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Department of Water Resources  
Eastern Region

*Attorneys for the Idaho Water Resource Board*

BEFORE THE DEPARTMENT OF WATER RESOURCES OF  
THE STATE OF IDAHO

IN THE MATTER OF APPLICATION  
FOR PERMIT NOS. 74-16008 IN THE  
NAME OF LYNN HERBST

IWRB'S POST-HEARING BRIEF

The State of Idaho ("State"), by and through its counsel of record, hereby files its post-hearing brief in the above captioned matter.

Introduction

The sole issue before the hearing officer in this matter is whether water right application 74-16008 should enjoy the subordination protections found in Section 10.b.6 of the Partial Decree for Federal Reserved Water Rights 74-13316 and 77-12941 ("Partial Decree"). Evidence at the hearing established that water right application 74-16008 should not enjoy the subordination protections of Section 10.b.6 because the maximum diversion rate exceeds 0.02 cfs of water per acre and it will not be used to irrigate new lands. In addition, it would not be in the local public

interest to allow water right application 74-16008 to enjoy the benefits of subordination under Section 10.b.6 of the Partial Decree because doing so would adversely affect the local economy.

**I. Water Right Application 74-16008 Cannot Enjoy the Subordination Protections of Section 10.b.6 Because it Authorizes a Maximum Diversion Rate of 0.03 cfs of Water per Acre.**

This case should be decided by the plain language of Section 10.b.6 of the Partial Decree which sets clear conditions under which a water right may enjoy the subordination protections of that section. The United States owns federal reserved water rights 75-13316 and 77-11941 on the Salmon River. The Partial Decree for water rights 75-13316 and 77-11941 is subject to the Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees (“Wild and Scenic Stipulation”), which was approved by the SRBA 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 Wild and Scenic Stipulation is a contractual document in which the United States and various parties agreed to the issuance of the Partial Decree subject to certain conditions. The State of Idaho, representing the Idaho Water Resource Board (“IWRB”), was a party to the Wild and Scenic Stipulation.<sup>1</sup> As a party, the State of Idaho including the IWRB must uphold the terms of the Stipulation and the Partial Decree.

Section 10.b.(6).(A).(i) of the Partial Decree provides:

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

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<sup>1</sup> Idaho Code Section 42-1734(3) tasks the IWRB with appearing on behalf of the State of Idaho “in matters related to its duties in any proceeding, negotiation, or hearing involving the federal government . . . .” Attorney General Wasden signed the Wild and Scenic Stipulation for the “State of Idaho, including the Idaho Water Resource Board.” The IWRB was the Attorney General’s client in the negotiations.

(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.<sup>2</sup> As illustrated by the testimony of Mr. Shaw, the 150 cfs constitutes a portion of the quantity of water the United States is entitled to under Section 3 of the Partial Decree. The United States agreed to make the 150 cfs available for use by junior water uses and agreed that its federal reserved water right would be subordinated to those junior uses. Therefore, the 150 cfs is not unappropriated water of the State of Idaho. Rather, it is water that is appropriated by the United States that is being made available to future beneficial uses under certain conditions. The conditions under which the 150 cfs may be used by junior water uses are set forth in Section 10.b.6.(A).(i).

Idaho courts interpret water decrees using the same interpretation rules that apply to contracts. *Rangen Inc. v. Idaho Dept. of Water Res.*, 159 Idaho 798, 807, 367 P.3d 193, 202 (2016). Interpretation of a contract must begin with the plain language of the document. *Knipe Land Co. v. Robertson*, 151 Idaho 449, 454–455, 259 P.3d 595, 600–601 (2011). “The document must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument.” *Id.* The plain language of Section 10.b.6.(A).(i) provides a subordination set aside “with a combined diversion of 150 cfs (including not more than 5,000 acres of irrigation *with a maximum diversion rate of 0.02 cfs/acre*).”<sup>3</sup> The words “with a maximum diversion rate of 0.02 cfs/acre” are clear and mean that any junior irrigation right

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<sup>2</sup> For brevity this brief will discuss only the 150 cfs provisions of Section 10.b.6.(A).(i). However, the analysis laid out herein also applies to the 250 cfs subordination set aside found in Section 10.b.6.(A).(ii).

