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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	)	
	)	
	)	MEMORANDUM IN SUPPORT OF
	)	SHOSHONE-BANNOCK TRIBES' AND
	)	UNITED STATES' MOTION FOR
	)	ENFORCEMENT OF THE FORT HALL
	)	INDIAN WATER RIGHTS CONSENT
	)	DECREE

INTRODUCTION

The Shoshone-Bannock Tribes of the Fort Hall Reservation (hereinafter referred to as the "Tribes"), and the United States of America as Trustee on behalf of the Shoshone-Bannock Tribes of the Fort Hall Reservation (hereinafter referred to as the "United States") have filed a Motion for Enforcement and order directing the State of Idaho and aligned parties to comply with the provisions of the Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin

(entered August 2, 1995, Subcase 92-22) (hereinafter, "Consent Decree", attached as Exhibit 1 to Affidavit of David A. Jarvis (hereinafter, "Jarvis Aff.")).

Specifically, the United States and Tribes ask this Court to:

1. Find that the 45,000 acre-feet per year limit in the Consent Decree has been exceeded;
2. Find that the parties have failed to negotiate an equitable adjustment to the Tribal water rights as contemplated by the Consent Decree; and
3. Interpret the Blackfoot River Basin "equitable adjustment" provision of the 1995 Consent Decree as requiring an increase to the Tribal Water Right by an amount equal to the annual diversions by non-tribal persons diverting natural flow from the Blackfoot River¹ in excess of 45,000 acre-feet per year, as provided for in right no. 27-11375.x.d.

The United States and Tribes seek judicial relief only after first engaging in negotiations with the Idaho Department of Water Resources, and then with the State of Idaho and aligned parties. Unless there is enforcement and an order issued, the conflicting claims and use of water by the Basin 27 water users will continue, as they do now, to seriously impact the existing decreed water rights of the Tribes in the Blackfoot River basin. The water users' actions undermine and violate the parties' negotiated Agreement and Consent Decree issued by this Court. In this situation we ask the Court to exercise its continuing jurisdiction to enforce the 1995 Consent Decree.

¹ The non-Indian water users who are referenced in 27-11375.x.d are the subject of the "State of Idaho's Motion for An Accounting of All Water Rights Benefitting from the Subordination Provisions of the Fort Hall Consent Decree and Insertion of a Remark Memorializing that Benefit on Each Affected Water Right," dated October 25, 2010. Appendix A to that filing is a list of water rights which the State of Idaho believes are entitled to the benefits of subordination of the tribal water right under 27-11375.x.d, and which are likewise the subject of the 45,000 acre-feet per year cumulative diversion volume. These water rights are typically held by non-Indians who divert surface water from the North Side of the Blackfoot River. They do not include rights to groundwater or water use by non-Indian water users within the Fort Hall Irrigation Project.

This memorandum is submitted in support of this Motion. It will first explain the background leading up to the present dispute, including the pertinent terms of the 1990 Fort Hall Indian Water Rights Agreement and the 1995 Decree of this Court which approved the Agreement. Next, this memorandum will address the present dispute and will explain the efforts by the parties to attempt to negotiate a resolution. Finally, this Memorandum will explain the basis for the relief sought by the Tribes and United States.

For the reasons set forth below, this Court should enforce the 1995 Consent Decree.

BACKGROUND

A. The 1990 Fort Hall Settlement and 1995 Consent Decree

The instant dispute arises out of a provision relating to one water right of the many rights which were decreed to be “held by the United States for the use and benefit of the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation.” *See* Consent Decree at 12 (Jarvis Aff. Ex. 1). The 1995 Consent Decree represented the culmination of over a decade of negotiations between the Shoshone-Bannock Tribes, United States, the State of Idaho, and representatives of water users located primarily in Water District 01 (“Committee of Nine”). These negotiations, which began in the mid-1980’s, bore fruit and resulted in 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” (hereinafter “1990 Agreement,” and attached as Jarvis Aff. Ex. 2). The 1990 Agreement was formally approved by the governing bodies of the Tribes, the Idaho legislature, and the United States Congress.² The Agreement was signed by Cecil Andrus,

² *See* Fort Hall Indian Water Rights Act of 1990, Pub. L. 101-602, 101st Cong. (November 16, 1990) (Jarvis Aff. Ex. 3).

Governor of the State of Idaho; Kesley Edmo, Chairman of the Shoshone-Bannock Tribes; Gene Gray, Chair of the Idaho Water Resources Board; Eddie Brown, Assistant Secretary for Indian Affairs; Paul Bergren, Chair of the Committee of Nine; and various attorneys for the governmental parties. *See* 1990 Agreement, at p. 93 (Jarvis Aff. Ex. 2).

