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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

Case No. 39576

)
) **Subcase Nos.: Attachment A**
)
) **MEMORANDUM IN SUPPORT OF**
) **JOINT MOTION TO MODIFY**
) **PARTIAL DECREES FOR**
) **PURPOSES OF DIVERSION RATE**
) **AND "RESET" ADMINISTRATIVE**
) **REMARKS**
)
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COME NOW, the Shoshone-Bannock Tribes ("Tribes") by and through their undersigned attorneys of record, and pursuant to Administrative Order 1, Section 14(d) and Rule 60(b)(6) of the Idaho Rules of Civil Procedure (I.R.C.P.), hereby submit this memorandum in support of the Joint Motion to Modify Partial Decrees for Purposes of Diversion Rate and "Reset" Administrative Remarks ("Joint Motion"). The Tribes concur with the arguments set out in the

Memorandum in Support of the Joint Motion to Modify Partial Decrees for Purposes of Diversion Rate and “Reset” Administrative Remarks submitted this same date by the Surface Water Coalition and other parties, which Memorandum is incorporated herein by reference. The Tribes are parties to the underlying Joint Motion as well as to the Stipulated Settlement being presented to the Court.¹ As provided in the Stipulated Settlement, all parties agree that, because of that Stipulation’s narrow circumstance, reopening the Snake River Basin Adjudication (“SRBA”) to include these limited “reset” administrative remarks is necessary to fully and finally resolve the dispute and for efficient administration of the water rights. The Tribes submit this separate Memorandum to present certain additional arguments specific to the Tribes that support the unique and compelling circumstances that justify the relief sought under Rule 60(b)(6).

INTRODUCTION

The parties submitting the Joint Motion have been involved in a longstanding complex dispute over conflicting interpretations of certain language in the SRBA Partial Decrees identified in the Stipulated Settlement—a dispute with potentially significant consequences to the parties’ ability to obtain the benefits of various matters settled or adjudicated in the SRBA. Through years of often-difficult negotiations, including an attempt at mediation overseen by this Court, the parties have reached agreement on the means of permanently settling that dispute through Stipulated Settlement. Implementing this Stipulated Settlement will require that

¹ See Exhibit G to Travis Thompson Declaration, Stipulation and Joint Motion for Order Approving Stipulation / Joint Motion for Stay (hereinafter “Stipulated Settlement”), IN THE MATTER OF THE PETITION REGARDING STORAGE RESET IN WATER DISTRICT 01 FILED BY MILNER IRRIGATION DISTRICT [HEREINAFTER “RESET CONTESTED CASE”], Docket No. P-WRA-2017-002 (April 10, 2019).

language necessary to clarify the ambiguities be incorporated in the SRBA Partial Decrees as well as change a portion of a water right held by the United States for storage water in Lake Walcott (1-219) that can only be accomplished through amending these Partial Decrees.

Because the storage rights have been finally decreed, the only mechanism available to the parties to implement this global, permanent settlement is a motion pursuant to I.R.C.P. 60(b)(6), which authorizes this Court to alter or amend a partial decree for “any other reason that justifies relief.” Rule 60(b)(6) is an appropriate mechanism for implementation of the Stipulated Settlement because the addition of the remarks is “narrow in scope and necessary for the efficient administration” of the water rights under the proposed settlement of the ongoing disputes.² Moreover, the proposed limited amendments represent a comprehensive and permanent resolution of both the lengthy judicial and administrative proceedings and are unopposed by any other water user in the basin.³ The overarching factual and legal support for this Joint Motion is set out in the Joint Motion, which the Tribes support and have joined.

Yet, there is an issue specific to the Tribes that underscores the unique and compelling interests supporting this motion: a proposed change in how the reservoirs are reset based on the contested interpretation of the SRBA Partial Decrees would result in significant adverse impacts to the Tribes’ bargained-for rights in the 1990 Fort Hall Indian Water Rights Agreement (“Fort Hall Agreement”), which is also incorporated into the final SRBA decree. Incorporating the

² See Order Granting Motion to Alter or Amend Partial Decrees; Order of Amended Partial Decree, *In Re SRBA Case No. 39576*, 5 (July 19, 2019); see also State of Idaho, Motion to Alter or Amend Partial Decrees for Water Right Nos. 63-303, 63-3613, 63-314, and 63-318, *In re SRBA Case No. 39576*, 2–3 (Feb. 19, 2019) (State of Idaho requesting similar relief in Administrative Basin 63).

³ See Order Granting Motion to Alter or Amend Partial Decrees; Order of Amended Partial Decree, *In Re SRBA Case No. 39576*, 4–5 (July 19, 2019).

remarks contained in the Stipulated Settlement into the SRBA Partial Decrees will avoid significant inequities to the Tribes' rights as negotiated by the parties in the Fort Hall Agreement. Moreover, relief under I.R.C.P. 60(b)(6) is the only means available to fully and finally provide the relief sought in the Stipulated Settlement, and without such remedy the Tribes would need to pursue further lengthy litigation in the form of a takings or other damages claim. The sovereign status of the Tribes (and the United States) and their willingness to collaborate constitutes further unique and compelling circumstances. And, relief is consistent with the longstanding practice of resolving Indian water rights claims through negotiation. In short, implementing the Stipulated Settlement by reopening the Partial Decrees is consistent with the applicable standard for I.R.C.P. 60(b)(6) motions.