<sup>3</sup> Emphasis added. As detailed in the testimony of Mr. Shaw, the 150 cfs is a “combined diversion rate.” The plain meaning of “combined diversion rate” is that it must include at least two separate categories of diversion rates that total 150 cfs. The parenthetical information “(including not more than 5,000 acres of irrigation with a maximum diversion rate of 0.02 cfs/acre)” makes clear that a portion of the “combined diversion rate” includes irrigation uses totaling 100 cfs, which is calculated by taking “5,000 acres . . . with a maximum diversion rate of 0.02 cfs/acre.” The remainder of the “combined diversion rate” is calculated by subtracting the 100 cfs of irrigation use from the 150 cfs total combined rate to come to 50 cfs for non-irrigation uses that are not “described in paragraphs (3) through (5)” of Section 10.a.

seeking to enjoy subordination under that section cannot be authorized to use more than 0.02 cfs of water per acre. Because the 150 cfs made available under Section 10.b.6.(A).(i) is appropriated water, the 0.02 cfs of water per acre is a strict contractual limitation that cannot be avoided by showing that the water user needs more than 0.02 cfs of water per acre to accomplish irrigation of his/her lands.<sup>4</sup>

The uncontroverted evidence presented at the hearing demonstrated that application for water right 74-16008 will authorize Mr. Herbst to use 5.76 cfs on 186.2 acres, which is 0.03 cfs of water per acre. Mr. Herbst owns water rights 74-740, 74-741, 74-742, and 74-7147 (“base water rights”) that authorize 5.76 cfs to be used on 186.2 acres<sup>5</sup> The base water rights have the same place of use as water right application 74-16008. The evidence at the hearing demonstrated that, under the terms of the Stipulation Resolving Protests entered into between Mr. Herbst and various protestors, water right application 74-16008 will be supplemental to Mr. Herbst’s base water rights.<sup>6</sup> It is undisputed that the base water rights and water right 74-16008, when used

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<sup>4</sup> Idaho Code Section 42-220 provides that a water user is limited to 0.02 cfs per acre “unless it can be shown . . . that a greater amount is necessary.” Idaho Code Section 42-220 applies to unappropriated water of the State of Idaho. The parties to the Wild and Scenic Stipulation chose to impose stricter conditions on the use of the 150 cfs than what appear in statute for the use of unappropriated water by not including any language suggesting a water user might be able to use more than 0.02 cfs of water per acre if they could show it was necessary. Even if the 0.02 cfs of water per acre requirement listed in Section 10.b.6.(A).(i) could be overridden by I.C. § 42-220, Mr. Herbst presented no evidence at the hearing indicating why he needs more than 0.02 cfs of water per acre.

<sup>5</sup> Water rights 74-740, 74-741, 74-742, and 74-7147 currently allow for 5.76 cfs to be used on 206.7 acres. Pending Transfer 80150 will change the place of use for water rights 74-740, 74-741, 74-742, and 74-7147 to cover the same 186.2 acres as water right application 74-16008. After Transfer 80150 is approved the base water rights will allow Mr. Herbst to use 0.03 cfs of water per acre.

<sup>6</sup> It is assumed, for purposes of this brief, that IDWR will approve the conditions set forth in the Stipulation Resolving Protests. The Stipulation Resolving Protests contains the following condition, which will make Mr. Herbst’s water use under water right application 74-16008 supplemental to his use under his base water rights:

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.

separately or together, authorize Mr. Herbst to use 0.03 cfs of water per acre on the place of use. Mr. Herbst did not present any evidence at the hearing demonstrating that water right application 74-16008 meets the 0.02 cfs of water per acre limitation found in Section 10.b.6. Because water right application 74-16008 authorizes the use of 0.03 cfs of water per acre it cannot enjoy subordination under Section 10.b.6.(A).(i) because the plain language of that section requires irrigation rights to have a “maximum diversion rate of 0.02 cfs/acre.”

**II. Water Right Application 74-16008 Cannot Enjoy the Subordination Protections of Section 10.b.6 Because it Will not Develop any New Acres of Irrigation.**

Water right application 74-16008 also cannot enjoy the benefits of subordination under Section 10.b.6.(A) of the Partial Decree because it will not be used to irrigate new lands (lands not previously irrigated). When interpreting a contract one must begin with the document’s plain language. *Knipe Land Co. v. Robertson*, 151 Idaho 449, 454–455, 259 P.3d 595, 600–601 (2011). The document must be construed in its “plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument.” *Id.* If, however, an ambiguity exists in the wording of the contract, a court may use evidence outside the four corners of the document to interpret the contract. An ambiguity exists in a contract if there are “two different reasonable interpretations or the language is nonsensical.” *Id.* Parol evidence may be used to determine the meaning of an ambiguous term. Parol evidence is “any . . . written or oral agreements or understandings . . . made prior to or contemporaneously with the written contract.” *Bilow v. Preco, Inc.*, 132 Idaho 23, 28, 966 P.2d 23, 28 (1998). If a contract term is ambiguous,

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The IWRB requests that the conditions listed in the Stipulation Resolving Protests be included in any approval of water right application 74-16008.

