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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)	)	IWRB'S RESPONSE TO LYNN
	)	HERBST'S DISCOVERY REQUESTS
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The Idaho Water Resource Board ("IWRB"), by and through its attorneys of record, hereby answers the interrogatories and responds to the requests for production in the Applicant's Discovery Requests of the Idaho Water Resource Board from Lynn Herbst ("Herbst"), dated June 13, 2016.

GENERAL OBJECTIONS

1. The IWRB objects to the "Definitions and Instructions" to the extent they purport to impose requirements, standards, or meanings in addition to and/or inconsistent with the Idaho Rules of Civil Procedure. The IWRB herein provides its answers and responses to Herbst's interrogatories and requests for production in accordance with the Idaho Rules of Civil Procedure.

2. These responses are made subject to all objections as to competence, relevance, materiality, and admissibility. These responses are subject to all objections that would require the exclusion of any statement, material, or information herein provided if such requests were asked of, or any statement, material, or information provided were made by witnesses present and testifying in court. All such objections reserved may be interposed at the time of trial.
3. No incidental or implied admissions are intended. The answers and responses provided herein are not waivers of any stated objection, or waivers of the IWRB's right to object to any future, additional, or supplemental discovery requests.
4. The IWRB objects to Herbst's discovery requests to the extent they seek information protected by the attorney-client privilege, the work product doctrine, and the rules governing discovery relating to experts as set forth in the Idaho Rules of Civil Procedure 26(b). This objection is intended to apply to all discovery requests that seek such information. The IWRB, to the extent possible, construed each request as requesting only information and/or documents not subject to any protection.

INTERROGATORIES

INTERROGATORY NO. 1: Please state the name, address, and telephone number of each person who has or claims to have knowledge of any facts relevant to this action known to you and provide a description of the nature of such person's involvement. This Interrogatory is calculated to identify the nature and extent of the knowledge such person is likely to have.

ANSWER TO INTERROGATORY NO. 1: The IWRB objects that a request for the identities of all persons who have knowledge of the facts relevant to this action is overboard and unduly burdensome. Notwithstanding these objections, the IWRB answers that David Shaw, ERO Resources Corp., 4001 E. Main St., Emmett ID 83617, (208) 365-7684, dshaw@eroresources.com, has knowledge of the negotiations and terms of the Partial Decrees for Federal Reserved Water Rights 75-13316 and 77-11941 and the Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees for Consolidated

Subcase 75-13316. Jeff Peppersack, Idaho Department of Water Resources ("IDWR"), 322 E. Front St. Boise ID 83702-7374, (208) 287-4800, jeff.peppersack@idwr.idaho.gov has knowledge of IDWR's internal policies and guidance regarding the Partial Decrees for Federal Reserved Water Rights 75-13316 and 77-11941.

INTERROGATORY NO. 2: Please identify each and every factual witness you intend to call (or may call) at the hearing in this matter. With respect to each of the witnesses so identified, state the subject matter and general substance of the facts and opinions to which he or she is expected to testify.

ANSWER TO INTERROGATORY NO. 2: The IWRB will call Jeff Peppersack with IDWR to testify with regard to IDWR's internal policy and guidance regarding administration of the provisions in Partial Decrees for Federal Reserved Water Rights 75-13316 and 77-11941.

INTERROGATORY NO. 3: Please identify each and every expert witness you intend to call (or may call) at the hearing in this matter. With respect to each of the witnesses so identified, state the subject matter and general substance of the facts and opinions to which he or she is expected to testify.

ANSWER TO INTERROGATORY NO. 3: The IWRB will call David Shaw with ERO Resources Corp. to testify with regard to the negotiation and terms of Partial Decrees for Federal Reserved Water Rights 75-13316 and 77-11941. He will testify to the technical development of and negotiator's intent with regard to Section 10.b.(6).(A) of Partial Decrees for Federal Reserved Water Rights 75-13316 and 77-11941 and to the provisions of Partial Decrees for Federal Reserved Water Rights 75-13316 and 77-11941 and the Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees for Consolidated Subcase 75-13316 generally.

INTERROGATORY NO. 4: Please describe any and all of the reasons for your protest of the Application.

ANSWER TO INTERROGATORY NO. 4: The reasons for the IWRB's protest are set forth in the IWRB's Notice of Protest to Water Right Application 74-16008 dated January 6, 2014, which is contained in the record for Water Right Application 74-16008 and is available on IDWR's website. In addition, the IWRB protests Water Right Application 74-16008 on the basis that it is not in the local public interest to approve Water Right Application 74-16008 without a condition stating it does not enjoy the subordination protections set forth in Section 10.b.(6).(A) of Partial Decrees for Federal Reserved Water Rights 75-13316 and 77-11941.