The Agreement was submitted to this Court for approval and entry of a consent decree confirming the tribal and federal water rights recognized in the 1990 Agreement. Subsequently, a hearing was held on July 18, 1995 before this Court (Hurlbutt, J., presiding). (A copy of the transcript of that proceeding is attached as Jarvis Aff. Ex. 4.) The purpose of the hearing, as stated by Mr. Strong for the State of Idaho, was to determine whether the proposed consent decree and underlying Agreement “is fair, adequate, and reasonable and does not unnecessarily interfere or injure third party rights.” Tr., July 18, 1995 at 3 (Jarvis Aff. Ex. 4). The principal witness was David B. Shaw, Adjudication Bureau Chief, for IDWR. At this hearing, the Court and parties discussed many details of the 1990 Agreement, including the provision at issue here. Ultimately, the Court approved the Agreement, and on August 2, 1995, Judge Hurlbutt entered a Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin. *See* Jarvis Aff. Ex. 1.

B. The Blackfoot River Provision.

The instant dispute concerns the provisions relating to one water right, enumerated as No. 27-11375. The Consent Decree³ confirms and decrees to the United States for the use and benefit of the Shoshone Bannock Tribes of the Fort Hall Indian Reservation a federal reserved right to divert 150,000 acre-feet per year (AFY) of surface water from the Blackfoot

³ The 1990 Agreement and 1995 Decree are identical in their description of this and all tribal water rights.

River. This right is based upon the "Winters Doctrine", *Winters v. United States*, 207 U.S. 564 (1908), and carries with it a priority date as of the date of creation of the Fort Hall Indian Reservation, or June 14, 1867. Among other elements and general provisions, this decreed water right contains the following general provision as deemed "necessary for definition, clarification or administration of the right":

* * * * *

.x.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 diversion under state created water rights is exceeded as a result of the Decree in the SRBA, the parties shall negotiate an equitable adjustment to the Tribal water rights to account for this change.

1995 Consent Decree at 31 (Jarvis Aff. Ex. 1).

The rationale for this provision can be found in the legislative history for the Congressional approval of the 1990 Settlement. In particular, the House Report provides *inter alia* that,

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. * * * Strict application of this [tribal] 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.

House Committee on Interior and Insular Affairs, "Approving the Fort Hall Indian Water rights Settlement, and for Other Purposes," H. Rep. 101-831, at 5 (Oct. 10, 1990) (Jarvis Aff. Ex. 5).

It is important to note that the benefit of this provision extends only to those non-Indian water users who were diverting natural, surface water, flows from the Blackfoot River prior to 1990. Ground water users, post-1990 surface water users, and water users who import water from outside the basin, are not entitled to the benefit of this provision.

The parties to the 1990 Agreement acknowledged to the SRBA Court in 1995 that certain aspects of the Consent Decree were dependent upon the future decree of other, non-tribal water rights in the SRBA, and contemplated that any future disputes would be presented to the Presiding Judge overseeing the SRBA. During the hearing to approve the Consent Decree, the Court specifically addressed whether the issuance of those decrees would require an adjustment of the Tribal water right through amendment of the Consent Decree.

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

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

Reporter's Transcript, Hearing on the Proposed Consent Decree on 1990 Fort Hall Indian Water Rights Settlement Agreement, pages 144-145 (Jarvis Aff. Ex. 4).

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

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

Mr. Shaw: Yes.

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

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

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

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

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

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

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

The Court: Oh, certainly.

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

The Court: Certainly.

Reporter's Transcript, Hearing on the Proposed Consent Decree on 1990 Fort Hall Indian Water Rights Settlement Agreement, pages 145-147 (Jarvis Aff. Ex. 4).

C. Equitable Adjustment Negotiations.

As noted above, the general provision (d) for this water right provides for the parties to negotiate an equitable adjustment to this water right, should the total annual diversions from the Blackfoot River by non-Indians exceed 45,000 AFY. Thus, the first thing to determine is the quantity of total annual diversions which are exercised under this water right. Discussion began in 2003 prior to the issuance of the Director's Report for Basin 27 in an effort to persuade the Director of the Idaho Department of Water Resources to include volumetric limits in his report of surface water rights. Affidavit of Woldezion Mesghinna (attached), ¶¶ 15 – 17, 20. The

Director declined the United States' and Tribes' reasoning, and issued a Director's Report for Basin 27 which included the element of annual diversion volume for groundwater water right claims, but ironically not for surface water right claims. The Tribes and the United States filed objections to approximately 300 surface water right claims which did not contain a volumetric limit, arguing that the above-cited provision in the 1990 Agreement requires that a volume be included in the water right decrees for Basin 27. *Mesghinna Aff.*, ¶ 18. The Tribes and United States contend that the element of annual diversion volume is necessary to comply with the 1990 Agreement, in order to determine whether the state created water rights in the Blackfoot River exceed the 45,000 AFY estimate. *Mesghinna Aff.*, ¶¶ 19, 21. These objections are presided over by Special Master Bilyeu, and a test case number 27-4096 is presently scheduled to go to trial in December, 2010.

