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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	)	Subcase Nos. 51-02002, <i>et al.</i> [Exhibit A]
	)	Subcase Nos. 51-12756, <i>et al.</i> [Exhibit B]
Case No. 39576	)	Subcase Nos. 51-12767, <i>et al.</i> [Exhibit C]
	)	
	)	UNITED STATES' RESPONSE TO
	)	SHOSHONE-PAIUTE TRIBES' OBJECTION
	)	TO ENTRY OF CONSENT DECREE
	)	

Pursuant to the Order Granting United States' Motion to Modify the Schedule, the United States hereby responds to the Shoshone-Paiute Tribes' ("Tribes") Objection to Entry of Consent Decree. This Response addresses the issues raised in both briefs filed in support of the Tribes' objection, Shoshone-Paiute Tribes' Objection to Entry of Consent Decree and Motion for Extension of Time to Respond, dated February 8, 2006 ("Tribes' February Brief"), and Shoshone-Paiute Tribes' Objection to Entry of Consent Decree and Motion for Extension of Time to Respond, dated

March 9, 2006 (“Tribes’ March Brief”).^{1/}

The Tribes object to the proposed Consent Decree, which would implement the United States’ acceptance of an Offer of Judgment (“Offer”) made by the State of Idaho (“State”) and other objectors in this subcase. For the reasons set forth in this brief and in the Joint Motion, their objections should be rejected. The Offer sets forth a fair and reasonable determination of the water rights claimed in Idaho for the benefit of the Duck Valley Indian Reservation. Pursuant to I.R.C.P. 68, the United States compared the State’s Offer with the likely outcome should the matter be litigated. It concluded, as described below, that the water rights in the Offer, and therefore in the Consent Decree, compare favorably with what the United States may expect following full litigation of the claims through this Court and any appeals. The Tribes have not offered evidence to the contrary, much less evidence that a trial would likely result in an award of water rights in excess of that outlined in the Offer. Moreover, although the Tribes are intervenors in this case, the United States is the claimant and owner of legal title of the water rights at issue and should be accorded discretion to accept the Offer.

The primary basis for the Tribes’ objection to the United States’ acceptance of the Offer appears to be that the Tribes would have preferred a comprehensive settlement, but the “overall settlement foundered on the failure to reach an agreement with the United States on a federal monetary contribution to settlement.” Tribes’ March Brief at 2. In the United States’ view, the Tribes have unrealistic expectations regarding both the amount and likelihood of a federal financial contribution. Regardless, while it is regrettable that the parties could not reach agreement on this issue, it is important to note that this action is a water adjudication and money is not at stake in such

^{1/}The United States assumes that the “motion for extension to respond” portion in the caption of the March 9, 2006 hearing is a typographical error since the brief itself does not seek additional time to respond.

a case. The only issues within the scope of this adjudication and, therefore, the jurisdiction of this Court, involve water rights. Moreover, the United States Congress, not the Executive Branch, is the only federal branch of government with authority to authorize a federal monetary contribution to settle an Indian water rights claim. The Court should note the distinction between a comprehensive settlement and a litigation settlement. A comprehensive Indian water rights settlement would typically include resolution of a number of issues beyond this Court's jurisdiction such as waivers by the Tribes of water-related claims against the United States and other parties, financial contributions, congressional approval, and possible subordination of claims or sharing of shortages. In contrast, the litigation settlement here, resulting from the Offer, only concerns the resolution of the water rights and the related issues over which this Court has jurisdiction. At bottom, the Tribes' refusal to agree to the Consent Decree appears to be an effort to force the United States to either contribute money to a comprehensive settlement or to fully litigate the claimed water rights. The only matter before this Court is whether the Offer and resulting proposed Consent Decree concerning water rights are fair, adequate, and reasonable, compared to the likely litigation outcome.

The proposed Consent Decree must be viewed in its proper procedural context. It is not the result of the typical process of negotiation between parties. *See* discussion of comprehensive settlement vs. litigation settlement above. Instead, it arises from the United States' acceptance of the State's Offer pursuant to I.R.C.P. 68. As a general matter, I.R.C.P. 68 provides cost-shifting provisions which encourage parties to propose and accept reasonable settlement offers. Whether the United States or the State could actually be held liable for costs under I.R.C.P. 68 is not clear

because, as sovereigns, both parties have defenses to cost-shifting provisions.^{2/} Therefore, the United States' task upon receipt of the Offer was to compare the water rights described in the Offer to what the United States might reasonably expect to be awarded at trial. For the reasons explained below, the United States assessed the State's Offer as being equal to or better than the likely outcome of litigation. In several meetings and conference calls, the United States communicated that assessment to the Tribes. Based on the Tribes filing of their objection, it appears that the Tribes' assessment differs from the United States'. In light of I.R.C.P. 68, the United States' obligation to act as a prudent trustee,^{3/} and the principle of judicial efficiency that encourages parties to avoid costly litigation where a reasonable settlement of claims has been proposed, the United States is justified in accepting the Offer.

