by IDFG and LID. Ex. 113. The IDFG and LID protests were withdrawn provided the following conditions 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.

18. Water right 74-14993, held by 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, a document titled "Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees" 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 (Stipulation and Joint Motion hereinafter referred to as the

“W&S Agreement”). Ex. 209. The State of Idaho was a party to the W&S Agreement. *Id.* at 1. Idaho Attorney General Lawrence Wasden signed the W&S Agreement on behalf of the State of Idaho and IWRB. *Id.* at 21.

20. On November 16, 2004, Judge John Melanson, the presiding judge for the SRBA Court, issued an Order Approving Stipulation and Entry of Partial Decrees. Ex. 211. A joint partial decree for water rights 75-13316 and 77-11941 (collectively referred to as “water right 75-13316”) was issued on the same day (partial decree hereinafter referred to as the “W&S Decree”). Ex. 212.

21. Water right 75-13316 bears a priority date of July 23, 1980 and describes the instream flows in the Salmon River under the Wild and Scenic Rivers Act. Ex. 212, page 3. The point of measurement for water right 75-13316 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 subject to curtailment to provide water to water right 75-13316. Ex. 212, page 2, ¶ 3.d.

22. Water rights junior to July 23, 1980 cannot be diverted if the instream flows described in water right 75-13316 are not satisfied. Ex. 114, page 2, ¶ 3.e. However, the W&S Decree specifically subordinates water right 75-13316 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 right 75-13316, 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 Paragraph 3.e of the W&S Agreement, the Department maintains a database (list) of junior water rights enjoying the subordination protections described in water right 75-13316. 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).

25. The W&S Agreement 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.

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 on the designated separate streams are still subject to priority date curtailment, to provide water for downstream senior water rights outside of the Lemhi River basin, including water right 75-13316. Ex. 209, page 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 Herbst's 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, IWRB confirmed its support of the Stipulation reached between Herbst and the other protestants. IWRB did not contend that the springs proposed to be appropriated are not tributary to Agency Creek. Nor did 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).

There is no evidence in the record suggesting that the proposed permit will 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 make the pending application 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.

Sufficient Financial Resources

Rule 45.01.d of the Department's Water Appropriation Rules (IDAPA 37.03.08) sets forth the 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 / Proposed Diversion Rate

Idaho Code § 42-202 generally describes the information that must be provided with an application for permit in order for the permit to be considered complete. Section 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, he must provide 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 his 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 provided any analyses or other technical information supporting the necessity of more than 0.02 cfs/acre. If the pending application 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).

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. It may be possible to rectify

this error when the water right is licensed. The Department's error in the Cockrell Permit does not justify committing the same error in the pending application.

It is important to note that Herbst's water right 74-7147, which was originally developed and used in combination with water right 74-741 was also limited to 0.02 cfs per acre, even though the field examiner's diversion measurements showed a much higher actual diversion rate per acre. This suggests that there may not be a physical justification for a higher rate per acre.

In this case, 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, the proposed permit 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.

As 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.

Local Public Interest

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).

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

W&S Agreement

Water right 75-13316 bears a priority date of July 23, 1980 and would be senior to Herbst's proposed permit. 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 provide water for water right 75-13316.

Water right 75-13316 includes specific language subordinating the water right to certain upstream junior water rights. The relevant provisions are found in **Paragraph 10.b** of the W&S Decree:

This Partial Decree is entered pursuant to that Stipulation among the United States, the State of Idaho and other objectors effective September 1, 2003 (the "Stipulation"), and pursuant to that Stipulation this water right is subordinated to the following water rights and uses that are junior to this federal reserved water right and that have points of diversion or impoundment and places of use within

the Salmon River Basin upstream from the ending point, as identified in element 5 above:

(1) All water right claims filed in the Snake River Basin Adjudication (SRBA) as of the effective date of the Stipulation to the extent ultimately decreed in the SRBA.

(2) All applications for permit and permits with proof of beneficial use due after November 19, 1987, on file with IDWR as of the effective date of the Stipulation, to the extent such applications for permit or permits are ultimately licensed; and all water right licenses with proof of beneficial use due after November 19, 1987, on file with IDWR as of the effective date of the Stipulation.

(3) [Domestic uses as defined in the W&S Decree.]

(4) [Stockwater uses as defined in the W&S Decree.]

(5) [Municipal uses as defined in the W&S Decree.]

(6)(A) Water rights other than those described in paragraphs (3) through (5) above claimed or applied for after the effective date of the Stipulation:

(i) 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. The specific acres to be irrigated each year will be identified to the IDWR by March 1 of each year, i.e., if a portion of the acreage permitted within this 150 cfs is to be idled for a year or more, an equal number of acres permitted for irrigation within the 225 cfs in subparagraph (ii) below can be substituted to take advantage of the subordination when the river is less than 1,280 cfs for the period of years the original acres are idled.