Further negotiations have continued under the auspices of these objections and with the patient supervision of Special Master Bilyeu. Technical representatives have met over the past several years in a good faith attempt to accomplish several tasks, including the development of a Blackfoot River Basin Water Management Plan,⁴ and the development of a solution to the equitable adjustment problem. *Mesghinna Aff.*, ¶¶ 22 – 24. Importantly, the technical representatives for all governmental parties recognize that the 45,000 annual diversion estimate has been consistently exceeded by 5,000 AFY to 15,000 AFY, with a predicted exceedence of about 5,000 AFY in future years. *See* *Meghinna Aff.*, with Attachments 1, 2 and 3.

⁴ The Technical Team Members have completed a final round of revisions to the Blackfoot River Management Plan and have circulated the final draft to parties' attorneys for final review. The Plan represents an important step toward the full implementation of the Fort Hall Agreement and is an important element in facilitating the equitable adjustment sought herein.

By the terms of the Court's decree of water right 27-11375.x.d, these diversion overages trigger an equitable adjustment to the Tribal water right. The Tribes met with the IDWR immediately after the Tribes' and United States' objections were filed, starting with an initial court hearing in July 2006. Mesghinna Aff., ¶ 20. These discussions continued with then IDWR Director David Tuthill until June, 2009 when the parties were unable to reach agreement before Director Tuthill left that position. Beginning in March 2010, a combined group of technical representatives, attorneys, and representatives of the water users from Basin 01 (Committee of Nine) and Basin 27 have continued to meet in "Equitable Adjustment" negotiations facilitated by David Tuthill, the former director of the Idaho Department of Water Resources. Mesghinna Aff., ¶ 20. The parties have participated in these discussions in good faith, but unfortunately the Committee of Nine and Basin 27 water users have not provided a resolution as to provision of water for making the equitable adjustment. Secondly, the lack of an organization with authority to represent the Basin 27 water users has made finding a solution problematic.

The negotiations, on the other hand, have focused on first, determining how much has actually been diverted on an annual basis, and second, how to make the "adjustment" described in the provision. Despite there being general agreement among the technical representatives for the governmental parties that the 45,000 acre-feet year annual diversion volume estimate has been exceeded, the parties have been unable thus far to reach a resolution as to the appropriate equitable adjustment. Mesghinna Aff., ¶ 20.

STANDARD OF REVIEW

In enforcing the terms of a consent decree, a court applies the principles of contract law. *Nehmer v. United States Dept. of Veterans Affairs*, 494 F.3d 846, 856 (9th Cir. 2007); *United States v. Armour Co.*, 402 U.S. 673, 681 (1971) ("Consent decrees are entered into by parties to a

case after careful negotiation has produced agreement on their precise terms Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.”).

ARGUMENT

I. THIS COURT HAS JURISDICTION TO HEAR THIS MOTION

When a court incorporates the terms of a settlement agreement or a stipulation into an order, it retains subject matter jurisdiction to interpret and enforce the contents of that order. *Flanagan v. Arnaiz*, 143 F.3d 540, 544 (9th Cir. 1998) (stating that a basis for jurisdiction may be furnished “by separate provision (such as a provision ‘retaining jurisdiction’ over the settlement agreement) or by incorporating the terms of the settlement agreement in the order” (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 378 (1991)). Because the Court incorporated the terms of the 1990 Agreement into the Consent Decree, the Court retained jurisdiction to interpret and enforce the terms of the 1990 Agreement, and therefore, plainly has jurisdiction to consider the United States and Tribes motion for enforcement of the Consent Decree. That was the understanding of all parties, as well as Judge Hurlbutt, when the Court was considering the Consent Decree. *See* Reporter’s Transcript, Hearing on the Proposed Consent Decree on 1990 Fort Hall Indian Water Rights Settlement Agreement, pages 145-147 (Jarvis Aff. Ex. 4) (Quoted *supra.*). Indeed, a court properly retains continuing jurisdiction for purposes of interpreting, clarifying and enforcing terms of the settlement agreement. *See e.g., Nehmer*, 494 F.3d at 856 (9th Cir. 2007). Moreover, the facts make clear that the Consent Decree requires action by the SRBA Court as a result of the Blackfoot River water users’ diversions exceeding the 45,000 acre-feet per year limit.