The United States has consulted extensively with the Tribes since it received the Offer on October 13, 2005. Representatives from the federal government traveled to the Reservation on two separate occasions, October 21, 2005 and November 9, 2005, and also conducted conference calls with counsel for the Tribes. These consultations demonstrate the efforts of the federal government to ascertain the Tribes' concerns regarding the Offer and to accommodate those concerns where

^{2/}For example, if the United States had rejected the State's Offer and the case went to litigation, I.R.C.P. 68 provides that the United States could be liable to the State for litigation costs if the United States prevailed on an amount of water less than the State's offer of judgment. While the application of these cost shifting provisions to sovereigns is unlikely, the thrust of Rule 68 clearly encourages the proposal and acceptance of equitable settlements. *See, e.g., United States v. Idaho ex rel. Director, Idaho Dept. of Water Resources*, 508 U.S. 1 (1993).

^{3/}Indeed, in the event that the United States rejected the State's Offer, proceeded to trial, and received less water rights than proposed in the Offer, the Tribes could arguably sue the United States for breach of trust asserting that a prudent trustee would have accepted the Offer because it was reasonable to conclude that it would have provided a better outcome. *See, e.g., Fort Mojave Indian Tribe v. United States*, 32 Fed. Cl. 29, 33-42 (1994) (denying a tribe's claim seeking money damages from the United States for alleged taking of property where the ultimate water rights awarded were less than the Tribe believed it was entitled to under the practicably irrigable acreage standard.).

possible while providing a full explanation to the Tribes of the unique position that the United States was placed in by the effect of I.R.C.P. 68.

In addition, the practical result of granting the Tribes' objection to the Motion for Entry of Consent Decree would be to force the United States to litigate the water rights in court rather than accepting the State's Offer. In accepting the Offer, the United States balanced the realistic hurdles it would have to overcome in trying to achieve a more advantageous result through litigation and concluded, in fulfillment of its trust responsibility, that the water rights in the Offer are likely equivalent to or better than a litigation outcome. The Tribes should not be granted "veto" authority over that decision. If the Tribes believe that the United States has somehow breached its trust obligation by acceptance of the Offer, their remedy lies in the Court of Federal Claims not in a determination by this Court that the United States must litigate the water right claims.

Overall, while the United States very much regrets the fact that the Tribes apparently believe that their interests have not been fully protected in this matter, it nonetheless believes that its action in accepting the Offer was reasonable and an appropriate exercise of discretion. Moreover, the United States will continue to work with the Tribes with regard to the Nevada-based claims.

I. The Consent Decree, as an implementation of the United States' acceptance of the State's Offer of Judgment, is fair, adequate and reasonable because it sets forth a result that is equal to or better than the likely outcome of litigation.

The proposed Consent Decree must be reviewed in its procedural context as the implementation of the United States' acceptance of the Offer. As explained above, I.R.C.P. 68 dictated that the United States compare the water rights outlined in the Offer with an assessment of the most likely outcome of litigation. In the professional judgment of the attorneys at the Departments of Interior and Justice, the Offer provides a water rights result which is in the range of, if not better than, what the United States would expect to win at trial. Acceptance of a proposal of

60% of the 1998 claim, as the Tribes' March Brief at page 7 labels the Consent Decree, is very reasonable in light of the inherent risks of proceeding to trial.

The Tribes protest that the Offer excludes three types of claims: wildlife habitat; storage for non-irrigation purposes; and instream flows. As explained more fully below, the exclusion of these three claims is fair and reasonable based on the litigation risk, the value of the overall Offer, the limited risks to Tribal wildlife lands and fisheries, and other factors. Moreover, the Tribes can utilize water for these uses as they see fit pursuant to the express language in the proposed partial final decrees which recognizes the Tribe's administrative authority and flexibility on the Reservation. The Tribes have not provided evidence to refute the United States' assessment that the amount of water provided in the Offer, even without these three types of claims, compares favorably to the likely litigation outcome. Further, the Tribes' arguments regarding these claims fail to address the fact that those water rights would overlap in many ways with the rights provided in Offer. The trust responsibility owed to Tribes by the United States includes the obligation to exercise best legal judgment, which requires acceptance of the Offer in this context.

A. The Offer includes an award of the majority of the water claimed in 1998 for uses which the United States would expect to prevail on at trial. Exclusion of water claims for wildlife habitat, non-irrigation storage, and instream flow claims is reasonable in light of litigation risk and other factors.

The quantity of water rights outlined in the Offer includes essentially the entire 1998 claim for irrigation, domestic, commercial, municipal, industrial, stockwatering and water storage uses. *See e.g.* Tribes' March Brief, table at p. 9. In fact, prevailing on 100% of the 1998 claim in these areas is arguably unlikely based on litigation risk inherent in complex trials. The Offer, as a result, arguably exceeds the results that might be expected from a trial on these claims. It is true that the United States was planning to amend its claims to comport with evidence developed since 1998 and

that those amendments would have, in some instances, increased the overall total diversion amount for some of these uses. However, the United States' review of the Offer concluded that 100% of the 1998 claims in these areas is well within what might be expected at trial, even of amended claim amounts, given litigation risk.

