

SEP 27 2010

**COPY**

The State of Idaho, the United States of America as Trustee on behalf of the Shoshone-Bannock Tribes of the Fort Hall Reservation (hereinafter referred to as the "United States") and the Shoshone-Bannock Tribes (hereinafter referred to as the "Tribes"), hereby submit this *Ninth Joint Case Management Report of Governmental Parties* in accordance with the *Order Setting Deadline and Scheduling Conference* entered on April 7, 2009 and the extension granted on April 29, 2009.

1. SETTLEMENT DISCUSSIONS HELD SINCE THE LAST STATUS HEARING

As earlier reported to the Court, the parties agreed to address the Equitable Adjustment issue in two primary documents. The first document would address water management issues in the Blackfoot River Basin and would be called the "Blackfoot River Water Management Plan" (Plan). The second document would only concern the equitable adjustment and ensure compliance with the terms of the Court's Decree approving the Fort Hall Indian Water Rights Agreement of 1990. Both of these documents were required by the Fort Hall Indian Water Rights Agreement of 1990.

A. Blackfoot River Management Plan

The Technical Committee Members have completed a final round of revisions to the Plan and have circulated the final draft to the parties' attorneys for final review. The Plan represents an important step toward the full implementation of the Fort Hall Agreement.

B. Equitable Adjustment Discussions

Article 7 of the Fort Hall Agreement and Section II of the Court's Order, provides in pertinent part as follows:

The Tribes and United States shall exercise this water right in a manner that ensures persons diverting natural flow from the Blackfoot River prior to January 1, 1990, whose rights are decreed in the SRBA will continue to receive their full legal entitlement under state law. The parties will specifically enumerate all

rights protected by this provision once the SRBA Decree for this basin becomes final. 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 diversion 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 rights to account for this change.

The Tribes and the United States filed objections to water right claims which did not contain a water volume, arguing that the above-cited provision in the Fort Hall Agreement requires that a volume be included in the water right decrees for Basin 27. The Tribes and United States contend that the element of annual diversion volume is necessary to comply with the 1990 Fort Hall Water Rights Agreement, in order to determine whether the state created water rights in the Blackfoot River exceed the 45,000 afy estimate. The negotiations, on the other hand, have focused on first, determining how much has actually been diverted on an annual basis, and second, how to make the “adjustment” described in the provision. Thus far, the parties have been unable to reach a resolution of this issue.

Moreover, after a closer examination of the record in the SRBA proceedings that resulted in the *Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin* (“Consent Decree”), the parties believe that the equitable adjustment issues may be more appropriately addressed by the SRBA District Court, under its continuing jurisdiction over the Fort Hall Consent Decree, rather than in the context of the diversion volume objections, including the instant test case.

The parties to the Fort Hall Agreement acknowledged to the SRBA Court in 1995 that certain aspects of the Consent Decree were dependant upon the future decree of other, non-tribal water rights in the SRBA. The Court specifically addressed whether the issuance of those decrees would require an adjustment of the Tribal water right through amendment of the Consent Decree.

The Court: So in that sense it seems to me that the parties do intend that this court essentially maintain continuing jurisdiction over those matters which in all likelihood will require some adjustment as noted in the proposed consent decree.

Mr. Strong: Your Honor, a mechanism along that line, I think, would be appropriate. Because although it's not going to change the content of the decree, certainly when we get to the end we don't want to have to refer back to old decrees. We'd like to be able to have a self-contained document that enumerates the rights.

Reporter's Transcript, Hearing on the Proposed Consent Decree on 1990 Fort Hall Indian Water Rights Settlement Agreement, pages 144-145.

The Court continued, addressing the equitable adjustment issue in particular:

The Court: It would appear an example of what we're talking about is . . . [water right No. 27-11375]. The source is the Blackfoot River. That would be remark .x.d?

Mr. Shaw: Yes.

The Court: Now, is that the kind of situation we're talking about, Mr. Shaw, where some adjustment may be necessitated later on?

Mr. Shaw: That's exactly right, Your Honor. The 45,000 acre-feet that is contemplated as the water supply for the north side non-Indians was the best estimate. And if the rights determined for them turns out to be 45,000 acre-feet per year or less, then no adjustment needs to be made in the agreement. If it turns out to be larger than that, then some adjustment will be required by the terms of the agreement.

The Court: And, Mr. Monson, the United States in this agreement then has consented that those adjustments would be made in the adjudication court when and if necessary?

Mr. Monson: Yes, that's correct, Your Honor.

The Court: That's your understanding as well, Mr. Strong?

Mr. Strong: That's correct, Your Honor.

Mr. Monson: It would be subject, the parties would try to negotiate an agreement and then submit a proposed –

The Court: Oh, certainly.

Mr. Monson: -- negotiated resolution to the court; but it would be to this court.

The Court: Certainly.

Reporter's Transcript, Hearing on the Proposed Consent Decree on 1990 Fort Hall Indian Water Rights Settlement Agreement, pages 145-147.

