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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	)	
	)	
	)	Subcases 51-02002, <i>et al.</i> [Exhibit A]
	)	(Riddle Ranches/Jackson)
	)	and
Case No. 39576	)	Subcases 51-12756, <i>et al.</i> [Exhibit B]
	)	Subcases 51-12767, <i>et al.</i> [Exhibit C]
	)	(US/Shoshone-Paiute Tribes)
	)	
	)	STATE OF IDAHO'S REPLY BRIEF
	)	IN SUPPORT OF JOINT MOTION
	)	FOR ENTRY OF CONSENT DECREE
_____	)	

INTRODUCTION

The State of Idaho and the United States jointly moved on January 9, 2006 for entry of the consent decree that, if approved, will resolve federal reserved water right claims asserted by the Federal Government on behalf of the Shoshone-Paiute Tribes (Tribes). They also filed a joint brief in support of the motion that summarized the reasons why the Special Master should recommend the decree's approval and entry. The Tribes alone oppose the motion. They argue, first, that the proposed consent decree may not be entered over their objection given their intervenor-party status and claimed prejudice and, second, that the decree is otherwise not "fair, adequate and reasonable." Mar. 9, 2006 Shoshone-Paiute Tribes' Obj. to Entry of Consent Decree and Motion for Ext. of Time to Respond (Mar. Obj.) at 7; see also Feb. 8, 2006 Shoshone-Paiute Tribes' Obj. to Entry of Consent Decree and Motion for Ext. of Time to Respond (Feb. Obj.) at 7-9.

The United States has filed simultaneously with this brief its reply in support of the motion that addresses the Tribes' opposition. Idaho concurs in the federal arguments but writes separately to underscore certain core legal principles concerning the Tribes' claim of a "veto" right and to supplement the United States' discussion of the decree's reasonableness.

With respect to the asserted right of veto, the Federal Government has long been held by the United States Supreme Court as possessing the right to initiate and settle litigation over interests that it holds in trust for Indian tribes. This principle has been extended explicitly to federal reserved water rights. Thus, while the Tribes have the same right as any other party to this proceeding to contest entry of the proposed decree under

the "fair, adequate and reasonable" standard, their consent to its entry is not required, and such entry will determine definitively the scope of the water rights attendant to the Duck Valley Reservation. With respect to the decree's reasonableness, the Tribes raise various objections, none of which remotely approaches satisfying the heavy burden that they carry in opposing the joint motion.

REPLY ARGUMENT

I. THE UNITED STATES HAS SETTLED AUTHORITY TO RESOLVE FEDERAL RESERVED WATER RIGHT CLAIMS ASSERTED ON BEHALF OF TRIBES AND TO BIND THEM THROUGH THE SETTLEMENT WITHOUT REGARD TO TRIBAL CONSENT

The Tribes contend that, by virtue of their intervention, they have "full party status in the adjudication" (Mar. Obj. at 3) and that, "[w]hile the United States may be able to bind the Tribes if they are not a party to the adjudication, . . . their consent is necessary for entry of a consent decree, particularly when the United States has compromised [their] water claims" (*id.* at 4). The legal *non sequitor* in the Tribes' position lies in the assumption that intervenor status somehow alters the unique trust relationship created under federal law between the United States and Indian tribes or the accompanying rule that the Federal Government has authority to settle claims related to tribal interests held in trust regardless of the affected tribe's concurrence so long as any other conditions precedent to the settlement are satisfied.