“interpretation of the contract is a question of fact.” *Weisel v. Beaver Springs Owners Ass’n, Inc.*, 152 Idaho 519, 528, 272 P.3d 491, 500 (2012).

In this case, an ambiguity exists as to the term “irrigation” found in Section 10.b.6. The ambiguity is latent and arises when the term “irrigation” is applied to the facts in this case. *Knipe Land Co. v. Robertston*, 151 Idaho 449, 454, 259 P.3d 595, 600 (2011). 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. Because the term “irrigation,” in the context of this case, is susceptible of two reasonable interpretations, and because the Wild and Scenic Stipulation does not contain a merger clause,<sup>7</sup> it is appropriate for the hearing officer to look to parol evidence to determine the correct interpretation of the term.

Parol evidence confirms that development of new acres (lands not previously irrigated) is a condition precedent to enjoying the subordination protections of Section 10.b.6 of the Partial Decree. Evidence presented by the IWRB at the hearing shows that the parties to the Stipulation intended that the subordination protections of Section 10.b.6 would be made available for future water rights that develop new acres of irrigation (lands not previously irrigated). Where the terms of a contract are ambiguous, the main objective is to give effect to the intent of the parties to the agreement. *Navarrete v. City of Caldwell*, 130 Idaho 849, 851, 949 P.2d 597, 599 (Ct. App. 1997). As a party to the Wild and Scenic Stipulation, the State of Idaho’s (representing the IWRB) interpretation of the terms of Section 10.b.6 should be given “great weight.” *Cottle v. Or. Mut. Life Ins. Co.*, 60 Idaho 628, 631, 94 P.2d 1079, 1080 (1939).

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<sup>7</sup> See *Howard v. Perry*, 141 Idaho 139, 142, 106 P.3d 465, 468 (2005).

The IWRB presented the testimony of Mr. Shaw who was part of the State of Idaho's negotiation team and who assisted in drafting the Partial Decree and the Wild and Scenic Stipulation. Mr. Shaw's testimony stated that it was the intent of the parties that the subordination protections of Section 10.b.6 should apply to water users irrigating new acres that had not been previously irrigated. Mr. Shaw's personal knowledge of the intent of the parties is based on conversations he participated in or heard during the negotiation process and on his experience drafting the Partial Decree and stipulation. Mr. Shaw testified that the subordination protections of Section 10.b.6 were the result of a hard-fought negotiation. It was extremely important to the State of Idaho that it preserve water for future agriculture economic development in the Salmon River basin. The State of Idaho recognized the subordination set aside of Section 10.b.6 was a precious resource that would provide a secure source of water for water users seeking to invest in new irrigation projects in the future. The State of Idaho understood that, without the subordination protections of Section 10.b.6, future water users would be unwilling to make the significant financial outlays necessary to irrigate new lands. The State of Idaho did not contemplate use of the subordination set aside for water users whose lands were adequately covered by existing water rights. Therefore, Mr. Shaw's testimony showed that the State of Idaho intended the subordination protections for future irrigation use found in Section 10.b.6 would be for water users developing new acres of irrigation.

Mr. Shaw also testified about the technical analysis he performed to help the parties develop the subordination set-aside quantities listed in Section 10.b.6. The technical analysis he performed elucidates the parties' intent that the Section 10.b.6 subordination protections were meant to apply to new lands only. While the 150 cfs was ultimately a negotiated quantity, its roots were in the number of new acres that could be developed for irrigation in the future. Mr.

Shaw testified that the 150 cfs quantity was developed through a technical analysis of lands not irrigated at the time of the agreement but that were susceptible of irrigation because of their slope and proximity to an available water source. If the parties had intended the subordination protection of Section 10.b.6 to apply to supplemental water for lands already covered by existing water rights the technical analysis would not have focused solely on undeveloped acres. This technical analysis demonstrates that it was the intent of the parties that the subordination set aside was for new development only.

Mr. Herbst's testimony confirmed that 74-16008 will not be used to irrigate any new lands. Mr. Herbst did not present any evidence regarding the meaning of the terms of Section 10.b.6. Mr. Herbst did not refute Mr. Shaw's testimony or present any evidence demonstrating it was the parties' intent that the Section 10.b.6 subordination protections apply to water rights seeking to irrigate lands already covered by existing water rights. The parties' interpretation of the terms of the Partial Decree should be given "great weight" by the hearing officer. *Cottle v. Or. Mut. Life Ins. Co.*, 60 Idaho 628, 631, 94 P.2d 1079, 1080 (1939). The State of Idaho, representing the IWRB, was a party to the Wild and Scenic Stipulation and the evidence presented at the hearing demonstrated it was the intent of the parties that the subordination protections of Section 10.b.6 for irrigation uses apply only to water users developing new acres of irrigation.

