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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	)	
	)	**AFFIDAVIT OF DAVID A. JARVIS**
	)	

STATE OF COLORADO)
)ss.
City and County of Denver)

AFFIDAVIT

I, DAVID A. JARVIS, being of lawful age and having been first duly sworn, state the following:

1. I make the following statements based upon personal knowledge and am competent to testify thereto.

2. I am a paralegal with USIS | Labat, a government contractor which provides paralegal services to the U.S. Department of Justice.

3. I provide paralegal support to Environment and Natural Resources Division attorneys who represent the interests for the United States in the Snake River Basin Adjudication. I have performed this role for approximately ten (10) years. As part of my duties, I act as the custodian of SRBA files for the United States Department of Justice, and am familiar with the court filings served upon the United States and the documents filed by the United States in the SRBA.

4. I attest that attached as Exhibit 1 is a true and correct copy of Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake Basin, dated Aug. 2, 1995.

5. I attest that attached as Exhibit 2 is a true and correct copy of The 1990 Fort Hall Indian Water Rights Agreement.

6. I attest that attached as Exhibit 3 is a true and correct copy of Public Law 101-602, 104 Stat. 3059 ("Fort Hall Indian Water Rights Act of 1990"), dated Nov. 16, 1990.

7. I attest that attached as Exhibit 4 is a true and correct copy of Reporter's Transcript (re Proposed Consent Decree on 1990 Fort Hall Indian Water Rights Settlement Agreement) dated July 18, 1995.

8. I attest that attached as Exhibit 5 is a true and correct copy of House Report 101-831 ("Approving the Fort Hall Indian Water Rights Settlement, and for Other Purposes"), dated October 10, 1990.

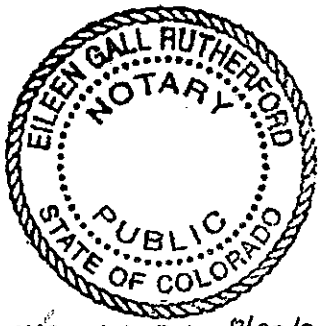
9. I attest that attached as Exhibit 6 is a true and correct copy of State of Idaho's Response to Discovery Requests of the Shoshone-Bannock Tribes and the United States, SRBA Subcase 27-04096, dated Sep. 30, 2010.

DATED this 28th day of October, 2010.

David A. Jarvis

David A. Jarvis

SUBSCRIBED AND SWORN to before me this 28TH day of October, 2010



My Commission Expires 8/27/2012

Eileen Gall Rutherford

Eileen Gall Rutherford
Notary Public for Colorado
Residing at: Denver, Colorado
My Commission Expires: 8/27/2012

Exhibit 1

DISTRICT COURT
Fifth Judicial District
County of Twin Falls-State of Idaho
AUG 02 1995
By
Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF TWIN FALLS

RECEIVED
SEP 1 1995
DEPT. JUSTICE ENVIRONMENT DIV.
DENVER, COLO.

	PARTIAL CONSENT DECREE
In Re SRBA	DETERMINING THE RIGHTS OF THE SHOSHONE-BANNOCK TRIBES TO THE USE OF WATER IN THE UPPER SNAKE RIVER BASIN
Case No. 39576	

The District Court of the Fifth Judicial District in and for the County of Twin Falls having entered on November 19, 1987 its COMMENCEMENT ORDER commencing the Snake River Basin adjudication; the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation, the State of Idaho, the United States, and certain Idaho Water Users having entered into **THE 1990 FORT HALL INDIAN WATER RIGHTS AGREEMENT** (hereinafter Agreement) in settlement of claims made by the United States on behalf of the Shoshone-Bannock Tribes to water rights in the Upper Snake River Basin; the Agreement having been submitted to this Court in lieu of a claim as provided by Idaho Code Section 42-1409(6) (1990); the Northside Canal Company having agreed by Resolution dated July 19, 1990, to receive natural flow water from Sand Creek in exchange for making storage water available to the Tribes as required by the Agreement; the United States and the State having agreed upon claims submitted for the non-Indian portion of the Fort Hall Irrigation Project and the Fort Hall Agency, Bureau of Indian Affairs; the Director having filed a

Director's Report setting forth all water rights that are the subject of this Decree; the period for filing objections to the Agreement having expired; any objections having been resolved; upon notice and an opportunity to be heard provided to all parties in this case pursuant to the docket sheet procedures contained in SRBA Administrative Order No. 1; and the Court having heard argument from the parties to the Agreement in support of its approval;

The District Court now finds as follows:

The Agreement is a fair and equitable settlement of all water right claims of the United States for the Shoshone-Bannock Tribes in the Upper Snake River Basin, for the Bureau of Indian Affairs, Fort Hall Agency and for the Fort Hall Irrigation Project;

The modifications in this decree to the descriptions of the water rights contained in the Agreement are clerical and ministerial in nature and do not alter the intent of the Agreement.

The Agreement does not adversely affect the interests of persons not party to the Agreement; and

THEREFORE IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the provisions of the 1990 Fort Hall Indian Water Rights Agreement for which this court has jurisdiction are ratified, confirmed and approved and that the water rights of the United States for the Shoshone-Bannock Tribes in the Upper Snake River Basin, for the Bureau of Indian Affairs, Fort Hall Agency, and the Fort Hall Irrigation Project are as follows:

I. DEFINITIONS.

The following definitions apply for the purposes of this Decree:

1. "Acre foot" or "AF" means the amount of water necessary to cover one acre of land to a depth of one foot and is equivalent to 43,560 cubic feet or 325,851 gallons of water.

2. "Acre feet per year" or "AFY" means the number of acre feet of water used from January 1 to December 31.

3. "Allotted lands" means lands within or without the exterior boundaries of the Fort Hall Indian Reservation, which were allotted to individual Indians in accordance with applicable Tribal/federal agreement and federal statutes, and which are presently owned by Indians in restricted fee or trust status, and which are located in the counties of Bannock, Bingham, Caribou, and Power. The applicable Tribal/federal agreement and statutes include:

   .1 the Agreement of May 14, 1880, ratified by Act of February 23, 1889, ch. 203, 25 Stat. 687; and

   .2 the Act of March 3, 1911, ch. 210, 36 Stat. 1058, 1063.

4. "American Falls Reservoir" means a water storage facility of the federal Minidoka Project authorized by the Secretary of the Interior under the Reclamation Act of 1902, 32 Stat. 388-390 (April 23, 1904); examined and reported upon by a Board of Army Engineers and approved by the President on January 5, 1911, in accordance with the Act of June 25, 1910, 36 Stat. 835-836; and initially constructed in 1927 and subsequently replaced under the authority of the Act of December 28, 1973,

Pub. L. 93-206, 87 Stat. 904-905.

5. "Annual diversion volume" means the maximum volume of water in AFY that can be diverted or stored by the holder of a water right.

6. "Annual volume of consumptive use" means the maximum volume of water in AFY that can be consumptively used by the holder of a water right.

7. "Basis of right" refers to the legal authority pursuant to which the water right is established or the document by which the right is evidenced.

8. "Beneficial use" means any use of water for DCMI, irrigation, hydropower generation, recreation, stockwatering, fish propagation and instream flow uses as well as any other uses that provide a benefit to the user of the water.

9. "Blackfoot Reservoir" means a water storage facility of the Federal Blackfoot Project authorized by the Act of March 1, 1907, ch. 2285, 34 Stat. 1015, 1024; the Act of April 30, 1908, ch. 153, 35 Stat. 70, 78; Act of April 14, 1910, ch. 140, 36 Stat. 269, 274; and the Act of May 24, 1922, ch. 199, 42 Stat. 552, 568.

10. "Ceded lands" means those lands within the Reservation as originally established under the Second Treaty of Fort Bridger of July 3, 1868, 15 Stat. 673 and companion executive orders of June 14, 1867, 1 C. Kappler 835-837 (1904), and July 30, 1869, 1 C. Kappler 838-839 (1904) and as fixed by the federal survey of 1873 that were ceded by the Tribes to the United States pursuant to the following Tribal/federal

agreements:

.1 Agreement of May 14, 1880, ratified by the Act of February 23, 1889, ch. 203, 25 Stat. 687;

.2 Agreement of July 18, 1881, ratified by the Act of July 3, 1882, ch. 268, 22 Stat. 148;

.3 Agreement of May 27, 1887, ratified by the Act of September 1, 1888, ch. 936, 25 Stat. 452; and

.4 Agreement of February 5, 1898, ratified by the Act of June 6, 1900, ch. 813, 31 Stat. 692.

11. "Consumptive use" means the amount of water that does not remain in the water system after use or is not returned to the water system through return flows or seepage, whether or not treatment for purpose of maintaining water quality is required before the water may be returned to the water system, but does not include water lost through evaporation from storage.

12. "Cubic feet per second" or "CFS" means a rate of water discharge equivalent to approximately 448.8 gallons per minute.

13. "DCMI" means domestic, commercial, municipal and industrial uses excluding hydroelectric generation. Domestic use means the diversion of water by one or more individuals, family units or households for drinking, cooking, laundering, sanitation and other personal comforts and necessities, stockwatering, and for the irrigation of a family lawn, garden or orchard not exceeding one-half acre of area per household. Industrial and commercial use means the use of

water for any purpose that benefits an industrial or commercial enterprise. Industrial and commercial use of water includes, but is not limited to, agricultural spraying, irrigation of plants in greenhouses, industrial cooling, mining, energy production, commercial recreation, and losses associated with any industrial or commercial operation. Municipal use means the delivery and use of water through an investor-owned, mutually-owned, tribally-owned or publicly-owned water utility or delivery system for all uses usual and ordinary to such systems. Such use includes but is not limited to uses of water for domestic, irrigation of lawns and gardens, commercial, industrial, fire protection, irrigation and other uses in park and recreation facilities, and street washing.

14. "Diversion" means the removal of water from its natural course or location by means of a ditch, canal, flume, bypass, pipeline, conduit, well, pump, or other act of man, or the impoundment of water in a reservoir for rediversion.

15. "Diversion rate" means the maximum rate in CFS at which water may be diverted at a point of diversion.

16. "Fort Hall Agency" means the component of the United States Department of the Interior, Bureau of Indian Affairs, located on the Fort Hall Indian Reservation.

17. "Fort Hall Indian Reservation" or "Reservation" means those lands within the boundaries of the Reservation, as originally established under the Second Treaty of Fort Bridger of July 3, 1868, 15 Stat. 673, and companion executive orders of

June 14, 1867, 1 C. Kappler 835-837 (1904), and July 30, 1869, 1 C. Kappler 838-839 (1904), as fixed by the federal survey of 1873 that have not been ceded by the Tribes to the United States pursuant to the following Tribal/federal agreements:

.1 Agreement of May 14, 1880, ratified by the Act of February 23, 1889, ch. 203, 25 Stat. 687.

.2 Agreement of July 18, 1881, ratified by the Act of July 3, 1882, ch. 268, 22 Stat. 148.

.3 Agreement of May 27, 1887, ratified by the Act of September 1, 1888, ch. 936, 25 Stat. 452, excepting those lots within the Pocatello Townsite which were not ceded by such agreement.

.4 Agreement of February 5, 1898, ratified by the Act of June 6, 1900, ch. 813, 31 Stat. 672, excepting Allotment Nos. T-8, 45, 46, 48, 50, 61, 71 and 72 owned by the Tribes or held in restricted fee or trust status for the Tribes by the United States.

Attachment A, which is incorporated herein by reference, shows the boundaries of the Fort Hall Indian Reservation.

18. "Fort Hall Irrigation Project" (also referred to as the "Fort Hall Indian Irrigation Project" in the Agreement) means the federal project constructed, in part, to provide water for the irrigation of lands on the Reservation. The following federal statutes authorized the Fort Hall Irrigation Project:

.1 Act of August 15, 1894, ch. 290, 28 Stat. 286, 305.

.2 Act of March 1, 1907, ch. 2285, 34 Stat. 1015, 1024.

.3 Act of April 30, 1908, ch. 153, 35 Stat. 70, 78.

.4 Act of April 4, 1910, ch. 140, 36 Stat. 269, 274.

.5 Act of May 24, 1922, ch. 199, 42 Stat. 552, 56.

.6 Act of May 9, 1924, ch. 151, 43 Stat. 117.

.7 Act of June 30, 1948, ch. 767, 62 Stat. 1167.

.8 Act of September 30, 1950, ch. 1114, 64 Stat. 1083.

.9 Act of August 31, 1954, ch. 1159, 68 Stat. 1026.

.10 Act of August 17, 1961, Pub. L. 87-154, 75 Stat. 390.

Attachment B, which is incorporated herein by reference, shows the exterior boundaries of the Fort Hall Irrigation Project.

19. "Grays Lake" means the storage facility used to store water for the benefit of the Fort Hall Irrigation Project.

20. "Impairment in the quality of water," applicable only in the context of a change in water right no. 01-10223, means a diminishment in the quality of water being diverted for a water right to the extent that it is no longer useful for its intended purpose.

21. "Indian" means any person who:

.1 is a member of a tribe recognized as eligible for special programs and services provided by the United States because of the person's status as an Indian; or

.2 is recognized as an Indian person under Tribal law; or

.3 holds or is recognized by the Secretary as eligible to hold restricted trust property on the Reservation.

22. "Indian lands" means all lands within the exterior boundaries of the Reservation that are held in trust for the Tribes or

owned by Indians and those lands outside the exterior boundaries of the Reservation held in trust by the United States for the Tribes or an enrolled member thereof.

23. "Injury to a water right," applicable only in the context of a change of water right no. 01-10223, means a diminishment in quantity or an impairment in the quality of water available to a senior or a junior water right holder as a consequence of a change, except that no water right holder is required to continue to waste water for the benefit of any other water right holders.

24. "Irrigation use" means application of water to the land surface or root zone of the soil for the purpose of producing crops, lawn or landscaping on that land.

25. "Michaud Contract" means that Memorandum Agreement of April 25, 1957 between the Bureau of Reclamation and the Bureau of Indian Affairs relating to the water supply for the Michaud Division of the Fort Hall Indian Reservation.

26. "Michaud Division" means that division of the Fort Hall Irrigation Project authorized by the Act of August 31, 1954, ch. 1159, 68 Stat. 1026.

27. "Palisades Reservoir" means a water storage facility of the federal Minidoka Project initially authorized under the provisions of the federal reclamation laws by the presentation to the President and the Congress of the report of December 9, 1941, H.R. Doc. No. 457, 77th Cong., 1st Sess., by the Secretary of the Interior, and reauthorized by section 1 of the Act of September 30, 1950, ch. 1114, 64

Stat. 1083.

28. "Period of use" means the time of the year when water may be used for a particular purpose.

29. "Person" means an individual, a partnership, a trust, an estate, a corporation, a municipal corporation, the state of Idaho or any political subdivision or instrumentality thereof, the United States or any political subdivision or instrumentality thereof, an Indian tribe or any political subdivision or instrumentality thereof, or any other public or private entity.

30. "Place of use" means the location where water is used.

31. "Point of diversion" or "POD" means any location at which water is diverted from the water system. A numeral to the right of the legal description indicates the number of existing points of diversion within a tract.

32. "Point of injection" means any location at which water that has been diverted from the water system is placed back into the water system. A numeral to the right of the legal description indicates the number of existing points of injection within a tract.

33. "Point of rediversion" means the location at which water that has been diverted from the water system and then placed back into the water system is again diverted from the water system. A numeral to the right of the legal description indicates the number of existing points of rediversion within a tract.

34. "Project lands" means those lands that are served by the Fort Hall Irrigation Project. Current project lands are shown on Attachment B.

35. "Priority date" means the priority date assigned to the water right.

36. "Purpose of use" means the nature of use of the water right.

37. "Reservation Watermaster" means the Tribal officer or any successor designated to administer the Tribal Water Code.

38. "Right number" means the number assigned to each decreed water right for purposes of identification. The first two numerals of the right number indicate hydrologic basin number assigned by IDWR.

39. "Secretary" means the Secretary of the United States Department of the Interior or a duly authorized representative thereof.

40. "Snake River Watermaster" means the Watermaster of Water District 01 or any successor.

41. "Source" means the named or described source of water within the water system.

42. "Stock water" means the use of water solely for livestock or wildlife consumption including associated losses.

43. "Transfer" means any change in a point of diversion, place of use, period of use or purpose of use for a water right.

44. "Tribal water right(s)" means those water rights confirmed and recognized in this Decree as rights held in trust for the Tribes by the United States, including those rights so held for the benefit of individual Indians on Indian lands.

45. "Tribes" or "Tribal" means the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation in Idaho as the collective successors-in-interest of Indian signatories to the Second Treaty of Fort Bridger of July 3, 1868, 15 Stat. 673, and subsequent Tribal/federal agreements.

46. "Upper Snake River Basin" means that portion of the Snake River Basin upstream from the Hells Canyon Dam, FERC Project No. 1971.

47. "Water system" means all rivers, streams, lakes, springs, groundwater or other water sources within the Snake River Basin within the State of Idaho.

48. "Winters Doctrine" means the federal legal principles announced by the United States Supreme Court in Winters v. United States, 207 U.S. 564 (1908).

II. WATER RIGHTS HELD BY THE UNITED STATES FOR THE USE AND BENEFIT OF THE SHOSHONE-BANNOCK TRIBES OF THE FORT HALL INDIAN RESERVATION IN THE UPPER SNAKE RIVER BASIN

A. THE WATER SUPPLIED FROM THE FOLLOWING SOURCES SHALL CONSTITUTE THE TRIBAL WATER RIGHTS:

Right No. 01-10223

.i Source: Snake River/Sand Creek

.ii Annual Diversion Volume: 100,000 AFY increasing to 115,000 AFY as (1) future reservation lands are irrigated from this source, or (2) as corresponding amounts of the water rights for the ceded lands of the Fort Hall Irrigation Project are relinquished by the United States.

.iii Diversion Rate: 390.00 CFS increasing to 470.00 CFS at the same relative rate as the volume in ii. above.

.iv Annual Volume of Consumptive Use: 60,986 AFY

.v Priority Date: June 14, 1867

.vi Points of Diversion:

SESWNE Sec 31 Twp 1N Rge 37E BM

(Snake River into Reservation Canal)

NENWNW Sec 7 Twp 2S Rge 37E BM

(Sand Creek into Reservation Canal)

Points of Injection:

NESWSE Sec 24 Twp 2S Rge 36E BM

(Reservation Canal into Blackfoot River)

Points of Rediversion:

NENENE Sec 13 Twp 3S Rge 35E BM

(Blackfoot River into Fort Hall Main Canal)

NWNENW Sec 14 Twp 3S Rge 35E BM

(Blackfoot River into North Canal)

Future points of diversion may be developed in accordance with paragraph II.C.3, II.C.4 and II.C.5, *infra*.

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 14,687 present and 8,672 future acres for a total of 23,359 acres within the Reservation.

.ix Basis of Right: Winters Doctrine

.x Matters Necessary for Definition, Clarification or Administration of the Right:

.a The rate of diversion for this water right shall be measured at the head of the Reservation Canal

located in SESWNE Sec 31 Twp 1N Rge 37E BM.

.b The volume of diversion for this water right shall be measured at the Drop located in SENWSE Sec 13 Twp 2S Rge 36E BM downstream from the point at which Sand Creek empties into the Reservation Canal.

.c This right combined with water right nos. 27-11375, 27-02007, and 25-02160 provide the water supply for up to 53,828 acres from the combined water sources but none of the limitations of diversion rate or volume shall be exceeded for this right in providing the water supply.

.d The available inflow to the Reservation Canal upstream from the Drop, including Sand Creek, shall be counted as part of this water right up to the demand of the North and Main Canals. The portion of Sand Creek that was used with the control afforded by the Equalizing Reservoir under conditions existing in 1989 shall continue to be used when the Snake River is under regulation by the Snake River Watermaster and will be considered part of this water right. When the Snake River is under regulation by the Snake River Watermaster fifteen percent (15%) of the computed Sand Creek flows, when returned to the Snake River through the Blackfoot River because of lack of control with the present Equalizing Reservoir, shall be

considered as natural flow credited to downstream water users and for which no exchange of storage will be required. All of the remaining Sand Creek water not diverted through the Main and North Canals because of the physical limitations of the Equalizing Reservoir, in excess of fifteen percent (15%) up to 50,000 AFY as determined by gaging, when the Snake River is under regulation by the Snake River Watermaster shall be delivered to the North Side Canal Company in exchange for an equal amount of storage water from Palisades or Jackson Lake Reservoirs. The actual storage water from Palisades or Jackson Lake Reservoirs will be released to meet the Snake River diversion requirements of the Tribes that would have been met by Sand Creek. This water shall be deemed the first storage water released from the American Falls Reservoir for the North Side Canal Company.

Right No. 27-11373

.i Source: Ross Fork Creek/Ross Fork Basin groundwater

.ii Annual Diversion Volume: 5,000 AFY

.iii Diversion Rate: 29.07 CFS

.iv Annual Volume of Consumptive Use: 3,320 AFY

.v Priority Date: June 14, 1867

.vi Existing Points of Diversion:

SENWNE Sec 4, SESENE Sec 10, SENWSW Sec 17, SWSESW Sec

21, NESWNW Sec 34 all in Twp 5S Rge 36E BM

NWNWSE Sec 31 (2 POD), SWSWSE Sec 33 all in Twp 4S Rge 36E BM

NENENE Sec 36 Twp 4S Rge 35E BM

Future Points of Diversion may be developed as needed within the Ross Fork Creek basin to utilize this water right within the Ross Fork Creek basin.

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 1,503 present and future acres within the Ross Fork Creek basin.

.ix Basis of Right: Winters Doctrine

.x Matters Necessary for Definition, Clarification or Administration of the Right:

.a The Tribes shall have the option of using surface water or groundwater diverted within the Ross Fork Creek basin to satisfy this right, in whole or in part, provided that any diversions of surface water or groundwater by the Tribes in excess of 5,000 AFY from the Ross Fork Creek Basin shall be charged against water right no. 27-11376.

Right No. 27-11374

.i Source: Lincoln Creek/Lincoln Creek Basin groundwater

.ii Annual Diversion Volume: 5,700 AFY

.iii Diversion Rate: 33.00 CFS

.iv Annual Volume of Consumptive Use: 3,768 AFY

.v Priority Date: June 14, 1867

.vi Existing Points of Diversion:

NENESE Sec 25 Twp 3S Rge 36E BM

NENWSE Sec 31 Twp 3S Rge 36E BM

Future points of diversion may be developed as needed within the Lincoln Creek Basin to utilize this water right within the Lincoln Creek drainage basin.

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 1,701 present and future acres within the Lincoln Creek basin.

.ix Basis of Right: Winters Doctrine

.x Matters Necessary for Definition, Clarification or Administration of the Right:

.a The Tribes shall have the option of using surface water or groundwater diverted within the Lincoln Creek basin to satisfy this right, in whole or in part, provided that any diversions of surface water or groundwater by the Tribes in excess of 5,700 AFY from the Lincoln Creek basin shall be charged against water right no. 27-11376.

Right No. 29-00466

.i Source: Bannock Creek

.ii Annual Diversion Volume: 3,095 AFY

.iii Diversion Rate: 16.25 CFS

.iv Annual Volume of Consumptive Use: 1,842 AFY

.v Priority Date: June 14, 1867

.vi Existing Points of Diversion:

NENWSE Sec 32 Twp 7S Rge 33E BM

SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in Twp 8S Rge 33E BM

NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all in Twp 9S Rge 33E BM

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 774 present and future acres within the Reservation.

.ix Basis of Right: The basis of the right is the Winters Doctrine with the relative share and priorities of the water allocations determined by the Bannock Creek Decree [United States v. Daniels (D. Idaho April 9, 1907)].

Right No. 29-00467

.i Source: Bannock Creek, West Fork Bannock Creek

.ii Annual Diversion Volume: 629 AFY

.iii Diversion Rate: 3.30 CFS

.iv Annual Volume of Consumptive Use: 374 AFY

.v Priority Date: April 1, 1889

.vi Existing Points of Diversion:

NENWSE Sec 32 Twp 7S Rge 33E BM

SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in Twp 8S Rge 33E BM

NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all in Twp 9S Rge 33E BM

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 157 present and future acres within the Reservation.

.ix Basis of Right: The basis of the right is the Winters Doctrine with the relative share and priorities of the water allocations determined by the Bannock Creek Decree [United States v. Daniels (D. Idaho April 9, 1907)].

Right No. 29-12848

.i Source: Rattlesnake Creek

.ii Annual Diversion Volume: 571 AFY

.iii Diversion Rate: 3.00 CFS

.iv Annual Volume of Consumptive Use: 340 AFY

.v Priority Date: June 14, 1867

.vi Existing Points of Diversion:

NENWSE Sec 32 Twp 7S Rge 33E BM

SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in Twp 8S Rge 33E BM

NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all in Twp 9S Rge 33E BM

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 143 present and future acres within the Reservation.

.ix Basis of Right: Winters Doctrine

.x Matters Necessary for Definition, Clarification or Administration of the Right:

.a The Tribes and the United States shall exercise this right in a manner that ensures persons with water rights decreed in the Bannock Creek Decree [United States v. Daniels (D. Idaho April 9, 1907)] and that are confirmed in the SRBA continue to receive their full legal entitlement.

Right No. 29-00469

.i Source: West Fork Bannock Creek

.ii Annual Diversion Volume: 190 AFY

.iii Diversion Rate: 1.00 CFS

.iv Annual Volume of Consumptive Use: 113 AFY

.v Priority Date: May 1, 1894

.vi Existing Points of Diversion:

NENWSE Sec 32 Twp 7S Rge 33E BM

SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in Twp 8S Rge 33E BM

NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all in Twp 9S Rge 33E BM

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 48 present and future acres within the Reservation.

.ix Basis of Right: The basis of the right is the Winters Doctrine with the relative share and priorities of the water allocations determined by the Bannock Creek Decree [United States v. Daniels (D. Idaho April 9, 1907)].

Right No. 29-00470

.i Source: West Fork Bannock Creek

.ii Annual Diversion Volume: 248 AFY

.iii Diversion Rate: 1.30 CFS

.iv Annual Volume of Consumptive Use: 147 AFY

.v Priority Date: April 1, 1894

.vi Existing Points of Diversion:

NENWSE Sec 32 Twp 7S Rge 33E BM

SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in Twp 8S Rge 33E BM

NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all in Twp 9S Rge 33E BM

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 62 present and future acres within the Reservation.

.ix Basis of Right: The basis of the right is the Winters Doctrine with the relative share and priorities of the water allocations determined by the Bannock Creek

Decree [United States v. Daniels (D. Idaho April 9, 1907)].

Right No. 29-00471

.i Source: Bannock Creek

.ii Annual Diversion Volume: 248 AFY

.iii Diversion Rate: 1.30 CFS

.iv Annual Volume of Consumptive Use: 147 AFY

.v Priority Date: April 1, 1894

.vi Existing Points of Diversion:

NENWSE Sec 32 Twp 7S Rge 33E BM

SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in Twp 8S Rge 33E BM

NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all in Twp 9S Rge 33E BM

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 62 present and future acres within the Reservation.

.ix Basis of Right: The basis of the right is the Winters Doctrine with the relative share and priorities of the water allocations determined by the Bannock Creek Decree [United States v. Daniels (D. Idaho April 9, 1907)].

Right No. 29-00472

.i Source: West Fork Bannock Creek

.ii Annual Diversion Volume: 190 AFY

.iii Diversion Rate: 1.00 CFS

.iv Annual Volume of Consumptive Use: 113 AFY

.v Priority Date: April 1, 1898

.vi Existing Points of Diversion:

NENWSE Sec 32 Twp 7S Rge 33E BM

SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in Twp 8S Rge 33E BM

NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all in Twp 9S Rge 33E BM

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 48 present and future acres within the Reservation.

.ix Basis of Right: The basis of the right is the Winters Doctrine with the relative share and priorities of the water allocations determined by the Bannock Creek Decree [United States v. Daniels (D. Idaho April 9, 1907)].

Right No. 29-00473

.i Source: West Fork Bannock Creek

.ii Annual Diversion Volume: 190 AFY

.iii Diversion Rate: 1.00 CFS

.iv Annual Volume of Consumptive Use: 113 AFY

.v Priority Date: April 1, 1898

.vi Existing Points of Diversion:

NENWSE Sec 32 Twp 7S Rge 33E BM

SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in Twp 8S Rge 33E BM

NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all in Twp 9S Rge 33E BM

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 48 present and future acres within the Reservation.

.ix Basis of Right: The basis of the right is the Winters Doctrine with the relative share and priorities of the water allocations determined by the Bannock Creek Decree [United States v. Daniels (D. Idaho April 9, 1907)].

Right No. 29-00474

.i Source: West Fork Bannock Creek

.ii Annual Diversion Volume: 190 AFY

.iii Diversion Rate: 1.00 CFS

.iv Annual Volume of Consumptive Use: 113 AFY

.v Priority Date: April 1, 1901

.vi Existing Points of Diversion:

NENWSE Sec 32 Twp 7S Rge 33E BM

SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in Twp 8S Rge 33E BM

NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all in Twp 9S Rge 33E BM

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 48 present and future acres within the Reservation.

.ix Basis of Right: The basis of the right is the Winters Doctrine with the relative share and priorities of the water allocations determined by the Bannock Creek Decree [United States v. Daniels (D. Idaho April 9, 1907)].

Right No. 29-12049

.i Source: Bannock Creek

.ii Annual Diversion Volume: 18,833 AFY

.iii Diversion Rate: 98.87 CFS

.iv Annual Volume of Consumptive Use: 11,205 AFY

.v Priority Date: June 14, 1867

.vi Existing Points of Diversion:

NENWSE Sec 32 Twp 7S Rge 33E BM

SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in Twp 8S Rge 33E BM

NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all in Twp 9S Rge 33E BM

NESWSE Sec 6 Twp 7S Rge 33E BM

(3 - 20 HP pumps for Michaud Project)

Future Points of Diversion may be developed within the

Bannock Creek basin to utilize this water right within the Bannock Creek drainage basin.

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 4,708 present and future acres within the Reservation.

.ix Basis of Right: Winters Doctrine

.x Matters Necessary for Definition, Clarification or Administration of the Right:

.a The Tribes and the United States shall exercise this right in a manner that ensures persons with water rights decreed in the Bannock Creek Decree [United States v. Daniels (D. Idaho April 9, 1907)] and that are confirmed in the SRBA continue to receive their full legal entitlement.

Right No. 29-12050

.i Source: Portneuf River/Jeff Cabin Creek

.ii Annual Diversion Volume: 970 AFY

.iii Diversion Rate: 9.70 CFS

.iv Annual Volume of Consumptive Use: 727.50 AFY

.v Priority Date: June 14, 1867

.vi Points of Diversion:

Future Points of Diversion may be developed within the Portneuf River basin upstream from the point the river enters the Portneuf Reservoir in Sec 11 Twp 6S Rge 38E BM for use within the Portneuf River basin.

.vii Purpose and Period of Use:

Irrigation 4/1 - 11/1

.viii Place of Use: 485 present and future acres within the Reservation.

.ix Basis of Right: Winters Doctrine

Right No. 29-00231

.i Source: Toponce Creek

.ii Annual Diversion Volume: 259.3 AFY

.iii Diversion Rate: 1.59 CFS

.iv Annual Volume of Consumptive Use: 154.3 AFY

.v Priority Date: February 16, 1869

.vi Points of Diversion: Toponce Creek

.vii Purpose and Period of Use:

Irrigation 1/1 - 12/31

.viii Place of Use: Allotment 61 (NESW, SENW, Sec 35 Twp 6S Rge 38E) for 79.53 acres.

.ix Basis of Right: The Winters Doctrine per the Memorandum Decision in United States v. Hibner, 27 F.2d 909 (D. Idaho, E.D. 1928) and the Decree of the United States District Court, Eastern Division, dated April 8, 1929.

Right No. 29-00238

.i Source: Toponce Creek

.ii Annual Diversion Volume: 282.5 AFY

.iii Diversion Rate: 1.733 CFS

.iv Annual Volume of Consumptive Use: 168.14 AFY

.v Priority Date: February 16, 1869

.vi Points of Diversion: Toponce Creek

.vii Purpose and Period of Use:

Irrigation 1/1 - 12/31

.viii Place of Use: Allotment 71 (SENW, SWNE, Sec 36 Twp 6S Rge 38E) for 86.67 acres. Allotment 72 (NESW and NWSE Sec 36 Twp 6S Rge 38E) for 80 acres.

.ix Basis of Right: The Winters Doctrine per the Memorandum Decision in United States v. Hibner, 27 F.2d 909 (D. Idaho, E.D. 1928) and the Decree of the United States District Court, Eastern Division, dated April 8, 1929.

Right No. 29-12051

.i Source: Mink Creek

.ii Annual Diversion Volume: 104.3 AFY

.iii Diversion Rate: 0.75 CFS

.iv Annual Volume of Consumptive Use: 62.1 AFY

.v Priority Date: February 26, 1869

.vi Points of Diversion: SWNW Sec 21 Twp 7S Rge 35E BM

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: Allotment T-8 (SWNW Sec 21 Twp 7S Rge 35E BM for 31.75 acres)as shown on Attachment A.

.ix Basis of Right: The Winters Doctrine per Decree of District Court of the Fifth Judicial District Court of

the State of Idaho, in and for the County of Bannock dated June 5, 1926, in Smith v. City of Pocatello, Case No. 6669.

Right No. 27-11375

.i Source: Blackfoot River

.ii Annual Diversion Volume: 150,000 AFY

.iii Diversion Rate: 1380 CFS

.iv Annual Volume of Consumptive Use: 79,546 AFY

.v Priority Date: June 14, 1867

.vi Points of Diversion:

SENWNW Sec 7 Twp 2S Rge 38E BM

(Blackfoot River into Little Indian Canal)

NENENE Sec 13 Twp 3S Rge 35E BM

(Blackfoot River into Fort Hall Main Canal)

NWNENW Sec 14 Twp 3S Rge 35E BM

(Blackfoot River into North Canal)

SWSESW Sec. 3 Twp 7S Rge 32E BM

SENWSE Sec. 3 Twp 7S Rge 32E BM

NWNWSW Sec. 2 Twp 7S Rge 32E BM

NESENW Sec. 2 Twp 7S Rge 32E BM

NWNENE Sec. 1 Twp 7S Rge 32E BM

SWNWNW Sec. 6 Twp 7S Rge 33E BM

NESESW Sec. 6 Twp 7S Rge 33E BM

NESESW Sec. 6 Twp 7S Rge 33E BM

SWSWSW Sec. 30 Twp 6S Rge 33E BM

Future Points of Diversion may be developed to divert water from (1) anywhere on the Blackfoot River or (2) ground water within the Reservation as described in Matters Necessary for Definition, Clarification or Administration of the Right, below.

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 30,469 present and future acres within the Reservation.

.ix Basis of Right: Winters Doctrine

.x Matters Necessary for Definition, Clarification or Administration of the Right:

.a If the natural flow of the Blackfoot River is not sufficient to satisfy this right and other rights to divert Blackfoot River natural flow pursuant to state law, the Tribes may satisfy this right by using water right nos. 27-02007 and 25-02160, provided that the combined use in satisfaction of this right shall not exceed 150,000 AFY.

.b If the diversions under this right exceed 150,000 AFY, the amount in excess of 150,000 AFY shall be charged against water right no. 01-10223.

.c This right combined with water right nos. 01-10223, 27-02007 and 25-02160 can be used to irrigate up to 53,828 present and future acres from the combined water sources.

.d 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 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 rights to account for this change.

.e The Tribes and the United States shall exercise this right in a manner that will not impair the project entitlements of the Fort Hall Irrigation Project water users.

.f If the water supplied under this right and water right nos. 27-02007 and 25-02160 does not provide 150,000 AFY, the Tribes may divert groundwater within the Reservation under this right, exclusive of the water right nos. 27-11376 and 29-12052, such that the combined water supply from water right nos. 27-02007 and 25-02160 and surface and

groundwater under this right yields 150,000 AFY.

Right No. 27-02007

.i Source: Blackfoot River

.ii Annual Diversion Volume: 348,000 AFY

.iii Diversion Rate: Not limited

.iv Annual Volume of Consumptive Use:

Included in water right nos. 01-10223 and 27-11375.

.v Priority Date: September 3, 1907

.vi Points of Diversion:

NWNE Sec 12 Twp 5S Rge 40E BM (Blackfoot River into Blackfoot Reservoir)

Points of Rediversion:

SENWNW Sec 7 Twp 2S Rge 38E BM

(Blackfoot River into Little Indian Canal)

NENENE Sec 13 Twp 3S Rge 35E BM

(Blackfoot River into Fort Hall Main Canal)

NWNENW Sec 14 Twp 3S Rge 35E BM

(Blackfoot River into North Canal)

.vii Purposes and Periods of Use:

Irrigation from Storage	3/15 - 11/15
	348,000 AFY
Storage for Irrigation	1/1 - 12/31
	348,000 AFY

.viii Place of Use: 30,469 present and future acres within the Reservation.

.ix Basis of Right: License.

.x Remarks:

.a The rediversion of water from storage under this right and the water right no. 25-02160 may be used to satisfy the Blackfoot River natural flow to meet but not exceed the 150,000 AFY annual diversion volume under water right no. 27-11375. The Tribes may use water from storage under this right in excess of the amount needed to satisfy water right no. 27-11375; provided that uses in excess of that amount necessary to satisfy the 150,000 AFY annual diversion volume of water right no. 27-11375 shall be charged against water right no. 01-10223.

.b This right combined with water right nos. 01-10223, 27-11375 and 25-02160 may be used to irrigate up to 53,828 present and future acres from the combined water sources.

.c The Tribes and the United States shall exercise this right in a manner that will not impair the project entitlements of the Fort Hall Irrigation Project water users.

Right No. 25-02160

.i Source: Grays Lake

.ii Annual Diversion Volume: 100,000 AFY

.iii Diversion Rate: Not limited

.iv Annual Volume of Consumptive Use: Included in the water right nos. 01-10223 and 27-11375.

.v Priority Date: August 23, 1919

.vi Points of Diversion:

SWSWSW Sec 1 Twp 5S Rge 42E BM

(Grays Lake/Clarks Cut Canal)

Points of Rediversion:

NWNE Sec 12 Twp 5S Rge 40E BM (Blackfoot Reservoir)

SENWNW Sec 7 Twp 2S Rge 38E BM

(Blackfoot River into Little Indian Canal)

NENENE Sec 13 Twp 3S Rge 35E BM

(Blackfoot River into Fort Hall Main Canal)

NWNENW Sec 14 Twp 3S Rge 35E BM

(Blackfoot River into North Canal)

.vii Purposes and Periods of Use:

Irrigation from Storage	3/15 - 11/15
	100,000 AFY
Storage for Irrigation	1/1 - 12/31
	100,000 AFY

.viii Place of Use: 30,469 present and future acres within the Reservation.

.ix Basis of Right: Permits

.x Matters Necessary for Definition, Clarification or Administration of the Right:

.a The rediversion of water from storage under this right and the water right no. 27-02007 may be used to satisfy the Blackfoot River natural flow to meet but not exceed the 150,000 AFY annual diversion volume under the water right no. 27-11375. The Tribes may use water from storage under this right in excess of the amount needed to satisfy water right no. 27-11375; provided that uses in excess of that amount necessary to satisfy the 150,000 AFY diversion volume of water right no. 27-11375 shall be charged against water right no. 01-10223.

.b This right combined with water right nos. 01-10223, 27-11375, and 27-02007 may be used to irrigate up to 53,828 present and future acres from the combined water sources.

.c The Tribes and the United States shall exercise this right in a manner that will not impair the project entitlements of the Fort Hall Irrigation Project water users.

Right No. 27-11376

.i Source: Groundwater within the Reservation

.ii Annual Diversion Volume: 125,000 AFY

.iii Diversion Rate: 813.40 CFS

.iv Annual Volume of Consumptive Use: 93,615 AFY

.v Priority Date: June 14, 1867

.vi Existing Points of Diversion:

SWSESW Sec. 3 Twp 7S Rge 32E BM

SENWSE Sec. 3 Twp 7S Rge 32E BM

NWNWSW Sec. 2 Twp 7S Rge 32E BM

NESENW Sec. 2 Twp 7S Rge 32E BM

NWNENE Sec. 1 Twp 7S Rge 32E BM

SWNWNW Sec. 6 Twp 7S Rge 33E BM

NESESW Sec. 6 Twp 7S Rge 33E BM

NESESW Sec. 6 Twp 7S Rge 33E BM

SWSWSW Sec. 30 Twp 6S Rge 33E BM

SESWSE Sec. 31 Twp 5S Rge 33E BM

SESWNE Sec. 32 Twp 5S Rge 33E BM

SWSENW Sec. 32 Twp 5S Rge 33E BM

SWSESE Sec. 32 Twp 5S Rge 33E BM

SWSESW Sec. 33 Twp 5S Rge 33E BM

NESESE Sec. 33 Twp 5S Rge 33E BM

SESESW Sec. 34 Twp 5S Rge 33E BM

SESENE Sec. 34 Twp 5S Rge 33E BM

SESWSE Sec. 35 Twp 5S Rge 33E BM

SESWNE Sec. 3 Twp 6S Rge 33E BM

SESWNW Sec. 3 Twp 6S Rge 33E BM

NWNENW Sec. 4 Twp 6S Rge 33E BM

NENWNW Sec. 6 Twp 6S Rge 33E BM

NWNENE Sec. 1 Twp 6S Rge 32E BM

NWNENW Sec. 1 Twp 6S Rge 32E BM

SENWNE Sec. 2 Twp 6S Rge 32E BM

NESESE Sec. 2 Twp 6S Rge 32E BM

SWNESW Sec. 1 Twp 6S Rge 32E BM

SWSESW Sec. 6 Twp 6S Rge 33E BM

SENENE Sec. 8 Twp 6S Rge 33E BM

SENWNW Sec. 8 Twp 6S Rge 33E BM

SENENE Sec. 7 Twp 6S Rge 33 E BM

NENWNE Sec. 12 Twp 6S Rge 33E BM

SENWNW Sec. 12 Twp 6S Rge 32E BM

NESWNE Sec. 11 Twp 6S Rge 32E BM

SWSESE Sec. 12 Twp 6S Rge 32E BM

NWSESW Sec. 8 Twp 6S Rge 33E BM

SENESW Sec. 8 Twp 6S Rge 33E BM

NWNENW Sec. 18 Twp 6S Rge 33E BM

SWNWNE Sec. 13 Twp 6S Rge 32E BM

SENENW Sec. 13 Twp 6S Rge 32E BM

SESENE Sec. 24 Twp 6S Rge 32E BM

SESWSE Sec. 23 Twp 6S Rge 32E BM

SWSESW Sec. 23 Twp 6S Rge 32E BM

NESWSE Sec. 22 Twp 6S Rge 32E BM

SENWSW Sec. 22 Twp 6S Rge 32E BM

SESENW Sec. 28 Twp 6S Rge 32E BM

NWSENW Sec. 27 Twp 6S Rge 32E BM

SWNESW Sec. 27 Twp 6S Rge 32E BM

SWSESW Sec. 28 Twp 6S Rge 32E BM

NESESE Sec. 29 Twp 6S Rge 32E BM

NWNWNW Sec. 33 Twp 6S Rge 32E BM

SESWNE Sec. 5 Twp 7S Rge 33E BM

SWSESE Sec. 7 Twp 7S Rge 33E BM

NESENE Sec. 21 Twp 3S Rge 35E BM

NWNWNW Sec. 6 Twp 4S Rge 35 E BM

SESESW Sec. 16 Twp 4S Rge 34E BM

NWNWSE Sec. 26 Twp 3S Rge 34E BM

Future points of diversion may be developed to utilize this water right on any Indian lands.

.vii Purposes and Periods of Use:

Irrigation	3/15 - 11/15	115,000 AFY
DCMI	1/1 - 12/31	10,000 AFY

.viii Place of Use: 42,592 present and future acres for irrigation within the Reservation. Present and future DCMI uses on any Indian lands.

.ix Basis of Right: Winters Doctrine

.x Matters Necessary for Definition, Clarification or Administration of the Right:

.a If the Tribes' combined surface water and groundwater diversions from the Ross Fork Creek basin exceed 5,000 AFY, or the Tribes' combined surface water and groundwater diversions from the Lincoln Creek basin exceed 5,700 AFY, such excesses shall be charged against this Tribal groundwater right.

.b The nine wells used to supplement the surface water portion of the Michaud Division divert water included in this Tribal water right.

.c Lot Nos. 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17 of Block No. 191; Lot No. 1 of Block 192; Lot Nos. 1, 2, 3, 4, 5, 6, 7, and 8 of Block No. 196; Lot Nos. 19 and 20 of Block No. 341; Lot No. 5 of Block No. 593; and Lot No. 7 of Block No. 599 within the City of Pocatello remain Indian lands and may utilize water under this water right. Water diverted or withdrawn under this right from diversion points or structures located on said lots shall be used only for domestic, commercial, municipal or industrial uses occurring on any said lots.

.d Allotment Nos. T-8, 45, 46, 48, 50, 61, 71 and 72 within the Portneuf River basin may utilize water under this right.

Right No. 29-12052

.i Source: Bannock Creek basin groundwater

.ii Annual Diversion Volume: 23,500 AFY

.iii Diversion Rate: 154.93 CFS

.iv Annual Volume of Consumptive Use: 17,843 AFY

.v Priority Date: June 14, 1867

.vi Points of Diversion:

Future points of diversion may be developed as needed within the Bannock Creek basin to utilize this water right within the Bannock Creek drainage basin.

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 8,704 future acres on Indian lands within the Reservation in the Bannock Creek drainage basin.

.ix Basis of Right: Winters Doctrine

.x Matters Necessary for Definition, Clarification or Administration of the Right:

.a The Tribes have the right to the annual yield of the Bannock Creek basin up to a combined surface and groundwater diversion of 48,500 AFY.

.b If the Tribes' combined surface and groundwater diversion from this basin exceeds 48,500 AFY, such excess shall be charged against water right no. 27-11376.

.c The Tribes and United States shall exercise this water right in a manner that ensures persons diverting ground water from the Bannock Creek drainage basin 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 the 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 2,400 AFY of water from the ground water of the Bannock Creek drainage basin. In the event

this estimate of the amount of existing diversions under state water rights is changed 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.

B. FEDERAL CONTRACT STORAGE SPACE HELD BY THE UNITED STATES FOR THE TRIBES

1. The Memorandum of Agreement between the Bureau of Reclamation and the Bureau of Indian Affairs Relating to a water supply for Michaud Division of the Fort Hall Irrigation Project as approved April 25, 1957, a copy of which is attached hereto as Attachment D, is included in the Agreement and referenced here for purposes of acknowledging that it describes a part of the Tribal water supply.

C. GENERAL PROVISIONS APPLICABLE ONLY TO WATER RIGHTS HELD BY THE UNITED STATES FOR THE BENEFIT OF THE SHOSHONE-BANNOCK TRIBE OF THE FORT HALL INDIAN RESERVATION

1. The Tribes shall have the right to use the natural flows of all waters arising wholly within and traversing only Reservation lands for instream flows to maintain or to enhance the integrity of an ecosystem.

2. The Tribes may transfer or lease within the Reservation all or any portion of the Tribal water rights, if the transfer:

.1 is to any beneficial use,

.2 does not exceed the maximum diversion rate not withstanding the period of use,

.3 does not exceed the annual volume of diversion,

.4 does not exceed the annual volume of consumptive use,

.5 is to any place of use within the Reservation, except as to water right nos. 27-11373, 27-11374, and 29-12050, where the place of use is specifically restricted by this Decree, and

.6 does not change the source, except as permitted by water right nos. 27-11373, 27-11374 and 27-11375.

3. The Tribes may change the points of diversion and periods of use of the water right no. 01-10223 provided the change:

.1 is to any beneficial use,

.2 does not exceed the maximum diversion rate not withstanding the period of use,

.3 does not exceed the annual volume of diversion,

.4 does not exceed the annual volume of consumptive use, and

.5 does not result in an injury to a water right.

4. Whenever the Tribes or the United States intend to change or add a point of diversion or change the period of use of all or part of the water right no. 01-10223, the Tribes or the United States will prepare a written Notice of Transfer of this water right. The Tribes or the United States shall serve a copy of the Notice of Transfer on each member of the Intergovernmental Board and shall publish the Notice of Transfer at least once a week for

two consecutive weeks in a newspaper printed within the county wherein the point of diversion lies, or in the event no newspaper is printed within that county, then in a newspaper of general circulation therein. The Tribes or the United States shall complete the service and publication at least one hundred and twenty (120) days prior to the intended change. The Notice of Transfer shall contain the following information:

.1 The amount of water in CFS and/or AFY that is to be changed including any reductions that will occur at any existing points of diversion, if applicable;

.2 The legal descriptions of the locations of any new or changed points of diversion including any points of diversion that will no longer be used, if applicable;

.3 The period of use during which the water will be used as a result of the change including periods during which water will no longer be used or periods during which water use will be reduced as a result of the change; and

.4 A statement that any person who believes that the change will injure a water right shall file a Notice of Objection with the Intergovernmental Board within ten days of the last date of service or publication.

5. Any person claiming that a change in a point of diversion or period of use of water right no. 01-10223 will injure

a water right shall first request mediation before the Intergovernmental Board prior to seeking judicial relief.

.1 In any proceeding, the person claiming that a change will injure the objector's water right shall have the burden of proving that an injury will occur.

.2 Upon receipt of any objection, the Intergovernmental Board shall attempt to mediate the dispute. After reviewing all relevant data and information, the Intergovernmental Board shall make a recommendation regarding the change if there is a consensus. In the event the Intergovernmental Board determines that the proposed change would injure an objector's water right, its recommendation shall address whether it is possible to mitigate the injury in a way that will allow the Tribes to achieve the purposes of the change.

.3 In the event that the Intergovernmental Board fails to mediate the dispute, judicial relief may be sought by the objector.

6. The Tribal water rights and any water accruing to such rights set forth in this Decree may not be sold, leased, rented, transferred or otherwise used off the Reservation.

7. Stock watering may occur anywhere on Indian lands from any part of the water system on Indian lands and may be used year around as a part of each water right defined in

this Decree except no diversion from a point off the Reservation for stockwater shall be made during the non-irrigation season.

8. The Tribes have the right to generate hydropower incidental to water delivery for the other purposes specified in this Decree as well as pursuant to paragraph II.C.2.

9. If any allottee or Tribal member is decreed a water right in the SRBA for Indian lands, there shall be a corresponding reduction in the Tribal water right(s) that provide a water supply for the Indian lands.

10. Except for the Snake River and the Blackfoot River, the administration of water rights within the Reservation shall be as follows:

.1 The Tribes shall administer the distribution of all Tribal water rights within the Reservation.

.2 Upon reasonable notice, the Tribes and the United States shall provide access to the State to inspect water monitoring devices and diversions within the Reservation. The Tribes and the United States may accompany the State.

.3 The Tribes shall adopt and submit a Tribal Water Code to the Secretary for approval. The Tribal Water Code shall, in part,

.i provide for a Reservation Watermaster,

.ii establish a Tribal Water Commission to manage the Tribal water delivery systems on the Reservation, and

.iii provide for monitoring of and enforcement of Tribal water rights.

.4 Pending adoption and approval of a Tribal Water Code, the Secretary, as trustee for the Tribes, shall temporarily administer the distribution of the Tribal water rights within the Reservation.

.5 The United States shall administer the distribution of the Fort Hall Irrigation Project water rights and the Fort Hall Agency water rights from the point the water is delivered to the project facilities.

.6 The State shall administer the distribution of those rights acquired under state law within the Reservation that are not a part of the Fort Hall Agency, Tribal or Fort Hall Irrigation Project water rights.

.7 Upon reasonable notice and in accordance with applicable law, the Tribes and the United States may inspect water monitoring devices and diversions within the Reservation for those water rights administered under paragraph II.C.10.6. The State may accompany the Tribes and the United States.

.8 The Tribes or the United States shall install or cause to be installed monitoring devices for

administration of Tribal water rights within the Reservation to the same extent as required of other water users in Idaho. The United States, the Tribes and the State shall monitor those diversions that each party actually administers within the Reservation and report the diversion records each year to the Intergovernmental Board by March 1 of the year after each reporting year.

11. This Decree does not resolve the administration of water rights from the Blackfoot River. Administration shall continue as described in the Agreement.

12. The administration of water rights from the Snake River shall be as follows:

.1 The State shall account for and administer the diversion of water from the Snake River by all water users, including the United States and the Tribes, in conformance with the SRBA Decree. The State, in administering such waters, shall ensure the delivery to all water users, including the United States and the Tribes, their legal entitlement to water from natural flow and storage. The United States shall be solely responsible for the physical operation of its Snake River diversion facilities in accordance with the Snake River Watermaster's direction. In the event the United States disputes the Snake River Watermaster's direction regarding the administration of its Snake

River diversion, the dispute shall be resolved by the District Court. Distribution of the water after diversion by the United States shall be in accordance with paragraphs II.C.10.1, II.C.10.4, and II.C.10.5.

.2 IDWR shall provide the Intergovernmental Board, upon request, any Snake River water measurement data or reports gathered or prepared by or for IDWR.

.3 Upon reasonable notice, the State shall provide the Tribes and the United States access to inspect water monitoring devices and diversions on the Snake River where necessary for purposes of the administration of Tribal or Fort Hall Irrigation Project water rights from the water system. The State may accompany the party inspecting the monitoring device or diversion.

13. The Tribes or the United States shall prepare a written Notice of Use of a Tribal water right whenever the Tribes or the United States intend to (1) transfer or lease within the Reservation the right to an existing use, (2) put to use within the Reservation any portion of the Tribal water right which is not in present use, or (3) undertake a combination of (1) and (2).

.1 The Notice of Use shall contain the following information:

.i The Right Number of the Tribal water right(s) to be changed or used;

.ii A legal description of the location where the Tribes or the United States will use the water right;

.iii A legal description of the location where the Tribes or the United States will reduce the use of water as a consequence of the transfer and of the point of diversion where the Tribes or the United States will reduce the diversion, if applicable;

.iv The ownership status of the land where the Tribal water right will be used;

.v The legal description of the new point of diversion;

.vi A narrative description of the proposed diversion works such as the size of pumps, ditches, wells, etc.;

.vii The amount of water stated in AFY and in CFS to be used on the location described in .ii above; and

.viii The nature of use of the Tribal water right at the location described in .ii above.

.2 Notices involving 25 CFS or more, or 7,500 AFY or more and notices involving any increase in the diversion rate or volume of the water right no. 01-10223 shall be served on each member of the

Intergovernmental Board at least thirty (30) days prior to the transfer, lease or new use.

.3 Notices involving less than 25 CFS or less than 7,500 AFY shall be served on the Intergovernmental Board annually at the time of the annual report provided for in paragraph II.C.10.8 provided that no notice will be required for transfers, leases or new uses of 0.04 CFS or 2.2 AFY or less.

14. The State shall provide written notice to the Tribes and the Fort Hall Agency Superintendent whenever an application for a state water right permit is sought for a water use in the Upper Snake River mainstem, the Blackfoot River basin, and the Portneuf River basin. The report shall contain the following:

.1 the permit number of the state water right applied for;

.2 a legal description of the location of the proposed place of use;

.3 the ownership status of the land where the water will be used, if known;

.4 the legal description of the proposed point of diversion; and

.5 a narrative description of the proposed diversion works, such as the size of the pumps, ditches, wells, etc.

