

Robert L. Harris, Esq. (ISB #7018)
rharris@holdenlegal.com
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
P.O. Box 50130
1000 Riverwalk Drive, Suite 200
Idaho Falls, ID 83405
Telephone: (208) 523-0620
Facsimile: (208) 523-9518

Attorneys for Lynn and Robin Herbst

RECEIVED
AUG 05 2016
Department of Water Resources
Eastern Region

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

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

**APPLICANT'S
POST-HEARING BRIEF**

Lynn Herbst and Robin Herbst (hereinafter collectively the "Applicant"), by and through their attorneys of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby submit *Applicant's Post-Hearing Brief*.

The contested case hearing involving the permit application for 74-16008 was held on July 14, 2016, at the Eastern Region Office of the Idaho Department of Water Resources in Idaho Falls. The only protestant remaining in the contested case for 74-16008 is the Idaho Water Resource Board (the "Board"). The other protestants to this contested case previously resolved their protests pursuant to the terms of a *Stipulation for Withdrawal of Protests* (the "Withdrawal Stipulation") contained in the record as Exhibit 113.

At the hearing, the Board stipulated that they were in favor of issuance of a permit for 74-16008 consistent with the terms of the Withdrawal Stipulation, with one additional provision—that 74-16008 should also include a condition excepting it from the subordination provisions found in the *Partial Decree for Federal Reserved Water Rights 75-13316 and 77-11941 Salmon Wild*

and Scenic River, which is contained in the record as Exhibit 114 (hereinafter, the “Federal Partial Decree”). Accordingly, the Board’s position at the hearing was that, under the local public interest criterion found at Idaho Code § 42-203A(5)(e), 74-16008 should be excepted from the subordination provisions in the *Federal Partial Decree*. It is undisputed that if 74-16008 was subject to priority administration from the *Federal Partial Decree*, it would virtually never be available, particularly where 74-16008 would be used only when one or more of the Applicant’s Lemhi River base water rights were curtailed under priority administration later in the irrigation season. See Exhibits 118 and 119 (Analysis from James Cefalo addressing when a junior, unprotected water right would be available if subject to the *Federal Partial Decree*); see also Exhibit 104 (spreadsheet showing Applicant’s base water rights).

The Applicant requested the ability to allow the parties to submit post-hearing briefing on the subordination issue, which the hearing officer granted.

For the reasons set forth below, 74-16008 should be issued consistent with the Withdrawal Stipulation and without a condition excepting it from the subordination provisions found in the *Federal Partial Decree*. The plain language of the *Federal Partial Decree* is not ambiguous. Therefore, the text of the document—not the subjective intent of the parties or any parol evidence presented by the Board—is determinative. 150 cfs is reserved for future water rights with the benefits of subordination; up to 100 cfs of that amount (5,000 acres × 0.02 cfs/acre) is further limited to a maximum flow rate of 0.02 cfs/acre; leaving 50 cfs without any such restriction. *Federal Partial Decree*, § 10.b.(6).(A).(i). In the alternative, 74-16008 also qualifies as a replacement water right, not subject to any of these restrictions, but still entitled to the benefits of subordination. *Federal Partial Decree*, § 10.b.(6).(C).

The Board's arguments to the contrary are not availing. The Board cannot point to any of the text of the *Federal Partial Decree* that is ambiguous or could reasonably support the restrictions the Board seeks to impose. Instead, the Board conflates the analysis and attempts to introduce parole evidence to create ambiguity—however, parole evidence can only be considered after the document is determined to be ambiguous. Further, the Board's reliance on the *Purcell Decision*, Exhibit 216, is entirely misplaced because that decision centered on the conclusion that Purcell's proposed use was already allowed under the basin's high flow provisions, which has absolutely no applicability or precedential value to this case. Further, the *Federal Partial Decree* and its supporting documents make clear that this is not the appropriate forum for the Board to attempt to step into the shoes of the United States and (mis-)apply the provisions of the *Federal Partial Decree*.