The only condition here is the "fair, adequate and reasonable" requirement that must be met before entry of any consent decree. This requirement arises not by operation of federal Indian law principles but as a result of general jurisprudential concerns over basic fairness and imposes a deferential standard of review. See, e.g., SEC v. Randolph, 736 F.2d 525, 529 (9th Cir. 1984) ("[u]nless a consent decree is unfair, inadequate, or

unreasonable, it ought to be approved[.]" and "the courts should pay deference to the judgment of the government agency which has negotiated and submitted the proposed judgment"); see also United States v. Oregon, 913 F.2d 576, 580 (9th Cir. 1990) ("the court's approval is nothing more than an amalgam of delicate balancing, gross approximations and rough justice") (internal quotation marks omitted). The threshold legal issue here is thus whether approval of the consent decree under the reasonableness standard will conclusively dispose of all claims to federal reserved water rights appurtenant to the Duck Valley Reservation notwithstanding the absence of the Tribes' consent to its terms.

A. **Heckman**. The seminal decision with regard to the United States' authority to vindicate tribal trust interests through litigation is Heckman v. United States, 224 U.S. 413 (1912). There, the Supreme Court upheld the Federal Government's authority to seek cancellation of allotted trust land conveyances without compliance with statutory restrictions on alienability. After reviewing at length prior relevant case law, the Court reasoned that "the United States [was] entitled to prosecute this suit by virtue of the interest springing from its peculiar relations to the Indians and the course of dealings which had finally led to the plan of separate allotments, accompanied by restrictions for the protection of the allottees." Id. at 442. It then held the allottees themselves were not necessary parties, since "[t]here can be no more complete representation than that on the part of the United States in acting on behalf of these dependents, whom Congress, with respect to the restricted lands, has not yet released from tutelage" and since such representation's "efficacy does not depend upon the Indians' acquiescence." Id. at 444-45. In light of this substantive authority on the Government's part, the allottees' "presence as parties could not add to, or detract from, the effect of the proceedings to

determine the violation of the restrictions and the consequent invalidity of the restrictions." Id. at 445.

B. Colorado River and the 1983 Trilogy. Although Heckman dealt with individual allottees and lands subject to specific statutory restraints on alienation, its core holding—the United States' power to assert and resolve claims related to trust property or interests independently of the beneficiary's presence or "acquiescence"—has been extended into the realm of federal reserved water rights in several decisions. The Supreme Court first addressed the issue in Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), where it concluded that the waiver of the United States' immunity from suit in the McCarran Amendment, 43 U.S.C. § 666, "provided consent to determine federal reserved water rights held on behalf of Indians in state court." Id. at 809. The Court reasoned in part that any other result "would enervate the Amendment's object" given "the ubiquitous nature of Indian water rights in the Southwest." Id. at 811. Implicit in this construction of the statute that lies at the heart of all general stream adjudications in the arid West was the principle that the United States possessed the authority to litigate the asserted reserved right claims without regard to tribal involvement. That implicit principle was made explicit seven years later through a trilogy of cases: Arizona v. California, 460 U.S. 605 (1983) (Arizona II); Nevada v. United States, 463 U.S. 110 (1983); and Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983).

In Arizona II, the Supreme Court rejected the party States' efforts at precluding tribal intervention in the ongoing original action apportioning the Colorado River.¹ It initially held that the States' Eleventh Amendment immunity from suit did not preclude intervention in light of the fact that the "[w]ater right claims for the Tribes were brought by the United States" and that "[n]othing in the Eleventh Amendment 'has ever been seriously supposed to prevent a state's being sued by the United States.'" 460 U.S. at 614. Like the Tribes here, the Arizona II intervenors did "not ask to bring new claims or issues against the states, but only ask[ed] leave to participate in an adjudication of their vital water rights that was commenced by the United States." Id. The Court further deemed unmeritorious the States' contention that intervention was unnecessary because "the presence of the United States insure[d] adequate representation of the Tribes' interests." Id. It appeared "obvious" to the Court that the tribal "interests in the water of the Colorado basin" were more than sufficient to justify permissive intervention under Fed. R. Civ. P. 24, to the extent that the rule might apply, "since the United States' action as their representative will *bind* the Tribes to any judgment." Id. at 615 (citing Heckman, 224 U.S. at 444-45) (emphasis supplied). Nothing in Arizona II intimated that the tribes' intervention would allow them to supersede the Federal Government's role in determining whether to resolve the claims despite their acknowledged "interest[]" in the scope of the reserved rights.