The Tribes and United States seek enforcement of the 1990 Agreement which was negotiated by the parties and approved by this Court in the 1995 Consent Decree. A consent “decree is important for the continued efficient administration of a water right.” *State v. Nelson*, 131 Idaho 12, 951 P.2d 943 (1998). And, “resolution of all claims arising within the scope of the SRBA are within the exclusive jurisdiction of the SRBA district court.” *Walker v. Big Lost River Irr. Dist.*, 124 Idaho 78, 80, 856 P.2d 868, 860 (1993). “Furthermore, the adjudication statutes provide that any supplemental adjudication of water rights within the scope of the SRBA district court must be filed in the district court that originally heard the general adjudication. See I.C. 42-1424(3).” *Sagewillow, Inc., v. Idaho Dept. of Water Resources*, 135 Idaho 24, 13 P.3d 855 (2000). Enforcement of the Consent Decree falls clearly within the exclusive continuing jurisdiction of the SRBA district court. Such continuing jurisdiction was contemplated by the parties particularly with regard to this Blackfoot River equitable adjustment matter. See Reporter’s Transcript at 145 – 147 (Jarvis Aff. Ex. 4).

II. THE 45,000 AFY DIVERSION LIMIT HAS BEEN EXCEEDED BY THE BLACKFOOT RIVER WATER USERS, THUS REQUIRING AN EQUITABLE ADJUSTMENT

A. The Parties’ Technical Team Has Documented a Violation of the Consent Decree

The parties negotiated and agreed to provision 27-11375.x.d., providing:

x.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 diversion under state created water rights is exceeded as a result of the Decree in the SRBA, the parties shall negotiate an equitable adjustment to the Tribal water rights to account for this change.*

Consent Decree, at 31 (Jarvis Aff. Ex. 1). (emphasis added).

The Consent Decree recognizes the Tribes' federal reserved water right to use direct flow water from the Blackfoot River, with a senior priority date of 1867, up to annual diversion of 150,000 acre-feet per year. The Tribes and United States, however, agreed to exercise this senior water right such that persons diverting direct flow from the Blackfoot River prior to January 1, 1990, will continue to receive their full entitlement to water. Mesghinna Aff., ¶ 8. The Blackfoot River water users were estimated to divert no more than 45,000 acre-feet of water per year. Mesghinna Aff., ¶ 9. If the water users are diverting greater than 45,000 AFY, then the parties agreed to negotiate an equitable adjustment to the Tribal water rights to account for this increase in use. *Id.*

Water rights in the Blackfoot River were to be administered per the Consent Decree. Since the water rights within the Blackfoot River had not been adjudicated, they were not subject to administration by a watermaster. Additionally, a Blackfoot River Water Management Plan as required by the Consent Decree was not developed. Last year, the Court issued an order for interim administration of water rights within Basin 27 in accordance with the Director's Report. See ORDER GRANTING STATE OF IDAHO'S MOTION FOR ORDER OF INTERIM ADMINISTRATION AS TO SURFACE AND STORAGE WATER RIGHTS IN BASIN 27, Subcase 00-92021-27 (Aug. 21, 2009).

There is substantial historical evidence showing the Basin 27 water users have consistently exceeded the 45,000 AFY of diversion volume in the past. Mesghinna Aff., ¶ 25. IDWR records for the "period 1922 – 1996 indicate an average non-Indian Basin 27 annual diversion of approximately 76,500 acre-feet per year." Mesghinna Aff., ¶ 27. Beginning in 2008, Technical staff of IDWR, the Tribes and the United States initiated efforts to inventory all

water users in the Upper Basin and describe characteristics of use for each water right.

Diversion estimates for Basin 27 were poor to non-existent prior to 2004. In 2007, IDWR staff started to measure diversion and talk with water users in the Upper Basin. A limited number of measurement data came out of this effort.

In February 2008, the Technical team members developed a preliminary report of estimated diversions. Estimates were 52,500 to 58,900 AFY based on the climate for any given year. February 2008 Preliminary Report Equitable Adjustment Assessment, Mesghinna Aff., Attachment 1. A subsequent report was issued by the Technical Committee in July 2008 that addressed some of the remaining issues identified in the February 2008 report. July 2008 Preliminary Report Equitable Adjustment Assessment, Mesghinna Aff., Attachment 2. The July 2008 report revised the estimated Basin 27 diversion volume to approximately 56,499 AFY in an average year. Much more accurate diversion measurements were taken in the Upper Basin in the summer of 2008 and several questions regarding the status and extent of water use in the Upper Basin were answered.

