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DEPARTMENT OF
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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 39576

)
) Subcase Nos. 03-00006, 03-00007, and
) 03-00008
)
) MEMORANDUM IN SUPPORT OF
) MOTION TO SET ASIDE AND AMEND
) PARTIAL DECREES
)
)

The Idaho Water Resource Board (IWRB) submits this memorandum in support of its “Motion to Set Aside and Amend Partial Decrees” in Subcase Nos. 03-00006, 03-00007, and 03-00008. The IWRB seeks to amend the partial decrees: 1) to include a provision in each decree that clarifies the waters and water rights subject to administration to satisfy each respective minimum stream flow water right in times of shortage, and 2) to amend other elements of the partial decrees to provide clarity and to ensure consistency between the description of the three stream flow water rights.

LEGAL STANDARD FOR MOTIONS TO SET ASIDE PARTIAL DECREES

“In the SRBA, a motion to set aside a partial decree is treated similar to a motion to set aside a default judgment and determined in accordance with the criteria set forth in I.R.C.P. 60(b).” *Memo. Decision and Order on Mot. to Set Aside Partial Decree* at 7, SRBA Subcase No. 55-02373 et al. (May 1, 2001); *see also* AO1 at 21. Rule 60(b) provides that a judgment may be set aside for “any other reason justifying relief from the operation of the judgment.” *Id.*¹

The court in determining whether to set aside a default judgment should “apply a standard of liberality rather than strictness and give the party moving to vacate the default the benefit of genuine doubt.” Johnson v. Pioneer Title Co., 104 Idaho 727, 733 (Ct. App. 1983). The court’s decision must “take into account the overriding preference for having a case decided on its merits.” *Order Conditionally Granting Mot. to Set Aside Partial Decrees* at 7, SRBA Subcase Nos. 37-07454 and 37-07602 (December 3, 2003) citing Reeves, 102 Idaho at 272). In making that determination,

[T]he Court must take into consideration that judgments by default are not favored, the general rule in doubtful cases is to grant relief from the default in order to reach a judgment on the merits, and procedural rules other than those which are jurisdictional should be applied to promote disposition on the merits.

Id. “This is a factual determination and is discretionary with the Court.” *Id.* (citing Johnson, 104 Idaho at 732).

ARGUMENT

The SRBA claims for 03-00006, 03-00007, and 03-00008 were prepared by the IWRB in 1988. At the time of the filing of the claims, the Board believed the claims as drafted clearly reflected the Snake River policy of the Idaho State Water Plan. Through the Swan Falls

¹ In addition to stating a reason that justifies setting aside a partial decree, typically the moving party must “allege facts which, if established, would constitute a meritorious defense.” *Memo. Decision and Order on Mot. to Set Aside Partial Decree* at 8, SRBA Subcase No. 55-02373 et al. (May 1, 2001). Since the IWRB seeks to set aside a decree in its favor, the meritorious defense element does not apply in this case.

litigation, however, the IWRB learned that partial decrees 03-00006, 03-00007, and 03-00008 are being interpreted as vesting the IWRB with a right to call against all junior water rights diverting upstream from the ending point, rather than only those junior water rights diverting within the discrete reach to which the minimum stream flow applies. As discussed below, this interpretation of the partial decrees is not consistent with the Idaho State Water Plan and the legislation creating the rights. Thus, the Board filed its “Motion to Set Aside and Amend Partial Decrees” for 03-00006, 03-00007 and 03-00008 to ensure that these minimum stream flow water rights are administered in accordance with the Idaho State Water Plan and applicable state law. The grounds supporting the inclusion of these provisions in each partial decree as well as the proposed amendments to other elements of the partial decrees is set forth below.