FACTUAL / PROCEDURAL BACKGROUND

The Tribes adopt and incorporate by reference the Factual and Procedural Background set out in the Joint Motion. However, the Tribes provide additional background relating to their unique and compelling circumstances justifying relief pursuant to I.R.C.P. 60(b)(6).

1. Fort Hall Agreement.

On August 30, 1985, two years before the SRBA began, the Tribes and the State of Idaho entered into a Memorandum of Understanding to "commence good faith, government-to-government negotiations." Fort Hall Agreement at Art. 3.7. After several years of negotiations, the Fort Hall Agreement resulted in a comprehensive settlement of the Tribes' water rights claims. The Fort Hall Agreement was signed on July 10, 1990, enshrining the agreement between the Tribes, the State of Idaho, the Idaho Water Resource Board, the United States

(through the Bureau of Indian Affairs (BIA) and Bureau of Reclamation (USBR)), and the Committee of Nine, which represented the Idaho water users' interests.⁴

Congress approved, ratified, and confirmed the Fort Hall Agreement on November 16, 1990, upon passage of the Fort Hall Indian Water Rights Act of 1990 (the "Fort Hall Act"). Pub. L. No. 101-602, 104 Stat. 3059 (1990). Thus, the parties avoided significant and contentious litigation, and instead "achieve[d] a fair, equitable, and final settlement of all claims of the [Tribes] ... to water rights in the Upper Snake River Basin." Pub. L. No. 101-602, § 3, 104 Stat. 3059, 3060.

Finally, as mandated in the legislation, the Fort Hall Agreement was incorporated into the SRBA. Fort Hall Act, Pub. L. No. 101-602, 104 Stat. 3059; Fort Hall Agreement at Art. 10. It was negotiated, agreed-to, and filed in lieu of federal reserved water right claims. On August 2, 1995, the SRBA court finalized and incorporated the Fort Hall Agreement into the decree for the Tribal water rights. *In re SRBA* Case No. 39576, Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of the Water in the Upper Snake River Basin ("Consent Decree"). Further, the United States and Idaho agreed to non-Indian claims for the Fort Hall Irrigation Project, which were entered into pursuant to Administrative Order No. 1. Consent Decree at 1-2.

As with all such settlement agreements, the Fort Hall Agreement involved compromises on certain claims, including compromises by the Tribes, to reach agreement and achieve the certainty, stability, and savings of time and costs that would have been involved in adjudicating

⁴ See Ann Y. Vonde et al., *Understanding the Snake River Basin Adjudication*, 52 IDAHO L. REV. 53, Section VII.A.1, 153-168 (2016).

the claims. In exchange for settling its claims, and for the water rights described in the Fort Hall Agreement, the Tribes agreed to forego certain surface and groundwater claims altogether.⁵ See Fort Hall Act, Pub. L. 101-602, § 8, 104 Stat. 3059, 3062–63 (generally describing the waiver and release of all Tribal claims against the State, the United States, and all other parties); *see also* Fort Hall Agreement at Art. 7.1.18.x.d, 7.1.19.x.c, and 7.1.20.x.c (Tribes and United States agreeing not to exercise certain surface water rights so as to avoid impacts to certain other users or to mitigate such impacts). The Fort Hall Agreement also contained a substantial mitigation provision for any impacts to other water rights that might be asserted to have resulted from the Agreement. Fort Hall Agreement at Art. 12.3. This provision committed the United States to make substantial expenditures to provide additional storage water in two reservoirs in the basin, and there is no dispute here that the United States met this commitment by making those expenditures.

The Fort Hall Agreement also included, as an inducement for the Tribes to enter into the Agreement, certain entitlements to storage water rights, held in the form of federal contracts for

⁵ A specific example is the Tribes' water right claims to the Fort Hall Bottoms springs, which arise on the Fort Hall Reservation and flow into American Falls Reservoir. Under the terms of the 1957 Michaud Contract, the United States as trustee to the Tribes, waived any Tribal water right claims to the Fort Hall Bottoms springs in exchange for the development of the Michaud Unit and for use of the two reservoir contract rights in American Falls and Palisades reservoirs, which are the subject rights being impacted by the proposed storage reset language.

The "Michaud Contract" is the shorthand term used to refer to the Memorandum of Agreement between the Bureau of Reclamation and the Bureau of Indian Affairs Related to the Water Supply for the Michaud Division of the Fort Hall Indian Reservation, Idaho, dated April 25, 1957. The purpose of the Michaud Contract was to make appropriate arrangements and limitations for the water supply for lands on the Michaud Division of the reservation, prior to the development of irrigation works. See Fort Hall Agreement at Art. 12.1; Consent Decree at II.B. The Michaud Contract was incorporated into the 1990 Fort Hall Agreement.

water stored in the American Falls Reservoir (2.089% of accrued water) and the Palisades Reservoir (6.9917% of accrued water). Fort Hall Agreement at Art. 7.3. The Fort Hall Agreement indicates that these federal contract rights are “presently equivalent” to 46,600 acre-feet in the American Falls Reservoir and 83,900 acre-feet in the Palisades Reservoir. Fort Hall Agreement at Art. 7.3. The Fort Hall Agreement identified the storage water rights as available for the Tribes to market to generate revenue. Fort Hall Agreement at Art. 7.3.6. and 7.3.7. Specifically, the Fort Hall Agreement calls for the establishment of a Shoshone-Bannock Water Bank pursuant to Idaho Code §§ 42-1761–1765. The Tribes have made significant investments of financial and other resources in developing the infrastructure and agreements to market that water per the Fort Hall Agreement.