INTERROGATORY NO. 5: Idaho Code § 42-222 requires that an application for permit will not conflict with the local public interest. Please describe why you believe the Application will conflict with this requirement.

ANSWER TO INTERROGATORY NO. 5: Idaho Code Section 42-222 applies to changes in points of diversion, place of use, period of use, or nature of use of water under established water rights and not to new water right applications for permit. Water Right Application 74-16008 is for a new water right and I.C. § 42-222 does not apply in this case. Notwithstanding those objections, the IWRB refers to its answer to Interrogatory No. 10 for further explanation of why it is not in the local public interest to approve Water Right Application 74-16008 without a condition stating it does not enjoy the subordination protections set forth in Section 10.b.(6).(A) of Partial Decrees for Federal Reserved Water Rights 75-13316 and 77-11941.

INTERROGATORY NO. 6: Attached hereto as Exhibit 1 is a spreadsheet downloaded from the Idaho Department of Water Resources' website at the following address: http://www.idwr.idaho.gov/WaterManagment/Wild_Scenic/WildScenic.htm. This spreadsheet summarizes the water rights which are subject to the Wild & Scenic Stipulated Agreement. Please identify any and all water right permits on this spreadsheet that the Board protested when the applications for permit for such rights were advertised pursuant to Idaho law.

ANSWER TO INTERROGATORY NO. 6: The IWRB does not agree that the phrase “summarizes the water rights which are subject to the Wild & Scenic Stipulated Agreement” accurately characterizes the spreadsheet for the Salmon River available from the website listed in Interrogatory No. 6. The IWRB notes that the website listed in Interrogatory No. 6 provides a link to a spreadsheet that lists the water rights which enjoy subordination protection under Section 10.b.(6).(A) of Partial Decrees for Federal Reserved Water Rights 75-13316 and 77-11941, but the IWRB objects that it would be unduly burdensome and time consuming to confirm that Exhibit 1 and the spreadsheet available from the website are the same. The IWRB does not, in answering Interrogatory No. 6, affirm or deny that Exhibit 1 and the spreadsheet available from the website are identical. Notwithstanding these objections the IWRB answers, of the water rights listed on Exhibit 1, it protested Water Right Applications 71-10935, 74-16010, 74-15889, 74-16042.

INTERROGATORY NO. 7: Please describe whether or not you believe water diverted for irrigation of crops under the Application will be beneficially used under Idaho law.

ANSWER TO INTERROGATORY NO. 7: The IWRB objects that Interrogatory No. 7 calls for a legal and/or factual conclusion with regard to future beneficial use under Water Right Application 74-16008. The IWRB cannot know what beneficial use may or may not be made of water under Water Right Application 74-16008 in the future.

INTERROGATORY NO. 8: Please describe whether or not you believe water diverted for irrigation of crops under the Application will be consumptively used under Idaho law.

ANSWER TO INTERROGATORY NO. 8: The IWRB objects that Interrogatory No. 8 calls for a legal and/or factual conclusion with regard to the future consumptive use of water under Water Right Application 74-16008. The IWRB cannot know what consumptive use may or may not be made of water under Water Right Application 74-16008 in the future.

INTERROGATORY NO. 9: Please describe whether or not you believe the water diverted under this Application are “high flows” as described in the decreed general provision authorizing the practice of diverting high flows in the Lemhi basin.

ANSWER TO INTERROGATORY NO. 9: Use of water under a water right (partial decree, permit, or license) is distinct from use of “high flow” water under a general provision. The Basin 74 General Provision states:

The following general provision shall govern the use of “High Flow” surface water for irrigation use within the Lemhi Basin:

The practice of diverting high flows in the Lemhi Basin, in addition to diverting decreed and future water rights that may be established pursuant to statutory procedures of the State of Idaho, is allowed provided:

- (a) the water so diverted are applied to beneficial use.
- (b) existing decreed rights and future appropriations of water are first satisfied.

The Basin 74 General Provision does not provide a definition of “high flow.” The Basin 74 General Provision does make clear that a water right (partial decree, permit, license) must be in existence as a prerequisite to use of “high flow.” Once a water right (partial decree, permit, license) is established on a place of use within Basin 74, the water user may also divert “high flow” water onto the same place of use under the Basin 74 General Provision. Water Right Application 74-16008 lists the source of the water that will be used under the application as “springs.” If Water Right Application 74-16008 is approved by IDWR as a permit/license with a source of water as “springs” Herbst could irrigate the place of use on the approved Water Right Application 74-16008 with spring water and Herbst could also apply “high flow” water to the same place of use under the Basin 74 General Provision.