The Offer, however, does not include water for wildlife habitat, non-irrigation storage and instream flows. As explained below, those claims are reasonably excluded. However, as a general matter, the Tribes' argument that acceptance of approximately 60% of the 1998 claims is unreasonable fails because it neglects to recognize any litigation risks. A trial on the merits of the United States' claims to water rights on behalf of the Tribes would constitute a complex effort wherein the United States would expect to call approximately twenty expert witnesses and offer extensive technical testimony. Likewise, the State and Riddle Ranches would likely offer their own expert testimony resulting in a "battle of the experts." While the United States would present a strong case at trial, such litigation bears inherent risks. Overall, the Tribes offer no basis for the premise on which their objection rests — that they would expect to prevail on 100% of the water right claims at trial. Such an assertion is unreasonable. The United States had an obligation under I.R.C.P. 68 to discern the likely litigation outcome through the lens of a more realistic litigation analysis than the Tribes propose.

In addition to the general litigation risks discussed above, the three types of claims which were excluded from the Offer carry their own litigation risks from both a legal and factual perspective. Although the United States fully believes that these claims have a valid legal and factual basis, it recognizes that the case law regarding these types of claims is not definitive. In order to preserve its rights to fully litigate these claims should this Consent Decree not be approved, the United States will not lay out for the Court and the objectors its complete legal analyses of these

issues, but will provide a few comments relevant to its decision to accept an Offer that excludes these claims.

The wildlife habitat claims would have allowed enhancement of wetlands in the Blue Creek drainage. Much of that area is already wet in most years and the Tribes could undertake more active management to enhance those wetlands with or without the wildlife habitat water rights. Further, although the United States recognizes that the nature of water development changes over time, at present, significant future development of water on Blue Creek upstream of the Tribes appears unlikely. The United States gave full consideration to litigation risks, the value of the overall Offer, the risks to the Tribes' wildlife lands, and other factors before agreeing to the Offer reflected in the Consent Decree.

The Tribes' objection to exclusion of the storage claim for uses other than irrigation fails to comprehend that the Offer awards the full 631 acre feet of water claimed for storage in the 1998 claim. *See table, Tribes' March Brief at 9.* Since the ultimate quantity of water awarded for storage is the same as the quantity claimed, the Tribes' assertion fails.

The Tribal objection that the instream flow claims are excluded from the Offer fails to recognize the overlap between those claims and the irrigation claims. The instream flow claims are for reaches of the Owyhee River and Mary's Creek. For the Owyhee River segments, a significant portion of the claimed flow is likely to be available from either natural flow or return flows from irrigation. For the Mary's Creek reach, except for one small stretch below Riddle Ranches' transbasin diversion, there are no significant upstream competing uses for the water and much of the upstream area lies within the Reservation. As a result the risk to the Mary's Creek fishery from upstream water development is minimal. After balancing litigation risks, the value of the overall Offer, the threat to the fishery resource if there was no instream flow right, and other considerations,

the United States as trustee agreed to the Offer as reflected in the proposed Consent Decree.

Moreover, the Tribes will have the administrative authority and flexibility to use the irrigation and storage water recognized in the Offer as they see fit, including for instream flows. To this end, the plain language in the proposed partial final decrees states that the “exercise [of the water right] on-reservation shall be administered by the Shoshone-Paiute Tribes pursuant to a tribal water code or by the United States as trustee for the benefit of the Tribes.” *See* Proposed Partial Final Decrees attached to the Motion for Approval of Consent Decree, dated January 9, 2006. Thus, the Tribes can utilize any amount of irrigation water for instream flows.

B. The Tribes objection to the inclusion of specific points of diversion and places of use in the proposed decrees is moot based on the plain language of the decrees which provide the Tribes with administrative flexibility on the Reservation. Moreover, the inclusion of these details is reasonable based on the technical information underlying the United States’ claims on behalf of the Tribes.

Based on the administration language included in the decrees, the Tribes are not bound to the points of diversion or places of use outlined in the proposed partial final decrees. Indeed, the proposed decrees recognize that the Tribes can manage the water on the reservation, including adjusting points of diversion and places of use. Specifically, the language in the proposed decrees reads as follows:

This water right is a federal reserved water right, is not subject to loss due to non-use, and its exercise on-reservation shall be administered by the Shoshone-Paiute Tribes pursuant to a tribal water code or by the United States as trustee for the benefit of the Tribes.

See Proposed Partial Final Decrees attached to the Motion for Approval of Consent Decree, dated January 9, 2006. This language makes it clear that a change of use procedure is not required on the Reservation. *See* Tribes’ March Brief at 12. For these reasons, the Tribes’ argument that the decrees should not include these specific details is moot.