I. ARGUMENT.

- A. The plain language of the *Federal Partial Decree* does not except a water right such as 74-16008 from the subordination protections contained therein.**

Words have meaning. When parties reach an agreement on certain matters, they memorialize their agreement with words that reflect what their meeting of the minds—their agreement—was prior to it being reduced to writing. The exercise of reducing an agreement to writing intentionally forces the parties to make sure they truly had a meeting of the minds in the first place. And, in that process, the absence of certain words in a written agreement has significance too.

The singular issue facing the hearing officer is to address the Board's claim that the *Federal Partial Decree* means something despite the absence of any words in the *Federal Partial Decree* to convey that meaning. Fortunately, the Idaho Supreme Court has articulated—on many

occasions—a process used to address a dispute over how a contract or other legal document is to be understood in the face of competing assertions that such a document means something.

Idaho courts apply “the same rules of interpretation to a decree that we apply to contracts.” *A & B Irr. Dist. v. Idaho Dep’t of Water Res.*, 153 Idaho 500, 523, 284 P.3d 225, 248 (2012) (citing *DeLancey v. DeLancey*, 110 Idaho 63, 65, 714 P.2d 32, 34 (1986)); *see also Rangen, Inc. v. Idaho Dep’t of Water Res.*, 159 Idaho 798, 807, 367 P.3d 193, 202 (2016) (“Idaho courts interpret water decrees using the same interpretation rules that apply to contracts” (citation omitted)). This interpretation process utilizes a two-step analysis. *See Kepler-Fleenor v. Fremont Cnty.*, 152 Idaho 207, 211, 268 P.3d 1159, 1163 (2012). First, the administrative agency or court reviews the plain language of the contract to determine if there is an ambiguity. *City of Meridian v. Petra Inc.*, 154 Idaho 425, 435, 299 P.3d 232, 242 (2013) (citations omitted). This determination of ambiguity is a question of law, where the tribunal only assesses the text of the document itself. *See DeLancey*, 110 Idaho at 65, 714 P.2d at 34 (citation omitted). Ambiguity only “exists when a contract term is reasonably susceptible to more than one interpretation.” *AMCO Ins. Co. v. Tri-Spur Inv. Co.*, 140 Idaho 733, 739, 101 P.3d 226, 232 (2004). “Only where the language is ambiguous will this Court look to rules of construction for guidance and consider the reasonableness of proposed interpretations.” *Stonebrook Const., LLC v. Chase Home Fin., LLC*, 152 Idaho 927, 931, 277 P.3d 374, 378 (2012) (citation omitted).

If there is no ambiguity, then the contract is interpreted consistent with its plain language. *AMCO Ins. Co.*, 140 Idaho at 739, 101 P.3d at 232 (citations omitted); *see also Kepler-Fleenor*, 152 Idaho at 211, 268 P.3d at 1163. Thus, because only the document’s plain language itself is required, the “interpretation of an unambiguous document is a question of law.” *DeLancey*, 110 Idaho at 65, 714 P.2d at 34 (citation omitted). In other words, in the absence of any ambiguity,

“the intention of the parties must be ascertained from the document itself.” *Kepler-Fleenor*, 152 Idaho at 211, 268 P.3d at 1163 (citation omitted).

On the other hand, it is *only* if there is ambiguity in the term or terms in dispute may the court or hearing officer engage in the second step of the interpretive analysis and resort to extrinsic evidence, also known as parol evidence, to construe the ambiguous provisions. *Buku Properties, LLC v. Clark*, 153 Idaho 828, 834, 291 P.3d 1027, 1033 (2012). In the face of ambiguity, the goal remains to give effect to the parties’ intent at the time of contracting. *Hap Taylor & Sons*, 157 Idaho at 610, 338 P.3d at 1214; *Bondy v. Levy*, 121 Idaho 993, 998, 829 P.2d 1342, 1347 (1992); *see also Kepler-Fleenor*, 152 Idaho at 211, 268 P.3d at 1163 (“Only when a document is ambiguous is parol evidence admissible to discover the drafter’s intent”). Because parol evidence is heard and considered in order to determine the parties’ intent, the “[i]nterpretation of an ambiguous document presents a question of fact” for the tribunal. *DeLancey*, 110 Idaho at 65, 714 P.2d at 34 (citation omitted).