A December 3, 2008, IDWR Report estimated future diversions by Basin 27 water users would be approximately 50,000 AFY. This estimate was based on several assumptions; including stricter administration of water rights, current Upper Basin water uses, and certain hydrologic conditions. Historical diversions by Basin 27 water users are known to be higher than the 50,000 AFY estimate provided in the IDWR December 3, 2008, Memorandum of James Cefalo, Mesghinna Aff., Attachment 3.

The evidence shows that Basin 27 water users have exceeded the 45,000 AFY of diversion volume in the past. At the present time, the IDWR has taken a more active role in administering the Basin 27 water rights and controlling irrigations, which has resulted in reduced

non-Indian diversions. These efforts are visible in 2008 and 2009 diversion volume totals. The Cefalo memorandum (Mesghinna Aff., Attachment 3), however, shows that even under stricter administration, it is estimated that Basin 27 water users will divert over 45,000 AFY. This finding is supported by the future potential increases discussed by Dr. Mesghinna. Mesghinna Aff., ¶¶ 32, 33.

In the future, the water rights that are currently recommended by IDWR for Basin 27 would allow diversions largely in excess of the 45,000 AFY volume, looking at either full use of the water right elements (flow rate multiplied by period of use) or at typical use of the recommended irrigated acreage. This prediction is based on the fact that a number of water rights recommended by the Director are not presently being used, due to reasons such as the lands being idle as a consequence of conservation reserve programs, water rights being placed in the Water Bank, or for other reasons. If these idle water rights and lands are placed back into production, it will increase the total diversions, further impacting the Tribes. Accordingly, we request the Court to find that the 45,000 acre feet per year limit in the Consent Decree has been consistently exceeded by the State and aligned parties.

B. All Efforts to Reach an Equitable Adjustment Have Failed

For over five years the parties have unsuccessfully attempted to reach agreement on the issue of equitable adjustment. In 2005, the Idaho Department of Water Resources issued its recommendations for water rights in Basin 27, and thereafter the Tribes and United States filed objections to the water rights based on there being no volume placed on the individual water right. These objections were filed because it was believed that that Basin 27 water users were exceeding the 45,000 acre-feet per year limit agreed to in the 1990 Agreement and as decreed by this Court in 1995. These IDWR recommendations brought to life strong fears in the Tribes and

United States that additional water might be diverted by the Basin 27 water users without any volume limit, and the Tribes would not receive their fair share of Blackfoot River water.

This fear was intensified by the fact that a Blackfoot River Water Management Plan, as required by the 1990 Agreement, had not been developed or implemented. Accordingly since the 1990 Agreement was reached in 1990, and the Consent Decree entered in 1995, no actions were taken to monitor, or accurately record the amount of water being diverted by the Basin 27 water users. Given the situation, the Tribes and United States requested a meeting with IDWR Director David Tuthill to discuss and raise their concerns with the lack of volume on the Basin 27 water rights and its potential conflict with the Consent Decree. These meetings resulted in the parties initiating efforts to draft a Blackfoot River Water Management Plan, to identify gaging and monitoring sites, etc. Importantly, the parties also agreed to conduct a study of water diversions by the Blackfoot River water users, which demonstrated that the water users are exceeding the 45,000 AFY limit. The meetings with David Tuthill, however, failed to reach agreement on the volume issue. The most the parties were able to accomplish on the volume issue was to recognize that the Committee of Nine and Basin 27 water users needed to be at the table.

In late 2009, the United States, Tribes, Committee of Nine and Basin 27 users began to discuss the equitable adjustment issue. Meetings or conference calls were held to develop options and proposals for the equitable adjustment on numerous occasions. *See Mesghinna Aff.*, Table 1. As part of this process various drafts of methodology and steps to address the equitable adjustment were exchanged and considered. While these discussions continued, major differences between the Tribes and United States on one side, and the water users and State of Idaho on the other side continued.

As part of this process, in July 2009, the Committee of Nine, Water Districts 01 and 27, and the IDWR held six meetings⁵ with Water Districts 01 and 27 water users, Idaho Irrigation Canal Company, including the Lower Blackfoot River ditch users' public meeting. The meetings were intended to provide interested parties information about the equitable adjustment component of the 1990 Agreement, present the proposals of the Tribes and United States, gain consensus about the equitable adjustment agreement, and provide more meaningful participation for the Water District 01 and 27 water users.

This year, the parties have held in person and teleconference calls facilitated by Dave Tuthill to attempt to reach an equitable adjustment agreement. *See Mesghinna Aff.*, Table 1. Despite many years of good faith negotiations, the parties' efforts have failed. Thus, we request the Court to issue a finding that the parties have failed to negotiate an equitable adjustment to the Tribal water rights as contemplated by the Consent Decree.