The Shoshone-Bannock Water Bank is an important, agreed-upon aspect of the Fort Hall Agreement. It was for the following general water right-related purposes: putting water right to beneficial use and providing a source of adequate water supplies to benefit new and supplemental water uses. Fort Hall Agreement at Art. 7.3.6. But the Fort Hall Agreement went on to note three additional purposes for the Shoshone-Bannock Water Bank particularly relevant to the current dispute. Fort Hall Agreement at Art. 7.3.6. First was to provide a source of Tribal funding for improving water user facilities and efficiencies. Fort Hall Agreement at Art. 7.3.6.iii. Second was to provide a mechanism for the Tribes to realize the value of their federal contract storage rights “resulting from settlement of this litigation.” Fort Hall Agreement at Art. 7.3.6.iv. Third was to provide for the continuation of good-faith cooperation among the parties to the Agreement. Fort Hall Agreement at Art. 7.3.6.v.

Moreover, the Fort Hall Agreement explicitly noted that the Shoshone-Bannock right to stored water shall not be subject to any of the following: “reduction of the quantity of water available under any other existing rights *since any such reductions are mitigated by the express federal commitments in Article 12.3*”; “any conflict with the public welfare or local public interest of the citizens of Idaho or the conservation of its water *since any such conflicts are mitigated by the express federal commitments in Article 12.3*”; and “any refill penalty for renting water from American Falls Reservoir below Milner Dam because of *the mitigation provided by the express federal commitments in Article 12.3*.” Fort Hall Agreement at Art. 7.3.5 (emphases added). Finally, the Agreement provides that “[t]he State agrees not to take any action that will interfere with the nature, scope, spirit and purposes of the Shoshone-Bannock Water Bank.” Fort Hall Agreement at Art. 7.3.6.

The Fort Hall Agreement and the Consent Decree also include and incorporate the Michaud Contract⁶ and its definitions of “irrigation season” and “storage season” with related timeframes. The definition of “storage season” includes a start date of October 1 and continuing into the next year until no more water is available for storage.⁷ The related definition of “irrigation season” is the period of each year from April 1 to October 31.⁸

At the time that the Fort Hall Agreement was finalized, and in the more than 25 years since, the allocation of surface water to reservoir storage in the upper Snake River basin was

⁶ See *infra* footnote 5 (explaining what the Michaud Contract is).

⁷ “‘Storage season’ shall mean . . . the period beginning October 1 of one year and ending the next year when, as to the particular reservoir, no more water is available for storage.” Michaud Contract at (3)(d).

⁸ “‘Irrigation season’ shall mean a period of each year beginning April 1 and ending October 31 of that year.” Michaud Contract at (3)(c).

generally carried out in the manner described as follows: at the earliest possible date when the most senior surface water rights had completed irrigation, the entire reservoir system would be “reset” and begin refilling, with the most senior right (Lake Walcott) filling first, and each subsequent reservoir filling after the one with the more senior date has filled. Any junior surface water irrigation rights would be turned off to allow the reservoirs with senior priority dates to begin filling for the next irrigation season.⁹

This system was understood by all parties to the Fort Hall Agreement, because it was the system in operation at the time the Agreement was finalized. Thus, the settled expectation of the Tribes, in reaching the Fort Hall Agreement and in making compromises and providing mitigation to benefit the other parties, is that the system would continue to operate in this same fashion going forward. And, indeed, the system continued to operate in this manner until quite recently.

2. The Underlying Dispute.

Sometime in 2014 or 2015, two parties to the current dispute, American Falls Reservoir District #2 (AFRD #2) and Milner Irrigation District (Milner) began advocating for a change to this accounting and reset protocol. Both of these parties have direct flow rights from the Snake River that are junior in priority to Lake Walcott,¹⁰ and are therefore directly affected by how the

⁹ Tony Olenichak, Reset Date Staff Memorandum (December 1, 2017) at 2–4 (submitted by Watermaster’s office per order of Director Spackman in the RESET CONTESTED CASE). Attached as Exhibit C to *Thompson Declaration*.

¹⁰ There are three water rights that are most important to understanding the reason for conflict on the storage reset issue: (1) Water Right No. 1-6 which was originally owned by AFRD #2 and is now owned by the USBR, with a diversion rate of 1,700 cubic feet per second (cfs) from 3/15 to 11/15 and a priority date of 3/30/1921; (2) Water Right Nos. 1-9A, 1-9B, 1-17, and 1-2050 which have a cumulative diversion rate of 285 cfs and priority dates of 7/8/1954, 7/12/1967, 11/14/1916, and 10/25/1939, respectively; and

storage reset date is administered. AFRD #2 and Milner were motivated to propose changes to storage water right administration for two reasons: (1) the decrees for the USBR storage water rights did not provide any specific comments on how the rights were to be administered, and (2) the recent court decisions concerning the refill of USBR storage rights after flood control releases indicated that the court would not look beyond the “face value” of the water rights.¹¹

After several years of attempting to resolve this issue through settlement negotiations (including mediation through a settlement judge appointed by this Court) proved unsuccessful, on or about August 18, 2017, Milner submitted a letter to the Idaho Department of Water Resources (IDWR) asserting the “fall ‘storage reset’ for purposes of water right administration” in Water District 01 “is not authorized in the current storage water right partial decrees, including the Lake Walcott storage right (1-219)” and “has in effect curtailed Milner’s natural flow water right 1-17 (November 14, 1916 priority date) in recent years.” Letter from Travis L. Thompson, Barker Rosholt & Simpson, LLP, to Director Gary Spackman, IDWR, and Lyle Swank, Watermaster, Water District 01, 1–2 (August 17, 2017). Letter attached as Exhibit B to *Declaration of Travis Thompson*, submitted October 30, 2019, in support of the Joint Motion (“*Thompson Declaration*”). Milner requested “the Water District and Director ensure Milner receives the appropriate natural flow as required by Idaho law.” *Id.* at 2.