Here, the *Federal Partial Decree* is not ambiguous, and therefore, its plain language controls. The key provision at issue in this matter is section 10.b.(6), which states:

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:

...

- (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 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 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.

Federal Partial Decree, § 10.b. This provision in the *Federal Partial Decree*, outlines which future water rights the *Federal Partial Decree* would be subordinate to. An amount of 150 cfs of future water rights are reserved for future development and are specifically allowed to benefit from this subordination in all circumstances. *Federal Partial Decree*, § 10.b.(6).(A).(i). A certain amount of that reserved 150 cfs is further limited—i.e., up to 100 cfs of the 150 cfs can be used

for the irrigation of 5,000 acres at a rate of 0.02 cfs/acre because $5,000 \text{ acres} \times 0.02 \text{ cfs/acre} = 100 \text{ cfs}$. *Federal Partial Decree*, § 10.b.(6).(A).(i) (note the use in the parenthetical of the preface “including,” which indicates that the described 100 cfs is a subset of the already-reserved 150 cfs).

74-16008 is proposed to be a supplemental water right that diverts spring water tributary to Agency Creek when the Applicant’s Lemhi River base water rights are no longer in priority. The Applicant agreed to this limitation with the Board and the others listed in the Withdrawal Stipulation, only to later learn that the Board desires to impose additional restrictions on 74-16008.

The Board’s attempt to further restrict 74-16008 is premised on the Board’s attempt to create ambiguity in the *Federal Partial Decree* by misapplying the two-step interpretive analysis and ignoring the language of the *Federal Partial Decree*. The Board contends that:

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).

Ex. 120, p. 7. For the following reasons, the Board’s position is unavailing.

First, as illustrated above, the 0.02 cfs/acre restriction applies to up to 100 cfs of the 150 cfs that is explicitly allowed to benefit under Section 10.b.(6).(A). In fact, it is clear that the 100 cfs is a subset, with this additional restriction. *See Federal Partial Decree*, § 10.b.(6).(A).(i) (describing the 150 cfs and then, in a parenthetical note, stating that the 150 cfs includes a restriction on 5,000 acres that amounts to a limitation on 100 cfs). The remaining 50 cfs are therefore not constrained by the 0.02 cfs/acre restriction or any other restrictions.

Second, the Board contends that the irrigation allowed for by § 10.b.(6).(A).(i) cannot be for “land not previously irrigated,” which means that the Applicant’s request for 74-16008—a

supplemental water right—would not qualify for subordination. But the words “supplemental” or “lands not previously irrigated” appear *nowhere* in the *Federal Partial Decree* or any of the stipulations that led to the *Federal Partial Decree*. Only the word “irrigation” appears, and “irrigation” is not ambiguous. There is no defined term for irrigation in the *Federal Partial Decree* or the stipulation that led to the partial decree. Therefore, “irrigation” retains in common meaning, which is “the artificial application of water to assist in the production of crops.” See <http://www.dictionary.com/browse/irrigation>. Land in Idaho that lacks natural moisture to produce crops is arid¹, and land reverts to its arid state when it is not being irrigated. Therefore, irrigation must occur on arid land to make it productive, and the nature of irrigation does not change depending on whether the arid land was previously irrigated or not. The term “irrigation” contains no qualifiers and includes all types of irrigation, including supplemental irrigation. In other words, the *Federal Partial Decree* contains no limitation on the land itself that can be irrigated—the only limitations described are on the allowable flow rate (0.02 cfs/acre) and on the area thus limited (5,000 acres). There is, simply, no discussion of the land to be irrigated; and, thus, to attempt to impose any restriction on the land to be irrigated in the absence of any such indication in the text of the *Federal Partial Decree* is unreasonable. Therefore, there is nothing patently or latently ambiguous with this term as contained in the *Federal Partial Decree* and its associated documents. The *Federal Partial Decree*, even if the 0.02 cfs/acre limitation applied to the up to 100 cfs portion, still allows supplemental water rights for this portion just as it would allow for the irrigation of new acres.

