



U.S. Department of Justice

Environment and Natural Resources Division

PCM:DAJ

90-6-2-63

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MAR 04 2008

DEPARTMENT OF
WATER RESOURCES

February 28, 2008

via FedEx mail

Diana R. Delaney, Chief Deputy Clerk
Snake River Basin Adjudication
DISTRICT COURT
253 Third Ave., North
Twin Falls, Idaho 83303-2707

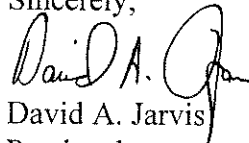
Re: SRBA Case No. 39576
Subcase Nos. 27-00001A, *et al.*, 27-10028, 27-12013

Dear Ms. Delaney:

Enclosed for filing in the above listed subcase is the following original document and, as per conversation earlier today with Janet Connell of the SRBA Court Staff, five additional copies:

1. **GOVERNMENTAL PARTIES JOINT STATUS REPORT.**

Sincerely,



David A. Jarvis
Paralegal

Enclosures

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MAR 04 2008

DEPARTMENT OF
WATER RESOURCES

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**Counsel for the Shoshone-Bannock
Tribes**

**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. See Exhibit A
	)	(Irrigation Use) and
	)	Sub-cases 27-10028 and 27-12013
	)	
Case No. 39576	)	GOVERNMENTAL PARTIES' JOINT
	)	STATUS REPORT

Pursuant to the Court's December 17, 2007 Order Deadline and Continued Scheduling
Conference in the Sub-cases listed on Exhibit A and the December 21, 2007 Order Setting
Deadline, Scheduling Conference, and Mandatory Settlement Conference Setting in Sub-cases

27-10028 and 27-12013, the undersigned parties present the following report on the status of negotiations to resolve the pending objections related to the annual volume of diversion element which affects numerous sub-cases. This report is submitted in order to inform the Court and other parties in advance of the hearings scheduled for March 7, 2008 at 9:30 a.m., 10:00 a.m. and 11:00 a.m.

At the hearing on December 5, 2007, counsel for the State of Idaho, the Shoshone-Bannock Tribes, and the United States (hereinafter, "Governmental Parties") reported to the Court that the parties were in the process of addressing the technical issues which underlie the diversion volume objections at issue before this Court. In short, the Court's 1995 decree of water rights to the Shoshone-Bannock Tribes provides for the Tribes to subordinate their water rights on the Blackfoot River to certain existing water rights which are decreed to water users diverting natural flow prior to January 1, 1990 from the North Side of the Blackfoot River ("Northside Water Users"). The Decree specifically notes that,

These state created water rights are estimated to divert not more than 45,000 AFY of water from the Blackfoot River. In the event this estimate of the amount of existing diversions under state created water rights is exceeded as a result of the Decree in the SRBA, the parties shall negotiate an equitable adjustment to the Tribal water right to account for this change.

Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin, (August 2, 1995) ("Partial Consent Decree"), at 31.

Technical representatives of the governmental parties have estimated total diversion volumes using the best available data and methodologies. The "Preliminary Report, Equitable Adjustment Assessment" (Exhibit B) which is attached and incorporated herein by reference. They have concluded that the total Blackfoot River diversions by the Northside Water Users range from 53,900 acre-feet per year in dry years to 60,500 acre-feet per year in average years.

Both amounts exceed the 45,000 acre-feet per year amount set forth in the Partial Consent Decree. Preliminary Report at 4.

CONCLUSION

The Preliminary Report identifies and describes a number of unresolved technical issues are identified in the Preliminary Report, however. Preliminary Report at pp. 4-6. Additional time will be required by the technical teams to resolve these issues and determine the appropriate Equitable Adjustment values. Time is also needed for these teams to meet with representatives of IDWR and for IDWR to undertake certain studies and actions as called for in the Preliminary Report. The undersigned counsel believe that six months is an appropriate time-frame, assuming that all parties and IDWR can devote sufficient time and man-power to this important project. Respectfully submitted this 29th day of February, 2008.

