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DEPARTMENT OF
WATER RESOURCES

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Fish and Game*

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

IN THE MATTER OF APPLICATION	)	
FOR PERMIT TO APPROPRIATE	)	PETITION FOR RECONSIDERATION
WATER, PERMIT NO. 74-15613, IN	)	
THE NAME OF F. JAMES AND	)	
PAULA J. WHITTAKER	)	
_____	)	

Protestant Idaho Department of Fish and Game (IDFG), by and through the undersigned deputy attorney general, hereby petitions the Director of the Idaho Department of Water Resources (IDWR) to reconsider its May 10, 2011 *Final Order* upon the following grounds:

1. IDAPA 37.01.01.740.02.a provides that any party may petition IDWR to reconsider a final order within fourteen (14) days of issuance, *see also* Idaho Code § 67-5246(4);
2. Finding of Fact No. 23 reads as follows:

SCANNED
MAY 24 2011

23. The state of Idaho executed the Nez Perce Agreement with the Nez Perce Tribe and the federal government. In the agreement, the state of Idaho agreed to: (a) develop federal cooperative agreements for the protection of anadromous fish pursuant to Section 6 of the Endangered Species Act; and (b) establish minimum stream flows in identified streams for the protection of anadromous fish. In addition, the state also executed a Wild & Scenic Rivers Agreement with the federal government for the Salmon River. The agreement to sustain minimum stream flows pursuant to the Wild & Scenic Rivers Agreement also indirectly promotes the recovery of anadromous fish.

Final Order at 6–7.

3. Finding of Fact No. 23 fails to accurately describe the terms that the State agreed to in the Nez Perce Agreement. Additionally, the interpretation of the agreement was not at issue in these proceedings. In order to avoid any confusion or prejudice regarding interpretation of the agreement, Finding of Fact No. 23 should be amended to incorporate the language of the agreement itself, which speaks for itself:

The state of Idaho executed the Nez Perce Agreement with the Nez Perce Tribe and the federal government. In the agreement, the state of Idaho agreed to: ~~(a) develop federal cooperative agreements for the protection of anadromous fish pursuant to Section 6 of the Endangered Species Act; and (b) establish minimum stream flows in identified streams for the protection of anadromous fish.~~ “implement a Salmon and Clearwater Habitat Management and Restoration Initiative for the conservation and restoration of habitat within the Salmon and Clearwater River Basins. The Initiative will consist of three components: 1) instream flow program, 2) forest practices program, and 3) a habitat restoration program.” *Nez Perce Agreement* at 3. “These measures are expected to protect and restore listed fish and their habitat in the Salmon and Clearwater basins and downstream basins.” *Id.* at 16.

4. Finding of Fact No. 23 also incorrectly relates the Wild and Scenic Rivers Agreement to the recovery of anadromous fish. First, the agreement itself was in no way intended to promote—directly or indirectly—the recovery of anadromous fish. Rather the sole purpose behind the agreement was simply to resolve ongoing litigation: “this Stipulation has been entered into based upon good faith negotiations for the purpose of resolving legal disputes, including pending litigation, by compromise and settlement” *Wild and Scenic Rivers*

SCANNED

MAY 24 2011

Agreement at 17. Second, there was no determination in the SRBA that the primary purpose of the water rights resulting from the Wild and Scenic Rivers Agreement was related to anadromous fish recovery. *See United States v. State*, 135 Idaho 655, 661, 23 P.3d 117, 123 (2001) (finding that the reservation of a water right under the federal reserved water right doctrine only applies to the amount of water necessary to serve the primary purpose of the reservation). Instead, both the agreement itself and the resulting partial decrees approved by the SRBA District Court included only a general reference to the enabling statutes in describing the purpose of use: “To fulfill the purposes of the Wild and Scenic Rivers Act, Pub.L. 90-542, 82 Stat. 906, Oct. 2, 1968 (codified as amended at 16 U.S.C. §§ 1271, et seq.), and the Central Idaho Wilderness Act of 19080, Pub.L. 96-312, 94 Stat. 948, July 23, 1980 (codified as amended at 16 U.S.C. §§ 1132, 1274, 1281).” *Partial Decree*, In re SRBA Case No. 39576, Subcase No. 75-13316 at 3 (Idaho 5th Dist. Ct. Nov. 16, 2004). As the Director pointed out, “fish and wildlife” values are included in the list of eligibility criteria under the Wild and Scenic Rivers Act. *See Final Order* at 3. However, that list is not mutually inclusive. *See* 16 U.S.C. § 1271 (“[C]ertain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, *or* other similar values, shall be preserved in free-flowing condition”) (emphasis added); 16 U.S.C. § 1273 (providing that free-flowing rivers may be eligible for inclusion into the system if the rivers and adjacent land area possesses “one or more of the values referred to in section 1271”). The interpretation of the enabling statutes as it relates to the primary purpose of the water rights resulting from Wild and Scenic Rivers Agreement was not at issue, and need not be decided, in these proceedings. In order to avoid any confusion or prejudice regarding interpretation of those water rights or enabling statutes, Finding of Fact No. 23 should be amended to incorporate the language of the