Third, the Board’s assertion regarding the “intent of the parties to the Stipulation” is irrelevant without anything showing of ambiguity in the text of the *Federal Partial Decree* (which

¹ Arid is defined as “being without moisture, extremely dry, parched; barren or unproductive because of lack of moisture.” See <http://www.dictionary.com/browse/arid?s=t>.

lifted the 10.b.(6).(A). language from the Stipulation). Simply, in the absence of any ambiguity in the text of the document, “*the intention of the parties must be ascertained from the document itself.*” *Kepler-Fleenor*, 152 Idaho at 211, 268 P.3d at 1163 (citation omitted, emphasis added). The *Federal Partial Decree* does not address anything about the acres to be irrigated under this subordination benefit—other than the fact that up to 5,000 acres of water rights can be issued for irrigation at 0.02 cfs/acre. See *Federal Partial Decree*, § 10.b.(6).(A).(i). There is no requirement, no limitation, no specification, no mention, and no description that only newly irrigated acres are eligible for the subordination benefits of § 10.b.(6).(A).(i). No reasonable reading of § 10.b.(6).(A).(i). can lead to an ambiguity on that point. The discussions or understandings of the parties to the Stipulation are irrelevant because the Stipulation and the *Federal Partial Decree* are not ambiguous in this regard.

Both Cynthia Bridge-Clark and David Shaw were questioned repeatedly on this point at the hearing. Both admitted that the words “land not previously irrigated,” or “supplemental,” or “new acres” appear nowhere in the written documents. Without plain language limiting the 50 cfs, no such limitations on the type of irrigation which qualifies for subordination protection exists. Further, without ambiguous language that could reasonably impose such a restriction, there is no cause to receive parol evidence.

Additionally, the limitations the Board asserts should exist (new acres only, no supplemental acres) are not complicated concepts which would require the inclusion of complicated language. The simple limiting words that would support the Board’s interpretation are simply not there when they could have easily been added. It therefore follows that there was no intent to limit the subordination protections as the Board now asserts.

It appears that the Board is relying exclusively upon the recollection of Mr. Shaw, who was involved in the negotiation of the *Federal Partial Decree* on behalf of the State of Idaho. The hearing officer can, and we are sure will, review the testimony offered at the hearing. As we recall the testimony, Mr. Shaw and Clive Strong of the attorney general's office were the primary negotiators—but Mr. Shaw admitted that he was not the drafter of the *Federal Partial Decree* or the Stipulation that led to the *Federal Partial Decree*, and in fact, had little involvement other than on the technical bases for certain numbers used in the negotiations. Despite this, Mr. Shaw asserts that the 5,000 acres were intended to only be for new acres despite no plain language (or even ambiguous language) in support of this interpretation. **Even if an assessment of possible new irrigable acres went into arriving at the numbers that eventually were contained in the *Federal Partial Decree*, it does not follow that the basis for arriving at the number parasitically and silently remains associated with the 150 cfs unless the plain language of the document expressly indicates otherwise.** The only explanation Mr. Shaw seemed to have concerning the lack of any language supporting his interpretation of the *Federal Partial Decree* is that it was not a perfect agreement. However, the lack of language supporting the Board's position and Mr. Shaw's acknowledgement leads to the conclusion that the Board simply has no textual basis demonstrating ambiguity to assert or discuss what the intent of the parties may have been.

Additionally, the Board's interpretation asserted in this proceeding is inconsistent its position in the recent past. As discussed at the hearing, one of the water rights enjoying subordination under IDWR's accounting of protected rights (found at Exhibit 116) is 74-16010, a permit issued to LaMar Cockrell and Sons LLC. This permit is virtually identical to the situation of the Applicant, and was issued for supplemental irrigation purposes from a spring source which runs into a Lemhi River ditch. *See* Exhibits 121 through 133, in particular Exhibit 133 (map

showing overlap of 74-16010 acres with Lemhi River base right acres). The Board withdrew its protest to this application without any assertion that it should be issued without subordination protection. See Exhibit 123 (Board protest) and Exhibit 126 (Board withdrawal of protest). If the *Federal Partial Decree* means what the Board now asserts it should mean in this Herbst matter, it cannot be based on the plain language of the *Federal Partial Decree*—otherwise, the Board would not have taken the position it did in the Cockrell matter. Rather, the position in the Herbst matter appears to be based on a change in policy position by the Board. Of course, the very reason agreements are reduced to writing is to avoid being subject to changing positions later in time.