(ii) an additional diversion of 225 cfs (including up to an additional 10,000 acres of irrigation with a maximum diversion rate of 0.02 cfs/acre) when the mean daily discharge at the Shoup gage is $\geq$ 1,280 cfs.

(iii) These subordinated amounts do not include storage, other than incidental storage, which is defined as storage of not more than a 24 hour water supply for any beneficial use.

(B) The subordinated amounts identified in subparagraph (A) above apply to all diversions in the Salmon River basin above the ending

point of this federal reserved water right, including diversions downstream from the Shoup gage, but excluding diversions in the Middle Fork Salmon River basin.

(C) Water rights of the United States, instream flow water rights, nonconsumptive water rights and replacement water rights shall not be deducted from the subordination amounts identified in this paragraph (5) for future rights. . . . Replacement water rights means all irrigation appropriations issued for the same purpose of use and place of use covered by an existing water right with no increase in period of use, diversion rate, and, if applicable, volume of water. To be considered a replacement water right: i) no element of the new appropriation may exceed that of the original water right; ii) only the original or the replacement water right or part of each water right may be used at the same time; and iii) the replacement water right cannot be used when water would not be legally and physically available under the original water right.

IWRB Arguments

In its post-hearing brief, IWRB argues the subordination protections described in Paragraph 10.b of water right 75-13316 do not apply to the proposed permit for two reasons. First, IWRB argues the subordination protections only apply to applications for “new” irrigated acres. Because the proposed place of use is already covered by existing Lemhi River water rights, IWRB contends the proposed permit should not receive subordination protection. Second, IWRB argues the subordination protection of the W&S Decree only applies to applications seeking no more than 0.02 cfs per acre. Because Herbst is seeking more than 0.02 cfs per acre, IWRB contends the proposed permit should not receive subordination protection.

Subordination Limited to New Acres

This argument raised by IWRB is not persuasive. The W&S Decree (including Paragraph 10.b) and the W&S Agreement do not contain any language indicating that the subordination protections are only extended to “new” acres.

IWRB called David Shaw to testify about the drafting of the W&S Agreement. He testified that it was the intent of all of the parties to the agreement that the subordination protection would only be extended to new acres. This begs the question of why a sentence wasn’t added to the agreement stating such an important limitation.

IWRB argues that the term “irrigation” is ambiguous in the W&S Decree. “The question is whether the term ‘irrigation’ includes only water rights seeking to irrigate new acres that have never been irrigated before, or if ‘irrigation’ includes water rights seeking water to irrigate lands that are already covered by existing water rights.” IWRB Brief, page 6.

IWRB 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.

Subordination Limited to Water Rights Less Than 0.02 cfs/acre

Paragraph 10.b(6)(A)(i) of the W&S Decree subordinates water right 75-13316 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)." 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.

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 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.

Administrator's Memorandum – Application Processing No. 70

On October 30, 2009, Jeff Peppersack, Bureau Chief for the Department's Water Allocation Bureau, signed a memorandum giving IDWR staff guidance on how to process applications for permit in the basins affected by the W&S Agreement. Ex. 213. The memo was identified as Application Processing No. 70 ("Memo 70"). *Id.* at 1. Memo 70 interpreted certain provisions of the W&S Agreement and W&S Decree. *Id.* at 2.

Memo 70 includes the following provisions relating to Paragraph 10.b(6)(A)(i):

Modern irrigation methods typically do not require more than 0.02 cfs per acre of irrigation. Approving new irrigation water rights for more than 0.02 cfs in the areas tributary to the Wild & Scenic Rivers could be contrary to the subordination provisions of the partial decrees, and it could further limit the number of irrigated acres that can benefit from the subordination provisions of the Wild & Scenic water rights. Therefore, . . . [the Department] interprets the future appropriation statements of [water right 75-13316] to mean the following:

1. [Water right 75-13316] will be subordinate to a combined total of 150 cfs of new appropriations that do not already enjoy the benefits of subordination under other provisions of the partial decree.

2. Not more than 100 cfs (5,000 acres at 0.02 cfs/acre) of new irrigation appropriations will enjoy the benefits of subordination.

3. [Water right 75-13316] will be subordinate to a new appropriation listing irrigation as a beneficial use only if the total diversion under all existing rights appurtenant to the place of use for that appropriation is less than or equal to 0.02 cfs/acre.

...

Permits for irrigation of existing irrigated acres that result in an overall diversion rate of more than 0.02 cfs/acre will not enjoy the benefits of subordination and will not be deducted from the future use subordination amounts. This applies even if the new license authorizes 0.02 cfs/acre or less, as long as the total diversion rate (including existing rights) for the irrigated acres exceeds 0.02 cfs/acre.

Ex. 213, pages 5-7.