Moreover, the specific points of diversion and places of use outlined in the proposed Decrees are appropriate because Tribal rights are litigated at a given point in time based on the technical information available. For example, a practicably irrigable acreage (“PIA”) claim is based on the amount of lands deemed irrigable given existing economics and technology. Therefore, the United States’ claims on behalf of the Tribes are based on specific, proposed water uses which result in specific places of use and points of diversion in the proposed partial final decrees. The inclusion of this level of detail is consistent with the legal requirements underlying an Indian water rights claims. *See e.g. Arizona v. California*, 373 U.S. 546, 565 (1963).⁴

C. The waivers and releases in the proposed Consent Decree are executed by the United States only and simply reflect the legal reality of the United States’ participation in a state adjudication pursuant to the McCarran Amendment.

The waivers and releases in the proposed Consent Decree are limited to the water rights which the United States has asserted or would assert on behalf of the Tribes. *See* Consent Decree at ¶ 6. The Tribes allegations that the waivers bind the Tribes is in direct contradiction to the plain reading of the waiver language. Specifically, the waivers cover three types of claims by the United States: all claims in Idaho by the United States as trustee for the benefit of the Tribes; for the Bureau of Indian Affairs Duck Valley Agency; and for the Duck Valley Indian Irrigation Project. The waiver of the United States’ claims is reasonable because the United States asserted all of its claims on behalf of the Tribes in this case and the Offer provides the water rights which the United States would have expected in litigation.

⁴The comparison to the Nez Perce decrees is not appropriate or relevant because that was a negotiated settlement of claims which Congress specifically stated shall not set precedent for other Indian water rights. *See* Snake River Water Rights Act of 2004, Pub. L. No. 108-447, Sec. 4, Division J, Title X, sec. 11.B.2(a) (“Nothing in this Act ... establishes any standard for the quantification of Federal reserved water rights or any other Indian water claims of any other Indian tribes in any other judicial or administrative proceeding.”)

Moreover, the waivers simply reflect the law regarding the United States' participation in a state adjudication pursuant to the McCarran Amendment. 43 U.S.C. § 666. The United States must assert its entire claim on behalf of a tribe in an adjudication because it may, in certain circumstances, be precluded from asserting further claims at a later date. *Nevada v. United States*, 463 U.S. 110, 132-35 (1983), *see also Colorado River Water Conservation District v. United States*, 424 U.S. 800, 819 (1976) (recognizing the clear federal policy of the McCarran Amendment to avoid piecemeal adjudication of water rights); *Arizona v. California*, 373 U.S. 546, 600-01 (1963) (finding that reserved water claim was intended to satisfy future as well as present needs of the Reservation). Therefore, once the claim is decided in litigation via acceptance of the Offer, the United States will not bring further federal reserved right claims on behalf of the Tribes in the future. Thus, the waivers simply establish the comprehensive nature of the United States' involvement in a state water proceeding on behalf of tribes. It should be noted that the Consent Decree expressly preserves the rights of the United States to assert state based claims to water rights on behalf of the Tribes, if needed, in the future. Consent Decree at ¶ 6. While the United States recognizes that the Tribes will be bound by this resolution of the claims filed by the United States on their behalf, *see* Section II below, the waivers themselves are limited to the United States as trustee and do not include the Tribes.⁵⁷

D. The United States, in its litigation discretion, filed claims on behalf of the Tribes seeking priority dates which correspond to the dates that each portion of the Reservation was established. The Offer is reasonable in that it provides those claimed priority dates. The Tribes' attempt to seek earlier priority dates at this late hour must be rejected.

The Offer provides the priority dates which were claimed by the United States on behalf of

⁵⁷The acceptance of the Offer and, therefore, the waivers in the Consent Decree, have no relevance as to any possible future aboriginal claims which the Tribes themselves may raise because those claims are not at issue here. *See Tribes' March Brief* at 12.

the Tribes in 1998. The Tribes consented to the claimed priority dates by adopting those claims without seeking amendment. The Tribes did not raise any issues related to priority date when they moved to intervene. Indeed, the Tribes have raised this issue before the Court for the first time in their objection to the proposed Consent Decree. The Tribes' objection to the claimed priority dates provided in the proposed partial final decrees, particularly at this late hour, should be rejected.

Moreover, the priority dates listed in the United States' claims on behalf of the Tribes correspond to the date that each portion of the Reservation was established. The legal basis for claiming the date of reservation as the priority date is well-settled. *Arizona v. California*, 373 U.S. 546, 600 (1963). While the United States recognizes numerous legal arguments for priority dates other than the date of reservation, *see e.g. United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1984), the basis for asserting priority dates is a complicated factual analysis unique to the historic circumstances of each tribe. Such an analysis includes review of treaties, reserving documents and other relevant historical facts. The Department of Justice, having reviewed those factors, filed for water rights with the priority dates claimed. The claim is reasonably based in law and fact and the Offer provides the priority dates as claimed. It is not appropriate for the Court to enter into the complicated factual and legal analysis related to priority dates in light of the United States' litigation discretion in filing the claims. *See Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476 (D.C.Cir. 1995) (fully discussed below).

