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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. 27-11375
)
) **AFFIDAVIT OF SHASTA**
) **KILMINSTER-HADLEY IN**
) **SUPPORT OF STATE'S RESPONSE**
)
)
)
)

State of Idaho)
)ss
County of Ada)

SHASTA KILMINSTER-HADLEY, being first duly sworn, deposes and states:

1. I am a competent adult over the age of eighteen years, and the statements

made herein are based upon my own personal knowledge of the events described.

2. I am a deputy attorney general assigned to the Snake River Basin Adjudication.

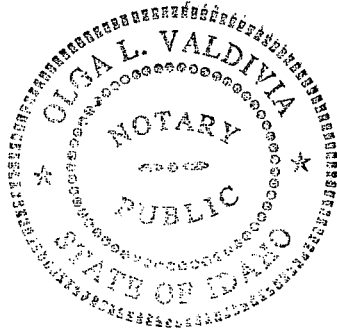
3. Attached to this affidavit are true and correct copies of the following documents:

- Exhibit 1 Testimony of the Shoshone-Bannock Tribes in Support of HB-258, Approving the Fort Hall Indian Water Rights Agreement (March 20, 1991); and
- Exhibit 2 "Resolution No. ____" of the Idaho Water Resource Board (June 14, 1990); and
- Exhibit 3 Letter from Clive Strong, Idaho Deputy Attorney General, to Ed Hall, Blackfoot River Water Master (September 8, 1989); and
- Exhibit 4 Resolution 16 of the Committee of Nine and accompanying Exhibit A (March 12, 1990); and
- Exhibit 5 Statement of Senator McClure to United States Senate on Bill to Approve Fort Hall Indian Water Rights Agreement, from Congressional Record, <http://thomas.loc.gov/cgi-bin/query/F?r101:1:./temp/~r101P49Lp2:e61110>: (last visited April 1, 2011); and
- Exhibit 6 Executive Summary, 1990 Fort Hall Indian Water Rights Agreement; and
- Exhibit 7 Tribes Response to State/W/U Proposal (September 1, 1989).

4. Further your affiant sayeth naught.


SHASTA KILMINSTER-HADLEY
Deputy Attorney General
Natural Resources Division

Subscribed and sworn (or affirmed) to before me, a notary public in and for the
State of Idaho this 1st day of April 2011.





Notary Public for Idaho
Residing at Boise, ID
My Commission expires: 2/8/2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of April 2011, I caused a true and correct copy of the foregoing **AFFIDAVIT OF SHASTA KILMINSTER-HADLEY IN SUPPORT OF STATE'S RESPONSE** to be filed with the Court and served on the following parties by the indicated methods:

<u>Original:</u> Clerk of the District Court Snake River Basin Adjudication P.O. Box 2707 253 Third Avenue North Twin Falls, Idaho 83303-2707	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile:
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Patrick J. Taney Represented by: Scott E. Axline PO Box 100 Blackfoot, ID 83221	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile:
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U.S.A. Represented by: United States Dept of Justice Environment & Natural Resource 550 West Fort Street, MSC 033 Boise, ID 83724	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile:
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Merlin Yancey 707 W. 300 S. Blackfoot, ID 83221	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile:


 SHASTA KILMINSTER-HADLEY

TESTIMONY OF THE SHOSHONE-BANNOCK TRIBES

FORT HALL INDIAN RESERVATION, IDAHO

IN SUPPORT OF HB-258

APPROVING THE 1990 FORT HALL INDIAN WATER RIGHTS AGREEMENT

BEFORE THE 51st IDAHO LEGISLATURE 1st REGULAR SESSION

SENATE COMMITTEE ON RESOURCES AND ENVIRONMENT

MARCH 20, 1991

SRBA



40660

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ATTACHMENT: HOUSE REPORT 101-831, APPROVING THE FORT HALL
INDIAN WATER RIGHTS SETTLEMENT, AND FOR OTHER
PURPOSES, 101ST CONGRESS 2d SESSION, OCTOBER 10,
1990.