It is further worth noting that there are other supplemental water rights that enjoy subordination under IDWR's accounting of protected rights, even though these rights involve "hybrid" situations where new water rights were used for new acres and for supplemental irrigation of existing irrigated acres. See, e.g., Water Right Nos. 72-16887, 71-10949, and 75-14636. When asked about these water rights to see how he would apply the subordination provisions based on the Board's new interpretation, Mr. Shaw asserted that they should somehow enjoy "split-protection" where only the new acres are protected and the already-irrigated acres are not. This position appears to be unworkable, but more importantly, it is unsupported by the plain language of the *Federal Partial Decree*.

At their core, new water rights necessarily result in further economic development which means they are in the local public interest. The Board's interpretation attempts to delineate what type of development is worthy of protection under the *Federal Partial Decree* (only irrigation of lands not previously irrigated), but this type of arbitrary line-drawing has no basis in any language contained in the *Federal Partial Decree*. If the intent of the 150 cfs was to allow for further and future development, supplemental irrigation is further and future development. Acres will be

irrigated for longer time periods, resulting in increased crop production—and those crops demand resources to raise them, resources primarily obtained locally to support the operation of the Herbst multi-generational ranching family. Mr. Herbst testified that later-season irrigation allows him to better produce hay and to also graze cattle on his hay fields in the fall. This feeds the cattle quality material, and also helps to preserve existing hay supplies.

Finally, on an even broader view, the Board has not shown that *any* portion of the *Federal Partial Decree* is ambiguous. Under the required analysis, when there is no ambiguity, then the document is interpreted consistent with its plain language. *AMCO Ins. Co.*, 140 Idaho at 739, 101 P.3d at 232 (citations omitted); *see also Kepler–Fleenor*, 152 Idaho at 211, 268 P.3d at 1163. There is no further inquiry into canons of construction, the underlying intent of the parties, or any other parol evidence. *Stonebrook Const., LLC*, 152 Idaho at 931, 277 P.3d at 378; *see also Kepler–Fleenor*, 152 Idaho at 211, 268 P.3d at 1163. Because the *Federal Partial Decree* is unambiguous, even the Stipulation itself is irrelevant to its interpretation, except to the extent the Stipulation is “incorporated ... by reference” into the *Federal Partial Decree*. *See, e.g., Federal Partial Decree*, § 10.c.

The Board cannot use parol evidence to demonstrate an ambiguity, which would then require the consideration of parol evidence offered at the hearing through the testimony of David Shaw. The ambiguity must exist in the text of the document. The *Federal Partial Decree* is not ambiguous. Its plain language makes certain restrictions and limits their application to specific circumstances.

74-16008 is entitled to the subordination benefits provided by § 10.b.(6).(A).(i). of the *Federal Partial Decree*. First, 74-16008 may be included in the 50 cfs of § 10.b.(6).(A).(i). that are not limited by the restriction to 0.02 cfs/acre. Second, 74-16008, may be considered part of

the 100 cfs (or 5,000 acres) restricted, and thus limited (over Herbst's objection) by the Department to 0.02 cfs/acre. Finally, given the nature of Herbst's proposed use of 74-16008, it may also qualify as a replacement water right under § 10.b.(6).(C) of the *Federal Partial Decree*, and thus enjoy the subordination benefits of § 10.b. without being subject to the quantity limitation of § 10.b.(6).(A).

B. The *Purcell Decision* provides no precedential value to this proceeding.

The Board included Exhibit 216 in their hearing exhibits, which is an administrative decision issued by IDWR Director Gary Spackman concerning application for permit no. 74-16004 (*Final Order Approving in Part and Rejecting in Part Application for Permit* (hereinafter, the "*Purcell Decision*")). The *Purcell Decision* appears to have been introduced as legal support for the Board's position that 74-16008 should not enjoy subordination protection. However, there are significant factual differences between the *Purcell* situation and the situation surrounding 74-16008.

