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DEPARTMENT OF
WATER RESOURCES

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March 9, 2006

By Fax (208)736-2121 and Fedex
Diana R. Delaney, Chief Deputy Clerk
Snake River Basin Adjudication
District Court
253 Third Ave., North
Twin Falls, ID 833-3-2707

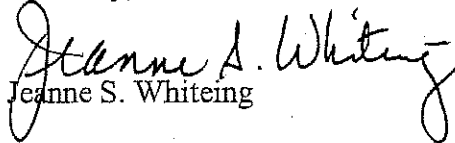
Re: SRBA Case No. 39576
Subcase Nos. 51-02002 et al., Subcase Nos. 51-12756, et al., Subcase Nos. 51-12604, et al.,

Dear Ms. Delaney,

Enclosed for filing in the above mentioned case are the original and 1 copy of the Shoshone-Paiute Tribes' Objection to Entry of Consent Decree and Certificate of Service.

Thank you for your assistance in this matter.

Sincerely,


Jeanne S. Whiteing

Enclosure

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ATTORNEYS FOR THE SHOSHONE-PAIUTE TRIBES

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

Re SRBA	)	Subcase Nos. 51-02002, et al [Exhibit A]
	)	Subcase Nos. 51-12756, et al. [Exhibit B]
	)	Subcase Nos. 51-12604, et al. [Exhibit C]
Case No. 39576	)	
	)	SHOSHONE-PAIUTE TRIBES' OBJECTION
	)	TO ENTRY OF CONSENT DECREE AND
	)	MOTION FOR EXTENSION OF TIME
	)	TO RESPOND

The United States and the State of Idaho, along with other parties, filed a Joint Motion for Approval of Consent Decree and Entry of Partial Final Decrees on January 9, 2006. The Shoshone-Paiute Tribes (hereinafter "Tribes") filed an objection to entry of the consent decree on January 9, 2006, and requested a thirty day of extension of time in which to further respond to the Joint Motion. An extension of time until March 10, 2006, was granted by the court on February 13, 2006. In its initial filing, the Tribes summarized its procedural and substantive objections to entry of the consent decree. The Tribes further expands on those objections herein.

INTRODUCTION

The United States, on behalf of the Shoshone-Paiute Tribes, filed a Notice of Claim to a Water Right Reserved Under Federal Law on February 4, 1998. On January 11, 1999, the Tribes moved to intervene in all claims filed on its behalf. As its complaint, the Tribes "adopt[ed] the claims filed by the United States on their behalf." *Id.* The Tribes' motion to intervene was granted on December 6, 1999 by Special Master Dolan.

For over ten years, the Tribes and other claimants expended significant time and resources in good faith efforts to resolve the Tribes' water right claims without litigation. While the negotiation of the water rights as between the Tribes and affected water users was successful, an overall settlement foundered on the failure to reach an agreement with the United States on a federal monetary contribution to settlement. The State of Idaho therefore made an offer of judgment to the United States in full satisfaction of all of the United States' federal reserved water right claims filed on behalf of the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation in the SRBA. The United States accepted the offer of judgment without the consent of the Tribes.

To implement the offer of judgment, the United States and the State of Idaho jointly prepared a proposed consent decree, and together filed the foregoing Joint Motion for Approval of Consent Decree and Entry of Partial Final Decrees on January 9, 2006, all without the consent of the Tribes. The Tribes vigorously objects to approval of the consent decree.

I. The Tribes Are a Full Party in this Case and Its Consent is Required to Settle the Case Through an Offer of Judgment and Proposed Consent Decree

The Tribes were granted intervention in the present proceeding for the adjudication of their water rights on December 6, 1999. While the Court did not state whether it was granting intervention as a matter of right, the Tribes' clearly met that standard: they hold a property