I. WEISER MINIMUM STREAM FLOW PARTIAL DECREE 03-00006

As part of the adoption and implementation of the 1976 Idaho State Water Plan, the IWRB established a minimum stream flow water right of 4,750 c.f.s. at the USGS Weiser Gage.² The elements of this water right, therefore, must be decreed consistent with the Snake River policy of the 1976 Idaho State Water Plan, and subsequent amendments thereto.³

² The IWRB’s authority to adopt the Idaho State Water Plan and to create minimum stream flow water rights was challenged in *Idaho Power Company v. State of Idaho*, 104 Idaho 570, 574, 661 P.2d 736, 740 (1983). On December 29, 1976, the IWRB adopted the first comprehensive state water plan, which called for a minimum average daily flow at the USGS Murphy gaging station of 3,300 c.f.s. In 1977, the Idaho Legislature enacted Idaho Code § 42-1736, which provided that the state water plan was not effective until approved by the legislature. Meanwhile, Idaho Power Company filed an action to defend its Swan Falls hydropower water rights and asserted, as part of that litigation, the Murphy minimum stream flow effectuated a taking of its Swan Falls hydropower water rights. This raised the issue of whether the IWRB or the Legislature had constitutional authority to formulate the State Water Plan, *id.* at 572, 661 P.2d at 738, and the Idaho Legislature intervened to defend the constitutionality of Idaho Code § 42-1736. In 1983, the Idaho Supreme Court determined that Section 42-1736 was an unconstitutional interference with the IWRB’s exclusive authority to adopt and implement the Idaho State Water Plan: “The state water plan was adopted by the Water Resource Board December 29, 1976, and was effective as the date of its adoption, without legislative action.” *Id.* at 574, 661 P.2d at 740. In reference to the Murphy minimum stream flow, the Supreme Court stated that its “present holding” had no effect on the Murphy minimum stream flow. *Id.* Since the Weiser minimum stream flow was created by the same provisions of the 1976 Idaho State Water Plan as the Murphy minimum stream flow water right, the holding in the *Idaho Power* case applies with equal force to the Weiser minimum stream flow water right.

³ All subsequent state water plans have included the same description of the Weiser minimum stream flow water right. 1982 Idaho State Water Plan at 42; 1986 Idaho State Water Plan at 35; 1992 Idaho State Water Plan at 28; and

Policy 32 of the 1976 State Water Plan provided that:

The available and unappropriated waters of the Snake River Basin are allocated to satisfy existing uses, meet needs for future growth and development, and protect the environment. The allocations recognize and protect existing water uses and rights. *The water allocations are made by large regions to allow the widest possible discretion in application.*

State Water Plan – Part Two at 115 (*see Exhibit 1 to Affidavit of Clive J. Strong in Support of Motion to Set Aside and Amend Partial Decrees*). In furtherance of this policy, the Board established three minimum daily flows on the Snake River:

“[M]ain stem Snake River flows will be protected against further appropriations and preserved to provide the following average daily flows at the following U.S. Geological Survey stream gaging stations:

<u>Gaging Station</u>	<u>Protected Flow (Average Daily)</u>
Milner	0 cfs
Murphy	3,300 cfs
Weiser	4,750 cfs

Id. at 116.⁴ These minimum stream flows were established for two purposes: 1) to protect a base flow for instream uses; and 2) to identify the amount of unappropriated water available for future development within each region of the Snake River Basin.⁵

The Plan provided that:

Water available in excess of the designated flows for development above an average annual flow basis are:

1996 Idaho State Water Plan at 17 (*see Exhibits 2, 3, 4, and 5 to Affidavit of Clive J. Strong in Support of Motion to Set Aside and Amend Partial Decrees*). The Snake River policy was denominated as policy 32 in the 1976 through 1982 State Water Plans. In the 1986 State Water Plan, the Snake River Policy was renumbered as policy 5.

⁴ The Milner and Murphy minimum stream flow water rights are at issue in subcases 02-00200, 02-00201, 02-00223 and 02-00224.

⁵ The 1982 Idaho State Water Plan explained the allocation process as follows: “The major policy action of the State Water Plan is the allocation of the available and unappropriated waters of the state to meet a selected level of future water use. . . . The allocation procedure is particularly critical in the Snake River Basin where studies have shown that future water uses will exceed supplies. . . . The allocation process as established by the State Water Plan, therefore, is specific for each water use function and will be administratively monitored and enforced. The allocation process is not specific as to where the water uses are to occur other than within the planning regions.” *Id.* at 45.

