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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT-SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

NOV 10 2010

By _____ Clerk
_____ Deputy Clerk

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 27-11375
Case No. 39576)
) INITIAL SCHEDULING ORDER
) SETTING FORTH PROCEDURES ON
) STATE'S MOTION FOR ACCOUNTING
) AND UNITED STATES' AND TRIBES'
) JOINT MOTION TO ENFORCE
)
) RE: FORT HALL INDIAN WATER
) RIGHTS CONSENT DECREE
)
)

This matter came before the Court pursuant to 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* ("Motion for Accounting") and a *Motion for Enforcement of Fort Hall Indian Water Rights Consent Decree* ("Motion to Enforce") filed jointly by the Shoshone-Bannock Tribes ("Tribes") and the United States as Trustee on behalf of the Tribes ("United States"). A status and scheduling conference was heard on both *Motions* on November 8, 2010.

A. **The State of Idaho's *Motion for Accounting*.**

The *Motion for Accounting* seeks an order from the Court requiring an accounting of those water rights benefitting from the subordination protection of Provision 27-11375.x.d. of the *Fort Hall Consent Decree* ("subordination provision"), which provides:

INITIAL SCHEDULING ORDER SETTING FORTH PROCEDURES ON STATE'S MOTION
FOR ACCOUNTING AND UNITED STATES' AND TRIBES' JOINT MOTION TO ENFORCE
RE: FORT HALL INDIAN WATER RIGHTS CONSENT DECREE

The Tribes and the United States shall exercise this water right in a manner that ensures persons diverting natural flow from the Blackfoot River prior to January 1, 1990, whose rights are decreed in the SRBA will continue to receive their full legal entitlement under state law. The parties will specifically enumerate all rights protected by this provision once the SRBA Decree for this basin becomes final. 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 decrees in the SRBA, the parties shall negotiate an equitable adjustment to the tribal water rights to account for this change.

(italics and underline added). The *Motion for Accounting* pertains to the italicized portion of the provision. The *Motion for Accounting* includes an attached list of those water rights identified by the State of Idaho as protected by the subordination provision (i.e. those who beneficially used water prior to January 1, 1990, and whose claims are decreed in the SRBA). The *Motion for Accounting* provides that the list may not be complete and seeks an order from the Court establishing a procedure for providing notice to claimants and the opportunity to demonstrate why their water right should be included on the list. The *Motion for Accounting* further requests that a remark be included in the partial decrees of those water rights determined to benefit from the subordination provision for purposes of administering water rights. The foregoing is a summary of the *Motion for Accounting*. **Parties should review the *Motion* for more detail.**

B. United States' and Tribes' *Motion to Enforce*.

The *Motion to Enforce* pertains to the underlined portion of the above-quoted provision. The *Motion to Enforce* seeks enforcement of the Fort Hall Consent Decree provision through 1) finding that the 45,000 acre feet per year limit has been exceeded, 2) finding that the parties have failed to negotiate an "equitable adjustment" as required by the provision, and 3) interpreting the "equitable adjustment" provision as requiring an increase to Tribal water rights by an amount equal to the annual diversions by those non-Tribal users protected by the subordination provision less the 45,000 acre feet per year in

manner that satisfies certain equitable characteristics. The foregoing is a summary of *Motion to Enforce*. Parties should review the *Motion* for more detail.

C. Order Setting Forth Procedures and Deadlines on State's *Motion for Accounting*.

Based on the foregoing THE FOLLOWING ARE HEREBY ORDERED:

1. The State of Idaho shall provide personal service of its *Motion for Accounting* on all surface water claimants in Basin 27, together with a copy of this **Order**, no later than **November 30, 2010**.
2. The United States and Tribes shall provide personal service of its *Motion for Accounting* on all surface water claimants in Basin 27, together with a copy of this **Order**, no later than **November 30, 2010**. The intent is that the United States and Tribes coordinate with the State of Idaho to combine personal service so that service may be accomplished jointly in one mailing.
3. Notice of the *Motion for Accounting*, the *Motion for Enforcement* and this **Order** shall also be pursuant to SRBA docket sheet notice and appear on the docket sheet for November 2010.
4. ***Objections to Motion for Accounting.***

Parties should review the list of water right numbers attached to the State's *Motion for Accounting*. Parties wishing to object to their right(s) being excluded from the list shall file an objection using a copy of the attached objection form entitled "OBJECTION TO STATE'S MOTION FOR ACCOUNTING" and serving it on the parties identified in the certificate of mailing included on the form. **All objections shall be filed no later than January 4, 2011.** Thereafter any objections to water rights being excluded from the list will be set for individual hearings to allow parties the opportunity

to prove why their right should be included on the list as qualifying for subordination protection. Any other objections to the State's *Motion for Accounting* will be addressed separately.

