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DEPARTMENT OF
WATER RESOURCES

Attorneys for the Committee of Nine

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. 27-11375
	)	
	)	COMMITTEE OF NINE'S
	)	RESPONSE TO THE CONTENT OF
	)	THE STATE'S LIST OF RIGHTS
	)	
	)	

COMES NOW, the Committee of Nine, by and through its counsel of record, and hereby submits this *Response to the Content of the State's List of Rights*, pursuant to the Court's February 18, 2011 *Second Scheduling Order on State's Motion for Accounting and United States' & Tribes' Motion to Enforce*. As discussed below, the water rights on Exhibit A of the *Affidavit of David Shaw* ("*Shaw Affidavit*") should be removed from the list of water rights identified to the *State of Idaho's Motion for an Accounting of All Water Rights Benefiting From the Subordination Provisions of the Fort Hall Consent Decree and Insertion of a Remark Memorializing that Benefit of Each Affected Water Rights* (the "*Accounting Motion*").¹

¹ This Response is not intended to question whether the water rights identified should be decreed but simply raise issue with the rights inclusion on the State's list accruing the benefit from the Fort Hall Water Right Agreement.

INTRODUCTION

The 1990 Fort Hall Indian Water Rights Agreement (“Fort Hall Agreement”) memorialized the agreement between the Shoshone-Bannock Tribes (“Tribes”), State of Idaho and various water users regarding the Tribes’ water rights. Specific to the issue before this Court, Article 7.1.18.x.d of the Fort Hall Agreement provides the following protection for non-Tribal water rights diverting from the Blackfoot River:

The Tribes and the 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.

(Emphasis added).² An identical provision was included on the partial decree for water right 27-11375.

Through the Fort Hall Agreement, the Tribes’ agreed to subordinate their water right, 27-11375, with a June 14, 1867 priority date, to all pre-1990 diversions from the Blackfoot River, up to 45,000 acre feet per year. Through its *Accounting Motion*, the State seeks to fulfill the obligation to “specifically enumerate all rights protected by this provision.”³

A review of the water rights listed by the State reveals that not all water rights identified by the State are protected by the Subordination Provision. Only those non-Tribal Basin 27 water rights actually being diverted at the time the Fort Hall Agreement was being negotiated were

² This remark will be referred to herein as the “Subordination Provision.”

³ In addition, the Tribes and United States have filed a *Motion for Enforcement of Fort Hall Indian Water Rights Consent Decree* (the “*Motion to Enforce*”), seeking an “equitable adjustment” in accordance with the condition on the partial decree. Pursuant to the Court’s *Second Scheduling Order*, the Tribes’ motion will be addressed in separate briefing.

considered part of the “estimated ... 45,000 AFY of water from the Blackfoot River.” As such, only those water rights are protected by the Subordination Provision.

The rights identified on Exhibit A of the *Shaw Affidavit* were not being diverted at the time the Fort Hall Agreement was being negotiated and the Basin 27 diversions were reviewed. As such, the rights should be removed from the State’s list of water rights.

ARGUMENT

The Subordination Provision applies only to “persons *diverting* natural flow from the Blackfoot River prior to January 1, 1990.” (Emphasis added). Use of the verb “diverting” is important for purposes of the State’s *Accounting Motion* because, as the *Shaw Affidavit* explains, the Subordination Provision was developed based on acreage being irrigated in the 1986-87 timeframe. Accordingly, to determine the water rights protected by the Subordination Provision, the Court must consider those rights actually being diverted at the time of the negotiations for the Fort Hall Agreement.