15. The Tribes reserve the right to develop geothermal ground water on the Reservation having a temperature of at least

two hundred twelve (212) degrees Fahrenheit in the bottom of a well.

III. WATER RIGHTS HELD BY THE UNITED STATES FOR USE ON NON-INDIAN OWNED LANDS WITHIN THE FORT HALL IRRIGATION PROJECT AND FOR THE BUREAU OF INDIAN AFFAIRS, FORT HALL AGENCY

A. THE WATER SUPPLIED FROM THE FOLLOWING SOURCES SHALL CONSTITUTE THE WATER RIGHTS:

Right No. 29-12558

.i Source: Bannock Creek

.ii Annual Diversion Volume: 80 AFY

.iii Diversion Rate: 0.42 CFS

.iv Annual Volume of Consumptive Use: 50 AFY

.v Priority Date: April 1, 1887

.vi Point of Diversion: SWSWSE Sec. 21, Twp 8S, Rge 33E, BM

.vii Purposes and Period of Use: Irrigation and Stock Water, 3/15 to 11/15

.viii Place of Use: 20 acres more or less located in the SWNW Sec. 4, Twp 8S, Rge 33E, BM as shown on Attachment C.

.ix Basis of Right: Bannock Creek Decree

.x Matters Necessary for Definition, Clarification or Administration of the Right:

a. To the extent a non-Indian water user is adjudicated a non-Project water right for Project lands, the amount of that non-Project water right will be deducted from the Project water rights at a diversion rate that is not more than the duty of

water per acre for lands within the Fort Hall Irrigation Project.

b. This land is served by the Pevo Ditch and is irrigated under a rotational procedure that also includes water right nos. 29-00466, 29-00467, 29-12848, 29-00469, 29-00470, 29-00471, 29-00472, 29-00473, 29-00474, 29-12049. The procedure requires up to 3.0 CFS diversion rate at the properties headgate.

Right No. 01-10248

.i Source: Snake River

.ii Annual Diversion Volume: 60,000 AFY

.iii Diversion Rate: 260 CFS

.iv Annual Volume of Consumptive Use: 33,222 AFY

.v Priority Date: December 14, 1891

.vi Point of Diversion:

SESWNE Sec 31 Twp 1N Rge 37E BM

(Snake River into Reservation Canal)

Points of Injection:

NESWSE Sec 24 Twp 2S Rge 36E BM

(Reservation Canal into Blackfoot River)

Points of Rediversion:

NENENE Sec 13 Twp 3S Rge 35E BM

(Blackfoot River into Fort Hall Main Canal)

NWNENW Sec 14 Twp 3S Rge 35E BM

(Blackfoot River into North Canal)

.vii Purpose and Period of Use: Irrigation, 3/15 to 11/15

.viii Place of Use: 13,630.13 acres within the Fort Hall Irrigation Project. This right combined with water right nos. 27-11560, 27-11561 and 25-13615 may be used to irrigate not more than 12,667.2 acres within the 13,630.13 Project acres.

.ix Basis of Right: Rexburg Decree for Snake River

.x Matters Necessary for Definition, Clarification or Administration of the Right:

a. This right is used in combination with water right no. 27-11560. The combined diversion rate of this right and water right no. 27-11560 shall not exceed 260 CFS and the combined diversion volume shall not exceed 60,000 AFY.

b. To the extent a non-Indian water user is adjudicated a non-Project water right for Project lands, the amount of that non-Project water right will be deducted from the Project water rights at a diversion rate that is not more than the duty of water per acre for lands within the Fort Hall Irrigation Project.

c. As the United States and owners of lands within the ceded area relinquish their rights to use water under this right on the Project lands the cap on the annual diversion rate and volume of water right no. 01-10223 shall be increased by a like amount until the ultimate diversion rate of 470 c.f.s. and

ultimate diversion volume of 115,000 AFY for right no. 01-10223 are reached.

d. This water right and water right nos. 27-11560, 27-11561 and 25-13615 are to be used on Project lands. The total annual volume of consumptive use from these rights shall not exceed 33,222 AFY.

Right No. 27-11560

.i Source: Sand Creek

.ii Annual Diversion Volume: 60,000 AFY

.iii Diversion Rate: 260 CFS

.iv Annual Volume of Consumptive Use: Included in water right no. 01-10248

.v Priority Date: April 4, 1914

.vi Point of Diversion:

NENWNW Sec. 7, Twp 2S, Rge 37E, BM

(Sand Creek into Reservation Canal)

Points of Injection:

NESWSE Sec 24 Twp 2S Rge 36 E BM

(Reservation Canal into Blackfoot River)

Points of Rediversion:

NENENE Sec 13 Twp 3S Rge 35 E BM

(Blackfoot River into Fort Hall Main Canal)

NWNENW Sec 14 Twp 3S Rge 35 E BM

(Blackfoot River into North Canal)

.vii Purpose and Period of Use: Irrigation, 3/15 to 11/15

.viii Place of Use: 13,630.13 acres within the Fort Hall Irrigation Project. This right combined with water right nos. 01-10248, 27-11561 and 25-13615 may be used to irrigate not more than 12,667.2 acres within the 13,630.13 Project acres.

.ix Basis of Right: Beneficial Use

.x Matters Necessary for Definition, Clarification or Administration of the Right:

a. This right is used in combination with water right no. 01-10248. The combined diversion rate of this water right and water right no. 01-10248 shall not exceed 260 CFS and the combined diversion volume shall not exceed 60,000 AFY.

b. To the extent a non-Indian water user is adjudicated a non-Project water right for Project lands, the amount of that non-Project water right will be deducted from the Project water rights at a diversion rate that is not more than the duty of water per acre for lands within the Fort Hall Irrigation Project.

c. As the United States and owners of lands within the ceded area relinquish their rights to use water under this water right on the Project lands, the cap on the annual diversion rate and annual diversion volume of water right no. 01-10223 shall be increased by a like amount until the ultimate diversion rate of 470 c.f.s and ultimate diversion

volume of 115,000 AFY for right no. 01-10223 are reached.

d. This water right and water right nos. 01-10248, 27-11561 and 25-13615 are to be used on Project lands. The total annual volume of consumptive use from these rights shall not exceed 33,222 AFY.

e. This right shall be exercised in accordance with provision .x.d of water right no. 01-10223.

Right No. 27-11561

.i Source: Blackfoot River

.ii Annual Diversion Volume: 25,500 AFY

.iii Diversion Rate: Not Limited

.iv Annual Volume of Consumptive Use: Included in water right no. 01-10248

.v Priority Date: September 3, 1907

.vi Points of Diversion:

NWNE Sec 12 Twp 5S Rge 40E BM (Blackfoot River into Blackfoot Reservoir)

Points of Rediversion:

SENWNW Sec 7 Twp 2S Rge 38E BM
(Blackfoot River into Little Indian Canal)

NENENE Sec 13 Twp 3S Rge 35E BM
(Blackfoot River into Fort Hall Main Canal)

NWNENW Sec 14 Twp 3S Rge 35E BM
(Blackfoot River into North Canal)

.vii Purposes and Periods of Use:

Storage for Irrigation, 1/1 to 12/31

Irrigation from Storage, 3/15 to 11/15

.viii Place of Use: 13,630.13 acres within the Fort Hall Irrigation Project. This right combined with water right nos. 01-10248, 27-11560 and 25-13615 may be used to irrigate not more than 12,667.2 acres within the 13,630.13 Project acres.

.ix Basis of Right: License

.x Matters Necessary for Definition, Clarification or Administration of the Right:

a. To the extent a non-Indian water user is adjudicated a non-Project water right for Project lands, the amount of that non-Project water right will be deducted from the Project water rights at a diversion rate that is not more than the duty of water per acre for lands within the Fort Hall Irrigation Project.

b. The rediversion of water from storage under this water right and water right nos. 01-10248, 27-11560 and 25-13615 is to be used on Project lands. The total annual volume of consumptive use from these rights shall not exceed 33,222 AFY.

c. The total annual diversion under this right and water right no. 25-13615 shall not exceed 25,500 AFY.

d. The total annual volume of water stored under this right and water right no. 27-02007 shall not exceed 348,000 acre-feet.

e. The first 25,500 AF of water stored each year in Blackfoot Reservoir and Grays Lake will be used to satisfy the 25,500 AFY diversion described in this water right and water right no. 25-13615.

Right No. 25-13615

.i Source: Grays Lake

.ii Annual Diversion Volume: 25,500 AFY

.iii Diversion Rate: Not Limited

.iv Annual Volume of Consumptive Use: Included in water right no. 01-10248

.v Priority Date: August 23, 1919

.vi Points of Diversion:

SWSWSW Sec 1 Twp 5S Rge 42E BM

(Grays Lake/Clarks Cut Canal)

Points of Rediversion:

NWNE Sec 12 Twp 5S Rge 40E BM (Blackfoot Reservoir)

SENWNW Sec 7 Twp 2S Rge 38E BM

(Blackfoot River into Little Indian Canal)

NENENE Sec 13 Twp 3S Rge 35E BM

(Blackfoot River into Fort Hall Main Canal)

NWNENW Sec 14 Twp 3S Rge 35E BM

(Blackfoot River into North Canal)

.vii Purposes and Periods of Use:

Storage for Irrigation, 1/1 to 12/31

Irrigation from Storage, 3/15 to 11/15

.viii Place of Use: 13,630.13 acres within the Fort Hall Irrigation Project. This right combined with water right nos. 01-10248, 27-11560 and 27-11561 may be used to irrigate not more than 12,667.2 acres within the 13,630.13 Project acres.

.ix Basis of Right: Permits

.x Matters Necessary for Definition, Clarification or Administration of the Right:

a. To the extent a non-Indian water user is adjudicated a non-Project water right for Project lands, the amount of that non-Project water right will be deducted from the Project water rights at a diversion rate that is not more than the duty of water per acre for lands within the Fort Hall Irrigation Project.

b. The rediversion of water from storage under this water right and water right nos. 01-10248, 27-11560 and 27-11561 is to be used on Project lands. The total annual volume of consumptive use from these rights shall not exceed 33,222 AFY.

c. The total annual diversion under this right and water right no. 27-11561 shall not exceed 25,500 AFY.

d. The total annual volume of water stored under this right and water right no. 25-02160 shall not exceed 100,000 acre-feet.

e. The first 25,500 AF of water stored each year in Blackfoot Reservoir and Grays Lake will be used to satisfy the 25,500 AFY diversion volume of this right and water right no. 27-11561.

Right No. 29-12559

.i Source: Groundwater

.ii Annual Diversion Volume: 277 AFY

.iii Diversion Rate: 2.06 CFS

.iv Annual Volume of Consumptive Use: 236 AFY

.v Priority Date: August 23, 1954

.vi Point of Diversion:

S1/2SESW Sec. 28, Twp 6S, Rge 32E, BM

.vii Purpose and Period of Use: Irrigation, 3/15 to 11/15

.viii Place of Use: 102.58 acres located in the NESW and SESW, Sec. 28, Twp 6S, Rge 32E, and the NENW Sec. 33, Twp 6S, Rge 32E, BM as shown on Attachment B.

.ix Basis of Right: Act of August 31, 1954 (Michaud Act), 68 Stat. 1026

.x Matters Necessary for Definition, Clarification or Administration of the Right:

a. To the extent a non-Indian water user is adjudicated a non-Project water right for Project lands, the amount of that non-Project water right

will be deducted from the Project water rights at a diversion rate that is not more than the duty of water per acre for lands within the Fort Hall Irrigation Project.

b. The pumping capacity for this diversion is actually 1500 GPM.

Right No. 29-12560

.i Source: Groundwater

.ii Annual Diversion Volume: 507 AFY

.iii Diversion Rate: 3.75 CFS

.iv Annual Volume of Consumptive Use: 431 AFY

.v Priority Date: August 23, 1954

.vi Points of Diversion: PODs located at the following locations:

SWSESW Sec. 3, Twp 7S, Rge 32E, BM

SENWSE Sec. 3, Twp 7S, Rge 32E, BM

NWNWSW Sec. 2, Twp 7S, Rge 32E, BM

NESENW Sec. 2, Twp 7S, Rge 32E, BM

NWNENE Sec. 1, Twp 7S, Rge 32E, BM

SWNWNW Sec. 6, Twp 7S, Rge 33E, BM

NESESW Sec. 6, Twp 7S, Rge 33E, BM

NESESW Sec. 6, Twp 7S, Rge 33E, BM

SWSWSW Sec. 30, Twp 6S, Rge 33E, BM

.vii Purpose and Period of Use: Irrigation, 3/15 to 11/15

.viii Place of Use: 187.7 acres as shown on Attachment B.

.ix Basis of Right: Act of August 31, 1954 (Michaud Act), 68 Stat. 1026

.x Matters Necessary for Definition, Clarification or Administration of the Right:

a. The lands identified in this right may also be supplied with a maximum annual diversion of 616 AF of water from the Portneuf River pumping plant under an exchange of federal contract storage rights described in Article 7.3.1. of the 1990 Fort Hall Indian Water Rights Agreement. This right and the water supplied from the Portneuf River provide a single water supply for these lands.

b. This right is to supplement the surface water supply and will be used at the discretion of the Fort Hall Irrigation Project manager to optimize the available water supply for the Project.

c. To the extent a non-Indian water user is adjudicated a non-Project water right for Project lands, the amount of that non-Project water right will be deducted from the Project water rights at a diversion rate not more than the duty of water per acre for lands within the Fort Hall Irrigation Project.

Right No. 27-11562

.i Source: Blackfoot River and tributaries and the Blackfoot Reservoir and tributaries

.ii Annual Diversion Volume: 14.54 AFY

.iii Diversion Rate; 0.20 CFS

.iv Annual Volume of Consumptive Use: De minimis

.v Priority Date: March 1, 1907

.vi Points of Diversion:

Twp 7S, Rge 41E, BM

Twp 7S, Rge 42E, BM

Twp 6S, Rge 41E, BM

Twp 6S, Rge 42E, BM

Twp 5S, Rge 40E, BM

Twp 5S, Rge 41E, BM

Twp 5S, Rge 42E, BM

Twp 4S, Rge 40E, BM

Twp 4S, Rge 41E, BM

.vii Purpose and Period of Use: Stock Water, 1/1 to 12/31

.viii Place of Use: Those lands used by the Bureau of Indian Affairs for stock grazing in:

Twp 7S, Rge 41E, BM

Twp 7S, Rge 42E, BM

Twp 6S, Rge 41E, BM

Twp 6S, Rge 42E, BM

Twp 5S, Rge 40E, BM

Twp 5S, Rge 41E, BM

Twp 5S, Rge 42E, BM

Twp 4S, Rge 40E, BM

Twp 4S, Rge 41E, BM

.ix Basis of Right: Beneficial Use

.x Matters Necessary for Definition, Clarification or Administration of the Right:

a. Water will be used for stock water for range cattle for the grazing rights associated with Blackfoot Reservoir.

Right No. 27-11563

.i Source: Blackfoot River and tributaries and the Equalizing Reservoir and tributaries

.ii Annual Diversion Volume: 0.70 AFY

.iii Diversion Rate: 0.01 CFS

.iv Annual Volume of Consumptive Use: De minimis

.v Priority Date: March 1, 1907

.vi Points of Diversion:

Twp 3S, Rge 36E, BM

Twp 3S, Rge 35E, BM

.vii Purpose and Period of Use: Stock water, 1/1 to 12/31

.viii Place of Use: Those lands used by the Bureau of Indian Affairs for stock grazing in:

Twp 3S, Rge 36E, BM

Twp 3S, Rge 35E, BM

.ix Basis of Right: Beneficial Use

.x Matters Necessary for Definition, Clarification or Administration of the Right:

a. Water will be used for stock water for range cattle for the grazing rights associated with the Equalizing Reservoir.

Right No. 25-13616

.i Source: Meadow Creek and tributaries and Grays Lake and tributaries

.ii Annual Diversion Volume: 14.54 AFY

.iii Diversion Rate: 0.20 CFS

.iv Annual Volume of Consumptive Use: De minimis

.v Priority Date: March 1, 1907

.vi Points of Diversion:

Twp 3S, Rge 43E, BM

Twp 4S, Rge 42E, BM

Twp 4S, Rge 43E, BM

Twp 5S, Rge 42E, BM

Twp 5S, Rge 43E, BM

.vii Purpose and Period of Use: Stock water, 1/1 to 12/31

.viii Place of Use: Those lands used by the Bureau of Indian Affairs for stock grazing in:

Twp 3S, Rge 43E, BM

Twp 4S, Rge 42E, BM

Twp 4S, Rge 43E, BM

Twp 5S, Rge 42E, BM

Twp 5S, Rge 43E, BM

.ix Basis of Right: Beneficial Use

.x Matters Necessary for Definition, Clarification or Administration of the Right:

a. Water will be used for stock water for range cattle for the grazing rights associated with Grays Lake.

Right No. 27-11564

.i Source: Groundwater

.ii Annual Diversion Volume: 224 AFY

.iii Diversion Rate: 1.84 CFS

.iv Annual Volume of Consumptive Use: 164 AFY

.v Priority Date: July 3, 1868

.vi Point of Diversion: SWNESW Sec. 36, Twp 4S, Rge 34E, BM (two POD)

.vii Purposes and Periods of Use: Domestic, Commercial, Municipal, and Industrial Uses, 1/1 to 12/31; Irrigation, 3/15 to 11/15

.viii Place of Use: Various locations on the S1/2 Sec. 36, Twp 4S, Rge 34E, BM (approximately 80 acres)

.ix Basis of Right: Federal Reserved Right

.x Matters Necessary for Definition, Clarification or Administration of the Right:

a. The water will be used by the United States Department of Interior, Bureau of Indian Affairs, Fort Hall Agency, for irrigation of lawns, landscaping, and domestic purposes at the Fort Hall Agency complex.

b. The pumping capacity of these wells is 1300 GPM.

Right No. 29-12561

.i Source: Groundwater

.ii Annual Diversion Volume: 1.20 AFY

.iii Diversion Rate: 0.04 CFS

.iv Annual Volume of Consumptive Use: De minimis

.v Priority Date: August 23, 1954

.vi Point of Diversion: SESESW Sec. 6, Twp 7S, Rge 33E, BM

.vii Purpose and Period of Use: Domestic, 1/1 to 12/31

.viii Place of Use: SESESW Sec. 6, Twp 7S, Rge 33E, BM

.ix Basis of Right: Beneficial Use

.x Matters Necessary for Definition, Clarification or Administration of the Right:

a. The water will be used by the United States Department of Interior, Bureau of Indian Affairs, Fort Hall Agency, for domestic purposes at the home site at the Bannock Creek Pumping Station.

Right No. 29-12562

.i Source: Groundwater

.ii Annual Diversion Volume: 15.80 AFY

.iii Diversion Rate: 0.04 CFS

.iv Annual Volume of Consumptive Use: De minimis

.v Priority Date: August 23, 1954

.vi Point of Diversion: NESESW Sec. 6, Twp 7S, Rge 33E, BM

.vii Purpose and Period of Use: Pump Cooling, 3/15 to 11/15

.viii Place of Use: NESESW Sec. 6, Twp 7S, Rge 33E, BM

.ix Basis of Right: Beneficial Use

.x Matters Necessary for Definition, Clarification or Administration of the Right:

a. The water will be used by the United States Department of Interior, Bureau of Indian Affairs, Fort Hall Agency, for pump cooling purposes at the Bannock Creek Pumping Station.

Right No. 29-12563

.i Source: Groundwater

.ii Annual Diversion Volume: 1.20 AFY

.iii Diversion Rate: 0.04 CFS

.iv Annual Volume of Consumptive Use: De minimis

.v Priority Date: August 23, 1954

.vi Point of Diversion: SWSESW Sec. 36, Twp 5S, Rge 33E, BM

.vii Purpose and Period of Use: Domestic, 1/1 to 12/31

.viii Place of Use: SWSESW Sec. 36, Twp 5S, Rge 33E, BM

.ix Basis of Right: Beneficial Use

.x Matters Necessary for Definition, Clarification or Administration of the Right:

a. The water will be used by the United States Department of Interior, Bureau of Indian Affairs, Fort Hall Agency, for domestic purposes at the home site at the Portneuf Pumping Station.

Right No. 29-12564

.i Source: Groundwater

.ii Annual Diversion Volume: 1.20 AFY

.iii Diversion Rate: 0.04 CFS

.iv Annual Volume of Consumptive Use: De minimis

.v Priority Date: August 23, 1954

.vi Point of Diversion: SWSESW Sec. 36, Twp 5S, Rge 33E, BM

.vii Purpose and Period of Use: Domestic, 1/1 to 12/31

.viii Place of Use: SWSESW Sec. 36, Twp 5S, Rge 33E, BM

.ix Basis of Right: Beneficial Use

.x Matters Necessary for Definition, Clarification or Administration of the Right:

a. The water will be used by the United States Department of Interior, Bureau of Indian Affairs, Fort Hall Agency, for domestic use at the Fort Hall Irrigation Project Office at the Portneuf Pumping Station.

Right No. 27-11565

.i Source: Groundwater

.ii Annual Diversion Volume: 12.40 AFY

.iii Diversion Rate: 0.04 CFS

.iv Annual Volume of Consumptive Use: De minimis

.v Priority Date: May 31, 1957

.vi Point of Diversion: NESE, Sec. 9, Twp 6S, Rge 42E, BM

.vii Purposes and Period of Use: Domestic and Commercial, 1/1 to 12/31

.viii Place of Use: NESE Sec. 9, Twp 6S, Rge 42E, BM

.ix Basis of Right: Beneficial Use

.x Matters Necessary for Definition, Clarification or Administration of the Right:

a. The water will be used by the United States Department of Interior, Bureau of Indian Affairs, Fort Hall Agency, for domestic use at the home site at the White Locks Marina.

Right No. 29-12565

.i Source: Groundwater

.ii Annual Diversion Volume: 15.80 AFY

.iii Diversion Rate: 0.04 CFS

.iv Annual Volume of Consumptive Use: De minimis

.v Priority Date: August 23, 1954

.vi Point of Diversion: SESESW Sec. 36, Twp 5S, Rge 33E, BM

.vii Purpose and Period of Use: Pump Cooling, 3/15 to 11/15

.viii Place of Use: SESESW Sec. 36, Twp 5S, Rge 33E, BM

.ix Basis of Right: Beneficial Use

.x Matters Necessary for Definition, Clarification or Administration of the Right:

a. The water will be used by the United States Department of Interior, Bureau of Indian Affairs, Fort Hall Agency, for pump cooling purposes at the Portneuf Pumping Station.

B. GENERAL PROVISION APPLICABLE ONLY TO WATER RIGHTS HELD BY THE UNITED STATES FOR USE ON NON-INDIAN OWNED LANDS WITHIN THE FORT HALL IRRIGATION PROJECT AND FOR THE BUREAU OF INDIAN AFFAIRS, FORT HALL AGENCY

1. Nothing in the Decree prohibits the transfer of any state law water right herein decreed in this Section III, in accordance with applicable or successor Idaho Code provisions.

IV. GENERAL PROVISIONS APPLICABLE TO ALL RIGHTS IN THIS DECREE

1. The Court hereby recognizes and respects the parties' disclaimers and reservations of rights contained in Article 11 and elsewhere in the 1990 Agreement.

2. Entry of judgment as set forth above has been consented to by the parties without trial or adjudication of fact or law herein and without the judgment constituting evidence or an admission by any party, with respect to any issue. Neither the Agreement nor this Decree shall be used as precedent for any other federal reserved water right claim.

3. The description of the water rights in this decree shall govern in the event of a conflict with the description of the water rights contained in the Agreement.

4. The parties to the Agreement and this Decree have relied upon the terms and conditions of the Michaud Contract, which the United States and/or the Tribes entered into as part of the authorization of the Michaud Division. Articles 7.3.3 and 7.3.4 of the

Agreement refer to the exchange of water for delivery and use of federal contract storage water on the Michaud Division lands. This exchange, delivery and use of federal contract storage water shall be in accordance with and limited by Section 3(b) of the Michaud Act and all the provisions of Articles 8 and 15 of the Michaud Contract. Except as expressly provided by Article 7.3.4 of the Agreement, nothing in the Agreement or in this Decree alters the Michaud Contract.

5. Nothing in this Decree is intended to limit the authority of the United States to redesignate lands within the Fort Hall Irrigation Project under applicable statutes and regulations as eligible to receive project water.

6. This Decree supersedes all prior decrees, except as otherwise provided in this decree, as they relate to the rights to the use of water held by the Shoshone-Bannock Tribes, including but not limited to the following:

.1 *United States v. Daniels*, (D. Idaho April 9, 1907).

.2 *United States v. Hibner*, 27 F.2d 909 (D. Idaho, E.D. 1928).

.3 *Smith v. City of Pocatello*, Bannock County Case No. 6669.

.4 Rexburg Decree

7. The water rights described in this Decree are in full satisfaction of all water rights or claims to water rights of the Shoshone-Bannock Tribes, its members, and its allottees within the Upper Snake River basin as well as on behalf of all water rights or claims of the United States for the Shoshone-Bannock Tribes, its members, and its allottees within the Upper Snake River basin. This Decree is also in full satisfaction of all water rights or claims to water rights by the United States for the Bureau of Indian Affairs, Fort Hall Agency and the Fort Hall Irrigation Project.

8. Each of the parties, to the Snake River Basin Adjudication, their agents, servants, employees, attorneys, counselors, heirs, administrators, successors, and assigns, and every person or persons acting by, or under, or in assistance of them or any of them, be and they are hereby forever and perpetually restrained and enjoined from in any manner using the waters from the sources described in this Consent Decree, in any other quantity or in any other manner than is herein set out,

defined, and decreed, and each of the parties shall respect the superior rights of all others adjudicated in the SRBA.

Dated this 7 day of ~~July~~ December, 1995.

DANIEL C. HURLBUTT, JR.
Presiding Judge
Snake River Basin Adjudication

54(b) CERTIFICATE

With respect to the issues determined by the above Partial Final Consent Decree it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED the 7 day of ~~July~~ December 1995.

DANIEL C. HURLBUTT, JR.
Presiding Judge
Snake River Basin Adjudication

Exhibit 2

THE 1990 FORT HALL INDIAN WATER RIGHTS AGREEMENT

* * *

By and Between

THE SHOSHONE-BANNOCK TRIBES

OF THE FORT HALL INDIAN RESERVATION,

THE STATE OF IDAHO, THE UNITED STATES,

and CERTAIN IDAHO WATER USERS

THE 1990 FORT HALL INDIAN WATER RIGHTS AGREEMENT

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THE 1990
FORT HALL INDIAN
WATER RIGHTS AGREEMENT

ARTICLES OF AGREEMENT BY AND BETWEEN THE SHOSHONE-BANNOCK TRIBES OF THE FORT HALL INDIAN RESERVATION, THE STATE OF IDAHO, THE UNITED STATES, AND CERTAIN IDAHO WATER USERS.

In settlement of litigation involving claims made by the United States on behalf of the Shoshone-Bannock Tribes to water rights in the Upper Snake River Basin and its tributaries, the parties agree as follows:

ARTICLE 1. TITLE

These Articles of Agreement collectively comprise, and may be cited as, "The 1990 Fort Hall Indian Water Rights Agreement" or the "Agreement."

ARTICLE 2. PURPOSE

All parties to this Agreement seek to secure, and pledge their honor to maintain, peaceful settlements of conflicts over water among the parties in the Snake River Basin in Idaho.

ARTICLE 3. PREAMBLE

3.1 The State of Idaho, pursuant to Idaho Code § 42-1406A (Supp. 1989) has commenced in the Fifth Judicial District Court of the State of Idaho in and for the County of Twin Falls a general adjudication of the rights to the use of the water from that portion of the Snake River Basin located within the State of Idaho.

3.2 H. Con. Res. 16, 48th Idaho Leg., 1st Sess. (1985) directed the State to engage in good faith, government-to-government

negotiations with the Shoshone-Bannock Tribes to settle the nature and extent of the Tribes' water rights reserved under the Winters Doctrine within the Snake River Basin in Idaho to avoid litigation.

3.3 The Tribes have a long-standing tradition of favoring negotiation as a means of resolving conflicts. Cong. Globe, 40th Cong., 3d Sess., p. 803, col. 1 (February 2, 1869).

3.4 The policy of the Congress and the federal Executive Branch is to facilitate negotiations among Indian tribes, states, private water users and federal agencies to avoid litigation. 55 Fed. Reg. 9223 (March 12, 1990).

3.5 Executive Order Nos. 85-9 and 87-9 provide that it is in the interest of the State of Idaho to settle through negotiated agreements, if possible, all claims for water rights reserved under federal law. These executive orders further instructed the Idaho Water Resource Board to represent the State and to provide for the effective involvement of interested Idaho water users and other members of the public in the negotiations.

3.6 The Fort Hall Business Council requested, by resolution dated July 17, 1985, that the United States, consistent with federal trust responsibilities to the Tribes, assist and participate in the negotiations leading to this Agreement.

3.7 The Tribes and the State agreed in a Memorandum of Understanding dated August 30, 1985, to commence good

faith, government-to-government negotiations as early as October 15, 1985. On January 10, 1986, the Tribes, the State and the United States agreed to extend that August 30, 1985 Memorandum of Understanding. The parties subsequently entered into a Technical Studies Agreement establishing a methodology to review the Tribes' reserved water rights claims and to identify matters for further discussion and analysis.

3.8 On October 31, 1985, the Idaho Water Resource Board appointed an Ad Hoc Committee to recommend how best to provide for the effective involvement of interested Idaho water users and other members of the public in the negotiations. That committee submitted its recommendation for review by the Idaho Water Resource Board on December 6, 1985 and for action by negotiators on December 10, 1985. Based upon the recommendation of the committee, the Board designated the Committee of Nine as a party to the negotiations to represent the Idaho water users' interests and established a notice procedure to notify the general public of negotiation meetings. On December 10, 1985 the United States, the Tribes and the State agreed to the Board's proposal providing for open meetings and public participation in the negotiations.

3.9 On May 19, 1987, the Tribes, the State, and the United States, joined by a committee of private water users, executed a Second Memorandum of Understanding, which provided for the continuation of the negotiations.

3.10 This Agreement is the culmination of negotiations undertaken by the parties since 1985.

ARTICLE 4. DEFINITIONS

The following definitions apply for the purposes of this Agreement:

4.1 "Acre foot" or "AF" means the amount of water necessary to cover one acre of land to a depth of one foot and is equivalent to 43,560 cubic feet or 325,851 gallons of water.

4.2 "Acre feet per year" or "AFY" means the number of acre feet of water used from January 1 to December 31.

4.3 "Allotted lands" means lands within or without the exterior boundaries of the Fort Hall Indian Reservation, which were allotted to individual Indians in accordance with applicable Tribal/federal agreement and federal statutes, and which are presently owned by Indians in restricted fee or trust status, and which are located in the counties of Bannock, Bingham, Caribou, and Power. The applicable Tribal/federal agreement and statutes include:

.1 the Agreement of May 14, 1880, ratified by Act of February 23, 1889, ch. 203, 25 Stat. 687; and

.2 the Act of March 3, 1911, ch. 210, 36 Stat. 1058, 1063.

4.4 "American Falls Reservoir" means a water storage facility of the federal Minidoka Project authorized by the Secretary of the Interior under the Reclamation Act of 1902, 32 Stat. 388-390 (April 23, 1904); examined and reported upon by a

Board of Army Engineers and approved by the President on January 5, 1911, in accordance with the Act of June 25, 1910, 36 Stat. 835-836; and initially constructed in 1927 and subsequently replaced under the authority of the Act of December 28, 1973, Pub. L. 93-206, 87 Stat. 904-905.

4.5 "Annual diversion volume" means the maximum volume of water in AFY that can be diverted or stored by the holder of a water right.

4.6 "Annual volume of consumptive use" means the maximum volume of water in AFY that can be consumptively used by the holder of a water right.

4.7 "Basis of right" refers to the legal authority pursuant to which the water right is established or the document by which the right is evidenced.

4.8 "Beneficial use" means any use of water for DCMI, irrigation, hydropower generation, recreation, stockwatering, fish propagation and instream flow uses as well as any other uses that provide a benefit to the user of the water.

4.9 "Blackfoot Reservoir" means a water storage facility of the Federal Blackfoot Project authorized by the Act of March 1, 1907, ch. 2285, 34 Stat. 1015, 1024; the Act of April 30, 1908, ch. 153, 35 Stat. 70, 78; Act of April 14, 1910, ch. 140, 36 Stat. 269, 274; and the Act of May 24, 1922, ch. 199, 42 Stat. 552, 568.

4.10 "Ceded lands" means those lands within the Reservation as originally established under the Second Treaty of Fort

Bridger of July 3, 1868, 15 Stat. 673 and companion executive orders of June 14, 1867, 1 C. Kappler 835-837 (1904), and July 30, 1869, 1 C. Kappler 838-839 (1904) and as fixed by the federal survey of 1873 that were ceded by the Tribes to the United States pursuant to the following Tribal/federal agreements:

.1 Agreement of May 14, 1880, ratified by the Act of February 23, 1889, ch. 203, 25 Stat. 687;

.2 Agreement of July 18, 1881, ratified by the Act of July 3, 1882, ch. 268, 22 Stat. 148;

.3 Agreement of May 27, 1887, ratified by the Act of September 1, 1888, ch. 936, 25 Stat. 452; and

.4 Agreement of February 5, 1898, ratified by the Act of June 6, 1900, ch. 813, 31 Stat. 692.

4.11 "Committee of Nine" or "Committee of Nine of Water District 01" means the advisory committee of Water District 01.

4.12 "Consumptive use" means the amount of water that does not remain in the water system after use or is not returned to the water system through return flows or seepage, whether or not treatment for purpose of maintaining water quality is required before the water may be returned to the water system, but does not include water lost through evaporation from storage.

4.13 "Cubic feet per second" or "CFS" means a rate of water discharge equivalent to approximately 448.83 gallons per minute.

4.14 "DCMI" means domestic, commercial, municipal and industrial uses excluding hydroelectric generation. Domestic use means the diversion of water by one or more individuals, family units or households for drinking, cooking, laundering, sanitation and other personal comforts and necessities, stockwatering, and for the irrigation of a family lawn, garden or orchard not exceeding one-half acre of area per household. Industrial and commercial use means the use of water for any purpose that benefits an industrial or commercial enterprise. Industrial and commercial use of water include, but are not limited to, agricultural spraying, irrigation of plants in greenhouses, industrial cooling, mining, energy production, commercial recreation, and losses associated with any industrial or commercial operation. Municipal use means the delivery and use of water through an investor-owned, mutually-owned, tribally-owned or publicly-owned water utility or delivery system for all uses usual and ordinary to such systems. Such use includes but is not limited to uses of water for domestic, irrigation of lawns and gardens, commercial, industrial, fire protection, irrigation and other uses in park and recreation facilities, and street washing.

4.15 "Director" means the Director of the Idaho Department of Water Resources or any successor.

4.16 "Diversion" means the removal of water from its natural course or location by means of a ditch, canal, flume,

bypass, pipeline, conduit, well, pump, or other act of man, or the impoundment of water in a reservoir for rediversion.

4.17 "Diversion rate" means the maximum rate in CFS at which water may be diverted at a point of diversion.

4.18 "Fee lands" means lands within the exterior boundaries of the Reservation held in fee with all federal restrictions on alienation removed.

4.19 "Fort Hall Indian Reservation" or "Reservation" means those lands within the boundaries of the Reservation, as originally established under the Second Treaty of Fort Bridger of July 3, 1868, 15 Stat. 673, and companion executive orders of June 14, 1867, 1 C. Kappler 835-837 (1904), and July 30, 1869, 1 C. Kappler 838-839 (1904), as fixed by the federal survey of 1873 that have not been ceded by the Tribes to the United States pursuant to the following Tribal/federal agreements:

.1 Agreement of May 14, 1880, ratified by the Act of February 23, 1889, ch. 203, 25 Stat. 687.

.2 Agreement of July 18, 1881, ratified by the Act of July 3, 1882, ch. 268, 22 Stat. 148.

.3 Agreement of May 27, 1887, ratified by the Act of September 1, 1888, ch. 936, 25 Stat. 452, excepting those lots within the Pocatello Townsite which were not ceded by such agreement.

.4 Agreement of February 5, 1898, ratified by the Act of June 6, 1900, ch. 813, 31 Stat. 672, excepting Allotment Nos. T-8, 45, 46, 48, 50, 61, and 71 owned

by the Tribes or held in restricted fee or trust status for the Tribes by the United States.

4.20 "Fort Hall Indian Irrigation Project" means the federal project constructed, in part, to provide water for the irrigation of lands on the Reservation. The following federal statutes authorized the Fort Hall Indian Irrigation Project:

.1 Act of August 15, 1894, ch. 290, 28 Stat. 286, 305.

.2 Act of March 1, 1907, ch. 2285, 34 Stat. 1015, 1024.

.3 Act of April 30, 1908, ch. 153, 35 Stat. 70, 78.

.4 Act of April 4, 1910, ch. 140, 36 Stat. 269, 274.

.5 Act of May 24, 1922, ch. 199, 42 Stat. 552, 56.

.6 Act of May 9, 1924, ch. 151, 43 Stat. 117.

.7 Act of June 30, 1948, ch. 767, 62 Stat. 1167.

.8 Act of September 30, 1950, ch. 1114, 64 Stat. 1083.

.9 Act of August 31, 1954, ch. 1159, 68 Stat. 1026.

.10 Act of August 17, 1961, Pub. L. 87-154, 75 Stat. 390.

4.21 "Grays Lake" means the storage facility used to store water for the benefit of the Fort Hall Indian Irrigation Project.

4.22 "Idaho Department of Water Resources" or "IDWR" means the executive agency of the State of Idaho created by Idaho Code § 42-1701 (1977), or any successor agency.

4.23 "Idaho Water Resource Board" or "IWRB" means the Idaho State Water Resource Agency constituted in accordance with Idaho Const. art XV, § 7, or any successor agency.

4.24 "Impairment in the quality of water," applicable only in the context of a change in the water right described in

Article 7.1.1 pursuant to Article 7.6, means a diminishment in the quality of water being diverted for a water right to the extent that it is no longer useful for its intended purpose.

4.25 "Indian" means any person who:

.1 is a member of a tribe recognized as eligible for special programs and services provided by the United States because of the person's status as an Indian; or

.2 is recognized as an Indian person under Tribal law; or

.3 holds or is recognized by the Secretary as eligible to hold restricted trust property on the Reservation.

4.26 "Indian lands" means all lands within the exterior boundaries of the Reservation that are held in trust for the Tribes or owned by Indians and those lands outside the exterior boundaries of the Reservation held in trust by the United States for the Tribes or an enrolled member thereof.

4.27 "Injury to a water right," applicable only in the context of a change of the water right described in Article 7.1.1 pursuant to Article 7.6, means a diminishment in quantity or an impairment in the quality of water available to a senior or a junior water right holder as a consequence of a change, except that no water right holder is required to continue to waste water for the benefit of any other water right holders.

4.28 "Instream flows" means a quantity of water in a stream reach to maintain or to enhance the integrity of an ecosystem.

4.29 "Irrigation use" means application of water to the land surface or root zone of the soil for the purpose of producing crops, lawn or landscaping on that land.

4.30 "Michaud Contract" means that Memorandum Agreement of April 25, 1957 between the Bureau of Reclamation and the Bureau of Indian Affairs relating to the Water Supply for the Michaud Division of the Fort Hall Indian Reservation.

4.31 "Michaud Division" means that division of the Fort Hall Indian Irrigation Project authorized by the Act of August 31, 1954, ch. 1159, 68 Stat. 1026.

4.32 "Other rights" means other water rights used on all or a portion of the lands listed as the place of use for the water right described.

4.33 "Palisades Reservoir" means a water storage facility of the federal Minidoka Project initially authorized under the provisions of the federal reclamation laws by the presentation to the President and the Congress of the report of December 9, 1941, H.R. Doc. No. 457, 77th Cong., 1st Sess., by the Secretary of the Interior, and reauthorized by section 1 of the Act of September 30, 1950, ch. 1114, 64 Stat. 1083.

4.34 "Parties" means the United States, the State of Idaho, the Tribes, and the Committee of Nine of Water District 01.

4.35 "Period of use" means the time of the year when water may be used for a particular purpose.

4.36 "Person" means an individual, a partnership, a trust, an estate, a corporation, a municipal corporation, the state

of Idaho or any political subdivision or instrumentality thereof, the United States or any political subdivision or instrumentality thereof, an Indian tribe or political subdivision or instrumentality thereof, or any other public or private entity.

4.37 "Place of use" means the location where water is used.

4.38 "Point of diversion" or "POD" means any location at which water is diverted from the water system. A numeral to the right of the legal description indicates the number of existing points of diversion within a tract.

4.39 "Point of injection" means any location at which water that has been diverted from the water system is placed back into the water system. A numeral to the right of the legal description indicates the number of existing points of injection within a tract.

4.40 "Point of rediversion" means the location at which water that has been diverted from the water system and then placed back into the water system is again diverted from the water system. A numeral to the right of the legal description indicates the number of existing points of rediversion within a tract.

4.41 "Priority date" means the priority date assigned to the water right.

4.42 "Purpose of use" means the nature of use of the water right.

4.43 "Rent" means a temporary legal conveyance by the Tribes of the right to use storage water pursuant to Idaho Code

§ 42-1761 for a fixed period of time during which ownership of the federal contract storage right is retained for the benefit of the Tribes.

4.44 "Reservation Watermaster" means the Tribal officer or any successor designated to administer the Tribal Water Code.

4.45 "Right number" means the number assigned to each decreed water right for purposes of identification. The first two numerals of the right number indicate the department's hydrologic basin number assigned by IDWR.

4.46 "Secretary" means the Secretary of the United States Department of the Interior or a duly authorized representative thereof.

4.47 "Shoshone-Bannock Water Bank" means the Tribal water bank established pursuant to Idaho Code § 42-1761 to provide for rental of stored water outside the Reservation.

4.48 "Snake River Basin Adjudication" or "SRBA" means Civil Case No. 39576 filed in the Fifth Judicial District Court of the State of Idaho in and for Twin Falls County on June 17, 1987 entitled In Re the General Adjudication of Rights to the Use of Water from the Snake River Basin Water System, which was commenced pursuant to Idaho Code § 42-1406A (Supp. 1989).

4.49 "Snake River Watermaster" means the Watermaster of Water District 01 or any successor.

4.50 "Source" means the named or described source of water within the water system.

4.51 "State" means the State of Idaho.

4.52 "Stockwater" means the use of water solely for livestock or wildlife consumption including associated losses.

4.53 "Transfer" means any change in a point of diversion, place of use, period of use or purpose of use for a water right.

4.54 "Tribal water right(s)" means those water rights confirmed and recognized in this Agreement in Articles 6 and 7 as rights held in trust for the Tribes by the United States, including those rights so held for the benefit of individual Indians on Indian lands.

4.55 "Tribes" or "Tribal" means the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation in Idaho as the collective successors-in-interest of Indian signatories to the Second Treaty of Fort Bridger of July 3, 1868, 15 Stat. 673, and subsequent Tribal/federal agreements.

4.56 "United States" means the United States of America.

4.57 "Upper Snake River Basin" means that portion of the Snake River Basin upstream from the Hells Canyon Dam, the lowest of the three dams authorized as FERC Project No. 1971.

4.58 "Water District 01" means the instrumentality created by the Director of the IDWR pursuant to Idaho Code § 42-604 (1977).

4.59 "Walton Right" means a water right claim asserted by a non-Indian based upon the decision in Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981).

4.60 "Water system" means all rivers, streams, lakes, springs, groundwater or other water sources within the Snake River Basin within the State of Idaho.

4.61 "Winters Doctrine" means the federal legal principles announced by the United States Supreme Court in Winters v. United States, 207 U.S. 564 (1908).

ARTICLE 5. PARTIES AND AUTHORITY

5.1 The Governor has authority to execute this Agreement pursuant to Idaho Const. art. IV, § 5 and Idaho Code § 67-802 (Supp. 1989).

5.2 The Attorney General, or any duly designated official of the Office of the Idaho Attorney General, has authority to execute this Agreement pursuant to his authority to settle litigation as provided for in Idaho Const. art. IV, § 1, and Idaho Code § 64-1401 (Supp. 1989).

5.3 The Idaho Water Resource Board has authority to execute this Agreement pursuant to Idaho Code § 1734(3) (Supp. 1989) and Executive Order Nos. 85-9 and 87-9.

5.4 The Fort Hall Business Council has authority to execute this Agreement on behalf of the Tribes pursuant to the following:

.1 The sovereign powers reserved by and for the Tribes in the Second Treaty of Fort Bridger of July 3, 1868, 15 Stat. 673 as well as subsequent Tribal/federal agreements; and

.2 Article VI, Section 1(a) of the Tribes' 1936 Constitution and Bylaws, as amended.

5.5 The Secretary has authority to execute this Agreement on behalf of the United States Department of the Interior and in his trust capacity for the Tribes pursuant to Article I,

§ 8, Clause 3 and Article II, § 2, Clause 2 of the Constitution of the United States, as well as 25 U.S.C. §§ 2 and 9 (1982) and 43 U.S.C. § 1457 (1982).

5.6 The United States Attorney General, or any duly designated official of the United States Department of Justice, has authority to execute this Agreement on behalf of the United States pursuant to the authority to settle litigation contained in 28 U.S.C. §§ 516-517 (1982).

5.7 The Committee of Nine executes this Agreement as an advisory committee of Water District 01.

5.8 Each signer for the United States, Tribes, and State, by executing this Agreement, represents and states that the signer has taken or will take the necessary administrative and legal action to procure the actual authority to bind the signer's principal.

ARTICLE 6. TRIBAL WATER RIGHTS FOR PRESENT AND FUTURE USE

6.1 The basis for the rights to use waters arising on, under, flowing across, adjacent to, or otherwise appurtenant to the Reservation to satisfy the purposes of the Reservation as set forth in the Second Treaty of Fort Bridger of July 3, 1868 and companion executive orders of June 14, 1867 and July 30, 1869, is the Winters Doctrine. The basis for these rights is reaffirmed in the following acts and agreements between the Tribes and the United States:

.1 Agreement of May 14, 1880, ratified by the Act of February 23, 1889, ch. 203, 25 Stat. 687.

.2 Agreement of July 18, 1881, ratified by the Act of July 3, 1882, ch. 268, 22 Stat. 148.

.3 Agreement of May 27, 1887, ratified by the Act of September 1, 1888, ch. 936, 25 Stat. 452.

.4 Agreement of February 5, 1898, ratified by the Act of June 6, 1900, ch. 813, 31 Stat. 692.

.5 Act of May 9, 1924, ch. 151, 43 Stat. 117.

6.2 The parties hereto find and agree that the Tribal water rights for the present and future uses in the Upper Snake River Basin amount to a right to divert up to 581,031 AFY from the Snake River Basin for present and future irrigation, DCMI, instream flow, hydropower and stock water uses as set forth in Article 7 of this Agreement. Nonuse of all or any part of the Tribal water rights shall not be construed as a relinquishment, forfeiture or abandonment of the rights.

ARTICLE 7. LIST OF TRIBAL WATER RIGHTS

The parties agree that water supplied from the following sources shall constitute the Tribal water rights:

7.1 Surface water use rights:

.1 Right No. A01-10223

.i Source: Snake River/Sand Creek

.ii Annual Diversion Volume: 100,000 AFY increasing to 115,000 AFY as (1) future reservation lands are irrigated from this source, or (2) as corresponding amounts of the water rights for the ceded lands of the Fort

Hall Indian Irrigation Project are relinquished by the United States.

.iii Diversion Rate: 390.00 CFS increasing to 470.00 CFS at the same relative rate as the volume in ii. above.

.iv Annual Volume of Consumptive Use: 60,986 AFY

.v Priority Date: June 14, 1867

.vi Points of Diversion:

SESWNE Sec 31 Twp 1N Rge 37E BM

(Snake River into Reservation Canal)

NENWNW Sec 7 Twp 2S Rge 37E BM

(Sand Creek into Reservation Canal)

Points of Injection:

NESWSE Sec 24 Twp 2S Rge 36E BM

(Reservation Canal into Blackfoot River)

Points of Rediversion:

NENENE Sec 13 Twp 3S Rge 35E BM

(Blackfoot River into Fort Hall Main Canal)

NWNENW Sec 14 Twp 3S Rge 35E BM

(Blackfoot River into North Canal)

Future points of diversion may be developed in accordance with Articles 7.6, 7.7 and 7.8.

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 14,687 present and 8,672 future acres for a total of 23,359 acres.

.ix Basis of Right: Winters Doctrine

.x Remarks:

.a The rate of diversion for this water right shall be measured at the head of the Reservation Canal located in SESWNE Sec 31 Twp 1N Rge 37E B.M.

.b The volume of diversion for this water right shall be measured at the Drop located in SENWSE Sec 13 Twp 2S Rge 36E BM downstream from the point at which Sand Creek empties into the Reservation Canal.

.c This right combined with the other rights described in Articles 7.1.18, 7.1.19 and 7.1.20 provide the water supply for up to 53,828 acres from the combined water sources but none of the limitations of diversion rate or volume shall be exceeded for this right in providing the water supply.

.d The available inflow to the Reservation Canal upstream from the Drop, including Sand Creek, shall be counted as part of this water right up to the demand of the North and Main Canals. The parties recognize that the water flow available from Sand Creek fluctuates to such extremes that only approximately 85

percent (85%) of the flows from Sand Creek needed to meet the demand of the North and Main Canals would normally be useable as a part of this water right with the Equalizing Reservoir rehabilitated and maintained at 5,000 acre-feet active capacity. The cost of rehabilitating and maintaining the Equalizing Reservoir are estimated at between $5 and $15 million initially and $150,000 per year based upon 1989 costs. To avoid these great costs, the parties agree that the portion of Sand Creek that was used with the control afforded by the Equalizing Reservoir under conditions existing in 1989 shall continue to be used when the Snake River is under regulation by the Snake River Watermaster and will be considered part of this water right. When the Snake River is under regulation by the Snake River Watermaster fifteen percent (15%) of the computed Sand Creek flows, when returned to the Snake River through the Blackfoot River because of lack of control with the present Equalizing Reservoir, shall be considered as natural flow credited to

downstream water users and for which no exchange of storage will be made under this Agreement. All of the remaining Sand Creek water not diverted through the Main and North Canals because of the physical limitations of the Equalizing Reservoir, in excess of fifteen percent (15%) up to 50,000 AFY as determined by gaging, when the Snake River is under regulation by the Snake River Watermaster shall be delivered to the North Side Canal Company in exchange for an equal amount of storage water from Palisades or Jackson Lake Reservoirs. The actual storage water from Palisades or Jackson Lake Reservoirs will be released to meet the Snake River diversion requirements of the Tribes that would have been met by Sand Creek. This water shall be deemed the first storage water released from the American Falls Reservoir for the North Side Canal Company.

.2 Right No. A27-11373

.i Source: Ross Fork Creek/Ross Fork Basin groundwater

.ii Annual Diversion Volume: 5,000 AFY

.iii Diversion Rate: 29.07 CFS

.iv Annual Volume of Consumptive Use: 3,320 AFY

.v Priority Date: June 14, 1867

.vi Existing Points of Diversion:

SENWNE Sec 4, SESENE Sec 10, SENWSW Sec 17, SWSESW Sec 21, NESWNW Sec 34 all in Twp 5S Rge 36E BM

NWNWSE Sec 31 (2 POD), SWSWSE Sec 33 all in Twp 4S Rge 36E BM

NENENE Sec 36 Twp 4S Rge 35E BM

Future Points of Diversion may be developed as needed within the Ross Fork Creek basin to utilize this water right within the Ross Fork Creek basin.

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 1,503 present and future acres.

.ix Basis of Right: Winters Doctrine

.x Remarks:

.a The Tribes shall have the option of using surface water or groundwater diverted within the Ross Fork Creek basin to satisfy this right, in whole or in part, provided that any diversions of surface water or groundwater by the Tribes in excess of 5,000 AFY from the Ross Fork Creek Basin shall be charged against the

Tribal groundwater right set forth in Article 7.2.1 of this Agreement.

.3 Right No. A27-11374

.i Source: Lincoln Creek/Lincoln Creek Basin groundwater

.ii Annual Diversion Volume: 5,700 AFY

.iii Diversion Rate: 33.00 CFS

.iv Annual Volume of Consumptive Use: 3,768 AFY

.v Priority Date: June 14, 1867

.vi Existing Points of Diversion:

NENESE Sec 25 Twp 3S Rge 36E BM

NENWSE Sec 31 Twp 3S Rge 36E BM

Future points of diversion may be developed as needed within the Lincoln Creek Basin to utilize this water right within the Lincoln Creek drainage basin.

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 1,701 present and future acres.

.ix Basis of Right: Winters Doctrine

.x Remarks:

.a The Tribes shall have the option of using surface water or groundwater diverted within the Lincoln Creek basin to satisfy this right, in whole or in part, provided that any diversions of surface water or

groundwater by the Tribes in excess of 5,700 AFY from the Lincoln Creek basin shall be charged against the Tribal groundwater right set forth in Article 7.2.1 of this Agreement.

.4 Right No. 29-00466

.i Source: Bannock Creek

.ii Annual Diversion Volume: 3,095 AFY

.iii Diversion Rate: 16.25 CFS

.iv Annual Volume of Consumptive Use: 1,842 AFY

.v Priority Date: June 14, 1867

.vi Existing Points of Diversion:

NENWSE Sec 32 Twp 7S Rge 33E BM

SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in Twp 8S Rge 33E BM

NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all in Twp 9S Rge 33E BM

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 774 present and future acres.

.ix Basis of Right: The basis of the right is the Winters Doctrine with the relative share and priorities of the water allocations determined by the Bannock Creek Decree [United States v. Daniels (D. Idaho April 9, 1907)].

.x Remarks:

.5 Right No. 29-00467

.i Source: Bannock Creek, West Fork Bannock Creek

.ii Annual Diversion Volume: 629 AFY

.iii Diversion Rate: 3.30 CFS

.iv Annual Volume of Consumptive Use: 374 AFY

.v Priority Date: April 1, 1889

.vi Existing Points of Diversion:

NENWSE Sec 32 Twp 7S Rge 33E BM

SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in Twp 8S Rge 33E BM

NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all in Twp 9S Rge 33E BM

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 157 present and future acres.

.ix Basis of Right: The basis of the right is the Winters Doctrine with the relative share and priorities of the water allocations determined by the Bannock Creek Decree [United States v. Daniels (D. Idaho April 9, 1907)].

.x Remarks:

.6 Right No. 29-00468

.i Source: Rattlesnake Creek

.ii Annual Diversion Volume: 571 AFY

.iii Diversion Rate: 3.00 CFS

.iv Annual Volume of Consumptive Use: 340 AFY

.v Priority Date: April 1, 1892

.vi Existing Points of Diversion:

NENWSE Sec 32 Twp 7S Rge 33E BM

SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in Twp 8S Rge 33E BM

NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all in Twp 9S Rge 33E BM

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 143 present and future acres.