**III. It is not in the Local Public Interest for Water Right Application 74-16008 to Enjoy the Subordination Protections of Section 10.b.6.**

Allowing a water right that has a diversion rate of more than 0.02 cfs of water per acre and does not develop new acres of irrigation to enjoy the subordination protections of Section 10.b.6 is not in the local public interest. A diversion rate of 0.02 cfs of water per acre is a requirement under the plain language of Section 10.b.6, but it also makes sense within the larger

context of Idaho's policy for the conservation of water resources of the state. As noted in the Final Order Approving in Part and Rejecting in Part Application for Permit 74-16004 in the name of Allan and Betty Purcell (Dec. 31, 2015) ("Purcell Order") it is not in the local public interest to "appropriate the limited supply of water available for new development from the Main Salmon and its tributaries" for "supplemental irrigation use . . . especially when existing irrigation rights already exceed 0.02 cfs per acre." *Id.* Water users seeking to use more than 0.02 cfs of water per acre must "first demonstrate efficient use of water through modern irrigation practices before they can be approved." Purcell Order at 5. It is not in the local public interest to allow the subordination set aside to be used on lands already covered by base water rights which allow 0.03 cfs of water per acre.

In addition, it is not in the local public interest to:

"[A]llocate 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 project* or other new beneficial uses in the basin. . ."

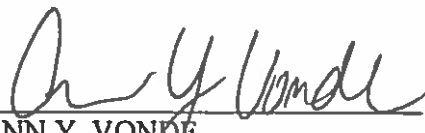
Emphasis added. Purcell Order at 4. Allowing the subordination protections of Section 10.b.6 to be exhausted by water users whose lands are already adequately covered by existing water rights would not be in the local public interest because it would adversely "[a]ffect the local economy of the local area." IDAPA 37.03.08.045.01.e. Mr. Shaw's testimony demonstrated that the purpose of the subordination protections of Section 10.b.6 was to provide a water source for development of new irrigation projects that would could not be curtailed by the Wild and Scenic water rights. It was important for the State of Idaho to ensure that new agricultural economic development could continue to occur in the Salmon River basin. Using up the subordination protections on irrigation uses, such as Mr. Herbst's, that do not develop any new acres would stymie new

economic development by discouraging farmers and ranchers from investing in new irrigation projects. Therefore, it is not in the local public interest to allow water right application 74-16008 to enjoy the subordination protections of Section 10.b.6.

**Conclusion**

Water right application 74-16008 cannot enjoy the benefits of subordination under Section 10.b.6 of the Partial Decree because (1) water right application 74-16008 will permit the applicant to use 0.03 cfs of water per acre on the authorized place of use, and (2) water right application 74-16008 will not irrigate any new acres/land that has not been previously irrigated. In addition, allowing water right 74-16008 to enjoy the benefits of subordination under Section 10.b.6 would not be in the local public interest because it would allocate a portion of the limited subordination set aside to lands already adequately covered by existing water rights and would discourage new agricultural economic development in the Salmon River basin.

DATED August 5, 2016.

  
ANN Y. VONDE  
Deputy Attorney General

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Department of Water Resources  
Eastern Region

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 5th day of August 2016, I caused to be served a true and correct copy of the foregoing IWRB'S POST-HEARING BRIEF by placing a copy thereof in the manner listed below:

1. Original to:

|                                                                                                                     |                                                                                                                                                                                                                                                                     |
|---------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Idaho Department of Water Resources<br>Attn: James Cefalo<br>900 N. Skyline Dr. Ste. A<br>Idaho Falls ID 83401-1718 | <input type="checkbox"/> U.S. Mail, postage prepaid<br><input type="checkbox"/> Hand Delivery<br><input type="checkbox"/> Federal Express<br><input type="checkbox"/> Facsimile: _____<br><input checked="" type="checkbox"/> Email:<br>James.Cefalo@idwr.idaho.gov |
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2. Copies to

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| Rob Harris<br>Holden, Kidwell, Hahn & Crapo PLLC<br>P.O. Box 50130<br>1000 Riverwalk Dr., Ste. 200<br>Idaho Falls ID 83405 | <input checked="" type="checkbox"/> U.S. Mail, postage prepaid<br><input type="checkbox"/> Hand Delivery<br><input type="checkbox"/> Federal Express<br><input type="checkbox"/> Facsimile: _____<br><input checked="" type="checkbox"/> Email: rharris@holdenlegal.com |
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