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*Attorneys for Lynn Herbst*

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  
LYNN HERBST

**STIPULATION FOR  
WITHDRAWAL OF PROTESTS**

THIS STIPULATION FOR WITHDRAWAL OF PROTESTS (this "Stipulation") is made and entered into by and between Lynn Herbst, of P.O. Box 21, Tendoy, ID 83468 (hereinafter "Herbst"), the applicant for the above-described water right permit, and the following protestants to the above-described water right permit:

1. **Idaho Department of Fish and Game**, Salmon Region, 99 Highway 93 North, Salmon, Idaho, 83467 (hereinafter, "IDFG").
2. **Lemhi Irrigation District**, 260 Withington Creek Road, Salmon, ID 83467 (hereinafter, "LID").

Collectively, the IDFG and LID are referred to herein as the "Protestants".

**RECITALS:**

- A. Application for Permit No. 74-16008 (hereinafter, simply "74-16008") was originally filed by Herbst with the Idaho Department of Water Resources ("IDWR" or "Department") pursuant to Idaho law. The original application sought to appropriate 3.17 cfs from springs/wastewater tributary to Agency Creek for the irrigation of 158.6 acres. The 158.6 acres are also currently irrigated with water from existing water rights owned by Herbst (Water Right Nos. 74-740, 74-741, 74-742, and 74-7147) which water rights

add up to a total diversion rate of 5.76 cfs.

- B. It was Herbst's original intent to divert the 3.17 cfs under 74-16008 in addition to the 5.76 cfs he is entitled to divert under his existing rights, for a total of 8.93 cfs. Herbst believed he was able to seek the additional flows without legal injury to other water rights because of the "separate streams" provision of the Basin 74 general provisions, a copy of which is attached at Exhibit 1.
- C. The Protestants protested 74-16008 for various reasons set forth in their protest filings on record with the Department. The matter was thereafter assigned to Hearing Officer James Cefalo (the "Hearing Officer").
- D. After discussions between the Parties, and in lieu of participating in administrative hearings provided for under Idaho law concerning 74-16008, the Parties hereby agree as set forth below, the result of which is withdrawal of the Protestants' protests and issuance of a permit for 74-16008 (as amended, as described below) consistent with the terms of this Stipulation.
- E. This Stipulation is entered into pursuant to IDAPA 37.01.01.204, .557, and .612.

#### **AGREEMENTS:**

- 1. **Application for Permit for 74-16008 is Now Supplemental.** Herbst has submitted an amended application for permit for 74-16008 in the amount 5.76 cfs which has been designated to be supplemental to Herbst's existing water rights (Water Right Nos. 74-740, 74-741, 74-742, and 74-7147), meaning that 74-16008 shall only be exercised when one or more of Herbst's existing water rights is no longer in priority. The approval for 74-16008 must contain a condition stating that 74-16008 is supplemental to Herbst's existing water rights described herein.
- 2. **Conditions of Approval for 74-16008.** Herbst and the Protestants agree that the following conditions (the "Conditions"), or conditions in substantially the same form, must be included in the order approving issuance of a permit for 74-16008:
- 3.
  - 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 of 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 the diverted water into Agency Creek, and two points of rediversion 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 rediversion 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 rediversion 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 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.
  8. If water rights 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.
4. **Withdrawal of Protests.** Protestants' protests to 74-16008 shall be deemed withdrawn with prejudice upon the issuance of a Final Order stating that the Conditions are approved and made a part of the approval. The parties hereto recognize that the Idaho Water Resource Board is not a signatory to this Stipulation, and intends to continue the matter to hearing.
  5. **Successors and Assigns.** This Stipulation shall be binding upon and shall inure to the benefit of each Parties' officers, directors, shareholders, heirs, successors and assigns, and shall be specifically enforceable.
  6. **Waiver and Modification.** No provision of this Stipulation may be waived, modified, or amended except by written agreement executed by all of the Parties hereto.
  7. **Enforcement and Interpretation.** This Stipulation is a valid and binding obligation of the parties, and their successors or assigns. It shall be admissible and enforceable according to its terms, and venue in any subsequent action shall rest within the State of Idaho. This Stipulation is subject to interpretation in accordance with the laws of the

State of Idaho.

8. **Counterparts.** This Stipulation may be executed in counterparts, each of which is deemed an original but all of which constitute one and the same instrument. The signature pages may be detached from each counterpart and combined into one instrument.
9. **Fees and Costs.** Each party hereto shall bear its own costs, expenses, and attorney's fees incurred in this matter.

"IDFG"

Idaho Department of Fish and Game

Date: 6/6/16

By: *Cheryl Wende*  
Attorney for IDFG

"LID"

Lemhi Irrigation District

Date: \_\_\_\_\_

By: \_\_\_\_\_

"Herbst"

Date: \_\_\_\_\_

By: \_\_\_\_\_

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State of Idaho.

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"IDFG"

Idaho Department of Fish and Game

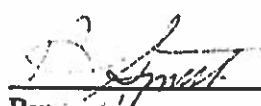
Date: \_\_\_\_\_

By: \_\_\_\_\_

"LID"

Lemhi Irrigation District

Date: 6/17/2016

By:  Sherman

"Herbst"

Date: \_\_\_\_\_

By: \_\_\_\_\_

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"IDFG"

Idaho Department of Fish and Game

Date: \_\_\_\_\_

By: \_\_\_\_\_

"LID"

Lemhi Irrigation District

Date: \_\_\_\_\_

By: \_\_\_\_\_

"Herbst"

Date: JUNE 22, 2016

Robert L. Harris  
By: Robert L. Harris, Attorney

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