I. SUMMARY OF 1990 FORT HALL WATER AGREEMENT

The 1990 Fort Hall Indian Water Rights Agreement ("Agreement") fashions creative solutions to water conflicts by recognizing the rights of the Shoshone-Bannock Tribes while protecting the water uses of other parties. The Agreement avoids tremendous financial costs associated with lengthy and divisive litigation while providing significant environmental and economic benefits.

A. SATISFACTION OF TRIBES' WINTERS RIGHTS

The tribal water rights in the Agreement are in satisfaction of all claims under the Winters Doctrine for water by the Shoshone-Bannock Tribes, its members, and its allottees in the Snake River upstream from Hells Canyon Dam.

Under the Agreement, the Tribes will be entitled to make use of 581,031 acre feet of water per year. All tribal water rights to natural flow and groundwater will be Winters reserved water rights.

B. TRIBAL STORAGE RIGHTS

Storage water rights in the Blackfoot River Basin will be utilized by the Tribes as a supplemental water supply to insure the Tribes' natural flow Winters water rights from the Blackfoot River.

The Tribes will assume control of their federal contract storage rights held in trust in American Falls Reservoir and Palisades Reservoir. Water accruing to this storage space may be used by the Tribes for instream flows on or adjacent to the Fort Hall Indian Reservation ("Reservation") or rented for any beneficial use, including instream flows, from a tribal water bank created pursuant to laws of the State of Idaho ("State") and federal legislation ratifying the water rights settlement.

The Tribes will have the right to establish instream flows on all interior rivers within the Reservation as well as use up to 15,000 AFY from Blackfoot Reservoir and Grays Lake storage for instream flows in the Blackfoot River.

C. FLEXIBILITY THROUGH LEASE/TRANSFER

The Tribes will have the flexibility to lease or transfer their water rights within and adjacent to the Reservation. This will occur pursuant to a tribal water code. In addition, the Tribes may opt at some future date to lease water off-Reservation on the terms outlined in the Agreement.

D. PROTECTION OF EXISTING USES

The Agreement accomodates certain historic water rights if they are decreed in the Snake River Basin Adjudication ("SRBA"). If the Tribes were to fully implement the maximum diversions provided for in the Agreement as well as market or rent all of its federal contract storage rights in American Falls and Palisades Reservoirs, the non-Indian water users on the Snake River would be adversely affected.

The Agreement provides for mitigation of this potential impact on Snake River water suers through the United States' contribution of approximately 100,000 acre-feet of uncontracted storage space in Palisades and Ririe Reservoirs to the non-Indian water users.

First, the Tribes agree to exercise their Winters rights to the Blackfoot River in a manner that protects the non-Indian water-users entitlement to divert up to 45,000 AFY of natural flow. In times of shortage in natural flows, the Tribes will supplement their flow rights with water accruing to their storage rights in Blackfoot Reservoir and Grays Lake.

In Bannock Creek, the parties agree to continue to allocate surface water pursuant to the Bannock Creek Decree of 1907. However, the Tribes will be entitled to water remaining in Bannock Creek over and above that necessary for the diversions under the Bannock Creek Decree.

As to groundwater in the Bannock Creek Basin, the Tribes agree to exercise their Winters groundwater right in a manner that protects up to 2,400 AFY of groundwater uses off-Reservation if they are decreed in the SRBA.

In addition, the Tribes have agreed to phase-in over time 15,000 acre feet of the Snake River tribal water right. This will allow non-Indian Snake River water users time to further mitigate any potential adverse impacts from the Tribes' diversion and marketing/rental rights.

Finally, the Agreement provides that the Fort Hall Indian Irrigation Project ("FHIIP") water users, either Indian or non-Indian, shall continue to receive whatever their respective project entitlements.

