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DEPARTMENT OF
WATER RESOURCES

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA

Case No. 39576

Subcase No. 63-04927

**MOTION FOR RELIEF UNDER
I.R.C.P., RULE 60(b) AND
MOTION TO FILE LATE
OBJECTION**

COMES NOW, the State of Idaho, by and through the undersigned deputy attorney general, and moves the Court for relief under I.R.C.P., Rule 60(b) from the *Final Order Disallowing Water Right Claims*, (hereinafter the "*Disallowal Order for Basin 63, Part III*") regarding water right no. 63-04927 and for entry of an order allowing the filing of a late objection to the Director's Report recommending disallowal of water right no. 63-04927. The grounds for these motions are as follows:

**MOTION FOR RELIEF UNDER I.R.C.P., RULE 60(b) and
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COPY

1. The Director of the Idaho Department of Water Resources filed the *Director's Report, Irrigation & Other Claims, Basin 63, Part III* on December 20, 2006 and recommended that water right no. 63-04927 be disallowed because no beneficial use was found. The Idaho Department of Fish and Game (hereinafter "IDF&G") is the claimant for water right no. 63-04927.

2. Walton C. Poole, Ph.D. (hereinafter "Dr. Poole"), IDF&G staff biologist, coordinates with the Office of the Idaho Attorney General regarding the Snake River Basin Adjudication. The IDF&G failed, through inadvertence, mistake, and/or excusable neglect, to file an objection to the recommended disallowal of water right no. 63-04927. *Affidavit of Walton C. Poole, Ph.D. Dated June 9, 2009*, at 2.

3. The Snake River Basin Adjudication District Court (hereinafter the "SRBA District Court") entered on March 19, 2009 its *Final Order Disallowing Water Right Claims* for Basin 63, Part III (hereinafter "*Disallowal Order for Basin 63, Part III*"). Water right no. 63-04927 was on the list of disallowed claims in the *Disallowal Order for Basin 63, Part III*.

4. Water right no. 63-04927 is a water right claimed for fish propagation in Duff Lane Pond near the City of Middleton, Idaho. Dr. Poole conducted additional research regarding the use of this site by IDF&G for fish propagation storage after the SRBA District Court entered its *Disallowal Order for Basin 63, Part III*. Attachments I through VII from this research are attached to his affidavit, and the facts from these documents may be summarized as follows:

A. Walter J. & Nellie M. McFarland sold the following parcel to the State of Idaho, Department of Highways, on March 10, 1956:

A rectangular parcel of land being all of the S½N½ of the NW¼SW¼ of Section 9, Township 4 North, Range 2 West, Boise Meridian, and containing 9.8 acres, more or less, excluding a strip of land 12.5 feet wide

along the West side of the above described land being present road right of way.

Attachment I: Deed Dated March 10, 1956 from Walter J. & Nellie M. McFarland to the State of Idaho. Canyon County Instrument No. 431418.

- B. The above tract is a former material source, nearly depleted and filled with sub-surface water. The tract is located one mile east and one-quarter mile south of Middleton on Highway 44. The resulting pond is now commonly referred to as "Duff Lane Pond."

Attachment II: Letter Dated April 5, 1971 from O. B. White to Gordon C. Trombley.

Attachment VI: Memo dated May 2, 1964 from William Platts to James C. Simpson.

- C. The IDF&G contacted fisherman about fishing in Duff Lane Pond, as early as May 2, 1964, and IDF&G's memo described the conditions as follows:

I sampled the bass population in the Duff Lane Pond and found they are averaging about 11 inches and are in excellent shape. Very few small ones can be observed.

I talked with a fisherman from Boise who was fishing the pond and he informed me that last year he caught about 40 bass from the pond and they averaged about 10 inches. He remarked the bass this year are running about 1 inch larger.

Because the pond is supporting a good fishing population of bass and the pond is easy to seine – maximum depth 7 feet – **I would recommend the pond, for the future be managed for a bass fishery and bass supply for stocking.**

Attachment VI: Memo dated May 2, 1964 from William Platts to James C. Simpson (emphasis added).

- D. John R. Woodworth, Director of the Idaho Fish and Game Department wrote on February 23, 1971 the State Highway Engineer about Duff Lane Pond. He stated:

We understand that the Highway Department is the owner of an excavated gravel pit in nonuse located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 9, T. 4

N., R. 2 W., B. M., which has filled with percolating ground waters. The pond at one time was privately stocked with Black Bass and Perch and is presently used by the public as a fishing site.