STATE OF IDAHO

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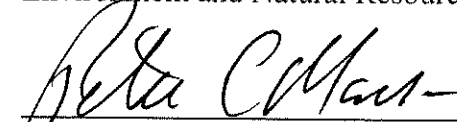


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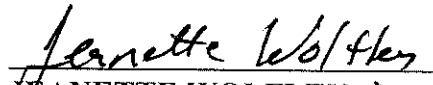
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SHOSHONE-BANNOCK TRIBES



JEANETTE WOLFLEY *By PCM*
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Shoshone-Bannock Tribes

EXHIBIT A

IRRIGATION USE

Subcase Nos:

27-00001A	27-00037E	27-02126	27-11199	27-12136
27-00001B	27-00037F	27-02165	27-11236	27-12137
27-00002A	27-00037G	27-04001	27-11245	
27-00002B	27-00037H	27-04009	27-11261	
27-00003C	27-00037J	27-04010	27-11262	
27-00003D	27-00037L	27-04058	27-11269	
27-00003E	27-00037M	27-04068	27-11271	
27-00003G	27-00037N	27-04077	27-11273	
27-00004AC	27-00038	27-04078	27-11317	
27-00004F	27-00039	27-04079	27-11330	
27-00004H	27-00040	27-04096	27-11334	
27-00004M	27-00041	27-04097	27-11918	
27-00004S	27-00045	27-04141	27-11919	
27-00004Y	27-00047	27-07013	27-11930	
27-00004Z	27-00049	27-07089	27-11939	
27-00005A	27-00050	27-10096	27-11940	
27-00005B	27-00051A	27-10116	27-11946	
27-00012A	27-00051B	27-10207	27-11966	
27-00012B	27-00052	27-10292	27-11988	
27-00013A	27-00054	27-10296	27-11989	
27-00013B	27-00055A	27-10341	27-11992	
27-00014B	27-00055B	27-10344	27-11994	
27-00014C	27-00056	27-10357	27-11995	
27-00014D	27-00073	27-10358	27-11997	
27-00016A	27-00074	27-10362	27-12006	
27-00017	27-00076	27-10370	27-12014	
27-00020A	27-00085A	27-10388	27-12015	
27-00020B	27-00088	27-10390	27-12016	
27-00021A	27-00094	27-10398	27-12017	
27-00021B	27-00102	27-10452	27-12027	
27-00021C	27-00104	27-10505	27-12028	
27-00021D	27-00105	27-10539	27-12029	
27-00022D	27-00106	27-10545	27-12030	
27-00023B	27-02001	27-10550	27-12031	
27-00023C	27-02003A	27-10552	27-12032	
27-00023E	27-02003B	27-10555	27-12035	
27-00025B	27-02008	27-10557	27-12040	
27-00025C	27-02015	27-10657	27-12045	
27-00026A	27-02019A	27-10667	27-12050	
27-00026B	27-02026	27-10728	27-12051	
27-00026C	27-02041A	27-10756	27-12064	
27-00026D	27-02041B	27-10790	27-12068	
27-00026E	27-02043	27-10844	27-12069	
27-00028	27-02048	27-10847	27-12074	
27-00029B	27-02052	27-10878	27-12081	
27-00029C	27-02054	27-10943	27-12108	
27-00029E	27-02066	27-10994	27-12109	
27-00035D	27-02078	27-10999	27-12115	
27-00037A	27-02080A	27-11016	27-12116	
27-00037C	27-02080B	27-11117	27-12118	

(Subcase list: IRRIGATION)

12/17/07

EXHIBIT B

PRELIMINARY REPORT, EQUITABLE ADJUSTMENT ASSESSMENT

(Prepared by the federal, tribal, state technical team)

INTRODUCTION

On July 5, 1990, the Shoshone-Bannock Tribes, the State of Idaho, the United States, and the Committee of Nine (hereinafter, "the Parties"), entered into an Agreement to settle the water rights claimed by the United States for the benefit of the Shoshone-Bannock Tribes (Tribes). On August 2, 1995, the presiding judge of the Snake River Basin Adjudication (SRBA) entered an Order approving the Agreement and decreeing water rights to the United States for the benefit of the Tribes.

The decree recognizes the Tribes' federal reserved right to use direct flow water from the Blackfoot River, with a senior priority date of 1867, up to an annual diversion of 150,000 acre-feet per year. However, the Tribes and United States agreed to exercise this water right such that persons diverting direct flow from the Blackfoot River prior to January 1, 1990, whose rights are decreed in the SRBA, (hereinafter "North Side Users" or "NS Users"), will continue to receive their full entitlement under State law. The NS Users were estimated to divert not more than 45,000 acre-feet of water per year (AFY). If the NS Users are, in effect, diverting greater than 45,000 AFY, then the Parties agreed to negotiate an Equitable Adjustment to the Tribal water rights to account for this incremental increase in use.

