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DEPARTMENT OF
WATER RESOURCES

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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	)	Subcase Nos. 21-00014, 21-00015,
	)	21-2153, 21-2159, 21-4006, 21-4007,
	)	21-4008, 21-7151
	)	
Case No. 39576	)	
	)	SUPPLEMENTAL MEMORANDUM OF
	)	AUTHORITY IN SUPPORT
	)	OF MOTION TO SET ASIDE
	)	PARTIAL DECREES
	)	
	)	

The Idaho Department of Fish and Game ("IDFG") by and through its counsel of record, hereby submits this Supplemental Memorandum of Authority in Support of Motion to Set Aside Partial Decrees.

BACKGROUND

On August 26, 2013, IDFG filed its *Motion to Set Aside Partial Decrees*, *Memorandum in Support of Motion to Set Aside Partial Decrees*, *Affidavit of Tom Bassista in Support of Motion to Set Aside Partial Decrees*, and *Affidavit of Ann Y. Vonde in Support of Motion to Set Aside Partial Decrees*. (collectively the “Motion to Set Aside Partial Decrees”), in subcase numbers 21-00014, 21-00015, 21-2153, 21-2159, 21-4006, 21-4007, 21-4008, and 21-7151 (“Partial Decrees”).¹ In the Motion to Set Aside Partial Decrees, IDFG asked this Court to set aside the Partial Decrees under Idaho Rule of Civil Procedure 60(b)(6) because of errors in the Source, Quantity, Period of Use, Point of Diversion, Place of Use, and Purpose of Use elements. On September 25, 2013, this Court held a hearing on the Motion to Set Aside Partial Decrees. At the hearing, the Special Master requested additional argument regarding the applicability of I.R.C.P. 60(b)(6) to this case. IDFG submits this Supplemental Memorandum of Authority in response to the Special Master’s request for additional support for its position that the Partial Decrees should be set aside under I.R.C.P. 60(b)(6).

STANDARD OF REVIEW

In the SRBA, a motion to set aside a partial decree is treated the same as a motion to set aside a default judgment and determined in accordance with the criteria set forth in I.R.C.P. 60(b). Administrative Order No. 1 § 14d (“Parties seeking to modify a partial decree shall comply with I.R.C.P. 60(a) or 60(b)”). Idaho Rule of Civil Procedure 60(b)

¹ On August 30, 2013 IDFG filed an *Amended Motion to Set Aside Partial Decrees* and *Amended Memorandum in Support of Motion to Set Aside Partial Decrees* (“Amended Documents”). The Amended Documents corrected a clerical error in one of the subcase numbers listed in the caption. The Amended Documents did not contain any substantive changes.

permits a court to relieve a party from a final judgment, order, or proceeding.² IDFG brings its Motion to Set Aside Partial Decrees under I.R.C.P. 60(b)(6); any other reason justifying relief from the operation of the judgment. A motion to set aside a partial decree under I.R.C.P. 60(b)(6) must be made “within a reasonable time” from entry of the judgment.

The decision to grant or deny a Rule 60(b) motion for relief from a final judgment rests in the sound discretion of the trial court. *Pullin v. City of Kimberly*, 100 Idaho 34, 36, 592 P.2d 849, 851 (1979). The trial court may grant a Rule 60(b) motion “on a showing of unique and compelling circumstances justifying relief.” *Miller v. Haller*, 129 Idaho 345, 349, 924 P.2d 607, 611 (1996). The standard for setting aside a default judgment takes into account the preference for having a case decided on its merits. In making the determination, the Court must take into consideration that judgments by default are not favored, that the general rule in doubtful cases is to grant relief from the default in order to reach a judgment on the merits, and that procedural rules, other than those which are jurisdictional, should be applied to promote disposition on the merits. *Bunn v. Bunn*, 99 Idaho 710, 711, 587 P.2d 1245, 1246 (1978).

In addition to satisfying the criteria of I.R.C.P. 60(b)(6) and complying with the time requirements, IDFG must also present a meritorious defense. *McFarland v. Curtis*, 123 Idaho 931, 934, 854 P.2d 274, 277 (Ct. App. 1993). The meritorious defense standard requires that IDFG allege facts which, if established, would constitute a defense to the

² Rule 60(b) provides a judgment may be set aside for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . , misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

action, and the facts supporting the defense must be detailed. *Cuevas v. Barraza*, 146 Idaho 511, 516, 198 P.3d 740, 745 (Ct. App. 2008).

