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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. 27-11375
Case No. 39576	)	
	)	STATE OF IDAHO'S MOTION FOR AN
	)	ACCOUNTING OF ALL WATER
	)	RIGHTS BENEFITTING FROM THE
	)	SUBORDINATION PROVISIONS OF
	)	THE FORT HALL CONSENT DECREE
	)	AND INSERTION OF A REMARK
	)	MEMORIALIZING THAT BENEFIT
	)	ON EACH AFFECTED WATER RIGHT

The State of Idaho, by and through its counsel of record, hereby moves the Court to take notice of the water rights receiving the benefit of the subordination conferred by Provision 27-11375.x.d of the Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin ("Fort

Hall Consent Decree”) and include a remark memorializing the right to that subordination on each affected water right.

The intent of the parties to the 1990 Fort Hall Agreement, and subsequent Fort Hall Consent Decree was to protect the right of non-Indian Blackfoot water users to divert up to the full legal entitlement of their natural flow water rights without regard for senior water right 27-11375.x.d. The mechanism for achieving this was a subordination of water right no. 27-11375 to the natural flow rights of the non-Indian water users existing at the time of the Agreement, which was estimated to be 45,000 acre feet of water.

The 1990 Fort Hall Agreement contemplated that once the non-Indian Blackfoot natural flow water rights were decreed in the SRBA, the parties would provide the Court with an accounting of the water rights benefitting from the subordination provisions of Provision 27-11375.x.d of the Fort Hall Consent Decree. This accounting is required for purposes of implementing provision 27-11375.x.d. The State asserts that this accounting should be made now, before final decrees are entered, to minimize the need for reopening partial decrees and for purposes of judicial economy. As part of the final accounting, the State requests that the Court include a remark on each of the listed natural flow water rights, indicating that the right benefits from the subordination of water right no. 27-11375.x.d as stated in the Fort Hall Consent Decree.

Statement of Issues

A. Whether it is necessary to memorialize the benefit of the subordination provision of the Fort Hall Decree on the affected water rights.

The Fort Hall Decree contains the following language in water right no. 27-11375, provision .x.d:

The Tribes and the 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.*

(emphasis added). The State has included a list of the water rights that it has determined to be protected by the provision above as Attachment A to this Motion. The State contends that, in addition to the requirement of the Fort Hall Decree that the natural flow rights be enumerated, it is also necessary for those rights to be identifiable by the watermaster charged with administering the rights on the Blackfoot River.

Identifying which water rights are protected by the provision above is necessary for the definition, clarification and administration of the water rights that benefit from such subordination. Idaho Code § 42-1411(2)(j). It is also necessary to fulfill the SRBA's purpose of making "a comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water" in the Snake River Basin. Idaho Code § 42-1406A (uncodified). In times of administration of water right no. 27-11375, the watermaster must be able to readily ascertain which natural flow water rights are protected by the subordination provision. *See Almo Water Co. v. Darrington*, 95 Idaho 16, 21, 501 P.2d 700, 705 (1972). If natural flow water rights that benefit from the subordination protection are not readily identifiable, it will be difficult for the watermaster to determine which water users are entitled to divert Blackfoot water in spite of the senior priority of the water right for the Tribes.

Nothing in what might be termed the "standard elements" of an SRBA partial decree—ownership, source, quantity, priority date, point of diversion, purpose and period of use, and place of use—allows the watermaster to reliably determine which water rights

receive the protection negotiated by the parties to the Fort Hall Decree. Thus, a remark on the face of each individual decree is necessary to clearly identify the natural flow water rights that benefit from the subordination protection of the Fort Hall Decree. Such a remark must be drafted in such a way that future splits, transfers or re-numberings of water rights will not affect the ability of the watermaster to identify which rights are protected. *See, e.g.*, Idaho Code § 42-1411(2)(j).

The State asserts that this can best be accomplished by inserting a remark on the decrees of the natural flow water rights that benefit from the subordination detailed in Provision 27-11375.x.d of the Fort Hall Consent Decree. This will ensure that the watermaster is able to readily identify water rights that are protected by the provision. Additionally, the subordination language can then be carried forward through future administrative changes affecting the water rights, such as transfers, splits and renumbering.

Thus, the State, through this Motion requests the Court to enumerate water rights benefitting from the subordination of water right no. 27-11375x.d, as required by the Fort Hall Decree. Additionally, the State asks the Court to include a remark on the decree of each water right determined to receive the benefit of the subordination of water right no. 27-11375. Finally, the State asks that the Court direct the Idaho Department of Water Resources to include the subordination remark on the face of any future transfers, splits or renumberings of the original enumerated rights.

B. Whether it is necessary to wait until final decrees are issued by the SRBA Court to enumerate the rights benefitting from the subordination provisions as required by the Fort Hall Decree.

Originally, the Fort Hall Decree contemplated that the accounting of the natural flow rights protected by provision 27-11375.x.d would occur “once the SRBA Decree for this basin becomes final.” This reflected the assumption of the parties to the Fort Hall Agreement that there would be a basin-specific final decree issued by the SRBA Court. 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 natural flow water rights that benefit from subordination.

The State asserts that submitting a list of the rights benefitting from subordination now will ensure that there is adequate time for water users who are not on the list, but believe they should be, to have an opportunity to object to the list and seek their inclusion without delaying the completion of the adjudication. As all of the potentially affected water rights have been recommended in the SRBA, there is adequate basis for the State to make a preliminary determination as to whether a water right is protected by the provisions of the Fort Hall Decree. Through this Motion, affected parties receive notice of that determination, and can seek inclusion on the list through an objection to the Motion. The State asserts that the SRBA Court is the appropriate forum for any dispute about which natural flow rights receive the benefit of subordination provided in the Fort Hall Decree. Therefore, the process should begin now, before final decrees for the basin are issued.