II. The United States, as the owner of legal title to water rights held in trust for the Duck Valley Indian Reservation, has the authority to accept the Offer without the consent of the Tribes, the beneficiary of the water rights owned in trust by the United States.

Indian water rights are real property rights owned by the United States and held in trust for tribes. *White Mountain Apache Tribe v. Hodel*, 784 F.2d 921, 922 (9th Cir. 1986). In other words, the United States holds legal title to the water rights while the Tribes have a beneficial interest in

the water rights. While the United States encourages tribes to intervene in water adjudications, tribal intervention is not necessary, nor can a tribe, as beneficiary, assume “veto power” over the claims of the United States, the legal owner of the water right. This conclusion flows from the trust regime established by Congress and interpreted by the Supreme Court. The Supreme Court has held that the United States is an indispensable party in any action challenging the scope or quantity of real property rights held by the United States for the benefit of the tribes. *See United States v. Minnesota*, 305 U.S. 382, 386 (1939); *see also Calson v. Tulalip Tribes of Washington*, 510 F.2d 1337, 1339 (9th Cir. 1975). Moreover, the United States may bring an action in its own right to protect its interests where the tribe or Indian beneficiary could not bring such an action. *See Heckman v. United States*, 224 U.S. 413, 438-441 (1912).

In the context of water rights, the Supreme Court has held that the United States can be joined pursuant to the McCarran Amendment to adjudicate Indian water rights, *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), and that those rights may be adjudicated with finality even if the tribal beneficiary does not opt to participate, *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545 (1983). Moreover, if the United States fails to assert a tribal water claim, in certain circumstances both the United States and the tribe may be barred from subsequently asserting that claim. *Nevada v. United States*, 463 U.S. 110, 132-35 (1983). For these reasons, as the legal owner and claimant of tribal water rights, the United States has the discretion to accept a reasonable offer of judgment which settles its claims on behalf of a tribe. *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476 (D.C.Cir. 1995).

A. The United States is the legal owner and official claimant of Indian water rights, whereas the Tribes’ interest in water rights is beneficial in nature. While tribes are encouraged to intervene in water adjudications, their intervention does not change the United States’ ownership of the water rights.

In *White Mountain Apache v. Hodel*, 784 F.2d 921 (9th Cir. 1986), the Tribe sued various

Interior Department officials alleging some complaints similar to those raised by the Shoshone-Paiute Tribes. For example, the White Mountain Apache Tribe asserted that their interests in water rights, which were in conflict with the United States, were not adequately represented by the federal government. *Id.* at 924-25. In that case, the Ninth Circuit recognized that the United States as trustee was the legal holder of title to the Tribe's water rights and, as such, was authorized to assert claims to water rights on behalf of the Tribe:

The United States is a party to [the water rights proceeding], in part because of its role as trustee for the Tribe and, accordingly, as holder of legal title to any water rights to which the Tribe may be beneficially entitled.

Id. at 922. While the *Hodel* Court recognized the importance of tribal intervention to protect its interest, it did not conclude that the Tribe's interest as beneficiary could function in a manner as to circumvent the United States' actions as owner of the title to the water rights in trust for the Tribe. Indeed, the Ninth Circuit emphasized the importance of the United States' litigation discretion in asserting the claims, reiterating that courts do not have jurisdiction "over the Attorney General's exercise of litigating judgment." *Id.* at 923, quoting *White Mountain Apache Tribe v. Smith*, No. 81-1205, slip op. (D.D.C. June 23, 1981), *aff'd mem.*, 675 F.2d 1341 (D.C.Cir. 1982), *cert. denied*, 463 U.S. 1228 (1983). In the event that the Tribes believe that the United States has somehow failed to forcefully represent their interests, they may claim a breach of that duty in a different court. *Hodel*, 784 F.2d at 925. However, *Hodel* dictates that the Shoshone-Paiute Tribes cannot exercise authority over the United States in a way which prevents it from exercising its litigation judgment in accepting the Offer.

The Tribes argue that "they hold a property interest in the adjudication of their reserved rights." Tribes' March Brief at 3. What the Tribes fail to clarify is that their interest is a beneficial interest, where the United States, as the holder of legal title to the water rights, possesses the

ownership property interest. The cases which the Tribes rely on in their Briefs all recognize that the United States, as trustee, is the owner of legal title to the water rights. Therefore, while Tribes are encouraged to intervene in water adjudications, that intervention does not change the fundamental ownership of the water rights by the United States. For example, *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, n. 17 (1983), recognized a tribe's right to intervene in state water adjudications to protect its interests. See Tribes' March Brief at 3. However, the *San Carlos* Court also expressly made clear the ability of the United States, as trustee, to bind the Indians in water rights proceedings. The Tribes' reference to *San Carlos* must be read in context:

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 have made quite clear in *Colorado River*) waive sovereign immunity with regard to the Indian *rights* at issue in those proceedings. Moreover, contrary to the submissions by certain of the parties, any judgment against the United States, as trustee for the Indians, would ordinarily be binding on the Indians. In addition, there is no indication in these cases that the state courts would deny the Indian parties leave to intervene to protect their interests.