.ix Basis of Right: The basis of the right is the Winters Doctrine with the relative share and priorities of the water allocations determined by the Bannock Creek Decree [United States v. Daniels (D. Idaho April 9, 1907)].

.x Remarks:

.7 Right No. 29-00469

.i Source: West Fork Bannock Creek

.ii Annual Diversion Volume: 190 AFY

.iii Diversion Rate: 1.00 CFS

.iv Annual Volume of Consumptive Use: 113 AFY

.v Priority Date: May 1, 1894

.vi Existing Points of Diversion:

NENWSE Sec 32 Twp 7S Rge 33E BM

SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in Twp 8S Rge 33E BM

NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all in Twp 9S Rge 33E BM

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 48 present and future acres.

.ix Basis of Right: The basis of the right is the Winters Doctrine with the relative share and priorities of the water allocations determined by the Bannock Creek Decree [United States v. Daniels (D. Idaho April 9, 1907)].

.x Remarks:

.8 Right No. 29-00470

.i Source: West Fork Bannock Creek

.ii Annual Diversion Volume: 248 AFY

.iii Diversion Rate: 1.30 CFS

.iv Annual Volume of Consumptive Use: 147 AFY

.v Priority Date: April 1, 1894

.vi Existing Points of Diversion:

NENWSE Sec 32 Twp 7S Rge 33E BM

SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in Twp 8S Rge 33E BM

NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all in Twp 9S Rge 33E BM

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 62 present and future acres.

.ix Basis of Right: The basis of the right is the Winters Doctrine with the relative share and priorities of the water allocations determined by the Bannock Creek Decree [United States v. Daniels (D. Idaho April 9, 1907)].

.x Remarks:

.9 Right No. 29-00471

.i Source: Bannock Creek

.ii Annual Diversion Volume: 248 AFY

.iii Diversion Rate: 1.30 CFS

.iv Annual Volume of Consumptive Use: 147 AFY

.v Priority Date: April 1, 1894

.vi Existing Points of Diversion:

NENWSE Sec 32 Twp 7S Rge 33E BM

SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in Twp 8S Rge 33E BM

NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all in Twp 9S Rge 33E BM

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 62 present and future acres.

.ix Basis of Right: The basis of the right is the Winters Doctrine with the relative share and

priorities of the water allocations determined by the Bannock Creek Decree [United States v. Daniels (D. Idaho April 9, 1907)].

.x Remarks:

.10 Right No. 29-00472

.i Source: West Fork Bannock Creek

.ii Annual Diversion Volume: 190 AFY

.iii Diversion Rate: 1.00 CFS

.iv Annual Volume of Consumptive Use: 113 AFY

.v Priority Date: April 1, 1898

.vi Existing Points of Diversion:

NENWSE Sec 32 Twp 7S Rge 33E BM

SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in Twp 8S Rge 33E BM

NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all in Twp 9S Rge 33E BM

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 48 present and future acres.

.ix Basis of Right: The basis of the right is the Winters Doctrine with the relative share and priorities of the water allocations determined by the Bannock Creek Decree [United States v. Daniels (D. Idaho April 9, 1907)].

.x Remarks:

.11 Right No. 29-00473

.i Source: West Fork Bannock Creek

.ii Annual Diversion Volume: 190 AFY

.iii Diversion Rate: 1.00 CFS

.iv Annual Volume of Consumptive Use: 113 AFY

.v Priority Date: April 1, 1898

.vi Existing Points of Diversion:

NENWSE Sec 32 Twp 7S Rge 33E BM

SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in Twp 8S Rge 33E BM

NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all in Twp 9S Rge 33E BM

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 48 present and future acres.

.ix Basis of Right: The basis of the right is the Winters Doctrine with the relative share and priorities of the water allocations determined by the Bannock Creek Decree [United States v. Daniels (D. Idaho April 9, 1907)].

.x Remarks:

.12 Right No. 29-00474

.i Source: West Fork Bannock Creek

.ii Annual Diversion Volume: 190 AFY

.iii Diversion Rate: 1.00 CFS

.iv Annual Volume of Consumptive Use: 113 AFY

.v Priority Date: April 1, 1901

.vi Existing Points of Diversion:

NENWSE Sec 32 Twp 7S Rge 33E BM

SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in Twp 8S Rge 33E BM

NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all in Twp 9S Rge 33E BM

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 48 present and future acres.

.ix Basis of Right: The basis of the right is the Winters Doctrine with the relative share and priorities of the water allocations determined by the Bannock Creek Decree [United States v. Daniels (D. Idaho April 9, 1907)].

.x Remarks:

.13 Right No. A29-12049

.i Source: Bannock Creek

.ii Annual Diversion Volume: 18,833 AFY

.iii Diversion Rate: 98.87 CFS

.iv Annual Volume of Consumptive Use: 11,205 AFY

.v Priority Date: June 14, 1867

.vi Existing Points of Diversion:

NENWSE Sec 32 Twp 7S Rge 33E BM

SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in Twp 8S Rge 33E BM

NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all in Twp 9S Rge 33E BM

NESWSE Sec 6 Twp 7S Rge 33E BM

(3 - 20 HP pumps for Michaud Project)

Future Points of Diversion may be developed within the Bannock Creek basin to utilize this water right within the Bannock Creek drainage basin.

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 4,708 present and future acres.

.ix Basis of Right: Winters Doctrine

.x Remarks:

.a The Tribes and the United States agree to exercise this right in a manner that will ensure that persons with water rights decreed in the Bannock Creek Decree [United States v. Daniels (D. Idaho April 9, 1907)] and that are confirmed in the SRBA continue to receive their full legal entitlement.

.14 Right No. A29-12050

.i Source: Portneuf River/Jeff Cabin Creek

.ii Annual Diversion Volume: 970 AFY

.iii Diversion Rate: 9.70 CFS

.iv Annual Volume of Consumptive Use: 727.50 AFY

.v Priority Date: June 14, 1867

.vi Points of Diversion:

Future Points of Diversion may be developed within the Portneuf River basin upstream from the point the river enters the Portneuf Reservoir in Sec 11 Twp 6S Rge 38E BM for use within the Portneuf River basin.

.vii Purpose and Period of Use:

Irrigation 4/1 - 11/1

.viii Place of Use: 485 present and future acres.

.ix Basis of Right: Winters Doctrine

.x Remarks:

.15 Right No. 29-00231

.i Source: Toponce Creek

.ii Annual Diversion Volume: 259.3 AFY

.iii Diversion Rate: 1.59 CFS

.iv Annual Volume of Consumptive Use: 154.3 AFY

.v Priority Date: February 16, 1869

.vi Points of Diversion: Toponce Creek

.vii Purpose and Period of Use:

Irrigation 1/1 - 12/31

.viii Place of Use: Allotment 61 (NESW, SENW, Sec 35 Twp 6S Rge 38E) for 79.53 acres.

.ix Basis of Right: The Winters Doctrine per the Memorandum Decision in United States v. Hibner, 27 F.2d 909 (D. Idaho, E.D. 1928) and

the decree of the United States District Court, Eastern Division, dated April 8, 1929.

.x Remarks:

.16 Right No. 29-00238

.i Source: Toponce Creek

.ii Annual Diversion Volume: 282.5 AFY

.iii Diversion Rate: 1.733 CFS

.iv Annual Volume of Consumptive Use: 168.14 AFY

.v Priority Date: February 16, 1869

.vi Points of Diversion: Toponce Creek

.vii Purpose and Period of Use:

Irrigation 1/1 - 12/31

.viii Place of Use: Allotment 71 (SENW, SWNE, Sec 36 Twp 6S Rge 38E) for 86.67 acres.

.ix Basis of Right: The Winters Doctrine per the Memorandum Decision in United States v. Hibner, 27 F.2d 909 (D. Idaho, E.D. 1928) and the decree of the United States District Court, Eastern Division, dated April 8, 1929.

.x Remarks:

.17 Right No. A29-12051

.i Source: Mink Creek

.ii Annual Diversion Volume: 104.3 AFY

.iii Diversion Rate: 0.75 CFS

.iv Annual Volume of Consumptive Use: 62.1 AFY

.v Priority Date: February 26, 1869

.vi Points of Diversion: SWNW Sec 21 Twp 7S Rge 35E BM

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: Allotment T-8 (SWNW Sec 21 Twp 7S Rge 35E BM for 31.75 acres)

.ix Basis of Right: The Winters Doctrine per decree of District Court of the Fifth Judicial District Court of the State of Idaho, in and for the County of Bannock dated June 5, 1926, in Smith v. City of Pocatello, Case No. 6669.

.x Remarks:

.18 Right No. A27-11375

.i Source: Blackfoot River

.ii Annual Diversion Volume: 150,000 AFY

.iii Diversion Rate: 1380 CFS

.iv Annual Volume of Consumptive Use: 79,546 AFY

.v Priority Date: June 14, 1867

.vi Points of Diversion:

SENWNW Sec 7 Twp 2S Rge 38E BM

(Blackfoot River into Little Indian Canal)

NENENE Sec 13 Twp 3S Rge 35E BM

(Blackfoot River into Fort Hall Main Canal)

NWNENW Sec 14 Twp 3S Rge 35E BM

(Blackfoot River into North Canal)

SWSESW Sec. 3 Twp 7S Rge 32E BM

SENWSE Sec. 3 Twp 7S Rge 32E BM

NWNWSW Sec. 2 Twp 7S Rge 32E BM

NESENW Sec. 2 Twp 7S Rge 32E BM

NWNENE Sec. 1 Twp 7S Rge 32E BM

SWNWNW Sec. 6 Twp 7S Rge 33E BM

NESESW Sec. 6 Twp 7S Rge 33E BM

NESESW Sec. 6 Twp 7S Rge 33E BM

SWSWSW Sec. 30 Twp 6S Rge 33E BM

Future Points of Diversion may be developed to divert water from (1) anywhere on the Blackfoot River or (2) ground water within the Reservation as described in Remarks below.

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 30,469 present and future acres.

.ix Basis of Right: Winters Doctrine

.x Remarks:

.a If the natural flow of the Blackfoot River is not sufficient to satisfy this right and other rights to divert Blackfoot River natural flow pursuant to state law, the Tribes may satisfy this Winters right by using the other rights described in Articles 7.1.19 and 7.1.20, provided that the combined use in

satisfaction of this Winters right shall not exceed 150,000 AFY.

.b If the diversions under this right exceeds 150,000 AFY, the amount in excess of 150,000 AFY shall be charged against the Tribal water right in Article 7.1.1.

.c This right combined with other rights described in Articles 7.1.1, 7.1.19, and 7.1.20 can be used to irrigate up to 53,828 present and future acres from the combined water sources.

.d The Tribes and United States agree to 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 that 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 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 rights to account for this change.

.e The Tribes and the United States agree to exercise this right in a manner that will not impair the project entitlements of the Fort Hall Indian Irrigation Project water users.

.f If the water supplied under this right and the other rights described in Articles 7.1.19 and 7.1.20 does not provide 150,000 AFY under the terms of this Agreement, the Tribes may divert groundwater within the Reservation under this right, exclusive of the water rights described in Article 7.2, such that the combined water supply from the other rights described in Articles 7.1.19 and 7.1.20 and surface and groundwater under this right yields 150,000 AFY.

.19 Right No. A27-02007

.i Source: Blackfoot River

.ii Annual Diversion Volume: 348,000 AFY

.iii Diversion Rate: Not limited

.iv Annual Volume of Consumptive Use:

Included in the other rights described in Articles 7.1.1 and 7.1.18.

.v Priority Date: September 3, 1907

.vi Points of Diversion:

NWNE Sec 12 Twp 5S Rge 40E BM (Blackfoot River into Blackfoot Reservoir)

Points of Rediversion:

SENWNW Sec 7 Twp 2S Rge 38E BM
(Blackfoot River into Little Indian Canal)

NENENE Sec 13 Twp 3S Rge 35E BM
(Blackfoot River into Fort Hall Main Canal)

NWNENW Sec 14 Twp 3S Rge 35E BM
(Blackfoot River into North Canal)

.vii Purposes and Periods of Use:

Irrigation from Storage	3/15 - 11/15
	348,000 AFY
Storage for Irrigation	1/1 - 12/31
	348,000 AFY

.viii Place of Use: 30,469 present and future acres.

.ix Basis of Right: License acquired pursuant to Fort Hall Indian Irrigation Project Act.

.x Remarks:

.a The rediversion from storage under this right and the other right described in Article 7.1.20 may be used to satisfy the

Blackfoot River natural flow to meet but not exceed the 150,000 AFY Winters entitlement under the water right described in Article 7.1.18. The Tribes may use water from storage under this right in excess of the amount needed to satisfy the Winters entitlement under Article 7.1.18; provided that uses in excess of that amount necessary to satisfy the 150,000 AFY Winters entitlement described in Article 7.1.18 shall be charged against the Tribal water right described in Article 7.1.1.

.b This right combined with other rights described in Articles 7.1.1, 7.1.18, and 7.1.20 can be used to irrigate up to 53,828 present and future acres from the combined water sources.

.c The Tribes and the United States agree to exercise this right in a manner that will not impair the project entitlements of the Fort Hall Indian Irrigation Project water users.

.20 Right No. A25-02160

.i Source: Grays Lake

.ii Annual Diversion Volume: 100,000 AFY

.iii Diversion Rate: Not limited

.iv Annual Volume of Consumptive Use: Included in the other rights described in Articles 7.1.1 and 7.1.18.

.v Priority Date: August 23, 1919

.vi Points of Diversion:

SWSWSW Sec 1 Twp 5S Rge 42E BM

(Grays Lake/Clarks Cut Canal)

Points of Rediversion:

NWNE Sec 12 Twp 5S Rge 40E BM (Blackfoot Reservoir)

SENWNW Sec 7 Twp 2S Rge 38E BM

(Blackfoot River into Little Indian Canal)

NENENE Sec 13 Twp 3S Rge 35E BM

(Blackfoot River into Fort Hall Main Canal)

NWNENW Sec 14 Twp 3S Rge 35E BM

(Blackfoot River into North Canal)

.vii Purposes and Periods of Use:

Irrigation from Storage	3/15 - 11/15
	100,000 AFY
Storage for Irrigation	1/1 - 12/31
	100,000 AFY

.viii Place of Use: 30,469 present and future acres.

.ix Basis of Right: Permit numbers 14247 and R-161 acquired pursuant to the Fort Hall Indian Irrigation Project Act

.x Remarks:

.a The rediversion from storage under this right and the other right described in Article 7.1.19 may be used to satisfy the Blackfoot River natural flow to meet but not exceed the 150,000 AFY Winters entitlement under the water right described in Article 7.1.18. The Tribes may use water from storage under this right in excess of the amount needed to satisfy the Winters entitlement under Article 7.1.18; provided that uses in excess of that amount necessary to satisfy the 150,000 AFY Winters entitlement described in Article 7.1.18 shall be charged against the Tribal water right described in Article 7.1.1.

.b This right combined with other rights described in Articles 7.1.1, 7.1.18, and 7.1.19 may be used to irrigate up to 53,828 present and future acres from the combined water sources.

.c The Tribes and the United States agree to exercise this right in a manner that will not impair the project entitlements of the Fort Hall Indian Irrigation Project water users.

7.2 Groundwater use rights:

.1 Right No. A27-11376

.i Source: Groundwater within the Reservation

.ii Annual Diversion Volume: 125,000 AFY

.iii Diversion Rate: 813.40 CFS

.iv Annual Volume of Consumptive Use: 93,615 AFY

.v Priority Date: June 14, 1867

.vi Existing Points of Diversion:

SWSESW Sec. 3 Twp 7S Rge 32E BM

SENWSE Sec. 3 Twp 7S Rge 32E BM

NWNWSW Sec. 2 Twp 7S Rge 32E BM

NESENW Sec. 2 Twp 7S Rge 32E BM

NWNENE Sec. 1 Twp 7S Rge 32E BM

SWNWNW Sec. 6 Twp 7S Rge 33E BM

NESESW Sec. 6 Twp 7S Rge 33E BM

NESESW Sec. 6 Twp 7S Rge 33E BM

SWSWSW Sec. 30 Twp 6S Rge 33E BM

Additional existing points of diversion will be identified by February 1, 1991.

Future points of diversion may be developed to utilize this water right on any Indian lands.

.vii Purposes and Periods of Use:

Irrigation	3/15 - 11/15	115,000 AFY
DCMI	1/1 - 12/31	10,000 AFY

.viii Place of Use: 42,592 present and future acres. Present and future DCMI uses on any Indian lands.

.ix Basis of Right: Winters Doctrine

.x Remarks:

.a If the Tribes' combined surface water and groundwater diversions from the Ross Fork Creek basin exceed 5,000 AFY, or the Tribes' combined surface water and groundwater diversions from the Lincoln Creek basin exceed 5,700 AFY, such excesses shall be charged against this Tribal groundwater right.

.b The nine wells used to supplement the surface water portion of the Michaud Division divert water included in this Tribal water right.

.c Lot Nos. 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17 of Block No. 191; Lot No. 1 of Block 192; Lot Nos. 1, 2, 3, 4, 5, 6, 7, and 8 of Block No. 196; Lot Nos. 19 and 20 of Block No. 341; Lot No. 5 of Block No. 593; and Lot No. 7 of Block No. 599 within the City of Pocatello remain Indian lands and may utilize water under this water right.

.d Allotment Nos. 45, 46, 48, 50, 60 and 71 within the Portneuf River basin may utilize water under this right.

.2 Right No. A29-12052

.i Source: Bannock Creek basin groundwater

.ii Annual Diversion Volume: 23,500 AFY

.iii Diversion Rate: 154.93 CFS

.iv Annual Volume of Consumptive Use: 17,843 AFY

.v Priority Date: June 14, 1867

.vi Points of Diversion:

Future points of diversion may be developed as needed within the Bannock Creek basin to utilize this water right within the Bannock Creek drainage basin.

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 8,704 future acres.

.ix Basis of Right: Winters Doctrine

.x Remarks:

.a The Tribes have the right to the annual yield of the Bannock Creek basin up to a combined surface and groundwater diversion of 48,500 AFY.

.b If the Tribes' combined surface and groundwater diversion from this basin exceeds 48,500 AFY, such excess shall be

charged against the Tribal groundwater right in Article 7.2.1.

.c The Tribes and United States agree to exercise this water right in a manner that ensures persons diverting ground water from the Bannock Creek drainage basin 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 the 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 2,400 AFY of water from the ground water of the Bannock Creek drainage basin. In the event this estimate of the amount of existing diversions under state water rights is changed 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.

7.3 Federal contract storage water rights held in trust by the United States for the benefit of the Tribes:

.1 The United States holds in trust federal contract storage rights for water that accrues to two and eight thousand and fifty nine ten thousandths percent (2.8059%) of the storage space in American Falls Reservoir and six and nine thousand nine hundred and seventeen ten thousandths per cent (6.9917%) of the storage space in Palisades Reservoir for the benefit of the Tribes and 187.7 acres of other lands served by the Michaud Division of the Fort Hall Indian Irrigation Project. These federal contract storage rights are presently equivalent to the following storage space in American Falls and Palisades Reservoirs:

American Falls Reservoir	46,931 AF
Palisades Reservoir	83,900 AF

.2 The federal contract storage rights described in Article 7.3.1 may be used to irrigate up to 33,938 present and future acres of Indian lands with an annual volume of consumptive use not to exceed 79,542 AFY. Indian lands in excess of 33,938 acres may be irrigated with the water that accrues to the federal contract storage rights described in Article 7.3.1 if no other water rights are injured thereby.

.3 The Tribes and the Secretary agree to continue to exchange storage water from the federal contract storage rights described in Article 7.3.1 for water diverted from the Portneuf River as provided for in

Article 8 of the Michaud Contract. The Tribes may identify the reservoir storage space to be used to provide storage water for this exchange. In the event no specific storage is identified, water from the Palisades storage space shall be the first water to be used for this exchange.

.4 The Tribes shall have the right to create a Shoshone-Bannock Water Bank pursuant to Idaho Code §§ 42-1761 through 42-1765 in order to rent as prescribed in Article 7 for any beneficial use outside the Reservation all or any part of the water accruing to the federal contract storage rights set forth in Article 7.3.1 that is not used on Indian lands as provided in Article 7.3.2 or exchanged pursuant to Article 7.3.3; provided that

.i storage water from Palisades Reservoir is rented and delivered for use within the Snake River Basin anywhere above Milner Dam, and

.ii storage water from the American Falls Reservoir is rented and delivered for use in the Snake River Basin anywhere within Idaho.

.5 The rental of the federal contract storage water rights in Article 7.3.1 through the Shoshone-Bannock Water Bank shall not be subject to any limitation based on the following:

.i any provision of the Michaud Contract except as set forth in Article 7.3.3;

.ii any reduction of the quantity of water available under any other existing water rights since any such reductions are mitigated by the express federal commitments in Article 12.3;

.iii any conflict with the public welfare or local public interest of the citizens of Idaho or the conservation of its water since any such conflicts are mitigated by the express federal commitments in Article 12.3; or

.iv any refill penalty for renting water from American Falls Reservoir below Milner Dam because of the mitigation provided by the express federal commitments in Article 12.3.

.6 The parties agree that the purposes of the Shoshone-Bannock Water Bank are to:

.i put to beneficial use the Tribal water rights set forth in Article 7.3.1;

.ii provide a source of adequate water supplies to benefit new and supplemental water uses;

.iii provide a source of Tribal funding for improving water user facilities and efficiencies;

.iv provide a mechanism for the Tribes to realize the value of their federal contract storage rights resulting from settlement of this litigation; and

.v provide for the continuation of good-faith cooperation among the parties to this Agreement.

The State agrees not to take any action that will interfere with the nature, scope, spirit and purposes of the Shoshone-Bannock Water Bank.

.7 The Shoshone-Bannock Water Bank provided for in Article 7.3.4 shall be operated by a Tribal Rental Pool Committee, which shall consist of the Superintendent of the Minidoka Project, the Snake River Watermaster, the Reservation Watermaster and three individuals designated by the Fort Hall Business Council unless the Tribes, the State and the United States mutually agree otherwise in writing.

.8 The Tribal Rental Pool Committee shall determine and establish priorities for rental of water from the Shoshone-Bannock Water Bank; provided that the Fort Hall Indian Irrigation Project water users shall have a right of first refusal to rent any storage water available for rent pursuant to Article 7.3.4.

.9 The Tribes may elect to assign for rental all or any portion of the water accruing to the federal contract storage rights in Article 7.3.1 that is not rented through the Shoshone-Bannock Water Bank or otherwise used or exchanged pursuant to Article 7 to any water bank created pursuant to state law in the Snake River basin above Milner Dam on the same terms and

conditions as any other water user may assign water to such a water bank.

.10 The parties agree that proceeds from renting all or any part of the federal contract storage rights pursuant to Article 7 shall not be subject to any form of taxation or alienation by the State or the United States, as provided for by legislation required by this Agreement, absent the written consent of the Tribes.

.11 The Tribes' exercise of the right to rent the storage water accruing to the federal contract storage rights described in Article 7.3.1 shall in no event be construed or interpreted as

.i any forfeiture, abandonment, relinquishment, or other loss of all or any part of their federal contract storage rights, or

.ii subject to any constraints on the amount of rental income or other compensation received by the Tribes.

.12 Neither the State nor the United States shall be liable for any financial losses suffered by the Tribes or any other person as a result of any rental of water from the Shoshone-Bannock Water Bank pursuant to Article 7.3.4.

7.4 Instream flows on and adjacent to the Reservation:

.1 In addition to the rental of water for instream flows pursuant to Article 7.3, the Tribes shall be entitled

to use storage water accrued to the federal contract storage space listed in Article 7.3.1 not used, exchanged, or rented pursuant to Article 7.3 for instream flows for river reaches on or adjacent to the Reservation.

.2 The Tribes shall have the right to use the natural flows of all waters arising wholly within and traversing only Reservation lands for instream flows.

.3 The Tribes shall have the right to use up to 15,000 AFY from the storage water rights described in Articles 7.1.19 and 7.1.20 for instream flows in reaches of the Blackfoot River. Prior to releasing water for instream flows in reaches of the Blackfoot River, the Tribes agree to give notice as provided in Article 8.5.

7.5 The Tribes may transfer or lease within the Reservation all or any portion of the tribal water rights set forth in this Article 7, if the transfer:

.1 is to any beneficial use,

.2 does not exceed the maximum diversion rate not withstanding the period of use,

.3 does not exceed the annual volume of diversion,

.4 does not exceed the annual volume of consumptive use,

.5 is to any place of use within the Reservation, except as to the water rights described in Articles 7.1.2, 7.1.3 and 7.1.14, where the place of use is specifically restricted by this Agreement, and

.6 does not change the source, except as permitted by Articles 7.1.2, 7.1.3, and 7.1.18.

7.6 The Tribes may change the points of diversion and periods of use of the water right described in Article 7.1.1 provided the change:

.1 is to any beneficial use,

.2 does not exceed the maximum diversion rate not withstanding the period of use,

.3 does not exceed the annual volume of diversion,

.4 does not exceed the annual volume of consumptive use, and

.5 does not result in an injury to a water right.

7.7 Whenever the Tribes or the United States intend to change or add a point of diversion or change the period of use of all or part of the water right described in Article 7.1.1, the Tribes or the United States will prepare a written Notice of Transfer of this water right. The Tribes or the United States shall serve a copy of the Notice of Transfer on each member of the Intergovernmental Board and shall publish the Notice of Transfer at least once a week for two consecutive weeks in a newspaper printed within the county wherein the point of diversion lies, or in the event no newspaper is printed within that county, then in a newspaper of general circulation therein. The Tribes or the United States shall complete the service and publication at least one hundred and twenty (120) days

prior to the intended change. The Notice of Transfer shall contain the following information:

.1 The amount of water in CFS and/or AFY that is to be changed including any reductions that will occur at any existing points of diversion, if applicable;

.2 The legal descriptions of the locations of any new or changed points of diversion including any points of diversion that will no longer be used, if applicable;

.3 The period of use during which the water will be used as a result of the change including periods during which water will no longer be used or periods during which water use will be reduced as a result of the change; and

.4 A statement that any person who believes that the change will injure a water right shall file a Notice of Objection with the Intergovernmental Board within ten days of the last date of service or publication.

7.8 Any person claiming that a change in a point of diversion or period of use of the Tribal water right in Article 7.1.1 will injure a water right shall first request mediation before the Intergovernmental Board prior to seeking judicial relief.

.1 In any proceeding, the person claiming that a change will injure the objector's water right shall have the burden of proving that an injury will occur.

.2 Upon receipt of any objection, the Intergovernmental Board shall attempt to mediate the dispute. After

reviewing all relevant data and information, the Intergovernmental Board shall make a recommendation regarding the change if there is a consensus. In the event the Intergovernmental Board determines that the proposed change would injure an objector's water right, its recommendation shall address whether it is possible to mitigate the injury in a way that will allow the Tribes to achieve the purposes of the change.

.3 In the event that the Intergovernmental Board fails to mediate the dispute, judicial relief may be sought by the objector.

7.9 Except as provided in Article 7.3, no Tribal water rights or water may be sold, leased, rented, transferred or otherwise used off the Reservation.

7.10 Stock watering may occur anywhere on Indian lands from any part of the water system on Indian lands and may be used year around as a part of each water right defined in this Agreement except no diversion from a point off the Reservation for stockwater shall be made during the non-irrigation season.

7.11 The Tribes have the right to generate hydropower incidental to water delivery for the other purposes specified in this Agreement as well as pursuant to Article 7.5.

7.12 The Tribes may construct, operate and maintain future storage projects or reservoirs located within the Reservation to the extent that such projects are not

inconsistent with the water rights set forth in this Agreement.

7.13 If any allottee or Tribal member is decreed a water right in the SRBA for Indian lands, there shall be a corresponding reduction in the Tribal water rights set forth in Article 7.

7.14 The State shall have the responsibility to deliver the federal contract storage water described in Article 7.3.1 within any established water district.

ARTICLE 8. ADMINISTRATION OF WATER RIGHTS

8.1 The Parties recognize and respect the sovereignty of the Tribes, the State, and the United States, as well as the powers and limitations accompanying the sovereignty of each government. In order to strike a balance among these sovereign interests, the parties, consistent with applicable law, agree to cooperate in administration of water resources to protect the use of all water rights decreed in the SRBA .

8.2 Except for the Snake River and the Blackfoot River, the parties agree to administer water rights within the Reservation as follows:

.1 The Tribes shall administer the distribution of all Tribal water rights within the Reservation.

.2 Upon reasonable notice, the Tribes and the United States agree to provide access to the State to inspect water monitoring devices and diversions within the

Reservation. The Tribes and the United States may accompany the State.

.3 The Tribes shall adopt and submit a Tribal Water Code to the Secretary for approval. The Tribal Water Code shall, in part,

.i provide for a Reservation Watermaster,

.ii establish a Tribal Water Commission to manage the Tribal water delivery systems on the Reservation, and

.iii provide for monitoring of and enforcement of Tribal water rights.

.4 Pending adoption and approval of a Tribal Water Code, the Secretary, as trustee for the Tribes, shall temporarily administer the distribution of the Tribal water rights within the Reservation.

.5 Consistent with Article 8.2.1, the United States shall administer the distribution of the Fort Hall Indian Irrigation Project water rights and the Fort Hall Agency water rights from the point the water is delivered to the project facilities.

.6 The State shall administer the distribution of those rights acquired under state law within the Reservation that are not a part of the Fort Hall Agency, Tribal or Fort Hall Indian Irrigation Project water rights.

.7 Upon reasonable notice and in accordance with applicable law, the Tribes and the United States may inspect water monitoring devices and diversions within

the Reservation for those water rights administered under Article 8.2.6. The State may accompany the Tribes and the United States.

.8 The Tribes or the United States shall install or cause to be installed monitoring devices for administration of Tribal water rights within the Reservation to the same extent as required of other water users in Idaho. The cost of these monitoring devices shall be paid from the funds authorized by Congress as required by Article 13.2. The United States, the Tribes and the State shall monitor those diversions that each party actually administers within the Reservation and report the diversion records each year to the Intergovernmental Board by March 1 of the year after each reporting year.

8.3 Although the water rights from the Blackfoot River have been delivered for over 100 years without any disputes arising between the Tribes, the United States, and the State over administration, the parties heretofore have been unable to agree upon their respective authority to administer water rights from the Blackfoot River. The parties agree to avoid litigation by continuing to administer the water rights decreed in the SRBA from the Blackfoot River as water rights from the Blackfoot River have been administered in the past. The parties also agree as follows:

.1 To prepare and implement a Blackfoot River Water Management Plan to satisfy the purposes set forth in the Attachment;

.2 To install or cause to be installed monitoring devices on all present and future points of diversion from the Blackfoot River; and

.3 To provide access to inspect water monitoring devices and diversions on the Blackfoot River where necessary for administration of rights to divert water from the water system. A party requesting access to a monitoring device shall provide reasonable notice, and the party providing access to the monitoring device or diversion may accompany the inspecting party.

8.4 The parties agree to administer water rights from the Snake River as follows:

.1 The State shall account for and administer the diversion of water from the Snake River by all water users, including the United States and the Tribes, in conformance with the SRBA decree. The State, in administering such waters, shall ensure the delivery to all water users, including the United States and the Tribes, their legal entitlement to water from natural flow and storage. The United States shall be solely responsible for the physical operation of its Snake River diversion facilities in accordance with the Snake River Watermaster's direction. In the event the United States disputes the Snake River

Watermaster's direction regarding the administration of its Snake River diversion, the dispute shall be resolved by the District Court. Distribution of the water after diversion by the United States shall be in accordance with Articles 8.2.1, 8.2.4, 8.2.5, and 8.3.

.2 IDWR shall provide the Intergovernmental board, upon request, any Snake River water measurement data or reports gathered or prepared by or for IDWR.

.3 Upon reasonable notice, the State agrees to provide the Tribes and the United States access to inspect water monitoring devices and diversions on the Snake River where necessary for purposes of the administration of Tribal or Fort Hall Indian Irrigation Project water rights from the water system. The State may accompany the party inspecting the monitoring device or diversion.

8.5 Because of the need to provide for cooperative planning and management of water resources, the Tribes or the United States agree to prepare a written Notice of Use of a Tribal water right whenever the Tribes or the United States intend to (1) transfer or lease within the Reservation the right to an existing use, (2) put to use within the Reservation any portion of the Tribal water right which is not in present use, or (3) undertake a combination of (1) and (2).

.1 The Notice of Use shall contain the following information:

.i The Right Number of the Tribal water right(s) described in Articles 7.1.1 through 7.3.1 to be changed or used;

.ii A legal description of the location where the Tribes or the United States will use the water right;

.iii A legal description of the location where the Tribes or the United States will reduce the use of water as a consequence of the transfer and of the point of diversion where the Tribes or the United States will reduce the diversion, if applicable;

.iv The ownership status of the land where the Tribal water right will be used;

.v The legal description of the new point of diversion;

.vi A narrative description of the proposed diversion works such as the size of pumps, ditches, wells, etc.;

.vii The amount of water stated in AFY and in CFS to be used on the location described in Article 8.5.1.ii; and

.viii The nature of use of the Tribal water right at the location described in Article 8.5.1.ii.

.2 Notices involving 25 CFS or more, or 7,500 AFY or more and notices involving any increase in the diversion rate or volume of the right described in Article 7.1.1

shall be served on each member of the Intergovernmental Board at least thirty (30) days prior to the transfer, lease or new use.

.3 Notices involving less than 25 CFS or less than 7,500 AFY shall be served on the Intergovernmental Board annually at the time of the annual report provided for in Article 8.2.8 provided that no notice will be required for transfers, leases or new uses of 0.04 CFS or 2.2 AFY or less.

8.6 The State agrees to provide written notice to the Tribes and the Fort Hall Agency Superintendent whenever an application for a state water right permit is sought for a water use in the Upper Snake River mainstem, the Blackfoot River basin, and the Portneuf River basin. The report shall contain among the following:

.1 the permit number of the state water right applied for;

.2 a legal description of the location of the proposed place of use;

.3 the ownership status of the land where the water will be used, if known;

.4 the legal description of the proposed point of diversion; and

.5 a narrative description of the proposed diversion works, such as the size of the pumps, ditches, wells, etc.

ARTICLE 9. INTERGOVERNMENTAL BOARD

9.1 In recognition of the concerns of separate sovereigns as well as the hydrologic and economic inter-relationships of water use within the Snake River basin, the parties agree to continue cooperative efforts to efficiently manage water resources and to fairly resolve disputes arising under this Agreement without resorting to litigation.

9.2 The parties agree to create a three-member Intergovernmental Board composed of the Chairman of the Fort Hall Business Council, the Director of the Idaho Department of Water Resources, and the Secretary, or their designees.

9.3 The Intergovernmental Board shall assist in the implementation of this Agreement and shall mediate disputes arising among the parties regarding the interpretation of this Agreement.

ARTICLE 10. FINALITY OF SETTLEMENT AGREEMENT

10.1 In lieu of filing claims by or on behalf of the Tribes in the SRBA and pursuant to Idaho Code § 42-1409(3) (Supp. 1989), the parties agree to submit this Agreement to the Director. The Director shall submit this Agreement and an abstract of the water rights listed in this Agreement to the Fifth Judicial District Court of the State of Idaho, in and for the County of Twin Falls pursuant to Idaho Code § 42-1411 (Supp. 1989). Other persons not signatory to this Agreement may file objections.

10.2 At the time the Director submits this Agreement and the abstract of this Agreement to the Fifth Judicial District Court of the State of Idaho in and for the County of Twin Falls, the State and the United States shall file a motion seeking approval of the water rights in the Agreement as a decree in the SRBA. The parties agree to jointly support and defend this Agreement against any and all objections or other challenges that may arise in any phase of the Adjudication, including any appeals, and in securing any necessary ratification of this Agreement.

10.3 The United States' and Tribal water rights confirmed in this Agreement shall be final and conclusive as to all parties to the Adjudication once the Agreement becomes effective as provided in Article 18.

10.4 The Tribal water rights recognized in Article 7 are in full satisfaction of all water rights or claims to water rights of the Tribes, its members, and its allottees within the Upper Snake River basin. If a member or an allottee is decreed a water right for Indian lands, then a corresponding reduction will be made in the Tribal water rights set forth in Article 7. This Agreement does not apply to state water right claims of Tribal members for non-Indian lands.

ARTICLE 11. DISCLAIMERS AND GENERAL PROVISIONS

11.1 Nothing in this Agreement shall be so construed or interpreted:

.1 To establish any standard to be used for the quantification of federal reserved water rights or any other Indian water claims of any other Indian Tribes in any judicial or administrative proceeding;

.2 To restrict the acquisition or exercise of an appropriative right to the use of water under state law for present Tribal or allotted lands, provided the Tribal water rights confirmed in this Agreement have been fully utilized at the time the application is made, or are not physically available for use through reasonable diversion facilities;

.3 To restrict the power of the United States to reserve, or of the United States or the Tribes to acquire water rights in the future, in accordance with this Agreement and other applicable law;

.4 To limit in any way the rights of the parties or any person to litigate any issue or question not resolved by this Agreement;

.5 To limit the authority of the United States or the Tribes to administer their respective water rights in accordance with the constitution, statutes, regulations, and procedures of the United States or of the Tribes except as expressly provided herein;

.6 To restrict, enlarge, or otherwise determine the subject matter jurisdiction of any state, tribal or federal court;

.7 To commit or obligate the United States, the State, or the Tribes to expend funds which have not been appropriated and budgeted;

.8 To quantify or otherwise determine Walton Right claims that may be made in the SRBA;

.9 To impair or impede the exercise of any Treaty rights reserved for members of the Tribe pursuant to Article 4 of the Second Fort Bridger Treaty of July 3, 1868, 15 Stat. 673;

.10 To waive or prejudice any contention by any party to this Agreement regarding the location and extent of the Reservation's northern and western boundaries along or within the Snake River and the Blackfoot River, as well as the ownership of the beds and banks of those rivers to the ordinary high water mark;

.11 To preclude the Tribes from participating in future water storage projects in the Upper Snake River basin;

.12 To quantify or otherwise determine any water right claims of the City of Pocatello under the Act of September 1, 1888, ch. 936, § 10, 25 Stat. 452 or the sources from which such claims may be satisfied, provided that in the event the City of Pocatello is determined to be entitled to such a right, such right shall be in addition to the Tribal water rights set forth in this Agreement;

.13 To quantify or otherwise determine any water right claims of the Northwestern Band of Shoshone, if any;

.14 To waive any applicable federal environmental law;

.15 To impair or impede the exercise of any civil or regulatory authority of the Tribes, the State, or the United States; and

.16 To quantify or otherwise determine any water right claims for the United States that are not quantified in this Agreement.

11.2 This Agreement represents a settlement of federal reserved water right claims of the Tribes under the Winters Doctrine that are unique to the Reservation. The parties are unable to agree on whether the reserved water rights doctrine extends to ground water. In order to avoid litigation, however, this Agreement recognizes federal reserved water rights to groundwater for the Tribes as described in Article 7. Because this Agreement is a resolution of a disputed claim, it is not and shall not be used as precedent for any other federal reserved water right claim.

11.3 This Agreement has been reached in the process of good faith negotiations for the purpose of resolving legal disputes, including pending litigation, and all parties agree that no offers and/or compromises made in the course thereof shall be construed as admissions against interest or be used in any legal proceeding.

11.4 Entry of judgment as set forth above has been consented to by the parties without trial or adjudication of fact or law herein and without the judgment constituting evidence or an admission by any party, with respect to any issue.

11.5 The Tribes and the United States reserve the right to assert federal reserved water right claims for instream flows in the Salmon River basin, the Clearwater River basin, and the Snake River basin below Hells Canyon Dam; however, no such instream flow claims made by the Tribes or the United States on behalf of the Tribes below Hells Canyon Dam shall require water to be supplied from above Hells Canyon Dam to satisfy such claims. All parties to this Agreement agree to engage in good faith negotiations in an attempt to settle these remaining claims.

11.6 The Tribes reserve the right to develop geothermal ground water on the Reservation having a temperature of at least two hundred twelve (212) degrees Fahrenheit in the bottom of a well.

11.7 Performance by the United States of the actions required by this Agreement, including the Congressional authorization and appropriation of any funds for deposit in the Tribal Development Fund described in Article 13 shall be conditioned on the Tribes executing a waiver and release of any and all existing claims against the United States arising in whole or in part from or concerning water rights finally settled by this Agreement, and for lands or water that have been inundated by the past construction or enlargement of American Falls Reservoir.

11.8 None of the parties will assert any claim against another party arising out of the negotiation of this Agreement or the entry by the Fifth Judicial District Court of the State

of Idaho in and for the County of Twin Falls of a decree embodying the water rights listed in this Agreement.

11.9 The United States, in its trust capacity for the Tribes only, and the Tribes agree not to object to water right claims filed by non-federal water users within the Upper Snake River basin in the SRBA that have no potential impact on the Tribal water rights set forth in this Agreement.

11.10 The United States and the Tribes agree not to make any claims against, or seek compensation from, any non-federal party to this Agreement for lands or water that have been inundated by the past construction or enlargement of American Falls Reservoir.

ARTICLE 12. PROTECTION OF EXISTING USES

12.1 Nothing in this Agreement alters the water right priorities as established by Section 3(b) of the Michaud Act, or Article 15 of the Michaud Contract, which the United States and/or the Tribes entered into as part of the authorization of the Michaud Division.

12.2 The Secretary shall continue to provide all project water users within the Fort Hall Indian Irrigation Project their project water entitlements pursuant to their project contracts.

12.3 The United States agrees to seek legislation authorizing the Secretary to contract with the Idaho Water Resource Board or another appropriate contracting entity acceptable to the Committee of Nine for the 80,500 acre feet of noncontracted storage space in Ririe Reservoir and the

18,980 acre feet of noncontracted storage space in Palisades Reservoir, provided that such entity makes application for the space within one year of the date such legislation becomes law. This space is estimated to provide on average approximately 45,000 AFY. The legislation shall provide for forgiveness of the repayment obligation associated with the construction cost for the noncontracted storage space; provided the contracting entity shall be responsible for operation and maintenance costs associated with this storage space.

12.4 The parties agree not to unreasonably oppose the efforts of any party to further mitigate the effects of the implementation of this Agreement on existing water users.

ARTICLE 13. CONTRIBUTIONS TO SETTLEMENT

13.1 The United States agrees to seek appropriations to continue to acquire up to 9,000 acres of land and grazing rights at Grays Lake, at a cost not to exceed $5,000,000, for the acquisition of lands, grazing rights and related improvements to enhance the operation and management of the Fort Hall Indian Irrigation Project, particularly through increased storage capacity and retention period of the reservoir, and the operation of the United States Fish and Wildlife Service refuge at Grays Lake.

13.2 The United States agrees to assist the Tribes in implementing a Tribal water management system for the Reservation. The total cost of this federal assistance to the Tribes for this Tribal water management system shall

not exceed $7,000,000. The United States agrees to seek appropriations of the $7,000,000 as follows:

.1 $2,000,000 in the first fiscal year following the effective date of this Agreement as set forth in Article 18, and

.2 an additional $5,000,000 payable over a twenty-year (20-year) period.

13.3 The United States agrees to seek an appropriation of $10,000,000 for a Tribal Development Fund payable in equal amounts of $2,000,000 each fiscal year for each of the five (5) years following the effective date of this Agreement as set forth in Article 18. Under no circumstances shall these funds be distributed on a per capita basis to members of the Tribes.

13.4 Federal financial contributions to this settlement will be budgeted for, subject to the availability of funds, by October 1 of the year following the year of enactment of the authorizing legislation described in Article 18.

13.5 The state will seek an authorization to provide $250,000 of in kind services to assist the Tribes in implementing this Agreement and will seek an appropriation of the monies necessary to pay the filing fees for the Tribes and the United States claims quantified as a part of this Agreement. These fees are estimated to be $250,000.

ARTICLE 14. SUCCESSORS

This Agreement shall bind and inure to the benefit of the respective successors of the parties.

ARTICLE 15. ENTIRE AGREEMENT

15.1 This Agreement sets forth all understandings between the parties with respect to water rights and claims to water rights for the Tribes, its members, and its allottees in the Upper Snake River basin. There are no other understandings--no covenants, promises, agreements, conditions, either oral or written--between the parties other than those contained herein. The parties expressly reserve all rights not granted, recognized or settled by this Agreement.

15.2 Ratification of the water rights set forth in Article 7 is irrevocable; however, the balance of this Agreement may be modified only upon the joint consent of the legislative bodies of the Tribes and the State, and to the extent an interest of the United States may be affected, the Secretary or the United States Attorney General, as appropriate.

ARTICLE 16. EFFECT OF HEADINGS

Headings appearing in this Agreement are inserted for convenience and reference and shall not be construed as interpretations of the text.

ARTICLE 17. MULTIPLE ORIGINALS

This Agreement is executed in quintuplicate. Each of the five (5) agreements with an original signature of each party shall be an original.

ARTICLE 18. EFFECTIVE DATE

18.1 This Agreement shall be effective only when all of the following events have occurred:

.1 This Agreement is executed;

.2 A decree acceptable to the parties quantifying the water rights in this Agreement and the water rights of the United States for the Fort Hall Indian Irrigation Project and for the Bureau of Indian Affairs Fort Hall Agency has been entered by the Fifth Judicial District Court of the State of Idaho in and for the County of Twin Falls and become final and nonappealable;

.3 Adoption by the Idaho Water Resource Board of the Shoshone-Bannock Water Bank Rules and Regulations consistent with Article 7.3;

.4 All federal and state expenditures required by this Agreement have been authorized;

.5 Ratification of this Agreement by the Legislature of the State of Idaho;

.6 Approval of the Agreement by the general membership of the Shoshone-Bannock Tribes;

.7 The Bureau of Reclamation has entered into a storage contract with the Idaho Water Resource Board or a designee of the Committee of Nine in accordance with Article 12.3; and

.8 Congressional approval of this Agreement.

The parties have executed this Agreement on the date following their respective signatures.

CECIL ANDRUS
Governor, State of Idaho

7-5-90
Date

KESLEY EDMO
Chairman, Shoshone-Bannock Tribal Council

7/5/90
Date

GENE M. GRAY
Chairman,
Idaho Water Resource Board

7-5-90
Date

HOWARD FUNKE
Tribal Attorney
Shoshone-Bannock Tribes

7/5/90
Date

CLIVE J. STRONG for JIM JONES
Attorney General,
State of Idaho

7/5/90
Date

DR. EDDIE F. BROWN
Assistant Secretary for
Indian Affairs

7-10-90
Date

PAUL BERGGREN
Chairman
Committee of Nine

7/9/90
Date

for **RICHARD B. STEWART**
Assistant Attorney General
Land and Natural Resources
Division
U.S. Department of Justice

7/10/90
Date

Exhibit 3

Lynn Collins at 387-0872

PUBLIC LAW 101-602 [H.R. 5398]; November 16, 1990

FORT HALL INDIAN WATER RIGHTS ACT OF 1990

For Signing Statement of Act, see p. 4393-1.

An Act to approve the Fort Hall Indian Water Rights Settlement, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Fort Hall Indian Water Rights Act of 1990. Idaho.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Fort Hall Indian Water Rights Act of 1990".

SEC. 2. DEFINITIONS.

For the purposes of this Act, and for no other purposes—

(1) The term "Agreement" means the "1990 Fort Hall Indian Water Rights Agreement" between the State of Idaho, the Shoshone-Bannock Tribes, the United States, and other participating parties.

(2) The term "Committee of Nine" means the advisory committee of water district 01, which is the instrumentality created by the Director of the Idaho Department of Water Resources pursuant to Idaho Code 42-604.

(3) The term "Final Decree" means the partial decree confirming the Tribal water rights described and quantified in Article 7 of the Agreement to be entered after the date of enactment of this Act and following submission of the Agreement as provided for in Article 10 of the Agreement in Civil Case No. 39576 filed in the Fifth Judicial District Court of the State of Idaho in and for Twin Falls County on June 17, 1987, entitled In Re the General Adjudication of Rights to the Use of Water from the Snake River Basin Water System.

(4) The term "Fort Hall Indian Irrigation Project" means the Federal project constructed to provide water for the irrigation of Reservation lands and certain ceded lands.

(5) The term "Idaho Water Resource Board" means the Idaho State Water Resource Agency constituted in accordance with Idaho Constitution article XV, section 7, or any successor agency.

(6) The term "Indian" means any person who is a member of a tribe recognized as eligible for special programs and services provided by the United States because of the person's status as an Indian, is recognized as an Indian under tribal law, or holds or is recognized by the Secretary as eligible to hold restricted trust property on the Reservation.

(7) The term "Indian lands" means (A) all lands within the exterior boundaries of the Reservation that are held in trust or owned for the Shoshone-Bannock Tribes or an Indian, and (B) those lands outside the exterior boundaries of the Reservation held in trust for or owned by the Shoshone-Bannock Tribes or held in trust for or owned subject to a restriction on alienation by a member of the Shoshone-Bannock Tribes.

(8) The term "Michaud Act" means the Act of August 31, 1954, chapter 1159, 68 Stat. 1026.

(9) The term "Michaud Contract" means that Memorandum Agreement of April 25, 1957, between the Bureau of Reclamation and the Bureau of Indian Affairs relating to the water supply for the Michaud Division.

(10) The term "Michaud Division" means that division of the Fort Hall Indian Irrigation Project authorized by the Act of August 31, 1954, chapter 1159, 68 Stat. 1026.

(11) The term "Party" or "Parties" means any entity or entities that are party to the Agreement.

(12) The term "Reservation" means the Fort Hall Indian Reservation.

(13) The term "Secretary" means the Secretary of the Interior.

(14) The term "Tribes" or "Tribal" means the Shoshone-Bannock Tribes, its members, and its allottees.

(15) The term "Upper Snake River Basin" means that portion of the Snake River Basin upstream from the Hells Canyon Dam, the lowest of the 3 dams authorized as FERC Project No. 1971.

SEC. 3. FINDINGS.

The purpose of the Fort Hall Indian Water Rights Settlement Act of 1990 is to achieve a fair, equitable, and final settlement of all claims of the Shoshone-Bannock Tribes, its members, and its allottees and the United States on behalf of the Shoshone-Bannock Tribes, its members, and its allottees to water rights in the Upper Snake River Basin.

SEC. 4. RATIFICATION OF AGREEMENT.

The Agreement is hereby approved, ratified, and confirmed. The Secretary is authorized and directed to implement the Agreement on behalf of the United States.

SEC. 5. PROTECTION OF EXISTING USES.

(a) CONTRACT FOR STORAGE SPACE.—The Secretary is authorized and directed to contract with the Idaho Water Resource Board or another appropriate contracting entity acceptable to the Committee of Nine for 18,900 acre feet of storage space in the Palisades Reservoir and the 80,500 acre feet of storage space in the Ririe Reservoir provided that the contracting entity makes application for the noncontracted storage space within 1 year of the date of this Act and the contracting party agrees to pay all operation and maintenance costs associated with the space. The repayment obligation associated with the construction costs for such noncontracted storage space is hereby deemed repaid by this Act. All exemptions that result from such a repayment shall be deemed to be applicable without further qualification on the part of such contracting entity, and with respect to subsequent users of this water, the Reclamation laws shall apply only to the extent such laws would have applied to such subsequent users prior to the date of this Act.

(b) LIMITATION ON SETTING ASIDE FINAL DECREE.—Neither the Committee of Nine nor the State shall have the right to set aside the Final Decree because either fails to make application for the storage space referred to in subsection (a) of this section within 1 year of the date of this Act.

SEC. 6. USE, TRANSFER, AND LEASE OF TRIBAL WATER RIGHTS.

(a) TRANSFER AND LEASE OF TRIBAL WATER RIGHTS WITHIN THE RESERVATION.—The Tribes shall have the right to transfer or lease within the Reservation all or any part of the Tribal water right confirmed in the Final Decree on the terms and conditions set forth in article 7 of the Agreement.

(b) RENTAL OF THE TRIBES FEDERAL CONTRACT STORAGE WATER.—The Tribes shall have the right to rent, pursuant to Idaho Code 42-1761 through 42-1765 as specified in article 7 of the Agreement, the water accruing to Federal storage space held in trust for the Tribes under the Michaud Act.

(c) INSTREAM FLOWS.—The Tribes shall have the right to use any or all of the water accruing to Federal storage space held in trust for the Tribes under the Michaud Act for instream flows for river reaches on or adjacent to the Reservation and up to 15,000 acre feet per year of the storage water rights described in articles 7.1.19 and 7.1.20 of the Agreement for instream flows in reaches of the Blackfoot River on the terms and conditions set forth in article 7.4 of the Agreement.

(d) REQUISITE CONGRESSIONAL APPROVAL.—Ratification of the Agreement as provided for by section 4 of this Act shall constitute the congressional approval, to the extent it is required by Federal law, of the uses described in subsections (a), (b), and (c) of this section.

(e) AMENDMENT OF MICHAUD ACT AND CONTRACT.—The Michaud Act and the Michaud Contract are hereby amended to the extent necessary to authorize the uses described in subsections (a), (b), and (c) of the proprietary rights described in article 7 of the Agreement. 68 Stat. 1026.

(f) NO ALIENATION OR TAXATION OF PROCEEDS.—The proceeds from leasing water pursuant to subsection (a) of this section or from renting all or any part of the water accruing to the Federal contract storage space pursuant to subsection (b) of this section shall not be subject to any form of taxation or alienation by the State.

(g) NO FORFEITURE, ABANDONMENT, LOSS, OR CONSTRAINTS ON INCOME.—The Tribes' exercise of the rights described in subsections (a), (b), and (c) of this section or nonuse of the Tribal water rights shall in no event be construed or interpreted as any forfeiture, abandonment, relinquishment, or other loss of all or any part of the Tribal water rights. Nor shall the exercise of the rights described in subsections (a) and (b) of this section be subject to any constraints on the amount of income or other compensation received by the Tribes.

(h) LIMITATION ON OFF-RESERVATION USE.—Except as authorized by this section, no Tribal water rights or water described in the Agreement may be sold, leased, rented, transferred, or otherwise used off the Fort Hall Indian Reservation.

SEC. 7. CONTRIBUTION TO SETTLEMENT.

Appropriation authorizations.

(a) TRIBAL DEVELOPMENT FUND.—There are hereby authorized to be appropriated to the Department of the Interior Bureau of Indian Affairs $4,000,000 in the first fiscal year, $3,000,000 in the second fiscal year, and $3,000,000 in the third fiscal year following the effective date of this Act for payment to the Tribal Development Fund, which the Secretary is authorized and directed to establish for the Shoshone-Bannock Tribes. Within 60 days of appropriation of moneys for the Tribal Development Fund, the Secretary shall allocate and make payment to the Fund. Once the funds are deposited

into the Tribal Development Fund, the Secretary shall disburse the funds to the Tribes upon request.

(b) RESERVATION WATER MANAGEMENT SYSTEM.—There is hereby authorized to be appropriated to the Department of the Interior Bureau of Indian Affairs the sum of $3,000,000 in the first fiscal year, $2,000,000 in the second fiscal year, and $2,000,000 in the third fiscal year following the effective date of this Act for use by the Tribes for development of a Reservation water management system. Within 60 days of appropriation of moneys for the Reservation water management system, the Secretary shall allocate and make payment to the Tribes for the purposes described in this section.