interest in the adjudication of their reserved water rights, *see Winters v. United States*, 207 U.S. 564, 576 (1908) (in reserving water rights on behalf of tribes, “the Government is asserting the rights of the Indians.”); *Nevada v. United States*, 463 U.S. 110, 125 (1983) (discussing the “property right in the water right”); *Arizona v. California*, 460 U.S. 605, 614 (1983) (describing Tribes’ interest in their water right as “vital”); and, their interests, while closely related to the United States, are not identical, *see In re the General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 83 (Wyo. 1988) (granting intervention in response to Tribes’ claim that United States would not adequately represent their interests); *Arizona v. California*, 460 U.S. at 615 (recognizing that Tribes’ intervention and participation was “critical to their welfare”).¹ Indeed, the courts have recognized that the “remedy” for Indian tribes that do not believe that the United States can adequately represent their interests in a water rights adjudication is to intervene. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 567, n.17 (1983); *Arizona v. California*, *supra*; *White Mountain Apache Tribe v. Hodel*, 784 F.2d 921, 925 (9th Cir. 1986) (“the Tribe’s best assurance that its interests will be protected in this unusual proceeding is to avail itself . . . of the opportunity the Arizona courts have extended to it to intervene.”)

The Shoshone-Paiute Tribes have taken advantage of this “remedy” by intervening in this proceeding. Once the Court granted intervention, the Tribes had, and continue to have, full party status in the adjudication. *See Diamond v. Charles*, 476 U.S. 54, 68 (1986) (intervenors, whether

¹ While the Tribes’ initially adopted the claims filed by the United States, the United States’ decision to accept the State of Idaho’s offer of judgment results in a substantial reduction from the amounts of water originally claimed and will substantially limit the Tribes’ use of water on its Reservation. This unilateral decision by the United States highlights the differences that now exist between the Tribes and the United States and confirms that the United States does not adequately represent the Tribes’ interests.

permissive or as of right, are considered parties to the litigation entitled, among other things, to seek appellate review); *United States v. California Mobile Home Park*, 107 F.3d 1374, 1378-79 (9th Cir. 1997), citing *Mine Workers v. Eagle-Picher Co.*, 325 U.S. 335, 338 (1945) (party permitted to intervene has standing to seek *certiorari* review); Wright, Miller & Cooper, Federal Practice and Procedure (Civil 2nd) § 1902 (1986) ("Unless conditions have been imposed, the intervener is treated as if he were an original party and has equal standing with the original parties.").²

While the United States may be able to bind the Tribes if they are not a party to the adjudication, see *Nevada v. United States*, 463 U.S. 110 (1983), where, as here, the Tribes are a party, their consent is necessary for entry of a consent decree, particularly when the United States has compromised the water claims of the Tribes as is set forth more fully below. This distinction was recognized by the Court in *Arizona v. California*. There, the Court recognized that the United States, as the Tribes' representative, could bind them in litigation in which the Tribes were not parties. 460 U.S. at 615, citing *Hackman v. United States*, 224 U.S. 413, 444-445 (1912) (a case in which the affected Indian tribe was not a party). In 1979, the Court had denied the Tribes' motion to intervene for the purpose of opposing entry of the 1979 Supplemental Decree, 439 U.S. 419, 437 (1979), which had previously been agreed to by the United States. See *Arizona v. California*, 460 U.S. at 612.³ However, the Court subsequently granted the Tribes

² Once granted intervention, the Tribes clearly meet the definitions of "party" and "claimant" under IC § 42-1401A(7).

³ In their Brief in Support of Joint Motion for Entry of Consent Decree at 7, the parties quote language from *Arizona v. California*, 460 U.S. at 626-27, for the proposition that the United States can bind tribes in litigation of the water rights claims. However, the Court's language makes it clear that it is discussing the role of the United States *prior* to the Tribes being granted intervention and becoming parties to the litigation. The sentence immediately preceding that quoted in the Brief in Support states: "Finally, the absence of the Indian Tribes in the prior

intervention to participate in all future proceedings, including adjudication of the Tribes' claims to additional water for omitted lands. *Id.* at 613-15. The ultimate settlement of those claims required the consent of *both* the affected Tribes and the United States before those settlements were adopted and approved by the Court in *Arizona v. California*, 493 U.S. 886 (2000).

The Supreme Court has held that an intervener does not have the right to block entry of a consent decree "merely by withholding its consent." *Local Number 93 v. City of Cleveland*, 478 U.S. 501, 529 (1986). But, "where 'nonconsenting interveners' have brought 'valid claims' that 'are properly raised,'" the Court recognized an exception to its rule. *Southern California Edison Company v. Lynch*, 307 F.3d 794, 807 (9th Cir. 2002), *citing Local No. 93*, 478 U.S. at 529.

Of course, parties who choose to resolve litigation through settlement may not dispose of the claims of third parties, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement.