San Carlos, 463 U.S. at 567, n. 17 (emphasis in the original). Based on this statement, the United States, as the legal owner of the water rights on behalf of tribes, has waived its sovereign immunity under the McCarran Amendment and has authority to litigate and bind the Tribes with respect to the water *rights* which the United States owns on their behalf. Tribes are encouraged to intervene in adjudications as *parties* to protect their interests. Such intervention is meaningful and important in that it provides a forum for the Tribal voice to be heard in court as well as in conjunction with the federal development of the water rights claims and litigation strategies. Ultimately, however, a tribe's intervention does not mean that the tribe assumes legal title to the water right or the ability to control the United States' decisions regarding the trust property. The Supreme Court has made clear that the federal government is authorized to assert water claims on behalf of tribes, despite the government's role in asserting claims on behalf of other federal interests. *Nevada v. United States*,

463 U.S. 110, 128 (1983). The United States takes seriously its obligation to represent the Tribe's interest forcefully despite its other representative obligations. *Nevada*, 463 U.S. at 142.

In this case, the United States coordinated with the Tribes in developing and litigating the water right claims on behalf of the Tribes. After receipt of the Offer, the United States continued to coordinate with the Tribes by meeting with them regarding their questions and concerns. A recurring concern expressed by the Tribes involved the issue of a federal monetary contribution to an overall settlement. Federal money is not at issue in this case, however, and the United States had to respond to the Offer regarding water rights, which are the subject of this litigation. Certainly, the Tribes' intervention was meaningful. However, that intervention does not mean that the Tribes have veto authority over the United States' litigation decisions regarding the water rights which it holds in trust for the Tribes.

B. The United States, as legal owner of the water rights, can bind the Tribes in litigation even when the Tribes are parties to the litigation.

The Tribes incorrectly argue that the rulings described above, which provide the United States with authority to bind the Tribes in litigation, are somehow limited to circumstances in which they are not parties. Tribes' March Brief at 4-5. Their support for this argument is the procedural history of the *Arizona v. California* litigation and, particularly, the most recent Supreme Court opinion in that case, *Arizona v. California*, 530 U.S. 392 (2000) ("*Arizona III*").⁹

That litigation began in 1952 when Arizona invoked the original jurisdiction of the Supreme Court to challenge California's apportionment of water from the Colorado River. *Arizona III*, 530

⁹The Tribes' reference in their March Brief at p. 5 to the 2000 *Arizona v. California* opinion is incorrectly stated as 493 U.S. 886 (2000). The case with that citation is the 1989 one-paragraph decision granting the state parties' motion to reopen the decree to determine the disputed boundaries of three Indian reservations at issue in the case. *Arizona v. California*, 493 U.S. 886 (1989).

U.S. at 397. In 1963, the Court issued *Arizona I* which recognized that the United States had reserved water rights for the Indian reservations at issue in the case. *Arizona v. California*, 373 U.S. 546, 565 (1963) (“*Arizona I*”). The United States in its trust capacity represented the Tribal interests in *Arizona I* and the Tribes did not participate separately. In 1983, *Arizona II* granted the Tribes’ motions to intervene regarding the determination of water rights for lands which had not been claimed on behalf of the Tribes due to reservation boundary disputes in the earlier *Arizona I* litigation. *Arizona v. California*, 460 U.S. 605, (1983)(“*Arizona II*”). The United States ultimately did not object to the Tribes intervention and “joined the Indians in moving for a supplemental decree to grant additional water rights to the reservations.” *Id.* at 612. In granting the Tribes’ motions to intervene, the Court stated:

[I]t is obvious that the Indian Tribes, at a minimum, satisfy the standards for permissive intervention set forth in the Federal Rules. The Tribes’ interests in the water of the Colorado basin have been and will continue to be determined in this litigation since the United States’ action as their representative will bind the Tribes to any judgment. *Heckman v. United States*, 224 U.S. 413, 444-45 (1912).... Accordingly, the Indians’ participation in litigation critical to their welfare should not be discouraged.

Id. at 614-15. It is particularly noteworthy that the Court recognized that the Tribes’ interest “have been and will continue to be determined” by the United States’ actions as trustee. *Id.* Therefore, contrary to the Tribes’ argument, *Arizona II* confirms that the United States’ actions in water adjudications continue to bind Tribes even when tribes intervene and participate in the litigation.