(3) Water Right No. 01-219 for storage in Lake Walcott with no diversion rate and a total annual volume of 95,200 acre feet (AF) from 1/1 to 12/31 and a priority date of 12/14/1909.

¹¹ The “face value” of the USBR storage rights is a season of use starting January 1 and ending December 31. The decreed rights do not have any comments relating to how the storage rights are to be administered such as having a fall storage fill and a storage season that crosses calendar years.

In a Notice and Order dated October 5, 2017, the IDWR Director (“Director”) determined that the letter from Milner was a “petition” as defined by the IDWR’s Rule of Procedure 230, and initiated formal proceeding to address the petition (the RESET CONTESTED CASE).¹² Exhibit C to *Goodman Declaration*. The Tribes and several other parties filed timely motions to intervene. The Director convened several prehearing conferences, and required the parties to submit briefs outlining the issues, and then to brief what he referred to as the “threshold question,” which the Director framed as follows:

Whether the plain language of the “period of use” element of the storage water right partial decrees for federal onstream reservoirs in Water District 01 that specify “1/1 to 12/31” as the time period for irrigation storage requires that the reset date for those rights be January 1?

Order re Statement of Issues and Responses; Order Adopting Deadlines; Amended Notice of Status Conference (January 3, 2018) (attached as Exhibit E to *Goodman Declaration*).

The parties submitted briefing to the Director on this question. However, prior to the Director issuing a ruling on the question, the parties requested a stay to engage in further settlement negotiations. Those negotiations ultimately resulted in a successful, mutually-agreeable resolution of the matter as set out in the Stipulated Settlement. A key element of the Stipulated Settlement was that the parties agreed to submit language to this Court to modify the relevant decrees via an I.R.C.P. 60(b)(6) motion, as doing so was deemed a necessary component of resolving the dispute permanently and with the involvement of the United States, a key party

¹² In a letter dated October 27, 2017, the Director also directed the District 01 Watermaster to move the reset date to January 1, in response to the Milner letter, but noting that the issue was also going to be addressed in this contested case. Letter to Lyle Swank, Water District 01 Watermaster from Gary Spackman, Director IDWR, *Re: Reset of Reservoir Water Rights and Recharge* (Oct. 27, 2017).

that is agreeing to a flow limitation of a decreed water right. Neither permanency nor the limitation of the United States' right can be accomplished administratively.

STANDARDS FOR CONSIDERING I.R.C.P. 60(b)(6) MOTION

The SRBA Court's administrative rules provide that "[p]arties seeking to modify a partial decree shall comply with I.R.C.P. 60(a) or 60(b)." Administrative Order No. 1, § 14(d). The Joint Motion is made pursuant to I.R.C.P. 60(b)(6). Below are the appropriate legal standards for a such motion.

1. Trial Court Discretion and Applicable Standard of Review.

The decision to grant I.R.C.P. 60(b) motions is committed to the trial court's discretion. *Pullin v. City of Kimberly*, 100 Idaho 34, 36, 592 P.2d 849, 851 (1979); see *In Re SRBA Case No. 39576 Subase* [sic] *No. 37-00864*, *Eden v. State of Idaho*, 164 Idaho 241, 248, 429 P.3d 129, 136 (2018) ("*Eden*"). The trial court has "wide latitude . . . in determining those circumstances under which to relieve a party from the effects of an order." *Hopkins v. Troutner*, 134 Idaho 445, 447, 4 P.3d 557, 559 (2000).

The trial court's discretionary decision will be upheld if the trial court "(1) correctly perceived the issue as discretionary, (2) acted within the boundaries of its discretion and consistent with the applicable legal standards, and (3) reached its determination through an exercise of reason." *Eden*, 164 Idaho at 248 (citing *Waller v. State, Dep't of Health & Welfare*, 146 Idaho 234, 237, 192 P.3d 1058, 1061 (2008)). Moreover, a determination under I.R.C.P. 60(b) "turns largely on questions of fact to be determined by the trial court." *Waller*, 146 Idaho at 237. "Those factual findings will be upheld unless they are clearly erroneous." *Id.*; see also *Eden*, 164 Idaho at 248; *Maynard v. Nguyen*, 152 Idaho 724, 729, and 731, 274 P.3d 589, 591,

and 596 (2011). “If the trial court applies the facts in a logical manner to the criteria set forth in Rule 60(b), while keeping in mind the policy favoring relief in doubtful cases, the court will be deemed to have acted within its discretion.” *Waller*, 146 Idaho at 238.

