



2. On October 15, 2008, the Homeowners Association accepted the proposed offer. *See* Affidavit of David I. Stanish, Ex. B.

3. On October 16, 2008, the parties jointly filed stipulations to continue the pending matters in these subcases, recognizing that the parties had “entered into a settlement agreement that contemplates full resolution of these matters . . . .” *See* Stipulation to Continue Hearing on Motion to Set Aside Partial Decree in Subcase No. 21-02100 and Stipulation to Continue Hearing on State of Idaho’s Motion to Alter and Amend Special Master’s Recommendation in Subcase No. 21-10015 at 2 (Oct. 16, 2008). The resolution was, however, “contingent upon completion of certain Idaho Department of Water Resources (IDWR) administrative proceedings contemplated therein.” *Id.*

4. As contemplated by the October 14, 2008 offer of judgment, the IDFG filed an application to transfer the point of diversion of water right no. 21-02100.

5. On March 2, 2009, the IDWR approved the IDFG’s transfer. *See* Affidavit of David I. Stanish, Ex. C.

6. On January 20, 2010, the IDFG sent proposed SF-5s to the Homeowners Association in order to conclude these subcases. Affidavit of David I. Stanish, Ex. D.

7. On February 4, 2010, counsel for the Homeowners Association filed his motion to withdraw as counsel.

8. Prior to the filing of Ms. Lana Esplin’s February 3, 2010 document entitled “New Evidence Submitted for Subcases 21-02100, 21-10015” with the SRBA District Court, the IDFG did not receive any notice from the Homeowners Association that the Homeowners Association intended to void the October 14, 2008 offer of judgment. *See* Affidavit of David I. Stanish at 1–2.

## I. MOTION FOR ORDER TO SHOW CAUSE

The Affidavit of David I. Stanish filed concurrent herewith and the exhibits attached thereto make a prima facie showing for an order requiring the Homeowners Association to submit to the entry of the January 20, 2010 proposed SF-5s. The IDFG has complied with its obligations under the October 14, 2008 offer of judgment entered into between the IDFG and the Homeowners Association, and thus, the Homeowners Association is bound to reciprocate. This Court should order the Homeowners Association to show cause as to why it should not be held to the terms of the October 14, 2008 offer of judgment that it agreed to.

The Homeowners Association's objections are irrelevant to its obligations under the October 14, 2008 offer of judgment. The Homeowners Association argues that the agreement was "based on wrong or withheld information . . . ." New Evidence Submitted for Subcases 21-02100, 21-10015 at 1 (Feb. 3, 2010). That assertion was an apparent reference to a measurement taken on the stream in question, which indicated that there was less water in the stream than authorized by the IDFG's water right. Regardless of what the measurement found, the October 14, 2008 offer of judgment was never contingent upon the results of any stream measurement. Moreover, beneficial use, not water availability, is the measure of a water right in the state of Idaho.

The deal that the parties entered into was simple:

1. The Parties shall stipulate to continue the pending *Motion to Set Aside Partial Decree* in SRBA subcase no. 21-02100 and *Motion to Alter and Amend Special Master's Recommendation* in SRBA subcase no. 21-10015, see Attachment I;
2. IDFG shall file with the Idaho Department of Water Resources (IDWR) an application to transfer water right no. 21-02100 that is consistent with that set forth in Attachment II;
3. Upon IDWR approval of an application to transfer water right no. 21-02100 that is consistent with that set forth in Attachment II: (a) the Parties

agree to enter SF-5s in subcase nos. 21-02100 and 21-10015 consistent with that set forth in Attachments III and IV; and (b) IDFG shall file with the Fremont County Clerk's Office a quitclaim deed forever releasing any and all right, title, and/or property interest related to the historic diversion works for water right no. 21-02100 appurtenant to the property owned and/or governed by the North Henry's Lake Homeowners Association.

Affidavit of David I. Stanish, Ex. A at 1-2.

The IDFG filed its application to transfer water right no. 21-02100 on December 10, 2008. On March 2, 2009, the Idaho Department of Water Resources approved the IDFG's transfer. *See* Affidavit of David I. Stanish, Ex. C. Pursuant to the offer of judgment, the Homeowners Association was required to object to the transfer within sixty (60) days of its issuance:

In the event . . . IDWR issues a decision, preliminary or final, on the application to transfer water right no. 21-02100 that is inconsistent with that set forth in Attachment II, the Parties agree that this agreement shall be voidable upon the discretion of either Party. The exercise of such discretion . . . must be served upon the other Party in writing within sixty (60) days of the issuance of such offending action or decision.

Affidavit of David I. Stanish, Ex. A at 2. The IDFG did not receive any notice from the Homeowners Association that the Homeowners Association intended to void the October 14, 2008 offer of judgment until February 3, 2010 when Ms. Lana Esplin filed her "New Evidence Submitted for Subcases 21-02100, 21-10015." *See* Affidavit of David I. Stanish at 2.

The Homeowners Association's attempt to now avoid its obligations under the October 14, 2008 offer of judgment is inexcusable and unwarranted. The Court should hold the Homeowners Association to the agreement that it entered into and should enter a special master's recommendation consistent with the SF-5s attached as Exhibit D to the Affidavit of David I. Stanish.

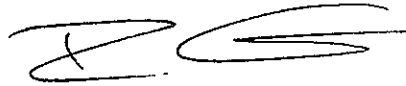
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## II. RESPONSE TO MOTION TO WITHDRAW

The IDFG has no objection to Mr. Rigby's withdrawal as counsel for the Homeowners Association. However, due to the fact that Mr. Rigby represented the Homeowners Association leading up to the October 14, 2008 offer of judgment, the interests of justice and judicial economy would be best served by having Mr. Rigby raise any objections that he may have to the authentication of the October 14, 2008 offer of judgment and to the authentication of the Homeowners Association's acceptance thereof at the March 3, 2010 status conference set in these matters prior to his withdrawal.

RESPECTFULLY submitted this 8th day of February 2010.



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DAVID I. STANISH  
Deputy Attorney General  
*Counsel for the Idaho Department of Fish  
and Game*

## CERTIFICATE OF SERVICE

I certify that on this 8th day of February 2010, I caused to be served the original and/or copy of this **APPLICATION FOR ORDER TO SHOW CAUSE and RESPONSE TO MOTION TO WITHDRAW** on each of 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

SPECIAL MASTER BILYEU  
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  
☐ Email:  
☐ Statehouse Mail

NORTH HENRY'S LAKE  
HOMEOWNERS ASSOCIATION  
REPRESENTED BY:  
JERRY RIGBY  
25 N 2<sup>ND</sup> E  
P.O. BOX 250  
REXBURG, ID 83440-0250

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

WALT POOLE  
IDAHO DEPARTMENT OF FISH  
AND GAME  
600 S. WALNUT  
BOISE, ID 83712

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

IDWR DOCUMENT DEPOSITORY  
PO BOX 83720  
BOISE, ID 83720-0098

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