(c) ACQUISITION OF LANDS, GRAZING RIGHTS, AND IMPROVEMENTS.—There are hereby authorized to be appropriated to the Department of the Interior Bureau of Indian Affairs $5,000,000 for the primary purposes of acquiring for the Fort Hall Indian Irrigation Project available lands and grazing rights adjacent to Grays Lake to enhance the operation and management of the project and of making related improvements as well as providing collateral benefits for the operation of the Fish and Wildlife Service Refuge at Grays Lake.

(d) LIMITATION ON PER CAPITA DISTRIBUTIONS.—Under no circumstances may any appropriated funds authorized by subsections (a), (b), and (c) of this section be distributed on a per capita basis to members of the Tribes.

(e) LIMITATION ON SETTING ASIDE FINAL DECREE.—Neither the Tribes nor the United States shall have the right to set aside the Final Decree because Congress fails to appropriate the funds authorized by subsection (a), (b), or (c) of this section or because the United States fails to acquire the grazing allotments adjacent to Grays Lake.

(f) TRUST RESPONSIBILITY.—Nothing in this Act shall be construed or interpreted to alter the future trust responsibility of the United States to the Tribes nor to prohibit the Tribes from seeking additional authorization or appropriation of funds for Tribal programs or purposes.

SEC. 8. WAIVER OF CLAIMS.

(a) GENERAL AUTHORITY.—Upon the effective date of the Agreement, the Tribes and the United States shall be deemed to have waived and released any and all water rights or claims to water rights of the Tribes, its members and its allottees from any source within the Upper Snake River Basin other than those set forth in article 7 of the Agreement. This release shall not apply to water right claims under State law of Tribal members for lands not defined as Indian lands for purposes of this Act nor to any other Indian tribe or to any Federal agency other than the Bureau of Indian Affairs, Fort Hall Indian Agency.

(b) WAIVER OF CLAIMS AGAINST THE UNITED STATES.—In consideration of performance by the United States of all actions required by the Agreement and this Act, including the congressional authorization, appropriation, and payment of all funds authorized in section 7 of this Act, the Tribes shall be deemed to have executed in return a waiver and release of any and all existing claims against the United States arising in whole or in part from or concerning water rights finally settled by the Agreement and for lands or water that have been inundated by the past construction or enlargement of American Falls Reservoir.

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(c) WAIVER OF CLAIMS AGAINST NON-FEDERAL PERSONS.—Upon entry of the Final Decree confirming the Tribal water rights, the United States and the Tribes agree not to make any claims against, or seek compensation from, any non-Federal person for lands or water that have been inundated by the past construction or enlargement of American Falls Reservoir. In the event funds are not paid as set forth in section 7, the Tribes are authorized to bring an action in the United States Claims Court for such funds plus applicable interest. The United States hereby waives any defense of sovereign immunity to such action.

SEC. 9. INDIVIDUAL MEMBERS AND ALLOTTEES OF THE TRIBES.

The water rights described in the Agreement and confirmed in the Final Decree are in full satisfaction of all water right claims of members of the Tribes and allottees for Indian lands in the Upper Snake River Basin. If any Tribal member or allottee is decreed a water right for Indian lands in Civil Case No. 39576 filed in the Fifth Judicial District Court of the State of Idaho in and for Twin Falls County on June 17, 1987, entitled "In Re the General Adjudication of Rights to the Use of Water from the Snake River Basin Water System", there shall be a corresponding reduction made in the Tribal water rights set forth in the Agreement and the Final Decree.

SEC. 10. EFFECTIVE DATE.

(a) DISBURSEMENT OF FUNDS UPON EFFECTIVE DATE.—The moneys appropriated pursuant to the authorization in section 7 of this Act shall not be disbursed until such time as the Agreement becomes effective. If the Agreement does not become effective, the moneys shall be returned to the General Fund of the Treasury, and the Agreement may be voided by any party to the Agreement.

(b) FORCE AND EFFECT.—No provision of this Act shall be of any force unless the Agreement becomes effective as provided by article 18 of the Agreement.

SEC. 11. DISCLAIMER.

(a) GENERAL DISCLAIMER.—Nothing in the Agreement or this Act shall be construed in any way to quantify or otherwise affect the water rights or water right claims of the city of Pocatello, Idaho, or of any Indian tribe, band, or community, other than the Shoshone-Bannock Tribes.

(b) RESERVATION OF TRIBAL CLAIMS.—Nothing in this Act shall be construed to waive any water rights or water right claims of the Tribe or the United States on behalf of the Tribes except as set forth in the Agreement. Nor shall anything in the Agreement or this Act affect the water rights or water right claims of any Federal agency, other than the Bureau of Indian Affairs, Fort Hall Indian Agency.

(c) RESERVATION OF RIGHTS.—The parties expressly reserve all rights not granted, recognized, or settled by the Agreement or this Act.

(d) DISCLAIMER REGARDING OTHER AGREEMENTS.—Except as expressly provided in this Act, nothing herein shall be considered to

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amend, construe, supersede, or preempt any State law, Federal law, Tribal law, or interstate compact that pertains to the Snake River or its tributaries.

SEC. 12. PROTECTION OF TRIBAL WATER RIGHTS.

The Tribal water rights confirmed by the Final Decree shall bind and inure to the benefit of the Tribes and shall not be taken from them absent their consent and payment of just compensation.

Approved November 16, 1990.

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LEGISLATIVE HISTORY—H.R. 5308:

HOUSE REPORTS: No. 101-831 (Comm. on Interior and Insular Affairs).
CONGRESSIONAL RECORD, Vol. 136 (1990):
Oct. 10, considered and passed House.
Oct. 27, considered and passed Senate.

Exhibit 4

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	)	REPORTER'S TRANSCRIPT
	)	
Case No. 39576	)	
	)	

RECEIVED
JUL 26 1995
DOJ/BOISE

****

D-a-t-e: Tuesday, July 18, 1995

T-i-m-e: 9:20 A.M.

P-l-a-c-e: SRBA Courthouse, Twin Falls, Idaho

B-e-f-o-r-e: HON. DANIEL C. HURLBUTT, JR.
District Judge (without jury)

H-e-a-r-i-n-g: PROPOSED CONSENT DECREE ON 1990 FORT HALL INDIAN WATER RIGHTS SETTLEMENT AGREEMENT

****

TITLE

I N D E X

****

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David B. Shaw

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COURTROOM OF THE DISTRICT COURT,
SNAKE RIVER BASIN ADJUDICATION
COURTHOUSE, 253 Third Avenue North,
Twin Falls, Idaho, Tuesday, July 18,
1995, 9:20 A.M.
****

THE COURT: Good morning, ladies and gentlemen. This is the District Court of the Fifth Judicial District in and for the State of Idaho. I'm Judge Hurlbutt.

This is the time and place set for a hearing on the Fort Hall Indian water rights settlement agreement and a proposed consent decree entered by the parties.

The State of Idaho is here represented by Clive Strong.

MR. STRONG: Good morning, Your Honor.

THE COURT: And David Barber.

MR. BARBER: Good morning, Your Honor.

THE COURT: The United States is represented by Peter Monson.

The record should reflect that Candy Jackson is participating by telephone.

Good morning, counsel.

MS. JACKSON: Good morning, Your Honor.

THE COURT: The department of water resources is represented by the director.

Good morning.

MR. DREHER: Good morning.

THE COURT: And Mr. Shaw, chief of the adjudication bureau.

Good morning, Mr. Shaw.

MR. SHAW: Good morning, Judge.

THE COURT: Mr. Strong, we discussed in chambers how we'll proceed on the agreement. I'll turn the podium over you. And since Miss Jackson is on the phone, ladies and gentlemen, we probably ought to use the podium this morning.

Mr. Strong.

MR. STRONG: Good morning, Your Honor. We are here on behalf of the State of Idaho seeking approval of the consent decree that has been entered into with the Shoshone-Bannock tribes regarding water rights for the Fort Hall Indian Reservation.

As we've indicated to you in chambers and now formally on the record, we have proceeded in this matter as though this is a consent decree. Although there were no objections filed by the

parties that signed off on the agreement, those objections would have been filed but for the completion of the agreement; and that agreement occurred prior in time to the closure of the formal objection period or the submission of the director's report for this area. It is on that basis that we believe that it's appropriate to view this as a contested case in which the parties have settled as amongst themselves their differences with respect to the determination of the water rights for the tribe.

Under the consent-decree standard, the measure is whether the agreement is fair, adequate and reasonable, and does not unnecessarily interfere or injure third party rights. The agreement itself, we believe, meets the fair, adequate and reasonable standard because it has been approved not only by the Idaho state legislature, but by Congress as well. The congressional -- there was extensive congressional hearings on this that evaluated the adequacy of the proposed agreement.

As to the injury, the injury issues have been largely addressed by the agreement. The agreement sets forth a mechanism by which injury

is taken into account to other parties, and provides mitigation for other water users.

There remain no objections to the Fort Hall water rights agreement at this time. There were approximately 212 objections initially filed. Of those 212, all but, I believe, seven were settled through stipulation that we will talk about this morning. And then as to the remaining seven, a determination was made by this court that those parties did not have standing to present evidence in this case because they had failed to file proper objections or notices of claim in the adjudication.

Given that, we think that we've met that initial burden with respect to going forward under the consent-decree standard. We understand, however, because of the change in the adjudication statutes, the court desires that we go forward and present a case with respect to the necessity of the various general provisions, remarks, and definitions that are contained in the agreement. And we're prepared to go forward with that showing that morning.

Under the new statute, the provisions that are appropriate in the decree are those necessary

for the definition, clarification or administration of rights. In order to provide testimony with respect to those issues, the State intends to call Mr. David Shaw of the department of water resources.

Our intent would be to go through the decree that -- the proposed partial decree that has been submitted to the court and is contained in the director's report, and speak only to those provisions that come within the purview of that necessity showing. And if that's appropriate, we would proceed that basis, Your Honor.

THE COURT: Very well. Mr. Strong, please call your first witness.

MR. STRONG: Okay, Your Honor. I would call Mr. David Shaw to the stand, please.

DAVID B. SHAW,

called as a witness by the State, being first duly sworn upon his oath, testified as follows:

DIRECT EXAMINATION

BY MR. STRONG:

Q. Mr. Shaw, would you please state your full name for the record, your position with the state, please?

A. My name is David, middle initial B., Shaw, S-h-a-w. I'm chief of the adjudication bureau for the Idaho Department of Water Resources.

Q. Would you also provide your address for the record, please?

A. Work address is 1301 North Orchard in Boise. My home address is 802 South Plaza Road in Emmett.

Q. Mr. Shaw have you previously testified in this proceeding?

A. Yes, I have.

Q. Were you qualified as an expert in this proceeding?

A. Yes, I was.

Q. And in what capacity were you qualified as an expert?

A. I was qualified as an expert in water right adjudications.

Q. Thank you.

MR. STRONG: Your Honor, may I approach the witness?

THE COURT: You may, counsel.

Q. (BY MR. STRONG) Mr. Shaw, I've handed you a document. It contains a blue cover entitled Director's Report, Parts I, II, & III for the 1990 Fort Hall Indian Water Rights Agreement, Snake River Basin Adjudication, Civil Case No. 39576.

Are you familiar with this document?

A. Yes, I am.

Q. And what is your familiarity based upon?

A. This is a document that was prepared by the department of water resources as a director's report for the 1990 Fort Hall Indian water right agreement. It also includes the water rights for the non-Indian portion of the Fort Hall project and for the Bureau of Indian Affairs, Fort Hall agency.

MR. STRONG: Your Honor --

MS. JACKSON: Excuse me, Your Honor.

This is Candy Jackson. I can't hear Mr. Shaw.

THE COURT: All right. Thank you, Miss Jackson. We'll try to reposition the microphone so you can hear.

Q. (BY MR. STRONG) Mr. Shaw, will you speak for the record to see if --

A. Okay. The document is the director's report prepared by the department of water resources for the 1990 Fort Hall Indian water right agreement. It also contains the water rights for the non-Indian portion of the project and for the Bureau of Indian Affairs, Fort Hall agency.

MR. STRONG: Your Honor, this document has been previously filed with the court; and we'd asked that it be made a part of the record in this particular proceeding.

THE COURT: Would you like it marked as an exhibit; or what's your preference?

MR. STRONG: Your Honor, probably it would be appropriate to mark it as an exhibit for this particular proceeding.

(State's Exhibit 1 MARKED)

MR. STRONG: We would ask that it be made part of the record.

THE COURT: Exhibit 1 which is the Director's Report, Parts I, II, & III to the 1990 Fort Hall Water Right Agreement, has been marked and shall be admitted into evidence

(State's Exhibit 1 ADMITTED)

MR. STRONG: Thank you, Your Honor.

Q. (BY MR. STRONG) Mr. Shaw, would you identify the portions of this report?

A. Yes. The first section of the report is an introductory -- well, the first section is a table of contents. It appears on page No. 2.

Then the first section of the report is an introduction. It contains a section describing the scope and purpose of the report, a description of the water system. It includes a map of the State of Idaho showing the applicable area that the water rights are contained within.

The 1990 Fort Hall Indian water right agreement is contained in its entirety in the report in the next section. Then there are the claims that were filed by the United States on behalf of the non-Indian water users and the Bureau of Indian Affairs, Fort Hall agency.

Finally the proposed consent decree, and then a number index that shows the pages on which

the various water right numbers are located within this report.

Q. (BY MR. STRONG) Okay. Mr. Shaw, would you turn to section 4 of the report, please?

(THE WITNESS COMPLIED)

Q. (BY MR. STRONG) Mr. Shaw, section 4 of the report is the proposed partial final consent decree; is that correct?

A. Yes, it is.

MR. STRONG: Your Honor, as a method of proceeding, rather than starting with the definitions, I propose that I go first through the water rights; explain the remarks, the general provisions; and then come back to the definitions so that they're placed in context.

THE COURT: Very well. Proceed, counsel.

Q. (BY MR. STRONG) Mr. Shaw, would you turn to page 12 of the consent decree, please?

A. Yes.

Q. Okay. On page 12 there is an area marked Roman numeral II.

Would you describe that to the court, please?

A. This section of the proposed consent

decree contains the water rights held by the United States for the use and benefit of the Shoshone-Bannock tribes of the Fort Hall Indian Reservation in the upper Snake River basin.

Q. Okay. Turning first to right No. 01-10223 on page 13, looking down through that right, there is a section on page 14 that's entitled "remarks."

A. Yes.

Q. Have you found that? Would you please describe for the court remark .x.a?

A. Yes. This remark says "the rate of diversion of this right shall be measured at the head of the Reservation Canal." Then it gives a legal description for that location. This remark describes how the rate of diversion portion of the quantity element will be administered in the delivery of the right.

Q. And, Mr. Shaw, why would that provision be necessary in this decree?

A. This particular water right is described with two sources of water. It's described with a source from the Snake River and a source from Sand Creek.

The location of this point, the head of the

Reservation Canal, is the point at which water is diverted from the Snake River. Sand Creek water enters the Reservation Canal slightly downstream from that point.

And the Snake River right is controlled by rate of diversion. And that's where this measurement will be located -- or is to be located at the head of the canal.

The other element of quantity, annual volume, which is described in the .b remark, is to be measured downstream from the combined source of Snake River and Sand Creek. So these .a and .b portions go hand in hand, if you will, to describe how the quantity for this right is to be measured and regulated, if you will, for water distribution purposes.

Q. Mr. Shaw, as you've testified, this is related to the quantity.

Could this item be moved up under another element of the water right?

A. It could be moved under quantity. In this particular right, quantity is divided into annual diversion volume and annual diversion rate. The .a portion could be moved under small Roman iii in the description of the right.

The .b portion could be moved under small Roman ii. Or perhaps the description could simply be annotated as describing part of the quantity element of this water right, or the administration of the quantity element.

Q. To clarify the record, Mr. Shaw, you spoke with regard to this particular water right and particularly .x.b.

Again, the necessity for inclusion of that provision is?

A. As I indicated, this water right is made up from two sources, Sand Creek and the Snake River. The Sand Creek source was critical, I guess, to the resolution of the quantity of this water right as among the water users, both Indian and non-Indian.

And in order to account for that Sand Creek water supply, the volume measurement, the volume portion of the quantity, if you will, for this water right needs to include Sand Creek. So the location of the measurement of volume has to be downstream from the point in the system where the Sand Creek water enters the Reservation Canal.

Q. Okay. Mr. Shaw, with regard to water right 01-10223, again, comment .x.c, would you describe that comment?

A. The Fort Hall project is a project that uses water from a number of water sources and a number of water rights. This water right, as I indicated, is from the Snake River and Sand Creek.

The project also receives water from the Blackfoot River, Blackfoot Reservoir and Grays Lake. The water is commingled in the canals and is used pretty much without distinction from the various water rights for the tribes once the water goes into the canals.

So .c, remark .c is simply an explanation that this water right plus the other project water rights are intended to provide a full water supply for the project lands of 53,828 acres.

Q. Mr. Shaw, could that remark .c be moved to an element of the water right?

A. Remark .c really describes two elements. It describes the quantity, indicating that all those rights together make up the quantity of water necessary for the project. It describes the place of use because it refers to the 53,828 acres in the project. And to some extent it deals with source, because the water

rights are from different sources -- Snake River, Blackfoot and Grays Lake.

So if it were going to be moved, I would think it would need to be moved to at least the quantity and place-of-use elements, perhaps the source element as well. And in doing so, perhaps some rephrasing would clarify the intent.

Q. Thank you, Mr. Shaw. Again, with water right 01-10223, we have comment .x.d.

Would you describe comment .x.d to the court, and then explain the necessity for that provision?

A. Yes. Remark .x.d deals with utilizing the Sand Creek portion of this water right. As I indicated, including the Sand Creek water supply in this water right was crucial to reaching an agreement over the extent of this water right.

The water provided by Sand Creek is difficult to manage because of the irregularity in flow not just from day to day, but from hour to hour. In the past, the project has used what's referred to in this remark as the Equalizing Reservoir to level out some of the fluctuations in the Sand Creek flow so that water could then be redistributed into the project's

canals.

The Equalizing Reservoir does not provide adequate regulation to fully utilize the available water supply. So as a compromise in reaching an agreement over the extent of this water right, an exchange is proposed whereby Sand Creek water will be credited toward the satisfaction of this water right.

Physical water delivery will occur from storage water held by North Side Canal Company on an exchange relationship. And North Side Canal Company will then use the actual Sand Creek water.

It's provided here, as I indicated, very much as a resolution of this water right to reach a point that all the water users could agree about the extent of this water right.

Q. Mr. Shaw, is this exchange intended to work in perpetuity?

A. Yes, it is.

Q. Mr. Shaw, turning to page 22 of the director's report, you see water right No. 27-11373.

That's the Ross Fork Creek water right, is that correct?

A. We must be on a different page.
Q. I'm sorry. I got two documents here.
A. Page 16?
Q. Page 16. You're correct.
A. Yes, I have it.
Q. Okay. Under water right No. 27-11373 there is a remark .x.a.
Would you please describe that remark for the court, and explain its necessity for this proceeding?
A. My understanding of the tribe's desire ,for this water right was to fully utilize the water supply available from the Ross Fork Creek drainage. You notice the source of water is Ross Fork Creek and Ross Fork Basin ground water. The quantity of the water right is 5,000 acre-feet per year for volume. That was estimated best – based on the best hydrology available at the time the agreement was put in place.
This remark provides that if it turns out there is more water available in the Ross Fork Basin than 5,000 acre-feet per year, the tribes could use that water. But the quantity in excess of 5,000 acre-feet that they chose to use would be charged against water right No. 27-11376,

effectively reducing the size of that water right and increasing the size of this water right.
Q. Mr. Shaw, would the purpose of that be to keep the tribal water right within the total cap of water supplied under this agreement to the tribe?
A. Yes. The intent was to have a quantity of water contained within the agreement as a cap, would still provide the tribe with some flexibility on how they were able to use that water right, and provide non-Indian water users protection where they felt they needed the protection.
Q. Mr. Shaw, could this provision be moved under an element of the water right?
A. This provision deals with several elements. Once again, it deals with source. It deals with quantity and points of diversion. So it could be, yes, divided up and placed under those elements.
Q. Okay. Mr. Shaw, then turning next to page 17 of the consent decree, right No. 27-11374?
A. Yes.
Q. That is a water right for Lincoln

Creek, correct?
A. Yes. This water right for Lincoln Creek and Lincoln Creek Basin ground water was developed the same way as the Ross Fork Creek water right.
The 5,700 acre-feet per year was based upon the best estimate of the available water supply for that basin. Yet to provide flexibility for the tribes, if they are able to use more water, they would be able to do so. The amount of water would be taken from or reduce the water right 27-11376 as indicated in the remark .x.a in water right 27-11374.
Q. So, Mr. Shaw, then the testimony you provided with regard to water right No. 27-11373, Ross Fork Creek is applicable to this water right for Lincoln Creek as well; is that correct?
A. Yes, it is.
Q. Turning to page 18 of the proposed consent decree, water right No. 29-00466, that is a water right for Bannock Creek, correct?
A. Yes, it is.
Q. And there are no remarks with respect to that water right, correct?
A. That's correct.

MR. STRONG: For the purpose of moving the proceeding along, counsel would note that water right No. 29-00467 also contains no remarks with respect to the water right.
Q. (BY MR. STRONG) Okay. Turning to page 19 of the consent decree, water right No. 29-12848, that is for Rattlesnake Creek; is that correct?
A. Yes, it is.
Q. Mr. Shaw, there's a remark with respect to that water right denominated .x.a.
Will you please describe that remark and its necessity for this proceeding?
A. Yes. That remark is essentially a provision to subordinate this water right to water rights that were previously decreed from Bannock Creek in the case of United States v. Daniels. That was a previous water right adjudication. It decreed water to both Indian and non-Indian water users.
This particular water right was not included in the decree. And the agreement was the water right could be utilized as long as it did not interfere with water rights that had previously been decreed in Daniels. So this

affects the priority date of this water right.
MR. STRONG: Let the record reflect that water right No. 29-00469 on page 20 of the consent decree contains no remarks.
Likewise water right No. 29-00470 on page 21 contains no remarks.
Water right No. 29-00471 on page 22 contains no remarks.
Water right No. 29-0472 on page 23 of the proposed consent decree also contains no remarks.
29-00473, a West Fork Bannock Creek water right, contains no remarks that appears on page 24 of the consent decree.
Water right No. 29-00474, West Fork Bannock Creek, again contains no remarks. It appears on page 25 of the consent decree.
Q. (BY MR. STRONG) Now, Mr. Shaw, turning to page 25, towards the bottom of the page there's a water right No. 29-12049. The source of water is Bannock Creek.
Is that correct?
A. Yes, it is.
Q. And on page 26 there is a remark denominated .x.a.

Would you please describe that remark to the court and its necessity?
A. Yes. This remark is the same as the last one dealing with Rattlesnake Creek.
This water right is for water from Bannock Creek that was not included in the United States v. Daniels decree. So the purpose of this remark is to subordinate this right to those water rights that were previously decreed in the United States v. Daniels, and grants a water right for all of the water over and above up to the quantity of this water right that is available from Bannock Creek.
Q. Mr. Shaw, also turning to that same water right, I note under element .v.i a reference to three 20-horsepower pumps from the Michaud project.
What is the purpose of that remark?
A. That remark, I believe, under the new statute would be, could be considered explanatory material. It describes information about the point of diversion in section 6 township 7 south range 33 east. I wouldn't see it as essential to the definition of the right.
Q. Mr. Shaw, at the bottom of page 26

there is a right No. 29-12050; and then on page 27 the source is defined as Portneuf River.
Would you please turn to that right?
A. Yes.
Q. Are there any remarks for that right?
A. There are none.
MR. STRONG: Water right No. 29-00231 on page 27, Toponce Creek, the record should reflect that there are no remarks on that water right.
Water right No. 29-00238, Toponce Creek, on page 28 again contains no remarks.
Water right No. 29-12051 on page 29 for Mink Creek contains no remarks.
Q. (BY MR. STRONG) Mr. Shaw, would you direct your attention to the consent decree on page 29, water right No. 27-11375?
A. Yes.
Q. Source is Blackfoot River. On page 30 there are remarks, .x. Under .x – and we will now proceed to go through each one of those with you.
Please describe to the court remark .a and why it is necessary.
A. Remark .a for the Blackfoot River

water right clarifies that this water right is for natural flow of the Blackfoot River up to a maximum of 150,000 acre-feet per year. However, Blackfoot River was also previously decreed. The water rights decreed were for non-Indian water users.
And the intent of this provision is to not interfere, subordinate, if you will, this water right to the non-Indian users with the proviso that the 150,000 acre-foot entitlement for this water right, instead of being taken from natural flow, can be made up by the storage water from Blackfoot Reservoir and Grays Lake.
Q. And, Mr. Shaw, do you believe this provision to be necessary to the agreement?
A. Yes, I do.
Q. And why?
A. This provision protects the non-Indian water users from the Blackfoot – I would say it would be essential to their approval or acceptance of the agreement. Without it, the priority date of this right predates their natural flow rights; and they would have no water.
Q. Mr. Shaw, on page 31, remark .b, would

you please describe that to the court and explain the necessity for that provision?

A. Provision .b, again, was intended to allow flexibility in the exercise of the tribal water rights. And there are certain circumstances when the water supply from the Blackfoot River is very high. It exceeds 150000 acre-feet plus the water supply necessary for the non-Indians.

And the intent of this provision would be to allow the tribes the flexibility to use that water, but charge it against water right 01-10223 which is the Snake River water right, thereby remaining under the total cap of the water supply for the reservation. It would allow the tribes some flexibility to use the water where it's most convenient.

Q. Mr. Shaw, could that provision be moved under an element of the water right?

A. This provision deals with both source and quantity. But it could be moved into those elements.

Q. Mr. Shaw, also stepping back one step, could remark .a be included under an element of the water right?

A. I believe remark .a would need to be included under both priority and quantity of this water right.

Q. Mr. Shaw, turning to remark .c for this Blackfoot water right, would you please describe that remark and why it is necessary to the agreement?

A. Yes. This remark again indicates that this water right along with the Snake River-Sand Creek water right that we talked about earlier, plus the Blackfoot Reservoir water right, plus the Grays Lake water right comprise a single water supply for the project, for the 53,828 acres.

So this remark is the counterpart to a similar remark in the Snake River water right. It's simply tying all of the water supplies together for the project.

Q. Mr. Shaw, again, on page 31 of the proposed consent decree, remark .d, will you please describe that remark to the court, and explain its purpose?

A. Remark .d is the rest of the subordination language that clarifies persons diverting natural flow from the Blackfoot River

prior to January 1 of 1990 that subsequently have the rights decreed in the Snake River Basin Adjudication up to a maximum of 45,000 acre-feet per year will be entitled to continue to divert those water rights even though their priorities are junior to the priority of this natural flow water right.

Q. Mr. Shaw, why is the provision written in the format that it's in now?

A. Well, I see two parts to this provision. The first being essentially the subordination. The second being that the qualification that the subordination is only for up to 45,000 acre-feet per year.

And if the water rights of the non-Indians diverting water from the Blackfoot is determined to be larger than that, this provision leaves the opportunity open to come back and make some adjustments in the Fort Hall agreement to account for more than 45,000 acre-feet being decreed. 45,000 acre-feet was the best estimate we could make based on the information available at the time the agreement was reached.

Q. Mr. Shaw, at the bottom of page 31, remark .e, would you please describe that remark to the court?

A. This is, remark .e is a limitation on the exercise of this right to protect the non-Indian portion of the Fort Hall project.

The Blackfoot water supply goes three different ways in a manner of speaking. There's the water supply for the tribal lands, which this water right is intended to provide a portion of. There is a water supply for non-Indian non-project water users, sometimes referred to as the north side users because they physically are located on the north side of the Blackfoot River. And there is a portion of the water supply for the Fort Hall project non-Indian lands.

The last provision, .d, that we spoke of was with regard to the non-Indian non-project, that is, north side water users. This provision .e is for the non-Indian project users, and to protect their interests, and limit the exercise of this right to be sure this right doesn't interfere with their interests.

Q. Mr. Shaw, the proposed consent decree contains water rights for the non-Indian portion of the project; is that correct?

A. That is correct.
Q. Mr. Shaw, does this provision relate – how does this provision relate to those rights?
A. This provision relates to the non-Indian project portion of the water right from the Blackfoot River, and essentially guarantees the exercise of that water right won't be impaired by this water right.
Q. Mr. Shaw, could this provision be placed under another element of the water right?
A. Perhaps this could be placed under priority; but it really goes to the, to the exercise of this right, to when, to when this right is called for delivery. Perhaps priority, but it goes more to administration.
Q. Okay. Mr. Shaw, turning your focus now to the consent decree, page 40, comment .f.
A. I believe that's page 32.
Q. Oh, I'm sorry. Page 32. Would you please describe that remark and its necessity for this agreement?
A. This remark is a saving provision for this water right, the water right from the Blackfoot Reservoir, and the water right for

Grays Lake.
Best information available indicates the natural flow of the Blackfoot River, Blackfoot Reservoir, Grays Lake will provide to the tribes 150,000 acre-feet a year. If that water supply won't actually provide that amount of water, this provision allows the exercise of this right from ground water to make up the balance of the 150,000 acre-feet.
It's the reverse, if you will, of some of the language in the other water rights we've described where the intent was to keep the total water supply within the cap included in the agreement. This provision insures access to a water supply to reach the cap, to be sure the supply is actually available in wet water.
Q. Okay. Mr. Shaw, could this provision be included under an element of a water right – an element of this water right?
A. I believe it would need to be under source and quantity, if it were to be moved under elements.
Q. What about diversion volume?
A. That would be quantity, yes.
Q. Mr. Shaw, turning now to page 32 of

the proposed consent decree, water right No. 27-02007, that's a Blackfoot water right, correct?
A. Yes, it is.
Q. On page 33 we have a section for this water right denominated as .x, remarks.
Would you please describe for the court now remark .a, and why it is necessary in this agreement?
A. This water right is for Blackfoot Reservoir. It's for the storage of water on the Blackfoot River.
This is the companion remark to the last water right that was natural flow from the Blackfoot River, saying that this water right along with the Grays Lake water right can be utilized to make up the 150,000 acre-foot water supply from the Blackfoot system.
Q. And, Mr. Shaw, could this remark be put under an element of the water right?
A. It could be put under quantity and source, I believe, since it involves the Grays Lake water right. It also talks about the situation where there might be excess water in the Blackfoot, and that water could be utilized

but charged against the Snake River right. So we need to refer to source, Snake River, as well.
Q. So it's a further definition or clarification of the water right?
A. Yes.
Q. On page 33, Mr. Shaw, there is a remark .b.
Would you please describe that to the court, and explain why it's necessary in the agreement?
A. Yes. This is the combined water right language again that we saw in the Snake River-Sand Creek water right to Blackfoot natural flow water right, indicating that the water rights from those sources plus Grays Lake can be utilized to irrigate the 53,828 acres within the Fort Hall project. So it's a further definition of source and place of use.
Q. Thank you, Mr. Shaw. At the bottom of page 33, remark .c to this Blackfoot River water right, would you please describe that for the court?
A. Yes. This water right, similar to the – or pardon me. This remark, similar to the remark in the natural flow water right for the

Blackfoot River, is intended to protect the Fort Hall project non-Indian water users. So this provision is a limitation on the exercise of the right to protect the Blackfoot water right for the non-Indian project water users.

Q. Then is it correct to say, Mr. Shaw, that remark .e, .x.e in water right 27-11375 in this remark serve the same purpose?

A. That's correct; they do.

Q. Mr. Shaw, on page 34 of the consent decree there is a water right No. 25-02160. The source of water is Grays Lake.

Would you turn to that, please?

A. Yes.

Q. Under this Grays Lake water right on page 35 we have a number of remarks that I would like to now ask you questions about.

Remark .x.a on page 35, would you please describe that to the court, and the reason for its inclusion?

A. Yes. Remark .x.a is the companion to remark .x.a on the last water right we discussed, the Blackfoot storage.

It indicates that this water right can be used along with the Blackfoot storage right to

make up the 150,000 acre-foot water supply of the tribes from the Blackfoot River. And if excess water is available from Grays Lake and the Blackfoot River, if that water is utilized, it's charged against the Snake River-Sand Creek right.

Q. Okay. Mr. Shaw, could this remark be put under an element of the water right?

A. Yes. It would be the same as before. It would need to go under source and quantity.

Q. Okay. Mr. Shaw, on page 35, remark .x.b, would you please describe that remark and its reason for its inclusion?

A. Yes. Remark .x.b is the companion to remark .x.b from the last water right, the Blackfoot storage.

It describes the combined use of the water right from Sand Creek-Snake River-Blackfoot-natural flow-Blackfoot storage and this water right to provide the water supply for the project, 53,828 acres.

Q. Mr. Shaw, could that remark be included under an element of this water right?

A. Yes. It would need to be under source and place of use.

Q. Mr. Shaw, again, on page 35,

remark .x.c, will you please describe that remark for the court and the purpose of its inclusion?

A. Remark .x.c is again the companion to remark .x.c from the Blackfoot storage. This right protects the non-Indian project water users supplied from the Blackfoot system.

Q. And could that remark be placed under an element of the water right?

A. Perhaps priority. This remark seems to go more to the administration of the right than defining the elements of the right.

Q. Mr. Shaw, on page 36 of the consent decree we have water right No. 27-11376. It's source is ground water within the reservation.

Will you please turn to that?

A. Yes.

Q. Over on page 38 of the proposed consent decree we have remarks to that ground water right.

Turning first to remark .x.a, will you please describe that remark and the necessity for its inclusion?

A. Remark .x.a is the companion to the remarks in the Ross Fork and Lincoln Creek water rights.

If the water supply in those basins is in excess of the amount described in those water rights, that excess can be utilized, but is utilized under the provisions of this water right rather than the specific Ross Fork or Lincoln Creek water rights. So this remark acknowledges that excess use, if you will, that will be charged to this water right.

Q. Mr. Shaw, could that remark be placed under an element of this water right?

A. I believe it would need to go under source and quantity.

Q. Mr. Shaw, on page 39, remark .x.b, would you please describe that remark?

A. This remark refers to the nine wells used to supplement the surface water supply for the Michaud division. I believe under the new statute this would be termed explanatory material; and I don't believe it would be necessary to define the elements of the water right.

Q. Okay. Mr. Shaw, now turning to comment .x.c, would you please describe that remark to the court?

A. Remark .x.c refers to specific lot

numbers within the Pocatello town site. I see that as further description of points of diversion and places of use for this water right.

MR. STRONG: Your Honor, may I approach the witness, please?

THE COURT: You may, counsel.

Q. (BY MR. STRONG) Mr. Shaw, I just handed you a document.

Will you please identify it for the court?

A. Title of this document is "Stipulation and Order Resolving Objections to the Director's Report Parts I, II & III for the 1990 Fort Hall Indian Water Rights Agreement and the Fort Hall Irrigation Project."

MR. STRONG: Your Honor, this document is one that has been filed with the court; and we would ask that it be made part of this record marked as Exhibit 2.

THE COURT: Very well. We will mark it as Exhibit 2; and it shall be admitted into evidence.

MR. STRONG: Thank you, Your Honor.

(State's Exhibit 2 MARKED & ADMITTED)

Q. (BY MR. STRONG) Turning to the

stipulation, Mr. Shaw, I believe there is a paragraph numbered 3 that refers to remark .x.c to water right 27-11376; is that correct?

A. Yes, it is.

Q. Mr. Shaw, would you describe that paragraph and what it says in relationship to this particular element that we just described, page 39?

A. This paragraph adds a sentence to what appeared in the director's report. That sentence reads: "Water diverted or withdrawn under this right from diversion points or structures located on said lots shall only be used for domestic, commercial, municipal or industrial uses occurring on any said lots."

Q. Okay. Mr. Shaw, what is the effect of that additional sentence?

A. It would be a further description of the uses that could be made of the water under this water right on these specific lots or locations.

Q. And, Mr. Shaw, is that necessary for this agreement?

A. It clarifies the allowed uses on those specific places of use. If we look at the water

right in total, the water right shows either irrigation or DCMI which is defined as domestic, commercial, municipal or industrial.

So this added language would limit the possible uses for this water right on specific places of use. So, yes, it would further define the water right.

Q. And, Mr. Shaw, could this remark .c be placed under an element of a water right?

A. It would need to be placed under both purpose of use and place of use since it really ties those two elements together for these specific places of use.

MR. STRONG: Your Honor, for purposes of the record, counsel would advise the court that this is a stipulation that has been entered into with a number of parties to settle objections to the water rights. It's been agreed to by all the parties to the agreement; and we have no objection to the modification that's contained in the stipulation.

THE COURT: Thank you, counsel.

Again, just to confirm, that sentence to be added comes from the stipulation, actually appears on page 4 at the top of the page, that last

sentence; is that correct?

MR. STRONG: Correct, Your Honor.

Q. (BY MR. STRONG) Mr. Shaw, turning again to the consent decree on page 39, we're still working through water right No. 27-11376. We have comment .d.

Would you please describe comment .d to the court?

A. Comment .d describes allotments that are additional places of use and points of diversion that can use water under this water right. So it would be further definition of points of diversion and places of use.

Q. Thank you, Mr. Shaw. On page 39 we have water right No. 29-12052. Source of water, Bannock Creek Basin ground water.

Is that correct?

A. Yes, it is.

Q. And, Mr. Shaw, on page 40 we have remarks to that Bannock Creek ground water, specifically remark .x.a.

Will you please describe that remark to the court, and explain its purpose?

A. Remark .x.a describes a limitation on this water right and the tribally-held water

rights from surface water for the Bannock Creek Basin, and specifies that the combined diversion from the Bannock Creek Basin for tribal purposes is limited to 48,500 acre-feet per year.

Q. And could that remark be placed under an element of the water right?

A. Could be placed under source and quantity, even though this water right refers to Bannock Creek Basin as specifically ground water. So -- and this remark refers to both ground and surface waters. I think it would need to go under both.

Q. Mr. Shaw, comment .x.b on page 40, would you please describe that to the court and its purpose?

A. This remark is like those we discussed for Ross Fork and Lincoln Creek basins. That in the event the Bannock Creek Basin is able to provide more than 48,500 acre-feet of water and the tribes elected to use that additional water, they could do so; but the quantity would be charged against water right 27-11376, again allowing maximum flexibility but reducing the total water supply to the cap provided in the agreement.

Q. So, Mr. Shaw, what elements of the water right does that relate?

A. This relates to source and quantity.

Q. On page 40, remark .x.c, would you please describe that provision to the court and the reason for its inclusion?

A. This provision is again a subordination of this water right to existing ground water users. This is comparable to the subordination on the Blackfoot River to the Blackfoot non-Indian non-project or north side users.

Here, the amount of water that's being subordinated to, if you will, is estimated to be 2400 acre-feet per year. But the agreement and the proposed -- the proposal here allows that if the quantity of water decreed in the Snake River Basin Adjudication is in excess of 2400 acre-feet per year, it would be possible to reopen and adjust the agreement to make the water supply be whole for the tribes.

Q. Mr. Shaw, could that provision be included under an element of the water right?

A. The first part of that provision, it deals with priority. The second part, once the

final decree is entered in the adjudication, will be resolved and wouldn't need to live on.

Q. Mr. Shaw, now turning to page 51 of the consent decree -- or excuse me, page 41 of the consent decree. We have a provision entitled "B., Federal Contract Storage Space Held by the United States for the Tribes."

Would you please describe that provision and the reason for its inclusion?

A. This provision makes reference to storage water in reservoirs of the Bureau of Reclamation held by contracts with Bureau of Indian Affairs for the Michaud division of the Fort Hall project.

The reason it's included in here is there was concern by all parties that the Fort Hall agreement be a package that described the water rights for the reservation. And even though these water rights are held by the Bureau of Reclamation and will be determined separately, this is an essential part of the water supply for the reservation; and without it, if one were to look at the agreement, there would simply be something missing, that this portion of the water wouldn't be identified. So I think its inclusion

here, even though it's not defining a particular water right, is important to understand the water supply for the reservation.

Q. Thank you, Mr. Shaw. Now, turning to page 41 of the consent decree, we now have a section entitled "C., General Provisions Applicable Only to Water Rights Held by the United States for the Benefit of the Shoshone-Bannock Tribes and Fort Hall Indian Reservation;" is that correct?

A. That's correct.

Q. Okay. Mr. Shaw, I would like to now move through those provisions and have you explain their effect, and then the reason for their inclusion.

Turning first to general provision No. 1, would you please describe that provision?

A. General provision No. 1 allows the use of natural flows on waters arising wholly within or traversing only reservation lands to be used for in-stream flows. So it would add that purpose of use to those sources that meet this definition for the tribal water rights.

Q. So it relates to purpose of use, correct?

A. Purpose of use as to specific sources of water. It's a limit to sources just arising on or traversing the reservation.

Q. Okay. Thank you, Mr. Shaw.

Now, Mr. Shaw, general provision No. 2, would you please describe that?

A. General provision No. 2 deals with the transfer of lease or lease of water within the reservation. The provisions of the agreement needed to deal with those areas of administration where there was some dispute of authority for administration without conceding anyone's authority or sovereignty, this transfer provision was agreed to that would allow the tribes and the United States the flexibility they felt they needed to utilize their water supply, and maintain the protection for the non-Indian water users outside the reservation.

Q. So, Mr. Shaw, is it correct your testimony is that this is a protection against injury to other water users by the way these rights are exercised?

A. By the way these rights are exercised and administered, yes.

Q. Mr. Shaw, turning to general provision

No. 3 on page 42, would you please that provision?

A. This provision deals specifically with changes in points of diversion for the Snake River-Sand Creek water right, water right No. 01-10223. That water right, since it is a Snake River water supply, was crucial to non-Indian water users and the impact that it would have on their water given the very early priority date for this water right. So this provision was, again, reached as a compromise for the flexibility that could be afforded the exercise of this right, and still protect non-Indian water users.

Q. Mr. Shaw, then is it correct that there's a dispute as to whether there's any statutory law that would cover this issue?

A. Yes, there is.

Q. General provision 4, Mr. Shaw, would you please describe that provision and its purpose?

A. General provision No. 4 outlines the procedure that would be followed if the point of diversion for the Snake River water right were to be changed. And this procedure sets out the

steps that people felt would be necessary in order to allow flexibility for the tribes, would protect the interests of the non-Indian water users.

Q. Okay. And, again, is there a dispute with respect to whether there is statutory authority under either federal or state law to cover this issue?

A. Yes, there is a dispute.

Q. Mr. Shaw, on page 43 of the consent decree there is a general provision No. 5.

Would you please describe that to the court, and its purpose?

A. General provision No. 5 is continuing with the procedure for changing the point of diversion for the Snake River water right. This sets out the procedure if a water user feels they're injured by the change and what they will need to do in order to exert that injury or protect their water right depending upon your point of view.

Q. And, again, is this another provision that was disputed as to whether there's applicable law to govern those issues?

A. Yes, it's disputed.

Q. Mr. Shaw, on page 44, general provision 6, would you please describe that provision and its necessity?

A. That provision is a limitation on the exercise of the tribal water rights. It sets out that they cannot be leased, rented, transferred or otherwise used off the reservation. So, once again, it's a limitation on the exercise of the tribal water rights.

Q. And that provision was included as a protection against injury to other water users, is that correct?

A. Yes, it is.

Q. Mr. Shaw, on page 44 of the consent decree, general provision No. 7, would you please describe that provision to the court, and the necessity for its inclusion?

A. Yes. This provision allows the use of water essentially under any tribal water right for stock watering purposes. That's a common situation where stock will utilize water where they find it. And this simply acknowledges and preserves that right with the proviso that the Snake River water right cannot be exercised specifically for stock water outside the

irrigation season.
Q. Mr. Shaw, could that be included under an element of a water right?
A. It could be included under purpose of use for all of the water rights essentially, yes.
Q. Would it essentially require a replication of this provision in each one of those rights?
A. It would, yes.
Q. Mr. Shaw, general provision No. 8, would you please describe that to the court?
A. This is a proviso allowing water rights within the consent decree to be used for hydropower, the companion, if you will, to the stock-water-right provision. Simply acknowledging the right to do that as long as the remainder of the elements of the water right are preserved.
Q. Okay. And, again, this, the same provision would apply – could be included under the element of a water right, but would have to be replicated in each one; is that correct?
A. That's correct.
Q. Mr. Shaw, general provision No. 9, would you please describe that provision?

A. General provision No. 9 goes to preserving the cap on the water supply for the Fort Hall Reservation. And the provision essentially acknowledges that it's possible an individual will be decreed a water right for water that's already included in the agreement and this consent decree. And if that were to happen, then the water rights in the agreement and the consent agreement would be reduced by an equal amount so that the cap for the reservation remains the same as was arrived at in the agreement.
Q. So, Mr. Shaw, this essentially voids the decreeing of a double right to the same acreage of land; is that correct?
A. That's correct.
Q. And, Mr. Shaw, would that provision have any operative effect at the conclusion of the adjudication?
A. At the conclusion of the adjudication, no, we would know what rights have been decreed; and if adjustments needed to be made, they could be made. And once the decree is final, there would be no further need for it.
Q. Okay. Mr. Shaw, general provision

No. 10, would you please describe that to the court?
A. General provision No. 10 deals with the administration of water rights within the reservation. It speaks both to administration of water rights by the tribes and administration of water rights by the State.
Again, there is a dispute as to authority, who may do what. This provision was reached to meet the necessities of administering the various water rights under terms that were acceptable to the parties.
Q. Mr. Shaw, do you have any knowledge of whether this provision – well, strike that.
Mr. Shaw, is it correct that you just testified that there's a disputed issue as to whether there's statutory or federal – state or federal authority that would cover this particular provision?
A. It is disputed, yes.
Q. Thank you. Mr. Shaw, turning now to general provision No. 11, would you please describe that provision to the court, and explain its purpose?
A. It's administration of water rights on

the Blackfoot River. The Blackfoot River forms the boundary of the reservation for some distance, is not included as a water supply that would be administered under this previous general provision No. 10. Attempts to write at administrative methodology for the Blackfoot River as a part of the negotiations were not successful.
What was successful is about 100 years of history of people being able to distribute the water of the Blackfoot River and get along in doing so. So the agreement simply acknowledged that; and the purpose of this provision is to further acknowledge that administration on the Blackfoot River would continue as it has in the past.
Q. Essentially it remained an issue that is not submitted to the court for final resolution at this time?
A. That's correct.
Q. Mr. Shaw, general provision No. 12, would you please describe that to the court as well?
A. General provision No. 12 deals with administration of water from the, the water right

from the Snake River. Once again, the Snake River point of diversion is off the reservation; so it doesn't come under general provision No. 10.

In this case, the negotiators were able to reach an agreement about how administration of that water right would take place. It is a disputed issue as to the authority of various parties to administer that water right. So this provision is an agreement as to how the water right could be issued and avoid resolving that dispute.

Q. Mr. Shaw, on page 48 we have general provision No. 13.

Would you please describe that to the court, and its purpose?

A. General provision No. 13 describes a procedure by which the tribes could exercise the flexibility that's provided in this agreement for the transfer of lease, transfer or lease of their water rights within the reservation. Or if they want to develop additional water, that's provided for in the agreement. And it's a notice procedure with the opportunity for notice to the world essentially to be given by the tribes as

they exercise their water rights.

Q. And, again, is this a disputed issue as to who has – or which government has authority to administer the rights?

A. Yes, it is a disputed issue.

Q. Mr. Shaw, turning to item No. 14, again, that's a provision that is compatible or companion to item No. 13; is that correct?

A. It is the companion to item No. 13. And while the State has obligation to give notice for new appropriations, this obligation that's described in this proposed decree is slightly different than the statutory obligation. It's tailored, if you will, to meet the needs of the agreement.

Q. And, again, it resolves the disputed issue as to the relative authorities of the governments, correct?

A. That's correct.

Q. Mr. Shaw, we've now spent a fair amount of time going through these administrative provisions.

In your opinion are these provisions necessary in order for the department to be able to enforce this decree?

A. Yes, they are.

Q. And why is that?

A. As indicated, many of the issues resolving administration are disputed as to who has authority to do what. These provisions resolve those disputes for purposes of administering the water rights for the Fort Hall Reservation both for the tribes and for the State.

Q. Mr. Shaw, in the absence of these provisions, would you be able to administer this decree?

A. In the absence of these provisions, my belief is there would be a great deal of litigation to resolve the disputes before administration would take place. I suspect our attempts at administration would be met by court injunctions or whatever other procedure to bar the State from administering these water rights until those disputes were finally resolved.

Q. Mr. Shaw, turning now to general provision No. 15, would you describe that provision to the court, and its purpose?

A. General provision No. 15 reserves to the tribes the right to develop geothermal water

of a temperature of 212 degrees Fahrenheit or higher. Under state law, administration of geothermal waters at 212 degrees or higher is not dealt with under the water laws. It's dealt with under separate geothermal law and, as such, would in our view not be considered a definition of a water right.

Q. Thank you, Mr. Shaw. Okay. Mr. Shaw, we're now at page 50 of the proposed consent decree. If you can turn to that page, we have a section entitled III.

Would you please describe that section, the general nature of that section?

A. This next section contains the listing of water rights for the non-Indian portion of the Fort Hall project. Once again, there's lots of pieces here. This is not water rights for the Blackfoot-non-Indian-north-side users. These are just water rights for the non-Indian project users and for the Bureau of Indian Affairs, Fort Hall agency.

Q. Thank you, Mr. Shaw. At the bottom of page 50 we have water right No. 29-12558. The source is Bannock Creek.

Is that correct?

A. Yes.
THE COURT: Excuse me, Mr. Strong. I think we should take a ten-minute recess; and then we'll proceed with this next section.
MR. STRONG: Okay. Thank you, Your Honor.
THE COURT: We'll be adjourned for 10 minutes.
(DISCUSSION HAD OFF THE RECORD)
(RECESS)
THE COURT: Mr. Shaw, making yourself comfortable. Mr. Strong is back at the podium. We'll continue with direct examination.
MR. STRONG: Thank you, Your Honor.
Q. (BY MR. STRONG) Mr. Shaw, we had left off on page 50 of the consent decree. And we were just beginning to start through the water rights that are set forth for the non-Indian portion of the project as well as the BIA lands within the project. And I had referred you to right No. 29-12558 on page 50.
A. Yes.
Q. That's a Bannock Creek water right. On page 51 of the consent decree, there again are remarks under .x. I would like to proceed

through those starting first with remark .a on page 51.
Would you please describe that remark and its purpose?
A. Yes. This remark is a proviso to avoid having duplicate water rights be decreed for the 20 acres for this water right. Again, it makes a provision that if a non-Indian water user is decreed a water right for this same purpose, then an adjustment will be made in the final decree so there isn't a duplicate water right for this land.
Q. If I understand your testimony, it would be necessary in order to avoid a duplicate decree of a water right; so it relates to each of the elements; is that correct?
A. That's correct.
Q. Mr. Shaw, remark .b on page 51, would you please describe that remark to the court, and its purpose?
A. Yes. This land is served through what's described here as the Pevo Ditch as are other tribal lands. And this water right and the water rights for the tribal lands are necessarily used in a rotation method in order to adequately

irrigate both these lands and the tribal lands.
This remark is a recognition and acknowledgment of that rotation between this non-Indian water right and the tribal water rights.
Q. Now, Mr. Shaw, would this rotation procedure be intended to apply into perpetuity?
A. Yes, it would.
Q. And how does it relate to the elements of the water right?
A. Well, it relates to the quantity and place of use of this water right and the other water rights that are enumerated there. And the practice, customary and ordinary practice is the water rights for these – the water for these various water rights is diverted into the Pevo Ditch; and then the users on Pevo Ditch will take the water supply, irrigate their land and then let the water supply go to the next user. The next user irrigates their land in a rotational scheme. So it applies to quantity and place of use.
THE COURT: Excuse me, Mr. Strong. Does it also relate to priority?
A. Judge, in this case I believe it would

because some of the Bannock Creek rights are decreed with different priorities than the 1867 priority for most of the tribal rights.
THE COURT: Thank you.
Q. (BY MR. STRONG) Okay, Mr. Shaw. Turning to page 52 of the consent decree, water right No. 01-10248 on the – and it's a Snake River water right.
A. Yes.
Q. Would you please describe how this water right relates to the tribal water right from the Snake River?
A. This water right is diverted at the same point of diversion as the tribal water right, but with a different priority. This water right has an 1891 priority whereas the tribal right has an 1867 priority.
It's then conveyed through the same canal. It's injected into the Blackfoot River along with the tribal water right, rediverted into the Main and North Canals and distributed through the Fort Hall project system in the same manner as the tribal water right.
Q. Okay. And what's the basis of this water right?

A. This water right was decreed in the Rexburg decree as a water right developed by, I believe it was the Idaho Canal Company as a state-law-based water right.

Q. Okay. Mr. Shaw, in the Snake River water right we again have remarks. They are appearing on page 53.

And would you now please describe remark .a to water right No. 01-10248 and explain its purpose?

A. Yes. Remark .a refers to a combination of this water right with water right No. 27-11560. That water right 27-11560 is the non-Indian Sand Creek water right.

It was necessary to separate those water rights for the non-Indian water users because of a difference in priority with an 1891 priority and a later priority for Sand Creek, whereas the tribal water right was all 1867. So this language here describes that this water right from the combined sources is quantified at 260 cfs and 60,000 acre-feet per year.

Q. Mr. Shaw, you said "non-Indian." Do you mean non-Indian project lands?

A. Non-Indian project lands, yes; that's

correct.

Q. And this water right is proposed to be decreed in the name of the United States, is that correct?

A. Yes. This water right will be decreed in the name of the United States.

Q. And, Mr. Shaw, this, is this -- where would this water be used? Within the reservation?

A. This water would be used on non-Indian lands. There may be some non-Indian lands within the exterior boundaries, but it's all non-reservation land at this point.

Q. Non-Indian lands, does it have any relationship to the project itself?

A. These lands would be Fort Hall project lands entirely.

Q. Mr. Shaw, comment No. .a, could that be included under an element of a water right?

A. It would -- or could be included under the quantity and the source elements.

Q. Okay. And, Mr. Shaw, comment .b on page 53, would you please describe that comment, and explain its purpose?

A. Yes. .b is the provision to avoid

having duplicate water rights decreed for the same lands. Simply a provision that if a non-Indian water user has water decreed for any of the 12,667 acres served by this water right, this water right would be adjusted accordingly in the final decree so there's no duplicates.

Q. Thank you, Mr. Shaw. Mr. Shaw, comment .c on page 53, would you please describe that comment and its purpose?

A. Yes. Comment .c acknowledges a provision back in water right 01-10223 which is the Snake River-Sand Creek tribal water right.

The tribal water right was initially limited to 100,000 acre-feet per year and 360 cfs, I believe it is. That water right ultimately is determined to be 470 cfs and 115,000 acre-feet per year.

One of the methods that water right, the tribal water right, can be increased is by a reduction in this water right which is part of the natural process that's occurred in the past within the project. As project lands have gone out of production, the Bureau of Indian Affairs has taken the water from those nonproductive lands and moved them to other lands served by the

project. Simply a transfer, if you will, within the project administration.

