

LAWRENCE G. WASDEN
Attorney General

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DEPARTMENT OF
WATER RESOURCES

CLIVE J. STRONG, ISB No. 2207
Deputy Attorney General
Chief, Natural Resources Division

Natural Resources Division
700 W. State St., 2nd Floor
Boise, ID 83720-0010
Telephone: (208) 334-4126
Facsimile: (208) 854-8072
Electronic Mail: clive.strong@ag.idaho.gov

Attorneys for the State of Idaho

JAMES C. TUCKER, ISB No. 2038
SARAH W. HIGER, ISB No. 8012
Idaho Power Company
1221 W. Idaho Street
P.O. Box 70
Boise, ID 83707

Attorneys for Idaho Power Company

**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 Nos. 02-00100, 02-02032A,
) 02-4000A, 02-04001A, 02-2032B,
) 02-4000B, 02-04001B, 02-02036,
) 02-02056, 02-02065, 02-02064,
) 02-10135, 02-02060, 02-02059
) 02-02001B, 02-02001A, 02-02057
) 37-02128, 37-02472, 37-02471
) 37-20710, 37-20709, 36-02013,
) 36-02018, and 36-02026

)
)
) **MEMORANDUM IN SUPPORT**
) **OF STATE OF IDAHO'S AND**
) **IDAHO POWER COMPANY'S**
) **JOINT MOTION TO AMEND**
) **REMARK NO. 2 FOR ABOVE**
) **REFERENCED PARTIAL**
) **DECREES**

MEMORANDUM IN SUPPORT OF MOTION TO AMEND PARTIAL DECREES

I. INTRODUCTION

The *Motion* does not seek to set aside the *Final Unified Decree*, but rather seeks to have Remark No. 2 in the above referenced partial decrees amended by an Order from this Court to reflect the new location of the “Murphy Gaging Station.” This Court has the authority to enter an Order making the amendment pursuant to jurisdiction it retained in Order No. 17 of the *Final Unified Decree*.

II. FACTUAL BACKGROUND

The above referenced partial decrees describe hydropower water rights held by the State or Idaho Power Company (“IPC”) at several locations on the Snake River. *See Exhibit 2*. Remark No. 2 of each of the partial decrees describes the location of the “Murphy Gaging Station” that has been used for administering the partial decrees. *Id.* The United States Geological Survey (“USGS”), IPC, and the State through the Idaho Department of Water Resources (“IDWR”) have developed a new gage immediately below the Swan Falls Dam that provides more reliable flow measurements than the existing Murphy gage referenced in the partial decrees.

The above parties began working on the new gage because “accuracy [of the current gage had] become increasingly difficult to maintain and [had] become suspect over the past several years due to increased macrophyte growth and degradation of the control downstream of the [gage].” *USGA Memorandum* at 1. The new gage has been in operation since 2015 and the USGS has conducted studies comparing the current “Murphy Gaging Station” and the new gage to see how they correlate, finding that the “relationship is essentially a 1:1 ratio.” *Id.* at 2. The USGS has also found that the new location limits the impacts of sedimentation and other issues affecting the current gage. *Id.* at 1.

The State and IPC both agree that the new gaging station should be used for the administration of their above referenced partial decrees and stipulate to amendment of Remark 2 for the purpose of referencing the location of the new gage. The parties propose that the remark be revised to read as follows:

The “Murphy Gaging Station” (U.S. Geological Survey gage no. 13172500) is located on the right bank of the Snake River at river mile 456.8, approximately 8.5 miles east-northeast of Murphy, Idaho and 0.9 miles downstream from the Swan Falls power plant at latitude 43° 15’ 17.33” N, longitude 116° 23’ 26.30” W, North American Datum of 1983, in the NW ¼ of the NW ¼ of section 18, T. 2 S., R. 1 E., Boise Meridian, Hydrologic Unit 17050103.

III. LEGAL STANDARD FOR AMENDING REMARK NO. 2 OF ABOVE REFERENCED PARTIAL DECREES

This Court, through jurisdiction it reserved in Order No. 17 of the *Final Unified Decree*, has authority to amend Remark No. 2 on the above referenced partial decrees. Order No. 17 provides:

This Court retains jurisdiction of this proceeding to: a) resolve any issues related to the Final Unified Decree that are not reviewable under the Idaho Administrative Procedures Act and/or the rules of the Idaho Department of Water Resources

As discussed below, only this Court has authority to amend Remark No. 2.

A. This Court has authority under Order No. 17 of the *Final Unified Decree* to amend Remark No. 2 on the above referenced partial decrees.

It is apparent from a plain reading of Order No. 17 that this Court reserved jurisdiction over “*any issues related to the Final Unified Decree* that are not reviewable under the Idaho Administrative Procedures Act and/or the rules of the Idaho Department of Water Resources” Although the Final Unified Decree contemplates that changes to decreed water rights will be handled by IDWR through its administrative process, this Court foresaw there might be instances

where issues related to the *Final Unified Decree* fall outside of IDWR's authority. This issue fits squarely into that category.

B. The Idaho Department of Water Resources has no statutory authority to amend Remark No. 2 on the above referenced partial decrees and therefore no Review is possible under Department rules or the Idaho Administrative Procedures Act.

Nothing in Chapter 14, Title 42 of the Idaho Code or the Idaho Administrative Procedures Act ("IDAPA") authorizes IDWR to change remarks in partial decrees. While the legislature has given the Director of IDWR authority to "to change the point of diversion, place of use, period of use, or nature of use of all or part of the water [right]," Idaho Code § 42-222(a) (2015), it has not conferred authority on IDWR to amend remarks in partial decrees. And, this Court in A.O.1 § 14.d states: "Partial decrees are final judgements and cannot be modified by an administrative proceeding except as provided in I.C. § 42-222."