Purcell's written statement was that he needed the additional water for the following reasons:

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

Purcell Decision at 3. Therefore, *Purcell* pursued a supplemental water right that would count against the 150 cfs protected under the *Federal Partial Decree* for a water use **already permitted** under the Basin 74 General Provisions known as the "high flow provisions." See Exhibit 115; see also *Purcell Decision* at 2-3. Because the beneficial use of diverting high flows was already

permitted under the general provisions decreed in the SRBA, the Director concluded that it was “not in the local public interest to allocate the limited water reserved for future development in the Wild & Scenic irrigation projects or other new beneficial uses in the basin.” *Purcell Decision* at 4. The Director went on to further stress that his rejection of the irrigation portion of Purcell’s application “in no way affects the ability of Purcell or others to continue to divert and use water consistent with the decreed general provision authorizing the practice of diverting high flows in the Lemhi basin.” *Id.* at 5.

The situation surrounding 74-16008 is much different. First, the Applicant (Herbst) is not appropriating “high flow” water. He is not seeking water to use early in the season or to raise the sub in his fields. Rather, the Applicant is seeking 74-16008 because IDWR threatened him with an NOV if he did not obtain a water right (Exhibit 100) because he has historically used the spring water later in the irrigation season to finish off his crops. If he was seeking “high flows,” as Purcell was, then IDWR would have had no basis to threaten an NOV. The only reason Herbst needed a water right was because he had developed a new irrigation project with new beneficial uses consisting of his efforts to extend the irrigation of his crops beyond what was authorized under his existing Lemhi River base rights when these rights were curtailed. Purcell’s application did not provide for any new water use because the water use was already allowed under the “high flow” provisions. Accordingly, the *Purcell Decision* has no precedential value to this proceeding because they involve significantly different factual situations. The hearing officer should not allow the Board to conflate the holding of the *Purcell Decision* when deciding this matter.

- C. **A contested case is not the appropriate forum for the Board to assert its new interpretation of the *Federal Partial Decree* and how it should affect 74-16008. The stipulation that led to the *Federal Partial Decree* contains a provision addressing how concerns raised with the implementation of any subordination provision in *Federal Partial Decree* are to be addressed.**

The stipulation that led to the *Federal Partial Decree* contains a provision found on page 15 that allows any party to the stipulation to “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.” Furthermore, paragraph 4 contains a dispute resolution provision, and even allows a party to take the matter up with the SRBA court if there are concerns with IDWR’s implementation of the stipulation. This includes IDWR’s accounting of water rights protected by the subordination provisions of the *Federal Partial Decree*. See Exhibit 116. Accordingly, this contested case is not the proper forum to raise the subordination issue. Rather, it should be addressed directly with IDWR if IDWR lists 74-16008 on its water right list of protected water rights.

We anticipate that the Board will point to the following provision found at page 16 of the Stipulation as a basis for protesting 74-16008:

- b. Permit Applications. This Stipulation does not affect the right of any party to protest any application for permit to appropriate water filed with IDWR. The United States, however, may not assert in any protest that the application for permit (if subordinated to the application Partial Decree) should be denied or conditioned (including on public interest grounds) to protect the flow of the Wild and Scenic Rivers subject to this Stipulation.

However, in the context of the dispute resolution provisions described herein, this provision properly interpreted means that protests can be filed on any other basis other than those already addressed in the stipulation. Specific to 74-16008, this means that if the Board does not

believe it should enjoy subordination protection, the Board should take that matter up with IDWR because that issue is directly addressed in the stipulation. If the Board wants to protest on other non-subordination grounds—for example, environmental concerns—then the Board should be able to protest on these non-subordination grounds because these grounds are not addressed in the stipulation. In short, the proper venue to address whether a water right should enjoy subordination is with IDWR rather than forcing the issue in a contested case hearing.

