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DEPARTMENT OF
WATER RESOURCES

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Idaho State Bar Number 7018

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

A. Subcase: 22-13915

**MOTION TO SET ASIDE PARTIAL DECREE FOR
WATER RIGHT NO. 22-13915 PURSUANT TO I.R.C.P.
60(b) AND MEMORANDUM IN SUPPORT**

Cherise Dodson, Gary Black, GNJ Properties, LLC, Idaho Investment Group, LLC, IGO Investments 1, LLC, KPW Holdings, LLC, Lanelle Peck, Michael Dodson, Pensco Trust Company, RIF Holdings 1, LLC, Robert Elmer, RYMI Investments, LLC, Stillwater Holdings, LLC, Stoly Associates, LC, Travis Gunnell, Trevor Peck and W. Steven Gunnell, (hereinafter, the "Claimants") by and through his counsel of record, Robert L. Harris of Holden, Kidwell, Hahn & Crapo, PLLC, hereby move this court to set aside the partial decree for Water Right No. 22-13915 pursuant to I.R.C.P. 60(b).

COPY

For the reasons set forth below, the partial decree should be set aside and amended to fully incorporate the provisions of an administrative decision entered for the parent right of 22-13915 on November 6, 1990, a copy of which is attached hereto as Exhibit A (hereinafter, the "Transfer Order"). Full incorporation of the Transfer Order was inadvertently not included in 22-13915 relative to the quantity and season of use elements of this water rights. These are the only elements that need to be amended pursuant to this motion, and as set forth below, the quantity element should be increased to 2.0 cfs over the currently-decreed .33 cfs amount (the 2.0 cfs is the maximum that can be diverted in conjunction with the "parent" right to 21-13915, which is 22-683A), and the season of use for irrigation use should add the ability to divert 2.0 cfs between 4/15 and 6/30, and between 9/1 and 10/31. The .33 cfs limitation for the season of use between 7/1 and 8/31 should remain the same as is currently decreed. The rationale for including these amendments is set forth below.

I. Idaho Rule of Civil Procedure 60(b).

Because the partial decree for the above water rights was issued less than six months prior to this motion to set it aside, Rule 60(b)(1), is applicable in this matter. The partial decree for Water Right No. 21-13915 was entered on August 4, 2010, and therefore, this motion is timely under Rule 60(b)(1). Rule 60(b)(1) provides that "a court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . ." The Claimants assert that there was either a mistake, inadvertence, surprise, and/or excusable neglect made by them and their counsel, and others involved in this matter, in failing to include the entirety of the Transfer Order. Indeed, Claimant's counsel was made

aware of the problem through communication with Steve Spencer of the United States Forest Service, once the water right was being administered after its entry of partial decree.

As set forth below, the mistake was quite understandable given the contents of the Transfer Order, and pursuant to Rule 60(b), the partial decree for Water Right No. 21-13915 should be set aside and amended as further set forth below.

II. BACKGROUND AND ARGUMENT.

This above subcase involves perhaps one of the most confusing administrative orders issued by IDWR in the recent past. In light of this order, it would not be unusual that one of the components of this decision was left out of the partial decree for this water right, wherein the parties to this subcase have made an oversight.

On January 5, 1989, Gary Grandy and Dick Gebhard filed an application for transfer to add a point of diversion to Water Right No. 22-683 on Pole Creek described as the NE1/4NW1/4SW1/4 of Section 26, Township 3 North, Range 45E (hereinafter, the "Upper POD"). The proposed new point of diversion was located on Forest Service property. Grandy and Gebhard already had a point of diversion on Pole Creek located in the SW1/4NW1/4NW1/4 (Lot 4) of Section 26, Township 3N, Range 45E (located on private property), but wanted to add a pipeline further up the creek to better supply their water right.

The transfer was protested by the landowner where the Upper POD was to be located, the United States Forest Service. The transfer application was later amended by Grandy and Gebhard to provide that only .33 cfs of Water Right No. 22-683 would be diverted from the new Upper POD between July 1st and August 31st of each year. Other amendments were also made relative to the

recreational storage component of the water right. However, the key amendment was the .33 cfs limitation at the Upper POD between July 1st and August 31st.