The binding quality of the United States' representation was exemplified several months later in Nevada and San Carlos. One of the issues before the Nevada Court was

¹ The prior opinion in the Colorado River apportionment proceeding was Arizona v. California, 373 U.S. 546 (1963). See Arizona v. California, No. 8 Orig., 2006 WL 758234, at *1 (U.S. Mar. 27, 2006) (consolidated decree describing litigation's history).

the conclusiveness of a prior water decree in later litigation and, more specifically, whether the decree's resolution of "'implied-reservation-of-water' rights" could be relitigated by a tribe in the face of the United States' party status to the decree. 463 U.S. at 135. The Court held no because the Federal Government had represented the tribe's interests and itself was precluded from relitigating the decree. As justification, it looked no further than Heckman, "where [the Court] plainly said that 'it could not, consistently with any principle, be tolerated that, after the United States on behalf of its wards had invoked the jurisdiction of its courts . . . these wards should themselves be permitted to relitigate the question.'" Id.

San Carlos drove the point home in dismissing the suggestion that the absence of any abrogation of tribal immunity from suit in the McCarran Amendment affected whether a federal court should stay its hand when a tribe brought suit to adjudicate only "Indian rights" already at issue in a state court general adjudication. 463 U.S. at 566. The Court carefully separated the absence of state court jurisdiction over a nonconsenting tribe from the existence of jurisdiction over the reserved water rights in dispute:

This argument, of course, suffers from the flaw that, although the McCarran Amendment did not waive the sovereign immunity of Indians as *parties* to state comprehensive water adjudications, it did (as we made quite clear in Colorado River) waive sovereign immunity with regard to the Indian *rights* at issue in those proceedings. Moreover, . . . any judgment against the United States, as trustee for the Indians, would ordinarily be binding on the Indians. . . . Thus, although the Indians have the right to refuse to intervene even if they believe the United States is not adequately representing their interests, the practical value of that right in this context is dubious at best.

Id. at 615 n.17. San Carlos, no less than Arizona II, thus left no legitimate doubt that intervention itself does not diminish the binding quality of the United States' representation; intervention instead merely allows the tribes to bring their perspectives to

bear on those issues that are otherwise before the court for decision-making. Here, the only such issue is whether the proposed consent decree passes muster under the reasonableness standard. If it does, the Tribes' reserved rights are definitively determined without reference to whether they are parties to or otherwise support the decree.

C. Gila VI. It is telling that the Tribes omitted from their brief any discussion of In re General Adjudication of All Rights to Use of Water in Gila River System, 127 P.3d 882 (Ariz. 2006) (Gila VI). See id. at 886 n.3 (citing prior Gila River adjudication decisions). A principal issue in Gila VI was whether a 1935 federal court consent decree precluded a tribe's assertion of rights to additional water in the state court general adjudication. That decree had been entered into by the United States and resolved all claims to use of the mainstem, including those held in trust for the tribe. Id. at 894-95. After rejecting the tribe's contrary position concerning the scope of the decree and its argument that the United States had lacked authority to represent its interests in the earlier litigation, the court turned to the claim that the Federal Government's representation had been so inadequate as to negate the privity necessary for any preclusion defense. The court began, in light of Heckman, "from the premise that the United States' representation, as trustee of a tribe in litigation that results in judgment or decree[,] ordinarily binds that tribe to the decree." Id. at 895. It added, citing Arizona II and Nevada, that the Supreme Court "has twice rejected similar arguments in cases analogous to this one." Id. at 898.