Local No. 93, 478 U.S. at 529. Lower courts have interpreted the Supreme Court's exception to "make it clear that a consent decree requires the consent of *all* parties whose legal rights would be adversely affected by the decree." *United States v. City of Hialeah*, 140 F.3d 968, 975 (11th Cir. 1998) (emphasis added), *citing United States v. City of Miami*, 664 F.2d 435 (5th Cir. 1981) (*en banc*) and *White v. Alabama*, 74 F.3d 1058 (11th Cir. 1996). The *City of Miami* court found that "parts of the decree do affect the third party who did not consent to it, and these parts cannot properly be included in a valid consent decree." 664 F.2d at 442. And, in the *White* decision, the court clearly recognized that in *Local No. 93*, the Supreme Court acknowledged that "had the settlement affected the union's rights, the decree could not have been entered without its

proceedings in this case does not dictate or authorize relitigation of their reserved rights." *Id.* at 426. The entire discussion by the Court addresses to the Tribes' claims regarding inadequate *past* representation, not the relationship between and respective roles of the United and Tribes *after* the Tribes intervened and became parties in the litigation.

consent.” 74 F.3d at 1075, n.53. *See also SoCal v. Lynch, supra*, 307 F.3d at 807. Here, of course, the only party whose interests are actually affected by the proposed consent decree is the Tribes.

In this adjudication the Tribes adopted and asserted on its own behalf the United States’ claims to reserved water rights for the benefit and use of the Tribes. The two parties’ claims are, therefore, identical, and the United States’ decision to compromise and limit those claims will, without any doubt, affect the Tribes’ rights by substantially limiting the scope, nature and extent of their reserved water rights and the physical amount of water actually available to the Tribes for use on their Reservation. The parties’ suggestion that “federal courts have entered consent decrees to which only some of the litigating parties have consented” is inapposite here where identical claims to property rights are at issue and the United States is acting as trustee for the Tribes. *See Sanguine, Ltd. v. United States Department of the Interior*, 798 F.2d 389 (9th Cir. 1986) (setting aside a consent decree on motion of individual Indian interveners where it would impair or impede their ability to protect their valuable property interests).

Moreover, to the extent the moving parties may be suggesting that the United States can settle its claims while leaving the Tribes to litigate its claims, such a procedure presents the potential for inconsistent decrees, a consent decree agreed to by the United States and the State of Idaho and a decree litigated by the Tribes and State, both premised upon identical claims. Such would clearly preclude a settlement that does not include the Tribes. If allowed to go forward in the form of the proposed consent decree, such a settlement would impact and affect the property rights of the Tribes and their ability to protect those vital rights in any continuing litigation. The courts have not failed to protect the rights of third party interveners under such circumstances, and a consent decree cannot be entered without the consent of all affected parties. To find

otherwise would clearly affect the Tribes' rights and would mean that, contrary to the statements of the Supreme Court and the Ninth Circuit, intervention has no meaning and provides no basis for tribes to protect their property rights.⁴

II. The Consent Decree Represents a Significant Compromise of the Tribes' Water Claims Rendering the Consent Decree Unfair, Inadequate and Unreasonable

As the Brief in Support of the Joint Motion acknowledges, the court is required to make a determination that the consent decree is fair, adequate and reasonable. *United States v. Oregon*, 913 F.2d 576, 580 (9th Cir. 1990). The proposed Consent Decree does not meet this standard. The consent decree represents a major compromise of the Tribes' water right without its consent and to its substantial detriment. The actual quantity of water in the consent decree represents only 60% of the 1998 filed claims, and only 51% of the claims supported by the 2005 expert reports provided to the State and other parties in discovery. Specifically, the consent decree excludes completely claims for wildlife habitat, lake level maintenance, and instream flows for fish and religious and ceremonial purposes. It further limits the use of storage water to irrigation and stock watering, and does not recognize storage for fish and wildlife or recreation. The proposed consent decree also forecloses any opportunity to establish the Tribes' correct priority date which had not yet been addressed by the parties. The proposed consent decree further