Now since the project is served by this water right and a tribal water right, this acknowledges that if that transfer occurs in the future, taking water from non-Indian lands to Indian lands, that there will be an adjustment in the water rights, the respective water rights as well.

Q. So, Mr. Shaw, how does this relate to the elements of the water right?

A. This affects the quantity and the place of use of this water right.

Q. Thank you. Mr. Shaw, page 53, comment .d, would you please describe that to the court, and its purpose?

A. Yes. The non-Indian portion of the project is served by this water right from the Snake River; the water right from Sand Creek, 27-11560; and water right from Blackfoot Reservoir, 27-11561; and a water right from Grays Lake, 25-13615. This provision acknowledges the conditions that those water rights used together are intended to provide one water supply for the project with a consumptive use up to

33,222 acre-feet per year.

Q. So, Mr. Shaw, what elements of the water right do these relate to?

A. They relate to source and consumptive use.

Q. And is this remark necessary for the department to administer the right?

A. Yes.

Q. Mr. Shaw, on page 67, right No. 27-11560, the source is described as Sand Creek. I would like you to now turn to that water right.

A. Yes. I believe that's on page 53.

Q. Oh, excuse me, 53. On page 54 of that right, we have a remarks section denominated .x.a.

Would you please describe paragraph .a and its purpose?

A. Paragraph .a is the companion to paragraph .a from the previous right in which its acknowledged that the Snake River right and the Sand Creek right together are limited to 260 cubic feet per second and 60,000 acre-feet per year.

Q. So, Mr. Shaw, your testimony with

respect to the Snake River water right subsection .a would be the same with respect to this right?

A. That's correct.

Q. Mr. Shaw, on page 55, paragraph .b, would you please describe that paragraph?

A. Yes. Paragraph .b is the companion to paragraph .b from the Snake River right, the provision to avoid duplicate water rights being decreed for the same land. That if a non-Indian water user is decreed a water right for the land, these 12,000 acres, that this water right would be adjusted accordingly.

Q. Mr. Shaw, would your testimony with respect to the Snake River water right and this provision be applicable to this right as well?

A. It would be the same, yes.

Q. Mr. Shaw, on page 55, would you please describe remark .c and its purpose?

A. Remark .c is the same as remark .c from the Snake River water right, 01-10248. It acknowledges that as non-Indian project lands are taken out of production the tribal Snake River water right can be increased by a comparable amount.

Q. And, Mr. Shaw, would your testimony with respect to the Snake-River-water-right provision be applicable to this provision as well?

A. It would be the same, yes.

Q. On page 55, would you please describe remark .d and its purpose?

A. Remark .d, once again, is the same as remark .d from the previous Snake River water right. It simply acknowledges that the water supply for the non-Indian portion of the project comes from the Snake River, Sand Creek, Blackfoot River and Grays Lake. The combined rights make one water supply for the lands, and their consumptive use is limited to 33,222 acre-feet per year.

Q. Mr. Shaw, would your testimony with respect to this provision on the Snake River water right be applicable to this right as well?

A. Yes, it would.

Q. On page 55, would you please describe remark .e?

A. Yes. Remark .e for this water right refers to remark .x.d for water right 01-10223. Remark .x.d that I talked about earlier today is

the exchange provision for Sand Creek water and the limitations of the Equalizing Reservoir, and how water can be made available from storage in exchange with the North Side Canal for natural flow from Sand Creek to satisfy the project water right.

Q. Mr. Shaw, what element of remark .e would this relate to?

A. This would refer to quantity.

Q. And, Mr. Shaw, I believe I forgot to ask you what element would remark .d refer to?

A. Remark .d would refer to source and to consumptive use.

Q. On page 55 there is a new right, right No. 27-11561. The source is Blackfoot River. I would like to turn to that right now and review it.

A. Yes.

Q. Okay. On page 56 to that Blackfoot water right there is a remark section.

Starting first on the bottom of the page 56, remark .a, would you please describe remark .a and its purpose?

A. Remark .a is similar to the provision from the two prior remarks to avoid having

duplicate water rights decreed for project lands. It simply acknowledges that if a non-Indian water user is decreed water for project lands this water right would be adjusted accordingly so that there would not be duplicate water rights for the same land.

Q. Thank you. On page 57, Mr. Shaw, remark .b, would you please describe that to the court, and explain its purpose?

A. This remark .b is the companion to remark .d from the two previous rights that acknowledges the water supply for the non-Indian portion of the project. It's made up from the Snake River, Sand Creek, Blackfoot storage and Grays Lake. And those water rights make one water supply for the project lands with an annual consumptive use volume of 33,222 acre-feet per year.

Q. Thank you, Mr. Shaw. Remark .c on page 57, would you please describe that remark and its purpose?

A. Remark .c specifies the quantity for this water right, 25,500 acre-feet, and that this amount, quantity is the combined supply from this right from the Blackfoot River and this supply

from right 25-13615 from Grays Lake.

Q. And, Mr. Shaw, could that provision be under an element of this water right?

A. It deals with quantity and source.

Q. On page 57, would you please explain remark .d and its purpose?

A. Remark .d acknowledges the physical limitation of storage in Blackfoot Reservoir at 348,000 acre-feet. And that would be a combined storage capability under this right and right No. 27-02007, which is the tribal water right for storage in Blackfoot Reservoir.

Q. What element does this describe, Mr. Shaw?

A. Goes to quantity.

Q. Again on page 57, remark .e, would you please describe remark .e and its purpose?

A. Remark .e is a companion remark to the limitation on the exercise of the Blackfoot storage right, the tribal right, to protect the non-Indian project lands. So here it's the other side of that exercise of the right indicating that the non-Indian project lands get the first 25,500 acre-feet of water available from Blackfoot Reservoir and Grays Lake.

Q. Mr. Shaw, what element of the water right does this provision relate to?

A. It could go to priority; but once again, it's primarily the exercise or the administration of the right.

Q. So it would be a limitation on the exercise of the right?

A. Yes, that's correct.

Q. And what is the purpose of that limitation?

A. The purpose of the limitation is to guarantee the tribal water rights won't interfere with the water supply for the non-Indian project lands up to this supply, 25,500 acre-feet per year.

Q. On page 57, Mr. Shaw, we have water right No. 25-13615. The source is Grays Lake. I would like to turn to the remarks for that particular water right which appear on page 59.

A. Okay.

Q. And, again, working through these provisions, would you please describe the purpose of remark .a and the reason for its inclusion?

A. Yes. Remark .a is the companion to remark .a from the previous right. It would

avoid duplicate rights being decreed for project lands; acknowledges that if a non-Indian water user is decreed water for project lands, there will be an adjustment in this right to avoid having duplicate rights. And it would – or goes to the definition of the quantity of this right.

Q. And it would serve the same purpose as you'd previously testified with respect to the other rights, is that correct?

A. That's correct.

Q. On page 59, remark .b, would you please describe that remark and its purpose?

A. This remark .b is a companion to remark .b from the previous right. It acknowledges that the water supply from Snake River, Sand Creek, Blackfoot and Grays Lake is the water supply for the project lands. And the annual volume of consumptive use from these rights is 33,222 acre-feet per year.

Q. And that provision is a companion provision to the prior rights, is that correct?

A. Yes, it is.

Q. And it serves the same purposes?

A. Yes, it does.

Q. Would you please describe remark .c on

page 59?
A. Remark .c is the companion to remark .c from the previous right. It acknowledges that the water supply the make up 25,500 acre-feet of water for the non-Indian project lands comes from Grays Lake and Blackfoot Reservoir under right 27-11561.
Q. And is that a companion provision as well?
A. Yes, it is.
Q. And does it serve the same purposes as in the other rights?
A. Yes, it does.
Q. Mr. Shaw, please describe remark .d on page 59?
A. Remark .d is an acknowledgment of the physical limitations, this time of Grays Lake and its ability to store 100,000 acre-feet of water, and acknowledges that the volume of water stored under this right and right 25-02160, which is the tribal right for Grays Lake, is limited to 100,000 acre-feet of physical space.
Q. And to which element of the water right does this provision relate?
A. To quantity.

Q. And is it a further definition of quantity?
A. Yes, it is.
Q. Mr. Shaw, on page 59, please describe remark .e and its purpose?
A. This remark .e is the same as remark .e from the previous water right for Blackfoot storage. And it acknowledges the limitation placed on the right, on the tribal right for Grays Lake to not be exercised to interfere with the non-Indian project lands; indicates that the first 25,500 acre-feet of water available from Blackfoot Reservoir and Grays Lake will be used on non-Indian project lands. So it goes to the exercise of this water right.
Q. Thank you, Mr. Shaw. At the bottom of page 59 we have water right No. 29-12559; and its source is ground water. I would like to turn now to the remarks to that particular water right which appear on page 60 and first have you describe remark .a and its purpose.
A. Remark .a is the limitation on avoidance of duplicate water rights being decreed. It's the same as remark .a on the

previous rights that we've been discussing for non-Indian project lands, and would serve the same purpose here.
Q. Mr. Shaw, there is a remark .b. Would you please describe that remark and explain its purpose?
A. Remark .b describes the physical capacity of the pumps for this water right. I believe under the new statute it would be explanatory material. I don't know that it goes to the definition of the elements.
Q. Thank you, Mr. Shaw. On page 60, right No. 29-12560, again as a ground water right. And I would like to turn your attention now to the remarks to that particular water right appearing on page 61 and 62.
Please describe the remark .a on page 61 and its purpose.
A. Remark .a acknowledges that this land is served by this water right and water from the Portneuf River. The Portneuf River is water that's provided as part of the Michaud exchange and goes back to that federal contract storage that we've mentioned earlier as being part of this entire package.

Remark .a simply acknowledges that this water right is used in combination with water under the Michaud exchange, and that this water right plus the water from the Portneuf River is a single water supply for these lands.
Q. Mr. Shaw, is this arrangement that you were just describing from the Michaud agreement one that's intended to exist in perpetuity?
A. Yes, it is.
Q. And, Mr. Shaw, how does this particular provision relate to the elements of a water right?
A. It addresses the source and the quantity.
Q. Does it act as a limitation on those?
A. Yes, it does.
Q. Mr. Shaw, on page 62, again, we have remark .b.
Would you please describe the purpose of remark .b and its inclusion in this decree?
A. This remark .b is a further acknowledgment of the two water rights that -- or the two water supplies that provide water for these lands. The intent of this right is to supplement the surface water with the exercise of

the right within the discretion of the project.
Q. Okay. And what element of the right does this relate to, Mr. Shaw?
A. Well, it would relate to the surface – or excuse me, relate to the source of the water supply for these lands.
Q. And a further description or clarification of that right?
A. Yes.
Q. On page 62, Mr. Shaw, would you please refer to remark .c and explain its purpose?
A. Remark .c is the same as remark .a has been for the rights we've talked about earlier for the non-Indian project lands. It would avoid duplication, an additional right being decreed for these lands, and would serve the same purpose as those previous remarks.
Q. Okay. Mr. Shaw, on page 62 there's water right No. 27-11562. I'd ask you to turn your attention to the remark to that water right appearing on page 63, remark .a.
Would you please describe the purpose of that remark?
A. Remark .a serves to describe the purpose of use or further clarify the purpose of

use and quantity of use as it relates to the number of cattle that will be using the stock water right.
Q. Mr. Shaw, could this remark be placed under one of the elements of the water right?
A. It could be placed under quantity, yes.
Q. Okay. Mr. Shaw, on page 63 there's water right No. 27-11563. And on page 64 there is a remark to that water right.
Is that remark identical to the remark you just discussed with respect to 27-11562?
A. It is identical. It refers to a different grazing area. So it would be a different quantity, but it serves the same purpose.
Q. It would be your testimony that it would serve the same purpose?
A. That's correct.
Q. Okay. On page 64, water right No. 25-13616 for Meadow Creek and tributaries to Grays Lake, again, it has a remark .a.
Please describe that remark and its purpose.
A. That remark is the same as the last

two dealing with the number of cattle and location of cattle that would be utilizing this water right. It would serve the same purpose as the remark on the previous two rights.
Q. On page 65, Mr. Shaw, there's a water right No. 27-11564 from ground water. It has a remark .a.
Would you please describe remark .a and its purpose?
A. The remark .a further describes the purpose and place of use of this water right as it is intended to be used by Bureau of Indian Affairs.
Q. And could that be placed under an element of the water right?
A. It will be placed under purpose and place of use. It describes both what for and where.
Q. On page 66 there is a remark .b.
Would you please describe that remark and its purpose?
A. This, again, I believe under the new statute this remark would be considered explanatory material as it describes the physical capacity of the pumping plant for this right.

Q. On page 66, Mr. Shaw, there is a water right No. 29-12561 for ground water. There is a remark .a.
Would you please describe remark .a and its purpose?
A. Yes. Remark .a further describes the purpose and place of use for this water right.
Q. So it could be placed under those elements, is that correct?
A. That's correct.
Q. Also on page 66 is water right No. 29-12562 from ground water. And on page 67 there is a remark .a.
Would you please describe that remark and its purpose?
A. That remark also further describes the purpose and place of use of this water right.
Q. Okay. On page 67, Mr. Shaw, there's a water right No. 29-12563 for ground water; and then on page 68 there is a remark .a.
Would you please describe that remark and its purpose?
A. This remark also further describes the purpose and place of use for this water right.
Q. On page 68, Mr. Shaw, there's a water

right No. 29-12564 and a remark .a.
Would you describe remark .a and its purpose?
A. That remark also further describes the purpose and place of use for the water right.
Q. Okay. On page 68 there's a water right No. 27-11565 from ground water; and on page 69 there's a remark .a.
Would you describe remark .a?
A. And remark .a, again, further describes the purpose and place of use of the water right.
Q. Okay. And on Page 69, Mr. Shaw, there's a water right No. 29-12565; and at the bottom of that page is the beginning of remark .a which carries over to page 70.
Would you describe that remark?
A. That remark also further describes the purpose and place of use of the water right.
Q. Mr. Shaw, we're now at page 70 of the proposed consent decree. And there is a subsection entitled "IV., General Provisions Applicable To All Rights In This Decree." I would like to now -- or I direct your attention to those provisions and discuss their purpose.

provision?
A. It was originally contained -- it simply acknowledges that the decree in this case doesn't change any of the provisions of the Michaud contract. I believe this is a provision that's changed by -- or proposed to be changed by stipulation.
Q. Mr. Shaw, would you turn to Exhibit 2 --
A. Yes.
Q. -- which is the stipulation. I believe there is a paragraph denominated No. 1; is that correct?
A. Yes, there is.
Q. And describe the effect of that paragraph.
A. This paragraph is intended to replace the original paragraph 4 in section 4 of the proposed consent decree. And it goes on to further say that the parties have relied upon the conditions of the Michaud contract in the preparation of this agreement; and, further, the Michaud contract provisions are to remain in place; and except as expressly provided, nothing in the agreement or this decree would alter the

Would you please describe general provision No. 1 and its purpose?
A. General provision No. 1 says, "The court recognizes and respects the parties' disclaimers and reservation rights contained in the 1990 agreement." It does not describe or define a water right.
Q. Okay. Mr. Shaw, on page 70 as well there is general provision No. 2.
Would you please describe that provision?
A. It's, general provision No. 2 is a limitation on the legal effect of the decree. It represents a compromise over disagreement on what should go into the decree. Resolves a disputed issue, if you will.
Q. Okay. General provision 3 on page 70, please describe that provision.
A. It says, "The description of water rights in the decree shall govern in the event of conflict with the description of water rights contained in the agreement." That doesn't seem to define a water right or the administration of a water right.
Q. Mr. Shaw, general provision No. 4 on page 70, would you please describe that

Michaud contract.
Q. Mr. Shaw, is the Michaud contract one that is intended to extend into perpetuity?
A. Yes, it is.
Q. And, Mr. Shaw, does that contract have any limitation on the exercise of the rights?
A. Yes, it does.
Q. And have you previously described those limitations?
A. Yes.
Q. Thank you. Mr. Shaw, turning to general provision No. 5, would you please describe that provision?
A. General provision No. 5 as originally proposed acknowledges that the decree doesn't limit the authority of the United States to redesignate lands within the Fort Hall project under applicable law.
Q. Okay. Mr. Shaw, again turning your attention to Exhibit No. 2, paragraph 2, what would be the effect of that paragraph on this provision?
A. The additional -- well, paragraph 2 adds a sentence to this provision. It says nothing in the decree prohibits the transfer of

any state-law water rights herein decreed in accordance with applicable or successor Idaho Code provisions.

That additional language places a limitation, it seems, on what the United States may be able to do in the redesignation of Fort Hall project lands. I'm not sure that the redesignation of lands defines a water right or places a limitation on a water right.

Q. Okay, Mr. Shaw. Provision No. 6, would you please describe that to the court?

A. Provision No. 6 describes the effect of this decree on prior decrees.

Q. Okay. And provision No. 7, would you please describe that provision? That's on page 71.

A. Provision No. 7 describes the effect of this, a decree, on the satisfaction of the water rights for the claimants in the agreement.

Q. Mr. Shaw, on paragraph 7, how does that relate to the scope of the claims of the tribe in this adjudication?

A. It clarifies that the decree includes all of the water rights of the tribes in the upper Snake River basin. So it clarifies that

this, that there are no more water rights for the tribes in that geographic area.

Q. So how does that relate to the description of the rights?

A. Well, it provides definition, if you will, that there are no other water rights; that these water rights described in here are the extent of the water rights of the tribes within that geographic area of the state, of the basin.

Q. Mr. Shaw, on page 71 there's general provision No. 8.

What would be the – what is your understanding of the effect of that provision?

A. It just indicates the conclusive nature of the decree that would be entered for these water rights.

Q. Mr. Shaw, we've now gone through the entire consent decree.

Based upon your review of the consent decree, would it provide a mechanism that would allow you to implement and effectively administer this decree if entered by the court?

A. Yes, it would.

Q. And, Mr. Shaw, in your opinion are the general provisions that have been described

necessary to the definition, clarification or administration of the rights that we have discussed?

A. Yes, they are.

Q. Now, Mr. Shaw, the next element that we need to return to is the definitions section. And that appears on page 3 of the consent decree.

Would you please describe definition 1 and its purpose?

A. Definition 1 is acre-foot, also defines the abbreviation AF. The abbreviation AF is used throughout the consent decree to quantify portions of water rights.

Q. Now, Mr. Shaw, please describe definition No. 2.

A. Definition No. 2 describe – or defines acre-feet per year. Also, it defines the abbreviation AFY, and notes that this acre-foot per year is acre-foot per calendar year as opposed to some of the other time frames that are often used when talking about quantities of water. And this term is used throughout the decree to define the quantity element of water rights.

Q. You've referred to other definitions of acre-foot per year.

What's an example of that?

A. A term frequently used is water year. It's a period from October 1st to September 30th. Another term frequently used is irrigation year from November 1st to October 31st. This simply clarifies that we're talking about calendar year.

Q. Mr. Shaw, definition No. 3, allotted lands, what's the purpose for its inclusion in the decree?

A. The decree refers to allottees in the provision that avoids duplicate water rights being decreed for tribal lands. Allotted lands are those lands held by allottees; so it is used to define that term.

Q. Mr. Shaw, definition No. 4, American Falls Reservoir, what's the purpose for its inclusion?

A. American Falls Reservoir is used, well, for two purposes. It provides water for the Michaud exchange; but it's also referred to in the Sand Creek administration provisions and the exchange with the North Side Canal Company.

Q. Mr. Shaw, definition No. 5, annual diversion volume, why is that included in the agreement?
A. Annual diversion volume is one of the quantity elements for most of the water rights that are described in this consent decree.
Q. And annual-volume-consumptive-use definition, No. 6, what's the purpose for its inclusion?
A. Annual volume of consumptive use is also one of the quantity elements. It's used to define the water rights.
Q. Thank you. Definition No. 7, basis of right, what's the purpose for its inclusion?
A. Basis of right is included as it is necessary to describe which water rights are limited in the transferability after they've been decreed. Those based on federal law, for example.
Q. Mr. Shaw, definition No. 8, beneficial use, where does this definition come from?
A. Beneficial use is used several places. It's used as the basis of some of the stock water rights. It's used in defining how or for what purpose transfers can occur for the

tribal rights within the administrative provisions of the decree.
Q. Mr. Shaw, is this definition contained in the agreement?
A. The term is used in the agreement, yes.
Q. Okay. Now, Mr. Shaw, definition No. 9, Blackfoot Reservoir, what's the purpose for its inclusion?
A. Blackfoot Reservoir is one of the storage facilities used for both the tribal and the non-Indian project water rights.
Q. What's the purpose for the inclusion of definition No. 10, ceded lands?
A. Ceded lands is used in the description of water rights by both the Snake River water rights and the Sand Creek right as they relate to changing water from the non-Indian lands to the ceded lands – or excuse me, from non-Indian lands to Indian project lands; and some of the non-Indian lands are described as ceded lands.
Q. Description No. 11, consumptive use, what's the purpose for its inclusion?
A. Consumptive use, this definition is a further clarification of the definition included

in the statute as it relates to evaporation from storage.
Q. And definition No. 12, cubic feet per second?
A. Well, cubic feet per second and also the abbreviation cfs are terms used throughout the proposed consent decree to quantify water rights.
Q. Definition No. 13, DCMI, what's the purpose for its inclusion?
A. DCMI is included as a purpose of use on the general ground water right for the tribal water rights.
Q. Definition No. 14, diversion, what's the purpose for its inclusion?
A. Well, the term diversion is used in a number of places in the decree and a description of diversion rate, diversion volume as further clarification of the quantity elements of the water rights.
Q. And definition No. 15, diversion rate?
A. Diversion rate is, again, used in the quantity element -- or used to describe the quantity element of the water rights. This clarifies that it's measured in cubic feet per

second.
Q. Mr. Shaw, what's the purpose of definition 16, fee lands?
A. I don't believe this definition is used in the proposed consent decree.
Q. Okay. Definition No. 17, Fort Hall agency, what's the purpose for inclusion of that provision?
A. Fort Hall agency is used in the definition of a number of the water rights.
Q. Okay. And definition No. 18, Fort Hall Indian Reservation?
A. Fort Hall Indian Reservation is also used in the definition or in the description of a number of the water rights.
Q. And definition No. 19, Fort Hall Irrigation Project?
A. Fort Hall Irrigation Project is also used in the description of a number of the water rights.
Q. Mr. Shaw, definition No. 20, Grays Lake, what's the purpose for its inclusion?
A. Grays Lake is, again, one of the storage facilities that provides both Indian – or tribal and non-tribal water rights for the

Fort Hall project.

Q. Definition No. 21, impairment in the quality of water, would you please describe the purpose for that definition?

A. Impairment in the quality of water is used in the description of the transfer procedures or methods for the Snake River water right, the tribal Snake River water right.

Q. Mr. Shaw, definition No. 22, Indian, what was the purpose for the inclusion of that provision?

A. That term is used in the description of a number of water rights.

Q. Mr. Shaw, definition No. 23, Indian lands, what was the purpose for including that provision?

A. That term is also used in the description of a number of the water rights.

Q. And definition No. 24, injury to the water right, what was the purpose for its inclusion?

A. The term is included in the description of the administrative procedure for changes to tribal water rights, particularly the Snake River water right. And that term is used

in that description of the procedure.

Q. Mr. Shaw, does that describe how that procedure – does it define how an element of that procedure would be implemented?

A. Yes.

Q. Definition No. 25, irrigation use, what's the purpose for its inclusion?

A. Irrigation use is the purpose of use of a number of the water rights that are described in the consent decree.

Q. And definition No. 26, Michaud contract, what is the purpose for its inclusion?

A. The Michaud contract is referred to in a number of situations in the decree both as it relates to the water rights described in this decree and as it relates to the water supply for the project.

Q. Mr. Shaw, definition No. 27, Michaud division, what was the purpose for its inclusion?

A. That term is used in the definition of water right 27 – or description of water right 27-11376.

Q. And definition No. 28, Palisades Reservoir, what's the purpose of its inclusion?

A. Palisades Reservoir, again like

American Falls Reservoir, provides some of the water supply for the Michaud exchange. It also is used in the description of the administration of the Sand Creek portion of the tribal water right.

Q. Okay. And definition No. 29, what's the purpose for its inclusion?

A. 29, period of use, is one of the elements of the water right. And, of course, it's used in the description of those water rights.

Q. And definition No. 30, person, what's the purpose for its inclusion?

A. This definition of person is used throughout the proposed consent decree; and it's a slightly different definition than the statutory definition. It contains some additional language that's not in the statutory definition.

Q. So, Mr. Shaw, would that provision govern with respect to the implementation of this agreement as opposed to the statutory provision?

A. My understanding is it would, yes.

Q. Mr. Shaw, definition No. 31, place of use, would you please describe its purpose?

A. Place of use is, again, one of the elements of the water right; and it's used in the description of the water rights in the consent decree.

Q. And definition No. 32, point of diversion, or POD, would you please describe its purpose?

A. Point of diversion also is one of the elements to the water rights described in the consent decree.

Q. And definition No. 33, point of injection?

A. Point of injection is a description of both an element of the water right, I believe, and also how the water right is utilized. For example, the Snake River water rights that are described in the consent decree are diverted from the Snake River. They are injected into the Blackfoot River, and then rediverted into the Main and North Canals from the Blackfoot River. So this describes, I believe, an element of the water right and how that water right is utilized.

Q. Please describe the purpose for definition No. 34, point of rediversion.

A. Point of rediversion is the companion

to the point of injection where, for example, Snake River water is injected into the Blackfoot River and rediverted into the canals on the reservation.

Q. And definition No. 35, project lands?

A. Project lands, the term is used in the description of a number of the water rights for the Fort Hall project.

Q. Okay. And definition No. 36, priority date?

A. Priority date is simply one of the elements used to describe the water rights in the consent decree.

Q. And definition No. 37, purpose of use?

A. As with priority, it's one of the elements that's used to describe the water rights in the consent decree.

Q. And it defines that provision, is that correct?

A. That's right.

Q. Okay. Definition No. 38, reservation watermaster, what's the purpose for its inclusion?

A. In the description of the administrative provisions provided in the

proposed consent decree, the term reservation watermaster is used and duties are assigned to administer the water rights.

Q. And definition No. 39, right number?

A. Right number, even though it's not a statutory element of the water right, is the identifier that's used to identify the water rights in the proposed consent decree.

Q. Okay. And definition No. 40, secretary?

A. Secretary as used in this proposed consent decree refers to the Secretary of Interior. And it's used in the description of some of the administrative provisions included in the proposed consent decree.

Q. And definition No. 41, Snake River watermaster?

A. Snake River watermaster is a term used in the description of the administration of the Snake River water right, the tribal Snake River water right.

Q. And definition No. 42, source, the purpose for its inclusion?

A. Well, source is one of the elements that's used to describe all the water rights.

Q. And definition No. 43, stock water?

A. Stock water is used to describe one of the purposes of the tribal water rights. And it happens to be included in some individual water rights held by the United States.

And this is not the statutory definition. The statutory definition of stock water places a 13,000-gallon-per-day limitation. This definition does not specifically include that limitation.

Q. And this definition, to what type of right does it relate?

A. Well, it would relate to a water right for stock watering purposes, but not a de minimis as they're frequently referred to as a stock water right. It's limited to 13,000 gallons per day or less.

Q. Does the basis of the right make a difference?

A. No, it does not.

Q. The rights that the stock water rights are supplemental to are, at least in the proposed decree would be decreed as federal reserved water rights, correct?

A. Well, there are specific beneficial

use stock water rights proposed to be decreed to the United States. There is the stock water purpose of use that's proposed to be decreed as an acceptable use for all of the tribal water rights.

Q. Okay. Definition No. 44, transfer, would you please describe its purpose?

A. The term transfer is used in the administrative provisions for a transfer of the tribal water rights.

Q. And definition No. 45, tribal water rights?

A. Tribal water rights are used – or the term is used to describe water rights in the proposed consent decree.

Q. Okay. And definition No. 46, tribes or tribal, the purpose for its inclusion?

A. Those terms are used throughout the document both in the definition of rights and the administration of the rights.

Q. Okay. And definition No. 47, upper Snake River basin, what's the purpose for its inclusion?

A. Upper Snake River basin defines the geographic area to which this proposed consent

decree applies. And it goes to the finality of the proposed consent decree.

Q. And definition No. 48, Walton right, what's the purpose for its inclusion?

A. That term is not used in the proposed consent decree.

Q. So it would not be necessary in your opinion?

A. It would not be necessary in my opinion, yes.

Q. Definition No. 49, water system?

A. The proposed consent decree uses that term in the general provisions dealing with administration.

Q. Okay. And definition No. 50, Winters Doctrine, how is that used in the proposed consent decree?

A. Winters Doctrine was used to describe the basis of right for federal reserved water rights in the proposed consent decree.

Q. Thank you, Mr. Shaw.

MR. STRONG: That would be the conclusion of my direct examination, Your Honor.

THE COURT: Thank you, Mr. Strong. Mr. Monson, did you intend to conduct

cross-examination or redirect as the case may be?

MR. MONSON: Your Honor, very briefly. I have just a few points of clarification to talk over with Mr. Shaw.

THE COURT: Please.

BY MR. MONSON:

Q. Good morning, Mr. Shaw.

A. Good morning, Mr. Monson.

Q. In your testimony earlier this morning you discussed a number of different remarks that you indicated further defined more than one element of a water right for that particular water right.

Do you recall that testimony?

A. Yes, I do.

Q. And I believe you also discussed the possibility of redrafting the remark into the provision – or into the particular elements that it applies?

A. Yes, I did.

Q. Do you see any problems with that, of doing that, taking that approach or trying to redraft the decree?

A. From my recollection of the amount of effort that went into drafting the remarks as they exist today, at least for these water rights, yes, I don't think that would necessarily be an easy task.

Q. Would there be a possibility that the

intent of the particular remark could be changed simply by introducing new language or different language?

A. Yes, that possibility would exist, does exist.

Q. Thank you. I'd like you to turn your attention to page 70 of the proposed consent decree which is the, includes the general provisions applicable to all water rights in this decree.

A. Yes.

Q. And specifically to general provision No. 3, do you know why that general provision No. 3 was included in the proposed consent decree?

A. My understanding was that it was included as a definition, if you will, that if a conflict exists this is the document that would govern.

Q. Were there some technical corrections or clerical corrections that were made between the time of the 1990 agreement and the development of this consent decree?

A. Yes, there were.

Q. And was it the intent of the parties

to your knowledge that the provisions in the consent decree were the correct ones if there's any conflict?
A. That's my understanding, yes.
Q. Okay. Thank you. If you could turn now, Mr. Shaw, to page 70 -- or excuse me, page 50 of the proposed consent decree, and in particular the paragraph marked No. 15 which I believe was a general provision applicable to the tribal water right; is that correct?
A. Yes, it is.
Q. You testified earlier about this general provision and indicated that it was not an element of state water law, that geothermal steam in excess of 212 degrees Fahrenheit was not something that is normally adjudicated in a water adjudication in Idaho; is that correct?
A. Under state law, that's correct, yes.
Q. Given or -- the tribal rights that are, for the most part, are decreed, proposed to be decreed in this are under federal law; isn't that correct? Or there are a number of them that are under federal law?
A. Well, they are based upon federal law; and whether they're decreed under federal law or

state law, I wouldn't offer an opinion.
Q. Do you know if the federal reserved rights doctrine has any provisions relating to geothermal steam?
A. I don't know.
Q. If federal law were to develop an element of the federal reserved right to incorporate geothermal steam, would this provision preserve the right of the tribes or the United States to assert such a right in the future?
A. It would seem to me it would, yes.
Q. Thank you. If you'd turn to page 53, and I call your attention to remark .x.c for both water rights 01-10248 and the following water right, the right No. 27-11560.
And I believe the remark .c is the same for both of those rights, is that correct?
A. Yes, it is the same for both of those rights.
Q. I believe that you testified earlier that this was intended to permit lands that went out of -- or permit the -- well, let me start over again.
This provision was intended to apply when

non-Indian project lands went out of production, is that correct?
A. Yes, that's correct.
Q. Doesn't it also require an affirmative act of relinquishment by the United States and the project landowner?
A. Yes, it does.
Q. So this provision would not necessarily be triggered, then, by the temporary -- by a landowner temporarily not irrigating his lands for whatever reason?
A. That's my understanding. It's not an automatic exchange.
MR. MONSON: Thank you, Mr. Shaw. I have no further questions.
THE COURT: Thank you, Mr. Monson.
Miss Jackson, are you still there?
MS. JACKSON: Yes, I am.
THE COURT: Miss Jackson, did you have questions you wanted to ask of Mr. Shaw?
MS. JACKSON: I have a couple clarifications, Your Honor.

CROSS EXAMINATION
BY MS. JACKSON:
Q. On page 26 of the proposed consent decree there's a section .x.a. You indicated that's the subordination of the rights.
Isn't it correct that these rights also have to be determined in the SRBA before they could be subordinated?
A. That's correct, yes. It would only be a subordination to rights that are decreed in the SRBA.
Q. Okay. And then referring again to page 50, paragraph 15, that Mr. Monson referred you to, if this paragraph was left out of this decree, would this right still exist in the agreement in your opinion?
A. In my opinion, the agreement would still apply, yes. And that provision was to be an applicable part of the agreement.
Q. That's the reason you're suggesting it was not necessary because of state law regarding geothermal ground water, is that correct?
A. That's correct.
MS. JACKSON: I have nothing else, Your Honor.

THE COURT: Thank you, Miss Jackson.
Were there any other signatories to the agreement or consent decree that had questions of Mr. Shaw?
(NO RESPONSE)
THE COURT: There being none, Mr. Strong, any redirect?
MR. STRONG: I have no further questions for Mr. Shaw. If there's no redirect or cross-examination, I would suggest Mr. Shaw can be dismissed.
THE COURT: All right. We're running into a time problem. I have a number of questions just to clarify. I think I'm pretty -- I understand the purpose of most of the provisions.
I do have a large number of questions; and time really doesn't permit going into those now. And I quite frankly don't expect we'll have time this afternoon unfortunately. So I think the way I'm going to have to leave this is that we'll have to continue this hearing.
I think most of the questions are ones that Mr. Shaw can answer. I think most of them are soluble. I will say that none of them -- or very

few of my questions would relate to the propriety of including any of these provisions in the consent decree, or the necessity for that matter. There are a few that might relate to necessity or propriety; but, again, those are few in number.
Mr. Strong, when would you like to continue this hearing?
MR. STRONG: Your Honor, from my perspective, the earliest convenient date possible, we'd like to proceed.
THE COURT: Tomorrow?
MR. STRONG: Tomorrow would be fine.
Peter, can you make that?
MR. MONSON: Your Honor, how long do you anticipate your questions would require? The reason I ask is I need to fly to Washington, D.C. tomorrow afternoon. It's possible I could stay overnight and be here for the morning session.
THE COURT: I wouldn't think my questions, I wouldn't think they'd take more than an hour. Many of my questions are essentially the same as they relate to a number of the remarks sections. It will take some time, however. It might take more time just to resolve

how we deal with the issues generated by the questions; but I certainly would expect that we'd be done in the morning.
MR. MONSON: Tomorrow morning would be acceptable to me then, Your Honor. I could stay.
THE COURT: Mr. Strong?
MR. STRONG: Me as well, Your Honor.
THE COURT: Miss Jackson, you're on vacation, right?
MS. JACKSON: I am on vacation. What time was the court thinking of?
THE COURT: Well, I, since presumably the necessary people will be here, I was thinking 9 o'clock. I could start earlier if that's more convenient.
MS. JACKSON: Earlier would be more convenient for me, Your Honor. I'm an hour behind here. I will be traveling tomorrow, but I think I can be a part of the call if we started at 8 o'clock your time.
THE COURT: Mr. Strong?
MR. STRONG: I guess we can make it.
THE COURT: All right. We'll begin at 8 o'clock tomorrow morning.
Miss Jackson, if you'll just call in, the

clerk will patch you in.
MS. JACKSON: Okay.
MR. STRONG: Your Honor, one matter just for housekeeping purposes. If we're simply down to your questions of Mr. Shaw and we're through with the direct and cross-examination, we had one other matter that we wanted to submit as part of the record, which would be a copy of the House of Representatives report approving the agreement, along with a copy of the federal legislation that has approved the agreement. I would like to have those marked as exhibits for the purpose of this proceeding.
THE COURT: And I'm assuming there's no objection, Mr. Monson or Miss Jackson?
MR. MONSON: No objection.
MS. JACKSON: No.
THE COURT: Have them marked as Exhibits 3 and 4 respectively, and they'll be admitted.
MR. STRONG: Okay, Your Honor. I'll approach the bench.
THE COURT: All right. Thank you.
(State's Exhibits 3 & 4 ADMITTED)
THE COURT: Counsel, ladies and

gentlemen, we'll be adjourned until tomorrow morning at 8 o'clock on this matter. We'll begin the monthly status conference and motions that have been noticed up at 1:30 this afternoon.

Mr. Strong, thank you for your assistance.

Mr. Shaw, we will need you tomorrow. I appreciate your diligence in hanging in there this morning. I know it was a long road for you. But I think we're getting pretty close to the end here.

With that, we will be adjourned until tomorrow morning. Thank you.

(PROCEEDINGS ADJOURNED)

COURTROOM OF THE DISTRICT COURT,
SNAKE RIVER BASIN ADJUDICATION
COURTHOUSE, 253 Third Avenue North,
Twin Falls, Idaho, Wednesday, July 19,
1995, 8:05 A.M.

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THE COURT: Good morning, ladies and gentlemen. This is the District Court of the Fifth Judicial District in and for the State of Idaho. I'm Judge Hurlbutt.

We are again proceeding on the 1990 Fort Hall Indian water rights settlement agreement and proposed consent decree.

Miss Jackson, do we have you on the line finally?

MS. JACKSON: You do, Your Honor.

THE COURT: Very well. The State of Idaho is here represented by Clive Strong, and the United States by Peter Monson.

Good morning, gentlemen.

MR. MONSON: Good morning, Your Honor.

MR. STRONG: Good morning.

THE COURT: Nice early morning. Mr. Strong, did you return to Boise?

MR. STRONG: I did.

THE COURT: How are the roads?

MR. STRONG: This morning and the hour, fairly open.

THE COURT: As best you can remember.

MR. STRONG: That's right.

THE COURT: Mr. Shaw is present in the courtroom. Mr. Shaw, just to move things along, why don't you return to the witness stand. You were previously sworn and are still under oath. And I appreciate your appearing this morning.

(WITNESS DAVID SHAW RESUMED STAND)

THE COURT: Counsel, when we adjourned yesterday, examination of Mr. Shaw had been concluded. I did have a couple of questions. Some of my questions will be of Mr. Shaw, and perhaps some of them are appropriately of counsel just to clarify some points in the proposed consent decree.

Just taking it from the top, let me begin with the definitional section, Mr. Shaw. On page 3 of the consent decree No. 1 is acre-foot.

What is the source of that definition, or does one even need to be cited?

A. Your Honor, the source of the definition, 43,560 cubic feet is a relationship

of cubic feet to the size of an acre. I don't know of any other particular source for the definition so far as the technical aspects are concerned. And a conversion to gallons is likewise a physical relationship.

THE COURT: And, Mr. Shaw, is there a statute which gives that definition?

A. There is not to my knowledge.

THE COURT: AND would that also be true for the definition No. 2, acre-feet per year?

A. Your Honor, I recall that the definition of the elements to be included in the director's report as calling for a calendar year volume; but I don't recall how much further it goes.

THE COURT: Okay. No. 3 – well, just one moment. Now, let's move on to page 4, definition No. 5, annual diversion volume.

What is the source, if any, for that definition?

A. Once again, the elements of the water right to be specified in the director's report called for diversion rate or annual diversion volume. And I don't believe the terms are

necessarily specified in acre-feet.
THE COURT: Let me ask you this: With respect to all of the statutory elements of a water right, that is equally true, is it not, that the statute will contain the term but not otherwise define it?
A. That's true except for there is a separate statute not in the adjudication chapter that states the standard measure of diversion rate will be cubic feet per second. But that's the only term that I'm aware of that's defined.
THE COURT: Okay. Thank you.
A. One other thing about these definitions, Your Honor, is the abbreviations that are used in the agreement are not part of the statute. The AF for acre-feet, for example.
THE COURT: Correct. That would be my conclusion as well.
On No. 6 on page 4, annual volume of consumptive use, defined as meaning the maximum volume of water in acre-feet per year, is that a definition that is intended to be used consistently throughout the SRBA?
A. I believe it is, Your Honor. The statute calls for, for irrigation purposes, for

example, consumptive amount to be determined based on the most water consumptive crop that can be grown in the area.
THE COURT: Okay.
A. It doesn't similarly say that every other use should be determined at the maximum consumptive use, but I think that's a logical conclusion. And that's what has been done in the department's efforts to determine consumptive use.
THE COURT: The reason for the question, my concern here is generally if these rights are decreed in this format, except for definitions which are clearly unique to the Shoshone-Bannock tribes, are these definitions then binding on the court and the parties subsequently; or is that your intention as the director of the adjudication bureau?
A. Your Honor, we were very careful when we drafted these definitions to be as certain as we could that they didn't produce a conflict with any other part of the adjudication. Some of them, as you say, are unique. Some of them will be used, or at least similar terms will be used for the definition of other water rights. And as

best as we were able, we made sure there was no conflict.
THE COURT: Again, referring to annual volume of consumptive use, it's to be defined in terms of acre-feet per year. That's a matter being litigated before one of the special masters.
Is this intended to resolve that matter and require that annual volume of consumptive use be always described numerically in acre-feet per year?
A. No, that would not be the intent of this definition – to preclude the definition of de minimis uses as defined as de minimis.
THE COURT: No, I agree. De minimis could be used. But wouldn't de minimis have to be defined in acre-feet per year numerically?
A. Well, that wasn't the intent of this definition. If that's the result, then –
THE COURT: Yes. I don't know what the intent is. I just wondered if that's the result. That's my concern. And perhaps it can't be answered beyond that.
MR. STRONG: Your Honor, if I might address that?

THE COURT: Sir.
MR. STRONG: It seems to me the definitions used here relate to these particular water rights. And in each of these water rights that is the approach that has been taken.
As to the de minimis, there is case law in Idaho that at least suggests that you don't have to have a fixed quantity. The AVONDALE case for one is an example where, if you need the entire flow, the definition says entire flow would be a certain quantification. We would argue by analogy that de minimis, likewise, if you can't measure it, it's a futile exercise; so it's an appropriate way to define that element.
THE COURT: Now, maybe the futility is to have it as an element altogether.
MR. STRONG: That may be a possibility.
THE COURT: All right. Thank you, Mr. Strong.
MS. JACKSON: Your Honor, this is Candy Jackson. I'm sorry. Mr. Strong was fading in and out when he was talking.
THE COURT: You were not able to hear Mr. Strong.

MS. JACKSON: No.
THE COURT: His comment just was that the definitions in the agreement were unique to the rights in the, contained within the proposed consent decree; and that there is case law which by analogy would support the use of de minimis in defining the annual volume of consumptive use.
MS. JACKSON: Thank you.
THE COURT: I'm sorry. We'll either get Mr. Strong's microphone working a little bit better or I will put him at the podium. Thank you, Miss Jackson.
MR. STRONG: Your Honor, I guess in terms of making the issue fairly clear before the court -- can you hear me, Candy?
MS. JACKSON: Yes, I can.
MR. STRONG: Okay. We do use the term de minimis back in the water rights, stock water rights for the BIA. And so I guess to the extent that you would make a ruling accepting that, it would have implications with respect to those subcases.
THE COURT: Thank you. Mr. Shaw, definition No. 8, beneficial use, what is the source of that particular definition?

A. Your Honor, I believe this definition was developed for the purposes of this agreement.
THE COURT: So it would be generally unique to this agreement?
A. Yes, it would be.
THE COURT: In your opinion, would this definition be applicable elsewhere in the adjudication as a general proposition?
A. I believe it would be. And this was one of the definitions that we worked with at length to find a definition that was suitable for the purposes of the agreement but, as best we could tell, didn't create any conflicts in the rest of the adjudication.
THE COURT: Okay. Thank you, Mr. Shaw.
Would that also be true on page 5 for the definition under No. 11 of consumptive use?
A. Your Honor, this definition parallels very closely with the statutory definition of consumptive use except the clarifying language about not including water lost through evaporation from storage was added. Once again, this definition was intended just for this

agreement.
But that's how the term consumptive use thus far has been applied in other parts of the adjudication as well. So I think there is not a conflict between this definition and the other parts.
THE COURT: And that last clause, not include water loss through evaporation from storage, in your opinion would be equally applied by the department throughout the adjudication?
A. It has been to date, yes.
THE COURT: Okay. Definition No. 16 on page 6, Mr. Shaw, you testified that fee lands was not used in the decree. I guess my -- maybe my question more appropriately would be of Mr. Strong or Mr. Monson and Miss Jackson.
Do we confuse anything by including a definition of a term that doesn't appear in the decree?
MR. STRONG: Your Honor, we would be in a position of stipulating to the removal of that definition. The problem was it was simply an oversight. We were trying to take those definitions from the agreement. So --
THE COURT: Mr. Monson?

MR. MONSON: I would agree with that.
THE COURT: Miss Jackson.
MS. JACKSON: Yes, I would agree to take it out.
THE COURT: Again, I don't find it offensive except that it raises the spectre of, a question about why it was defined here and whether it has some implication or some effect on a provision that exists.
That would also be true for, on page 12, No. 48, Walton right?
MR. STRONG: Correct, Your Honor.
THE COURT: And should that also be removed?
MR. MONSON: Yes, Your Honor. I think both terms are just artifacts from earlier drafts that didn't get removed when we deleted the language referencing those terms.
THE COURT: Mr. Shaw, on page 9, No. 24, the term injury to a water right is defined.
What was the source for that particular definition?
A. Your Honor, that definition was one that, again, was derived for the purposes of this

agreement. I don't know of any prior definition that was relied on, nor do I think this definition is offensive to any other part of the adjudication.

THE COURT: Mr. Strong, in your opinion if the term injury is redefined or further defined by the State's Supreme Court later on, what effect would that have on this consent decree?

MR. STRONG: Your Honor, the purpose of this definition, as Mr. Shaw testified, was exclusively for the purposes of the administrative provisions. And so this was an agreed upon negotiated definition of injury to a water right, would not be applicable to injury in other contexts. It would only be for this hearing.

THE COURT: And, as I understand it, and I'll ask about it later, there is a mechanism for setting up procedures to deal with certain types of transfers that will go before the intergovernmental board, but ultimately be subject to some form of judicial proceeding. It's not clear to me whether that would be a state or federal court or how.

And the reason I ask the question is if it is in a state court and the Supreme Court has defined injury to a water right, how would a court at that time proceed given what could be two different definitions?

MR. MONSON: Your Honor, perhaps I could take a shot at that.

THE COURT: Mr. Monson.

MR. MONSON: As I recall from the negotiations, the term was developed in part as a unique provision applicable to the federal reserved water rights that are described in the agreement. And there was a concern at least by the tribal and federal representatives that the term be defined for the purposes of this agreement and that it remain inviolate and not subject to later legislative or judicial changes at a state level.

Because these are federal water rights, and so we wanted them to essentially cast in stone some of these unique definitions. And so I think it was our intent that if the Supreme Court comes up with a different definition that this definition would control for these water rights.

THE COURT: Unless you get a better

definition from the court?

MR. MONSON: Well, no. I think --

THE COURT: No, I understand.

MR. STRONG: Your Honor, just to follow up on Mr. Monson, it seems to me that if this becomes a part of the decree, then it is -- it would be the State's position that this court, pursuant to implementation of the decree, could define the term based upon the context of the agreement that's been submitted to the court. And so it would be unique to this particular aspect.

THE COURT: Okay. I don't have a problem with that. I just want to try to be clear on where we're going with that. Okay. Thank you.

Mr. Shaw, on page 11, definition No. 43, stock water, you testified that that is not the statutory definition.

What's intended by defining stock water in this fashion?

A. I believe part of the intent, Your Honor, is to make it clear that it is not the statutory definition which places the 13,000-gallon-per-day limitation on the quantity

that can be diverted. The stock water rights, both state-law based and federal-law based, in here were not intended to be subject to that limitation. And the quantities were uniquely defined in the individual water rights.

THE COURT: Do you agree, Mr. Monson?

MR. MONSON: Yes.

THE COURT: Mr. Strong?

MR. STRONG: Yes, Your Honor.

THE COURT: And so that definition would be unique to this agreement.

MR. STRONG: Uh-huh.

THE COURT: Now, Mr. Strong, we talked about my reading of the Supreme Court's decision and the limitations on entering administrative but presumably any provision that would be already -- where the territory was already occupied by a statute. Certainly where parties waive certain rights under a statute, as they can do under the Constitution, I can probably accept that.

I guess I look at these differences in definition as really that kind of phenomenon where the parties freely, voluntarily and with full knowledge have agreed to waive the effect of

the statute on their particular rights and agree to another format to deal with them. And I guess where that's certainly not inconsistent with the Constitution, I don't have any problem with that.

MR. STRONG: Your Honor, just in commenting on that, this agreement is a quantification in most part of federal reserved water rights. And federal law is a controlling element as to the description of those particular water rights.

And the scope or the extent of the application of the state law to that is somewhat uncertain not in terms of definition of elements of the water rights, but in terms of the administration. The State's position would be that we have the authority to administer those water rights. The United States would take the opposite position, that we do not.

Given that, there is a lack of certainty in what laws are applicable. And so I think what the parties have done here is essentially try to define those areas in which there is a disagreement between governmental authorities and stipulate to how that authority would be

exercised. And, as such, I don't think it's within any of the statutory provisions that we are dealing with.

THE COURT: That's a good point. And as long as we're on it, let me ask the question: There are a number of provisions which have been adopted to deal with that very conflict or unknown.

In the general area of administration of these particular rights, Mr. Strong, are there state statutes that in your opinion govern administration?

MR. STRONG: Your Honor, if we turn just to the Fort Hall water rights agreement -- and there's one other point I should make to the prior question, is that both the federal government and the state government have given their consent to these particular provisions. I think that's important.

THE COURT: So I understand, I'm not trying to argue with you; I'm just trying to understand the nature of the dispute. I'm not saying one side is right or wrong or otherwise, and I can accept the settlement.

But maybe for my own edification, I would

like to know just a little bit about that, the nature of that dispute so I can make a finding of necessity.

MR. STRONG: The only reason I was bringing up that other point, Your Honor, is --

THE COURT: Okay. No, proceed.

MR. STRONG: -- just, I think, help clarify where the consensus of the government will lead to.

THE COURT: Yes.

MR. STRONG: I just had a note delivered to me that Ray Rigby and David Barber were trying to get in on this conference call -- or I mean on this hearing. And because of the way that Miss Jackson has called in, it is not possible to have those other people joined in this hearing.

Is there a mechanism that we can address that issue?

THE COURT: We don't have the capability of tying them in. I know we tried earlier. I'm sorry.

MR. STRONG: Well, hopefully that's not going to be a problem with the hearing. I hope Mr. Rigby -- I can speak for Mr. Barber. I'm not

worried about that aspect.

THE COURT: Okay. Well, I am very sorry. I think we probably need to attend to getting notice earlier; and then we can make the arrangements. But under these circumstances, we could not.

MR. STRONG: I'm sorry, Your Honor. The last question I was getting ready to address --

THE COURT: Oh, I just -- I wondered if you, from the State of Idaho's perspective, could explain maybe the foundational issues in this dispute of jurisdiction over administration of these rights.

MR. STRONG: With regard to the federal reserved water rights, the issue that exists is between the United States and the State as to whether the State would prior to administration of a federal reserved water right be required to come before the court and ask for the court to enforce its decree. Or the State simply could in the normal context when it is administering state water rights go out and administer the federal water rights; and then if there was an objection to that, the burden would be on the United States

to object to that process is, as I understand, the dispute. And we clearly have a difference of opinion on that issue. And for the purpose of this agreement, we're trying the avoid that issue with regard to these rights.

The one aspect of this agreement, I think, that should be emphasized, though, is that the BIA rights that are set forth in the attachment, we do not address the administration issues with respect to those rights. And I think both the State and the United States would retain their respective authorities on that administration issue with respect to those rights.

THE COURT: Mr. Monson, is that the basic nature of the dispute with respect to the administration of these rights?

MR. MONSON: I think that's a fair statement of the dispute. I think our position -- well, first of all, the difficult issue is how you define administration and what that means.

Our position consistently through this case has been that absent some other legislative authority, and the legislation approved in the Fort Hall agreement might constitute such other

authority, but absent that, the McCarran Amendment provisions regarding administration of water rights would control and that by its very terms requires that there be a suit for the administration of water rights.

And I think, you know, our concern has been one of federal supremacy and sovereignty to the extent that we do not want to have other entities interfering with federal water rights physically. If administration is simply a matter of accounting, that may be a different matter. But to the extent that it involves turning head gates and that sort of thing, then we have some substantial concerns and would -- if a dispute were to arise, we would take the position that court authority or a suit for the administration of water rights would be required before any nonfederal entity could come out and turn head gates on federal or tribal property.

And I think the concerns are enhanced in a case of Indian reservations where you have, you have the other sovereign entity of the tribe and the protections that are given to Indian treaty rights. So that would be essentially our position.

But, again, we recognize that it's in everybody's interests to reach an accord on the administration provisions. And so we endeavored as best we could to try to do, to accomplish that in the terms of the Fort Hall agreement. And it's definitely a compromise, but it's one that we think we all can live with and that will allow for the efficient administration of water both on and off the reservation.

THE COURT: Now, as I read the proposal, it would be section .c beginning on page 41, the general provisions applicable only to water rights held by the United States for the benefit of the Shoshone-Bannock tribes, those are the provisions that are intended to resolve this particular dispute essentially?

MR. MONSON: That's correct, Your Honor.

THE COURT: All right. Then turning to page 41, the question -- the principal question I had is actually on page, beginning at page 43 and carrying on to page 44, the procedure to change a point of diversion. On page 44, it would be 5.3, the last section of 5, failure of mediation would result in the opportunity for

judicial relief.

What court or forum was contemplated for that relief?

MR. MONSON: Your Honor, I don't believe that we were able to reach an agreement as to the proper forum to take those kinds of disputes. And so I think the parties left it open to the complaining party to choose a forum. And I suppose the dispute as to which forum is appropriate might have to be resolved at that time.

But we did not -- I think we discussed the issue; but I don't think we were able to reach an agreement as to whether a state or federal forum would be appropriate in all kinds of disputes, including this type of a dispute. And so we intentionally left that open for future resolution if and when, and I underscore if, there is a dispute. Because there may never be one.