III. RELIEF IN THE FORM OF AN EQUITABLE ADJUSTMENT IS NECESSARY AND PROPER

In light of the Technical team documenting the agreement of the parties that the 45,000 AFY has been exceeded by the Blackfoot River water users, the recommendation of IDWR allowing for future diversion exceeding the 45,000 AFY, and the failure of the parties to reach any agreement on the issue of equitable adjustment, the United States and Tribes respectfully request the Court to determine an equitable adjustment to the Tribal water right.

During the negotiations, the parties did not define "equitable adjustment" nor does the Consent Decree offer any interpretation. *Mesghinna Aff.*, ¶ 11. Dr. Mesghinna states equitable adjustment means "that the Tribes will be provided an additional water supply at their existing points of diversion along the Blackfoot River in an amount equal to what has been diverted by

⁵ These meetings were held on August 26, September 9, September 10, September 22, October 1, November 4, 2009.

the non-Indian Basin 27 water users in excess of 45,000 acre-feet per year. This water should be of good quality, delivered in a timely manner, and available without cost to the Tribes, just as direct diversion of Blackfoot River supplies would have been for the Tribes. Mesghinna Aff., ¶ 11. In turn, the State offers, “[p]rovision x.d of water right 27-11375 was intended to protect the historic water user 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.” State’s Response to Interrogatory No. 9 (**State of Idaho’s Response to Discovery Requests of the Shoshone-Bannock Tribes and the United States**, SRBA Subcase No. 27-04096, dated Sep. 30, 2010) (Jarvis, Aff. Ex. 6). Additionally, the Tribes and United States propose that there are two primary components which should be considered in defining “equitable adjustment”. These components are (1) the calculation of the equitable adjustment in terms of water volume; and (2) certain conditions that should be met to make the adjustment equitable.

A. Methodology for Determining Equitable Adjustment

The Tribes objected to the recommended water rights as stated in the Basin 27 Director’s Report because the State and aligned parties have failed to determine the cumulative volumetric diversion of the protected state create water rights as provided under the Consent Decree. At the time of the 1990 Agreement, the understanding of the Tribes and United States was that water right volumes would constitute the basis for determining an equitable adjustment to the Tribes’ water rights. After all, the Tribal water rights all contain an annual diversion volume cap, so it seems only logical that all water rights in the basin would similarly contain such a cap.

While it may be the case that the State of Idaho statutes and policies have changed since the 1990 Agreement was adopted, but that does not relieve the State from its obligations under

the 1990 Agreement or Consent Decree. Moreover, the State has included annual volume limits on previous decrees either as acre-feet per year or as a water duty of acre-feet per year. State's Response to Request for Admission No. 10 (Jarvis Aff. Ex. 6). After originally filing objections in March 2006 due to a lack of diversion volume limits on individual recommended water rights in Basin 27, the Tribes and United States understand that IDWR and other non-Indian parties would prefer to use annual diversion measurements in fulfilling their responsibility for determining cumulative diversion volumes for Basin 27.

Thus, the Tribes and United States believe there are two distinct options for fulfilling the State's responsibility to quantify Basin 27 diversion volumes: (1) place volume limits on individual water rights and accumulate their water right volumes for those specific water rights protected by the 1990 Agreement, or (2) conduct an annual measurement program of diversions in Basin 27 and accumulate diversions such that there is a running tally of the cumulative Basin 27 diversion volume.

Option 1. The first methodology uses a volume limit placed on the individual water rights. The State, specifically IDWR, would recommend reasonable annual diversion volume limits for each irrigation water right in Basin 27. Then, the Tribes and United States would request a summation of the annual diversion volumes for these water rights be compared to the 45,000 AFY and the difference would be taken as an equitable adjustment to the Tribes' water rights. The methodology steps as described by Dr. Mesghinna's are as follows:

- (1) Enumerate (identify) those specific water rights that were using water prior to the 1990 Agreement and are afforded priority date protection from the Tribes' senior Blackfoot River rights⁶;
- (2) For those water rights described in Step (1), sum up the individual water right volumes to obtain a total annual diversion volume (in units of

⁶ The State of Idaho has provided a list of such water rights in this subcase. See Appendix A to "State of Idaho's Motion for An Accounting," dated October 25, 2010. See note 1, *supra*.

acre feet) for the protected non-Indian Basin 27 water users;

(3) Make a direct comparison between the total annual diversion volume calculated in Step (2) and the 45,000 acre-feet per year estimate provided in the 1990 Agreement. If the total annual diversion volume in Step (2) is greater than 45,000 acre-feet per year, then the equitable adjustment to the Tribes' water rights is calculated as the difference. If the total annual diversion volume from Step (2) is less than or equal to 45,000 acre feet per year, then no equitable adjustment to the Tribes' water rights is necessary.