⁴ The United States' and the State of Idaho's reliance on *Shoshone-Bannock Tribes v. Reno*, 56 V.3d 1476 (D.C. Cir. 1995) is misplaced. That case dealt with prosecutorial discretion to bring a claim in the first instance. Such discretion is broader than and different from the question of how a claim must be handled once the decision has been made to pursue it. This difference was highlighted by the court when it stated, "The government's refusal to institute legal proceedings – as compared to an affirmative exercise of power – is less likely to encroach upon protected liberty or property interests. Judicial monitoring of a refusal to act is correspondingly less necessary." 56 F.3d at 1481, citing *Heckler v. Chaney*, 470 U.S. 821, 823 (1985) (emphasis added). Judicial monitoring is required in the present circumstances where the decision to make the claim on behalf of the Tribes has been made, and the question is whether the claim can be compromised without the Tribes' consent.

identifies specific points of diversion and places of use that are inconsistent with the nature of Indian reserved rights which are intended for future as well as present needs and which are not restricted by the specific purposes for which water is claimed. Finally, the consent decree contains waivers of claims that have not been discussed or presented to the Shoshone-Paiute Tribes and for which no explanation is provided. Such waivers and releases significantly impair the rights of the Tribes.

The offer of judgment and proposed consent decree represent an expedient resolution of some thorny issues for the United States and the State. The United States no longer must make a monetary contribution to a comprehensive settlement, a contribution which it has readily embraced in nearly every other Indian water rights settlement to date; the State no longer will be pressed to make a State contribution to settlement; and both parties avoid any further litigation costs. Completely left out of the process is the Shoshone-Paiute Tribes, the real party in interest, and the only party who must actually live with the result.

The entire economy of the Duck Valley Reservation is based on agriculture and fish and wildlife. Without adequate supplies of water for these purposes, the promise of a permanent homeland is seriously compromised, and the Tribes' very existence is put into jeopardy. A compromise of nearly 50% of the claims filed on behalf of the Tribes cannot under any standard be considered fair, adequate and reasonable in the present case. Accordingly, the court should refuse to recommend approval of this unfair, inadequate and unreasonable consent decree.

A. The Consent Decree Significantly Compromises the Quantity of Water Claimed by the United States on Behalf of the Tribes and by the Tribes on Its Own Behalf

The proposed consent decree represents a major compromise of the Tribes' water rights. It does not include water for the claims filed by the United States on behalf of the Tribes and

claimed by the Tribes on its own behalf, for wildlife habitat, storage for purposes other than irrigation, i.e. storage for recreation, fisheries, wildlife habitat and other non-irrigation uses, lake level maintenance and instream flows. The chart below compares the offer of judgment and the 1998 claims filed on behalf of the Tribes and adopted by the Tribes. The chart also includes a comparison to the claims that the United States was prepared to file to conform to the expert reports provided to the State in discovery in 2005.

Purpose	Offer of Judgment	1998 Claim	2005 Claim from Expert Reports ⁵
DCMI	Limited to 381 AFY (2005 Claim)	Domestic - 382 wells (approx. 152.8 AF) Municipal - 415 AF	Domestic - 121.9 AF from 298 wells Municipal - 258.6 AF
Stockwater	Total diversion limited to 687 AFY	240 claims to springs and stockponds; 24 claims for instream flow for stock and wildlife at .02 cfs (approx. 687 AFY)	235 claims to springs and stockponds; 24 claims for instream flow for stock and wildlife - 687 AFY
Irrigation	17,816 AFY	17,816 AFY	22,916 AFY
Reservoir Storage	631 AFY limited to irrigation purpose	631 AFY for irrigation, livestock, recreation, wildlife and fisheries	Not available
Lake Level Maintenance	36 AFY (to be decreed as storage for irrigation and stock)	1,293 AFY	426 AFY
Wildlife Habitat	0	11,305 AFY	13,501 AFY
Instream Flows for Fish (Claimed as alternative use of water)	0	Claims for fish habitat, channel maintenance and riparian habitat in Owyhee and Mary's Creek	Claims for fish habitat, channel maintenance and riparian habitat in Owyhee and Mary's Creek
Water diverted in NV for use in ID (informational only, not included in totals)	32,393 AFY irrigation 7,115 AFY storage	32,393 AFY irrigation 7,115 AFY storage	34,418 AFY

⁵ Source: Northwest Economic Associates, *Comprehensive Plan to Support Consumptive Use Water Right Claims Filed on Behalf of the Shoshone and Paiute Tribes of the Duck Valley Indian Reservation*, April, 2005, Table 27 at 49, Exhibit A hereto.