THE COURT: I just, again for my own edification, I want to understand what clearly is contemplated to require the continuing jurisdiction of this court, what may be a federal court and, in this case, what may be simply

open.
Is that a correct assessment, Mr. Strong?
MR. STRONG: That's a correct assessment, Your Honor. The State's position would be that the decree itself provides a mechanism for state court review of that. Obviously the United States would take a different position perhaps on whatever the issue may be. But since we couldn't resolve amongst ourselves that difference, we just left that for future resolution.
THE COURT: Mr. Monson, again looking at 5.3 on page 44, it speaks in terms of where there is a failure of mediation judicial relief may be sought by the objector.
Does that mean that the Shoshone-Bannock tribes, if they were requesting the transfer, would not be accorded judicial relief? Or do I misunderstand?
MR. MONSON: Well, as I understand, this would cover the instance where there was a third party, not the governmental parties to the agreement, but a third-water-user party who claims to be injured by a proposed transfer by the Sho-Bans from one point to another. And in

that event, that would be the objector who would be seeking judicial relief.
THE COURT: Okay. What is the mechanism for the tribes if -- well, where the request for a transfer is made, the only function of the intergovernmental board will be one to mediate?
MR. MONSON: That's correct, Your Honor.
THE COURT: Okay. I guess I'm just practically trying to think this through. The request is made for the transfer. An objector surfaces, a third-party objector surfaces. It goes to mediation. That fails.
I guess the way this is set up is that unless the objector takes the matter to court, the transfer simply happens?
MR. STRONG: Correct, Your Honor.
MR. MONSON: Yes.
THE COURT: Okay.
MR. STRONG: Your Honor, I'm confused by the request for transfer because this is essentially a decision by the tribes and the United States to make the transfer. They would give notice of the transfer; and then if somebody

has a problem with that, then they have a right to challenge that.
THE COURT: I'm sorry. That's correct. Okay.
I do, as long as we're on the topic of this state-federal dispute, I do want to turn to page 71. And we're into the general general provisions.
No. 8 is, because it's, I guess, fairly traditional or standard in consent decrees, but my question is: Does that provision No. 8, which binds the parties, then subject them to the contempt powers of this court for an alleged failure to conduct their affairs according to the consent decree? And was that your intent?
MR. STRONG: Yes, Your Honor. That was the intent. The idea is that if this is a final decree the parties would be bound by the decree and comply with it as they move forward.
THE COURT: Mr. Monson?
MR. MONSON: That's correct, Your Honor. That was our intent as well.
THE COURT: But if there's that type of dispute where, as we're talking before, where parties couldn't agree on a state or federal

forum, where are we there? If the allegation in that context is one of contempt, it would seem to me you're in the state forum at least for that purpose.
MR. MONSON: Well, if the agreement -- or if the final decree does not provide a specific forum for that relief, then I would argue at least that there would be no -- the injunction would not direct one way or another as to that particular issue. You know, I can see that there may be instances where the state forum is the appropriate forum to go to, and we would not contest that. I mean we're not --
THE COURT: Well, it means that even under a contempt proceeding brought pursuant to paragraph 8 the first issue may be whether it's the correct forum, that there may be a more specific forum defined elsewhere that would override.
MR. STRONG: Your Honor, let's take an example.
THE COURT: Okay.
MR. STRONG: And let's go back to the objector paragraph and that the tribe is proposing to transfer a water right, and they

refused to go through the intergovernmental affairs boards to have that mediated.

It seems to me at that point in time that issue is one of contempt because they have bound themselves to go through that process. On the other hand, if they go through the steps of the process and there's a mediation and it fails, then at that point in time we're not at an issue of contempt. It's a difference of opinion as to whether there is an injury; and the objector can choose his forum. So I don't see the conflict between the two provisions.

THE COURT: Well, somebody will raise it. But I understand what the intent of the parties is. And I think it's perfectly reasonable. All right. Thank you.

I don't have any more questions about the definitional section.

The testimony was very clear on the remarks sections. There are a couple areas that I would like to ask Mr. Shaw about.

Mr. Shaw, on page 26, it would be the remarks to the water right that began on the preceding page, just one remark, .a. This deals with subordination of rights which were

previously decreed.

This remark is somewhat executory in that it is dependent on the decree of those rights, non-tribal rights that were covered in United States v. Daniels that will ultimately again be decreed in the Snake River Basin Adjudication, correct?

A. Yes.

THE COURT: In your opinion would the decrees of those U.S. v. Daniels rights that happens later on require in any way an adjustment of this water right by amending this consent decree?

A. I don't believe it would be necessary in this case, Your Honor.

THE COURT: Now, there are some other cases where clearly it is contemplated that there would be various types of adjustments.

A. That's correct.

THE COURT: Okay. This is not one of those.

A. This is not one of those.

MR. STRONG: Your Honor, if I might address that point?

THE COURT: Yes.

MR. STRONG: This raises one of the issues that we've had difficulty with; and that is that, although we'd have the agreement concluded, there are certain rights that have to be decreed. And from our perspective, we've been trying to figure out a mechanism that achieves that objective.

One thing that is important from the parties' perspective is to try to get a final decree. We would like to go to a 54(b) certification if we can finally agree on the form of the decree.

The only thing that we have been able to ascertain at this point in time is a way to resolve this would be a motion to amend the partial decree once those other rights are decreed, once -- it would be towards the end of the adjudication or when we have completed those basins, we could simply then come in and enumerate those particular rights that would fit within this provision and for clarity purposes.

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.

MR. MONSON: The United States would agree with that. I think it's not essential; and as Mr. Strong indicated, that we would -- it would certainly not change the intent. It would just be a matter of listing those rights that fit within this two-part definition.

THE COURT: It would appear an example of what we're talking about is page 31, section .d?

A. Your Honor, my document is numbered differently. If you'd give me a water right number, it would help me find it.

THE COURT: Oh, I'm sorry, Mr. Shaw. This would be water right No. 27-11375. The source is the Blackfoot River. That would be

remark .x.d?
A. Yes.
THE COURT: Now, is that the kind of situation we're talking about, Mr. Shaw, where some adjustment may be necessitated later on?
A. 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. Shaw, is that also the situation with right No. 29-12052? The source is Bannock Creek Basin ground water. And there it would be remark which is section .x.c?
A. That's exactly right, Your Honor. In this situation we had estimated the rights that might be determined would be 2400 acre-feet per year.
If they are that amount or less, no adjustment would be necessary. If they turn out

to be more than that amount, then some adjustment will be necessary in 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 will 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.
MR. STRONG: Your Honor, I don't view that as being a large issue because we think that we have fairly accurately assessed the amount of water that's being used. And if there needs to be an adjustment, it would be on an acre-foot-per-acre-foot basis; and so it is more

a mechanical act than anything else.
THE COURT: Well, I'm hopeful that that would be the case, too. But, again, just for my own edification, I want to know what future responsibilities the court may with, call them loose ends or whatever with the agreement.
Clearly there's some situations contemplated here where other future decrees might impact and require adjustment here; or other empirical data that's generated perhaps during the process of the adjudication would require some adjustment here.
I guess those are the two situations where we have those kinds of loose ends, is that correct, Mr. Shaw?
A. Well, Your Honor, I'm trying to think of the situation where the empirical data might result in an adjustment. Certainly the determination of other rights could result in the adjustment.
THE COURT: I can't point you to a section; but it seemed to me there were perhaps one or two sections where certain quantities of water in, I don't know if it was Grays Lake or, I can't remember, were simply not known. The

measurements were not available with the certainty the parties would like.
A. Your Honor, the two I can think of are Ross Fork Creek Basin and Lincoln Creek Basin where an estimate was made of the yield -- and the Bannock Creek Basin, I believe. If the yield turned out to be something more or less than estimated, there are provisions in here for the adjustments to take place.
But I believe the provisions are already contained in the description of the water rights. I don't think it will necessitate going back and making adjustments.
THE COURT: I stand corrected. You're right. I think it is automatic under those circumstances.
MR. MONSON: And if I could also add to that, Your Honor, I think that, as a question of timing, any adjustments that would be necessitated as a result of a decree with respect to the north side Blackfoot River water users, for example, would probably take place shortly after the court had entered a partial final decree as to that basin. So we would -- it would still probably -- our expectation would be it

still would be within the time period when this court has continuing jurisdiction over the whole case.

THE COURT: That would be my understanding as well.

MR. STRONG: Your Honor, you've identified, I think, the three situations which would require action by the court later. One would be the decree of the Bannock Creek water rights, the decree of the Blackfoot water rights, and the decree of the Bannock Creek ground water rights. With respect to the latter two, it will require us to come back, if we've made our estimates incorrectly, to make some adjustment.

But there's a way, though, that I think we might be able to address, and I think an appropriate way to address, your first concern about the Bannock Creek decree. And we could simply make a part of the record or you can take judicial notice of the Bannock Creek decree. And so then that identifies those water rights that would come within that particular provision.

THE COURT: Well, yes, I think there are a number of ways to handle it. And I'm not really concerned. My only concern was so that we

all understood what matters we contemplated would come back before this court. And I think all these matters, as Mr. Monson has pointed out, would come back during the existence of this case pretty clearly.

MR. STRONG: I would be prepared, if we could access to a copy machine, to be able to submit a copy of the Bannock Creek decree – I have that with me -- and supply that for the record.

THE COURT: Mr. Shaw, I would like to -- again, it's page 41 in my document; but it is section .b, federal contract storage space held by the United States for the tribes. You commented in your testimony that the Bureau of Reclamation storage water would be decreed later in this adjudication.

Is that the contemplation of the parties?

A. Yes, it is.

THE COURT: Mr. Monson?

MR. MONSON: Yes, it is, Your Honor.

THE COURT: Informally I had understood there might be some problem with the submission of claims by the Bureau of Reclamation. Has that been resolved?

I guess – and, again, it was maybe secondhand information. I understood that the Bureau of Reclamation filed claims to water rights as a courtesy but not acknowledging jurisdiction of this court or this case over their rights.

MR. MONSON: I believe that's another agency you're speaking of. Bureau of Reclamation did in fact file all its claims in this case, and is agreeing to have them adjudicated in this case.

The agency you may be thinking of is the Corps of Engineers which has filed what they, we termed comity filings to advise the court of its interests in water but -- and this isn't in every case; but in certain cases there are certain projects that they don't believe come within the terms of this adjudication.

THE COURT: They're not part of the United States, I guess.

MR. MONSON: No, it's that the rights are not -- the federal interests there are not water rights. They're commerce clause powers, for example.

THE COURT: Thank you. Thank you for

that clarification.

Does this provision, Mr. Monson, or could it require a future adjustment by this court given the decree that might ultimately issue to the Bureau of Reclamation?

MR. MONSON: I don't believe that it would. This is really just essentially a marker to point people to the existence of this other agreement and this other water supply that is --

THE COURT: The Michaud agreement.

MR. MONSON: – Michaud agreement and the water supply that is actually held in the name of the United States through the Bureau of Reclamation as opposed to the Bureau of Indian Affairs for the benefit of the tribes.

THE COURT: Is that your understanding, Mr. Strong?

MR. STRONG: You're correct, Your Honor. There would be no required adjustment as a result of this language.

THE COURT: I think that may resolve all but one question. Let me just double-check. Actually a couple of questions.

Mr. Monson, just for, again, my edification, on page 50 of the consent decree,

No. 15 deals with the reservation of the right to develop geothermal ground water on the reservation.

Is there federal law on the development of geothermal water of this type?

MR. MONSON: There is federal law, the geothermal steam leasing act; but that does not necessarily apply to the Shoshone-Bannock tribes which have a claim at least to a reserved right to use the resources on their reservation, including geothermal steam if it's found thereon that would not necessarily be the subject of this geothermal leasing act which applies really to federal public domain lands.

THE COURT: So this provision is a compromise or an agreement between all of the signatories to allow for this type of development?

MR. MONSON: That's correct, Your Honor. A part of the problem is that there is no case law to my knowledge under the federal reserved rights doctrine which deals with geothermal resources. It simply just hasn't come up yet.

But we wanted to preserve the opportunity

that if geothermal steam is found on the reservation and the tribes want to put it to some economic use, or any use that meets their needs, that they be allowed to do that and at least be allowed to assert that and be – and that this decree would not act as a bar to their use of those resource.

Because simply it's a matter of saying that this decree simply doesn't deal with geothermal steam because, as I recall Mr. Shaw's testimony yesterday, state law doesn't consider geothermal steam to be a water resource subject to adjudication. So it's not necessary to try to attempt to decree it or quantify it in this case; but we just wanted to preserve the option for the tribes to develop that at a future time.

THE COURT: So, Mr. Strong, if the tribe determined that it would like to develop geothermal ground water, in your opinion how would they go about doing that? Do they have to make, resort to the department or this court or –

MR. STRONG: No, Your Honor. This gives them the right to do that.

THE COURT: Okay.

MR. MONSON: That's correct.

MR. ROSHOLT: Your Honor, may I add to that?

THE COURT: Yes, Mr. Rosholt.

MR. ROSHOLT: The other purpose for that, I think for those of us downriver that are concerned about the ground water development, is anything that's not 212 degrees would fit into the ground water allocation.

THE COURT: So there's clearly a line of demarcation here then. Thank you.

On page 51 of the proposed decree – this would deal with right 29-12558 – we have a provision under remarks which is section .x.b; and it establishes a rotational procedure on the Pevo Ditch. Now, I guess my question may be more of a legal one for Mr. Strong.

Mr. Strong, a rotational procedure is really an agreement between the parties to subordinate priority dates based on that rotational system. Is that in effect what's happening here?

MR. STRONG: I don't know that it is necessarily a subordination. It's an agreement that they will use a set of water rights in

conjunction with one another to provide a full water supply for the lands; and that they will – the water that accrues to those particular water rights will be rotated from one parcel of land to the next on a regular agreement basis.

THE COURT: Well, why would you need to rotate it if you just couldn't go under your priority?

MR. STRONG: Well, the reason you would rotate is sometimes the water right you have isn't sufficient for your own property; but by combining the various rights and by using them on alternate days, you are able to stretch that water supply to be able to serve the entire land base.

THE COURT: All right. Is that an adjustment of priority, or quantity, or what in your opinion?

MR. STRONG: It affects a number of the rights – I mean a number of the elements. It is not just simply – it allows you to use it on different places of use, allows you to essentially rent water from one person and trade water back and forth to use on your particular piece of property. So I think it could touch

about any of the elements.
THE COURT: Now, isn't such a rotational mechanism in the nature of a private contract between those water users?
MR. STRONG: It is essentially an agreement amongst the water users on how to trade the water amongst themselves or use the water amongst themselves.
THE COURT: No, I understand. And as Mr. Shaw testified, apparently on the Pevo Ditch here that we're talking about this is a long-standing mechanism that pretty much has historically been set for the operation on that ditch; is that right.
MR. STRONG: That's correct. And the difficulty we have here is we have tribal water rights and we have non-Indian water users that are served by some of the bureau of lands. And it is important to memorialize that relationship because of the tribes' sovereignty and the United States' sovereignty.
THE COURT: The purpose of my question is I have no problem here in this agreement. I know that rotational procedures are going to evidence themselves elsewhere because there

certainly are other places where historically that's gone on. And I'm trying to get my bearings to figure out what the best mechanism is to deal with those.
The unique circumstances of the Pevo Ditch where you have the mixture of the non-tribal and tribal rights, I think, from the standpoint of administration makes it necessary to put it in the decree.
MR. STRONG: Your Honor, I think on the rotational agreements you're going to have to look at those on a case-by-case basis and decide whether the parties have developed this as a custom and practice of the use of the water rights and that's really become an element of the water right, or whether it is a temporary agreement which isn't appropriate before the court. I think as those cases come forward you'll be able to make that judgment.
THE COURT: Now, as I read the state Constitution, the prior appropriation doctrine strictly applied would not allow this type of rotation.
MR. STRONG: I don't believe that's correct, Your Honor. The prior appropriation

doctrine incorporates custom and practice as part of the definition of a water right. And rotational agreements have historically been part of that practice.
THE COURT: Well, certainly one can waive the right, the constitutional right to make a call under their priority date. And where we have that custom or a written agreement to the contrary, again if it's free, voluntary and knowledgable, it certainly is acceptable.
MR. STRONG: Certainly if a party did not want to enter into the rotational agreement, they would have the ability the prevent that from happening.
THE COURT: Yes. Okay. That leads me to the last question, and in some part it was addressed yesterday.
It would appear that there is no disagreement with Mr. Shaw's characterization of those remarks which are -- or can be part of one of the elements.
Mr. Monson, can they be moved under the element?
MR. MONSON: It would probably depend on each remark, Your Honor. Some of the remarks

apply to more than one element of a water right. And in those cases, they're really more appropriate -- in my opinion they're more appropriately deemed to be a matter that further defines the water right, and would be better left out of each individual element as it would be a -- we could change the title of the remarks to other matters necessary to define the water right, and leave it in that category.
In other cases were it really just defines one element of the water right, it could be moved up under that element.
THE COURT: Mr. Strong, your opinion.
MR. STRONG: Your Honor, I would agree with Mr. Monson's comments. To some extent, I think maybe we have a nomenclature problem here with the use of the word remarks.
What we're really doing is we are defining, clarifying or providing for the administration of the water rights. And under 42-1411(k), that is in my mind an element -- or, as defined by the legislature, is an element of the water right.
And the question is a practical one. Where is the most efficient place to put these various types of descriptions, clarifications or

administrative provisions?
And certainly physically they could be moved under the elements. But if they relate to more than one element, do you then replicate it under each element? Does it cause confusion? Does it make it more difficult for people to read the decree?
If it relates to a single element, certainly it could be moved.
The other question that comes in is as you retry to redraft this -- and this shouldn't necessarily be the controlling question; but it is an important question. As we redraft this, if you get into questions whether you're changing the meaning of where you've been and whether the parties will then continue their consent to the agreement or the decree, and whether we'd have to come back with a new form of decree, so that's a practical problem we have to deal with.
THE COURT: I understand.
MR. STRONG: And one suggestion I'd make to the court is that perhaps one way of addressing the problem is changing the word remarks and simply saying clarification, definition or administration of water rights and

may approach?
THE COURT: You may, counsel.
MR. MONSON: I was asked by counsel for the Shoshone-Bannock tribes yesterday to offer on their behalf and on the United States' behalf a copy of the resolution of the Shoshone-Bannock tribal council indicating their approval of the agreement. It's a document similar to the congressional documents which were offered yesterday, and goes to the issue of the appropriateness of the agreement.
MS. JACKSON: Your Honor, this is Candy Jackson. I'm sorry. I couldn't hear what Mr. Monson was offering.
THE COURT: Oh. Mr. Monson is offering the resolution by the Shoshone-Bannock tribes dated February 4th, 1991, accepting the agreement.
MS. JACKSON: Okay.
THE COURT: And there is a second document attached thereto entitled "tribal water agreement referendum vote."
MS. JACKSON: Yes.
THE COURT: You're familiar with that document?

make that the element.
THE COURT: Thank you. That concludes my questions.
Do you have any other questions you would like to ask of Mr. Shaw, Mr. Strong?
MR. STRONG: No, Your Honor.
THE COURT: Mr. Monson?
MR. MONSON: I have no further questions of Mr. Shaw, Your Honor. I did, before we close the record in this case, want to offer an exhibit though. But we can do that in a moment.
THE COURT: Miss Jackson, did you have any questions of Mr. Shaw?
MS. JACKSON: No, Your Honor.
THE COURT: Mr. Rosholt, since you're here?
MR. ROSHOLT: Nothing. Thank you.
THE COURT: Mr. Shaw, you may step down. Thank you very much for your help.
(WITNESS EXCUSED)
THE COURT: Mr. Strong, did you have -- well, Mr. Monson, you had an exhibit you wish to present?
MR. MONSON: I do, Your Honor. If I

MS. JACKSON: Yes, I am.
THE COURT: All right. You want this marked as one exhibit?
MR. MONSON: Yes. I believe the staple just didn't quite make it to the last page; so it should be marked as one exhibit and admitted as the next exhibit in line.
THE COURT: As part of the federal cost-cutting you're getting shorter staples.
Mr. Strong, any objection?
MR. STRONG: No objection, Your Honor.
THE COURT: Mr. Rosholt?
MR. ROSHOLT: No objection.
THE COURT: We'll mark this as Exhibit 4; and it will be admitted and made part of the record.
Thank you, Mr. Monson.
MR. MONSON: Thank you, Your Honor.
(U.S. Exhibit 5 MARKED & ADMITTED)
THE COURT: Mr. Strong, did you have any further testimony or evidence you wish to present?
MR. STRONG: Your Honor, we had spoken earlier about the United States v. Daniels decree that was issued by the Circuit Court of the

United States in and for the District of Idaho, the Southern Division. Unfortunately I don't have an official copy with me at this point in time; but I would like to make that as part of this record.

Would it be permissible to submit that to the court for the record?

THE COURT: Any objection, Mr. Monson?

MR. MONSON: None.

THE COURT: When it's submitted, it will be marked as Exhibit No. 5 and can be admitted and made a part of this record.

At your convenience, Mr. Strong, submit it to the clerk; and we'll have it appended to the record.

MR. STRONG: The only other comment, Your Honor, is that when we were going through the definitions I understood the court to have a concern with the definitions, with whether they're unique to this particular agreement or whether they were going to have effect throughout the adjudication. And there are combination of those.

It seems to me, though, for the purposes of

the agreement we can simply say that they are applicable only to this agreement, but reserve the right to come back and suggest they would be appropriate for the overall adjudication at a later point in time.

THE COURT: No, that would be perfectly appropriate. My concern was just one of understanding what the intended effect of the definitions would be. And I can see we've got a mixed set of definitions pretty clearly.

MR. STRONG: They were really drafted for the agreement; but to the extent that we thought that they had application outside the agreement, we tried to do the type of definition that we would come back to the court and recommend and one that we felt we could live with in the adjudication.

THE COURT: Anything you wish to say in conclusion, Mr. Strong?

MR. STRONG: No, thank you.

THE COURT: Mr. Monson?

MR. MONSON: No, Your Honor, unless the court has further questions.

THE COURT: I do not.

Counsel, I would first like to make the

finding that the proposed form of judgment in this case emanating from the 1990 Fort Hall Indian water rights agreement is appropriate, and that is a consent decree form of judgment.

I find that based on the record the proposed consent decree is fair and adequate. There is – in addition to the signatures of the parties, there has been both federal and state legislation adopted essentially confirming the agreement and implementing parts of the agreement as well as the submission by the United States on behalf of the Shoshone-Bannock tribe indicating adoption of the agreement by the tribe.

There is no evidence of record showing that the agreement and the matters contain therein would unnecessarily interfere with the rights of third parties. The agreement does provide mitigation to third parties in certain situations with a procedure to resolve some contemplated changes and/or disputes.

Counsel, with respect to the definitional section, I find it's appropriate with the understanding that some of these definitions are clearly unique to the agreement; others are certainly terms that will be used generally in

the Snake River Basin Adjudication. I accept those definitions without binding the court to the application of those definitions in future decrees.

I'm not saying I'm rejecting them. I think it was the intent of the parties that it would be left open.

With respect to the specific rights and remarks sections for those rights denominated in the consent decree, I find that the majority are necessary either to further define the right or provide for administration of these rights under the terms of the decree. I find that they are necessary because there is no clear statutory or other authority that would allow for the administration contemplated.

There are certain remarks sections which, while perhaps not necessary in the sense that there is no other statutory or rule authority, I find are of sufficient assistance in further defining the rights or clarifying the contemplation of the parties that they ought to be included in the consent decree. That is equally true for the two sets of general provisions contained in the document.

Counsel, with respect to the inclusion of what could be definitions of the elements in the remarks sections, this agreement is unique. My decision accepting this agreement as it is is based, one, on the fact that substantial multi-year, multiparty negotiations resulted in the agreement, all of which occurred prior to the adoption of the 1994 amendments to the adjudication statutes and prior to the 1995 decision of the Idaho Supreme Court on basinwide issues No. 2 and 3.

Therefore I don't feel under these circumstances it would be appropriate nor required to make adjustments which I may require made in other situations that come before the court and would be clearly subject to the '94 amendments and the current Supreme Court decision. I think that the benefit to the parties and the process is far better served by accepting this in this form.

I guess what I'm saying, Mr. Strong, is this may or may not be the format for subsequent decrees; but balancing the equities and the difficulties presented in reaching an agreement in the first place, I don't think it serves a

useful purpose to elevate, in this situation, form over substance.

I would direct the parties, though, that is the United States and the State of Idaho, in ongoing negotiations with tribes or other federal entities to consider my comments; and where remarks or descriptions quite clearly could be placed or should be placed under an element, that should be done. Where there is that confusion where a remark covers multi-elements, use your best efforts to put it in the best place you can; and we'll simply review them on a case-by-case basis. I don't know if that's helpful, but --

Counsel, I would like, however, three modifications to the decree that we've already talked about being made. The two definitional sections, the Walton rights and I believe -- is it ceded lands? I can't remember.

MR. STRONG: Fee lands.

THE COURT: Fee lands be removed. That may require renumbering.

And, counsel, I would like to -- rather than use remarks section, I would like to conform the title of that section to the statute. I don't have a particular term that I'd like to

use. Clearly this falls in some other category; and it doesn't have to be just other.

I think a more descriptive title could be used. I'll leave it to you to suggest what that should be.

Mr. Monson, Mr. Strong, is there a date or time frame within which we should look to receiving your final submission on this? I'm not in a panic mode; but if it would be helpful, maybe we need to talk about that.

MR. STRONG: Your Honor, with the changes you're suggesting, I don't see any reason why we couldn't have the form of the decree submitted to you before the end of the week.

MR. MONSON: Your Honor, I think that's appropriate with the possible exception that I won't be back in the office until Friday. So perhaps the beginning of next week will allow me a day to review just what Mr. Strong is proposing.

THE COURT: Well, that will be fine. If our expectation is sometime in the next week or two, then that's --

Would that be acceptable, Miss Jackson?

MS. JACKSON: Yes, Your Honor.

THE COURT: All right.

MR. MONSON: Your Honor, at the time that we submit it, would it be appropriate to also request rule 54(b) certification?

THE COURT: I don't see any reason why not.

MR. MONSON: Okay. Thank you.

THE COURT: I think that was contemplated by everybody. I certainly would favor it. I will consider the certification with open eyes, but I think that that has been all of our expectation, and if you could attach that certification.

MS. JACKSON: Your Honor, would this be submitted to the court's mailing list, the expedited mailing list or--

THE COURT: Mr. Strong? I guess I don't think it needs to be, but --

MR. STRONG: My concern, Your Honor, is that we're talking about a -- obviously due process has to control; and I need to go back and look at the statutes. And we're talking about a 72-page document, too. I guess I'll just have to look at it and come back with a recommendation with Peter, Mr. Monson.

THE COURT: All right. Well, Miss Jackson, I would like you to consult with Mr. Monson and Mr. Strong.

My initial reaction, without thinking carefully, is that it's not necessary; that from a due process standpoint there is the opportunity to appeal when and assuming if this is certified under rule 54. But I will take your advice and counsel on this because I certainly, I think, join with you in trying to ensure that this thing is done pursuant to law so that we can avoid challenges.

MR. STRONG: Your Honor, I will make a suggestion for the definition to replace remarks; and it would be "matters necessary for definition and clarification or administration of the right."

THE COURT: I think in this context that would be acceptable. In future decrees I might want to break those out.

Again, just as a side note, Mr. Strong, if what were remarks in this document had been included under the elements, there would be no requirement for a necessity hearing. And so to the extent we can eliminate that procedure by

putting them under the elements, that's a benefit. Now, I do understand the other concerns; and we may not be able to do it with all of them.

That heading, I think, would be probably the best under these circumstances.

Counsel, is there anything further we should take up as part of this matter?

(NO RESPONSE)

THE COURT: Mr. Strong, Mr. Monson, thanks for your help; and I appreciate your getting together this morning.

Mr. Shaw, I appreciate your making yourself available as well.

I guess it is onward and upward. One down and 149,000 to go or something like that.

Gentlemen, ladies, we are adjourned. Thank you.

MR. MONSON: Thank you, Your Honor.

(PROCEEDINGS ADJOURNED)

REPORTER'S CERTIFICATE

STATE OF IDAHO)
) ss
County of Twin Falls)

I, DUANE J. SCHNEBERGER, duly appointed, qualified and acting official reporter of the Fifth Judicial District of the State of Idaho, DO HEREBY CERTIFY that I reported in stenotype the evidence and proceedings adduced in the above and foregoing cause, and that I thereafter transcribed said stenotype notes in longhand typewriting, and that the within and foregoing constitutes and is a true and correct copy of the transcript of said requested evidence and proceedings, said transcript consisting of pages 1 through 174, inclusive.

IN WITNESS WHEREOF, I have hereunto set my hand this 24 day of July, 1995.

DUANE J. SCHNEBERGER
Idaho CSR Cert. No. 5
Twin Falls, Idaho

Exhibit 5

101ST CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
101-831

APPROVING THE FORT HALL INDIAN WATER RIGHTS SETTLEMENT, AND FOR OTHER PURPOSES

OCTOBER 10, 1990.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. UDALL, from the Committee on Interior and Insular Affairs, submitted the following

REPORT

[To accompany H.R. 5308]

[Including cost estimate of the Congressional Budget Office]

The Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 5308) to approve the Fort Hall Indian Water Rights Settlement, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

Page 8, line 13, strike "$2,000,000 each year for the 5 fiscal years" and insert "$4,000,000 in the first fiscal year, $3,000,000 in the second fiscal year, and $3,000,000 in the third fiscal year".

Page 8, line 25, strike "$2,000,000 to be paid in the first fiscal year following the effective date of this Act and an additional $5,000,000 payable in not less that equal annual installments in not more than a 20-year period", and insert "$3,000,000 in the first fiscal year, $2,000,000 in the second fiscal year, and $2,000,000 in the third fiscal year".

Page 10, line 25, strike "any" and insert "all".

Page 11, line 13, at the end of the subsection insert "In the event funds are not paid as set forth in Section 7, the Tribes are authorized to bring an action in the United States Claims Court for such funds plus applicable interest. The United States hereby waives any defense of sovereign immunity to such action.".

PURPOSE

The purpose of H.R. 5308, by Mr. Stallings, Mr. Campbell and Mr. Craig, is to ratify and to contribute to the implementation of

the settlement of the water rights claims of the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation as set out in the Fort Hall Indian Water Rights Agreement of July 10, 1990.

BACKGROUND

In 1867, President Andrew Johnson by Executive Order designated the Fort Hall Indian Reservation for various Shoshone and Bannock Tribes. The reservation is located near the city of Pocatello in southeastern Idaho. On July 3, 1868, the Shoshone and Bannock Tribes concluded the Second Treaty of Fort Bridger, which was ratified by the Senate on February 24, 1869. Article 4 of the Treaty secured the Fort Hall Indian Reservation as a "permanent home" for the affected tribes. 15 Stat. 647–75. Although "the [1868] Treaty called for a reservation of approximately 1.8 million acres, 'surveying errors' in 1873 reduced its actual size to approximately 1.2 million acres." *Swim* v. *Bergland,* 696 F.2d 712714 (9th Cir. 1983). Subsequent cessions reduced the present-day Fort Hall Indian Reservation to approximately 544,000 acres. The Tribes (47 percent) and individual Indians holding allotments subject to restraints on alienation (43 percent) own most of the lands within the exterior boundaries of the Reservation.

In 1985, the Idaho legislature directed the Idaho Department of Water Resources to seek a general adjudication as to the water rights of various parties in the Snake River Basin. In the same session, the legislature enacted a concurrent resolution at the request of the Shoshone-Bannock Tribes and the Idaho executive branch directing that the Governor and the Attorney General attempt to settle through negotiation rather than litigation the extent of the Tribes water rights claims in the Snake River basin.

On August 30, 1985, the Shoshone-Bannock Tribes and the State of Idaho executed a Memorandum of Understanding that established a process for negotiating the Tribes' water right claims in the Snake River Basin in Idaho. Later the United States and certain water users joined in the negotiations. The negotiations proceeded with the Tribes, the State, the United States and interested water users all seated equally at the table, committed to good-faith government-to-government negotiations, with decision making based on sharing the best available data.

Negotiators for the Tribes, the State, the United States and the water users agreed at the outset to attempt to fashion an agreement that not only satisfied the Tribes water entitlements from the Upper Snake River but also protected to the maximum extent possible certain existing water users entitlements under state law. An agreement in principal consistent with this goal was reached on September 1, 1989, exactly four years after the execution of the first Memorandum of Understanding. On July 18, 1990, H.R. 5308 was introduced, which ratifies the agreement and authorizes and directs the Secretary of the Interior to implement the agreement on behalf of the United States.

The agreement and the legislation serve to settle all water right claims of the Shoshone and Bannock Tribes of the Fort Hall Indian Reservation in the Upper Snake River basin. As shown on Attachment 1, the Upper Snake River basin includes all sources of water

within the Snake River basin upstream from the Hells Canyon dam, the lower of three Idaho Power Co. dams authorized by FERC Project License No. 1971. Attachment 1 also shows the important hydrologic features on or near the Fort Hall Indian Reservation.

Under the Agreement, the Tribes, Tribal members and Tribal allotees will receive 581,031 AFY (acre-feet per year) of water from the Snake River basin as full satisfaction of all existing water right claims for present and future uses of the Tribes, Tribal members and Tribal allottees in the Upper Snake River Basin. Article 6.1 of the Agreement states that the basis of the Tribes' rights to water in the Agreement is the Winters Doctrine, first articulated by the United States Supreme Court in the case of *Winters* v. *United States,* 207 U.S. 564 (1908). This doctrine holds that, in the various treaties, statutes and executive orders recognizing or creating reservations for Indian tribes, there were reserved directly or by implication, such water for present and future use of the tribes as may be necessary to fulfill the purpose of the reservation.

The water supply for the Tribal water rights is a combination of natural flow, groundwater and federal contract storage water in satisfaction of the Tribes *Winters* water right claims. Following is a brief description of these rights.

SUMMARY OF WATER RIGHTS

Henceforth, unless otherwise indicated, the term "Agreement" refers to the Fort Hall Indian Water Rights Agreement of July 10, 1990; and, unless otherwise indicated, the term "Article" refers to specific portions of the Agreement.

1. Snake River/Sand Creek water rights

Article 7.1.1 of the Agreement provides that the Tribes shall have the right to divert 115,000 AFY of the natural flow of the Snake River. 100,000 AFY may be diverted as of the effective date of the Agreement. An additional 15,000 AFY of the Tribes' right to divert natural flow of the Snake River will be phased in over time: (1) as Indian lands not presently irrigated are brought under cultivation; or (2) as ceded lands served by the Fort Hall Indian Irrigation Project (FHIIP) are taken out of cultivation and corresponding water rights for such lands are relinquished by the United States.

The maximum rate at which the Tribes may divert natural flow of the Snake River is, initially, set at 390 CFS. However, this diversion rate will automatically increase to a maximum of 470 CFS at the same relative rate as the volume of the diversion increases from 100,000 to 115,000 AFY. The annual volume of consumptive use is 60,986 AFY. The priority date assigned to this water right is June 14, 1987, the date of the Executive Order creating the Reservation. The basis for the Tribal water right listed in Article 7.1.1 is the Winters Doctrine.

The natural flow of the Snake River is diverted into the Reservation Canal at the FHIIP's headgate. The maximum rate of diversion is measured at this headgate. This water is subsequently augmented by inflow to the Reservation Canal, primarily by return flow from Sand Creek, upstream of the "Drop" where the diversion volume is measured. This water is injected into the Blackfoot River

channel, travels downstream through the Equalizing Reservoir, and is rediverted into the Fort Hall Main Canal and North Canal for delivery within the FHIIP area. The combination of Snake River natural flow diversions and the inflows from Sand Creek will count as part of this water right, but only up to the actual demand of the North and Main Canals. Water which is not diverted by the Fort Hall Main Canal or North Canal continues down the Blackfoot River channel and is either diverted by other water users or returned to the Snake River.

The parties recognize that the water flow available from Sand Creek is generally surface runoff and subject to extreme fluctuation. The amount of flow from Sand Creek which is available to satisfy a portion of the Tribal water right in Article 7.1.1 varies depending upon: (1) the active storage capacity of the Equalizing Reservoir; (2) the predictability and timing of Sand Creek flow; and (3) Blackfoot River flow upstream of the point at which water from the Reservation Canal is injected into the Blackfoot River.

It is the Committee's understanding that the parties estimate that even if the Equalizing Reservoir were rehabilitated so that its active storage was 5,000 acre-feet, approximately 15 percent of the flows from Sand Creek would still not normally be usable to satisfy the Tribal water right to divert Snake River natural flow. Based upon 1989 costs, reconstruction of the Equalizing Reservoir to provide active storage of 5,000 acre-feet would cost between $5 and $15 million initially and annual maintenance would require an expenditure of about $150,000 each year. The Equalizing Reservoir was originally designed to store approximately 3,000 acre-feet. The present active storage capacity of the Equalizing Reservoir, however, is severely limited by sedimentation and other physical characteristics.

The Agreement provides a novel means of allocating Sand Creek flow which avoids the costs of rehabilitating and maintaining the Equalizing Reservoir so as to provide 5,000 acre-feet of active storage. Up to 85 percent of the Sand Creek flows are chargeable but only up to the demand of the Main and North Canals less the diversions into the Main and North Canals udner the combined Tribal water rights described in Articles 7.1.18, 7.1.19 and 7.1.20. The Agreement uses existing storage facilities to distribute the Sand Creek flows chargeable to the Tribal water right. Through an accounting mechanism that portion of the Sand Creek flow that is chargeable to Tribal use but not diverted will be credited to the Northside Canal Company in exchange for the release of the Northside Canal Company's upstream storage water. The storage water will be used to augment the natural flow of the Snake River and will be available to satisfy the Tribes' right to divert natural flow from the Snake River.

2. Blackfoot River water rights

The basis for the Tribal water right to divert natural flow of the Blackfoot River Basin in Article 7.1.18 of the Agreement is the Winters Doctrine. The Tribes shall have the right to divert a maximum of 150,000 AFY with a priority date as of the establishment of the Fort Hall Reservation (1867). Maximum consumptive use under this water right is 79,564 AFY. The water supplied under this right

can be used to irrigate 53,828 acres of Indian lands which are either presently under cultivation or which may be brought under cultivation in the future.

In exercising the Tribes' right to divert the Blackfoot River's natural flow, the Tribes and the United States agree to ensure that persons diverting natural flows from the Blackfoot River under State law continue to receive as much as 45,000 AFY. Articles 7.1.18(x)(d), 7.1.19(x)(a), and 7.1.20(x)(a). Strict application of this priority right would have preempted existing natural flow water rights for non-Indian lands within the Blackfoot River basin. To avoid this result, the Tribes agreed to exercise their water right from the Blackfoot River in a manner that protects the existing non-Indian entitlements. The process provides for both the Tribes and the non-Indians to divert available natural flows of the Blackfoot River. When natural flow is insufficient to satisfy both Indian and non-Indian natural flow water rights, the non-Indian water users will use the natural flow necessary to meet their entitlements and the Tribes will satisfy their full legal entitlement under the Winters Doctrine by supplementing the Tribal natural flow right with water accruing to the 348,000 AF Blackfoot Reservoir and 100,000 AF Grays Lake facility. In addition, the Tribes may supplement these back-up storage rights by developing the capability to divert groundwater, provided the combined diversion does not exceed the total 150,000 AFY diversion right.

The Agreement commits the parties to develop a Blackfoot River Management Plan to assist in the implementation of the 1990 Fort Hall Water Rights Agreement in accordance with the Blackfoot River Water Management Plan Statement of Purposes (April 20, 1990). That statement of purposes stipulates that it shall not change any final decree in the Snake River Basin Adjudication as provided for under Article 18 of the Agreement.

In addition, the Tribes and the United States agree to exercise this right in a manner which does not impair the project entitlements of water users in FHIIP. To protect the non-Indian Fort Hall Project water users, the Agreement is contingent upon the quantification of that portion of the existing Snake River Fort Hall Indian Project water right necessary to satisfy their contract entitlements. Presently, this is estimated to be not more than 60,000 AFY. The United States will ensure that the non-Indian Fort Hall Project water users' legal entitlement is met from the Snake River water right quantified for the non-Indian project water users and the 22,000 AFY of storage from Blackfoot Reservoir set aside for these water users.

3. Ross Fork Creek and Lincoln Creek water rights

The Tribes shall have the right to divert 5,000 AFY of natural flows from Ross Fork Creek and 5,700 AFY from Lincoln Creek under the water rights in Articles 7.1.2 and 7.1.3 of the Agreement. The basis for both diversion rights is the Winters Doctrine. The Tribes may opt to divert either groundwater or surface water to satisfy such rights, and may exceed limitations on diversions provided that any excesses are charged against tribal groundwater rights in Article 7.2.1.

4. Bannock Creek water rights

Articles 7.1.4 through 7.1.13 list Tribal water rights to divert natural flows of Bannock Creek and its tributaries. The basis for such rights is the Winters Doctrine. The combined maximum diversion volume of such rights amounts to 24,384 AFY.

The priority date of the water right in Article 7.1.13 is the establishment of the Fort Hall Reservation (1867). Priority dates for the water rights in Articles 7.1.4 through 7.1.12 vary according to the priorities for water allocations under the Bannock Creek Decree. *United States* v. *Daniels* (D. Idaho April 9, 1907, unpublished).

A strict application of the Tribes' *Winters* rights to natural flow would be inconsistent with the federal court decree in *United States* v. *Daniels* and would have displaced existing non-Indian water rights within the basin. Thus, the parties agreed to continue the historic water allocations pursuant to the Bannock Creek decree. Although the water right described in Article 7.1.13 has a priority date as of the establishment of the Fort Hall Reservation, it will be delivered subject to satisfaction of the Bannock Creek decreed water rights.

5. Portneuf River water rights

Articles 7.1.14 through 7.1.17 list Tribal water rights to divert natural flows of the Portneuf River and its tributaries. The basis for each of these water rights is the Winters Doctrine. The priority date for the water right in Article 7.1.14 is the date the Fort Hall Reservation was created. Priority dates of the water rights in Articles 7.1.15 and 7.1.16 vary according to the priority dates established in *United States* v. *Hibner*, 27 F.2d 909 (D. Idaho, E.D. 1928). The priority date for the water right in Article 7.1.17 is per the decree of the District Court of the Fifth Judicial District Court of the State of Idaho, in and for the County of Bannock dated June 5, 1926 in *Smith* v. *City of Pocatello*, Case No. 6669.

6. Tribal groundwater rights

Article 7.2.1 lists the Tribes' right to divert groundwater from any location within the Fort Hall Reservation. The basis for this right is the Winters Doctrine, and the priority date is the date the Fort Hall Reservation was created. If the Tribes' diversions of natural flows (or groundwater) from the Ross Fork Creek basin or Lincoln Creek basin exceed the maximum volumes set forth in Articles 7.1.2 and 7.2.3, excesses will be charged against the Reservation-wide right to divert groundwater.

Nine wells used to supplement the surface water applied to lands in the Michaud Division of the FHIIP are included in the tribal water right in Article 7.2.1; the Tribes may also divert groundwater for Indian lands within the City of Pocatello, and other Indian lands within the Portneuf River basin.

In addition to the Reservation-wide groundwater right in Article 7.2.1, the Tribes may divert groundwater from the Bannock Creek basin under Article 7.2.2 of the Agreement. The basis for this right is the Winters Doctrine and priority date is the date the Reservation was created. The Tribes have the right to divert the annual yield of surface water and groundwater from Bannock Creek basin,

provided that if such combined diversions exceed 48,500 AFY, the excess will be charged against the tribal water right listed in Article 7.2.1

The Tribes and the United States agreed to exercise this water right in a manner which ensures that persons diverting as much as 2,400 AFY of groundwater from the Bannock Creek basin continue to receive their full legal entitlement.

7. Tribal Federal contract storage water rights

Federal contract storage water rights held in trust by the United States for the benefit of Tribes as part of the Michaud Division of the FHIIP are listed for American Falls Reservoir and Palisades reservoir in Article 7.3.1 of the Agreement. These federal contract storage rights are in partial satisfaction of the Tribes *Winters* rights and these contract rights are equivalent to 46,931 acre-feet of storage space in American Falls Reservoir and 83,900 acre-feet in Palisades Reservoir and may be used to irrigate up to 33,938 acres of Indian lands. Article 7.3.2 provides that Indian lands in excess of 33,938 acres may be irrigated with the water that accrues to these federal contract storage rights if no other water users are injured thereby.

Article 7.3.3 indicates that the Tribes and the Secretary agree to continue to exchange water accruing to the federal contract storage rights in Article 7.3.1 for water diverted from the Portneuf River as provided for in Article 8 of the Michaud Contract, which is an agreement between the Bureau of Reclamation and the Bureau of Indian Affairs implementing the Michaud Act.

The tribal water rights listed in Article 7.3.1 may also be rented through Shoshone-Bannock Water Bank to be established under Article 7.3.4 of the Agreement. The terms and conditions under which the Tribes may rent such stored water off the Reservation are set forth in Articles 7.3.4 through 7.3.12. In addition to renting storage water under Article 7.3, the Agreement provides that the Tribes shall be entitled to allocate the water listed in Article 7.3.1 for instream flows in river reaches on or adjacent to the Reservation.

The parties agree that transactions through the Shoshone-Bannock Water Bank may include rental of water for instream flow purposes in the middle and lower portions of the Snake River to protect and enhance anadromous fish runs, as well as provide benefits for resident fish and wildlife. In addition, water rented through the Shoshone-Bannock Water Bank has the potential to relieve mounting pressures on consumptive water use by Idaho water users in the Upper Snake River Basin.

The Shoshone-Bannock Water Bank will be established pursuant to State law subject to several protections for all parties built into the Agreement. These protections include assurances that there will be no limitations placed on rental of tribal water supplies due to: (1) the Michaud Contract (except for the Portneur exchange); (2) any potential reductions in the quantities of water available to other water users; (3) any potential conflict with public welfare or local public interest; and (4) any refill penalties for renting water on the terms and conditions set forth in the Agreement.

The Agreement expressly provides that the purposes of Tribal water bank include: (1) beneficial use of tribal water rights; (2) assuring the adequacy of tribal water supplies; (3) providing tribal funding for water facilities; (4) allowing the Tribes to realize the full economic value associated with their water entitlements; and (5) encouraging good-faith dealing and cooperation among the parties.

The State expressly agrees in Article 7.3.6, not to take any action that will interfere with the nature, scope, spirit and purposes of the Shoshone-Bannock Water Bank. In addition, in Article 7.3, the Tribes are assured that there will be: (1) no taxation or alienation of the proceeds of any water rental transaction by either State or federal governments; (2) no forfeiture, abandonment, or relinquishment of tribal water rights as a result of any water rental transaction; and (3) no constraints on income which the Tribes may earn from renting its storage water.

Neither the State nor the United States will be subject to any liability for financial losses suffered by any purchaser of water rented by the Tribes. However, the State acknowledges its responsibility to deliver such rented water within any established water district within Idaho, and the State has assured the Tribes that, as a result of the Snake River Basin Adjudication, such districts will be established through the length of the Snake River basin in Idaho.

In addition to the Tribes' federal contract storage rights in Article 7.3, the United States holds in trust for the benefit of the Tribes and other water users within the FHIIP federal contract storage water rights in Blackfoot Reservoir and Grays Lake. These storage water rights will be used by the Tribes to supplement the Tribal Water right to divert 150,000 acre feet of natural flow from the Blackfoot River under Article 7.1.18 and to provide up to 22,000 AFY for non-Indian Fort Hall Indian Irrigation Project water users.

The Tribe's storage rights in Blackfoot Reservoir carry a priority date of September 3, 1907. The basis of this storage right is the license acquired pursuant to the 1907 Act. The basis of the Tribes' storage rights in Grays Lake are permit numbers 14247 and R-161 acquired pursuant to the 1907 Act and carry a priority date of August 23, 1919 per the process whereby the United States acquired such rights for the benefit of the Tribes and other water users in the FHIIP.

SUMMARY OF OTHER PROVISIONS RELATING TO THE TRIBAL WATER RIGHTS

Articles 7.4.1 through 7.4.3 provide that the Tribes shall be entitled to allocate water for instream flows on, as well as adjacent to, the Reservation. Under Articles 7.4.1 and 7.4.3, the Tribes may use storage water accruing to their federal contract storage rights in American Falls Reservoir and Palisades Reservoir, and as much as 15,000 acre-feet of storage in Blackfoot Reservoir and Grays Lake, to maintain and enhance the integrity of ecosystems. In addition, the Tribes may rent water accruing to the federal contract storage

water rights listed in Article 7.3.1 outside the Reservation for instream flow purposes under Articles 7.3.4 through 7.3.12.

Article 7.5 provides that the Tribes shall have the flexibility to apply water supplied from the water rights listed in Article 7 of the Agreement for any beneficial use within the Reservation, provided that such transfers as may occur do not exceed: (1) the maximum diversion rate not withstanding the period of use; (2) the annual volume of diversion; and (3) the annual volume of consumptive use. Article 4.8 of the Agreement provides that the transfer or lease of such water within the reservation may be for: (1) irrigation; (2) domestic, commercial, municipal or industrial purposes; (3) hydropower generation; (4) recreation; (5) stockwatering; (6) fish propagation; (7) instream flows; and (8) any other uses which provide benefits to the users of such water.

As set forth in Article 7.6, which applies only to the Tribes' right to divert natural flow of the Snake River and Sand Creek, transfer or lease of the water right in Article 7.1.1 may not result in an injury to another water right which is not capable of being mitigated in accordance with the process described in Articles 7.7 and 7.8.

The Tribes agree that water users served by the FHIIP shall be provided a right of first refusal to lease water made available for such purposes within the Reservation.

In order to mitigate the impacts on non-Indian Snake River Water users from implementation of this Agreement, the United States will contribute unallocated storage space in Ririe and Palisades reservoirs. This water will be made available without cost other than the payment of annual operation and maintenance charges for use in mitigating the impacts to non-Indian Snake River water users from the implementation of this Agreement. All environmental compliance costs associated with the execution of the storage space contracts with the Idaho Water Resource Board or other appropriate contracting entity are a federal obligation.

In addition to quantifying the Tribal water rights and providing protection for existing water users, the Agreement provides for the administration of the water rights. The administration provisions are designed exclusively for the purposes of this Agreement and do not address the administration of any other federal water rights such as the Bureau of Reclamation water rights for the federal dams on the Snake River.

COMMITTEE AMENDMENTS

The first two amendments provide for funding of the Tribal Development Fund over three years instead of five, and that the Reservation Water Management System will also obtain all of its funding in three years instead of twenty years. The third amendment is technical but important. The previous language stated that the tribes waived and released claims after "any" monies are paid. The amendment provides that the waiver applies to only after "all" funds are paid. The fourth amendment provides for a legal recourse against the United States. The amendment clarifies that a binding contract exists which would result in liquidated damages in the U.S. Claims Court if the United States fails to make its payments.

SECTION-BY-SECTION ANALYSIS OF H.R. 5308

Section 1

Section 1 provides that the title may be cited as the "Fort Hall Indian Water Rights Act of 1990."

Section 2

Section 2 provides definitions for various terms used in the bill. The term "Agreement" refers to the "1990 Fort Hall Indian Water Rights Agreement" between the State of Idaho, the Shoshone-Bannock Tribes, the United States and other parties. The term "Committee of Nine" means the advisory committee of the affected non-Indian water district in Idaho. The term "Final Decree" refers to the decree which will be entered in Idaho State Court after enactment of this bill, which will confirm tribal water rights set forth in the Agreement. The term "Michaud Division" refers to a division of the Fort Hall Indian Irrigation Project authorized by the "Michaud Act of 1954." The "Michaud Contract of 1957" is a Memorandum of Agreement between the Bureau of Reclamation and the Bureau of Indian Affairs relating to the Michaud Division.

Section 3

Section 3 states the purpose of the Act is to achieve a fair, equitable and final settlement to all water rights claims of the Shoshone-Bannock Tribes in the Upper Snake River Basin.

Section 4

Section 4 ratifies the water rights agreement and authorizes and directs the Secretary of the Interior to implement the Agreement.

Section 5

Subsection (a) of Section 5 authorizes and directs the Secretary to contract with the Idaho Water Resource Board, or another entity acceptable to the Committee of Nine, for 18,900 acre feet of space in the Palisades Reservoir and 80,500 acre feet of space in the Ririe Reservoir and deems the payment for the storage to have been made. The contracting entity is required to apply within 1 year of enactment, and the contracting party must agree to pay maintenance and operation costs associated with the space. The repayment obligation associated with the construction costs for the non-contracted storage space is deemed repaid by this Act. Non-Indian irrigators will be eligible for all Reclamation law exemptions that normally apply when reclamation project beneficiaries themselves repay project costs.

Subsection (b) precludes the Committee of Nine and the State from setting aside the Final Decree because of failure to apply for storage space within the requisite one year. If the United States fails to convey the space after the filing of timely application, however, then the Committee of Nine or the State have the right to set aside the decree.

Section 6

Subsection (a) provides that the Tribes have the right to transfer or lease for any beneficial purpose the water rights confirmed in

the Final Decree within the Reservation pursuant to article 7 of the Agreement.

Subsection (b) provides that the Tribes have the right pursuant to the Agreement to rent for any beneficial purpose the water accruing to Federal contract storage space held in trust for the Tribes under the Michaud Act.

Subsection (c) allows the Tribes to use water accruing to the Federal contract storage space held in trust under the Michaud Act for instream flows for river reaches on or adjacent to the Reservation and up to 15,000 acre feet per year for instream flows in reaches of the Blackfoot River pursuant to the Agreement.

Subsection (d) provides that the ratification in section 4 constitutes congressional approval of uses described in subsections (a), (b), and (c) of the proprietary water rights described in article 7 of the Agreement.

Subsection (e) amends the Michaud Act and the Michaud Contract to authorize uses described in subsections (a), (b) and (c).

Subsection (f) precludes State and Federal taxation or alienation of proceeds obtained under subsections (a) or (b).

Subsection (g) provides that the Tribes use of water rights described in subsections (a), (b), and (c) or nonuse of rights are not to be interpreted as or result in any loss of water rights. Exercise of the rights in subsections (a) and (b) are not subject to income or other compensation constraints.

Subsection (h) provides that, with the exception of this section, Tribal water rights described in the Agreement may not be sold, leased, rented, transferred, or otherwise used off the Fort Hall Indian Reservation.

Section 7

Section 7 outlines the federal monetary contribution of $22 million. The Agreement provided for a pay out of these funds over 20 years. The Committee, however, has amended this section of the bill to provide for a pay out over not more than three years and to clarify the Tribes' right to seek payment in the U.S. Claims Court pursuant to section 8(b) if the funds are not appropriated as provided in this section.

Subsection (a) authorizes the appropriation to the Department of Interior of $4 million in the first fiscal year and $3 million in the second and third fiscal year following the date of enactment of this bill for payment to a Tribal development fund, which the Secretary is authorized and directed to establish for the Shoshone-Bannock Tribes. The Secretary is required to pay the funds within 60 days of the appropriation and is required to disburse funds on request of the Tribes.

Subsection (b) authorizes the appropriation of $3 million in the fiscal year and $2 million in the second and third fiscal years following the date of enactment of this bill to the BIA for use by the Tribes for development of a Tribal Reservation water management system. The Secretary is required to allocate and make payment to the Tribes within 60 days of the appropriation of funds.

Subsection (c) authorizes to be appropriated to the BIA $5 million to acquire for the Fort Hall Indian Irrigation Project up to 9,800 acres of land, grazing rights and related improvements adjacent to

Grays Lake primarily to enhance storage and the operation of the Project, and to provide collateral benefits for the United States Fish and Wildlife Refuge. This appropriation will greatly enhance the flexibility of operation for the project while simultaneously providing significant incidental benefits for the Grays Lake Wildlife Refuge. Once appropriated, these funds will be available until expended for the purposes set forth in this subsection.