The parties stipulated to entry of a proposed decision without a hearing. Eventually, IDWR Director Keith Higginson issued a Final Memorandum Decision and Order—the “Transfer Order.” The Transfer Order held the following, with the key conditions relevant for this motion bolded:

IT IS, THEREFORE, HEREBY ORDERED that Application for Transfer of Decree 22-00683 is APPROVED subject to the following conditions:

1. A special use permit must be obtained from the U.S. Forest Service prior to construction.
2. **The combined diversion rate of diversion from the old and new points of diversion shall not exceed 2.0 cfs.**
3. **No more than 0.33 cubic feet per second can be diverted from the new point of diversion between July 1 and August 31 of each year.**
4. The total volume of water diverted from the two points of diversion approved by this transfer shall be limited to the volume traditionally diverted from the old point of diversion.
5. **The priority date for that portion of the right diverted from the new point of diversion is November 2, 1989.**
6. The priority date for the wintertime recreational use is November 2, 1989.
7. The rights changed by this transfer shall be subject to any established water rights with earlier dates of priority.
8. Use of water under this permit is subject to control by the watermaster of Water District 01, Snake River.
9. The place of use pursuant to this application for transfer is as follows:

T3N, R45E	Section 22	NE1/4SE1/4	38 acres
		NW1/4SE1/4	28 acres
		SE1/4SE1/4	3.4 acres
T3N, R45E	Section 23	SW1/4SW1/4	6
Total Number of acres irrigated			- 79.4

Transfer Order at 5-6.

In determining how to best decree Water Right No. 22-683 in the SRBA, the most difficult part of the Transfer Order to incorporate was Condition No. 5, which gave a new priority date to the water diverted at the Upper POD. In determining how best to do this, Ernie Carlsen to IDWR determined that it would be simplest to create a new offspring water right with the November 2, 1989 priority date. This was determined to be the best course of action, and the result was a split of Water Right No. 22-683, which was numbered 22-13195. The remainder of Water Right No. 22-683 was renumbered as 22-683A.

The current partial decree for 22-13195 is accurate in nearly every respect. It included the Upper POD as its authorized point of diversion, while 22-683A only lists the Lower POD. *See* Condition No. 3 of the Transfer Order. It contains a combined limits remark limiting the diversion of 22-13195 and 22-683A to 2.0 cfs. *See* Condition No. 2 of the Transfer Order. It contained a diversion limit and season of use limit of .33 cfs between July 1st and August 31st of the irrigation season. *See* Condition No. 3 of the Transfer Order. It further included the later priority date of November 2, 1989. *See* Condition No. 5 of the Transfer Order.

Unfortunately, the part of the Transfer Order that was **not** incorporated into 22-13915 was that the Transfer Order did allow use of up to 2.0 cfs from the Upper POD prior to July 1st, and after August 31st. Because Water Right No. 22-683A does not have the Upper POD listed as an authorized point of diversion, it cannot be amended to incorporate this part of the Transfer Order, and furthermore, even if it could, the priority date would not be correct as it would be much earlier than the Transfer Order's mandate that any water diverted at the Upper POD has a November 2, 1989 priority date. Therefore, the only means of fully incorporating pre-July 1st and post-August 31st

use at the Upper POD is to amend Water Right No. 22-13195 to include an increased diversion rate of 2.0 cfs, but to limit the diversion rate in two important respects: First, that between July 1st and August 31st, the rate is limited to .33 cfs; Second, that diversion of water at the Upper POD and Lower POD is limited to 2.0 cfs under both 22-683A and 22-13195 between April 15th (the beginning of the irrigation season) and June 30th (Condition 3 of the Transfer Order) and between September 1st (Condition 3 of the Transfer Order) and October 31st (the end of the irrigation season).

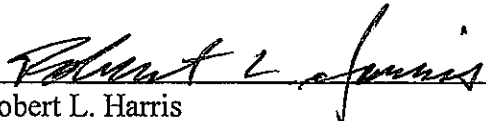
The Claimants propose that the lined out and handwritten changes set forth on Exhibit B attached hereto be incorporated into the partial decree.

The legal basis for inclusion of these additional provisions is clearly that the Transfer Order is *res judicata* on this issue, as the water right at issue here was amended administratively, and pursuant to the SRBA's charge to accurately inventory water rights in the Snake River Basin, every component of that administrative change must be included in the SRBA partial decree. There is therefore a good faith basis and meritorious position relative to this motion, and the Claimants request that the partial decree be set aside.

III. CONCLUSION.

For the reasons set forth above, this court has legal authority to set aside the partial decree for Water Right No. 22-13915 under Idaho Rule of Civil Procedure 60(b), and the Claimants request that this be done and that the matter be remanded to IDWR for a new recommendation for partial decree as set forth in Exhibit "B."

Dated this 2nd day of February, 2011.


Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, PLLC

CERTIFICATE OF MAILING

I certify that on this ^{2nd day Feb. 11} ~~7th~~ day of April, 2009, I mailed the original and copies of this form, including all attachments, to the following persons by mailing the original and/or copies, postage prepaid and addressed as follows:

1. Original to:

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

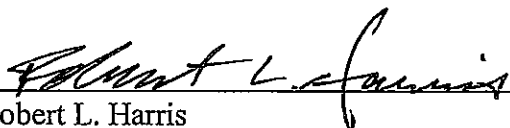
2. Copies to:

PARTIES:
Sean R. Moulton
P.O. Box 631
Driggs, ID 83422

IDWR Document Depository
P.O. Box 83720
Boise, ID 83720-0098

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

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


Robert L. Harris

G:\WPDATA\URLH\13812 Crystal Springs\01 Triangle G Ranch\Set Aside PD.MOT&MEMO.wpd:cdv

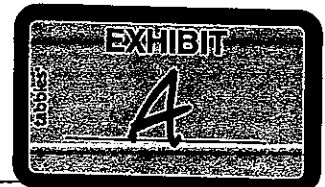
BEFORE THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR	)	
	)	
TRANSFER OF DECREE NO. 22-00683	)	
	)	FINAL MEMORANDUM DECISION
Source: Pole Creek	)	AND ORDER
County: Teton	)	
	)	

Following a hearing of protests against application for transfer of decreed right no. 22-00683, and issuance of a Proposed Decision, Gary W. Grandy and Dick Gebhard (applicants) filed exceptions to the Proposed Decision. The applicants took exception to the Department's failure to address a component of the transfer seeking diversion of 0.05 cfs for a recreational pond. After review of the file, I have determined that the exception is legitimate, and the following Findings of Fact and Conclusions of Law address and authorize the recreational use:

FINDINGS OF FACT

1. On January 5, 1989, Gary Grandy and/or Dick Gebhard applied to the Department of Water Resources for transfer of a point of diversion of a decreed water right numbered 22-00683. The application sought to add a diversion on Pole Creek upstream from the original point of diversion at a legal description listed as the NE1/4NW1/4SW1/4, Section 26, Township 3 North, Range 45 East. This proposed point of diversion is located on ground administered by the United States Forest Service (USFS). The original place of use for this decree would remain unchanged. The application was amended after the conference of September 7,



1989, to specify that only 0.33 cubic feet per second of the 2.0 cfs right would be diverted from the new point of diversion during a period of use from July 1, to August 31 of each year. The description of the water source was also amended to include a spring tributary to Pole Creek. The amendment also proposed diversion of 0.05 cfs from October 1 through May 1 for recreational purposes. The water will be used to maintain levels in a recreational pond.

2. A protest against approval of the application for transfer was received from J.S. Tixier, Regional Forester for the USFS.

The protestant raised objections to the addition of a point of diversion by alleging that:

a. The new point of diversion would be a mile inside the boundary of the Targhee National Forest.

b. The new diversion would injure riparian habitat that the Forest Service is responsible to protect under the Multiple-Use Sustained-Yield Act.

3. A conference was held September 7, 1989, in Driggs, Idaho. Both parties agreed to review an amended form of the application for transfer. Both applicant and protestant signed a stipulation for entry of proposed decision without a hearing. The amended application was reviewed by USFS personnel and the protest was left in place.

4. The stream ceases to flow at the present point of diversion beginning in the latter part of July or early August, and remains dry for the remainder of the irrigation season. The applicant submitted information showing that the stream did not dry up in 1930.

5. The stream at the proposed new point of diversion has been measured in August by USFS personnel to still have a flow of approximately 0.33 cubic feet per second.

6. The applicant does not intend to divert a total of more than the original 2.00 cubic feet per second. The applicant will limit diversion from the upper point of diversion to 0.33 cubic feet per second from July 1 to August 31 of each season.

7. The USFS has not recorded water rights for use in the area of the application but protests on the basis of its management responsibility under the National Environmental Policy Act (NEPA). In addition, the applicants lack an approved Special Use Permit from the Forest Service.

8. Forest Service personnel have not assessed the flow requirements or flows available to maintain riparian vegetation.

9. The applicants must reduce the number of acres irrigated under this right to compensate for an out of season diversion of 0.05 cfs to the recreational pond. A continuous diversion of 0.05 cfs over the period from October 1 through May 1 will result in total storage diversion of 18.0 acre-feet of water.