2. Legal Standards for Rule 60(b)(6) Motion.

I.R.C.P. 60(b)(6) authorizes a court to set aside and modify a partial decree for “any other reason that justifies relief.”¹³ A motion under I.R.C.P. 60(b)(6), must also be made within a reasonable time. I.R.C.P. 60(c)(1); *see also Waller*, 146 Idaho at 239 (“[t]here is no express time limit for an independent action to relieve a party from judgment.”). Although the trial court has a broad grant of discretion in whether to grant or deny such relief, because an I.R.C.P. 60(b)(6) motion should not be used as a substitute for a timely appeal, the Idaho Supreme Court has limited that discretion and instructed that such motions should “be granted only on a showing of unique and compelling circumstances justifying relief.” *Miller v. Haller*, 129 Idaho 345, 349, 924 P.2d 607, 611 (1996) (quoting *In re Estate of Bagley*, 117 Idaho 1091, 1093, 793 P.2d 1263, 1265 (Ct. App. 1990)); *Eden*, 164 Idaho at 140. “Where an appeal from the judgment is the proper remedy, Rule 60(b)(6) may not be used as an end-run around” such time limits, but is applicable whenever “such action is appropriate to accomplish justice.” *First Security Bank of Idaho, N.A. v. Stauffer*, 112 Idaho 133, 143, 730 P.2d 1053, 1063 (1986) (citing *Klapprott v. United States*, 335 U.S. 601, 615 (1949)).

¹³ The I.R.C.P. rules were rescinded by Court Order and replaced entirely with new rules, effective July 1, 2016. The former I.R.C.P. 60(b)(6) provided that a court may relieve a party from a final judgment for “any other reason justifying relief from the operation of the judgment.” As the operative language of I.R.C.P. 60(b)(6) is nearly identical courts continue to apply precedent established under the former rule. *See e.g., Eden*, 164 Idaho at 248.

ARGUMENT

Unique and compelling circumstances exist to grant the timely Joint Motion to modify the Partial Decrees in this case because without such relief the Tribes will suffer a great inequity—severe adverse impact to the Tribes’ storage water rights, as negotiated for in the Fort Hall Agreement, and as incorporated into the final SRBA decree. These rights have been diligently pursued and because of the global nature of the negotiated settlement, will not prejudice other water rights holders. Indeed, the proposed limited amendments are unopposed by any other water user in the basin. Moreover, no other remedy exists to implement the global settlement regarding the “reset” of the reservoirs on the upper Snake River that will provide the Tribes with the quantity of storage water negotiated under the Fort Hall Agreement, and as such, without relief from judgment, the Tribes’ must pursue a takings or other damages claim. In short, relief is required to accomplish justice, that is, to provide the Tribes with storage water rights bargained for and agreed to in the Fort Hall Agreement and incorporated into the final SRBA decree. Further, unique and compelling circumstances exist because of the status of the Tribes (and the United States) as sovereigns. And finally, relief from judgment would be consistent with the longstanding practice of resolving Indian water rights claims through settlement. Relief under I.R.C.P. 60(b)(6) is therefore appropriate and necessary, as set forth in detail below.

- 1. Unique and Compelling Circumstances Exist Pursuant to I.R.C.P. 60(b)(6) Because the Joint Motion Is Timely and Will Not Prejudice Any Other Water User.**

As this Court is aware, the parties have diligently pursued settlement of this very dispute for a considerable length of time, under the jurisdiction of this Court and elsewhere. Thus, the

timeframe for submitting this motion is reasonable, given the diligent and ongoing efforts of the parties to reach a comprehensive and permanent resolution of this complex administrative litigation. Importantly, the final Stipulated Settlement is not opposed by any water user within the basin and therefore will not result in any prejudice. As such, unique and compelling circumstances are present to justify relief pursuant to I.R.C.P. 60(b)(6).¹⁴

The Idaho Supreme Court addressed the issue of a reasonable time and its relationship to the prejudice of other parties in *Eden*. In *Eden*, the Court affirmed a district court's determination that no unique and compelling circumstances existed to justify a grant of relief under I.R.C.P. 60(b)(6) to reopen a partial decree in the SRBA for the purposes of allowing the Edens to file a late notice of claim where the Edens attempt to file a claim did not comply with the statutory requirements, despite several notices of how to do so sent to all potential claimants, and the Edens never followed up or pursued their alleged claim until eleven years after the decree was issued and their water right was disallowed. *Eden*, 429 P.3d at 140. In that case the Court noted that although the Edens made the motion under I.R.C.P. 60(b)(6), the claim was really more akin to a request for relief under I.R.C.P. 60(b)(1) for mistake, surprise, or excusable neglect – and that the Edens' failure to take steps to reconcile their mistake from the time of notice in 2005 until the right was discontinued in 2016 precluded them from relief under I.R.C.P. 60(b)(6). *Id.* Moreover, the Court noted that “by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights,” and that to allow the Edens to assert a claim for a water right previously disallowed would prejudice

¹⁴ See e.g., Order Granting Motion to Alter or Amend Partial Decrees; Order of Amended Partial Decree, *In Re SRBA Case No. 39576*, 4–5 (July 19, 2019).

existing water users with rights junior to their alleged claim in an already short water basin. *Id.* at 141.¹⁵ Therefore the Court determined that “by sitting on their rights, the Edens [] failed to show unique and compelling circumstances exist that warrant setting aside the *Final Unified Decree* and the *Closure Order*.” *Id.*

The current Joint Motion is plainly distinguishable from the *Eden* case. Unlike the parties in that case, the Tribes participated extensively through the Fort Hall Agreement and throughout the SRBA to assert their water rights. The current dispute over the reservoir reset arose as a result of a subsequent proposed change in the longstanding methodology and practice of accounting for reservoir storage. Once the proposed change came to the Tribes’ attention, the Tribes immediately engaged with IDWR and the other parties, including participating in negotiations, in the contested case, and in the Stipulated Settlement. Neither the Tribes nor any of the other parties to this motion sat on their rights. Those facts demonstrate that the parties to the Stipulated Settlement and who are requesting the relief sought have not been “sitting on their rights,” but have been diligently seeking to resolve this issue through often-difficult negotiations.