Totals	19,551 acre feet	32,229.8 acre feet + instream flows for fish	37,910.8 acre feet + instream flows for fish and reservoir storage
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As shown, the consent decree represent 12,714.8 acre feet less than the filed claims and includes no right to water for wildlife habitat, lake level maintenance, storage for fish and wildlife and recreation or for instream flows for fish. As to the amended claims that the United States and the Tribes were preparing based on the United States' 2005 expert reports, the consent decree is 18,395.8 acre feet less than the claims supported by the United States' expert reports, and again includes no right to water for wildlife habitat, lake level maintenance, storage for fish and wildlife and recreation or for instream flows for fish. The United States has therefore significantly compromised the water rights of the Shoshone-Paiute Tribes to the Tribes' detriment.

As to irrigation claims, most of the 1998 claims in the amount of 17,816 acre feet are includes in the proposed consent decree.⁶ However, based on the United States' 2005 expert reports, the total irrigation claim in Idaho is 22,916 acre feet. The historic and present irrigation claim is 19,226 acre feet. The irrigation water right of 17,816 acre feet under the proposed consent decree for all present, historic and future (PIA) irrigation is 5,100 acre feet less than the claim supported by the 2005 expert reports, and 1,410 acre feet less than the 2005 potential historic and present claims alone. The United States has therefore entirely compromised any right to establish water for future irrigation use.⁷

⁶ The consent decree excludes Claim No. 55-13816 in Blue Creek for 10 wells for a supplementary water supply of 1,151 acre fee for lands in Blue Creek Basin. Similar claims in the Owyhee River are proposed to be decreed as claimed (Claim Nos. 55-13818 and 55-13820), and there is no apparent explanation for treating the Blue Creek claim differently.

⁷ Of course, the offer of judgment and consent decree preempt the amended claims that the United States would have filed to conform to the expert reports if litigation had continued.

The exclusion of any water for fish and wildlife is particularly detrimental to the Shoshone-Paiute Tribes. The Reservation waters and reservoirs have established and well known fisheries that attract fishers throughout the West, and are the basis for an ever growing segment of the Tribes' economy. The numbers and types of waterfowl and other birds and wildlife that inhabit the Reservation are extraordinary, and the Tribes have taken steps to manage and support wildlife habitat on the Reservation through various federal grants. These activities, which are in fulfillment of the purpose of the Reservation to provide a homeland for the Tribes and their members, are substantially negated by the settlement between the United States and the State of Idaho, and will seriously jeopardize the economic of the Reservation and the future of the Tribes.

B. The Decree Provisions Concerning Point of Diversion and Place of Use is Inconsistent with the Nature of Indian Water Rights

It is fundamental that the quantity of reserved Indian water rights is intended to satisfy future as well as present needs, and that a Tribes is not restricted to the specific purposes for which water rights are claimed and awarded. The purposes and standard by which the rights are quantified are not "a restriction of the usage of them." *Arizona v. California*, 439 U.S. 419, 411 (1979). Therefore, it must be recognized in the consent decree that the irrigation purposes and other purposes by which the Tribes' water rights are measured are not a restriction on the Tribes' use of the water for any other purpose at any point of diversion or any location on the Reservation. Accordingly, it is inappropriate for the proposed consent decree to contain the detailed purposes, places of diversion and places of use that are now included in the proposed decree.

The notation that the rights are subject to administration by the United States and the Tribes does not address this issue. Designation of the use, point of diversion and place of use

implies that a change procedure is required to change the designated elements. However, such is not the case. These elements are apparently not required by law, as they are not included in the Nez Perce decree.⁸ Therefore, the Tribes objects to the description of the water rights as inconsistent with the fundamental characteristics of a *Winters* right.

C. The Waivers and Releases in the Consent Decree Appear to Bind the Tribes Without Its Consent

The waivers and releases contained in the proposed consent decree are broad and appear to foreclose all other water claims by the United States on behalf of the Tribes or by the Tribes itself. These waivers and releases were not presented to the Tribes for its review and were never otherwise raised or discussed with the Tribes by the United States. Among other things, the waivers and releases preclude water rights for any aboriginal lands within the Snake River Basin to which the Tribes may claim or may establish title in the future. This issue is of particular significance to the Tribes, and the Tribes sought to protect such claims in negotiation discussions. It therefore appears that what the Tribes would not agree to in the context of negotiations, the State would be able to accomplish through the consent decree if approved.