The Idaho Department of Water Resources (IDWR), acting as the Blackfoot River watermaster, has carried out a water diversion measurement program for many of the NS Users from 2004 to 2007. Most of the major NS Users are located downstream of the USGS stream gaging station at Shelley, Idaho. In addition, IDWR, in 2005, submitted a Director's Report which recommended water rights to be decreed by the SRBA Court. A review of the recent diversion measurements plus the nature and extent of the recommended surface water rights resulted in the preliminary conclusion that present diversions are more than the 45,000 acre-feet estimate. Allowable additional diversions that are not currently exercised could further add to the volume difference. As such, an Equitable Adjustment assessment is required.

To assist in refining diversion estimates, the United States and State of Idaho funded an expanded ditch diversion measurement program for essentially the July to September period in the middle (Wolverine Creek to Blackfoot Dam) and upper (above Blackfoot Dam) Blackfoot River watersheds in water year 2007. This supplemental measurement program provides important additional information on water use throughout the basin. Unfortunately, water year 2007 was a low flow year but the new diversion records allow meaningful assessments to be completed relative to the nature and extent of actual diversions taking place on the ground.

A Technical Team (Team) of federal, state and tribal experts was established to facilitate the development of defensible estimates of recent diversions by the NS Users under dry and average year conditions. This Team was secondarily charged with addressing the effects of these diversions on water supplies available to be diverted from the North and Main Canals of the federal Fort Hall Irrigation Project. These results were to be compared to the 45,000 acre-feet Agreement base case assumptions. The Team was also responsible to identify key issues that

must be further researched to facilitate final conclusions to be developed relative to the nature and extent of the Equitable Adjustment.

TECHNICAL APPROACH

Background Information

The 45,000 acre-foot diversion limit is for the entire Blackfoot River basin. However, for ease of assessment, the area of study was divided into a lower basin (downstream of the confluence of Wolverine Creek with the Blackfoot River to the mouth of the Blackfoot River) and the middle and upper basins. Historic diversions (2004 to 2007) are recorded for the majority of the lower basin while only limited diversion data are available for the middle and upper basins.

Currently irrigated acreage and ditch delivery information is available for the lower basin while new estimates of current, recent and long-term idle acreage and associated water delivery infrastructure had to be created for the middle and upper basins. The IDWR Directors Report and associated exhibits were of major assistance.

Evapotranspiration and net irrigation requirement estimates for key crops in the area of study are available from the State of Idaho website. These values are determined to be sufficient for use in the study.

Lower Basin

Representatives from the Team had previously developed exhibits of surface and groundwater service areas and associated delivery systems for the lower basin service area. A comprehensive work session was completed with IDWR on April 25, 2007 to review the accuracy of the detailed exhibits and to verify the locations of diversions, measurement points and return flow nodes. Slight modifications were made to the maps and it was concluded that all Northside Water User diversions below the USGS, at Shelley, gaging station provided essentially no return flow above the Fort Hall Irrigation Project North and Main Canal diversions. As such, it was concluded that diversions equal depletions in the lower basin study area.

The Team then analyzed the IDWR diversion measurement records from 2004 to 2007. The Team is in general agreement with the recorded diversion values. The measurement accuracy is felt to be improving over time. There are some questions on selected power record calculations for diversions but these values are associated with minor water users. There is also a question as to whether the Younnie Ditch diversions are fully accounted for. These values can be refined with additional study.

Middle and Upper Basins

Extensive work was required to identify lands that are currently or have been recently irrigated. Points of diversion and conveyance systems were also mapped. Long-term idle lands were also identified. These are tracts that currently have non-functional irrigation systems and appear to be abandoned. Some of the long-term idle lands were included within IDWR recommended water rights places of use. As such, these lands need to be identified and documented.