Additionally, unlike in *Eden*, no prejudice will result in granting the requested relief under I.R.C.P. 60(b)(6) because the Stipulated Settlement arose from a public-record, contested case before the Director, in which all parties with a potential stake in the issue intervened, and all those parties signed on to the Stipulated Settlement. In short, unique and compelling circumstances exist to justify relief under I.R.C.P. 60(b)(6) because the parties have diligently

¹⁵ The Court noted that “The significant prejudice and potential undermining of over 158,600 water rights that were timely claimed, adjudicated and decreed supports the SRBA court’s discretion in denying the Edens the right to assert a late filed claim.” *Id.* at 141.

pursued the resolution of this lengthy and complex litigation resulting in a Stipulated Settlement that is comprehensive, permanent, and without opposition from any other water user.

2. The Tribes' History with Regard to Their Bargained-For Storage Water Rights Present Unique and Compelling Circumstances that Require Incorporating the Stipulated Settlement into the Partial Decrees to Avoid an Inequitable Result.

The history of the Tribes' bargained for storage rights in this case present unique and compelling circumstances such that the relief requested in the Joint Motion to modify the Partial Decrees under I.R.C.P. 60(b)(6) is necessary to accomplish justice and avoid an inequitable result. Specifically, the understanding of the Tribes (and the United States) in negotiating and agreeing to the Fort Hall Agreement—including the mitigation being provided by the United States and the settlement of other asserted claims by the Tribes—was that the reset accounting for the upper Snake River reservoir system was being operated in a certain manner and would continue to be operated in that manner; that is, with a reset date in the fall at which time the oldest storage right (01-219) would begin to refill from natural flow, followed in priority order by the remaining storage rights. Since this manner of operation was part of the understanding of the Tribes and the United States at the time of the Fort Hall Agreement, it was an understanding that was crucial to “achieve a fair, *equitable*, and final settlement of all claims of the Shoshone-Bannock Tribes . . . to water rights in the Upper Snake River Basin.” Fort Hall Act, Pub. L. No. 101-602, § 3, 104 Stat. 3059, 3060 (emphasis added).

While the Fort Hall Agreement could not guarantee the Tribes a specific amount of storage water each year, what was preserved and protected in the Fort Hall Agreement was expectation-based understanding of how that storage water would be accrued and accounted for

from natural flow in the late season each year. It was on the basis of that understanding that the Tribes calculated the value of those storage water rights, and thus calculated the value of what they were willing to trade for them in the negotiations leading to the Fort Hall Agreement—an “equitable” result as recognized by Congress. Thus, the Fort Hall Agreement, the Fort Hall Settlement Act, and ultimately the final SRBA decree are all founded on this basic and equitable assumption of how storage water in the Upper Snake River reservoirs would be accrued and accounted for. The Tribes, in negotiating the compromises memorialized in the Fort Hall Agreement, had relied on that longstanding methodology and practice. Furthermore, they continued to rely on that same methodology and practice for the next 27 years.

As the Tribes have asserted in the Reset Contested Case before the IDWR Director, the proposed change to a system of accounting and accrual that would begin on January 1 (rather than in the fall) would necessarily result in significant adverse impacts to its storage water rights—in violation of the express language of the Fort Hall Agreement. Such result is grossly unfair and inequitable in light of the understandings upon which the Tribes based the compromises made in the Fort Hall Agreement. In addition, we note that the storage water rights at issue here were included in the Fort Hall Agreement in significant part as a mechanism for revenue generation and infrastructure development on the historically impoverished Fort Hall Reservation. Fort Hall Agreement at Art. 7.3.6.iii, 7.3.6.iv. An adverse impact on those water rights through the proposed change in storage reset accounting would deprive the Tribes of that mechanism, a clearly inequitable result.

The Tribes’ unique and compelling circumstances here are similar to those in which courts have granted relief in the past. For example, unique and compelling circumstances existed

justifying a grant of relief under I.R.C.P. 60(b)(6) when a motion to amend a judgment in a foreclosure proceeding was granted without a hearing depriving the absent party of the protection under final decree. *First Security Bank of Idaho, N.A.*, 112 Idaho at 143. Similar to *First Security Bank of Idaho, N.A.*, without relief from judgment here the Tribes face the loss of the protection of their previously bargained-for rights under the Fort Hall Agreement, ratifying legislation, and the final SRBA decree without a hearing or other due process protections. 112 Idaho at 143.

Moreover, in *Dawson v. Cheyovich Family Trust*, the Idaho Supreme Court found unique and compelling circumstances where a judgment was unlawfully inconsistent with earlier pleadings, leaving the party without any another remedy, and relief from the judgment was necessary to accomplish justice. 149 Idaho 375, 381, 234 P.3d 699, 705 (2010). Here, the relief requested through the Joint Motion pursuant to I.R.C.P. 60(b)(6) is needed to avoid the possibility of an administrative interpretation that would be inconsistent with the earlier filings relied on by the Tribes in the SRBA, that is, the understandings in the Fort Hall Agreement and ratifying legislation, resulting in adverse impacts to those bargained-for storage water rights, no other remedy exists, and reopening the Partial Decrees to add the reset remarks is necessary to accomplish justice.