Mesghinna Aff., ¶ 36.

Our objections filed in some 300 subcases before Special Master Bilyeu based on lack of volume would be addressed under this first methodology. The Tribes' water diversions are restricted by a volumetric diversion cap as defined in the 1990 Agreement, but the State is recommending that the Court decree surface water rights for the Basin 27 water users with no volumetric restriction defined. It is indeed impractical and unfair to administer water rights in the same river system in a manner that constrains the Tribes with volumetric limits (as set forth in the 1990 Agreement), while letting Basin 27 users free to divert with no volumetric limit. Therefore, consistent with the Fort Hall Agreement and in fairness to all, the Tribes and United States objected to grant the Basin 27 users water right with no volumetric limit. The first proposed methodology would resolve the inequity created and also provide a fixed value of equitable adjustment. This is the preferred adjustment because the water rights are not variable year to year.

Option 2. The second methodology uses annual diversion measurements. If measurements are taken on an annual or more frequent basis, then the parties have to agree to provide the Tribes with an equitable adjustment for any diversions exceeding 45,000 AFY or else cut-off Basin 27 diversions once 45,000 AFY is reached. The Basin 27 water rights would be limited by a maximum diversion flow rate and period of use. With the decreed water rights in

place, the following steps as described by Dr. Mesghinna would be used to calculate an equitable adjustment by using diversion measurements:

- (1) Enumerate (identify) those specific water rights that were using water prior to the 1990 Agreement and are afforded priority-date protection from the Tribes' senior Blackfoot River rights.⁷
- (2) The IDWR Watermaster for Basin 27 would operate a Measurement Program in Basin 27 to measure on a pre-defined schedule each and every diversion in the Blackfoot River system. Diversion measurements would be made through standard procedures.⁸
- (3) On a regular basis such as once per week, the individual diversion measurements within Basin 27 would be summed for those specific water rights identified in Step (1) to obtain a total measured diversion volume (to date) for those identified water rights.
- (4) Make a direct comparison between the up-to-date annual diversion volume calculated in Step (3) and the 45,000 acre-feet per year estimate when the accumulated volume from Step (3) has not reached or exceeded the 45,000 acre-feet per year limit, then no equitable adjustment to the Tribes' water rights would be necessary. If Basin 27 water users are allowed to continue diverting even after the 45,000 acre-feet per year limitation has been reached, then some quantity of equitable adjustment will be due to the Tribes.
- (5) If an equitable adjustment is due to the Tribes, as determined in Step (4), then the equitable adjustment should be calculated as the difference between the total measured diversion volumes from Step (3) and the 45,000 acre-feet per year estimate provided in the 1990 Agreement. This difference calculation could be undertaken on a recurring basis during The irrigation season or at one time at the end of the irrigation season.

Mesghinna Aff., ¶ 38.

The drawback of using this second methodology is that measured diversion volumes is a calculated equitable adjustment that varies each year. The Tribes' water rights cannot be adjusted equitably as contemplated in the 1990 Agreement because the water rights represent

⁷ The State of Idaho has provided a list of such water rights in this subcase. See Appendix A to "State of Idaho's Motion for An Accounting," dated October 25, 2010. See note 1, *supra*.

⁸ The Blackfoot River Water Management Plan, which is nearing final approval, calls for a water measurement program.

fixed quantities. Instead, a supplemental water supply that is equivalent to direct diversions of Blackfoot River flows by the Tribes, would be provided to the Tribes in addition to their decreed water rights in an amount equal to the calculated equitable adjustment. The main problem of using measured diversion volumes is that the full extent of equitable adjustments is not known until after the irrigation diversions have occurred, and after the Tribes' ability to utilize their Blackfoot River natural flow rights have been negatively impacted. Therefore, some mechanism needs to be put in place which ensures that the Tribes' receive their equitable adjustment at a point in time when they will be able to use the water during the irrigation season.

B. To Be Equitable, The Adjustment Must Meet Certain Conditions

Under either option, in order for the adjustment under the Consent Decree to be fair and equitable as agreed to by the parties, certain primary conditions should also be met. These conditions include the following – (1) the water must be available and delivered to the Tribes existing points of diversions; (2) the water must come at no cost to the Tribes; (3) the water must come from a source other than the Blackfoot River Basin; (4) the water must not interfere with any of the Tribes' other decreed water rights; (5) the water must have the same priority date as the Blackfoot River water right – 1867; and (6) the water must be delivered in a timely manner during the irrigation season. Each of these conditions are discussed below.