Gaging Station	Water Presently Available for Appropriation (Average Year)
Milner	1,437,000 acre-feet
Murphy	4,218,700 acre-feet
Weiser	7,821,000 acre-feet

Id. The premise behind these two provisions of Policy 32 of the 1976 Idaho State Water Plan is that the three minimum stream flow water rights would be exercised in a coordinated fashion with each to be limited to its applicable reach. A contrary interpretation – namely that each instream flow water right can call against all junior water rights diverting from water sources tributary to the Snake River above the next upstream instream flow water right– would undermine the Snake River policy of the Idaho State Water Plan.

Under the Swan Falls Settlement, the State of Idaho holds the hydropower water rights in excess of the Murphy minimum flows in trust for the power company and the people of the State of Idaho. *Memorandum Decision And Order On Cross-Motions For Summary Judgment*, entered in Consolidated Subcase 00-92023 on April 18, 2008. The rights held in trust are subject to subordination and to depletion by future beneficial uses. Idaho Code §§ 42-203B and 42-203C (2003). Thus, the effect of the Swan Falls Agreement was “to make available more water for future appropriators and to assist in the expansion of other beneficial uses” above the Murphy Gage. *Miles v. Idaho Power Co.* 116 Idaho 635, 637, 778 P.2d 757, 759 (1989). If the Weiser minimum stream flow water right were allowed to call above Murphy, this objective of the Swan Falls Settlement and the corresponding amendments to the Snake River policy of the Idaho State Water Plan would be frustrated.

In order to be consistent with the Swan Falls Settlement and the Snake River policy of the Idaho State Water Plan and to avoid future conflict over the administration of water right 03-

00006, the IWRB requests that partial decree 03-00006 be set aside and amended to include the following provision:

This water right shall not be administered or enforced against any water rights diverting from the waters of the Snake River or surface or ground water tributary to the Snake River upstream from the Murphy Gage (T01S, R01W, S35, NWSE, Boise Meridian, on the right bank approximately 4.2 miles downstream from Swan Falls Power Plant).

In addition, the IWRB requests that the point of diversion, purpose and period of use and place of use of partial decree 03-00006 be amended as set forth in its “Motion to Set Aside and Amend Partial Decrees.”

As the holder of partial decree 03-00006, the IWRB has the right to voluntarily seek amendment of its decree to conform to the Idaho State Water Plan and applicable state law. *Idaho Power Company v. State of Idaho*, 104 Idaho 575, 587, 661 P.2d 741, 753 (1983). Since the IWRB motion seeks to limit rather than expand partial decree 03-00006, the granting of the motion will not injure other water rights. Indeed, the fact that no one objected to the partial decree confirms that no other water right will be injured.

II. JOHNSON’S BAR MINIMUM STREAM FLOW PARTIAL DECREE 03-00007

In 1978, the Idaho Legislature created the Johnson’s Bar minimum stream flow water right (03-00007) by enactment of Idaho Code § 42-1736A(3).⁶ Subsection 3 established a 5,000 c.f.s. average daily minimum stream flow “[i]n order to retain the stream flows and hydro-base.” This water right was based upon Policy 32 of the 1976 Idaho State Water Plan, which found the

⁶ Although Idaho Code § 42-1736A was held unconstitutional by the Idaho Supreme Court “to the extent that it would enable the legislature to supplant the Board’s power to set out an official statement of Idaho water policy in the ‘State Water Plan . . .,’” 104 Idaho at 574, 661 P.2d at 574 (emphasis added), nothing in the opinion suggested the Idaho Legislature was precluded from enacting legislation to implement policies contained in the 1976 Idaho State Water Plan. Since the Johnson’s Bar minimum stream flow water right is based on Policy 32 in the 1976 Plan, there is no basis for concluding the Legislature lacked authority in 1978 to implement the instream flow water right through Idaho Code § 42-1736A.

maintenance of a 5,000 c.f.s. minimum stream flow at Johnson's Bar to be in the public interest.

1976 Idaho State Water Plan at 116-117.⁷

Policy 32 incorporated the flows provided for in Article 43 of the Hells Canyon FERC License, which provides as follows:

The project shall be operated in the interest of navigation to maintain 13,000 c. f. s. flow into the Snake River at Lime Point (river mile 172) a minimum of 95% of the time, when determined by the Chief of Engineers to be necessary for navigation. Regulated flows of less than 13,000 c. f. s. will be limited to the months of July, August, and September, during which time operation of the project would be in the best interest of power and navigation, as mutually agreed to by the Licensee and the Corps of Engineers. *The minimum flow during periods of low flow or normal minimum plant operations will be 5,000 c. f. s. at Johnson's Bar, at which point the maximum variation in river stage will not exceed one foot per hour.* These conditions will be subject to review from time to time as requested by either party.