In sum, the Tribes' involvement and history with regard to the settlement of this dispute present additional unique and compelling circumstances justifying relief under I.R.C.P. 60(b)(6) to accomplish justice and avoid an inequitable result. Here, the inequity suffered by the Tribes through the loss of water would be remedied by simply reopening the Partial Decrees to add the remarks. This court should exercise its discretion and grant the motion.

3. Unique and Compelling Circumstances Exist Because, In the Absence of Relief, There Are No Remedies Available that Would Resolve the Matter through the Approach Agreed to Here by All Parties to the Stipulated Settlement, Which Would Result in a Takings or Other Damages Claim by the Tribes Against the State of Idaho.

The Stipulated Settlement implements a unique approach to a contentious water rights dispute. It is an approach that took extensive negotiations to develop, and it was finally agreed to by all parties to this dispute. There is no alternate remedy that would permit this negotiated approach to be implemented. In the absence of implementing this agreement, there is the potential for additional protracted litigation—particularly over the Tribes’ takings or other damages claim—but even that litigation would not provide the remedy sought here: the implementation of the terms of this negotiated settlement among the parties to this contested case.

Because a taking would result due to a change in the reset provisions that occurred after the Partial Decrees, the Tribes provide a unique and compelling reason for this Court to amend the judgement pursuant to I.R.C.P. 60(b)(6). Specifically, IDWR’s proposed change in reset accounting hinders the Tribes from receiving the full amount of their property right in the use of the water in a way that amounts to a physical taking¹⁶ or other damages for which the State could be liable. It is undisputed that the proposed change in the accounting procedures and reset date

¹⁶ A water right is tantamount to a real property right, and is legally protected as such.” *Crow v. Carlson*, 107 Idaho 461, 465, 690 P.2d 916, 920 (1984). An agreement to change any of the definitional factors of a water right would be comparable to a change in the description of property. *Olson v. Idaho Dept. of Water Resources*, 105 Idaho 98, 101, 666 P.2d 188, 191 (1983). A physical taking occurs when the government’s action amounts to a physical occupation or invasion of the property, including the functional equivalent of a “practical ouster of [the owner’s] possession.” *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1878), *abrogated by Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

would have resulted, in many years, in less water accruing to certain storage water rights in the upper Snake River basin than would have accrued were the existing system to remain in place. Among the rights that would have accrued less water would be the Tribes' storage water rights in the American Falls and Palisades Reservoirs. This accounting diversion would have the same effect as any physical diversion, by taking water from the Tribes and distributing to other water rights holders on the system.

This result is avoided by granting the relief requested under I.R.C.P. 60(b)(6). In sum, resolving this lengthy dispute, through this fair and comprehensive Stipulated Settlement of both judicial and administrative proceedings, avoids unnecessary and protracted litigation, including the complex litigation surrounding a takings or other damages claim by the Tribes, and leads to judicial efficiency and the efficient administration of the water rights.

4. The Tribes' Status as a Sovereign and Willingness to Collaborate is Also a Unique and Compelling Circumstance.

An additional unique and compelling component of this settlement is that the United States is willing to assist in the compromise of this complex dispute by incorporating a 2,500 cubic feet per second (cfs) flow cap for thirty days on its Lake Walcott right. This is a narrow amendment and acts a limitation on its right, not an expansion.¹⁷ However, the only way in which the United States can provide this critical element is through a settlement within the SRBA framework, since the contemplated change requires a reduction to their water right, which cannot be accomplished administratively.

¹⁷ See e.g., Order Granting Motion to Alter or Amend Partial Decrees; Order of Amended Partial Decree, *In Re SRBA Case No. 39576*, 4 (July 19, 2019).

Further, this Stipulated Settlement, implemented in the manner intended, will resolve not only a contentious dispute among private parties, but will resolve a dispute between two sovereign entities—the State of Idaho and the Tribes—consistent with the principles of the Fort Hall Agreement and with the government-to-government relationship that will enable the Tribes and the State to work together cooperatively rather than expend limited resources and good will in contentious litigation. Thus, the circumstances surrounding the Joint Motion to reopen the Partial Decrees are unique and compelling.

5. Unique and Compelling Circumstances Exist Because Reopening the Partial Decrees is Consistent with Longstanding Practice of Seeking to Resolve Indian Water Rights Claims Through Settlement, Whereas Administrative Resolution Does Not Provide the Finality Needed to Resolve this Dispute in a Comprehensive Manner.

Here, the Stipulated Settlement is a collaborative approach encompassing many aspects of a negotiated agreement that ultimately benefits all parties in part by avoiding the complex, expensive, and protracted litigation typical of water rights disputes. Idaho's adjudication through settlement is the preferred route for resolving issues in a general stream adjudication, and resolving this matter through settlement is consistent with that approach.

In the proceedings before the IDWR Director, the Tribes and United States asserted unique arguments specific to the Tribes arising from their federal reserved rights and water claims settlement in the Fort Hall Agreement and ratifying legislation. These claims have different legal and factual background from other water rights holders with state water rights. The Tribes have unique claims based on their reserved water rights and the negotiated settlement formalized in the Fort Hall Agreement. As the Western States Water Council (WSWC) and the

Native American Rights Fund (NARF) recognized, in a joint statement supporting funding for settling rather than litigating Tribal water rights claims:

Settlements are the preferred manner of resolving Indian water rights claims. First, they give states and tribes certainty and control over the outcome of water rights adjudications for tribal claims, whereas litigated outcomes are fraught with uncertainty. Second, settlements build positive relationships between states, tribes, and the federal government, which are essential because water is a shared resource that all parties must cooperatively manage after adjudication. Third, Indian water rights claims are extremely complex and settlements enable tribes and non-Indian neighbors to take a comprehensive approach, allowing them to craft mutually beneficial solutions tailored to their specific needs, including the development of water infrastructure that increases available water supplies for all users. Fourth, settlements can provide mechanisms that enable tribes to turn quantified rights into “wet water,” while litigation typically provides tribes with “paper rights” only. Fifth, settlements are often less costly and less time-consuming than litigation, which can last for decades and can be extremely expensive for all parties.¹⁸

In determining whether the Partial Decrees should be reopened on a limited basis to include the requested remarks, the Court should consider the fact that granting the limited relief requested would be consistent with the above-stated principles regarding the preference for resolving Tribal water rights claims through settlements rather than protracted litigation.