E. ADMINISTRATION OF WATER RIGHTS

The Agreement provides a process for the administration of water rights that affords respect for the sovereignty of each government. Within the Reservation, the Tribes will administer the Tribal water rights. The United States shall administer the Fort Hall Agency water rights, FHIIP and the water rights for non-Indians within that project. The State shall administer remaining State-law rights not part of the tribal, Fort Hall Agency or FHIIP.

F. CONTRIBUTIONS TO SETTLEMENT

Each party will contribute to the settlement. The Tribes agree to protect certain historic non-Indian water users and phase-in their Snake River water right. The non-Indian Snake River water users will be required to mitigate part of the impact arising from implementation of the Tribes' rights in the Agreement.

The State will contribute \$500,000 in filing fees and in-kind services.

Finally, the United States will contribute \$22 million dollars to meet part of its federal trust responsibilities to the Tribes and approximately 100,000 acre-feet of storage space to non-Indian Snake River water users to help mitigate impacts of the Agreement.

II. NEGOTIATION PROCESS LEADING TO THE AGREEMENT

In 1985, the 48th Idaho Legislature passed H. Con. Res. 16 directing the State to engage in good faith, government-to-government negotiations with the Shoshone-Bannock Tribes to attempt 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 divisive and costly litigation. Executive Orders 85-9 and 87-9 provide that it is in the best interest of the State of Idaho to negotiate the settlement of claims for water rights reserved under federal law.

In 1986, the State, Tribes and water users drafted comprehensive revisions to the Idaho water adjudication statute. These revisions provided for the Snake River general stream adjudication and the submittal of negotiated agreements involving federal rights to the state court in lieu of litigation claims.

The State commenced the general adjudication of the claims to the use of water in the Snake River in Idaho in 1987. Following five years of intensive negotiations, the Tribes, State, United States and the Committee of Nine water users in July of 1990 reached "The 1990 Fort Hall Indian Water Rights Agreement."

The negotiations provided an opportunity for the Tribes to measure by an objective and fair standard their water rights and entitlements. The State and Idaho water users were given the opportunity to fashion a water agreement that devoted much time and analysis to devising a solution which would substantially minimize impacts on Idaho water users.

The Agreement was ratified by the 101st Congress in the fall of last year and signed by President Bush on November 16, 1990. Act of November 16, 1990, Pub. L. 101-602 (104 Stat. 3059).

III. HISTORY OF THE SHOSHONE-BANNOCK TRIBES AND THE FORT HALL INDIAN RESERVATION

Prior to 1868, ancestors of the Shoshone-Bannock Tribes occupied and used an extensive aboriginal domain which comprised "vast areas of Idaho and surrounding states," including "the Salmon River country, the Snake River country, and the length of what is now Southern Idaho since time immemorial. See State v. Tinno, 94 Idaho 759, 764, 497 P.2d 1386, 1391 (1972).

The 1868 Fort Bridger Treaty ("1868 Treaty") was one of a series of treaties negotiated in 1868 by a federal Peace Commission established by the congressional Act of July 20, 1867, 15 Stat. 17 (1867 Act). Section 2 of the 1867 Act directed the Peace Commission to locate areas within the western territories which, "when so selected ... and approved by Congress, shall be and remain permanent homes for said Indians to be located thereon." 15 Stat. 17.

Pursuant to the 1867 Act, the Peace Commission negotiated with tribal leaders Washakie and Tahgee on behalf of the "Eastern Band" of Shoshone and the Bannock Tribes and concluded the 1868 Treaty on July 3 at Fort Jim Bridger in Utah Territory. This treaty was ratified by the Senate on February 24, 1869 and proclaimed by President Grant on February 26, 1869.