The Tribes’ reliance on *Arizona III* is equally inappropriate. That decision addressed the water rights for additional lands on three Indian reservations: the Fort Yuma Reservation; the Fort Mojave Reservation; and the Colorado River Indian Reservation. As to the Fort Mojave and Colorado River Indian Reservations, the Court approved settlements which were agreed upon by all parties to the case, including the Tribes and the United States. *Arizona 2000*, 530 U.S. at 418-19.

Since the settlements were agreed to by all parties, the Court did not address the issue of whether a tribe's consent to a settlement of water rights by the United States is required. Regarding the Fort Yuma Reservation, *Arizona III* concluded that a 1983 consent judgment²⁷ in the Court of Claims did not preclude both the United States and the Quechan Tribe from asserting claims to water for additional lands. Again, the Court did not address the issue of whether Tribal consent to a settlement of water rights by the United States is required because the United States and Tribe together were asserting the additional claims in litigation.

C. The Tribes are parties to the case but are claimants of a beneficial, rather than an ownership, interest in water rights. Therefore, they do not have the authority to prevent the United States from accepting the Offer.

As explained above, the Tribes' property interest in water rights is beneficial in nature whereas the United States holds legal title as the owner of the property rights. Therefore, although the Tribes are parties to the case, they cannot block the Consent Decree by withholding their consent.

The U.S. Supreme Court analyzed the issue of intervenor status with respect to a consent decree in *Local Number 93, Int'l Association of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986). There, a group of minority firefighters, the Vanguard, filed a racial discrimination suit against the City of Cleveland. *Id.* at 504. The Firefighters Union intervened as a party-plaintiff, *id.* at 506, and was granted intervention as of right. *Id.* at 528. After negotiations, the Vanguard and the City reached a settlement agreement which they proposed to the court in a consent decree. *Id.* at 510. The Union objected arguing that "because [it] was permitted to intervene as of right, its

²⁷The consent judgment at issue in *Arizona 2000* is very different than the proposed consent decree at issue here. The 1983 consent judgment was a court entry of an agreed upon settlement between the United States and the Quechan Tribe which settled all claims against the federal government brought by the Quechan Tribe pursuant to the Indian Claims Commission process. *Arizona 2000*, 530 U.S. at 405.

consent was required before the court could approve a consent decree.” *Id.* at 528. The Court summed up the applicable law as follows:

A consent decree is primarily a means by which parties settle their disputes without having to bear the financial costs of litigating. It has never been supposed that one party – whether an original party, a party that was joined later, or an intervenor – could preclude other parties from settling their own disputes and thereby withdrawing from litigation. Thus, while an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent (citations omitted). Here, Local 93 took full advantage of its opportunity to participate in the District Court’s hearings on the consent decree. It was permitted to air its objections to the reasonableness of the decree and to introduce relevant evidence; the District Court carefully considered these objections and explained why it was rejecting them. ...

Of course, parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party’s agreement. A court’s approval of a consent decree between some of the parties therefore cannot dispose of valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor.

Id. at 528-29. Based on this analysis, the Court approved the consent decree over the Union’s objection. The Ninth Circuit, in *Southern California Edison Co. v. Lynch*, 307 F.3d 794 (9th Cir. 2002), another case cited in the Tribes’ March Brief at 5, applied this rationale in ruling that consent of a permissive intervenor is not required.⁸

The analysis in *Local Number 93* and *Southern California Edison* applies herein. When viewed in its proper context as the implementation of the United States’ acceptance of the Offer of Judgment, the consent decree process has effectively allowed the Tribes, as intervenor, to “have its objections heard.” *Id.* However, after airing their objections, the Tribes cannot “preclude other parties [the United States and State] from settling their own disputes and thereby withdrawing from

⁸It is the United States’ position that the Tribes’ intervention in this case was permissive rather than as of right. However, the Court does not need to reach that issue since the applicable law applies to both permissive and of right intervenors.

litigation.” *Id.* Indeed, following its careful review of the Offer, litigation risks, and other relevant factors, it would have been difficult for the United States not to have heeded I.R.C.P. 68’s implicit command to accept a reasonable settlement offer. The proposed Consent Decree simply implements the acceptance of the Offer. The plaintiff in *Local Number 93*, while permitted to intervene as a matter of right, had no ability to block the proposed consent decree. Similarly, the Tribes have no ability to preclude the entry of the Consent Decree simply by withholding their consent.

Furthermore, the Consent Decree does not “dispose of claims ... or impose duties on” the Tribes without their consent. *Id.* Instead, it disposes of the United States’ claims on behalf of the Tribes. The Tribes assert that they have claims separate from the federal ones because they adopted the United States’ claims as intervenors in the adjudication. Tribes March Brief at 6. At the same time, the Tribes recognize, as they must, that their adopted claims are identical to the United States’ claims, including the ownership element of the right: “United States of America as trustee on behalf of the [Tribes].” *See* 1998 Claims filed by the United States. In asserting that their claims are separate from the United States and asserted on their own behalf, the Tribes fail to address the distinction between the United States’ ownership interest in the claims and the Tribes’ beneficial interest in the claims. In asserting that their claims are identical to the United States, the Tribes inadvertently recognize this ownership/beneficiary interest distinction. The Tribes, as beneficiaries, have not asserted valid, third-party claims apart from the United States as the legal owner and trustee of the water right. Indeed, they admit as much when they recognize that the claims are “identical.” Tribes’ March Brief at 6. If such claims exist, however, they are not disposed of by the Consent Decree.