Administrative memos guide Department staff in the performance of their various tasks. To the extent an administrative memo seeks to interpret water right decrees, statutes or contracts, it does not constitute binding precedent for a hearing officer. Certainly, a hearing officer can refer to administrative memos as evidence of how applications have been handled in the past. However, a hearing officer is free to evaluate relevant documents and statutes and reach his or her own conclusions about the evidence presented.

Memo 70 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/acre. There is no support for this limitation in the W&S Agreement or the W&S Decree. Paragraph 10.b(6)(A)(i) does not create an excluded class of applications based on the elements of existing water rights, and the Department should not create such a class of its own initiative.

Purcell Order

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

On December 31, 2015, the Department issued a Final Order Approving in Part and Rejecting in Part Application for Permit ("*Purcell Order*"). The Department rejected the irrigation element of Application 74-16004 based on conservation of water resources and local public interest concerns. The stockwater element of the application was approved.

The *Purcell Order* included the following evaluation of the local public interest:

Approval of the irrigation component of this application for permit, if unsubordinated as sought by Purcell, would count against the 150 cfs of water set aside for future development. It is not in the local public interest to allocate the limited water reserved for future development in the Wild & Scenic Agreement for supplemental irrigation uses that do not result in actual new development of irrigation projects or other new beneficial uses in the basin.

Ex. 216, page 4, ¶ 7.

The *Purcell Order* does not determine the outcome of the present application. Purcell's application is distinguishable from the present application. Purcell proposed diverting additional water above and beyond his existing water rights on acres with a full water supply. In other words, Purcell was seeking additional water on acres with a full water supply during times when those existing rights were in priority. In this case, Herbst is seeking water rights to supplement their water supply when their Lemhi River water rights are curtailed.

In the absence of the proposed permit, if the Herbst Lemhi River rights were curtailed, Herbst would have to dry up the acres associated with the curtailed rights. The proposed permit would allow Herbst to continue to irrigate those acres. Therefore, the proposed permit represents an increase in beneficial use because Herbst can extend their irrigation season, increasing crop yields. In contrast, Purcell 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.

Replacement Water Right

Herbst argues the proposed water right qualifies under Paragraph 10.b(6)(C) of the W&S Decree and, therefore, does not count against the 150 cfs subordination cap. 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) clearly 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 the proposed permit 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 the proposed permit may qualify as a replacement water right. However, Condition #7 of the Stipulation makes it clear that Herbst intends to divert water under the permit only during times when the Lemhi River rights (the original water rights) are curtailed (physically and legally not available). Ex. 113. The replacement water provisions of the W&S Decree do not apply to the proposed permit.

Forum and Timing Question

Although IWRB chose to challenge the implementation of the subordination provisions 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. Paragraphs 3.f(6) and 4 of the W&S Agreement set forth a dispute resolution process for disagreements about the implementation of the subordination provisions. Paragraph 3.f(6) of the W&S Agreement 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.

Paragraph 4 of the W&S Agreement 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 denovo 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.

There 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. At the time a permit is issued, a water right has not been fully developed. There is a good chance that a water right, as developed and licensed, will be different than the permitted water right. For example, a permit may be issued to develop new acres on the edge of existing irrigated farm ground. Such a permit would likely count against the 150 cfs subordination limit. However, the water user may actually develop the water right on existing irrigated acres as a replacement source. The licensed water right may meet the definition of a "replacement water right" and would not count against the 150 cfs subordination limit. Until a water right reaches the final license stage, it is difficult to know exactly where it may land within the structure of the W&S Decree.

CONCLUSIONS OF LAW

Lynn and Robin 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), the proposed permit 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 proposed conditions listed in the Stipulation (resolving the protests of LID and IDFG) should be revised to be consistent with this order and included on the permit.

The arguments raised by IWRB relating to the W&S Agreement and W&S Decree are not persuasive and do not warrant any additional conditions being added to the permit. The subordination protections described in Paragraph 10.b of the W&S Decree are not limited to new acres and can be extended to supplemental water rights, such as the pending application. Further, limiting the proposed permit to 0.02 cfs per acre (as required by Idaho Code § 42-202) means the proposed permit fits squarely within Paragraph 10.b(6)(A)(i), obviating the need for interpretation of that paragraph.

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
SEnw	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.
8. 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.
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 30th day of August, 2016.



James Cefalo
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of August 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: Preliminary Order Granting 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

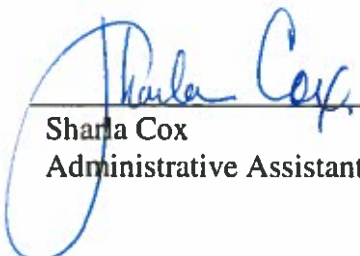
Ann Vonde
Deputy Attorney General
PO Box 83720
Boise, ID 83720-0010

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



Shana Cox
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer 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 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

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.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case 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 of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.