ARGUMENT

A. There are unique and compelling circumstances that warrant setting aside the Partial Decrees.

In conjunction with the filing of IDFG's late claims 21-2039 and 21-2170, IDFG and IDWR investigated the complex set of water rights associated with the Sand Creek Wildlife Management Area. During that investigation, IDWR found significant errors in the eight partial decrees that govern water use within the Sand Creek Wildlife Management Area. *Affidavit of Carter Fritschle* at 2.

Partial decrees 21-00014, 21-00015, and 21-4006 contain errors that are inconsistent with Idaho law, that are contrary on-the-ground water use, and that will make the partial decrees unadministrable in the future. These errors present unique and compelling circumstances that warrant setting aside partial decrees 21-00014, 21-00015, and 21-4006 under I.R.C.P. 60(b)(6). In addition, partial decrees 21-2153, 21-2159, 21-4007, 21-4008, and 21-7151 contain significant errors in their points of diversion, places of use, and source elements. *See Affidavit of Carter Fritschle* at 2–3. Because the water rights within the Sand Creek Wildlife Management area create a complex interconnected pond system, the errors in partial decrees 21-2153, 21-2159, 21-4007, 21-4008, and 21-7151 compound with the errors in 21-00014, 21-00015, and 21-4006 to create unique and compelling circumstances that warrant setting aside all eight Partial Decrees under I.R.C.P. 60(b)(6).

1. Unique and compelling circumstances warrant setting aside partial decrees 21-00014 and 21-00015 because they were decreed inconsistently with the Arcadia Reservoir Decree.

Unique and compelling circumstances warrant setting aside partial decrees 21-00014 and 21-00015 because there was no basis for the rights to be decreed inconsistently with the prior *Arcadia Reservoir Irrigation and Canal Co. v. Rosenborough* (“Arcadia Reservoir Decree”). Partial decrees 21-00014 and 21-00015 were originally decreed in the Arcadia Reservoir Decree as natural flow irrigation rights with quantities of 1.0 cfs and 0.2 cfs respectively. Exhibit C to *Affidavit of Ann Y. Vonde*. IDFG acquired the land to which water rights 21-00014 and 21-00015 were appurtenant and filed claims to the water in the SRBA. Exhibit B and D to *Affidavit of Ann Y. Vonde*.

IDFG’s claims for water rights 21-00014 and 21-00015 were in accord with the Arcadia Reservoir Decree. It claimed a quantity of 1.0 cfs for right 21-00014 and a quantity of 0.2 cfs for right 21-00015. Exhibit B and D to *Affidavit of Ann Y. Vonde*. As allowed by I.C. § 42-1425, IDFG sought to change the purpose of use from the consumptive use of irrigation to a non-consumptive use of fish propagation. Exhibit B and D to *Affidavit of Ann Y. Vonde*. IDFG’s claims clearly indicate the rights were being used as natural flow rights, not storage. The claims state the “pond is run-of-creek.” Exhibit B and D to *Affidavit of Ann Y. Vonde*.

When water rights 21-00014 and 21-00015 were recommended and partially decreed, however, the quantity element of the rights were changed from natural flow rights with a quantity listed in cubic-feet per second, to storage rights with quantities listed in acre-feet per year. It is settled law in Idaho that a prior decree is conclusive “as to those persons party to the proceeding.” I.C. § 42-1404(6). A prior decree is

considered the basis for IDWR's recommendation of a water right claim. *Order Designating Basin-Wide Issue 91-13*, 8 SRBA 6, 6.4 (2004). Consequently, the partial decree should be consistent with the former decree or, alternatively, a determination by the Court should be made as to why the two are not consistent. *Id.*

In this case, no determination was made by IDWR or the Court as to why water rights 21-00014 and 21-00015 should be partially decreed with different quantity elements than they were given in the Arcadia Reservoir Decree. Because IDFG is privy to the Arcadia Reservoir Decree, the doctrine of *res judicata* prevents the quantity elements from being changed from natural flow rights to storage rights without an explanation as to why the SRBA decree should be different from the prior decree. IDFG properly claimed these rights as natural flow rights. IDFG has not historically and does not currently use water rights 21-00014 and 21-00015 as storage water rights. Therefore, without explanation or factual basis for why the quantity element should be different, partial decrees 21-00014 and 21-00015 were decreed with quantities that are inconsistent with the Arcadia Reservoir Decree. This error presents a unique and compelling circumstance that warrants setting aside partial decrees 21-00014 and 21-00015.