The waivers and releases also provide that the consent decree is in full satisfaction of all water rights or claims to water for the Duck Valley Irrigation Project. The Tribes are the primary beneficiary of the Duck Valley Irrigation Project, and the Tribes therefore have a critical interest in Project water. No explanation of the waivers and releases has been provided to the Tribes. Full disclosure of the intent and meaning of the releases and waivers should be provided before

⁸ The Nez Perce decree provides that points of diversion and places of use may be developed within land reserved by the Treaty. It further provides: "This water right will be administered by the Nez Perce Tribe in accordance with the Tribal Water code. Specific locations for Points fo Diversion or Place of Use shall be determined pursuant to the Tribal Water Code." See Exhibit B to Tribes' Initial Response and Objection dated February 8, 2006.

any approval of the consent decree is considered.

D. The Tribes' Water Rights Priority Date Under the Proposed Consent Decree is Erroneous

In the summary judgment motion filed by the United States and joined in by the Tribes, the issue of the Tribes' priority date was left open to be addressed at a later time. It is the Tribes' position that the correct priority date for all Duck Valley Reservation water rights is October 1, 1863, the date of the Treaty of Ruby Valley, 18 Stat. 689, which authorized the President "to make such reservations for their use as he may deem necessary," and which authorization was implemented by Executive Orders of April 16, 1877, May 4, 1886, and, July 1, 1910, 1 Kappler 866, 879.⁹ The proposed consent decree which provides for three separate priority dates based on the three separate executive orders is erroneous.¹⁰

1. The Tribes' Correct Water Rights Priority Date is October 1, 1863.

The United States concluded a treaty of peace and friendship with the Western Shoshones on October 1, 1863, 18 Stat. 689. In the Treaty, the parties agreed to establish and maintain peace and friendship, and the Shoshones agreed to cease all hostilities and depredations against emigrant trains, mail and telegraph lines, and citizens of the United States. After expanding

⁹ In construing the relevant governing documents for purposes of determining the Tribes' priority date, the fundamental canons of construction governing Indian treaties and statutes apply. Under these canons, Indian treaties are to be construed liberally according to the Indians' understanding, as expressed in the treaty terms, negotiations, and subsequent construction. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *Choctaw Nation v. United States*, 318 U.S. 423, 431-432 (1943). Any ambiguity in such treaties is to be resolved in the favor of the Indians. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973); *Winters v. United States*, 207 U.S. 564, 675-577 (1908). Construed accordingly, the 1863 Ruby Valley Treaty and the implementing executive orders establish a 1863 water rights priority date.

¹⁰ The Tribes acknowledge that an amendment to the claims would be necessary to assert the priority it claims here.

further on these themes, Article 5 of the Treaty defines the boundaries of Shoshone country.

Article 6 of the Treaty then provides:

The said bands agree that whenever the President of the United States shall deem it expedient for them to abandon the roaming life, which, they now lead, and become herdsmen or agriculturalists, he is hereby authorized to make such reservations for their use as he may deem necessary within the country above described; and they do also hereby agree to remove their camps to such reservations as he may indicate, and to reside and remain therein.

Between 1863 and 1877, various attempts were made to establish a suitable Shoshone reservation pursuant to the Treaty. *See* Clemmer at 66, 67, 86, 92, 94. Reservations at Ruby Valley and Carlin Farms were attempted, but in both cases, the reservations were not protected against intruders, including settlers and soldiers, and were abandoned by the federal government. There was also an attempt to have the Western Shoshones waive their rights under the Ruby Valley Treaty and move to Fort Hall, but the Shoshones refused to go. Clemmer at 86. Throughout this period, the federal efforts to establish a Western Shoshone reservation were taken in furtherance of the 1863 Ruby Valley Treaty, and the expectation and understanding of the Shoshones was that a reservation would be set aside for them within their treaty territory.