PARTIES FAILING TO OBJECT TO THEIR WATER RIGHT(S) BEING EXCLUDED FROM THE LIST OF PROTECTED RIGHTS WILL BE PRECLUDED FROM LATER RAISING AND BEING HEARD ON THAT ISSUE. PARTIES WHOSE WATER RIGHTS ARE ALREADY INCLUDED ON THE LIST NEED NOT FILE ANYTHING WITH RESPECT TO THE *MOTION FOR ACCOUNTING* AS THEIR RIGHT(S) WILL REMAIN ON THE LIST OF PROTECTED RIGHTS.

5. *Participation in Motion to Enforce.*

Parties wishing to participate in the *Motion to Enforce* shall file a notice of intent to participate using a copy of the attached objection form entitled "NOTICE OF INTENT TO PARTICIPATE IN THE MOTION TO ENFORCE" and serving it on the parties identified in the certificate of mailing included on the form **no later than January 4, 2011**. Thereafter, the Court will set a scheduling hearing on the matter.

PARTIES SHOULD TAKE NOTE THAT THE OUTCOME OF THESE PROCEEDINGS MAY AFFECT THEIR WATER RIGHT(S). AFFECTED RIGHTS WILL BE BOUND BY THE ULTIMATE OUTCOME OF THE PROCEEDINGS, WHATEVER THAT MAY BE, WHETHER OR NOT A PARTY PARTICIPATES IN THE *MOTION TO ENFORCE*.

IN DECIDING WHETHER OR NOT TO PARTICIPATE IN THE *MOTION TO ENFORCE* PARTIES SHOULD ACKNOWLEDGE THAT THEY WILL BE A PARTY TO A LAWSUIT AND SUBJECT TO THE IDAHO RULES OF CIVIL PROCEDURE AND *SRBA ADMINISTRATIVE ORDER 1*.

PRIOR TO PARTICIPATING IN THE *MOTION*, (BECAUSE OF THE LARGE NUMBER OF WATER RIGHTS POTENTIALLY AFFECTED), PARTIES MAY WANT TO CONSIDER WHETHER OR NOT THEIR INTERESTS WILL ALREADY BE ADEQUATELY REPRESENTED BY OTHER PARTICIPANTS.

6. *Certificate of Mailing.*

**INITIAL SCHEDULING ORDER SETTING FORTH PROCEDURES ON STATE'S MOTION FOR ACCOUNTING AND UNITED STATES' AND TRIBES' JOINT MOTION TO ENFORCE
RE: FORT HALL INDIAN WATER RIGHTS CONSENT DECREE**

The *Motion for Accounting* and *Motion for Enforcement* were both filed in subcase number 27-11375, which is a water right decreed pursuant to the *Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin* issued September 1, 1995. No activity occurred in the subcase since that time until the filing of these two *Motions*. The certificate of mailing for the subcase may therefore be obsolete. Also the certificate of mailing excludes the large number of parties with potentially affected water rights. Accordingly, the Court therefore requires that all parties except the State of Idaho, the United States, the Shoshone-Bannock Tribes and the Committee of Nine file an appearance using the provided form. The certificate of mailing for this *Order* is for purposes of this *Order* only. Following the expiration of deadlines for the two motions, the Court will determine how the proceedings should be segregated and a certificate of mailing will be generated for future proceedings.

7. Proceedings before the Special Master.

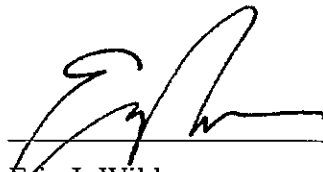
The Court has reviewed the file for the proceedings on the test case of tribal volumetric objections presently before Special Master Bilyeu. The Special Master has conducted many hearings on the volumetric objections. In September of 2009, the test case was designated for the Tribal volumetric objections, subcase 27-4096. All parties to the volumetric objection cases in Basin 27 received the Trial Scheduling Order and had an opportunity to participate in the test case trial which is set for December 6-10, 2010. The Court's understanding is that the test case is intended to cover many of the same issues involved in the *Motion for Enforcement*. The objections have been pending before the Special Master for a period of over four years (initial hearing July 25, 2006) and the proceedings have reached the point where the matter is now ready for trial. The Court is therefore concerned that allowing the United States and Tribes to withdraw their objections and have the case proceed from the beginning in its entirety may not be the most judicious process for addressing the *Motion to Enforce*. To the extent the test case

may resolve in advance some of the issues related to the *Motion to Enforce*, particularly if there are any factual issues, the Court is hesitant to start from the beginning.

THEREFORE, the Court requests that Special Master Bilyeu submit to the Court a recommendation as to whether the trial set December 6-10, 2010, should go forward after hearing from the parties and the Department during the pre-trial conference scheduled for November 17, 2010.