Finally, it is worth noting that the very basis the Board is asserting against the Applicant concerning the subordination issue was delineated as a basis that the United States could not assert as a protestant to a water right permit application. It is unclear, therefore, why the Board is effectively stepping into the United States' shoes on this issue when the United States is the owner of the *Federal Partial Decree*. What is clear is that it appears from the plain language of the agreement that any disputes regarding the subordination issue were to be addressed by the parties in good faith, and then if the matter could not be resolved, to pursue the matter before the SRBA court. It was not to be taken up in a permit application contested case. Accordingly, the hearing officer should not address the subordination issue with the possible inclusion of a condition excepting 74-16008 from subordination protection. The hearing officer should not include such a condition, and allow the parties to follow the procedure they agreed to and memorialized with clear language in their stipulation.

- D. In the alternative to the above, the hearing officer should not include the subordination condition requested by the Board because 74-16008 is a replacement water right.**

In the alternative to the above, the hearing officer should conclude that 74-16008 is a “replacement water right” under the provisions of the *Federal Partial Decree*. Exhibit 114 at 7. Based on the plain language of the *Federal Partial Decree*, replacement water rights are not

deducted from the 150 cfs subordination amount. To be considered a replacement water right, the

Federal Partial Decree states:

Water rights of the United States, instream flow 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 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.

Federal Partial Decree, § 10.b.(6).(C).

74-16008 meets each of these three requirements. First, 74-16008 does not exceed any elements of the Lemhi River base rights to which it is supplemental. 74-16008 and all of the base rights will be limited to a maximum diversion rate of 5.76 cfs and all are tied to the same place of use. Second, 74-16008's conditions as agreed to in the Withdrawal Stipulation only allow 74-16008 to be exercised when one or more of the base rights are out of priority and only up to the amount that is out of priority. Third and finally, 74-16008 can be used even if the Lemhi River base rights are out of priority and are therefore not actually available. Water diverted under 74-16008 is legally available because the source of water is springs that are tributary to Agency Creek. Under the Basin 74 general provisions, Agency Creek is administered separately from all other water rights in Basin 74 (including Lemhi River water rights). This makes water under 74-16008 legally available. Additionally, as the record reflects from the hearing, every year spring water flows into L-31 and is physically available for the Applicant's diversion and use. *See, e.g.*, Exhibit 105. For these reasons, 74-16008 is a replacement water right and should not be deducted from the 150 cfs subordination amount. *See Federal Partial Decree*, § 10.b.(6).(C). Should the hearing

officer agree, then the subordination issue becomes moot and the permit for 74-16008 should be issued without any reference to the subordination issue.

II. CONCLUSION.

For the reasons set forth above, 74-16008 should be issued consistent with the Withdrawal Stipulation and without a condition excepting it from the subordination provisions found in the *Federal Partial Decree*. The plain language of the *Federal Partial Decree* is not ambiguous. Therefore, the text of the document—not the subjective intent of the parties or any parol evidence presented by the Board—is determinative. 150 cfs is reserved for future water rights with the benefits of subordination; up to 100 cfs of that amount ($5,000 \text{ acres} \times 0.02 \text{ cfs/acre}$) is further limited to a maximum flow rate of 0.02 cfs/acre; leaving 50 cfs without any such restriction. *Federal Partial Decree*, § 10.b.(6).(A).(i). In the alternative, 74-16008 also qualifies as a replacement water right, not subject to any of these restrictions, but still entitled to the benefits of subordination. *Federal Partial Decree*, § 10.b.(6).(C).

Dated this 5th day of August, 2016.

For


Robert L. Harris, Esq.

HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the following described pleading or document on the parties listed below by hand delivery, email, mail, or by facsimile, with the correct postage thereon, on this 5th day of August, 2016.

DOCUMENT SERVED: APPLICANT'S POST-HEARING BRIEF

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Idaho Department of Water Resources
900 North Skyline Drive, Suite A
Idaho Falls, ID 83402-1718
james.cefalo@idwr.idaho.gov

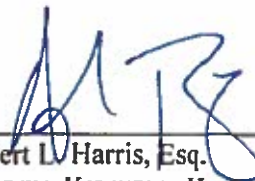
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ATTORNEYS AND/OR INDIVIDUALS SERVED:

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

() First Class Mail
() Overnight Mail
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(X) Email

for


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

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