See Idaho Power Co., 14 FPC 55 (1955) (emphasis added).

Policy 32 concluded that the three average daily flows at Milner, Murphy and Weiser would "allow the flow requirements contained in the Federal Power Commission License issued for the Hells Canyon hydropower complex to be met without significantly affecting hydropower production." *Id.* at 116. While the Plan found the Article 43 flows to be in "the public interest." *Id.* at 117, the Plan expressly provided these flows would not constrain upstream consumptive uses. *Id.* at 141.⁸

Consistent with Policy 32 of the 1976 Idaho State Water Plan, the IWRB requests that partial decree 03-00007 be set aside and amended to include the following provision:

⁷ All subsequent versions of the Idaho State Water Plan have retained the finding that the 5,000 c.f.s. minimum stream flow at Johnson's Bar is in the "public interest." 1982 Idaho State Water Plan at 42-43; 1986 Idaho State Water Plan at 35-36; 1992 Idaho State Water Plan at 28-29; and, 1996 Idaho State Water Plan at 17-18.

⁸ "Upstream consumptive water use will not be constrained (sic) to provide minimum flow for navigation below Hells Canyon Dam." 1976 Idaho State Water Plan at 141. In the 1992 Idaho State Water Plan the IWRB recognized "that the state has no authority to require releases of stored water by the power company" *Id.* at 28-29.

This water right shall not be administered or enforced against any water rights diverting from the waters of the Snake River or surface or ground water tributary to the Snake River upstream from Hells Canyon Dam, (River Mile 247.5).

In addition, the IWRB requests that the point of diversion, purpose and period of use and place of use of partial decree 03-00007 be amended as set forth in its “Motion to Set Aside and Amend Partial Decrees.”

As the holder of partial decree 03-00007, the IWRB has the right to voluntarily seek an amendment of its partial decree to conform to the Idaho State Water Plan and applicable state law. *Idaho Power Company v. State of Idaho*, 104 Idaho at 587, 661 P.2d at 753. Since the motion seeks to limit rather than expand the Johnson’s Bar water right, granting the motion will not injure other water rights. Indeed, the fact that no one objected to the partial decree confirms that no other water right will be injured.

III. LIME POINT MINIMUM STREAM FLOW DECREE 03-00008

The Lime Point minimum stream flow water right (03-00008) was created through legislative ratification of the IWRB’s March 1, 1985, resolution amending the Idaho State Water Plan. Chapter 204, 1985 Idaho Sess. L. at 514. Consistent with the 1976 and 1982 Idaho State Water Plans, the 1985 amendments to the Plan incorporated Article 43 of the FERC Hells Canyon License for Project 1971 in the Idaho State Water Plan. *Resolution, In the Matter of Policy 32 of the State Water Plan* at 1-2 (March 1, 1985). “By adopting these flows, the Idaho Water Resource Board recognize[d] the importance of minimum flows to downstream uses and [made] their maintenance a matter of state water policy.” *Id.* at 2.⁹ As noted above in the Johnson’s Bar discussion, however, the Snake River minimum stream flows below Hells Canyon Dam were never intended to be a constraint on consumptive water use upstream from Hells

⁹ All subsequent state water plans have found maintenance of the Lime Point minimum flow to be in the public interest. 1986 Idaho State Water Plan at 35-36; 1992 Idaho State Water Plan at 28-29; and, 1996 Idaho State Water Plan at 17-18.

Canyon Dam. 1976 State Water Plan at 141. Indeed, the Plan observed that maintenance of the Lime Point minimum stream flow would “conflict with existing as well as additional upstream development.” *Id.* at 131.¹⁰

An examination of Article 43 of the FERC License for the Hells Canyon Project also establishes that the Lime Point water right has never been viewed as taking precedence over the Johnson’s Bar minimum stream flow. Rather, the Johnson’s Bar minimum stream flow controls “during periods of low flow or normal minimum plant operations.” The Lime Point flow, in contrast, is only required to be met when the Chief of Engineers determines that the flow is necessary “in the interest of navigation.” Since the State Water Plan is based upon Article 43, it follows that the Lime Point water right should be conditioned to be consistent with Article 43.