The places of use relative to the state recommended water rights base were used to establish the initial study boundaries. Aerial photo coverage for the 1980, 1987, 1988, 1992, 2004, and 2006 time periods were used to photo-interpret the irrigated land base. Most of the noted photography was stereoscopic and observed under a 3X ocular Lietz, MS-27 stereoscope. This markedly improved the quality of irrigated land mapping. This range of aerial photo coverage represented dry and average year runoff time frames and coincided with work products used by IDWR to develop conclusions on recommended water rights. Members of the Team performed aerial over-flights of the entire study area in late June and late July of 1999. Notes from these observations were valuable in confirming the photo interpretation. Several on-ground field investigations were completed by Team members over the last decade that further assisted in refining the mapping results.

Preliminary mapping of the historically irrigated land base was submitted to IDWR to assist them in the 2007 diversion measurement program. IDWR developed a numerical code that tied each measured diversion to a specific water right and / or owner. Extensive irrigated land tracts were found that had no recommended water rights plus multiple areas where none or only a portion of the recommended water right service area was irrigated. Further, the IDWR measurement sites (due to time/budget constraints) provided only partial coverage of all identified diversions. As such, diversion quantity estimates had to be independently developed for a large number of sites. These volumes were established from similar diversions that were measured.

Therefore, 30 comprehensive irrigated land maps were developed for the middle and upper basin study areas. Historically irrigated lands were identified as being either actively irrigated or long-term idle. Active irrigation was further divided into two categories based on water availability. Use was made of IDWR diversion records and monthly stream flow measurements made by BIA for most of the tributaries to the Blackfoot River in the area of study to evaluate supply. IDWR had conducted limited interviews with several of the major water users and these inputs assisted in interpreting the diversion measurement data and aerial photo interpretation results. The first active irrigation category identifies those lands that would generally receive water during a dry year. The second category defined additional lands that appeared to be irrigated during average runoff periods. All of these irrigated land types were quantified.

A schematic accompanied each of the 30 irrigated land maps. For each primary point of diversion, summaries were presented relative to estimated active irrigation uses and associated recommended water right acreage, peak use rates and periods of use. The points of diversion were numbered so that they could be cross referenced to the IDWR diversion measurement program results for the 2007 irrigation season. Sources of supplies were documented so that the respective streams could be correlated to the monthly BIA stream-gaging results.

The Team then completed an assessment of diversion quantities for each drainage in the Upper and Middle Basins by point of diversion. The initial step was to develop estimates of diversion quantities for each point of diversion measured in dry year 2007. Unit diversions for estimated actively irrigated acreage were then established. These results were compared with calculated crop consumptive irrigation requirements for selected crops, periods of use and estimated ditch efficiencies. Cross checks were made against BIA monthly stream flow measurements in the drainage plus levels of water use identified on the aerial photographic coverage. The IDWR measured results seemed reasonable for a dry year. Using the same informational sources plus the results of the limited interviews with the water users in 2007, estimates were made of

anticipated water diversions for estimated active irrigation in average years. Results were reviewed for reasonableness. Those diversions which were not measured in 2007 were correlated to similar diversions and irrigation use levels that had been measured by IDWR.

Most of the unit diversions were less than 2.5 acre-feet per estimated actively irrigated acre. As such, diversions were projected to be fully depleted. For service areas with larger diversions, depletions were estimated based on the crop consumptive irrigation requirement (generally grass pasture) plus irrecoverable losses of one-third of the potential return flow. An analysis was undertaken to evaluate whether adjustments should be made to crop water requirements relative to elevation. Elevation was documented as having only minor differences in the values calculated in the middle and upper basins and adjustments were not implemented.

RESULTS

Lower Basin

As previously documented, diversions were estimated to be depletions. Water year 2007 was designated as a dry year and diversions / depletions were measured at about 41,800 acre-feet. Water year 2006 was identified as being representative of an average year with diversion / depletions measured at about 43,700 acre-feet. These values may be adjusted slightly upward due to accuracy issues with certain measurements.

Middle and Upper Basins

Based on dry year calculations, there are currently about 6400 acres of actively irrigated land that diverts about 12,100 acre-feet of water, of which 10,700 acre-feet are estimated to be depleted. Under average year conditions, there are an estimated 7800 irrigated acres with diversions and depletions of 16,800 acre-feet and 15,200 acre-feet, respectively. The actively irrigated acreage within the places of use of the recommended water rights, in an average year, is several thousand acres less than the IDWR recommended irrigated water rights acreage.