IT IS SO ORDERED

Dated November 10, 2010.

A handwritten signature in black ink, appearing to read 'Eric J. Wildman', written over a horizontal line.

Eric J. Wildman
Presiding Judge of the
Snake River Basin Adjudication

**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	)	NOTICE OF INTENT TO
	)	PARTICIPATE IN THE <i>MOTION</i>
	)	<i>TO ENFORCE</i>
_____	)	

Please Print or Type the Following Information:

NAME AND ADDRESS OF PERSON PARTICIPATING:

Name: _____
Address: _____
Phone: _____

Name and Address of Attorney, if any:

Water Right Number(s) _____

Please Check Applicable Box:

☐ **I wish to participate in the *Motion to Enforce* filed in the above-mentioned subcase.**

Signature: _____ Dated: _____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of _____, 2010, a true and correct copy of the foregoing was mailed with sufficient first-class postage to the following:

DIRECTOR OF IDWR
P.O. Box 83720
Boise, Idaho 83720

SHOSHONE-BANNOCK TRIBES
Represented By:
Jeanette Wolfley, Special Counsel
202 N. Arthur
Pocatello, ID 83202

U.S. DEPARTMENT OF JUSTICE
Attn: Peter C. Monson
Indian Resources Section
999 18th Street
Denver, CO 80202

STATE OF IDAHO
Office of Attorney General
Attn: Clive Strong / Shasta Kilminster-Hadley
P.O. Box 83720
Boise, ID 83720

COMMITTEE OF NINE
Represented By:
Barker, Rosholt & Simpson, LLP
P.O. Box 485
Twin Falls, ID 83303

SRBA DISTRICT COURT
P.O. Box 2707
Twin Falls, Idaho 83303-2707

Signature

**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	)	OBJECTION TO STATE'S MOTION
	)	FOR ACCOUNTING
	)	
_____	)	

Please Print or Type the Following Information:

NAME AND ADDRESS OF PERSON OBJECTING:

Name: _____
Address: _____
Phone: _____

Name and Address of Attorney, if any:

Water Right Number(s) _____

Please Check Applicable Box:

- ☐ **I wish to object to my water right(s) not being included in the list of water rights benefitting from the subordination provisions of the Fort Hall Consent Decree.**

Signature: _____ Dated: _____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of _____, 2010, a true and correct copy of the foregoing was mailed with sufficient first-class postage to the following:

DIRECTOR OF IDWR
P.O. Box 83720
Boise, Idaho 83720

SHOSHONE-BANNOCK TRIBES
Represented By:
Jeanette Wolfley, Special Counsel
202 N. Arthur
Pocatello, ID 83202

U.S. DEPARTMENT OF JUSTICE
Attn: Peter C. Monson
Indian Resources Section
999 18th Street
Denver, CO 80202

STATE OF IDAHO
Office of Attorney General
Attn: Clive Strong / Shasta Kilminster-Hadley
P.O. Box 83720
Boise, ID 83720

COMMITTEE OF NINE
Represented By:
Barker, Rosholt & Simpson, LLP
P.O. Box 485
Twin Falls, ID 83303

SRBA DISTRICT COURT
P.O. Box 2707
Twin Falls, Idaho 83303-2707

Signature

CERTIFICATE OF MAILING

I hereby certify that true and correct copies of the **INITIAL SCHEDULING ORDER SETTING FORTH PROCEDURES ON STATE'S MOTION FOR ACCOUNTING AND UNITED STATES' AND TRIBES' JOINT MOTION TO ENFORCE** were mailed on November 10, 2010, by first-class mail to the following:

DIRECTOR OF IDWR
PO Box 83720
Boise, ID 83720-0098

Clive Strong
Shasta-Kilminster Hadley
Chief Natural Resources Division
Office of the Attorney General
PO Box 44449
Boise, ID 83711-4449

United States Department of Justice
Environment & Natural Resources Div.
999 18th Street
South Terrace, Suite 370
Denver, CO 80202

Jeanette Wolfley, Special Counsel
Shoshone-Bannock Tribes
202 N Arthur
Pocatello, ID 83202

John K. Simpson
PO Box 2139
Boise, ID 83701-2139

Randall C. Budge
Thomas J. Budge
PO Box 1391
Pocatello, ID 83204-1391

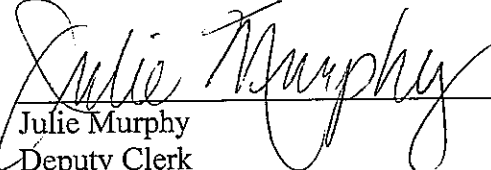
Robert L. Harris
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Scott E. Axline
PO Box 100
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Scott Smith
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Daniel V. Steenson
PO Box 2773
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Julie Murphy
Deputy Clerk