Finally, subsequent to the IWRB’s filing of the Lime Point minimum stream flow water right claim in the SRBA and the adoption of the 1996 Idaho State Water Plan, the State of Idaho adopted new instream flow water rights in the Salmon River Basin as part of the ratification of the 2004 Snake River Water Rights Agreement. In addition, Salmon River Wild and Scenic federal reserved water rights were decreed by the SRBA District Court. All of these new Salmon River state and federal instream water rights contain subordination provisions that protect existing uses and certain identified future uses. The Lime Point partial decree fails to take into account these changed circumstances and, thus, could be construed, in the future, as overriding the protections afforded to existing and future Salmon River water users through the 2004 Snake River Water Rights Agreement and the Wild and Scenic Water Rights Agreement.

¹⁰ Subsequent state water plans have referred to the Murphy and Weiser minimum stream flows as “management constraints,” while referring to the Johnson’s Bar and Lime Point stream flow water rights as “a matter of state water policy.” 1986 Idaho State Water Plan at 35; 1992 Idaho State Water Plan at 28 (“The minimum flows established for the Snake River at Murphy and Weiser gauging stations are management and permitting constraints The minimum flows established for Johnson’s Bar and Lime Point are . . . a matter of state water policy.”); 1996 Idaho State Water Plan at 17 (the 1996 Plan uses the same language as the 1992 Plan to describe the four rights).

Accordingly, the IWRB requests that partial decree 03-00008 be set aside and amended to include the following provision:

This water right shall not be administered or enforced against any water rights diverting from the waters of the Snake River or surface or ground water tributary to the Snake River upstream from Johnson Bar (River Mile 229.9), and any water rights diverting waters of the Salmon River or surface or ground water tributary to the Salmon River.

In addition, the IWRB requests that the point of diversion, purpose and period of use and place of use of partial decree 03-00008 be amended as set forth in its "Motion to Set Aside and Amend Partial Decrees."

As the holder of partial decree 03-00008, the IWRB has the right to voluntarily seek amendment of its decree to conform to the Idaho State Water Plan, the 2004 Snake River Water Rights Agreement, the Wild and Scenic Rivers Agreement and applicable state law. *Idaho Power Company v. State of Idaho*, 104 Idaho at 587, 661 P.2d at 753. Since the motion seeks to limit rather than expand water right decree 03-00008, the granting of the motion will not injure any other water right. Indeed, the fact that no one objected to the partial decree confirms that no other water right will be injured

CONCLUSION

For the reasons set forth above, the IWRB requests that partial decrees 03-00006, 03-00007, and 03-00008 be set aside and amended to include the proposed provisions for the purpose of clarifying the future administration and enforcement of these minimum stream flow water rights.

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DATED this 15th day of July 2011.

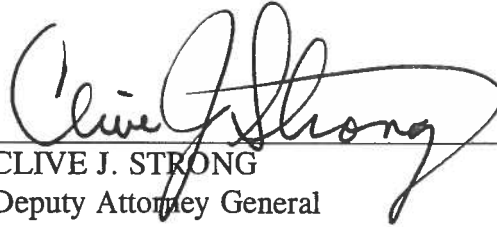
LAWRENCE G. WASDEN

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Chief, Natural Resources Division

A handwritten signature in black ink, appearing to read "Clive J. Strong", is written over a horizontal line. The signature is fluid and cursive, with the last name "Strong" being more prominent.

CLIVE J. STRONG

Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of July 2011, I caused a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION TO SET ASIDE AND AMEND PARTIAL DECREES to be filed with the Court and served on the following parties by the indicated methods:

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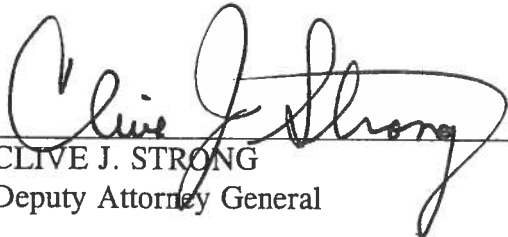
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