At the time of the negotiations for the Fort Hall Agreement, David Shaw was the Adjudication Bureau Chief for the Idaho Department of Water Resources (“IDWR” or “Department”). *Shaw Aff.* at ¶ 5. One of Mr. Shaw’s assignments as the Bureau Chief was to estimate the non-Tribal diversions from the Blackfoot River basin (i.e. the “North Side Users”). *Id.* at ¶ 6. Mr. Shaw used various sources of data, primarily Landsat Satellite imagery, to determine which acres were being irrigated and which acres were “inactive” in the 1986-87 timeframe. *Id.* at ¶¶ 6-9. Once the acreage was determined, the duty of water was estimated. *Id.* at ¶ 7. This duty of water estimate was developed in consultation with various Department staff members, including the members of the hydrology group. *Id.* Mr. Shaw also met with Ed Hall, then Water District 27 Watermaster, to better understand the needs of the North Side Users. *Id.*

at ¶ 11. Using this information and analysis, Mr. Shaw estimated that the duty of water for the actively irrigated acreage in 1986-87 was 45,000 acre feet per year (“AFY”). *Id.* at ¶ 8.⁴

Based on this information, the United States, State of Idaho and Tribes negotiated the Subordination Provision, *supra. Id.* at ¶ 12. Importantly, the acreage that was idled in 1986-87 was not “included in the actively irrigated acreage used to estimate the 45,000 [AFY] water requirements for the North Side Users.” *Id.* at ¶¶ 13-15. No other party or water user participated in negotiating the Subordination Provision.

Not all of the water rights identified by the State were being diverted in the 1986-87 timeframe. *Id.* at ¶ 14. Mr. Shaw reviewed the State’s list of water rights and identified those that were inactive in the 1986-87 timeframe. Those inactive rights were “not included in the 45,000 ac-ft estimate of water needed by the North Side Users.” *Id.* at ¶ 14. These “inactive” water rights are identified on Exhibit A to the *Shaw Affidavit*.⁵

The water rights identified on Exhibit A to the *Shaw Aff.* should be removed from the State’s list of rights. Mr. Shaw participated in the negotiations and had an intimate understanding of the intent of the Subordination Provision. Indeed, he was the primary technical representative for the State in identifying the water rights being diverted at the time – i.e. those rights that would receive the protection of the Subordination Provision. No other individual or party to the Fort Hall Agreement undertook the same level of review. The 45,000 AFY figure was derived from his work and accepted by the parties to the Fort Hall Agreement.

⁴ It is important to note, and Mr. Shaw states, that this 45,000 AFY estimate does not include water that may have previously been diverted and used on these inactive acres. *Shaw Aff.* at ¶ 9. Rather, it only provided an estimate of the water actually being used during the 1986-87 timeframe. *Id.* The estimate also did not include diversions for domestic and stockwater rights due to the recognition by the parties to the Fort Hall Agreement that these rights had a de minimus impact on the Blackfoot River and would not be subject to administration to satisfy water right 27-11375. *Id.* at ¶ 10.

⁵ It also appears that many of these same acres continue to be inactive. *Id.* at ¶ 14.

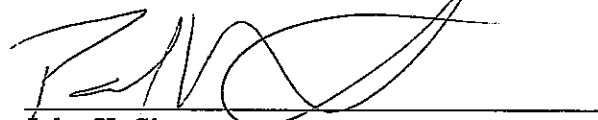
Any water right not being diverted during the 1986-87 timeframe should not receive the benefit of the Subordination Provision. Such rights were not considered part of the 45,000 AFY of diversions to which the Tribes subordinated heir senior water rights. Since the water rights identified in on Exhibit A, *Shaw Aff.*, were not being diverted at the time of the Fort Hall Agreement, they are not considered in the Subordination Provision. Accordingly, those rights should be removed from the State's list of water rights.

CONCLUSION

Since the water rights identified on Exhibit A, *Shaw Aff.*, were not being diverted at the time the Fort Hall Agreement was negotiated, they are not protected by the Subordination Provision. As such, they should be removed from the State's list of water rights attached to its *Accounting Motion*.

DATED this 18th day of March, 2011

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of March, 2011, a true and correct copy of the foregoing was mailed with sufficient first-class postage to the following:

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