D. The United States, as legal owner of title to water rights for the Tribes' benefit, has discretion to accept the State's Offer as a reasonable settlement of its claims asserted on behalf of the Duck Valley Indian Reservation.

Contrary to the Tribes' assertion, *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476 (D.C.Cir. 1995) applies to the facts of this case. There, the United States decided against bringing claims for off-reservation water rights on behalf of the Shoshone-Bannock Tribes of the Fort Hall Reservation. The Shoshone Bannock Tribes sued the United States seeking, among other things, an order to compel the Attorney General to file claims on their behalf. *Id.* at 1479. The court summed up the issue:

The Department of Interior and the Department of Justice concluded, for reasons we see no need to explain, that the Tribes' water rights claim was meritless, that the United States would therefore not file and defend it in the state adjudication, and that if the Tribes wished to proceed they would have to do so on their own. The question is whether the federal courts have the authority to force the United States to pursue this claim on the Tribes' behalf.

Id. at 1480. The D.C. Circuit held that the Attorney General has discretion over the United States' litigation decisions and, therefore, judicial review of his determinations is not available. *Id.* at 1484. In reaching its conclusion, the court noted that the principle is well-settled:

"Except as otherwise provided by law," the authority to conduct litigation in which the United States is interested is reserved to the Department of Justice, 28 U.S.C. § 516, and the Attorney General shall supervise that litigation, 28 U.S.C. § 519. ... In both civil and criminal cases, courts have long acknowledged that the Attorney General's authority to control the course of the federal government's litigation is presumptively immune from judicial review.

Id. at 1480.

Similar to the Shoshone-Bannock Tribes, the Shoshone-Paiute Tribes seek to compel the United States to take an action which they support and the United States does not -- to continue litigating the water rights rather than accept the Offer via the proposed Consent Decree. Just as the D.C. Circuit concluded that it would not review the United States' litigation decision regarding

pursuit of a particular claim, this Court should not evaluate, by way of the Tribes' objection, the decision to accept the Offer. *Id.* at 1482. The Shoshone-Paiute Tribes, like the Shoshone-Bannock Tribes, have failed to identify a limitation to the Attorney General's discretion. *Id.* at 1482 ("We agree with the district court that an Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty."). The D.C. Circuit found that the Shoshone-Bannock Tribes did not have a "right to demand that the Department of Justice act as its attorney for any and all claims the Tribes consider worth filing in state court." *Id.* In the same way, the Shoshone-Paiute Tribes do not have a right to demand that the Justice Department act as their attorney by rejecting an Offer which the United States, in its litigation discretion, assessed as fair compared with the likely outcome of litigation.

The Shoshone-Paiute Tribes seek to distinguish *Shoshone Bannock Tribes v. Reno* from the present facts because that case dealt with claims which had not yet been filed, whereas the water right claims on behalf of the Tribes in this case have already been filed. While that is true, it is irrelevant. The Tribes appear to be arguing that the Attorney General loses his litigation discretion over United States' claims once they have been filed. No support exists for such a contention. The Tribes suggest that discretion is "broader and different" when the United States is deciding whether to bring a claim, compared to "how a claim must be handled once the decision has been made to pursue it." Tribes' March Brief at 7, n. 4. The practical implications of this argument would be the Attorney General has discretion over whether to bring claims on behalf of tribes, but loses discretion and is subject to the dictates of the Tribes once the claims are filed. Such an outcome is both illogical and clearly barred by *Shoshone Bannock Tribes v. Reno*. Here, the United States reasonably exercised its litigation discretion in accepting an offer of judgment for water right claims which the federal government assessed was similar to or better than the likely litigation outcome.

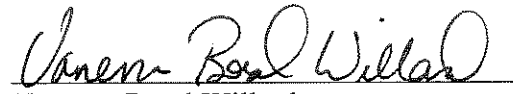
Neither the Shoshone-Paiute Tribes nor this Court have authority to second guess the Attorney General's litigation judgment in making that decision.

CONCLUSION

For all of these reasons, the Court should enter the proposed Consent Decree over the Tribes' objections.

Respectfully submitted this 30th day of March 2006.

Sue Ellen Wooldridge
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A handwritten signature in cursive script, reading "Vanessa Boyd Willard", written over a horizontal line.

Vanessa Boyd Willard
Indian Resources Section

CERTIFICATE OF MAILING

I hereby certify that on this 30th day of March 2006, I caused to be served true and correct copies of the attached **United States' Response to Shoshone-Paiute Tribes' Objection to Entry of Consent Decree** as follows:

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