INTERROGATORY NO. 10: Please describe the basis for the Board’s interpretation of the provisions of partial decrees for Water Rights 75-13316 and 77-11941, which the Applicant understands to be that these provisions do not protect supplemental water rights, where supplemental water rights are generally understood to mean water rights that supply water to a water user when the base water rights(s) is/are no longer in priority and no longer entitled to receive water.

ANSWER TO INTERROGATORY NO. 10: The United States owns Federal Reserved Water rights 75-13316 and 77-11941 on the Salmon River. The Partial Decrees for Federal Reserved Water Rights 75-13316 and 77-11941 are subject to the Stipulation and Joint

Motion for Order Approving Stipulation and Entry of Partial Decrees (“Stipulation”), which was approved by the Snake River Basin Adjudication Court in its Order Approving Stipulation and Entry of Partial Decrees and Amended Order Approving Stipulation and Entry of Partial Decrees (Consolidated Subcase No. 75-13316).

The Stipulation is a contractual document in which the United States and parties agreed to the issuance of the Partial Decrees for Federal Reserved Water Rights 75-13316 and 77-11941 subject to certain conditions. One of the contractual provisions is found in Section 10.b.(6).(A) of the Partial Decree for Federal Reserved Water Rights 75-13316 and 77-11941:

[T]his water right is subordinated to the following water rights and uses that are junior to this federal reserved water right Water rights . . . 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)

In this provision, the United States agreed to subordinate its water right to certain future uses, up to 150 cfs. Therefore, the 150 cfs is not unappropriated water of the State of Idaho. Rather, it is appropriated water that is being made available to future beneficial uses under certain conditions.

The contractual conditions are clear that an irrigation use for more than 0.02 cfs/acre does not qualify for the benefits of Section 10.b.(6).(A). For a junior irrigation water right to qualify for the subordination protections of Section 10.b.(6).(A) it must have a “maximum diversion rate of 0.02 cfs/acre.” In addition, the intent of the parties to the Stipulation was that the benefits of Section 10.b.(6).(A) should be applied to junior irrigation water rights seeking to develop new acres (land not previously irrigated).

Approving Water Right Application 74-16008 without a condition stating that it will not enjoy the subordination protection of Section 10.b.(6).(A) is contrary to the plain language of Section 10.b.(6).(A) requiring new irrigation uses to use no more than 0.02 cfs/acre. It is also contrary to the local public interest because it would affect the economy of the local area by

limiting the opportunity for the development of new irrigation (lands not previously irrigated) in the Salmon River basin that would not be subject to a delivery call by the senior Federal Reserved Water Rights 75-13316 and 77-11941.

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1: Please produce all documents which support or form the basis for your Answer to Interrogatory No. 1.

RESPONSE TO REQUEST FOR PRODUCTION NO. 1: The IWRB provides herewith a DVD that includes copies of documents response to this request. The DVD includes folders for each request for production and the folder for each request for production includes the documents responsive to the request.

REQUEST FOR PRODUCTION NO. 2: Please produce all documents that the fact witnesses identified in Interrogatory No. 2 will rely on in support of their testimony.

RESPONSE TO REQUEST FOR PRODUCTION NO. 2: The IWRB provides herewith a DVD that includes copies of documents response to this request. The DVD includes folders for each request for production and the folder for each request for production includes the documents responsive to the request.

REQUEST FOR PRODUCTION NO. 3: Please produce all documents that the expert witnesses identified in Interrogatory No. 3 will rely on in support of their testimony.

RESPONSE TO REQUEST FOR PRODUCTION NO. 3: The IWRB provides herewith a DVD that includes copies of documents response to this request. The DVD includes folders for each request for production and the folder for each request for production includes the documents responsive to the request.

REQUEST FOR PRODUCTION NO. 4: Please produce all documents which support or form the basis for your Answer to Interrogatory No. 5.

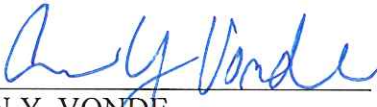
RESPONSE TO REQUEST FOR PRODUCTION NO. 4: The IWRB provides herewith a DVD that includes copies of documents response to this request. The DVD includes folders

for each request for production and the folder for each request for production includes the documents responsive to the request.

REQUEST FOR PRODUCTION NO. 5: Please produce all documents which support or form the basis for your Answer to Interrogatory No. 10.

RESPONSE TO REQUEST FOR PRODUCTION NO. 5: The IWRB provides herewith a DVD that includes copies of documents response to this request. The DVD includes folders for each request for production and the folder for each request for production includes the documents responsive to the request.

DATED this 21st day of June, 2016


ANN Y. VONDE
Deputy Attorney General