Moreover, the Idaho Supreme Court has explicitly stated that IDWR "has only such powers as the statute or ordinance confers." *Beker Indus. Inc. v. Georgetown Irr. Dist.*, 101 Idaho 187, 191, 610 P.2d 546, 550 (1980). In discussing the right to change the nature of use, which was not included in Idaho Code § 42-222 at the time, the Court found that "[w]hile it may not make sense to give the [IDWR] authority to grant [some changes] while not giving them power to grant [another change], we leave the incongruity to the legislature to remedy if they see fit." *Id.* The requested amendment to Remark No. 2 does not fit into any of the changes IDWR is authorized by statute to make. Because IDWR does not have authority to amend Remark No. 2 on the above referenced partial decrees, it falls within the jurisdiction this Court retained under Order No. 17 of the Final Unified Decree.

C. A motion under Idaho Rule of Civil Procedure 60 is improper because the State and IPC are not seeking relief from the partial decrees or the *Final Unified Decree*.

While A.O.1 § 14.d states that “[p]arties seeking to modify a partial decree shall comply with I.R.C.P 60(a) or 60(b), these rules are not applicable to the proposed amendment for the following reasons. Rule 60(a) is not applicable because the proposed amendment is not the result of a clerical mistake, or an oversight or omission that occurred when the partial decrees were entered by this Court.

Rule 60(b) is not applicable for the following reasons. The State and Idaho Power are not seeking to set aside or relief from the partial decrees or *Final Unified Decree* issued by this Court. Rather, the amendment seeks to allow IDWR to use a different gage for purposes of administration of the partial decrees. Rules 60(b)(1), (2), and (3) are not applicable because it has been over six months since the partial decrees and *Final Unified Decree* were issued. I.R.C.P. 60(c)(1). And, the proposed amend to Remark 2 does not come within the reasons set forth in Rules 60(b)(4) and (5).

While Rule 60(b)(6) allows this court to set aside a final judgment for “any other reason that justifies relief,” the Supreme Court has limited the application of this rule to those situations where a party can show “unique and compelling circumstances.” *Miller v. Haller*, 129 Idaho 345, 349, 924 P.2d 607, 611 (1996). No such situation exists here; the amendment sought is just to aid in the orderly administration of the partial decrees. Since Rule 60 is inapplicable in this instance, the State and IPC request the Court to exercise its jurisdiction under Order No. 17 of the Final Unified Decree to amend Remark 2 of the above referenced partial decrees.

D. An order issued by this Court amending Remark No. 2 on the above referenced partial decrees will not injure other water rights in the Snake River Basin.

The requested amendment is purely ministerial in nature and will not injure other water rights. There is no change in quantity used nor enlargement of the water rights. The only purpose of the amendment is to improve administration of the partial decrees by authorizing IDWR to use

a gage that provides more reliable measurements. Because no injury to other water rights will occur from the requested amendments, the Court should exercise its retained jurisdiction to amend Remark No. 2, in the above identified partial decrees.

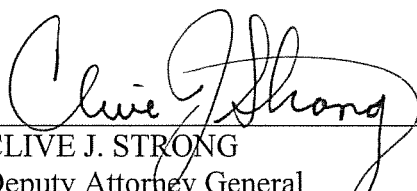
IV. CONCLUSION

The State of Idaho and Idaho Power respectfully request this Court to use its retained jurisdiction in Order No. 17 of the *Final Unified Decree* to enter an Order amending Remark No. 2 on all of the above referenced partial decrees to read as follows:

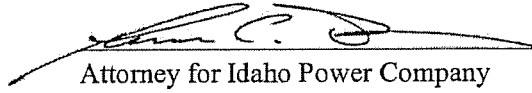
The “Murphy Gaging Station” (U.S. Geological Survey gage no. 13172500) is located on the right bank of the Snake River at river mile 456.8, approximately 8.5 miles east-northeast of Murphy, Idaho and 0.9 miles downstream from the Swan Falls power plant at latitude 43° 15’ 17.33” N, longitude 116° 23’ 26.30” W, North American Datum of 1983, in the NW ¼ of the NW ¼ of section 18, T. 2 S., R. 1 E., Boise Meridian, Hydrologic Unit 17050103.

Respectfully submitted this 16th day of May, 2017.

LAWRENCE G. WASDEN
Attorney General


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

JAMES C. TUCKER



Attorney for Idaho Power Company

**MEMORANDUM IN SUPPORT OF STATE OF IDAHO'S AND IDAHO POWER COMPANY'S JOINT
MOTION TO AMEND REMARK NO. 2 FOR ABOVE REFERENCED PARTIAL DECREES - 7**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of May 2017, I caused the foregoing
*Memorandum in Support of State of Idaho's and Idaho Power Company Joint Motion to Amend
Remark No. 2 for the Above Referenced Partial Decrees* and attached Exhibits to be filed with
the Court and true and correct copies were served on the following parties by the methods
indicated below:

1. Original to:

CLERK OF THE DISTRICT COURT
SNAKE RIVER BASIN ADJUDICATION
253 THIRD AVENUE NORTH
PO BOX 2707
TWIN FALLS, ID 83303-2707

X U.S. Mail, Postage Prepaid
Hand Delivery
Federal Express
Facsimile: (208) 736-2121

2. Copies to:

JAMES C. TUCKER
SARAH W. HIGER
IDAHO POWER CO.
PO BOX 70
BOISE, ID 83707-0070

X U.S. Mail, Postage Prepaid
Hand Delivery
Federal Express
Email

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

X U.S. Mail, Postage Prepaid
Hand Delivery
Federal Express

