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DEPARTMENT OF  
WATER RESOURCES

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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 No. 27-04020        |
|                | ) |                             |
| Case No. 39576 | ) | SHOSHONE-BANNOCK TRIBES'    |
|                | ) | OPPOSITION TO BART CONLIN'S |
|                | ) | MOTION FOR SUMMARY JUDGMENT |
| _____          | ) |                             |

COMES NOW, the Shoshone-Bannock Tribes, by and through their undersigned attorney of record, and submits this Response to Bart Conlin's Motion for Summary Judgment in the above-captioned subcase pursuant to AO1 Section 10Kk) and Idaho Rule of Civil Procedure 24. For the reasons set forth below, this Court should deny Bart Conlin's Motion.

**I. INTRODUCTION**

The Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin, 92-22 (August 2, 1995), contains a provision whereby the Shoshone-Bannock Tribes ("Tribes") and the United States agreed to subordinate the exercise of the Tribes' Blackfoot River natural flow water right (water right no. 27-11375) to certain non-Indian water rights in the Blackfoot River. The subordination was based upon an estimate by the parties' water engineers that the total annual diversion volume of

these non-Indian water rights would not exceed 45,000 acre-feet per year. The Tribes have filed objections to all water rights in Basin 27 not containing a total annual volume of diversion to ensure that the 45,000 acre-foot limitation is upheld and to determine any amount of equitable adjustment water due to the Tribes under the terms of the "1990 Fort Hall Indian Water Rights Agreement".

The State of Idaho and United States have agreed to participate in a study to establish the total volume of the actual diversions for the entire Blackfoot River Basin (Basin 27). A report regarding the study is due the court on February 29, 2008. The Tribes objection to water right Subcase no. 27-0420 is part and parcel to determining the total volume of non-Indian diversions in Basin 27, and to determining the volume of equitable adjustment due to the Tribes.

## **II. BART CONLIN'S WATER SOURCE AND USE IMPACTS THE TRIBES' WATER RIGHTS**

Mr. Conlin's argues that his water right is improperly included in this litigation and that this water and its use does not impact the Tribes or the Blackfoot River and as such, is not the proper subject of this litigation. Mr. Conlin further maintains "The water never reaches, enters or impacts the Blackfoot River, nor, for that matter, does it enter, reach or impact any other creek, stream, or body of water." These statements are not correct. Mr. Conlin's water source, Gardner Spring, is a tributary to the Blackfoot River, and depletions from tributary streams have the same impact on the Tribes' water rights as depletions caused by diversions from the main-stem Blackfoot River.

Mr. Conlin has observed that discharges from Gardner Spring sink back underground. Aff. of Conlin, ¶ 7. This does not mean such waters would not contribute to the flows of the Blackfoot River and eventually contribute to the water available to the Tribes. Groundwater flows can be considered as "tributaries" to the Blackfoot River, just as surface water creeks are

considered tributaries. The consumptive use of groundwater flowing under the surface has the same impact on the Blackfoot River as the consumptive use from a creek; namely that any water consumed would not contribute to the Blackfoot River flows and not be available to the Tribes.

Moreover, the fact that the discharges of Gardner Spring sink underground does not mean that those flows do not continue as underground flow down-gradient to the Blackfoot River and contribute to its surface flows. The flows of the Blackfoot River represent a combination of tributary flows, both from surface and ground water sources. As one moves higher in the basin, there is no main-stem Blackfoot River, but rather numerous tributaries which intersect to form the river. Any depletion that occurs along these tributaries has the same effect as diverting and depleting from the main-stem Blackfoot River, because the river is basically the combination of these various tributary building blocks. The Tribes' water rights in the Blackfoot River are impacted by diversions and depletions along any and all upstream tributaries, and impacts are not isolated to direct diversions from the main-stem Blackfoot River.