Total Basin

In the 1990 Agreement, the North Side Users were estimated to divert no more than 45,000 acre-feet per year. Based on the preliminary findings to date, the diversions in a dry year are 53,900 acre-feet and they increase to 60,500 acre-feet in an average year. These totals are based on an assessment of actively irrigated lands which was independent of the IDWR water right recommendations. Therefore, the totals include some irrigated lands that are outside the places of use for recommended water rights and exclude lands with recommended water rights found to not be actively irrigated.

These results establish the need to negotiate an Equitable Adjustment for the Tribal Water Right from the Blackfoot River. There are, unfortunately, a number of additional key issues that must be addressed by the Parties before the Equitable Adjustment calculation can be finalized. These elements are addressed in the following section.

UNRESOLVED ISSUES

The Team has identified a number of issues that must be resolved by the Parties before a final Equitable Adjustment quantity can be established. They are summarized below.

1. **Should irrigated acreage that extends outside recommended water rights boundaries be included?** There are extensive acres in the lower, middle and upper Blackfoot basins that are irrigated in dry or average years that are not included in a Director's recommended water right. Under the terms of the Agreement, we understand that these acres are not eligible for the benefit of the priority protection and should be excluded. IDWR should make every effort to contact these water users and let them know the consequences of their decision to not have a water right decreed for all their irrigated land in the SRBA. It is assumed that these owners will take the necessary steps to establish these water rights. If the acres are subsequently covered by a water right decreed in the SRBA and otherwise meet the terms of the Agreement, the acreage will need to be included. As previously noted, the diversions for these lands are presently included in the current Blackfoot River basin diversion totals.
2. **Should the significant acreage within the recommended water rights boundaries that shows no recent irrigation be included? If not, should the recommended water rights be reduced?** There are several thousand acres in the lower, middle and upper Blackfoot basins that are covered by recommended water rights that appear to have been idle for decades. It is assumed IDWR had ample evidence of an existing water right for these rights to be recommended to the SRBA court and to be eligible for the priority protection benefit of the Agreement. These acres should be monitored, preferably by IDWR, after entry of the partial decree and, at the end of 5 years of non-use, a forfeiture proceeding should be initiated to minimize the anticipated burden placed on water users to accomplish the Equitable Adjustment. If these tracts resume irrigation, then diversion quantities would increase and a modification must be made to the Equitable Adjustment.
3. **Should CRP lands in areas of firm water supplies be included or not?** There are several hundred acres of CRP lands in the lower, middle and upper Blackfoot River basins. These lands are included in the current diversion totals. It is recommended that these acres be extracted and a re-opener provision be included in the Equitable Adjustment to accommodate these lands should they go back into production.
4. **Should long-time idle acreage, within recommended water right service area boundaries, that are located along the Blackfoot River be included as recently irrigated since they can be put quickly back into active use?** There are several hundred acres of land that fall into this category. These tracts fall into Issue No 2 above. They should, however, be closely monitored by IDWR since they are associated with a firm water supply. The water rights associated with these lands are not eligible for transfer until they have been put fully back into use and the Equitable Adjustment volume modified.
5. **How should lands that have July 1 cutoff dates but divert water during the full irrigation season be addressed?** There are a few hundred acres in the middle and upper basins that have a season of use ending on July 1 but continue to divert water the full irrigation season. It is recommended that these water users be contacted by IDWR and be given the opportunity to provide proof that would permit their water rights to be decreed as full season water rights. If the water users fail to or are unable to provide such proof,

CERTIFICATE OF SERVICE

I certify that on the 28th day of February 2008, I lodged the original copy of foregoing **GOVERNMENTAL PARTIES JOINT STATUS REPORT** and five additional copies with the SRBA Court at the following address via FedEx mail:

CLERK OF THE SRBA COURT
SRBA Courthouse
253 Third Ave. North
Twin Falls, Idaho 83301
Phone: (208) 736-3011

I certify that on the 29th day of February 2008, I served a true and correct copy of the foregoing **GOVERNMENTAL PARTIES JOINT STATUS REPORT** to the following parties via first-class U.S. Mail pre-paid:

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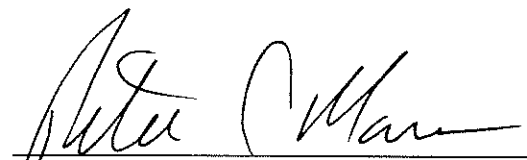
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