Given that the Tribes' and United States' objections in these subcases are based on their interpretation of the Fort Hall Agreement and the resultant Consent Decree, the parties believe that a clarification of the relevant provision in the Consent Decree is necessary to determine whether the Decree requires a volume limit on water rights in Basin 27. Additionally, in the event of an equitable adjustment, the parties clearly anticipated that the SRBA District Court would be the ultimate arbiter, whether the parties reached a negotiated agreement or not, and would amend the Consent Decree to reflect such adjustment. As the parties advised the Court in the *Eighth Joint Case Management Report of Governmental Parties*, they have been thus far unable to reach resolution of the equitable adjustment issue.

Therefore, in an effort to move forward as efficiently and expeditiously as possible, the United States and the Shoshone-Bannock Tribes are contemplating filing a Motion for enforcement of the Fort Hall Consent Decree with the SRBA District Court. The motion will request that the Court enforce the Decree's requirement that an equitable adjustment be made to the Tribes' water right.

Additionally, the State notes that the Fort Hall Agreement and the Consent Decree contemplated an accounting of all water rights receiving the benefit of subordination on the Blackfoot, and on Bannock Creek when the decree for Basin 27 becomes final. In light of the Court's partial decree process for individual water rights, and the absence of any established process for a basin specific decree, the State submits that now is the time for identifying those

who benefit from subordination. If we submit a listing of the rights benefitting from subordination now, there will be adequate time for water users who are not on the list, but believe they should be, to have an opportunity to appeal. The State believes that, ultimately, the final lists (of both Blackfoot water users and water users on Bannock Creek) should be referenced in a general provision. The State intends, therefore, to file a motion with the SRBA District Court listing those water rights that are to receive the benefit of subordination of the Tribes' water rights, pursuant to the Consent Decree. The State will provide notice to all water users it identifies that could be affected by such a remark.

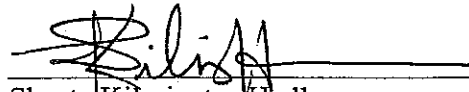
At present, the governmental parties are hoping to file both motions at approximately the same time, and hopefully within the next couple of weeks.

2. A LIST OF ADDITIONAL SUBCASES SETTLED WITH SF5s FILED WITH THE COURT.

While the negotiations on the global volume diversion issue have proceeded, the governmental parties have continued to review and settle other subcases. Since May, the parties have filed a Standard Form 5 in subcase no. 27-04101, and a stipulation in subcase no. 27-02069. There are currently Stipulations to Resolve Objections circulating in subcase nos. 27-00012A, 27-00013B and 27-11197. Finally, the Tribes have filed motions to withdraw objections to the place of use in subcase nos. 27-10341, 27-10362 and 27-10790, leaving only the volumetric objections in those subcases.

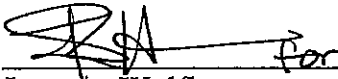
Respectfully submitted this 24th day of September 2010.

STATE OF IDAHO



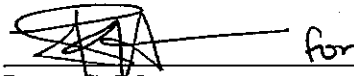
Shasta Kilminster-Hadley  
Deputy Attorney General

**SHOSHONE-BANNOCK TRIBES**

 for

Jeanette Wolfley  
Attorney for Shoshone-Bannock Tribes

**UNITED STATES OF AMERICA**

 for

Peter C. Monson  
Attorney for United States of America

## CERTIFICATE OF SERVICE

I certify that on this 24th day of September 2010, I caused to be served the original and copies of the **NINTH JOINT CASE MANAGEMENT REPORT OF GOVERNMENT PARTIES** to the persons listed below and via the method indicated::

Original via Facsimile (208) 736-2121

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

Copies via U.S. Mail, First Class Postage Prepaid to:

U.S. Department of Justice  
Environment & Natural Resources  
550 West Fort Street, MISC 033  
Boise, ID 83724

Committee of Nine  
Represented By:  
Barker, Rosholt & Simpson LLP  
113 Main Ave. W, Suite 303  
PO Box 485  
Twin Falls, ID 83303-0485

Randall C Budge  
201 E Center, Suite A2  
PO Box 1391  
Pocatello, ID 83204- 1391

Ray W. Rigby  
25N2dE  
PO Box 250  
Rexburg, ID 83440-0250

State of Idaho  
Office of Attorney General  
PO Box 44449  
Boise, ID 8371 1-4449

Robert Harris  
1000 Riverwalk Dr., Suite 200  
PO Box 50130  
Idaho Falls, ID 83405

Jerry R. Rigby  
25 N 2nd E  
PO Box 250  
Rexburg, ID 83440-0250

Scott E. Axline  
PO Box 100  
Blackfoot, ID 83221

Scott Smith  
201 E. Center  
PO Box 1391  
Pocatello, ID 83204-1391

Director of IDWR  
PO Box 83720  
Boise, ID 83720-0098

  
SHASTA KILMINSTER-HADLEY  
Deputy Attorney General  
Natural Resources Division