Administration of Mr. Conlin's water source would likely fall under the State's Conjunctive Management Rules, which are:

Rules for Conjunctive Management of Surface and Ground Water Resources, IDAPA 37, Title 03, Chapter 11. Conjunctive management is defined in these rules as the "Legal and hydrologic integration of administration of the diversion and use of water under water rights from surface and ground water resources, including areas having a common ground water supply." In practical terms, conjunctive management is the combined administration of water rights from "hydraulically connected" surface and ground water sources recognizing the relative priorities of the rights, the physical characteristics and significance of source connectedness, and the differences in impacts occurring from surface water diversions versus impacts from ground water diversions.

Therefore, considering these points, the diversion and depletion of flows from Gardner Spring by Mr. Conlin does indeed impact the Tribes' Blackfoot River water rights. Therefore, water right 27-04020 is properly included in the current Basin 27 litigation.

The Court should deny Mr. Colin's motion due to the nature of the Tribes' objections in Basin 27. The Tribes' objections are based on the cumulative impacts of all non-Indian diversions from the Blackfoot River, and as a result it is difficult to settle an individual objection (either to a particular water right or a particular component of a water right) without knowing the full resolution of all of the objections. The Tribes' objections stem from protecting the 45,000 acre-feet limitation on non-Indian diversions in Basin 27, and settlement of a single sub-case does not provide adequate assurance that the provisions of the 1990 Agreement will be upheld. The Tribes' objections taken as a whole are best handled as a single issue to be settled, and the objections to the various water right sub-cases can be thought of as a single objection to all non-Indian water right users in the Blackfoot River Basin.

On April 10, 2007 the Shoshone-Bannock Tribes submitted a request for a Standard Form 5 to the Idaho Department Water Resources' Eastern Region office to resolve the Tribes' objection to Mr. Conlin's water right 27-04020. On May 4, 2007 the Idaho Department of Water Resources issued a letter stating:

"It is IDWR's understanding that you have agreed to settle the volume objection made by the Tribal Objectors to your water right by including a specific total annual volume limit on your irrigation water right. Recently, the Tribal Objectors requested that IDWR concur in the settlement agreement. IDWR is reluctant to concur in such settlements because of a lack of information regarding actual diverted volumes in Basin 27. If a volume limit is to be included in a water right, IDWR wants to make sure that the volume limit is as accurate as possible. To this end, IDWR is currently in the process of implementing a study intended to provide a basis for determining diverted volumes in Basin 27. Still, IDWR realizes that that some water users might have information that would provide actual diverted volumes for their water rights, thus eliminating the need to wait for completion of the study. As such, IDWR is requesting that information you have to support historical diversion amounts for your water right. If you have any such information, please send it to the address listed above."

The Tribes and claimant did reach agreement on water right no. 27-04020 for stockwater purposes to resolve the Tribes' objection. Presently, water right no. 27-04020 has not been

amended to include an irrigation use on the water right, and as such the Tribes' would support that the agreement reached on the stockwater portion of the water right should be allowed to proceed through the Standard Form 5 process.

In the alternative, if and when water right no. 27-04020 is amended to include an irrigation element it would fall into the "irrigation" sub-cases as categorized by this Court. In this way, the Tribes' objection to water right 27-4020 would not be isolated and would be handled as part of the larger group of Tribal objections.

In conclusion, based on the foregoing, Mr. Conlin's Motion for Summary Judgment should be denied.

Dated this 15<sup>th</sup> day of February, 2008.

Respectfully submitted,

  
Jeanette Wolfley

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15<sup>th</sup> day of February 2008, I caused to be served the original and copy of the SHOSHONE-BANNOCK TRIBES' OPPOSITION TO BART CONLIN'S MOTION FOR SUMMARY JUDGMENT by first class U.S. mail, postage prepaid, to the following:

Original to and Via Facsimile:

Clerk of the District Court  
Snake River Basin Adjudication  
253 Third Avenue North  
P.O. Box 2707  
Twin Falls, ID 83303-2707

Copies to:

Bart Conlin  
8569 60<sup>th</sup> Drive  
Elmhurst, NY 11373

IDWR Document Depository  
P.O. Box 83720  
Boise, ID 83720-0098

United States Department of Justice  
Environment & Natural Resources Division  
550 W. Fort Street, MSC 033  
Boise, ID 83724

Chief, Natural Resources Division  
Office of Attorney General  
P.O. Box 44449  
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