Fourteen years after the 1863 Ruby Valley Treaty, the Duck Valley Reservation was established pursuant to the Treaty by Executive Order of April 16, 1877, 1 Kappler 866. *See* H.R. Doc. 736, 56th Cong., 1st Sess (1899) (*Indian Land Cessions in the United States* compiled by Charles C. Royce, Part 2 of the *Eighteenth Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution, 1896-1897*), <http://memory.loc.gov/ammem/amlaw/lwss-ilc.html>. *See also* *Western Shoshone Identifiable Group v. United States*, 40 Ind. Cl. Comm. 318 (1977) (Findings of Fact #71 and #72). The Reservation was intended to and understood by the Tribes and the United States as fulfilling the

promise of the Ruby Valley Treaty. Additions were made to the Reservation by Executive Orders of May 4, 1886, and, July 1, 1910, 1 Kappler 866, 879.

In nearly identical circumstances, the court in *State of New Mexico v. Lewis*, 116 N.M. 194, 861 P.2d 235 (1993), held that the Mescalero Apache Tribe of New Mexico had a water rights treaty priority date of July 1, 1852, the date of their initial peace and friendship treaty with the United States. The Mescalero Apache Tribe entered into a treaty of peace and amity on July 1, 1852, 10 Stat. 979. Article 9 of the Treaty provides “that the government of the United States shall at its earliest convenience designate, settle and adjust their territorial boundaries, ...” The Mescalero Reservation was subsequently established by five executive orders in 1873, 1874, 1875, 1882 and 1883. 861 P.3d at 239.

The court held that the water rights priority date issue was a matter of law, rather than a question of fact: “[W]hen there is a vague treaty together with a course of dealing that, at best, can be characterized as ambiguous, we believe that the courts must rule, as a matter of law, in accordance with the canons of construction that liberally favor the Indians.” *Id* at 243. The court thus concluded that “the priority date should be the date the United States promised to create a reservation,” in the 1852 Treaty. *Id.* at 244. The court relied on and cited to the decisions in *United States v. Walker River Irrigation Dist.*, 104 F.2d 334 (9th Cir. 1939), applying the rule of liberal construction to conclude that instructions from the Commissioner of Indian Affairs directing the General Land Office to reserve lands for Indian purposes were sufficient to establish the Walker River Reservation which was subsequently formally sanctioned by Presidential Proclamation; *United States v. Carpenter*, 111 U.S. 347 (1884), holding that an 1859 promise to survey out an area for the Indians which was not accomplished until 1872, precluded the intervening rights of a non-Indian; and *Corrigan v. Brown*, 169 F. 477 (W.D. Wash. 1907),

holding that lands reserved by treaty in 1855 were not established until 1873. *See also Nevada v. United States*, 463 U.S. at 115-116, holding that the water rights priority of the Pyramid Lake Paiute Reservation which was set aside by Departmental order in 1859 but not confirmed by Executive Order until 1874, was 1859. The *Lewis* decision fully supports a treaty priority date of 1863 for the Shoshone-Paiute Tribes.

2. In the Alternative, the Priority Date for All Tribal Water Rights is the Date the Reservation Was First Established by Executive Order

In the alternative, the Tribes' priority date for all water rights is April 16, 1877, the date of the first Executive Order. Each of the subsequent executive orders in 1886 and 1910 merely set apart lands as "an addition to the Duck Valley Reservation." As an addition to the existing reservation, the priority date of the new lands would relate back to the original date of establishment. The practical difficulty of focusing on each separate executive orders was explained in the Arizona Supreme Court's recent decision in *In re General Adjudication of All Rights to Use Water in the Gila River System and Source*, 201 Ariz. 307, 315, 35 P.3d 68, 74 (Ariz. 2001):

First, as pointed out by the state litigants, many Indian reservations were pieced together over time. For example, the boundaries of the Gila River Indian Community changed ten times from its creation in 1859 until 1915, resulting in overall growth from 64,000 to 371,422 acres. But some of the changes along the way actually decreased the size of the reservation or limited the scope of previous additional. If these alternations had different purposes, as the state litigants suggest, it might be argued that water reserved to a specific parcel could not be utilized elsewhere on the same reservation, or that water once available could no longer be accessed. Such a patchwork of water rights would be unworkable and inconsistent with the concept of a permanent, unified homeland.

These same practical difficulties exist if there are differing priority dates for water within the same reservation. Water reserved in one part of the reservation may not be available for use in another part of the Reservation, and if once available, may no longer be available depending on

the priority date. Such a system would equally interfere with the homeland purpose of the Reservation.