The Gila VI court then considered the tribe's contention that the Arizona II and Nevada decisions were factually distinguishable and that the Restatement (Second) of Judgments § 42(1)(c) (1982) specified circumstances under which inadequate

representation would vitiate privity—*i.e.*, when "[t]he representative failed to prosecute or defend an action with due diligence and reasonable prudence[] and the opposing party was on notice of facts making that failure apparent." 127 P.3d at 897. It declined on comity grounds to resolve this issue, however, because the federal district court had held in an earlier ruling on an intervention motion by a party other than the tribe that it would not relitigate issues determined in the consent decree or entertain claims of inadequate representation by the United States. *Id.* at 900-01.

The analysis in Gila VI, while not resolving the privity issue, nonetheless has direct relevance instantly. First, the Arizona court recognized the principle that the fruits of federal representation "ordinarily" will be binding on tribes and identified no judicially sanctioned exceptions to this rule. Second, even if *arguendo* the tribe there had been allowed to pursue its privity challenge on the merits, the asserted grounds for the challenge—lack of due diligence or reasonable prudence in representation—would have been comparable to the reasonableness standard against which the consent decree here will be measured. The Tribes accordingly cannot complain of unfairness in being bound by the decree.²

II. NONE OF THE TRIBES' OBJECTIONS ESTABLISHES THE UNREASONABLENESS OF THE CONSENT DECREE

The Tribes criticize the proposed consent decree on several grounds, but the common denominator of their objections is that the consent decree does not mimic the

² The Tribes' reliance on Sanguine, Ltd. v. USDOI, 798 F.2d 389 (10th Cir. 1986), is unwarranted for this reason. Mar. Obj. at 6. As a Tenth Circuit panel recently explained, the unfairness in Sanguine arose from the inability of the involved tribal members, who were granted leave to intervene only after the consent decree had been approved, "to effectively present [their] objections to the decree." Johnson v. Lodge No. 93, 393 F.3d 1096, 1109 (10th Cir. 2004). The Tribes suffer no like inequity.

claims filed or, in some instances, *should* have been filed by the United States. Two fundamental problems attend their criticism since the sole issue before the Court is whether the decree represents a reasonable disposition of keenly disputed rights.

The Tribes' objections must be placed into proper procedural perspective. The Tribes begin their argument in support of the objections by acknowledging that they adopted the claims of the United States at the time of intervention. They nevertheless effectively ask the Court to ignore that threshold litigation choice and object to the consent decree which, in substantial measure, is a restatement of the claims submitted by the United States. The Tribes cannot have it both ways. They cannot adopt the claims of the United States on one hand and then reject them on the other as inadequate descriptions of the federal reserved water rights appurtenant to the Reservation.

The Tribes' mode of analysis additionally ignores the reality of litigation—where asserted entitlements often are not realized in whole or even in part—and the fact that the decree sets aside a lion's share of the available water for the Tribes. Under the circumstances, the settlement is not only reasonable but also quite favorable to their interests. This conclusion is inescapable when the principal individual objections are analyzed.

A. The proposed consent decree describes an incorrect priority date for the Reservation. Feb. Obj. at 7; Mar. Obj. at 13. Prior to filing the two sets of objections, the Tribes had not contested before this Court the priority date assigned to the claims by the United States. The Federal Government acted reasonably in agreeing to a priority date that it had identified from the outset in its claims.

B. The proposed consent decree does not include proposed amendments to the United States' claims. Feb. Obj. at 7; Mar. Obj. at 7. The Tribes describe these amendments as an effort to conform the claims to expert reports submitted by the United States. This Court neither may nor should engage in speculation about the validity of claims that were never presented to it. Again, the issue to be resolved is whether the consent decree reasonably resolves the claims that have been filed and are before the Court. There are, as well, significant procedural difficulties attendant to the Tribes' position because Idaho would have opposed any eleventh hour amendments on the eve of trial given the substantial prejudice to its trial preparation were the amendments to have been allowed.