2. Unique and compelling circumstances warrant setting aside partial decrees 21-00014, 21-00015, and 21-4006 because the points of diversion are not on the decreed source and are inconsistent with the statutory requirement for off-stream reservoirs.

Unique and compelling circumstances warrant setting aside partial decrees 21-00014, 21-00015, and 21-4006 because they were decreed with points of diversion that are not on the decreed source, Sharp Springs Fork of Sand Creek. *Affidavit of Carter Fritschle* at 3. IDFG's claims for 21-00014, 21-00015, and 21-4006 all correctly list the point of diversion at T10N R41E S10 NWSW on Sharp Springs Fork of Sand Creek. *See*

Exhibit B, D, and E *Affidavit of Ann Y. Vonde*. However, the points of diversion were partially decreed in the middle of Pond #4. Without a point of diversion on the decreed source, there is no way for IDFG to get the water from Sharp Springs Fork of Sand Creek in to Pond #4.

In addition the point of diversion for water right 21-4006 is incorrect because it is inconsistent with the statutory requirements for describing points of diversion for off-stream reservoirs. For purposes of water right 21-4006, Pond #4 acts as an off-stream reservoir because it impounds water that is diverted from the Sharp Springs Fork of Sand Creek, through a ditch, and into Pond #4. *See Exhibit A to Affidavit of Ann Y. Vonde*. Under Idaho law, the point of diversion for an off-stream reservoir should be located at “the point at which water is diverted to storage.” IDAPA 37.03.01.060.02.d.iv. Therefore, the point of diversion for partial decree 21-4006 is inconsistent with the requirements of Idaho law because it is not located at the point on Sharp Spring Fork of Sand Creek where water is diverted to Pond #4.

IDWR recognizes that the error in the points of diversion will make these rights difficult to administer. *Affidavit of Carter Fritschle* at 2–3. The errors will make it impossible for IDFG to use these water rights within the Sand Creek Wildlife Management Area because there will be no legal way for IDFG to get water from the creek and into Pond #4. This error must be corrected to make these water rights consistent with Idaho law and to allow IDFG to continue to use the water to manage the Sand Creek Wildlife Management Area for the public.

- 3. Unique and compelling circumstances warrant setting aside partial decrees 21-2153, 21-2159, 21-4007, 21-4008, and 21-7151 because the errors they contain interfere with IDFG’s management of the Sand Creek Wildlife Management Area.**

Unique and compelling circumstances exist that warrant setting aside partial decrees 21-2153, 21-2159, 21-4007, 21-4008, and 21-7151. The water rights within the Sand Creek Wildlife Management area create a complex, interconnected pond system. IDFG manages the water from all eight Partial Decrees as a whole. All eight water rights are integral to the success of the Wildlife Management Area and an error in one partial decree jeopardizes the future administration and use of all the other Partial Decrees. The errors in partial decrees 21-2153, 21-2159, 21-4007, 21-4008, and 21-7151 compound with the errors in 21-00014, 21-00015, and 21-4006 to create unique and compelling circumstances that warrant setting aside all eight Partial Decrees.

The aggregate errors in all eight Partial Decrees will make it extremely difficult for IDFG to fulfill its duty to properly manage the Sand Creek Wildlife Management area for the benefit of the public and they could jeopardize IDFG's continued use of the water should these water rights need to be administered in the future. The aggregate errors will make administration of these interconnected water rights extremely difficult and will only serve to cause confusion. Therefore, sufficient unique and compelling circumstances exist for setting aside partial decrees 21-2153, 21-2159, 21-4007, 21-4008, and 21-7151.

4. The purposes of the SRBA would be thwarted if the Partial Decrees are allowed to stand.

Partial decrees 21-00014, 21-00015, 21-2153, 21-2159, 21-4006, 21-4007, 21-4008, and 21-7151 do not accurately reflect the way IDFG uses the water within the Sand Creek Wildlife Management Area and they are, in some cases, inconsistent with Idaho law. As noted by IDWR, the errors in these water rights are significant and will make administration of the rights extremely difficult. *Affidavit of Carter Fritschle* at 2-3. The

errors severely hinder IDFG's ability to manage the Sand Creek Wildlife Management Area, could prevent the efficient resolutions of administrative disputes in the future, and undermine the sense of finality and accuracy that the SRBA is meant to achieve.

