

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)	
FOR PERMIT NO. 74-16008)	ORDER SETTING DEADLINES
<u>IN THE NAME OF LYNN HERBST)</u>	FOR LEGAL BRIEFING

On December 4, 2013, Lynn Herbst filed Application for Permit 74-16008 with the Idaho Department of Water Resources ("Department"), seeking a permit to divert wastewater and water from springs for irrigation use. The application stated that the spring and wastewater sources were tributary to Agency Creek.

The applications were advertised to the public and protests were filed by the Idaho Water Resource Board ("IWRB"), the Idaho Department of Fish & Game ("IDFG"), and Lemhi Irrigation District. Ann Vonde with the Idaho Attorney General's Office represents IWRB and IDFG in this contested case.

The Department has conducted multiple conferences with the parties in an attempt to informally resolve the issues of protest. Recently, the parties identified a legal question that, if answered, could assist the parties in their settlement negotiations. The parties have requested that the hearing officer establish a briefing schedule to address the legal question. Once the briefing period closes and an opinion is issued, the Department will conduct another status conference to determine whether an administrative hearing is needed. Parties are not required to participate in the legal briefing.

ORDER

IT IS HEREBY ORDERED that the parties to this contested case are authorized to file legal briefs addressing the following question:

The Partial Decree for general provisions in Basin 74 includes a list of 27 streams which are tributary to the Lemhi River and declares: "Future appropriations of water on the above streams are not considered to be subject to prior downstream rights on the Lemhi River proper." In applications for permit filed on any of these 27 streams or their tributaries, does this general provision alter an applicant's burden (set forth in Idaho Code § 42-203A(5) and the Department's Water Appropriation Rules (IDAPA 37.03.08)) to demonstrate that the proposed water use will not reduce the quantity of water under existing water rights on the Lemhi River?

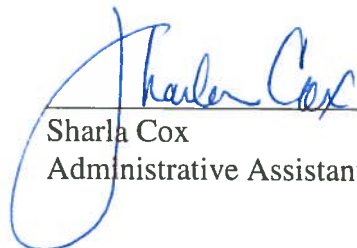
All parties wishing to participate in the legal briefing shall file initial briefs with the Department on or before December 19, 2014. Response briefs are due on or before January 10, 2015. Copies of the briefs shall be served on all other parties to this contested case.

Dated this 24th day of November, 2014.


James Cefalo
Water Resources Program Manager

CERTIFICATE OF MAILING

I hereby certify that on the 24th day of November 2014, I mailed a true and correct copy, postage prepaid, of the foregoing ORDER SETTING DEADLINES FOR LEGAL BRIEFING to the person(s) listed below:


Sharla Cox
Administrative Assistant

US MAIL

RE: Order Setting Deadlines for Legal Briefing (Application 74-16008)

Holden Kidwell Hahn & Crapo
Robert L. Harris
PO Box 50130
Idaho Falls ID 83405-0130

Ann Vonde
Deputy Attorney General
PO Box 44449
Boise, ID 83711-4449

Lemhi Irrigation District
c/o R.J. Smith
260 Withington Creek Road
Salmon, ID 83467

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 730.02)

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

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **Note: the petition must be received by the department within this fourteen (14) day period.** The department 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 with the Director. Otherwise, this preliminary order will become a final order of the agency.

REQUEST FOR HEARING

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

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, requests 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 IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

FINAL ORDER

The Director 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.