1. Existing Points of Diversion

The Tribes currently divert natural flows of the Blackfoot River at three points of diversion listed under water right 27-11375: (1) Little Indian Canal; (2) Fort Hall Main Canal; and (3) Fort Hall North Canal. The canals and related infrastructure are already in place for the Tribes to utilize the flows of the Blackfoot River from these existing points of diversion. If equitable adjustment were made available for diversion by the Tribes at some other point,

different than the existing points of diversion listed above, the Tribes would incur significant costs in modifying the irrigation project infrastructure to accommodate new points of diversion. In order for the adjustment to be equitable, the Tribes should be able to utilize the water as if it was the natural flow of the Blackfoot River, and available at the Tribes existing points of diversion along the Blackfoot River.

2. No Cost to the Tribes

Under the Fort Hall Agreement, the Tribes subordinated their senior water right to the Blackfoot River Water users in the amount of 45,000 AFY in exchange for the promise that the water users would not exceed that 45,000 AFY amount. The Tribes and the United States did not agree or contemplate that they would pay for any water or the means to provide water to the Tribes should the Blackfoot River water users use more than was agreed to in 1990. Accordingly, any equitable adjustment to the Consent Decree should not penalize the Tribes by requiring any additional costs in the form of purchasing water, building additional canals, drilling wells for groundwater, etc.

3. Source of Water

The water for the equitable adjustment must come from a source other than the Blackfoot River. The Blackfoot River Basin consists of natural flows that are produced from the natural hydrologic processes and storage flows that are produced by releasing water stored in the Blackfoot Reservoir. The Tribes and Basin 27 water users both have water rights to divert from the natural flows of the Blackfoot River, with provision of water right 27-11375 allowing the non-Indians to divert water in a manner senior to the Tribes. The Tribes have the right to divert all natural flows not diverted by the non-Indian water users in Basin 27. Here, the natural flows are currently being exhausted by non-Indian and Tribal diversion rights. Therefore there are no

additional water supplies in the Blackfoot River Basin that are not already available to the Tribes under the existing Tribal water rights. A source of equitable adjustment could not come from the Blackfoot River Basin because it would not act as an adjustment to the Tribes' existing water rights.

The Tribes and United States propose that the source for the equitable adjustment amount of water shall be derived from either the Snake River with a priority date of June 14, 1867 or reliable stored water having a dependable storage water equivalent to Blackfoot River with a priority date of June 14, 1867.

4. No Interference with Other Decreed water rights

Any adjustment must be tailored to not interfere with other decreed Tribal water rights.

5. Senior Priority Date

Any supplemental source of water provided to the Tribes must have a priority date of June 14, 1867, which is the current date decreed for Tribes' Blackfoot River water rights.

6. Timely Delivery

Any equitable adjustment must provide supplemental water at a time of year during which the Tribes can make productive use of it; e.g., during the irrigation season.

CONCLUSION

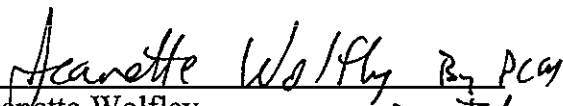
Based on the foregoing, the Tribes and the United States are entitled to an equitable adjustment to the Tribal water right in order to fulfill the terms of the 1995 Partial Final Decree and the 1990 Fort Hall Indian Water Rights Settlement. All parties agree that the surface water diversions in the Blackfoot River Basin by non-Indian water users have consistently exceeded and will continue to exceed the estimate of 45,000 AFY that was contemplated by the negotiators and parties to the 1990 Agreement, as well as representations made to this Court. The agreement

and decree both provide for the same thing: equitable adjustment of the tribal water right, either by negotiations or by order of this Court. The parties have been in negotiations to determine the appropriate equitable adjustment for many years, without success. Judicial action is now necessary.

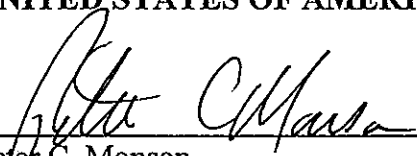
Therefore, this Court should enter an order increasing the Tribes' surface water rights by an appropriate amount including the equitable adjustment characteristics and to provide other relief as it deems just and necessary.

Respectfully submitted this 28th day of October, 2010.

SHOSHONE-BANNOCK TRIBES


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UNITED STATES OF AMERICA


Peter C. Monson
Attorney for United States of America

CERTIFICATE OF SERVICE

I certify that on this 28th day of October, 2010, I caused to be served the original and copies of the **Motion for Enforcement of Fort Hall Decree, Supporting Memorandum, Affidavit of David A. Jarvis, and Affidavit of Woldezion Mesghinna** to the persons listed below and via the method indicated:

Original via U.S. Mail, First Class Postage Prepaid:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
Twin Falls, Idaho 83303-2707
Phone: 208-736-3011

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