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DEPARTMENT OF  
WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

|                                      |                               |
|--------------------------------------|-------------------------------|
| IN THE MATTER OF APPLICATION FOR )   | STATE OF IDAHO DEPARTMENT OF  |
| PERMIT NO. 74-15613 IN THE NAME OF ) | FISH AND GAME'S EXCEPTIONS TO |
| JAMES OR PAULA M. WHITTAKER )        | DENIAL OF PETITION FOR        |
| )                                    | RECONSIDERATION TO CORRECT    |
| )                                    | TECHNICAL ERRORS              |
| )                                    |                               |
| _____ )                              |                               |

COMES NOW, the Idaho Department of Fish and Game, hereinafter the "IDF&G," and respectfully files its exceptions to denial by operation of law of petition for reconsideration of the PRELIMINARY ORDER in the above-entitled matter served on September 12, 2007. The grounds for IDF&G's exceptions to denial of petition for reconsideration are as follows:

1. Finding of Fact No. 23 of the PRELIMINARY ORDER does not accurately characterize the Nez Perce Agreement or the Wild & Scenic Rivers Agreement. Finding of Fact No. 23 states as follows:

23. In addition, the state of Idaho has an obligation under the Nez Perce Agreement and the Wild & Scenic Rivers Agreement to promote the recovery of anadromous fish.

Preliminary Order at 5. The Nez Perce Agreement, among other things, was a voluntary agreement entered into by the state of Idaho that provides for the development of state and federal cooperative agreements under Section 6 of the Endangered Species Act. The present wording of Finding of Fact No. 23 does not recognize this fact. In addition, the Wild & Scenic Rivers Agreement is the settlement of a water rights dispute. The relevance of that agreement to this proceeding is that the senior water rights described in the Agreement are subordinated to junior water users. The Wild & Scenic Rivers Agreement does not promote the recovery of anadromous fish.

2. These minor comments about Finding of Fact No. 23 may be addressed by amending Finding of Fact No. 23 to read as follows:

23. In addition, the state of Idaho voluntarily agreed to develop Section 6 agreements and approved instream flows ~~has an obligation under the Nez Perce Agreement and the Wild & Scenic Rivers Agreement to~~ promote the recovery of anadromous fish.

3. Finding of Fact No. 24 of the PRELIMINARY ORDER is overly broad and a simplification of the use of water from the Big Timber Creek watershed. In addition, while the IDF&G has not had the opportunity to listen to the tapes of the hearing held in this matter, the IDF&G does not recall any evidence that would support the statements made in Finding of Fact No. 24. IDF&G recommends that Finding of Fact No. 24 be deleted.

4. Conclusion of Law No. 6 of the PRELIMINARY ORDER contains a misstatement of law and a mischaracterization of the facts offered into evidence in this matter. Conclusion of Law No. 6 states:

6. 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 have resulted in an approved conservation plan under the Endangered Species Act. The local water users are protected 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.

Preliminary Order at 6-7. Conclusion of Law No. 6 states (i) that “an approved conservation plan under the Endangered Species Act” exists for the Lemhi River drainage and (ii) that the local water users are protected from incidental take liability. Both statements are incorrect. Finding of Fact No. 22 more accurately characterizes the evidence offered in this matter. Finding of Fact No. 22 states:

22. The reconnections, screening, improved diversion structures, riparian habitat improvement, are components of a conservation plan supported by the local people and the agencies responsible for overseeing recovery, to protect the local people from liability should there be an incidental taking of an endangered species. If a conservation plan is approved by the National Marine Fisheries Service and the U.S. Fish and Wildlife Service, local water users are protected from liability should a spring chinook salmon, steelhead, or bull trout be killed or otherwise ‘taken’ as a result of diversion and use of water for irrigation.

Preliminary Order at 5.

5. The IDFG submitted Idaho Exhibit 19 that may have inadvertently confused this issue. Idaho Exhibit 19, which is entitled “2002-2003 Conservation Agreement in the Lemhi River Basin,” set forth in Section II “Tier 2 Habitat Measures For 2002 and 2003.” Idaho Exhibit 19 states its conclusion as follows:

The Service and NOAA and NMFS will exercise their enforcement discretion relative to initiating prosecution if measures identified in Tier 2 are implemented as discussed in this Agreement. This exercise of enforcement discretion will apply to the diversion activities of water users exercising otherwise lawful rights within the boundaries of the Lemhi

River Basin, and shall not apply to any intentional 'take' of ESA-listed species.

Idaho Exhibit 19, at 9. Accordingly, water users within the Lemhi River Basin had some protection from prosecution for incidental take of a listed species under the Endangered Species Act through December 31, 2003. However, the long term agreement for conservation of ESA-listed fish species, which was contemplated by Section III of Idaho Exhibit 19, is currently being developed, but is not yet completed. Accordingly, the following statement from Conclusion of Law No. 6 is not correct: "[A]n approved conservation plan exists for the Lemhi River Basin." The absence of an approved conservation plan makes the conclusion of law incorrect that the water users in the Lemhi River Basin have protection from prosecution for incidental take of an endangered species.

6. These very technical comments about Conclusion of Law No. 6 of the PRELIMINARY ORDER may be corrected by amending Conclusion of Law No. 6 to read as follows:

6. 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 are part of the development of a cooperative conservation agreement under 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 participating water users have resulted in an approved conservation plan under the Endangered Species Act. The local water users are protected 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.

7. The Idaho Department of Water Resources never considered the substantive content of the STATE OF IDAHO DEPARTMENT OF FISH AND

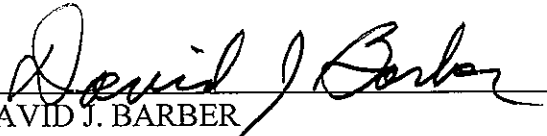
GAME'S PETITION FOR RECONSIDERATION TO CORRECT TECHNICAL ERRORS. The IDF&G has raised meritorious factual and legal issues that warrant a substantive response by the Idaho Department of Water Resources.

8. Oral argument is not requested on these EXCEPTIONS to the denial of the petition for reconsideration by operation of law, although the IDF&G is certainly willing to provide further argument if that would assist the Director.

RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of October 2007.

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## CERTIFICATE OF SERVICE

I certify that on the 24<sup>th</sup> day of October 2007, I caused to be served a copy of the  
STATE OF IDAHO DEPARTMENT OF FISH AND GAME'S EXCEPTIONS TO  
DENIAL OF PETITION FOR RECONSIDERATION TO CORRECT TECHNICAL  
ERRORS on each of the following persons by the indicated method.

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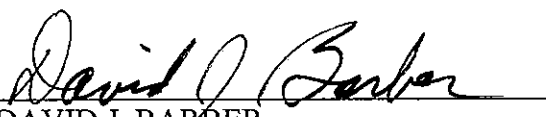
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