SCANNED

MAY 24 2011

partial decrees themselves, which speaks for itself:

In addition, the state also executed a Wild & Scenic Rivers Agreement with the federal government for the Salmon River. The agreement to sustain minimum stream flows pursuant to the Wild & Scenic Rivers Agreement also indirectly promotes the recovery of anadromous fish resulted in insteam flow water rights on the mainstem Salmon River and the North Fork Salmon River “to fulfill the purposes of the Wild and Scenic Rivers Act, Pub.L. 90-542, 82 Stat. 906, Oct. 2, 1968 (codified as amended at 16 U.S.C. §§ 1271, et seq.), and the Central Idaho Wilderness Act of 1908, Pub.L. 96-312, 94 Stat. 948, July 23, 1980 (codified as amended at 16 U.S.C. §§ 1132, 1274, 1281).”

5. Finding of Fact No. 24 reads as follows:

Typically, senior water right holders whose rights authorize diversion from Big Timber Creek and Little Timber Creek will not divert water early in the year because they know their water rights can be satisfied later in the year. Later in time priority right holders divert water from Big Timber Creek and its tributaries early in an attempt to irrigate prior to demands being made upon the water by senior priority water right holders.

6. Finding of Fact No. 24 should be deleted because it is overly-broad, simplistic, and potentially unsupported by the record. *See Petition for Reconsideration to Correct Technical Errors* at 2 (Sept. 26, 2007).

7. Conclusion of Law No. 6 reads follows:

Reconnection of Big Timber Creek and the Lemhi River has been promoted through significant efforts of the local people and government agencies as one of the solutions for salmon, steelhead, and bull trout recovery. The stream reconnection and other salmon, steelhead, and trout recovery efforts by the local people contribute to the development of a cooperative conservation agreement pursuant to Section 6 of the Endangered Species Act. The plan is intended to promote conservation of species listed under the Endangered Species Act and to provide protection from incidental take liability. It is not in the local public interest to allow a new appropriation that will result in further dewatering of Big Timber Creek that would frustrate the reconnection efforts.

Final Order at 8.

8. Conclusion of Law No. 6 fails to accurately describe the framework through which the reconnection efforts on Big Timber Creek are being pursued. Those efforts are the result, at least in part, of the Salmon and Clearwater Habitat Management and Restoration

Initiative and not of any particular ESA Section 6 agreement. Consequently, Conclusion of Law

No. 6 should be amended as follows:

Pursuant to the Salmon and Clearwater Habitat Management and Restoration Initiative, Reconnection of Big Timber Creek and the Lemhi River has been promoted through significant efforts of the local people and government agencies as one of the solutions for salmon, steelhead, and bull trout recovery. The stream reconnection and other salmon, steelhead, and trout recovery efforts by the local people contribute to the development of a cooperative conservation agreement pursuant to Section 6 of the Endangered Species Act. The plan is intended to promote conservation of species listed under the Endangered Species Act and to provide protection from incidental take liability. measures of the Initiative, which “are expected to protect and restore listed fish and their habitat in the Salmon and Clearwater basins and downstream basins.” It is not in the local public interest to allow a new appropriation that will result in further dewatering of Big Timber Creek that would frustrate the reconnection efforts.

DATED this 24th day of May 2011.

LAWRENCE G. WASDEN
Attorney General

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



DAVID I. STANISH
Deputy Attorney General

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MAY 24 2011

CERTIFICATE OF SERVICE

I certify that on this 24th day of May 2011, I caused to be served the original and copies of the State of Idaho's **PETITION FOR RECONSIDERATION** on the following persons by the methods indicated:

1. Original to:

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2. Copies to:

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