No objections to the Motion to Set Aside Partial Decrees were filed. Other water users will not be adversely affected if the Partial Decrees are set aside. If this Court grants the Motion to Set Aside Partial Decrees IDWR will issue new recommendations for these water rights and any interested parties will have an opportunity to object and participate in the determination of what the new partial decrees will be. Setting aside the Partial Decrees will allow this Court to accurately reflect water use in the Sand Creek Wildlife Management Area and will serve to maintain the status quo on Sharp Springs Fork of Sand Creek.

B. IDFG can Present a Meritorious Defense

IDFG can present facts that, if established, would constitute a defense to the action. It is clear from the facts, affidavits, and documents already submitted to the Court that a genuine controversy exists regarding the discrepancies between the Partial Decrees and the way that water is, and has historically, been used under the water rights. Thus, IDFG has set forth sufficient facts to establish a meritorious position supporting its request to set aside the Partial Decrees.

C. IDFG filed its Motion to Set Aside the Partial Decrees within a reasonable time.

Admittedly, it has taken considerable time for IDFG to seek to set aside the Partial Decrees. Nevertheless, this Court reasonably can and should find that IDFG acted in good faith and exercised due diligence in the prosecution and protection of these water rights and grant it the requested relief.

IDWR and IDFG did not discover the errors in the Partial Decrees until they investigated late claims 21-2039 and 21-2170 earlier this year. The Sand Creek Wildlife Management Area and its water rights are a complex, interconnected system. The time that has passed since the Partial Decrees were entered should be weighed against the desirable legal objective of accurately decreeing these water rights. Given the long timeframes encountered in the SRBA, it is not unusual that a motion to set aside be granted years after the partial decree is issued.³ IDFG asks the Court to exercise its discretion and set aside the Partial Decrees because the delay was not willful, the errors were only recently discovered, and no other water uses will be prejudiced.

CONCLUSION

Partial decrees 21-00014, 21-00015, and 21-4006 contain errors that are contrary to Idaho law, do not reflect the use of water within the Sand Creek Wildlife Management Area, and which will make it impossible to properly administer the water rights in the future. These errors present unique and compelling circumstances that warrant setting aside partial decrees 21-00014, 21-00015, and 21-4006 under I.R.C.P. 60(b)(6). Because the water rights within the Sand Creek Wildlife Management Area create an interconnected water system that must be managed as a whole, the errors in partial decrees 21-2153, 21-2159, 21-4007, 21-4008, and 21-7151 compound with the errors in partial decrees 21-00014, 21-00015, and 21-4006 to create unique and compelling circumstances that warrant setting aside all eight Partial Decrees. IDFG, IDWR, and the

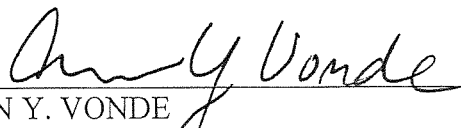
³ See Subcase Nos. 2-2003, 2-00083 *Partial Decree* issued 5/2009, *Motion to Set Aside* filed 1/2013, *Order Setting Deadlines* conditionally granting motion 6/2013; Subcase No. 43-192 *Partial Decree* filed 6/2002, *Motion to Set Aside* filed 2/2010, *Order Setting Aside and Amending Partial Decree* granting motion 10/2010; Subcase No. 22-13739 *Partial Decree* issued 1/2009, *Motion to Set Aside* filed 2/2012, *Special Master's Report and Recommendation on Motion to Set Aside Partial Decree* granting motion 8/2012.

Court have an interest in not perpetuating known errors and in accurately decreeing these water rights. Therefore, IDFG respectfully requests this Court to set aside partial decrees 21-00014, 21-00015, 21-2153, 21-2159, 21-4006, 21-4007, 21-4008, and 21-7151.

Respectfully submitted this 21st day of October, 2013.

LAWRENCE WASDEN
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CERTIFICATE OF SERVICE

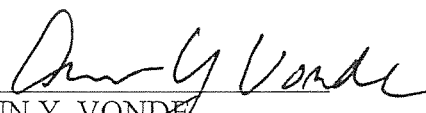
I HEREBY CERTIFY that on this 21st day of October 2013, I caused this SUPPLEMENTAL MEMORANDUM OF AUTHORITY IN SUPPORT OF MOTION TO SET ASIDE PARTIAL DECREES to be filed with the Court and true and correct copies served on the following parties by the methods indicated:

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: <u>(208) 736-2121</u>
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2. Copies to:

IDWR Document Depository P.O. Box 83720 Boise, ID 83720-0098	☒ U.S. Mail, Postage Prepaid ☐ Hand Delivery ☐ Federal Express ☐ Statehouse Mail
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