Subsection (d) prohibits funds acquired under subsections (a), (b) and (c) from being distributed to tribal members on a per capita basis.

Subsection (e) prohibits the Tribes and the United States from setting aside the Final Decree if Congress fails to appropriate the funds authorized by subsection (a), (b) or (c) or if the United States fails to acquire the lands, grazing rights, or other improvements adjacent to Grays Lake. However, it is the understanding of the Committee that if the funds authorized by subsections (a), (b) and (c) of this section fail to be appropriated and disbursed as provided for in subsections (a), (b) or (c), the cause of action provided for in subsection 8(b) shall accrue.

Subsection (f) provides that this Act shall not be construed to alter the Federal trust responsibility to the Tribes or to prohibit the Tribes from seeking additional authorizations or appropriations for Tribal programs or purposes.

Section 8

Subsection (a) provides that the Shoshone and the Bannock Tribes of the Fort Hall Indian Reservation, their members, and their allottees and the United States on behalf of these Tribes, their members, and their allottees and the Bureau of Indian Affairs, Fort Hall Agency waive and release all claims to water rights from any source within the Upper Snake River basin other than those described in article 7 of the Agreement. The waiver and release does not apply, however, to individual member claims under state law for lands not defined as Indian lands, any other tribes than the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation, or federal agencies other than the Bureau of Indian Affairs, Fort Hall Indian Agency.

Subsection (b) provides that the Tribe's claims against the United States concerning the water rights settled by the Agreement and for lands and water associated with the construction and enlargement of the American Falls Reservoir will not be waived until full payment of the monies required by section 7 is made. Although it was the intent of the parties that the waiver of claims in subsections (a), (b) and (c) of this section would give the Tribes a cause of action in the U.S. Claims Court under subsection (b) of section 8 if Congress failed to appropriate the funds required by this section, the Committee felt that an amendment was necessary to clarify this understanding. Thus, the section now specifically provides that, in consideration of the waiver of any claims provided for in subsections (a), (b) or (c) of this section, should Congress fail to appropriate the funds in the amounts and within the time limits provided for in this section, the Tribes shall have a cause of action in the U.S. Claims Court against the United States for any unpaid funds plus interest. Subsection 8(b) creates a binding contract be-

tween the United States and the Tribes for liquidated damages for any unpaid amounts authorized by this section should the United States fail to make the payments as required. Further, the section waives the United States defense of sovereign immunity.

Subsection (c) provides that the Tribes and the United States agree to not make claims against or seek compensation from any non-federal person for lands or water associated with the construction or enlargement of the American Falls Reservoir upon entry of the Final Decree.

Section 9

Section 9 provides that the water rights described in the Agreement and confirmed in the Final Decree are in full satisfaction of all water right claims of members of the Tribes and allottees for Indian lands in the Upper Snake River Basin. This section is in recognition of the fact that the Tribal water rights described in the Agreement are based upon the water needs for Indian lands held by Tribal members and allottees as well as the general needs of the Tribes. If individual Tribal members or allottees are decreed a water right in Civil Case No. 39576, a corresponding deduction is to be made in the Tribal water rights set forth in the Agreement.

Section 10

Subsection (a) precludes the funds authorized under section 7 from being disbursed until the Agreement becomes effective. If the Agreement does not become effective, the money will be returned to the Treasury and the Agreement may be voided by any party.

Subsection (b) provides that the Act will have no force or effect unless the Agreement becomes effective. This section is necessary because there are still several steps required before the Agreement becomes effective including but not limited to state legislative and general Tribal membership approval.

Section 11

Subsection (a) preserves the water right claims of the city of Pocatello, Idaho and Indian tribes other than the Shoshone-Bannock Tribes of Fort Hall Indian Reservation and states that the Act shall not be construed to quantify or affect those claims.

Subsection (b) provides that water right claims of the Tribes and the United States are preserved and not waived except as set forth in the Agreement, and water right claims of Federal agencies other than the Bureau of Indian Affairs, Fort Hall Agency are not affected by the Agreement or the Act. Nothing in the Agreement or this Act are intended to restrict federal power to reserve or federal or tribal power to acquire water rights in the future in accordance with the Agreement and applicable law.

Subsection (c) preserves the rights of the parties not granted, recognized, or settled by the Agreement or the Act.

Subsection (d) states that, except as expressly provided for in the Act, nothing is to be considered to amend, construe, supersede, or preempt any State, Federal, or Tribal law or any interstate compact regarding the Snake River or its tributaries.

Section 12

Section 12 provides that the rights confirmed in the Final Decree are not to be taken from the Tribes without their consent and the payment of just compensation.

COST AND BUDGET ACT COMPLIANCE

The cost and budgetary impact of H.R. 5308, as evaluated by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 3, 1990.

Hon. MORRIS K. UDALL,
Chairman, Committee on Interior and Insular Affairs, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the attached cost estimate for H.R. 5308, the Fort Hall Indian Water Rights Act of 1990.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

ROBERT D. REISCHAUER,
Director.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: H.R. 5308.
2. Bill title: The Fort Hall Indian Water Rights Act of 1990.
3. Bill status: As ordered reported by the House Committee on Interior and Insular Affairs, September 26, 1990.
4. Bill purpose: The Fort Hall Indian Water Rights Act of 1990 would ratify an agreement between the State of Idaho, the Shoshone-Bannock Tribes, the United States and other specified parties to settle certain claims to water on the Snake River. The Department of the Interior would be directed to provide storage space in certain federal reservoirs to specified nonfederal interests; forgive certain outstanding obligations to repay the federal government for the construction of that storage space; and provide for the use of water by the Tribes.

This bill would authorize the appropriation of $22 million over the next three years to establish a tribal development fund ($10 million), to construct water management systems for the reservation ($7 million), and to acquire land and grazing rights ($5 million).

5. Estimated cost to the Federal Government:

[By fiscal year, in millions of dollars]

	1991	1992	1993	1994	1995
Estimated authorization level	12	5	5		
Estimated outlays	10	6	5	1	

The costs of this bill fall in budget functions 300 and 450.

Basis of estimate: CBO assumes that H.R. 5308 will be enacted by early in fiscal year 1991 and that the authorized funds will be appropriated beginning in that year. Outlays were estimated based on information from the Department of the Interior and on historical spending patterns for similar programs.

Information from the Bureau of Reclamation and the Bureau of Indian Affairs indicates that under current law, the federal government is unlikely to collect payments on the outstanding repayment obligations being forgiven.

We therefore do not expect enactment of those forgiveness provisions to affect the federal budget.

6. Estimated costs to State and local governments: Not yet completed.

7. Estimate comparison: None.

8. Previous CBO estimate: None.

9. Estimate prepared by: Theresa Gullo.

10. Estimate approved by: C.G. Nuckols, for James L. Blum, Assistant Director for Budget Analysis.

INFLATIONARY IMPACT STATEMENT

Enactment of H.R. 5308, as amended, will not have any inflationary impact.

OVERSIGHT STATEMENT

No specific oversight activities were undertaken by the Committee and no recommendations were submitted to the Committee pursuant to rule X, clause 2.

COMMITTEE RECOMMENDATIONS

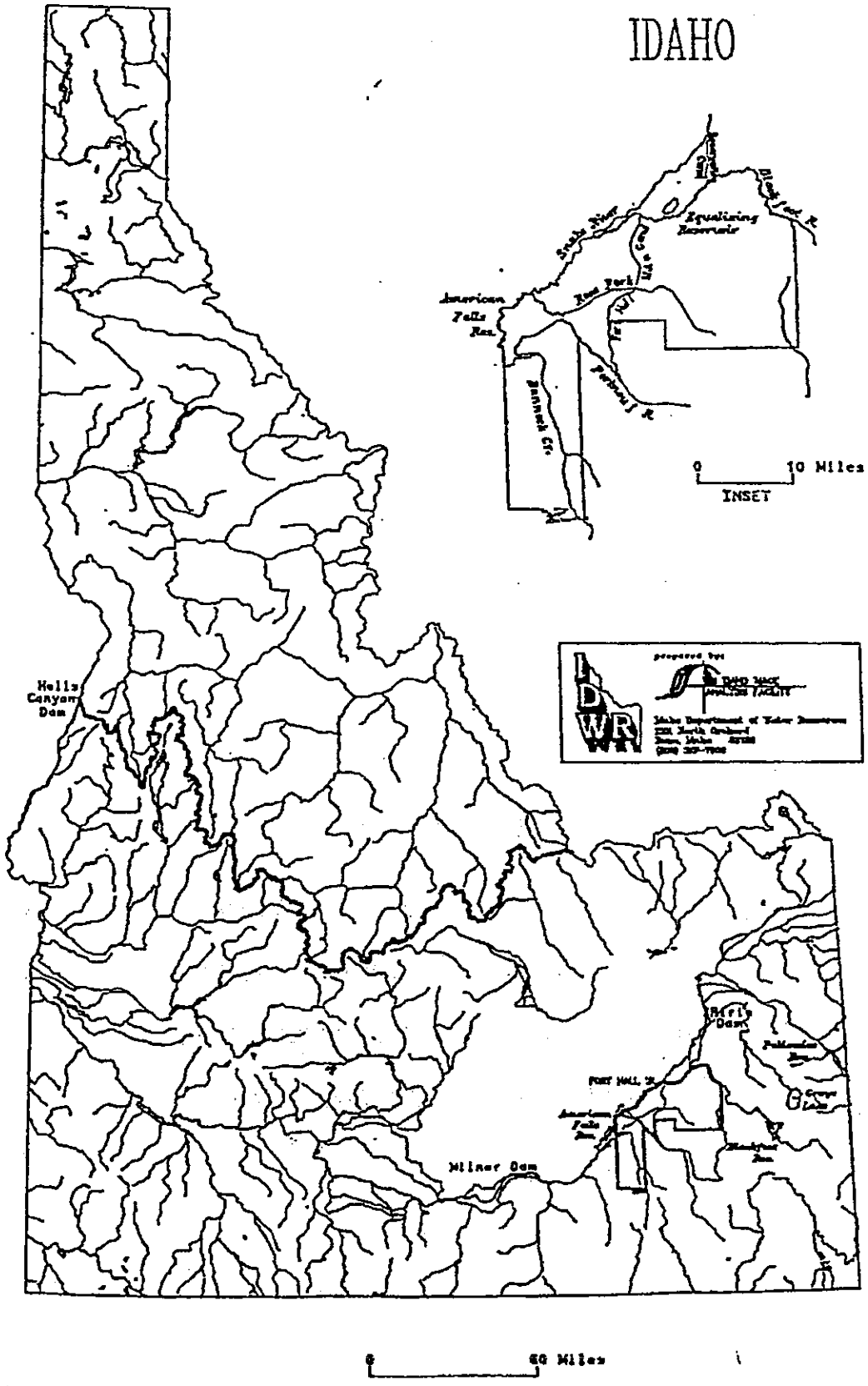
The Committee on Interior and Insular Affairs, by voice vote, approved the bill, as amended, and recommends its enactment by the House.

DEPARTMENTAL REPORT

The Committee requested a report on the legislation from the Department of the Interior by a letter dated August 23, 1990. While an official report from the Interior Department has not been received as of the writing of this report, testimony was submitted by the Department to the Committee at the September 14, 1990 hearing.

APPENDIX I

A map of the Upper Snake River Basin and important hydrologic features, for use with the Fort Hall Indian Water Rights Agreement, is set forth below:



APPENDIX II

The Fort Hall Indian Water Rights Agreement of July 10, 1990, is set forth below:

THE 1990 FORT HALL INDIAN WATER RIGHTS AGREEMENT

* * *

By and Between

THE SHOSHONE-BANNOCK TRIBES OF THE FORT HALL INDIAN RESERVATION, THE STATE OF IDAHO, THE UNITED STATES, and CERTAIN IDAHO WATER USERS

THE 1990 FORT HALL INDIAN WATER RIGHTS AGREEMENT

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THE 1990
FORT HALL INDIAN
WATER RIGHTS AGREEMENT

ARTICLES OF AGREEMENT BY AND BETWEEN THE SHOSHONE-BANNOCK TRIBES OF THE FORT HALL INDIAN RESERVATION, THE STATE OF IDAHO, THE UNITED STATES, AND CERTAIN IDAHO WATER USERS.

In settlement of litigation involving claims made by the United States on behalf of the Shoshone-Bannock Tribes to water rights in the Upper Snake River Basin and its tributaries, the parties agree as follows:

ARTICLE 1. TITLE

These Articles of Agreement collectively comprise, and may be cited as, "The 1990 Fort Hall Indian Water Rights Agreement" or the "Agreement."

ARTICLE 2. PURPOSE

All parties to this Agreement seek to secure, and pledge their honor to maintain, peaceful settlements of conflicts over water among the parties in the Snake River Basin in Idaho.

ARTICLE 3. PREAMBLE

3.1 The State of Idaho, pursuant to Idaho Code § 42-1406A (Supp. 1989) has commenced in the Fifth Judicial District Court of the State of Idaho in and for the County of Twin Falls a general adjudication of the rights to the use of the water from that portion of the Snake River Basin located within the State of Idaho.

3.2 H. Con. Res. 16, 48th Idaho Leg., 1st Sess. (1985) directed the State to engage in good faith, government-to-government

negotiations with the Shoshone-Bannock Tribes to settle the nature and extent of the Tribes' water rights reserved under the Winters Doctrine within the Snake River Basin in Idaho to avoid litigation.

3.3 The Tribes have a long-standing tradition of favoring negotiation as a means of resolving conflicts. Cong. Globe, 40th Cong., 3d Sess., p. 803, col. 1 (February 2, 1869).

3.4 The policy of the Congress and the federal Executive Branch is to facilitate negotiations among Indian tribes, states, private water users and federal agencies to avoid litigation. 55 Fed. Reg. 9223 (March 12, 1990).

3.5 Executive Order Nos. 85-9 and 87-9 provide that it is in the interest of the State of Idaho to settle through negotiated agreements, if possible, all claims for water rights reserved under federal law. These executive orders further instructed the Idaho Water Resource Board to represent the State and to provide for the effective involvement of interested Idaho water users and other members of the public in the negotiations.

3.6 The Fort Hall Business Council requested, by resolution dated July 17, 1985, that the United States, consistent with federal trust responsibilities to the Tribes, assist and participate in the negotiations leading to this Agreement.

3.7 The Tribes and the State agreed in a Memorandum of Understanding dated August 30, 1985, to commence good

faith, government-to-government negotiations as early as October 15, 1985. On January 10, 1986, the Tribes, the State and the United States agreed to extend that August 30, 1985 Memorandum of Understanding. The parties subsequently entered into a Technical Studies Agreement establishing a methodology to review the Tribes' reserved water rights claims and to identify matters for further discussion and analysis.

3.8 On October 31, 1985, the Idaho Water Resource Board appointed an Ad Hoc Committee to recommend how best to provide for the effective involvement of interested Idaho water users and other members of the public in the negotiations. That committee submitted its recommendation for review by the Idaho Water Resource Board on December 6, 1985 and for action by negotiators on December 10, 1985. Based upon the recommendation of the committee, the Board designated the Committee of Nine as a party to the negotiations to represent the Idaho water users' interests and established a notice procedure to notify the general public of negotiation meetings. On December 10, 1985 the United States, the Tribes and the State agreed to the Board's proposal providing for open meetings and public participation in the negotiations.

3.9 On May 19, 1987, the Tribes, the State, and the United States, joined by a committee of private water users, executed a Second Memorandum of Understanding, which provided for the continuation of the negotiations.

3.10 This Agreement is the culmination of negotiations undertaken by the parties since 1985.

ARTICLE 4. DEFINITIONS

The following definitions apply for the purposes of this Agreement:

4.1 "Acre foot" or "AF" means the amount of water necessary to cover one acre of land to a depth of one foot and is equivalent to 43,560 cubic feet or 325,851 gallons of water.

4.2 "Acre feet per year" or "AFY" means the number of acre feet of water used from January 1 to December 31.

4.3 "Allotted lands" means lands within or without the exterior boundaries of the Fort Hall Indian Reservation, which were allotted to individual Indians in accordance with applicable Tribal/federal agreement and federal statutes, and which are presently owned by Indians in restricted fee or trust status, and which are located in the counties of Bannock, Bingham, Caribou, and Power. The applicable Tribal/federal agreement and statutes include:

.1 the Agreement of May 14, 1880, ratified by Act of February 23, 1889, ch. 203, 25 Stat. 687; and

.2 the Act of March 3, 1911, ch. 210, 36 Stat. 1058, 1063.

4.4 "American Falls Reservoir" means a water storage facility of the federal Minidoka Project authorized by the Secretary of the Interior under the Reclamation Act of 1902, 32 Stat. 388-390 (April 23, 1904); examined and reported upon by a

Board of Army Engineers and approved by the President on January 5, 1911, in accordance with the Act of June 25, 1910, 36 Stat. 835-836; and initially constructed in 1927 and subsequently replaced under the authority of the Act of December 28, 1973, Pub. L. 93-206, 87 Stat. 904-905.

4.5 "Annual diversion volume" means the maximum volume of water in AFY that can be diverted or stored by the holder of a water right.

4.6 "Annual volume of consumptive use" means the maximum volume of water in AFY that can be consumptively used by the holder of a water right.

4.7 "Basis of right" refers to the legal authority pursuant to which the water right is established or the document by which the right is evidenced.

4.8 "Beneficial use" means any use of water for DCMI, irrigation, hydropower generation, recreation, stockwatering, fish propagation and instream flow uses as well as any other uses that provide a benefit to the user of the water.

4.9 "Blackfoot Reservoir" means a water storage facility of the Federal Blackfoot Project authorized by the Act of March 1, 1907, ch. 2285, 34 Stat. 1015, 1024; the Act of April 30, 1908, ch. 153, 35 Stat. 70, 78; Act of April 14, 1910, ch. 140, 36 Stat. 269, 274; and the Act of May 24, 1922, ch. 199, 42 Stat. 552, 568.

4.10 "Ceded lands" means those lands within the Reservation as originally established under the Second Treaty of Fort

Bridger of July 3, 1868, 15 Stat. 673 and companion executive orders of June 14, 1867, 1 C. Kappler 835-837 (1904), and July 30, 1869, 1 C. Kappler 838-839 (1904) and as fixed by the federal survey of 1873 that were ceded by the Tribes to the United States pursuant to the following Tribal/federal agreements:

.1 Agreement of May 14, 1880, ratified by the Act of February 23, 1889, ch. 203, 25 Stat. 687;

.2 Agreement of July 18, 1881, ratified by the Act of July 3, 1882, ch. 268, 22 Stat. 148;

.3 Agreement of May 27, 1887, ratified by the Act of September 1, 1888, ch. 936, 25 Stat. 452; and

.4 Agreement of February 5, 1898, ratified by the Act of June 6, 1900, ch. 813, 31 Stat. 692.

4.11 "Committee of Nine" or "Committee of Nine of Water District 01" means the advisory committee of Water District 01.

4.12 "Consumptive use" means the amount of water that does not remain in the water system after use or is not returned to the water system through return flows or seepage, whether or not treatment for purpose of maintaining water quality is required before the water may be returned to the water system, but does not include water lost through evaporation from storage.

4.13 "Cubic feet per second" or "CFS" means a rate of water discharge equivalent to approximately 448.63 gallons per minute.

4.14 "DCMI" means domestic, commercial, municipal and industrial uses excluding hydroelectric generation. Domestic use means the diversion of water by one or more individuals, family units or households for drinking, cooking, laundering, sanitation and other personal comforts and necessities, stockwatering, and for the irrigation of a family lawn, garden or orchard not exceeding one-half acre of area per household. Industrial and commercial use means the use of water for any purpose that benefits an industrial or commercial enterprise. Industrial and commercial use of water include, but are not limited to, agricultural spraying, irrigation of plants in greenhouses, industrial cooling, mining, energy production, commercial recreation, and losses associated with any industrial or commercial operation. Municipal use means the delivery and use of water through an investor-owned, mutually-owned, tribally-owned or publicly-owned water utility or delivery system for all uses usual and ordinary to such systems. Such use includes but is not limited to uses of water for domestic, irrigation of lawns and gardens, commercial, industrial, fire protection, irrigation and other uses in park and recreation facilities, and street washing.

4.15 "Director" means the Director of the Idaho Department of Water Resources or any successor.

4.16 "Diversion" means the removal of water from its natural course or location by means of a ditch, canal, flume,

bypass, pipeline, conduit, well, pump, or other act of man, or the impoundment of water in a reservoir for rediversion.

4.17 "Diversion rate" means the maximum rate in CFS at which water may be diverted at a point of diversion.

4.18 "Fee lands" means lands within the exterior boundaries of the Reservation held in fee with all federal restrictions on alienation removed.

4.19 "Fort Hall Indian Reservation" or "Reservation" means those lands within the boundaries of the Reservation, as originally established under the Second Treaty of Fort Bridger of July 3, 1868, 15 Stat. 673, and companion executive orders of June 14, 1867, 1 C. Kappler 835-837 (1904), and July 30, 1869, 1 C. Kappler 838-839 (1904), as fixed by the federal survey of 1873 that have not been ceded by the Tribes to the United States pursuant to the following Tribal/federal agreements:

.1 Agreement of May 14, 1880, ratified by the Act of February 23, 1889, ch. 203, 25 Stat. 687.

.2 Agreement of July 18, 1881, ratified by the Act of July 3, 1882, ch. 268, 22 Stat. 148.

.3 Agreement of May 27, 1887, ratified by the Act of September 1, 1888, ch. 936, 25 Stat. 452, excepting those lots within the Pocatello Townsite which were not ceded by such agreement.

.4 Agreement of February 5, 1898, ratified by the Act of June 6, 1900, ch. 813, 31 Stat. 672, excepting Allotment Nos. T-8, 45, 46, 48, 50, 61, and 71 owned

by the Tribes or held in restricted fee or trust status for the Tribes by the United States.

4.20 "Fort Hall Indian Irrigation Project" means the federal project constructed, in part, to provide water for the irrigation of lands on the Reservation. The following federal statutes authorized the Fort Hall Indian Irrigation Project:

.1 Act of August 15, 1894, ch. 290, 28 Stat. 286, 305.

.2 Act of March 1, 1907, ch. 2285, 34 Stat. 1015, 1024.

.3 Act of April 30, 1908, ch. 153, 35 Stat. 70, 78.

.4 Act of April 4, 1910, ch. 140, 36 Stat. 269, 274.

.5 Act of May 24, 1922, ch. 199, 42 Stat. 552, 56.

.6 Act of May 9, 1924, ch. 151, 43 Stat. 117.

.7 Act of June 30, 1948, ch. 767, 62 Stat. 1167.

.8 Act of September 30, 1950, ch. 1114, 64 Stat. 1083.

.9 Act of August 31, 1954, ch. 1159, 68 Stat. 1026.

.10 Act of August 17, 1961, Pub. L. 87-154, 75 Stat. 390.

4.21 "Grays Lake" means the storage facility used to store water for the benefit of the Fort Hall Indian Irrigation Project.

4.22 "Idaho Department of Water Resources" or "IDWR" means the executive agency of the State of Idaho created by Idaho Code § 42-1701 (1977), or any successor agency.

4.23 "Idaho Water Resource Board" or "IWRB" means the Idaho State Water Resource Agency constituted in accordance with Idaho Const. art XV, § 7, or any successor agency.

4.24 "Impairment in the quality of water," applicable only in the context of a change in the water right described in

Article 7.1.1 pursuant to Article 7.6, means a diminishment in the quality of water being diverted for a water right to the extent that it is no longer useful for its intended purpose.

4.25 "Indian" means any person who:

.1 is a member of a tribe recognized as eligible for special programs and services provided by the United States because of the person's status as an Indian; or

.2 is recognized as an Indian person under Tribal law; or

.3 holds or is recognized by the Secretary as eligible to hold restricted trust property on the Reservation.

4.26 "Indian lands" means all lands within the exterior boundaries of the Reservation that are held in trust for the Tribes or owned by Indians and those lands outside the exterior boundaries of the Reservation held in trust by the United States for the Tribes or an enrolled member thereof.

4.27 "Injury to a water right," applicable only in the context of a change of the water right described in Article 7.1.1 pursuant to Article 7.6, means a diminishment in quantity or an impairment in the quality of water available to a senior or a junior water right holder as a consequence of a change, except that no water right holder is required to continue to waste water for the benefit of any other water right holders.

4.28 "Instream flows" means a quantity of water in a stream reach to maintain or to enhance the integrity of an ecosystem.

4.29 "Irrigation use" means application of water to the land surface or root zone of the soil for the purpose of producing crops, lawn or landscaping on that land.

4.30 "Michaud Contract" means that Memorandum Agreement of April 25, 1957 between the Bureau of Reclamation and the Bureau of Indian Affairs relating to the Water Supply for the Michaud Division of the Fort Hall Indian Reservation.

4.31 "Michaud Division" means that division of the Fort Hall Indian Irrigation Project authorized by the Act of August 31, 1954, ch. 1159, 68 Stat. 1026..

4.32 "Other rights" means other water rights used on all or a portion of the lands listed as the place of use for the water right described.

4.33 "Palisades Reservoir" means a water storage facility of the federal Minidoka Project initially authorized under the provisions of the federal reclamation laws by the presentation to the President and the Congress of the report of December 9, 1941, H.R. Doc. No. 457, 77th Cong., 1st Sess., by the Secretary of the Interior, and reauthorized by section 1 of the Act of September 30, 1950, ch. 1114, 64 Stat. 1083.

4.34 "Parties" means the United States, the State of Idaho, the Tribes, and the Committee of Nine of Water District 01.

4.35 "Period of use" means the time of the year when water may be used for a particular purpose.

4.36 "Person" means an individual, a partnership, a trust, an estate, a corporation, a municipal corporation, the state

of Idaho or any political subdivision or instrumentality thereof, the United States or any political subdivision or instrumentality thereof, an Indian tribe or political subdivision or instrumentality thereof, or any other public or private entity.

4.37 "Place of use" means the location where water is used.

4.38 "Point of diversion" or "POD" means any location at which water is diverted from the water system. A numeral to the right of the legal description indicates the number of existing points of diversion within a tract.

4.39 "Point of injection" means any location at which water that has been diverted from the water system is placed back into the water system. A numeral to the right of the legal description indicates the number of existing points of injection within a tract.

4.40 "Point of rediversion" means the location at which water that has been diverted from the water system and then placed back into the water system is again diverted from the water system. A numeral to the right of the legal description indicates the number of existing points of rediversion within a tract.

4.41 "Priority date" means the priority date assigned to the water right.

4.42 "Purpose of use" means the nature of use of the water right.

4.43 "Rent" means a temporary legal conveyance by the Tribes of the right to use storage water pursuant to Idaho Code

§ 42-1761 for a fixed period of time during which ownership of the federal contract storage right is retained for the benefit of the Tribes.

4.44 "Reservation Watermaster" means the Tribal officer or any successor designated to administer the Tribal Water Code.

4.45 "Right number" means the number assigned to each decreed water right for purposes of identification. The first two numerals of the right number indicate the department's hydrologic basin number assigned by IDWR.

4.46 "Secretary" means the Secretary of the United States Department of the Interior or a duly authorized representative thereof.

4.47 "Shoshone-Bannock Water Bank" means the Tribal water bank established pursuant to Idaho Code § 42-1761 to provide for rental of stored water outside the Reservation.

4.48 "Snake River Basin Adjudication" or "SRBA" means Civil Case No. 39576 filed in the Fifth Judicial District Court of the State of Idaho in and for Twin Falls County on June 17, 1987 entitled In Re the General Adjudication of Rights to the Use of Water from the Snake River Basin Water System, which was commenced pursuant to Idaho Code § 42-1406A (Supp. 1989).

4.49 "Snake River Watermaster" means the Watermaster of Water District 01 or any successor.

4.50 "Source" means the named or described source of water within the water system.

4.51 "State" means the State of Idaho.

4.52 "Stockwater" means the use of water solely for livestock or wildlife consumption including associated losses.

4.53 "Transfer" means any change in a point of diversion, place of use, period of use or purpose of use for a water right.

4.54 "Tribal water right(s)" means those water rights confirmed and recognized in this Agreement in Articles 6 and 7 as rights held in trust for the Tribes by the United States, including those rights so held for the benefit of individual Indians on Indian lands.

4.55 "Tribes" or "Tribal" means the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation in Idaho as the collective successors-in-interest of Indian signatories to the Second Treaty of Fort Bridger of July 3, 1868, 15 Stat. 673, and subsequent Tribal/federal agreements.

4.56 "United States" means the United States of America.

4.57 "Upper Snake River Basin" means that portion of the Snake River Basin upstream from the Hells Canyon Dam, the lowest of the three dams authorized as FERC Project No. 1971.

4.58 "Water District 01" means the instrumentality created by the Director of the IDWR pursuant to Idaho Code § 42-604 (1977).

4.59 "Walton Right" means a water right claim asserted by a non-Indian based upon the decision in Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981).

4.60 "Water system" means all rivers, streams, lakes, springs, groundwater or other water sources within the Snake River Basin within the State of Idaho.

4.61 "Winters Doctrine" means the federal legal principles announced by the United States Supreme Court in Winters v. United States, 207 U.S. 564 (1908).

ARTICLE 5. PARTIES AND AUTHORITY

5.1 The Governor has authority to execute this Agreement pursuant to Idaho Const. art. IV, § 5 and Idaho Code § 67-802 (Supp. 1989).

5.2 The Attorney General, or any duly designated official of the Office of the Idaho Attorney General, has authority to execute this Agreement pursuant to his authority to settle litigation as provided for in Idaho Const. art. IV, § 1, and Idaho Code § 64-1401 (Supp. 1989).

5.3 The Idaho Water Resource Board has authority to execute this Agreement pursuant to Idaho Code § 1734(3) (Supp. 1989) and Executive Order Nos. 85-9 and 87-9.

5.4 The Fort Hall Business Council has authority to execute this Agreement on behalf of the Tribes pursuant to the following:

.1 The sovereign powers reserved by and for the Tribes in the Second Treaty of Fort Bridger of July 3, 1868, 15 Stat. 673 as well as subsequent Tribal/federal agreements; and

.2 Article VI, Section 1(a) of the Tribes' 1936 Constitution and Bylaws, as amended.

5.5 The Secretary has authority to execute this Agreement on behalf of the United States Department of the Interior and in his trust capacity for the Tribes pursuant to Article I,

§ 8, Clause 3 and Article II, § 2, Clause 2 of the Constitution of the United States, as well as 25 U.S.C. §§ 2 and 9 (1982) and 43 U.S.C. § 1457 (1982).

5.6 The United States Attorney General, or any duly designated official of the United States Department of Justice, has authority to execute this Agreement on behalf of the United States pursuant to the authority to settle litigation contained in 28 U.S.C. §§ 516-517 (1982).

5.7 The Committee of Nine executes this Agreement as an advisory committee of Water District 01.

5.8 Each signer for the United States, Tribes, and State, by executing this Agreement, represents and states that the signer has taken or will take the necessary administrative and legal action to procure the actual authority to bind the signer's principal.

ARTICLE 6. TRIBAL WATER RIGHTS FOR PRESENT AND FUTURE USE

6.1 The basis for the rights to use waters arising on, under, flowing across, adjacent to, or otherwise appurtenant to the Reservation to satisfy the purposes of the Reservation as set forth in the Second Treaty of Fort Bridger of July 3, 1868 and companion executive orders of June 14, 1867 and July 30, 1869, is the Winters Doctrine. The basis for these rights is reaffirmed in the following acts and agreements between the Tribes and the United States:

.1 Agreement of May 14, 1880, ratified by the Act of February 23, 1889, ch. 203, 25 Stat. 687.

.2 Agreement of July 18, 1881, ratified by the Act of July 3, 1882, ch. 268, 22 Stat. 148.

.3 Agreement of May 27, 1887, ratified by the Act of September 1, 1888, ch. 936, 25 Stat. 452.

.4 Agreement of February 5, 1898, ratified by the Act of June 6, 1900, ch. 813, 31 Stat. 692.

.5 Act of May 9, 1924, ch. 151, 43 Stat. 117.

6.2 The parties hereto find and agree that the Tribal water rights for the present and future uses in the Upper Snake River Basin amount to a right to divert up to 581,031 AFY from the Snake River Basin for present and future irrigation, DCMI, instream flow, hydropower and stock water uses as set forth in Article 7 of this Agreement. Nonuse of all or any part of the Tribal water rights shall not be construed as a relinquishment, forfeiture or abandonment of the rights.

ARTICLE 7. LIST OF TRIBAL WATER RIGHTS

The parties agree that water supplied from the following sources shall constitute the Tribal water rights:

7.1 Surface water use rights:

.1 Right No. A01-10223

.i Source: Snake River/Sand Creek

.ii Annual Diversion Volume: 100,000 AFY increasing to 115,000 AFY as (1) future reservation lands are irrigated from this source, or (2) as corresponding amounts of the water rights for the ceded lands of the Fort

Hall Indian Irrigation Project are relinquished by the United States.

.iii Diversion Rate: 390.00 CFS increasing to 470.00 CFS at the same relative rate as the volume in ii. above.

.iv Annual Volume of Consumptive Use: 60,986 AFY

.v Priority Date: June 14, 1867

.vi Points of Diversion:

SESWNE Sec 31 Twp 1N Rge 37E BM

(Snake River into Reservation Canal)

NENWNW Sec 7 Twp 2S Rge 37E BM

(Sand Creek into Reservation Canal)

Points of Injection:

NESWSE Sec 24 Twp 2S Rge 36E BM

(Reservation Canal into Blackfoot River)

Points of Rediversion:

NENENE Sec 13 Twp 3S Rge 35E BM

(Blackfoot River into Fort Hall Main Canal)

NWNENW Sec 14 Twp 3S Rge 35E BM

(Blackfoot River into North Canal)

Future points of diversion may be developed in accordance with Articles 7.6, 7.7 and 7.8.

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 14,687 present and 8,672 future acres for a total of 23,359 acres.

.ix Basis of Right: Winters Doctrine

.x Remarks:

.a The rate of diversion for this water right shall be measured at the head of the Reservation Canal located in SESWNE Sec 31 Twp 1N Rge 37E B.M.

.b The volume of diversion for this water right shall be measured at the Drop located in SENWSE Sec 13 Twp 2S Rge 36E BM downstream from the point at which Sand Creek empties into the Reservation Canal.

.c This right combined with the other rights described in Articles 7.1.18, 7.1.19 and 7.1.20 provide the water supply for up to 53,828 acres from the combined water sources but none of the limitations of diversion rate or volume shall be exceeded for this right in providing the water supply.

.d The available inflow to the Reservation Canal upstream from the Drop, including Sand Creek, shall be counted as part of this water right up to the demand of the North and Main Canals. The parties recognize that the water flow available from Sand Creek fluctuates to such extremes that only approximately 85

percent (85%) of the flows from Sand Creek needed to meet the demand of the North and Main Canals would normally be useable as a part of this water right with the Equalizing Reservoir rehabilitated and maintained at 5,000 acre-feet active capacity. The cost of rehabilitating and maintaining the Equalizing Reservoir are estimated at between $5 and $15 million initially and $150,000 per year based upon 1989 costs. To avoid these great costs, the parties agree that the portion of Sand Creek that was used with the control afforded by the Equalizing Reservoir under conditions existing in 1989 shall continue to be used when the Snake River is under regulation by the Snake River Watermaster and will be considered part of this water right. When the Snake River is under regulation by the Snake River Watermaster fifteen percent (15%) of the computed Sand Creek flows, when returned to the Snake River through the Blackfoot River because of lack of control with the present Equalizing Reservoir, shall be considered as natural flow credited to

downstream water users and for which no exchange of storage will be made under this Agreement. All of the remaining Sand Creek water not diverted through the Main and North Canals because of the physical limitations of the Equalizing Reservoir, in excess of fifteen percent (15%) up to 50,000 AFY as determined by gaging, when the Snake River is under regulation by the Snake River Watermaster shall be delivered to the North Side Canal Company in exchange for an equal amount of storage water from Palisades or Jackson Lake Reservoirs. The actual storage water from Palisades or Jackson Lake Reservoirs will be released to meet the Snake River diversion requirements of the Tribes that would have been met by Sand Creek. This water shall be deemed the first storage water released from the American Falls Reservoir for the North Side Canal Company.

.2 Right No. A27-11373

.i Source: Ross Fork Creek/Ross Fork Basin groundwater

.ii Annual Diversion Volume: 5,000 AFY

.iii Diversion Rate: 29.07 CFS

.iv Annual Volume of Consumptive Use: 3,320 AFY

.v Priority Date: June 14, 1867

.vi Existing Points of Diversion:

SENWNE Sec 4, SESENE Sec 10, SENWSW Sec 17, SWSESW Sec 21, NESWNW Sec 34 all in Twp 5S Rge 36E BM

NWNWSE Sec 31 (2 POD), SWSWSE Sec 33 all in Twp 4S Rge 36E BM

NENENE Sec 36 Twp 4S Rge 35E BM

Future Points of Diversion may be developed as needed within the Ross Fork Creek basin to utilize this water right within the Ross Fork Creek basin.

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 1,503 present and future acres.

.ix Basis of Right: Winters Doctrine

.x Remarks:

.a The Tribes shall have the option of using surface water or groundwater diverted within the Ross Fork Creek basin to satisfy this right, in whole or in part, provided that any diversions of surface water or groundwater by the Tribes in excess of 5,000 AFY from the Ross Fork Creek Basin shall be charged against the

Tribal groundwater right set forth in Article 7.2.1 of this Agreement.

.3 Right No. A27-11374

.i Source: Lincoln Creek/Lincoln Creek Basin groundwater

.ii Annual Diversion Volume: 5,700 AFY

.iii Diversion Rate: 33.00 CFS

.iv Annual Volume of Consumptive Use: 3,768 AFY

.v Priority Date: June 14, 1867

.vi Existing Points of Diversion:

NENESE Sec 25 Twp 3S Rge 36E BM

NENWSE Sec 31 Twp 3S Rge 36E BM

Future points of diversion may be developed as needed within the Lincoln Creek Basin to utilize this water right within the Lincoln Creek drainage basin.

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 1,701 present and future acres.

.ix Basis of Right: Winters Doctrine

.x Remarks:

.a The Tribes shall have the option of using surface water or groundwater diverted within the Lincoln Creek basin to satisfy this right, in whole or in part, provided that any diversions of surface water or

groundwater by the Tribes in excess of 5,700 AFY from the Lincoln Creek basin shall be charged against the Tribal groundwater right set forth in Article 7.2.1 of this Agreement.

4 Right No. 29-00466

.i Source: Bannock Creek

.ii Annual Diversion Volume: 3,095 AFY

.iii Diversion Rate: 16.25 CFS

.iv Annual Volume of Consumptive Use: 1,842 AFY

.v Priority Date: June 14, 1867

.vi Existing Points of Diversion:

NENWSE Sec 32 Twp 7S Rge 33E BM

SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in Twp 8S Rge 33E BM

NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all in Twp 9S Rge 33E BM

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 774 present and future acres.

.ix Basis of Right: The basis of the right is the Winters Doctrine with the relative share and priorities of the water allocations determined by the Bannock Creek Decree [United States v. Daniels (D. Idaho April 9, 1907)].

.x Remarks:

.5 Right No. 29-00467

.i Source: Bannock Creek, West Fork Bannock Creek

.ii Annual Diversion Volume: 629 AFY

.iii Diversion Rate: 3.30 CFS

.iv Annual Volume of Consumptive Use: 374 AFY

.v Priority Date: April 1, 1889

.vi Existing Points of Diversion:

NENWSE Sec 32 Twp 7S Rge 33E BM

SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in Twp 8S Rge 33E BM

NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all in Twp 9S Rge 33E BM

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 157 present and future acres.

.ix Basis of Right: The basis of the right is the Winters Doctrine with the relative share and priorities of the water allocations determined by the Bannock Creek Decree [United States v. Daniels (D. Idaho April 9, 1907)].

.x Remarks:

.6 Right No. 29-00468

.i Source: Rattlesnake Creek

.ii Annual Diversion Volume: 571 AFY

.iii Diversion Rate: 3.00 CFS

.iv Annual Volume of Consumptive Use: 340 AFY

.v Priority Date: April 1, 1892

.vi Existing Points of Diversion:

NENWSE Sec 32 Twp 7S Rge 33E BM

SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in Twp 8S Rge 33E BM

NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all in Twp 9S Rge 33E BM

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 143 present and future acres.

.ix Basis of Right: The basis of the right is the Winters Doctrine with the relative share and priorities of the water allocations determined by the Bannock Creek Decree [United States v. Daniels (D. Idaho April 9, 1907)].

.x Remarks:

7 Right No. 29-00469

.i Source: West Fork Bannock Creek

.ii Annual Diversion Volume: 190 AFY

.iii Diversion Rate: 1.00 CFS

.iv Annual Volume of Consumptive Use: 113 AFY

.v Priority Date: May 1, 1894

.vi Existing Points of Diversion:

NENWSE Sec 32 Twp 7S Rge 33E BM

SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in Twp 8S Rge 33E BM

NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all in Twp 9S Rge 33E BM

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 48 present and future acres.

.ix Basis of Right: The basis of the right is the Winters Doctrine with the relative share and priorities of the water allocations determined by the Bannock Creek Decree [United States v. Daniels (D. Idaho April 9, 1907)].

.x Remarks:

.8 Right No. 29-00470

.i Source: West Fork Bannock Creek

.ii Annual Diversion Volume: 248 AFY

.iii Diversion Rate: 1.30 CFS

.iv Annual Volume of Consumptive Use: 147 AFY

.v Priority Date: April 1, 1894

.vi Existing Points of Diversion:

NENWSE Sec 32 Twp 7S Rge 33E BM

SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in Twp 8S Rge 33E BM

NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all in Twp 9S Rge 33E BM

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 62 present and future acres.

.ix Basis of Right: The basis of the right is the Winters Doctrine with the relative share and priorities of the water allocations determined by the Bannock Creek Decree [United States v. Daniels (D. Idaho April 9, 1907)].

.x Remarks:

.9 Right No. 29-00471

.i Source: Bannock Creek

.ii Annual Diversion Volume: 248 AFY

.iii Diversion Rate: 1.30 CFS

.iv Annual Volume of Consumptive Use: 147 AFY

.v Priority Date: April 1, 1894

.vi Existing Points of Diversion:

NENWSE Sec 32 Twp 7S Rge 33E BM

SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in Twp 8S Rge 33E BM

NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all in Twp 9S Rge 33E BM

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 62 present and future acres.

.ix Basis of Right: The basis of the right is the Winters Doctrine with the relative share and

priorities of the water allocations determined by the Bannock Creek Decree [United States v. Daniels (D. Idaho April 9, 1907)].

.x Remarks:

.10 Right No. 29-00472

.i Source: West Fork Bannock Creek

.ii Annual Diversion Volume: 190 AFY

.iii Diversion Rate: 1.00 CFS

.iv Annual Volume of Consumptive Use: 113 AFY

.v Priority Date: April 1, 1898

.vi Existing Points of Diversion:

NENWSE Sec 32 Twp 7S Rge 33E BM

SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in Twp 8S Rge 33E BM

NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all in Twp 9S Rge 33E BM

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 48 present and future acres.

.ix Basis of Right: The basis of the right is the Winters Doctrine with the relative share and priorities of the water allocations determined by the Bannock Creek Decree [United States v. Daniels (D. Idaho April 9, 1907)].

.x Remarks:

.11 Right No. 29-00473

.i Source: West Fork Bannock Creek

.ii Annual Diversion Volume: 190 AFY

.iii Diversion Rate: 1.00 CFS

.iv Annual Volume of Consumptive Use: 113 AFY

.v Priority Date: April 1, 1898

.vi Existing Points of Diversion:

NENWSE Sec 32 Twp 7S Rge 33E BM

SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in Twp 8S Rge 33E BM

NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all in Twp 9S Rge 33E BM

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 48 present and future acres.

.ix Basis of Right: The basis of the right is the Winters Doctrine with the relative share and priorities of the water allocations determined by the Bannock Creek Decree [United States v. Daniels (D. Idaho April 9, 1907)].

.x Remarks:

.12 Right No. 29-00474

.i Source: West Fork Bannock Creek

.ii Annual Diversion Volume: 190 AFY

.iii Diversion Rate: 1.00 CFS

.iv Annual Volume of Consumptive Use: 113 AFY

.v Priority Date: April 1, 1901

.vi Existing Points of Diversion:

NENWSE Sec 32 Twp 7S Rge 33E BM

SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in Twp 8S Rge 33E BM

NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all in Twp 9S Rge 33E BM

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 48 present and future acres.

.ix Basis of Right: The basis of the right is the Winters Doctrine with the relative share and priorities of the water allocations determined by the Bannock Creek Decree [United States v. Daniels (D. Idaho April 9, 1907)].

.x Remarks:

13 Right No. A29-12049

.i Source: Bannock Creek

.ii Annual Diversion Volume: 18,833 AFY

.iii Diversion Rate: 98.87 CFS

.iv Annual Volume of Consumptive Use: 11,205 AFY

.v Priority Date: June 14, 1867

.vi Existing Points of Diversion:

NENWSE Sec 32 Twp 7S Rge 33E BM

SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in Twp 8S Rge 33E BM

NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all in Twp 9S Rge 33E BM

NESWSE Sec 6 Twp 7S Rge 33E BM

(3 - 20 HP pumps for Michaud Project)

Future Points of Diversion may be developed within the Bannock Creek basin to utilize this water right within the Bannock Creek drainage basin.

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 4,708 present and future acres.

.ix Basis of Right: Winters Doctrine

.x Remarks:

.a The Tribes and the United States agree to exercise this right in a manner that will ensure that persons with water rights decreed in the Bannock Creek Decree [United States v. Daniels (D. Idaho April 9, 1907)] and that are confirmed in the SRBA continue to receive their full legal entitlement.

.14 Right No. A29-12050

.i Source: Portneuf River/Jeff Cabin Creek

.ii Annual Diversion Volume: 970 AFY

.iii Diversion Rate: 9.70 CFS

.iv Annual Volume of Consumptive Use: 727.50 AFY

.v Priority Date: June 14, 1867

.vi Points of Diversion:

Future Points of Diversion may be developed within the Portneuf River basin upstream from the point the river enters the Portneuf Reservoir in Sec 11 Twp 6S Rge 38E BM for use within the Portneuf River basin.

.vii Purpose and Period of Use:

Irrigation 4/1 - 11/1

.viii Place of Use: 485 present and future acres.

.ix Basis of Right: Winters Doctrine

.x Remarks:

15 Right No. 29-00231

.i Source: Toponce Creek

.ii Annual Diversion Volume: 259.3 AFY

.iii Diversion Rate: 1.59 CFS

.iv Annual Volume of Consumptive Use: 154.3 AFY

.v Priority Date: February 16, 1869

.vi Points of Diversion: Toponce Creek

.vii Purpose and Period of Use:

Irrigation 1/1 12/31

.viii Place of Use: Allotment 61 (NESW, SENW, Sec 35 Twp 6S Rge 38E) for 79.53 acres.

.ix Basis of Right: The Winters Doctrine per the Memorandum Decision in United States v. Hibner, 27 F.2d 909 (D. Idaho, E.D. 1928) and

the decree of the United States District Court, Eastern Division, dated April 8, 1929.

.x Remarks:

.16 Right No. 29-00238

.i Source: Toponce Creek

.ii Annual Diversion Volume: 282.5 AFY

.iii Diversion Rate: 1.733 CFS

.iv Annual Volume of Consumptive Use: 168.14 AFY

.v Priority Date: February 16, 1869

.vi Points of Diversion: Toponce Creek

.vii Purpose and Period of Use:

Irrigation 1/1 - 12/31

.viii Place of Use: Allotment 71 (SENW, SWNE, Sec 36 Twp 6S Rge 38E) for 86.67 acres.

.ix Basis of Right: The Winters Doctrine per the Memorandum Decision in United States v. Hibner, 27 F.2d 909 (D. Idaho, E.D. 1928) and the decree of the United States District Court, Eastern Division, dated April 8, 1929.

.x Remarks:

.17 Right No. A29-12051

.i Source: Mink Creek

.ii Annual Diversion Volume: 104.3 AFY

.iii Diversion Rate: 0.75 CFS

.iv Annual Volume of Consumptive Use: 62.1 AFY

.v Priority Date: February 26, 1869

.vi Points of Diversion: SWNW Sec 21 Twp 7S Rge 35E BM

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: Allotment T-8 (SWNW Sec 21 Twp 7S Rge 35E BM for 31.75 acres)

.ix Basis of Right: The Winters Doctrine per decree of District Court of the Fifth Judicial District Court of the State of Idaho, in and for the County of Bannock dated June 5, 1926, in Smith v. City of Pocatello, Case No. 6669.

.x Remarks:

.18 Right No. A27-11375

.i Source: Blackfoot River

.ii Annual Diversion Volume: 150,000 AFY

.iii Diversion Rate: 1380 CFS

.iv Annual Volume of Consumptive Use: 79,546 AFY

.v Priority Date: June 14, 1867

.vi Points of Diversion:

SENWNW Sec 7 Twp 2S Rge 38E BM

(Blackfoot River into Little Indian Canal)

NENENE Sec 13 Twp 3S Rge 35E BM

(Blackfoot River into Fort Hall Main Canal)

NWNENW Sec 14 Twp 3S Rge 35E BM

(Blackfoot River into North Canal)

SWSESW Sec. 3 Twp 7S Rge 32E BM

SENWSE Sec. 3 Twp 7S Rge 32E BM

NWNWSW Sec. 2 Twp 7S Rge 32E BM

NESENW Sec. 2 Twp 7S Rge 32E BM

NWNENE Sec. 1 Twp 7S Rge 32E BM

SWNWNW Sec. 6 Twp 7S Rge 33E BM

NESESW Sec. 6 Twp 7S Rge 33E BM

NESESW Sec. 6 Twp 7S Rge 33E BM

SWSWSW Sec. 30 Twp 6S Rge 33E BM

Future Points of Diversion may be developed to divert water from (1) anywhere on the Blackfoot River or (2) ground water within the Reservation as described in Remarks below.

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 30,469 present and future acres.

.ix Basis of Right: Winters Doctrine

.x Remarks:

.a If the natural flow of the Blackfoot River is not sufficient to satisfy this right and other rights to divert Blackfoot River natural flow pursuant to state law, the Tribes may satisfy this Winters right by using the other rights described in Articles 7.1.19 and 7.1.20, provided that the combined use in

satisfaction of this Winters right shall not exceed 150,000 AFY.

.b If the diversions under this right exceeds 150,000 AFY, the amount in excess of 150,000 AFY shall be charged against the Tribal water right in Article 7.1.1.

.c This right combined with other rights described in Articles 7.1.1, 7.1.19, and 7.1.20 can be used to irrigate up to 53,828 present and future acres from the combined water sources.

.d The Tribes and United States agree to 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 that 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 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 rights to account for this change.

.e The Tribes and the United States agree to exercise this right in a manner that will not impair the project entitlements of the Fort Hall Indian Irrigation Project water users.

.f If the water supplied under this right and the other rights described in Articles 7.1.19 and 7.1.20 does not provide 150,000 AFY under the terms of this Agreement, the Tribes may divert groundwater within the Reservation under this right, exclusive of the water rights described in Article 7.2, such that the combined water supply from the other rights described in Articles 7.1.19 and 7.1.20 and surface and groundwater under this right yields 150,000 AFY.

.19 Right No. A27-02007

.i Source: Blackfoot River

.ii Annual Diversion Volume: 348,000 AFY

.iii Diversion Rate: Not limited

.iv Annual Volume of Consumptive Use:
Included in the other rights described in Articles 7.1.1 and 7.1.18.

.v Priority Date: September 3, 1907

.vi Points of Diversion:
NWNE Sec 12 Twp 5S Rge 40E BM (Blackfoot River into Blackfoot Reservoir)
Points of Rediversion:
SENWNW Sec 7 Twp 2S Rge 38E BM
(Blackfoot River into Little Indian Canal)
NENENE Sec 13 Twp 3S Rge 35E BM
(Blackfoot River into Fort Hall Main Canal)
NWNENW Sec 14 Twp 3S Rge 35E BM
(Blackfoot River into North Canal)

.vii Purposes and Periods of Use:

Irrigation from Storage	3/15 - 11/15	
	348,000 AFY	
Storage for Irrigation	1/1 - 12/31	
	348,000 AFY	

.viii Place of Use: 30,469 present and future acres.

.ix Basis of Right: License acquired pursuant to Fort Hall Indian Irrigation Project Act.

.x Remarks:

.a The rediversion from storage under this right and the other right described in Article 7.1.20 may be used to satisfy the

Blackfoot River natural flow to meet but not exceed the 150,000 AFY Winters entitlement under the water right described in Article 7.1.18. The Tribes may use water from storage under this right in excess of the amount needed to satisfy the Winters entitlement under Article 7.1.18; provided that uses in excess of that amount necessary to satisfy the 150,000 AFY Winters entitlement described in Article 7.1.18 shall be charged against the Tribal water right described in Article 7.1.1.

.b This right combined with other rights described in Articles 7.1.1, 7.1.18, and 7.1.20 can be used to irrigate up to 53,828 present and future acres from the combined water sources.

.c The Tribes and the United States agree to exercise this right in a manner that will not impair the project entitlements of the Fort Hall Indian Irrigation Project water users.

.20 Right No. A25-02160

.i Source: Grays Lake

.ii Annual Diversion Volume: 100,000 AFY

.iii Diversion Rate: Not limited

.iv Annual Volume of Consumptive Use: Included in the other rights described in Articles 7.1.1 and 7.1.18.

.v Priority Date: August 23, 1919

.vi Points of Diversion:

SWSWSW Sec 1 Twp 5S Rge 42E BM

(Grays Lake/Clarks Cut Canal)

Points of Rediversion:

NWNE Sec 12 Twp 5S Rge 40E BM (Blackfoot Reservoir)

SENWNW Sec 7 Twp 2S Rge 38E BM

(Blackfoot River into Little Indian Canal)

NENENE Sec 13 Twp 3S Rge 35E BM

(Blackfoot River into Fort Hall Main Canal)

NWNENW Sec 14 Twp 3S Rge 35E BM

(Blackfoot River into North Canal)

.vii Purposes and Periods of Use:

Irrigation from Storage	3/15 - 11/15 100,000 AFY
Storage for Irrigation	1/1 - 12/31 100,000 AFY

.viii Place of Use: 30,469 present and future acres.

.ix Basis of Right: Permit numbers 14247 and R-161 acquired pursuant to the Fort Hall Indian Irrigation Project Act

.x Remarks:

.a The rediversion from storage under this right and the other right described in Article 7.1.19 may be used to satisfy the Blackfoot River natural flow to meet but not exceed the 150,000 AFY Winters entitlement under the water right described in Article 7.1.18. The Tribes may use water from storage under this right in excess of the amount needed to satisfy the Winters entitlement under Article 7.1.18; provided that uses in excess of that amount necessary to satisfy the 150,000 AFY Winters entitlement described in Article 7.1.18 shall be charged against the Tribal water right described in Article 7.1.1.

.b This right combined with other rights described in Articles 7.1.1, 7.1.18, and 7.1.19 may be used to irrigate up to 53,828 present and future acres from the combined water sources.