E. The United States and the State Have Failed to Meet Their Burden to Show the Settlement is Fair, Adequate and Reasonable

The United States' and the State's argue that they are entitled to a "presumption" that the consent decree is fair, adequate and reasonable. Brief at 6. No support for such a presumption is provided. The parties' argument for a presumption rests merely on the fact that the United States accepted the offer of judgment and worked with the other parties in drafting the consent decree. They claim that because the United States filed the claims and accepted the offer of judgment it must be presumed fair, ignoring the Tribes' view that the offer and proposed consent decree unfairly and substantially limits the scope and extent of their property rights. Ironically, that is exactly the complaint of the Tribes: the United States accepted the offer of judgment without the consent of the Tribes, and then proceeded to work with the other parties to implement its acceptance in the form of a consent decree, all to the detriment of the Tribes.

More disconcerting is the claim that the proposed consent decree meets the bare minimum requirements of *Winters v. United States*, 207 U.S. 564 (1908), apparently because it provides water for the Tribes' agricultural needs but excludes water for other purposes claimed by the United States and Tribes. A comparison of those claims and the proposed settlement, detailed above, demonstrates that the settlement deprives the Tribes of significant and substantial reserved water rights for important purposes of the Reservation. That discrepancy is even more egregious if one considers the amended claims that the United States and Tribes were in the process of filing prior to the State's submission of its offer of judgment to the United States.

Further the moving parties' comparison of the differences between the claims and the

consent decree is disingenuous. Their explanation is in terms of types of claims and numbers of claims and not quantity of water. When quantity is compared, as the Tribes has set out in the table above, the magnitude of the compromise and the impact on the Tribes' property rights is dramatic and significant.

CONCLUSION

For all of the above reasons, the court should decline to recommend approval of the proposed consent decree.

Respectfully submitted this 9th day of March, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of March, 2005, a true and correct copy of the **SHOSHONE-PAIUTE TRIBES' RESPONSE TO JOINT MOTION FOR STATUS CONFERENCE AND STATEMENT RE OFFER OF JUDGMENT** was served by Email and U.S. Mail, except as otherwise indicated, on the following:

Clerk of the District Court (Fedex)
Snake River Basin Adjudication
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Twin Falls, ID 83302

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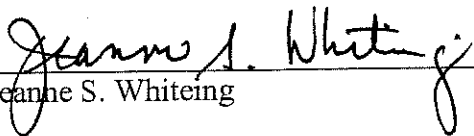
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water requirements are served from sources in the three primary basins of Owyhee River, Blue Creek, and Marys Creek. Table 27 provides a summary of the water requirements for water diverted from Idaho sources of supply. Nearly two-thirds, or 23,764 acre-feet, originates in the Blue Creek drainage. Another 12,219 acre-feet of water derives from the Owyhee River. The remainder, or 1,195 acre-feet, comes from the Marys Creek basin. More than half of the requirement, or 19,226 acre-feet, serves presently and historically irrigated lands in both Blue Creek and Owyhee River basins. Future agricultural irrigation requires 3,353 acre-feet; this serves land in the Blue Creek basin (800 acre-feet) and Pleasant Valley (2,553 acre-feet). Wildlife habitat enhancement in Blue Creek has a water duty of 12,306 acre-feet, and wildlife habitat maintenance in Marys Creek requires 1,195 acre-feet annually.

Table 27
Summary of Surface and Ground Water Needs from
Idaho Sources of Supply, Duck Valley Indian Reservation
(Acre-Feet)

Surface Water	Owyhee River	Blue Creek	Marys Creek	TOTAL
Historic and Present Irrigation	8,711	10,515	0	19,226
Future Irrigation	2,553	800	0	3,353
Wildlife Habitat	0	12,306	1,195	13,501
Livestock Water	672	0	0	672
Lake level maintenance	283	143	0	426
Total – Surface Water Sources	12,219	23,764	1,195	37,178
Ground Water				
Future Irrigation	337	0	0	337
Livestock Water*	15	0	0	15
DCMI*	381	0	0	381
Total – Groundwater Sources	733	0	0	733
TOTAL	12,952	23,764	1,195	37,911

* Livestock and DCMI water from ground water sources are shown as "from the Owyhee River" for display purposes.