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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	)	
Case No. 39576	)	
	)	Subcase No: 27-04096
	)	
	)	STATE OF IDAHO'S
	)	PRE-TRIAL STATEMENT
	)	
	)	

On November 10, 2010, District Court Judge Wildman issued an *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*. In the *Order*, Judge Wildman requested that the parties in this subcase advise Special Master Bilyeu of whether the pending trial in subcase 27-04096 may resolve in advance some of the issues related to the *Motion to Enforce* filed by the United States and the Tribes. Judge Wildman requested that Special Master Bilyeu then make a recommendation as to whether the trial should take place as planned.

DISCUSSION

The United States and the Tribes filed objections in this subcase, as well as in approximately 300 other subcases, asserting that the subject water right decrees should contain a diversion volume. In addition to the volumetric objections, the Tribes filed season of use objections in certain water rights. The Tribes' Counsel has indicated that the season of use objection is inextricably linked to the volumetric objection, in that the season of use would be used to calculate the volume of a particular water right. The Tribes also filed objections to the recommended source element of certain water rights, but withdrew those objections on November 12, 2010.

For the past four years, the parties to the subcases with the volumetric objections have participated in negotiations over the effect of provision 27-11375.x.d to the Fort Hall Consent Decree:

The Tribes and United States shall exercise this water right in a manner that ensures persons diverting natural flow from the Blackfoot River prior to January 1, 1990, whose rights are decreed in the SRBA will continue to receive their full legal entitlement under state law. The parties will specifically enumerate all rights protected by this provision once the SRBA Decree for this basin becomes final. These state created water rights are estimated to divert not more than 45,000 AFY of water from the Blackfoot River. In the event this estimate of the amount of existing diversion under state created water rights is exceeded as a result of the Decree in the SRBA, the parties shall negotiate an equitable adjustment to the Tribal water rights to account for this change.

The Tribes and the United States argued that the inclusion of a diversion volume on the water rights that receive the benefit of the above subordination is necessary in order to calculate the total annual diversion of water in relation to the 45,000 acre-feet per year described above. This is the basis for the volumetric objections made by the United States and the Tribes in these subcases. In late 2009, Special Master Bilyeu set this subcase as a test case for all the volumetric

objections and set a trial date of December 6, 2010. Although the parties were initially hopeful that a resolution through negotiation would be accomplished before that time, it became apparent to the governmental parties in August 2010, that settlement was unlikely to occur before the trial.

Once the parties shifted their focus to the pending trial, it became clear that the issues before this Court were not representative of the actual controversy sought to be resolved by the Tribes and the United States. The Tribes and the United States seek resolution of the effect of the above-cited subordination provision of the Fort Hall Consent Decree. The issue pled before this Court, however, is whether the Director is required to place a diversion volume on surface water rights, a question that is purely statutory in nature and requires no factual development.¹ There have been no dispositive motions to determine whether the language of the Fort Hall Consent Decree requires a volume on these water rights, and none of the parties has placed at issue before this Court the total diversions of the non-Indian Blackfoot water users or the need for an equitable adjustment.² Thus, the issues to be tried in this subcase will not “resolve in advance some of the issues related to the *Motion to Enforce*. Order at 6.

The controversy over the meaning and effect of provision 27-11375.x.d of the Fort Hall Consent Decree is not at issue in the upcoming trial in this subcase. Because the SRBA District Court in 1995 retained jurisdiction over provision 27-11375.x.d of the Fort Hall Consent Decree, issues pertaining to the effect or interpretation of that provision should be heard by the SRBA

¹ There is also a season of use objection pending, but the Tribes have indicated that the season of use objection is inextricably tied to the Tribes’ efforts to pin down the maximum diversion volume. The Tribes have indicated that they will withdraw the season of use objections if the Motion to Enforce goes forward in the District Court.

² The State anticipates that the controversy over the effect of the subordination provision of the Fort Hall Decree will be decided on a purely legal basis, requiring no factual development. The issue is one of determining the intent of the parties to the Fort Hall Agreement and Consent Decree, first through the plain language of those documents, and secondly through the legislative history surrounding the Fort Hall Agreement itself. However, to the extent the Court believes that there may be issues of fact such that a trial is necessary to determine the effect of provision 27-11375.x.d, the State asserts that the interpretation of the Fort Hall Consent Decree or the Fort Hall Agreement are outside the scope of this subcase and are not currently before this Court. Jurisdiction over those issues is properly held by the SRBA District Court as contemplated in 1995.

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

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

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

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

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

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

Mr. Shaw: Yes.

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

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

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

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

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

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

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

The Court: Oh, certainly.

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

The Court: Certainly.

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

Judicial economy will be best served by allowing Tribes and the United States to withdraw their volumetric and season of use³ objections in this case and approximately 300 other subcases and proceeding before Judge Wildman on the *Motion to Enforce*. This is the best and most expedient way for this issue to be heard. Proceeding before Judge Wildman in subcase no. 27-11375 puts the issues squarely before the District Court and provides all affected parties with notice of the real controversy before the Judge. Additionally, in the event of an equitable adjustment, the parties clearly anticipated that the SRBA District Court would be the ultimate arbiter, whether the parties reached a negotiated agreement or not, and would amend the Consent Decree to reflect such adjustment. As the parties advised the Court in the *Ninth Joint Case Management Report of Governmental Parties*, they have been, thus far, unable to reach resolution of the equitable adjustment issue.

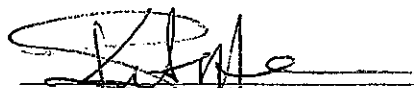
³ The Tribes have stated that the season of use objections are inextricably linked to the volume objections such that if the volume objections are withdrawn the season of use objections will also be withdrawn. The season of use objections are therefore also irrelevant to the issues related to the *Motion to Enforce*.

CONCLUSION

The *Motion to Enforce* filed by the United States and the Tribes appropriately seeks to resolve the current questions about the effect of provision 27-11375.x.d in the proper forum, as anticipated by the SRBA District Court and the parties to the Consent Decree in 1995. The State maintains that the current issues set for trial in December will not permit the parties to resolve any part of the issues presented in the *Motion to Enforce* because any controversy over the meaning or effect of provisions of the Fort Hall Consent Decree is outside the scope of this subcase. **There are therefore no factual issues related to the Motion to Enforce that can be resolved by trial in this subcase.** Additionally, principles of judicial economy will be best served by the withdrawal of the Tribes' and United States' objections in the 300 individual subcases, and proceeding in subcase no. 27-11375.

The State therefore asks the Special Master to recommend that the Motion to Enforce be heard by the SRBA District Court as soon as possible, and that the trial be vacated in 27-04096 following withdrawal of the Tribal and Federal objections. Alternatively, the State asks that if the Special Master recommends adhering to the trial schedule, she expressly limit the issues at trial to those that are properly within this Court's jurisdiction: 1) whether the Director is required to place a volume on surface water rights and 2) whether the recommended season of use is erroneous, and that she recommend that the *Motion to Enforce* proceed concurrently.

Respectfully submitted this 16th day of November 2010.


SHASTA KILMINSTER-HADLEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that on this 16th day of November 2010, I caused to be served the original and copies of the **STATE OF IDAHO'S PRETRIAL STATEMENT** to the persons listed below and via the method indicated:

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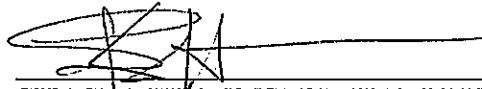
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