.c The Tribes and the United States agree to exercise this right in a manner that will not impair the project entitlements of the Fort Hall Indian Irrigation Project water users.

7.2 Groundwater use rights:

.1 Right No. A27-11376

.i Source: Groundwater within the Reservation

.ii Annual Diversion Volume: 125,000 AFY

.iii Diversion Rate: 813.40 CFS

.iv Annual Volume of Consumptive Use: 93,615 AFY

.v Priority Date: June 14, 1867

.vi Existing Points of Diversion:

SWSESW Sec. 3 Twp 7S Rge 32E BM

SENWSE Sec. 3 Twp 7S Rge 32E BM

NWNWSW Sec. 2 Twp 7S Rge 32E BM

NESENW Sec. 2 Twp 7S Rge 32E BM

NWNENE Sec. 1 Twp 7S Rge 32E BM

SWNWNW Sec. 6 Twp 7S Rge 33E BM

NESESW Sec. 6 Twp 7S Rge 33E BM

NESESW Sec. 6 Twp 7S Rge 33E BM

SWSWSW Sec. 30 Twp 6S Rge 33E BM

Additional existing points of diversion will be identified by February 1, 1991.

Future points of diversion may be developed to utilize this water right on any Indian lands.

.vii Purposes and Periods of Use:

Irrigation	3/15 - 11/15	115,000 AFY
DCMI	1/1 - 12/31	10,000 AFY

.viii Place of Use: 42,592 present and future acres. Present and future DCMI uses on any Indian lands.

.ix Basis of Right: Winters Doctrine

.x Remarks:

.a If the Tribes' combined surface water and groundwater diversions from the Ross Fork Creek basin exceed 5,000 AFY, or the Tribes' combined surface water and groundwater diversions from the Lincoln Creek basin exceed 5,700 AFY, such excesses shall be charged against this Tribal groundwater right.

.b The nine wells used to supplement the surface water portion of the Michaud Division divert water included in this Tribal water right.

.c Lot Nos. 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17 of Block No. 191; Lot No. 1 of Block 192; Lot Nos. 1, 2, 3, 4, 5, 6, 7, and 8 of Block No. 196; Lot Nos. 19 and 20 of Block No. 341; Lot No. 5 of Block No. 593; and Lot No. 7 of Block No. 599 within the City of Pocatello remain Indian lands and may utilize water under this water right.

.d Allotment Nos. 45, 46, 48, 50, 60 and 71 within the Portneuf River basin may utilize water under this right.

.2 Right No. A29-12052

.i Source: Bannock Creek basin groundwater

.ii Annual Diversion Volume: 23,500 AFY

.iii Diversion Rate: 154.93 CFS

.iv Annual Volume of Consumptive Use: 17,843 AFY

.v Priority Date: June 14, 1867

.vi Points of Diversion:

Future points of diversion may be developed as needed within the Bannock Creek basin to utilize this water right within the Bannock Creek drainage basin.

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 8,704 future acres.

.ix Basis of Right: Winters Doctrine

.x Remarks:

.a The Tribes have the right to the annual yield of the Bannock Creek basin up to a combined surface and groundwater diversion of 48,500 AFY.

.b If the Tribes' combined surface and groundwater diversion from this basin exceeds 48,500 AFY, such excess shall be

charged against the Tribal groundwater right in Article 7.2.1.

.c The Tribes and United States agree to exercise this water right in a manner that ensures persons diverting ground water from the Bannock Creek drainage basin 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 the 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 2,400 AFY of water from the ground water of the Bannock Creek drainage basin. In the event this estimate of the amount of existing diversions under state water rights is changed 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.

7.3 Federal contract storage water rights held in trust by the United States for the benefit of the Tribes:

.1 The United States holds in trust federal contract storage rights for water that accrues to two and eight thousand and fifty nine ten thousandths percent (2.8059%) of the storage space in American Falls Reservoir and six and nine thousand nine hundred and seventeen ten thousandths per cent (6.9917%) of the storage space in Palisades Reservoir for the benefit of the Tribes and 187.7 acres of other lands served by the Michaud Division of the Fort Hall Indian Irrigation Project. These federal contract storage rights are presently equivalent to the following storage space in American Falls and Palisades Reservoirs:

American Falls Reservoir	46,931 AF
Palisades Reservoir	83,900 AF

.2 The federal contract storage rights described in Article 7.3.1 may be used to irrigate up to 33,938 present and future acres of Indian lands with an annual volume of consumptive use not to exceed 79,542 AFY. Indian lands in excess of 33,938 acres may be irrigated with the water that accrues to the federal contract storage rights described in Article 7.3.1 if no other water rights are injured thereby.

.3 The Tribes and the Secretary agree to continue to exchange storage water from the federal contract storage rights described in Article 7.3.1 for water diverted from the Portneuf River as provided for in

Article 8 of the Michaud Contract. The Tribes may identify the reservoir storage space to be used to provide storage water for this exchange. In the event no specific storage is identified, water from the Palisades storage space shall be the first water to be used for this exchange.

4 The Tribes shall have the right to create a Shoshone-Bannock Water Bank pursuant to Idaho Code §§ 42-1761 through 42-1765 in order to rent as prescribed in Article 7 for any beneficial use outside the Reservation all or any part of the water accruing to the federal contract storage rights set forth in Article 7.3.1 that is not used on Indian lands as provided in Article 7.3.2 or exchanged pursuant to Article 7.3.3; provided that

.i storage water from Palisades Reservoir is rented and delivered for use within the Snake River Basin anywhere above Milner Dam, and

.ii storage water from the American Falls Reservoir is rented and delivered for use in the Snake River Basin anywhere within Idaho.

.5 The rental of the federal contract storage water rights in Article 7.3.1 through the Shoshone-Bannock Water Bank shall not be subject to any limitation based on the following:

.i any provision of the Michaud Contract except as set forth in Article 7.3.3;

.ii any reduction of the quantity of water available under any other existing water rights since any such reductions are mitigated by the express federal commitments in Article 12.3;

.iii any conflict with the public welfare or local public interest of the citizens of Idaho or the conservation of its water since any such conflicts are mitigated by the express federal commitments in Article 12.3; or

.iv any refill penalty for renting water from American Falls Reservoir below Milner Dam because of the mitigation provided by the express federal commitments in Article 12.3.

6 The parties agree that the purposes of the Shoshone-Bannock Water Bank are to:

.i put to beneficial use the Tribal water rights set forth in Article 7.3.1;

.ii provide a source of adequate water supplies to benefit new and supplemental water uses;

.iii provide a source of Tribal funding for improving water user facilities and efficiencies;

.iv provide a mechanism for the Tribes to realize the value of their federal contract storage rights resulting from settlement of this litigation; and

.v provide for the continuation of good-faith cooperation among the parties to this Agreement.

The State agrees not to take any action that will interfere with the nature, scope, spirit and purposes of the Shoshone-Bannock Water Bank.

.7 The Shoshone-Bannock Water Bank provided for in Article 7.3.4 shall be operated by a Tribal Rental Pool Committee, which shall consist of the Superintendent of the Minidoka Project, the Snake River Watermaster, the Reservation Watermaster and three individuals designated by the Fort Hall Business Council unless the Tribes, the State and the United States mutually agree otherwise in writing.

.8 The Tribal Rental Pool Committee shall determine and establish priorities for rental of water from the Shoshone-Bannock Water Bank; provided that the Fort Hall Indian Irrigation Project water users shall have a right of first refusal to rent any storage water available for rent pursuant to Article 7.3.4.

.9 The Tribes may elect to assign for rental all or any portion of the water accruing to the federal contract storage rights in Article 7.3.1 that is not rented through the Shoshone-Bannock Water Bank or otherwise used or exchanged pursuant to Article 7 to any water bank created pursuant to state law in the Snake River basin above Milner Dam on the same terms and

conditions as any other water user may assign water to such a water bank.

.10 The parties agree that proceeds from renting all or any part of the federal contract storage rights pursuant to Article 7 shall not be subject to any form of taxation or alienation by the State or the United States, as provided for by legislation required by this Agreement, absent the written consent of the Tribes.

.11 The Tribes' exercise of the right to rent the storage water accruing to the federal contract storage rights described in Article 7.3.1 shall in no event be construed or interpreted as

.i any forfeiture, abandonment, relinquishment, or other loss of all or any part of their federal contract storage rights, or

.ii subject to any constraints on the amount of rental income or other compensation received by the Tribes.

.12 Neither the State nor the United States shall be liable for any financial losses suffered by the Tribes or any other person as a result of any rental of water from the Shoshone-Bannock Water Bank pursuant to Article 7.3.4.

7.4 Instream flows on and adjacent to the Reservation:

.1 In addition to the rental of water for instream flows pursuant to Article 7.3, the Tribes shall be entitled

to use storage water accrued to the federal contract storage space listed in Article 7.3.1 not used, exchanged, or rented pursuant to Article 7.3 for instream flows for river reaches on or adjacent to the Reservation.

.2 The Tribes shall have the right to use the natural flows of all waters arising wholly within and traversing only Reservation lands for instream flows.

.3 The Tribes shall have the right to use up to 15,000 AFY from the storage water rights described in Articles 7.1.19 and 7.1.20 for instream flows in reaches of the Blackfoot River. Prior to releasing water for instream flows in reaches of the Blackfoot River, the Tribes agree to give notice as provided in Article 8.5.

7.5 The Tribes may transfer or lease within the Reservation all or any portion of the tribal water rights set forth in this Article 7, if the transfer:

.1 is to any beneficial use,

.2 does not exceed the maximum diversion rate not withstanding the period of use,

.3 does not exceed the annual volume of diversion,

.4 does not exceed the annual volume of consumptive use,

.5 is to any place of use within the Reservation, except as to the water rights described in Articles 7.1.2, 7.1.3 and 7.1.14, where the place of use is specifically restricted by this Agreement, and

.6 does not change the source, except as permitted by Articles 7.1.2, 7.1.3, and 7.1.18.

7.6 The Tribes may change the points of diversion and periods of use of the water right described in Article 7.1.1 provided the change:

.1 is to any beneficial use,

.2 does not exceed the maximum diversion rate not withstanding the period of use,

.3 does not exceed the annual volume of diversion,

.4 does not exceed the annual volume of consumptive use, and

.5 does not result in an injury to a water right.

7.7 Whenever the Tribes or the United States intend to change or add a point of diversion or change the period of use of all or part of the water right described in Article 7.1.1, the Tribes or the United States will prepare a written Notice of Transfer of this water right. The Tribes or the United States shall serve a copy of the Notice of Transfer on each member of the Intergovernmental Board and shall publish the Notice of Transfer at least once a week for two consecutive weeks in a newspaper printed within the county wherein the point of diversion lies, or in the event no newspaper is printed within that county, then in a newspaper of general circulation therein. The Tribes or the United States shall complete the service and publication at least one hundred and twenty (120) days

prior to the intended change. The Notice of Transfer shall contain the following information:

.1 The amount of water in CFS and/or AFY that is to be changed including any reductions that will occur at any existing points of diversion, if applicable;

.2 The legal descriptions of the locations of any new or changed points of diversion including any points of diversion that will no longer be used, if applicable;

.3 The period of use during which the water will be used as a result of the change including periods during which water will no longer be used or periods during which water use will be reduced as a result of the change; and

.4 A statement that any person who believes that the change will injure a water right shall file a Notice of Objection with the Intergovernmental Board within ten days of the last date of service or publication.

7.8 Any person claiming that a change in a point of diversion or period of use of the Tribal water right in Article 7.1.1 will injure a water right shall first request mediation before the Intergovernmental Board prior to seeking judicial relief.

.1 In any proceeding, the person claiming that a change will injure the objector's water right shall have the burden of proving that an injury will occur.

.2 Upon receipt of any objection, the Intergovernmental Board shall attempt to mediate the dispute. After

reviewing all relevant data and information, the Intergovernmental Board shall make a recommendation regarding the change if there is a consensus. In the event the Intergovernmental Board determines that the proposed change would injure an objector's water right, its recommendation shall address whether it is possible to mitigate the injury in a way that will allow the Tribes to achieve the purposes of the change.

.3 In the event that the Intergovernmental Board fails to mediate the dispute, judicial relief may be sought by the objector.

7.9 Except as provided in Article 7.3, no Tribal water rights or water may be sold, leased, rented, transferred or otherwise used off the Reservation.

7.10 Stock watering may occur anywhere on Indian lands from any part of the water system on Indian lands and may be used year around as a part of each water right defined in this Agreement except no diversion from a point off the Reservation for stockwater shall be made during the non-irrigation season.

7.11 The Tribes have the right to generate hydropower incidental to water delivery for the other purposes specified in this Agreement as well as pursuant to Article 7.5.

7.12 The Tribes may construct, operate and maintain future storage projects or reservoirs located within the Reservation to the extent that such projects are not

inconsistent with the water rights set forth in this Agreement.

7.13 If any allottee or Tribal member is decreed a water right in the SRBA for Indian lands, there shall be a corresponding reduction in the Tribal water rights set forth in Article 7.

7.14 The State shall have the responsibility to deliver the federal contract storage water described in Article 7.3.1 within any established water district.

ARTICLE 8. ADMINISTRATION OF WATER RIGHTS

8.1 The Parties recognize and respect the sovereignty of the Tribes, the State, and the United States, as well as the powers and limitations accompanying the sovereignty of each government. In order to strike a balance among these sovereign interests, the parties, consistent with applicable law, agree to cooperate in administration of water resources to protect the use of all water rights decreed in the SRBA .

8.2 Except for the Snake River and the Blackfoot River, the parties agree to administer water rights within the Reservation as follows:

.1 The Tribes shall administer the distribution of all Tribal water rights within the Reservation.

.2 Upon reasonable notice, the Tribes and the United States agree to provide access to the State to inspect water monitoring devices and diversions within the

Reservation. The Tribes and the United States may accompany the State.

.3 The Tribes shall adopt and submit a Tribal Water Code to the Secretary for approval. The Tribal Water Code shall, in part,

.i provide for a Reservation Watermaster,

.ii establish a Tribal Water Commission to manage the Tribal water delivery systems on the Reservation, and

.iii provide for monitoring of and enforcement of Tribal water rights.

.4 Pending adoption and approval of a Tribal Water Code, the Secretary, as trustee for the Tribes, shall temporarily administer the distribution of the Tribal water rights within the Reservation.

.5 Consistent with Article 8.2.1, the United States shall administer the distribution of the Fort Hall Indian Irrigation Project water rights and the Fort Hall Agency water rights from the point the water is delivered to the project facilities.

.6 The State shall administer the distribution of those rights acquired under state law within the Reservation that are not a part of the Fort Hall Agency, Tribal or Fort Hall Indian Irrigation Project water rights.

.7 Upon reasonable notice and in accordance with applicable law, the Tribes and the United States may inspect water monitoring devices and diversions within

the Reservation for those water rights administered under Article 8.2.6. The State may accompany the Tribes and the United States.

.8 The Tribes or the United States shall install or cause to be installed monitoring devices for administration of Tribal water rights within the Reservation to the same extent as required of other water users in Idaho. The cost of these monitoring devices shall be paid from the funds authorized by Congress as required by Article 13.2. The United States, the Tribes and the State shall monitor those diversions that each party actually administers within the Reservation and report the diversion records each year to the Intergovernmental Board by March 1 of the year after each reporting year.

8.3 Although the water rights from the Blackfoot River have been delivered for over 100 years without any disputes arising between the Tribes, the United States, and the State over administration, the parties heretofore have been unable to agree upon their respective authority to administer water rights from the Blackfoot River. The parties agree to avoid litigation by continuing to administer the water rights decreed in the SRBA from the Blackfoot River as water rights from the Blackfoot River have been administered in the past. The parties also agree as follows:

.1 To prepare and implement a Blackfoot River Water Management Plan to satisfy the purposes set forth in the Attachment;

.2 To install or cause to be installed monitoring devices on all present and future points of diversion from the Blackfoot River; and

.3 To provide access to inspect water monitoring devices and diversions on the Blackfoot River where necessary for administration of rights to divert water from the water system. A party requesting access to a monitoring device shall provide reasonable notice, and the party providing access to the monitoring device or diversion may accompany the inspecting party.

8.4 The parties agree to administer water rights from the Snake River as follows:

.1 The State shall account for and administer the diversion of water from the Snake River by all water users, including the United States and the Tribes, in conformance with the SRBA decree. The State, in administering such waters, shall ensure the delivery to all water users, including the United States and the Tribes, their legal entitlement to water from natural flow and storage. The United States shall be solely responsible for the physical operation of its Snake River diversion facilities in accordance with the Snake River Watermaster's direction. In the event the United States disputes the Snake River

Watermaster's direction regarding the administration of its Snake River diversion, the dispute shall be resolved by the District Court. Distribution of the water after diversion by the United States shall be in accordance with Articles 8.2.1, 8.2.4, 8.2.5, and 8.3.

.2 IDWR shall provide the Intergovernmental board, upon request, any Snake River water measurement data or reports gathered or prepared by or for IDWR.

.3 Upon reasonable notice, the State agrees to provide the Tribes and the United States access to inspect water monitoring devices and diversions on the Snake River where necessary for purposes of the administration of Tribal or Fort Hall Indian Irrigation Project water rights from the water system. The State may accompany the party inspecting the monitoring device or diversion.

8.5 Because of the need to provide for cooperative planning and management of water resources, the Tribes or the United States agree to prepare a written Notice of Use of a Tribal water right whenever the Tribes or the United States intend to (1) transfer or lease within the Reservation the right to an existing use, (2) put to use within the Reservation any portion of the Tribal water right which is not in present use, or (3) undertake a combination of (1) and (2).

.1 The Notice of Use shall contain the following information:

.i The Right Number of the Tribal water right(s) described in Articles 7.1.1 through 7.3.1 to be changed or used;

.ii A legal description of the location where the Tribes or the United States will use the water right;

.iii A legal description of the location where the Tribes or the United States will reduce the use of water as a consequence of the transfer and of the point of diversion where the Tribes or the United States will reduce the diversion, if applicable;

.iv The ownership status of the land where the Tribal water right will be used;

.v The legal description of the new point of diversion;

.vi A narrative description of the proposed diversion works such as the size of pumps, ditches, wells, etc.;

.vii The amount of water stated in AFY and in CFS to be used on the location described in Article 8.5.1.ii; and

.viii The nature of use of the Tribal water right at the location described in Article 8.5.1.ii.

.2 Notices involving 25 CFS or more, or 7,500 AFY or more and notices involving any increase in the diversion rate or volume of the right described in Article 7.1.1

shall be served on each member of the Intergovernmental Board at least thirty (30) days prior to the transfer, lease or new use.

.3 Notices involving less than 25 CFS or less than 7,500 AFY shall be served on the Intergovernmental Board annually at the time of the annual report provided for in Article 8.2.8 provided that no notice will be required for transfers, leases or new uses of 0.04 CFS or 2.2 AFY or less.

8.6 The State agrees to provide written notice to the Tribes and the Fort Hall Agency Superintendent whenever an application for a state water right permit is sought for a water use in the Upper Snake River mainstem, the Blackfoot River basin, and the Portneuf River basin. The report shall contain among the following:

.1 the permit number of the state water right applied for;

.2 a legal description of the location of the proposed place of use;

.3 the ownership status of the land where the water will be used, if known;

.4 the legal description of the proposed point of diversion; and

.5 a narrative description of the proposed diversion works, such as the size of the pumps, ditches, wells, etc.

ARTICLE 9. INTERGOVERNMENTAL BOARD

9.1 In recognition of the concerns of separate sovereigns as well as the hydrologic and economic inter-relationships of water use within the Snake River basin, the parties agree to continue cooperative efforts to efficiently manage water resources and to fairly resolve disputes arising under this Agreement without resorting to litigation.

9.2 The parties agree to create a three-member Intergovernmental Board composed of the Chairman of the Fort Hall Business Council, the Director of the Idaho Department of Water Resources, and the Secretary, or their designees.

9.3 The Intergovernmental Board shall assist in the implementation of this Agreement and shall mediate disputes arising among the parties regarding the interpretation of this Agreement.

ARTICLE 10. FINALITY OF SETTLEMENT AGREEMENT

10.1 In lieu of filing claims by or on behalf of the Tribes in the SRBA and pursuant to Idaho Code § 42-1409(3) (Supp. 1989), the parties agree to submit this Agreement to the Director. The Director shall submit this Agreement and an abstract of the water rights listed in this Agreement to the Fifth Judicial District Court of the State of Idaho, in and for the County of Twin Falls pursuant to Idaho Code § 42-1411 (Supp. 1989). Other persons not signatory to this Agreement may file objections.

10.2 At the time the Director submits this Agreement and the abstract of this Agreement to the Fifth Judicial District Court of the State of Idaho in and for the County of Twin Falls, the State and the United States shall file a motion seeking approval of the water rights in the Agreement as a decree in the SRBA. The parties agree to jointly support and defend this Agreement against any and all objections or other challenges that may arise in any phase of the Adjudication, including any appeals, and in securing any necessary ratification of this Agreement.

10.3 The United States' and Tribal water rights confirmed in this Agreement shall be final and conclusive as to all parties to the Adjudication once the Agreement becomes effective as provided in Article 18.

10.4 The Tribal water rights recognized in Article 7 are in full satisfaction of all water rights or claims to water rights of the Tribes, its members, and its allottees within the Upper Snake River basin. If a member or an allottee is decreed a water right for Indian lands, then a corresponding reduction will be made in the Tribal water rights set forth in Article 7. This Agreement does not apply to state water right claims of Tribal members for non-Indian lands.

ARTICLE 11. DISCLAIMERS AND GENERAL PROVISIONS

11.1 Nothing in this Agreement shall be so construed or interpreted:

.1 To establish any standard to be used for the quantification of federal reserved water rights or any other Indian water claims of any other Indian Tribes in any judicial or administrative proceeding;

.2 To restrict the acquisition or exercise of an appropriative right to the use of water under state law for present Tribal or allotted lands, provided the Tribal water rights confirmed in this Agreement have been fully utilized at the time the application is made, or are not physically available for use through reasonable diversion facilities;

.3 To restrict the power of the United States to reserve, or of the United States or the Tribes to acquire water rights in the future, in accordance with this Agreement and other applicable law;

.4 To limit in any way the rights of the parties or any person to litigate any issue or question not resolved by this Agreement;

.5 To limit the authority of the United States or the Tribes to administer their respective water rights in accordance with the constitution, statutes, regulations, and procedures of the United States or of the Tribes except as expressly provided herein;

.6 To restrict, enlarge, or otherwise determine the subject matter jurisdiction of any state, tribal or federal court;

.7 To commit or obligate the United States, the State, or the Tribes to expend funds which have not been appropriated and budgeted;

.8 To quantify or otherwise determine Walton Right claims that may be made in the SRBA;

.9 To impair or impede the exercise of any Treaty rights reserved for members of the Tribe pursuant to Article 4 of the Second Fort Bridger Treaty of July 3, 1868, 15 Stat. 673;

.10 To waive or prejudice any contention by any party to this Agreement regarding the location and extent of the Reservation's northern and western boundaries along or within the Snake River and the Blackfoot River, as well as the ownership of the beds and banks of those rivers to the ordinary high water mark;

.11 To preclude the Tribes from participating in future water storage projects in the Upper Snake River basin;

.12 To quantify or otherwise determine any water right claims of the City of Pocatello under the Act of September 1, 1888, ch. 936, § 10, 25 Stat. 452 or the sources from which such claims may be satisfied, provided that in the event the City of Pocatello is determined to be entitled to such a right, such right shall be in addition to the Tribal water rights set forth in this Agreement;

.13 To quantify or otherwise determine any water right claims of the Northwestern Band of Shoshone, if any;

.14 To waive any applicable federal environmental law;

.15 To impair or impede the exercise of any civil or regulatory authority of the Tribes, the State, or the United States; and

.16 To quantify or otherwise determine any water right claims for the United States that are not quantified in this Agreement.

11.2 This Agreement represents a settlement of federal reserved water right claims of the Tribes under the Winters Doctrine that are unique to the Reservation. The parties are unable to agree on whether the reserved water rights doctrine extends to ground water. In order to avoid litigation, however, this Agreement recognizes federal reserved water rights to groundwater for the Tribes as described in Article 7. Because this Agreement is a resolution of a disputed claim, it is not and shall not be used as precedent for any other federal reserved water right claim.

11.3 This Agreement has been reached in the process of good faith negotiations for the purpose of resolving legal disputes, including pending litigation, and all parties agree that no offers and/or compromises made in the course thereof shall be construed as admissions against interest or be used in any legal proceeding.

11.4 Entry of judgment as set forth above has been consented to by the parties without trial or adjudication of fact or law herein and without the judgment constituting evidence or an admission by any party, with respect to any issue.

11.5 The Tribes and the United States reserve the right to assert federal reserved water right claims for instream flows in the Salmon River basin, the Clearwater River basin, and the Snake River basin below Hells Canyon Dam; however, no such instream flow claims made by the Tribes or the United States on behalf of the Tribes below Hells Canyon Dam shall require water to be supplied from above Hells Canyon Dam to satisfy such claims. All parties to this Agreement agree to engage in good faith negotiations in an attempt to settle these remaining claims.

11.6 The Tribes reserve the right to develop geothermal ground water on the Reservation having a temperature of at least two hundred twelve (212) degrees Fahrenheit in the bottom of a well.

11.7 Performance by the United States of the actions required by this Agreement, including the Congressional authorization and appropriation of any funds for deposit in the Tribal Development Fund described in Article 13 shall be conditioned on the Tribes executing a waiver and release of any and all existing claims against the United States arising in whole or in part from or concerning water rights finally settled by this Agreement, and for lands or water that have been inundated by the past construction or enlargement of American Falls Reservoir.

11.8 None of the parties will assert any claim against another party arising out of the negotiation of this Agreement or the entry by the Fifth Judicial District Court of the State

of Idaho in and for the County of Twin Falls of a decree embodying the water rights listed in this Agreement.

11.9 The United States, in its trust capacity for the Tribes only, and the Tribes agree not to object to water right claims filed by non-federal water users within the Upper Snake River basin in the SRBA that have no potential impact on the Tribal water rights set forth in this Agreement.

11.10 The United States and the Tribes agree not to make any claims against, or seek compensation from, any non-federal party to this Agreement for lands or water that have been inundated by the past construction or enlargement of American Falls Reservoir.

ARTICLE 12. PROTECTION OF EXISTING USES

12.1 Nothing in this Agreement alters the water right priorities as established by Section 3(b) of the Michaud Act, or Article 15 of the Michaud Contract, which the United States and/or the Tribes entered into as part of the authorization of the Michaud Division.

12.2 The Secretary shall continue to provide all project water users within the Fort Hall Indian Irrigation Project their project water entitlements pursuant to their project contracts.

12.3 The United States agrees to seek legislation authorizing the Secretary to contract with the Idaho Water Resource Board or another appropriate contracting entity acceptable to the Committee of Nine for the 80,500 acre feet of noncontracted storage space in Ririe Reservoir and the

18,980 acre feet of noncontracted storage space in Palisades Reservoir, provided that such entity makes application for the space within one year of the date such legislation becomes law. This space is estimated to provide on average approximately 45,000 AFY. The legislation shall provide for forgiveness of the repayment obligation associated with the construction cost for the noncontracted storage space; provided the contracting entity shall be responsible for operation and maintenance costs associated with this storage space.

12.4 The parties agree not to unreasonably oppose the efforts of any party to further mitigate the effects of the implementation of this Agreement on existing water users.

ARTICLE 13. CONTRIBUTIONS TO SETTLEMENT

13.1 The United States agrees to seek appropriations to continue to acquire up to 9,000 acres of land and grazing rights at Grays Lake, at a cost not to exceed $5,000,000, for the acquisition of lands, grazing rights and related improvements to enhance the operation and management of the Fort Hall Indian Irrigation Project, particularly through increased storage capacity and retention period of the reservoir, and the operation of the United States Fish and Wildlife Service refuge at Grays Lake.

13.2 The United States agrees to assist the Tribes in implementing a Tribal water management system for the Reservation. The total cost of this federal assistance to the Tribes for this Tribal water management system shall

not exceed $7,000,000. The United States agrees to seek appropriations of the $7,000,000 as follows:

.1 $2,000,000 in the first fiscal year following the effective date of this Agreement as set forth in Article 18, and

.2 an additional $5,000,000 payable over a twenty-year (20-year) period.

13.3 The United States agrees to seek an appropriation of $10,000,000 for a Tribal Development Fund payable in equal amounts of $2,000,000 each fiscal year for each of the five (5) years following the effective date of this Agreement as set forth in Article 18. Under no circumstances shall these funds be distributed on a per capita basis to members of the Tribes.

13.4 Federal financial contributions to this settlement will be budgeted for, subject to the availability of funds, by October 1 of the year following the year of enactment of the authorizing legislation described in Article 18.

13.5 The state will seek an authorization to provide $250,000 of in kind services to assist the Tribes in implementing this Agreement and will seek an appropriation of the monies necessary to pay the filing fees for the Tribes and the United States claims quantified as a part of this Agreement. These fees are estimated to be $250,000.

ARTICLE 14. SUCCESSORS

This Agreement shall bind and inure to the benefit of the respective successors of the parties.

ARTICLE 15. ENTIRE AGREEMENT

15.1 This Agreement sets forth all understandings between the parties with respect to water rights and claims to water rights for the Tribes, its members, and its allottees in the Upper Snake River basin. There are no other understandings--no covenants, promises, agreements, conditions, either oral or written--between the parties other than those contained herein. The parties expressly reserve all rights not granted, recognized or settled by this Agreement.

15.2 Ratification of the water rights set forth in Article 7 is irrevocable; however, the balance of this Agreement may be modified only upon the joint consent of the legislative bodies of the Tribes and the State, and to the extent an interest of the United States may be affected, the Secretary or the United States Attorney General, as appropriate.

ARTICLE 16. EFFECT OF HEADINGS

Headings appearing in this Agreement are inserted for convenience and reference and shall not be construed as interpretations of the text.

ARTICLE 17. MULTIPLE ORIGINALS

This Agreement is executed in quintuplicate. Each of the five (5) agreements with an original signature of each party shall be an original.

ARTICLE 18. EFFECTIVE DATE

18.1 This Agreement shall be effective only when all of the following events have occurred:

.1 This Agreement is executed;

.2 A decree acceptable to the parties quantifying the water rights in this Agreement and the water rights of the United States for the Fort Hall Indian Irrigation Project and for the Bureau of Indian Affairs Fort Hall Agency has been entered by the Fifth Judicial District Court of the State of Idaho in and for the County of Twin Falls and become final and nonappealable;

.3 Adoption by the Idaho Water Resource Board of the Shoshone-Bannock Water Bank Rules and Regulations consistent with Article 7.3;

.4 All federal and state expenditures required by this Agreement have been authorized;

.5 Ratification of this Agreement by the Legislature of the State of Idaho;

.6 Approval of the Agreement by the general membership of the Shoshone-Bannock Tribes;

.7 The Bureau of Reclamation has entered into a storage contract with the Idaho Water Resource Board or a designee of the Committee of Nine in accordance with Article 12.3; and

.8 Congressional approval of this Agreement.

The parties have executed this Agreement on the date following their respective signatures.

CECIL ANDRUS
Governor, State of Idaho

7-5-90
Date

KESLEY EDMO
Chairman, Shoshone-Bannock Tribal Council

7/5/90
Date

GENE M. GRAY
Chairman,
Idaho Water Resource Board

7-5-90
Date

HOWARD FUNKE
Tribal Attorney
Shoshone-Bannock Tribes

7/5/90
Date

CLIVE J. STRONG for JIM JONES
Attorney General,
State of Idaho

7/5/90
Date

DR. EDDIE F. BROWN
Assistant Secretary for
Indian Affairs

7-10-90
Date

PAUL BERGGREN
Chairman
Committee of Nine

7/9/90
Date

RICHARD B. STEWART
Assistant Attorney General
for Land and Natural Resources
Division
U.S. Department of Justice

7/10/90
Date

O

Exhibit 6

ORIGINAL

RECEIVED

OCT 0 1 2010

DOJ/BOISE

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Chief, Natural Resources Division
SHASTA KILMINSTER-HADLEY (ISB #7889)
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Facsimile: (208) 854-8072
Counsel for the State of Idaho

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. 27-04096
	)	
Case No. 39576	)	**STATE OF IDAHO'S RESPONSE**
	)	**TO DISCOVERY REQUESTS OF**
	)	**THE SHOSHONE-BANNOCK TRIBES**
	)	**AND THE UNITED STATES**
	)	
	)	

The State of Idaho hereby submits its responses to "Discovery Requests from the Shoshone-Bannock Tribes and the United States to State of Idaho" (hereinafter, "Discovery Requests"). As discussed by the parties, the Tribes and the United States have agreed to withdraw, and therefore the State will not provide responses to, the following discovery requests: Requests for Admission nos. 2, 6, 7, 9, 12 and 13; Interrogatory nos. 28, 29, 30, 34 and 35; and Requests for Production nos. 2, 3 and 5. The State has made good faith inquiries into the matters raised by the Discovery Requests in the time allotted, is continuing such inquiries, and will supplement these responses, if necessary, as required by the Idaho Rules of Civil Procedure.

OBJECTIONS

1. The State objects to each and every request and interrogatory in the Discovery Requests to the extent they are propounded to the Idaho Department of Water Resources ("the

Department"). The Idaho Rules of Civil Procedure provide that Requests for Admissions, Interrogatories and Requests for Production of Documents are available only as to a "party" to a case. *See* I.R.C.P. 33(a), 34(a), 36(a). The Department is not a party to the Snake River Basin Adjudication. Idaho Code §§ 42-1401B(2); 42-1401A(3).

2. The State objects to the definitions and instructions to the extent they purport to require discovery responses beyond that required under the Idaho Rules of Civil Procedure. These responses are provided in accordance with the Idaho Rules of Civil Procedure regardless of any definitions and instructions that may accompany these discovery requests.

3. These responses are subject to all objections, including, but not limited to, competence, relevance, materiality and admissibility. These responses are further subject to all objections that would require the exclusion of any statement, material, or information herein provided if such interrogatory were asked of, or any statement, material or information provided were made by witnesses present and testifying in court. All such objections are reserved and may be interposed at the time of trial.

4. No incidental or implied admissions are intended. The fact that the State has responded to any discovery request, or part thereof, should not be taken as an admission that the State accepts that the discovery request or objection thereto constitutes admissible evidence. Similarly, the fact that the State has responded to all or part of an interrogatory is not intended to, and shall not be construed to be a waiver by the State of all or part of any objection to other interrogatories. The State's answers to any discovery requests do not constitute a waiver of the State's right to object to any future additional or supplemental discovery requests regarding the same or similar matters.

5. If the State objects to a request on the grounds that it is vague and/or ambiguous, but nonetheless provides a response, the State's response is based on the State's good faith interpretation of the vague and/or ambiguous term(s) or phrase(s).

RESPONSES TO REQUESTS FOR ADMISSION AND INTERROGATORIES

REQUEST FOR ADMISSION NO. 1: Please admit that the element of annual diversion volume or annual volume of consumptive use, or both, are decreed for all water rights described 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" entered August 2, 1995 ("1995 Decree"), and for all water rights decreed to the United States for the Use and benefit of the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation, and to the United States for use on non-Indian owned lands within the Fort Hall Irrigation Project and for the Bureau of Indian Affairs, Fort Hall Agency.

RESPONSE TO REQUEST FOR ADMISSION NO. 1: The State admits that the element of annual diversion volume or annual volume of consumptive use, or both, are decreed for all water rights described 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" entered August 2, 1995 ("1995 Decree"), and for all water rights decreed to the United States for the Use and benefit of the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation, and to the United States for use on non-Indian owned lands within the Fort Hall Irrigation Project and for the Bureau of Indian Affairs, Fort Hall Agency.

INTERROGATORY NO. 1: If you Deny Request for Admission No. 1, please State the Basis for your Denial and identify all documents which support, contradict or otherwise relate to your answer to the requested admission.

RESPONSE TO INTERROGATORY NO. 1: Not applicable, since the State admitted Request for Admission No. 1.

INTERROGATORY NO. 2: Please Identify each Person who has information that relates to your Contention that is the subject of Interrogatory No. 1.

RESPONSE TO INTERROGATORY NO. 2: Not applicable, since the State admitted Request for Admission No. 1.

REQUEST FOR ADMISSION NO.3: Please admit that water right No. 27-11375 contains a provision 27-11375.x.d which states,

> 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 full 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 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 rights to account for this change.

RESPONSE TO REQUEST FOR ADMISSION NO. 3: Denied.

INTERROGATORY NO. 5: If you Deny Request for Admission No. 3, please State the Basis for your Denial and identify all documents which support, contradict or otherwise relate to your answer to the requested admission.

RESPONSE TO INTERROGATORY NO. 5: The provision as stated in the Request for Admission does not accurately represent the provision contained in the 1995 Decree. Certain words contained in provision 27-11375.x.d are omitted from the Request for Admission above. The 1995 Decree speaks for itself.

INTERROGATORY NO. 6: Please Identify each Person who has information that relates to your Contention that is the subject of Interrogatory No. 5.

RESPONSE TO INTERROGATORY NO. 6:
Not applicable; the 1995 Decree speaks for itself.

REQUEST FOR ADMISSION NO. 4: Please admit that, at the time the provision 27-11375.x.d was negotiated, the representatives for the State, the Tribes and United States, all assumed that the element of annual diversion volume would be included in the recommendations of the Director and the Decree of the Court for natural flow rights entitled to the benefit of the terms of 27-11375.x.d.

RESPONSE TO REQUEST FOR ADMISSION NO. 4: Denied.

INTERROGATORY NO. 7: If you Deny Request for Admission No. 4, please State the Basis for your Denial and identify all documents which support, contradict or otherwise relate to your answer to the requested admission.

RESPONSE TO INTERROGATORY NO. 7:The State never assumed that an annual diversion volume would be included in recommendations. The 45,000 ac-ft annual diversion volume estimate for the non-Indian, non-Fort Hall Irrigation Project water users, (hereinafter "North Side Users"), was based upon estimated actual water diversions. The purpose of the estimate was twofold. First, the estimate was used to ensure the protection of existing non-Indian entitlements. Secondly, it was the result of a good faith effort to identify the impact of the North Side Users on the Blackfoot River system water supply and the effect such diversions would have on the water supply from the Blackfoot system that would be available to the tribes.

It was not the practice of the Director of the Idaho Department of Water Resources to include annual diversion volume limits on natural flow surface water rights recommended to the adjudication court. This is evidenced by the lack of annual diversion volumes for surface water rights in prior decrees in the Lemhi River, Payette River and Reynolds Creek systems. Diversion volumes for natural flow surface water rights have, on occasion, been included in the Director's recommendation when the diversion volume was established in some prior administrative or judicial action such as an application for transfer of a water right.

It is unknown what the representatives of the Tribes and the United States assumed with regard to annual diversion volume limits.

INTERROGATORY NO. 8: Please Identify each Person who has information that relates to your Contention that is the subject of Interrogatory No. 7.

RESPONSE TO INTERROGATORY NO. 8:

David B. Shaw

ERO Resources Corporation
Consultants in Natural Resources and the Environment
3314 Grace Street | Boise, ID 83703
208.373.7983 | dshaw@eroresources.com | www.eroresources.com

REQUEST FOR ADMISSION NO. 5: Please admit that the adjudication of the element of annual diversion volume is necessary in order to effectuate the provision of the decree of water right 27-11375.x.d.

RESPONSE TO REQUEST FOR ADMISSION NO. 5: Denied.

INTERROGATORY NO. 9: If you Deny Request for Admission No. 5, please State the Basis for your Denial and identify all documents which support, contradict or otherwise relate to your answer to the requested admission.

RESPONSE TO INTERROGATORY NO. 9: Provision x.d of water right 27-11375 was intended to protect the historic water use of the North Side Users for those water rights decreed in the SRBA and to make the Tribal water right whole if the actual water use by the North Side Users exceeded 45,000 acre-feet per year. The draft Blackfoot River Management Plan makes this possible by requiring the watermaster of Water District 27 to determine and make available to all parties on a weekly basis the actual total annual water use of the North Side Users. With the information available from Water District 27 the Tribes and the United States will know if and when the equitable adjustment provision of water right 27-11375 can be exercised. Provision x.f of water right 27-11375 authorizes the Tribes and United States to augment its Blackfoot water supply with groundwater in those years when the North Side Users actual diversions exceed 45,000 acre-feet.

INTERROGATORY NO. 10: Please Identify each Person who has information that relates to your Contention that is the subject of Interrogatory No. 9.

RESPONSE TO INTERROGATORY NO. 10:
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REQUEST FOR ADMISSION NO. 8: Please admit that the Director's Report for irrigation and other water rights for Basin 27 is now final.

RESPONSE TO REQUEST FOR ADMISSION NO. 8: The State objects to this request on grounds it is vague and ambiguous. Subject to and without waiving the foregoing general and

specific objections which are incorporated herein, the State admits that the Idaho Department of Water Resources filed its Director's Report for Irrigation and Other Water Rights, Reporting Area 11, IDWR Basin 27 on November 10, 2005. The State also admits that Basin 27 was ordered closed to new late claims except for de minimis stock and domestic purposes as of April 10, 2009 pursuant to Special Master Bilyeu's order of December 18, 2008.

INTERROGATORY NO. 15: If you Deny Request for Admission No. 8, please State the Basis for your Denial and identify all documents which support, contradict or otherwise relate to your answer to the requested admission.

RESPONSE TO INTERROGATORY NO. 15: Not applicable; the State admitted Request for Admission No. 8.

INTERROGATORY NO. 16: Please Identify each Person who has information that relates to your Contention that is the subject of Interrogatory No. 15.

RESPONSE TO INTERROGATORY NO. 16: Not applicable; the State admitted Request for Admission No. 8.

REQUEST FOR ADMISSION NO. 10: Please admit that there have been previous decrees in Idaho that have annual volume limits either as acre-feet per year or as a water duty of acre-feet per year.

RESPONSE TO REQUEST FOR ADMISSION NO. 10: The State admits that there have been previous decrees in Idaho that have included annual volume limits either as acre-feet per year or as a water duty of acre-feet per year on some water rights.

INTERROGATORY NO. 19: If you Deny Request for Admission No. 10, please State the Basis for your Denial and identify all documents which support, contradict or otherwise relate to your answer to the requested admission.

RESPONSE TO INTERROGATORY NO. 19: Not applicable, and the State admitted the foregoing Request for Admission.

INTERROGATORY NO. 20: Please Identify each Person who has information that relates to your Contention that is the subject of Interrogatory No. 19.

RESPONSE TO INTERROGATORY NO. 20: Not applicable, and the State admitted the foregoing Request for Admission.

REQUEST FOR ADMISSION NO. 11: Please admit that the State originally established an annual volume of 6 acre-feet per acre for water users in the lower Blackfoot River Basin.

RESPONSE TO REQUEST FOR ADMISSION NO. 11: Denied

INTERROGATORY NO. 21: If you Deny Request for Admission No. 11, please State the Basis for your Denial and identify all documents which support, contradict or otherwise relate to your answer to the requested admission.

RESPONSE TO INTERROGATORY NO. 21: After reviewing all available documentation, the State has found no evidence of such a policy.

INTERROGATORY NO. 22: Please Identify each Person who has information that relates to your Contention that is the subject of Interrogatory No. 21.

RESPONSE TO INTERROGATORY NO. 22:

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Boise, Idaho 83720-0098
Phone: (208) 287-4800
Fax: (208) 287-6700

REQUEST FOR ADMISSION NO. 14: Please admit that the State has determined that the cumulative annual volume of non-Indian Basin 27 irrigation diversions from the Blackfoot River system for the period 1990 to 2010 was over 45,000 acre feet per year.

RESPONSE TO REQUEST FOR ADMISSION NO. 14: The State objects to the request for admission because it is ambiguous. Without waiving this objection, the State denies in part, and admits in part the request for admission.

INTERROGATORY NO. 26:If you Deny Request for Admission No. 14, please State the Basis for your Denial and identify all documents which support, contradict or otherwise relate to your answer to the requested admission.

RESPONSE TO INTERROGATORY NO. 26: This request is ambiguous in that it can be read to suggest that the diversions of the non-indian uses that are part of the Fort Hall Project count toward the 45,000 afy equitable adjustment provision in 27-11375.x.d. Section x.d of water

right 27-11375 describes the water rights to be protected as those persons diverting natural flow from the Blackfoot River prior to January 1, 1990, *whose rights are decreed in the SRBA.* Therefore, to the extent this request for admission may be interpreted to include the non-Indian Fort Hall Project diversions, the State denies the request for admission.

Although all rights diverting natural flow from the Blackfoot are not yet decreed, IDWR has issued recommendations in the SRBA for all natural flow water rights diverting from the Blackfoot River prior to January 1, 1990. The 2010 irrigation season is the first irrigation season these water rights have been administered as recommended in the SRBA, and, as of September 22, 2010, the non-Fort Hall Irrigation Project non-Indian natural flow water users have not diverted over 45,000 ac-ft in 2010. Therefore, the State denies the request for admission with respect to non-Indian Blackfoot natural flow diversions in the year 2010.

Data from the watermaster reports prior to 2004 is based in part upon estimates and measurements of unknown accuracy. Trying to modify that data based upon water rights recommended in the SRBA would be speculative. Therefore, the State is unable to admit or deny whether non-Indian Blackfoot natural flow water diversions with a priority date prior to January 1,1990 were diverting in excess of 45,000 afy prior to 2004 and therefore denies this request for admission with respect to any years prior to 2004.

The measurements collected from 2004 through 2009 have been used to estimate the amount of water likely to be diverted if the water rights recommended in the SRBA were used to control diversions but those controls were not implemented until 2010. Based upon the estimates made by modifying the historical measurement data for the period 2004-2009, the State admits that the non-Fort Hall Project non-Indian natural flow water users have, in some years, diverted water in excess of 45,000 ac-ft per year. However, until an accounting of the water rights entitled to the benefit of subordination is completed and approved by the Court, as required by the Fort Hall Agreement, there can be no certainty as to the total annual diversion volume of those benefitting rights.

The amount of an equitable adjustment can only be discerned once 1) the water rights that benefit from subordination are identified and verified by the Court, 2) all of those water rights are administered as decreed or recommended in the SRBA, in accordance with the Blackfoot River Management Plan.

INTERROGATORY NO. 27: Please Identify each Person who has information that relates to your Contention that is the subject of Interrogatory No. 26.

RESPONSE TO INTERROGATORY NO. 27:
David B. Shaw
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INTERROGATORY NO. 31: Please State in detail all reasons why the element of annual diversion volume is required for the water rights decreed to the United States for the benefit of the Tribes in Basin 27, but are not recommended to be decreed for water rights of other surface water users in Basin 27.

RESPONSE TO INTERROGATORY NO. 31: The annual diversion volume included on Tribal rights was a result of the negotiations to settle disputed Tribal water right claims. The inclusion of this element was necessary to define and limit the impact of these claims on other water rights.

INTERROGATORY NO. 32: Please provide the best estimate of the cumulative annual volume of non-Indian Basin 27 irrigation diversions from surface water sources for the period 1990 to 2010.

RESPONSE TO INTERROGATORY NO. 32: Objection, non-Indian Basin 27 irrigation diversions include the non-Indian portion of the Fort Hall Irrigation Project and those quantities are not separately reported to the watermaster or the State. Without waiving that objection, the watermaster records for the North Side Users for the period 1990 through 2003 are not based upon water deliveries pursuant to the water rights recommended in the SRBA. The measurements used to prepare those records are of unknown quality and frequency and the reports contain estimates of water use that may or may not be representative of actual water use. While that information is public record it is of questionable value in addressing whether the North Side Users regularly divert in excess of 45,000 acre-feet per year.

Since 2004 the IDWR has been the watermaster for Water District 27 and the data are such that adjustments based upon the SRBA recommended water rights for the North Side Users can be made to estimate actual diversions that would have occurred had the SRBA recommendations been the basis of water administration. Those estimates are:

Year	Acre-Feet
2004	49200
2005	44600
2006	42800
2007	46100
2008	49800
2009	39600

As noted above, in 2010 water administration for the North Side Users is based upon the recommendations and decrees in the SRBA. As of September 22, 2010 the annual diversion volume has not exceeded 45,000 acre-feet but the annual total is not yet known since diversions are continuing.

INTERROGATORY NO. 33: Please provide any estimates that have been made to date regarding the natural flow of the Blackfoot River at the following locations: Rocky Ford (below the outlet of Blackfoot Dam); Shelley (at the USGS gage site named Blackfoot River near Shelley); and at the mouth of the Blackfoot River.

RESPONSE TO INTERROGATORY NO. 33: Objection, the term natural flow is not defined and its intended meaning is unclear. Without waiving this objection the three sites identified currently have stream gages in place and actual flow or observed flow does not need to be estimated since the gages measure that flow. The IDWR has in the past made estimates of basin yield but did not separately identify natural flow. The current Blackfoot River Water Management Plan draft includes equations to allow the watermaster to determine if natural flow is available for North Side Users at Rocky Ford and whether there is additional natural flow available for the Tribes at the Shelley gage but does not direct the watermaster to determine the total natural flow at any time at any location. The current draft management plan equations have not yet been implemented.

INTERROGATORY NO. 36: Please estimate what total combined annual volume all the recommended non-Indian surface water irrigation rights outside the Fort Hall Irrigation Project will divert, on average, from the Blackfoot River and its tributaries (Basin 27).

RESPONSE TO INTERROGATORY NO. 36: 2010 is the first year water rights for the North Side Users are being administered according to SRBA recommendations and partial decrees and the total diversions for 2010 are less than 45,000 acre-feet as of September 22. The examination of diversion records for prior years, even though administration was not based upon SRBA water rights, shows the total diversion volume varies from year to year based upon the Blackfoot River system water supply and crop water needs. Since 2004 when the IDWR became watermaster for Water District 27 there are sufficient data to estimate what the actual diversions might have been had the SRBA rights been the basis of administration. Based upon the 6 years 2004 through 2009 North Side Users diversion data and adjusting for anticipated changes based upon SRBA water rights the average anticipated diversion is 45,300 acre feet per year.

INTERROGATORY NO. 37: Please Identify each Person who participated in or furnished information for the preparation of all or any portion of your responses to these Discovery Requests.

RESPONSE TO INTERROGATORY NO. 37:
David B. Shaw
ERO Resources Corporation
Consultants in Natural Resources and the Environment

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INTERROGATORY NO. 38: If you intend to use testimony by deposition or affidavit or any Expert Witness in support of your claim in This Case, please Identify each Person whom you expect to call as an Expert Witness, state the subject matter on which the expert is expected to testify, state the substance of opinions to which the expert is expected to testify, and state the underlying facts and data upon which the expert opinions are based.

RESPONSE TO INTERROGATORY NO. 38

David B. Shaw
ERO Resources Corporation
Consultants in Natural Resources and the Environment
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208.373.7983

Mr. Shaw may be called upon to testify as an expert on questions of Department policy regarding Director's Reports and Recommendations, and whether diversion volume is 1) required by statute to be included in a water right decree or 2) whether diversion volume is necessary for the definition, clarification or administration of the water right that is the subject of the subcase.

He may also be called upon to testify regarding the calculation and measurement of natural flow.

Carter Fristchle
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Phone: (208) 287-4800
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Mr. Fristchle may be called upon to testify as an expert on questions of Department policy regarding Director's Reports and Recommendations, and whether diversion volume is 1) required by statute to be included in a water right decree or 2) whether diversion volume is necessary for the definition, clarification or administration of the water right that is the subject of the subcase.

Jeff Peppersack
322 East Front Street
PO Box 83720
Boise, Idaho 83720-0098
Phone: (208) 287-4800
Fax: (208) 287-6700

Mr. Peppersack may be called upon to testify as an expert on questions of Department policy regarding Director's Reports and Recommendations, and whether diversion volume is 1) required by statute to be included in a water right decree or 2) whether diversion volume is necessary for the definition, clarification or administration of the water right that is the subject of the subcase.

INTERROGATORY NO. 39: If you intend to use testimony by deposition or affidavit of any Person other than an Expert Witness in support of your claim, in This Case, please identify each

Person who you expect to use, state, the subject matter on which the Person is expected to testify, state the substance of the matters to which the Person is expected to testify, and Describe the facts and data to which the Person is expected to testify.

RESPONSE TO INTERROGATORY NO. 39:
David B. Shaw
ERO Resources Corporation
Consultants in Natural Resources and the Environment
3314 Grace Street | Boise, ID 83703
208.373.7983

Mr. Shaw may be called upon to testify as a fact witness regarding the negotiation of the Fort Hall Agreement, the original estimates of annual diversion volume of non-Indian water users on the Blackfoot River, the current annual diversion volume from non-Indian water users in the Blackfoot River Basin, and the Blackfoot River Management Plan.

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1: Please Produce all Relevant Document that you assert support or Relate to your Contention that is the subject of Interrogatory Nos. 1 to 27.

RESPONSE TO REQUEST FOR PRODUCTION NO. 1: Documents responsive to this request have been provided in conjunction with these responses. Because of the scope of the request, however, the State has been unable to completely review all files for relevant documents at this time. The State will continue to search for responsive documents and will supplement this production with any additional responsive documents.

REQUEST FOR PRODUCTION NO. 4: Please Produce all notes, calculations, memos or related information that were used in developing or would support the original 45,000 acre-feet estimate of cumulative non-Indian Basin 27 irrigation diversions from the Blackfoot River system that was included in water right no. 27-11375.x.d.

RESPONSE TO REQUEST FOR PRODUCTION NO. 4: Documents responsive to this request have been provided in conjunction with these responses. The documents requested in this Request for Production are highly technical in nature. Given the short amount of time that the State has had to respond to these Discovery Requests, it has not had time to meet with its technical expert for a review of documents of a highly technical nature to determine responsiveness to this request. Additionally, some of the electronically stored documents cannot be easily accessed because they were created using antiquated technology that the State no longer possesses. The State is in the process of having those files converted to an accessible format. Once the State has met with its technical expert and ascertained which documents are responsive to this request, it will supplement this production accordingly.

REQUEST FOR PRODUCTION NO. 6: Please Produce copies of any Relevant Documents that You have provided to any Person in conjunction with his or her anticipated testimony in This Case.

RESPONSE TO REQUEST FOR PRODUCTION NO. 6: At this time, the State has provided no documents to any person in conjunction with his or her anticipated testimony in this case.

REQUEST FOR PRODUCTION NO. 7: Please Produce copies of any Relevant Documents that you have received from any Person in conjunction with his or her anticipated testimony in This Case.

RESPONSE TO REQUEST FOR PRODUCTION NO. 7: At this time, the State has received no documents from any person in conjunction with his or her anticipated testimony in this case.

REQUEST FOR PRODUCTION NO. 8: Please provide a privilege log that identifies, in accordance with Instruction D of these Document Requests, each Document that was requested herein to be Produced, but which you have declined to Produce on the basis of a claim of privilege or other legal protection.

RESPONSE TO REQUEST FOR PRODUCTION NO. 8: The State will provide a privilege log identifying those documents that are responsive to these requests but have not been provided on the basis of a claim of privilege or other legal protection upon completion of its review of its files.

Dated this 30th day of September 2010.

STATE OF IDAHO

Shasta Kilminster-Hadley
Deputy Attorney General