10. In the Teton Basin, the duty of water is approximately 3.0 acre-feet per acre of irrigated land.

MEMORANDUM DECISION AND ORDER

11. The applicants must reduce their irrigated acreage by 6 acres. The applicants have identified the SW1/4SW1/4 of Section 23, T3N, R45E, B.M. as the place of use which should be reduced.

12. The priority of the recreational use must be advanced to the date the application for transfer was filed.

CONCLUSIONS OF LAW

1. Section 42-222 of the Idaho Code (1989 Supp.) provides that ". . . the director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole or in part, or upon conditions (emphasis added), provided water rights are not injured thereby, the change does not constitute an enlargement in use of the original right and the change is in the local public interest as defined in Section 42-203A, Idaho Code."

2. The change in point of diversion seeks to add a second point to divert a specific amount of water which in conjunction with the original point of diversion will not exceed a diversion rate of 2.00 cubic feet per second.

3. Diversion from the proposed upper point of diversion will result in use of water for an additional one to two months beyond the period when water has traditionally been available. The extension of water availability is an enlargement of use unless the transfer is specifically conditioned to prevent enlargement.

4. The total volume of water diverted must be limited to the volume traditionally diverted from the old point of

MEMORANDUM DECISION AND ORDER

2 2

diversion.

5. The date of priority for the new point of diversion and the 0.33 cfs diverted from it must be changed to November 2, 1989, the date the amended transfer was filed, to avoid possible injury to other water rights.

6. The right changed by this transfer must be subject to any recorded, reserved or beneficial use rights with earlier dates of priority.

7. To prevent an enlargement of use, the acreage irrigated must be reduced by 6 acres, and the recreation use priority advanced to November 2, 1989, the date the amended transfer was filed.

ORDER

IT IS, THEREFORE, HEREBY ORDERED that Application for Transfer of Decree 22-00683 is APPROVED subject to the following conditions:

1. A special use permit must be obtained from the U.S. Forest Service prior to construction of the new point of diversion.

2. The combined rate of diversion from the old and new points of diversion shall not exceed 2.0 cfs.

3. No more than 0.33 cubic feet per second can be diverted from the new point of diversion between July 1 and August 31 of each year.

MEMORANDUM DECISION AND ORDER

4. The total volume of water diverted from the two points of diversion approved by this transfer shall be limited to the volume traditionally diverted from the old point of diversion.

5. The priority date for that portion of the right diverted from the new point of diversion is November 2, 1989.

6. The priority date for the wintertime recreational use is November 2, 1989.

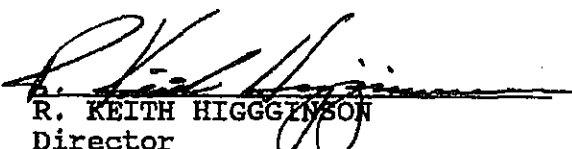
7. The right changed by this transfer shall be subject to any established water rights with earlier dates of priority.

8. Use of water under this permit is subject to control by the watermaster of Water District 01, Snake River.

9. The place of use pursuant to this application for transfer is as follows:

T3N, R45E	Section 22	NE1/4SE1/4	38	acres
		NW1/4SE1/4	28	acres
		SE1/4SE1/2	3.4	acres
T3N, R45E	Section 23	SW1/4SW1/4	6	acres
	Total Number of acres irrigated	-	79.4	

Dated this 6th day of NOVEMBER, 1990.


R. KEITH HIGGINSON
Director

CERTIFICATE OF MAILING

I hereby certify that on this 8th day of November, 1990, I mailed a true and correct copy of this Final Memorandum Decision and Order, postage prepaid, to the following individuals:

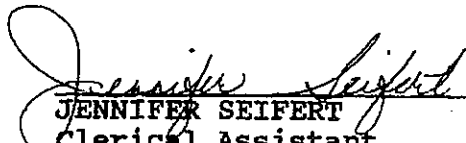
Gary W. Grandy
Box 1111
Petersburg, Alaska 99833

Dick Gebhard
25721 Taladro Circle
Unit #B
Mission Viejo, CA 92691

J.S. Tixier, Regional Forester
324 25th Street
Ogden, UT 84401

IDWR - Eastern Region

Clarence M. Murdock
Forest Service
P.O. Box 777
Driggs, ID 83422


JENNIFER SEIFERT
Clerical Assistant

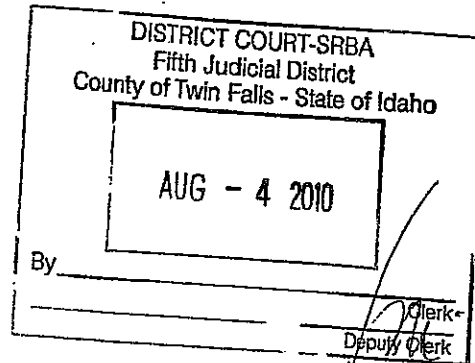
IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA)
) PARTIAL DECREE PURSUANT TO
) I.R.C.P. 54(b) FOR
Case No. 39576)
)
) Water Right 22-13915