One of our Biologists, Mr. Bill Webb, reports that the area is in need of policing for litter and that the pond has been used to some extent as a dump area for used tires. . . . Should the Highway Department consider this pit to be expended or surplus to its needs, the Fish and Game Department would be willing to pay the cost of disposal, . . . and to pay to the Highway Department the sum of \$10.00.

Attachment VII: Letter Dated February 23, 1971 from John R. Woodworth to Ellis L. Mathes.

- E. The Idaho Board of Highway Directors agreed to the transfer at their regular meeting on March 23, 1971.

Attachment II: Letter Dated April 5, 1971 from O. B. White to Gordon C. Trombley.

- F. The State Land Board approved this transfer at their meeting on June 8, 1971.

Attachment III: Letter Dated June 11, 1971 from W. J. Mitchell to O. B. White.

Attachment IV: Letter Dated June 17, 1971 from O. B. White to Gordon C. Trombley.

- G. The IDF&G was notified of this transfer in a letter dated August 10, 1971.

Attachment V: Letter Dated August 10, 1971 from Jack E. Gillette to Robert L. Salter.

- H. The newly discovered evidence described above shows a use of Duff Lane Pond as a source of Black Bass for fish propagation by the IDF&G prior to May 20, 1971.

5. Attached hereto is the IDF&G's late *Objection* for the Court's consideration.

6. I.R.C.P. 60(b) provides that a final judgment may be set aside due to mistake, inadvertence, and/or excusable neglect. Here, the failure to find this additional history regarding Duff Land Pond constitutes a mistake, inadvertence, or excusable neglect. Most the information

that is described above was obtained by a search of internet files maintained by the Idaho Department of Lands. The files only became accessible in this manner recently. It is in the best interest of justice that the *Disallowal Order for Basin 63, Part III*, as it concerns water right no. 63-04927, be set aside in accordance with I.R.C.P. 60(b) and that IDF&G be granted leave to file its attached late *Objection*.

7. These motions are supported by the *Affidavit of Walton C. Poole, Ph.D., Dated June 9, 2009*.

8. IDF&G reserves the right to file a memorandum in support of these motions consistent with the Idaho Rules of Civil Procedure.

Oral argument is requested on these matters.

PRAYER FOR RELIEF

WHEREFORE, the State of Idaho, Department of Fish and Game, requests that the Court enter an Order that does all of the following:

1. Sets aside the *Disallowal Order for Basin 63, Part III* as it concerns water right no. 63-04927;
2. Grants the IDF&G leave to file the attached late *Objection*; and
3. Grants such other or further relief that the Court deems appropriate and proper.

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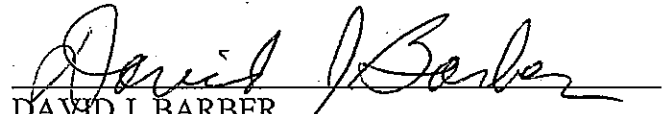
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RESPECTFULLY SUBMITTED this 9th day of June 2009.

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division


DAVID J. BARBER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of June, 2009, the foregoing **MOTION FOR RELIEF UNDER I.R.C.P., RULE 60(b) AND MOTION TO FILE LATE OBJECTION** was filed or served on the following persons by the indicated methods:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

- ☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Federal Express
☐ Facsimile: (208) 736-2121
☐ Statehouse Mail

2. Copies to

STATE OF IDAHO, Department of
Fish and Game
600 South Walnut Street
P.O. Box 25
Boise, ID 83707

- ☐ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Federal Express
☐ Facsimile: _____
☒ Statehouse Mail

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

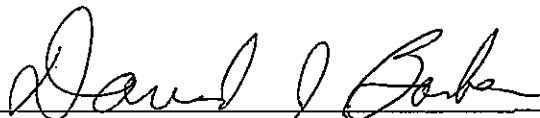
- ☐ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Federal Express
☐ Facsimile: _____
☒ Statehouse Mail

United States Department of Justice
Environment and Natural Resource
Division
550 West Fort Street, MSC 033
Boise, ID 83724

- ☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Federal Express
☐ Facsimile: _____
☐ Statehouse Mail

Chief of Natural Resource Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83711-4449

Not Applicable


Deputy Attorney General