Finally, the State asserts that the natural flow water rights receiving the benefit of subordination pursuant to the Fort Hall Decree should be memorialized in the SRBA such that they will be readily identifiable to the watermaster in times of administration. This can be accomplished through the inclusion of a remark on each affected right detailing

the benefits of Provision 27-11375.x.d. Now is the appropriate time to create such a remark, as most of the affected natural flow water rights have not yet been decreed. For those relative few that have already received a partial decree, there is ample time for the Court to reopen those rights without delaying the completion of the SRBA. Delaying the accounting until after final decrees have issued would require reopening SRBA proceedings. Thus, in the interest of judicial economy and efficiency, the State requests that the Court enter an order identifying those rights enjoying the benefit of subordination of water right 27-11375 now, rather than following the issuance of final partial decrees.

Conclusion

Memorializing the subordination protection of the Fort Hall Consent Decree in the SRBA is necessary for the definition, clarification and administration of the water rights that benefit from such subordination. While the parties to the Fort Hall Agreement contemplated that the rights benefitting from the protection would be identified following the issuance of a final basin decree, the process should begin now, to afford parties the opportunity to appeal their inclusion or exclusion on the list. The State therefore asks that the Court allow the accounting required by the Fort Hall Consent Decree to occur before the issuance of final partial decrees, and that the Court include subordination remarks on the decrees of each natural flow water right benefitting from the subordination protection of Provision 27-11375.x.d of the Fort Hall Consent Decree.

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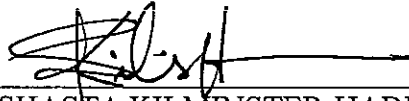
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Respectfully submitted this 25th day of October 2010.

LAWRENCE WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

A handwritten signature in black ink, appearing to read 'Shasta Kilminster-Hadley', written over a horizontal line.

SHASTA KILMINSTER-HADLEY
Deputy Attorney General

Appendix A					
Blackfoot River Water Rights Benefitting from Water Right 27-11375					
Subordination Provision					
Water Right	Water Right	Water Right	Water Right	Water Right	Water Right
27-1A	27-23F	27-55B	27-4097	27-10878	27-12029
27-1B	27-25A	27-56	27-4141	27-10943	27-12030
27-2A	27-25B	27-73	27-4147	27-10999	27-12031
27-2B	27-25C	27-74	27-7008A	27-11016	27-12032
27-3C	27-26A	27-76	27-7008B	27-11117	27-12035
27-3D	27-26B	27-85A	27-7071	27-11233	27-12040
27-3E	27-26C	27-88	27-7302	27-11236	27-12045
27-3G	27-26D	27-94	27-7370	27-11245	27-12050
27-4AC	27-26E	27-102	27-7374	27-11261	27-12051
27-4F	27-27D	27-104	27-10096	27-11262	27-12064
27-4H	27-28	27-105	27-10116	27-11269	27-12068
27-4L	27-29B	27-106	27-10207	27-11271	27-12069
27-4M	27-29C	27-2001	27-10292	27-11273	27-12074
27-4S	27-29D	27-2003A	27-10296	27-11317	27-12080
27-4Y	27-29E	27-2003B	27-10341	27-11330	27-12081
27-4Z	27-35D	27-2008	27-10344	27-11334	27-12108
27-5A	27-37A	27-2009	27-10357	27-11918	27-12115
27-5B	27-37C	27-2018	27-10358	27-11919	27-12116
27-12A	27-37F	27-2019A	27-10362	27-11930	27-12118
27-12B	27-37G	27-2026	27-10370	27-11931	27-12121
27-13A	27-37H	27-2039	27-10388	27-11939	27-12136
27-13B	27-37J	27-2040	27-10390	27-11940	27-12137
27-14B	27-37L	27-2041A	27-10398	27-11966	27-12142
27-14C	27-37M	27-2041B	27-10452	27-11988	27-12151
27-14D	27-37N	27-2048	27-10505	27-11989	27-12152
27-16A	27-38	27-2049	27-10539	27-11992	27-12189
27-16C	27-39	27-2052	27-10545	27-11994	27-12192
27-17	27-40	27-2054	27-10550	27-11995	27-12198
27-20A	27-41	27-2066	27-10552	27-11997	27-12199
27-20B	27-45	27-2078	27-10555	27-12000	27-12200
27-21A	27-47	27-2080A	27-10557	27-12002	27-12201
27-21B	27-49	27-2165	27-10657	27-12003	27-12213
27-21C	27-50	27-4009	27-10667	27-12006	27-12214
27-21D	27-51A	27-4010	27-10728	27-12014	
27-22D	27-51B	27-4058	27-10756	27-12015	
27-23B	27-52	27-4077	27-10790	27-12016	
27-23C	27-54	27-4079	27-10844	27-12027	
27-23E	27-55A	27-4096	27-10847	27-12028	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of August 2010, I caused a true and correct copy of the foregoing STATE OF IDAHO'S MOTION FOR AN ACCOUNTING OF ALL WATER RIGHTS BENEFITTING FROM THE SUBORDINATION PROVISIONS OF THE FORT HALL CONSENT DECREE AND INSERTION OF A REMARK MEMORIALIZING THAT BENEFIT ON EACH AFFECTED WATER RIGHT to be filed with the Court and served on the following parties by the indicated methods:

Original via Facsimile

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