NAME AND ADDRESS: CRYSTAL SPRINGS LAND &
CATTLE INC
4581 FORTUNA WAY
SALT LAKE CITY, UT 84124

RICHARD HOWARD GEBHARD
PO BOX 168
VICTOR, ID 83455

CHERISE DODSON
GARY BLACK
GNJ PROPERTIES LLC
IDAHO INVESTMENT GROUP LLC
IGO INVESTMENTS 1 LLC
KPW HOLDINGS LLC
LANELLE PECK
MICHAEL DODSON
PENSICO TRUST COMPANY
RIF HOLDINGS 1 LLC
ROBERT ELMER
RYMI INVESTMENTS LLC
STILLWATER HOLDINGS LLC
STOLY ASSOCIATES.LC
TRAVIS GUNNELL
TREVOR PECK
W STEVEN GUNNELL
4581 FORTUNA WAY
SALT LAKE CITY, UT 84124



SOURCE: POLE CREEK TRIBUTARY: SINKS
QUANTITY: 2.0
9.33 CFS

The rights listed below are limited to a total combined diversion rate of 2.00 cfs. Combined Right Nos: 22-683A, 22-683B, and 22-13915.

The capacity of the storage reservoir is 1.8 AF. The volume of water designated for recreation from storage allows the reservoir to be refilled multiple times up to a total diversion volume of 18 AF during the period of October 10 to May 1.

PRIORITY DATE: 11/02/1989

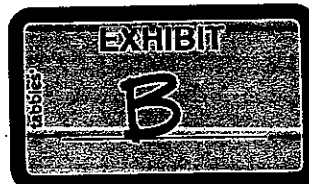
POINT OF DIVERSION: T03N R45E S26 NENWSW Within Teton County

PURPOSE AND
PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Recreation Storage	01-01 TO 12-31	1.80 APY
Irrigation	07-01 TO 08-31	0.33 CFS
Recreation from Storage	10-10 TO 05-01	18.00 APY
Diversion to Storage	10-01 TO 05-01	0.05 CFS

→ 04/15 TO 9/30 : 2.0
9/1 TO 10/31 465

PLACE OF USE: Irrigation
T03N R45E S22 NESE 29.0 Within Teton County
SESE 1.8 NWSE 13.0
S23 SWSW 4.0
47.8 Acres Total



SRBA Partial Decree Pursuant to I.R.C.P. 54(b) (continued)

PLACE OF USE (continued)

Recreation Storage
T03N R45E S23

SWSW

Within Teton County

The rights listed below are limited to the irrigation of a combined total of 47.8 acres in a single irrigation season.
Combined Right Nos.: 22-683A, 22-683B, and 22-13915.
The rights listed below are limited to the irrigation of a combined total of 52.8 acres in a single irrigation season.
Combined Right Nos.: 22-683A, 22-2279, and 22-13915.
Place of use does not include federal public lands.

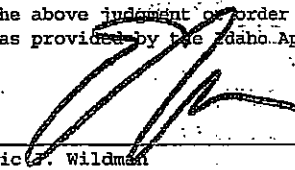
OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

Property is also known as Homestead Entry Survey No. 253 Tract A and B.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.


Eric P. Wildman
Presiding Judge of the
Snake River Basin Adjudication

PLACE OF USE (continued)

Recreation Storage
T03N R45E S23

SWSW

Within Teton County

The rights listed below are limited to the irrigation of a combined total of 47.8 acres in a single irrigation season.

Combined Right Nos.: 22-683A, 22-683B, and 22-13915.

The rights listed below are limited to the irrigation of a combined total of 52.8 acres in a single irrigation season.

Combined Right Nos.: 22-683A, 22-2279, and 22-13915.

Place of use does not include federal public lands.

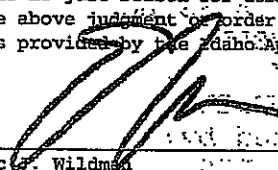
OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

Property is also known as Homestead Entry Survey No. 253 Tract A and B.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.


Eric A. Wildman
Presiding Judge of the
Snake River Basin Adjudication