C. The proposed consent decree does not include any water rights for wildlife habitat, for storage purposes other than irrigation, or for instream flows. Feb. Obj. at 7; Mar. Obj. at 7. This objection is puzzling because the Tribe has control under the consent decree over whether the waters from the Reservation's three streams are diverted for consumptive use purposes.³ If they choose not to divert all or a portion of available

³ A brief description of the Reservation's hydrology underscores this point. The Owyhee River flows into the Reservation in its southeastern corner and flows out at the northwestern corner. Blue Creek, a tributary of the Owyhee River, flows into the Reservation from the north and into the East Fork of the Owyhee River. China Hat Dam is the major diversion facility of the Duck Valley Irrigation Project, which is located within the Reservation in Nevada on the Owyhee River. The operation of China Hat Dam largely determines whether the waters of the Owyhee River are diverted for consumptive uses or remain in the channel of the Owyhee River for instream flow purposes. The downstream Pleasant Valley Dam is the other diversion facility from the Owyhee River within the Reservation. It also is a major control structure that determines whether the waters of the Owyhee River are used for instream flow purposes or diverted from the channel of the Owyhee River for irrigation uses. Finally, Marys Creek rises on the Reservation within the State of Nevada and flows out at its northwestern corner. The Tribes have full control over the water available in that watercourse except for the exercise of a senior water right by Riddle Ranch.

natural flow, the water will be left instream. Forfeiture is not possible.⁴

D. The proposed consent decree contains waivers and releases that are broad and that bind the Tribes without its consent. Feb. Obj. at 9; Mar. Obj. at 12. This objection essentially attacks the United States' authority to resolve the water right claims conclusively and has been discussed in the Part I of the Argument above.

E. The proposed 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. Mar. Obj. at 7. The Tribes either misapprehend or misrepresent the effect of the consent decree. The Reservation's geography dictates that a major portion of the water supply for the lands in Idaho actually is diverted in Nevada. The Tribes did not include this water in their calculation, although they list it in the table in their objection. Mar. Obj. at 9. If the Nevada water is included in the amount recognized under the offer of judgment, the offer of judgment represents a little over 80% of the amount originally claimed for the Reservation. That amount represents a reasonable accommodation of the State's and the Federal Government's competing

⁴ A reserved water right for wildlife habitat purposes under the Treaty of Ruby Valley, 18 Stat. 689 (1863), was quite problematic in the State's view and thus was not recognized in its offer of judgment. Article 6 of the Treaty provides as follows:

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 and agriculturalists*, he is hereby authorized to make such reservations for their use as he may deem necessary with the country above described. [Emphasis supplied.]

The Executive Order of 1877 implemented Article 6 by creating the first land withdrawal for the Reservation. The primary purposes of the Reservation were to make a place for the Indians to reside and become herdsmen and farmers, not to provide for wildlife habitat. E.g., United States v. New Mexico, 438 U.S. 696, 702 (1978) (implied water right exists solely to "fulfill the very purposes for which a federal reservation is created"). Given the treaty language, it was hardly unreasonable for the United States not to litigate an issue, when the offer of judgment recognized the remainder of the claims.

positions with regard to the proper volume of water that should be allocated to the Reservation.

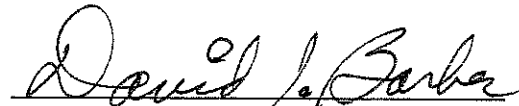
CONCLUSION

The Joint Motion for Entry of Consent Decree should be granted.

RESPECTFULLY SUBMITTED this 30th day of March 2006.

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CERTIFICATE OF SERVICE

I certify that on this 30th day of March 2006, I caused to be served the original and/or copy of this **STATE OF IDAHO'S REPLY BRIEF IN SUPPORT OF JOINT MOTION FOR ENTRY OF CONSENT DECREE** on the following persons by the indicated method:

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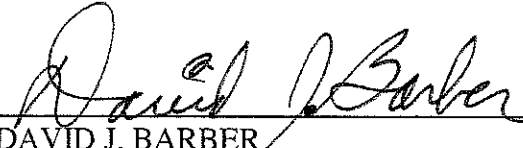
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Not Applicable



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