The Tribes (and other parties) are willing to compromise and resolve its unique claims in the underlying dispute in exchange for permanent resolution. An administrative settlement that the IDWR Director has approved does not provide that level of permanence, since it is a decision that a future Director could change, and it was the Director’s initial willingness to implement a

¹⁸ WSWC and NARF Joint Paper, *The Importance of Indian Water Rights Settlement Funding*, Section III (May 18, 2015), available online at https://www.eenews.net/assets/2015/05/18/document_daily_02.pdf. The WSWC is a water policy advisory body affiliated with the Western Governors’ Association that consists of representatives appointed by the governors of eighteen western states. NARF is a legal defense fund for Native American tribes, organizations, and individuals.

new accounting mechanism to the Tribes' detriment, and at odds with the specific dictates of the Fort Hall Agreement, that created the current dispute. If the Partial Decrees are not reopened, a party may later argue the Stipulated Settlement alone, even if agreed to by the Director, is insufficient. The Supreme Court of Idaho has held in one case that

The Settlement Agreement cannot define, add, or subtract from the defining elements of [a water right]. It is limited to providing "additional conditions and limitations" on the exercise of [the water right]. To allow the Settlement Agreement to enlarge or otherwise alter the clearly decreed elements of [the water right], would allow private parties to alter a judicial decree. Such a result is simply untenable. *Cf. Borley v. Smith*, 149 Idaho 171, 177, 233 P.3d 102, 108 (2010) ("An important principle drives this holding—private stipulations cannot circumvent court orders.").

City of Blackfoot v. Spackman, 162 Idaho 302, 309, 396 P.3d 1184, 1191 (2017). Moreover, the State of Idaho has itself recognized the need for limited and narrow decree amendments in the presence of such unique and compelling circumstances, as is demonstrated by its own successful motion for relief pursuant to I.R.C.P. 60(b)(6) to amend certain decrees to settle ongoing disputes over the "fill and/or "refill" of the storage water rights for on-stream reservoirs in Administrative Basin 63, which was granted by this Court.¹⁹

Thus, resolution of the Tribes' claims through the reopening of the Partial Decrees is in fact consistent with the settlement of the Fort Hall Agreement. That Agreement involved the resolution of complex tribal claims in a relatively short period (five years) of negotiations. By way of contrast, contested tribal claims in general stream adjudications can and do take decades, numerous trips up and down the appeals courts, and thus impose a significant burden on the

¹⁹ See *infra* footnote 2 (citing State of Idaho's Motion to Amend Partial Decrees for Water Rights Nos. 63-303, 63-3613, 63-314, and 63-318); see also Order Granting Motion to Alter or Amend Partial Decrees; Order of Amended Partial Decree, *In Re SRBA Case No. 39576*, 4-5 (July 19, 2019).

administrative and judicial systems. The Stipulated Settlement provides the opportunity to resolve this matter between all parties.

CONCLUSION

The Parties have spent much time and effort negotiating for a comprehensive and permanent resolution of the storage “reset” dispute. The Tribes have negotiated and participated in resolving this issue, and through this memorandum submit their distinct claims showing their own “unique and compelling” circumstances that justify relief under I.R.C.P. 60(b)(6) independently of the other parties. The requested remarks are necessary not only for efficient administration of the storage water rights and creating certainty, but must be included to protect tribal water rights and avoid future litigation. Importantly, granting the Joint Motion will not prejudice any water user, as no water user is opposed to the Motion. The Tribes respectfully request the Court find that there is a “unique and compelling” reason to reopen the Partial Decrees under I.R.C.P. 60(b)(6) and grant the Joint Motion.

DATED this 30th day of October 2019.



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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of October, 2019, I served a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF JOINT MOTION TO MODIFY PARTIAL DECREES FOR PURPOSES OF DIVERSION RATE AND "RESET"**

ADMINISTRATIVE REMARKS on the persons listed below by U.S. Mail:

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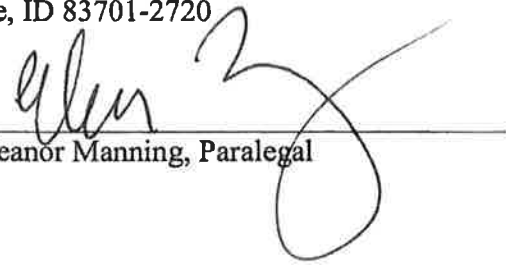
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**MEMORANDUM IN SUPPORT OF JOINT MOTION TO
MODIFY PARTIAL DECREES FOR PURPOSES OF DIVERSION RATE
AND "RESET" ADMINISTRATIVE REMARKS**

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ATTACHMENT A

01-219
01-2064
01-2068
01-4055
01-10042
01-10043
01-10045
01-10620
01-10621A
01-10621B
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