Article 4 of the 1868 Treaty secured these lands as "permanent home[s]" for the affected tribes. 15 Stat 674-75. Tribal leaders, as well as the United States, mutually understood that the locale of the Reservation was selected for two principal reasons: (1) it was an area traditionally used and occupied by the Tribes since time immemorial; and (2) it contained and was bounded by extensive natural water systems central to the common goal of promoting tribal self-sufficiency.

In 1867, President Andrew Johnson's Executive Order designated the Fort Hall Indian Reservation as comprising 1.8 million acres. Although "the [1868] Treaty called for a Reservation of 1.8 million acres, 'surveying errors' in 1873 reduced its actual size to approximately 1.2 million acres." Swim v. Bergland, 696 F.2d 712, 714 (9th Cir. 1983).

Between 1880 and 1900, the Tribes were subjected to several cession agreements by the United States which had the effect of further reducing the original Fort Hall Reservation to about thirty percent of its original size.

The current Fort Hall Reservation contains approximately 544,000 acres which are owned primarily by: (1) the Tribes collectively (forty-seven percent); and (2) individual Indians holding allotments subject to restraints on alienation without the consent of the United States (forty-three percent).

The United States holds title to about six percent of Reservation lands, most of which---more than 28,000 acres---were ceded to the United States in 1924 to assure construction of the American Falls Reservoir. Act of May 9, 1924, 43 Stat. 117. Non-Indians currently own less than four percent of Reservation lands.

The Snake River and a key tributary thereto, the Blackfoot River, form the northern and western boundary of the Reservation for approximately 50 miles. The Portneuf River, approximately 100 miles in length, as well as most of its tributaries, were contained within the Reservation as late as 1900. Since then, about 10 miles of the Portneuf River, at its headwaters and its mouth, remain within the Reservation, while the balance crosses substantial public lands wherein the Tribes retain priority hunting, fishing, and other use rights. Bannock

Creek rises outside the Reservation but the great majority of the creek is contained within the Reservation and flows north through the entire southwestern segment thereof.

These water resources are hydrologically connected in an area known as the "Fort Hall Bottoms," the ancient wintering ground and heart of Shoshone-Bannock aboriginal homelands. These bottom lands contain numerous spring-fed creeks and originally embraced about 40,000 acres of land extending along the Snake River where it formed the far western boundary of the Reservation.

Pursuant to federal legislation enacted in 1924, more than 28,000 acres of bottom lands were flooded to create American Falls Reservoir. More than half of the 56,000-acre reservoir remains part of the Reservation and is "subject to the reservation of an easement to the Fort Hall Indians to use the said lands for grazing, hunting, fishing and gathering of wood, and so forth ... in so far as such uses shall not interfere with the use of said lands for reservoir purposes." Act of May 9, 1924, ch. 151, 43 Stat. 117.

The Supreme Court held that the "principal purpose of the [1868] [T]reaty was that the Shoshone should have, and permanently dwell in, the [Reservation] defined" by Article 2 of the 1868 Treaty. United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938). In so holding, the court construed the pertinent Article 2 phrase---securing the reservation for the "absolute and undisturbed use and occupation" of the Shoshones---in light of the "settled policy of the United States fairly to deal with Indian tribes." Id. at 116.

The federal court of appeals for the Ninth Circuit concluded that the "objective of self-sufficiency [for the Shoshone-Bannock Tribes was] implicit in the 1868 Treaty" Swim v. Bergland, 696 F 2d 712, 719 (1983).

Article 4 of the 1868 Treaty reserved to the signatory tribes continuing rights "to hunt" off Reservation upon "the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and the Indians on the borders of the hunting districts." 15 Stat. 674.

Pursuant to this treaty clause, the Shoshone-Bannocks retain priority hunting, fishing and gathering rights, including the right to use anadromous fish for food and other purposes, on unoccupied lands outside their Reservation. Such treaty guarantees are expressly preserved by Article 11.1.9 of the Agreement.

IV. ANALYSIS OF TRIBAL WATER RIGHTS AND OTHER IMPORTANT PROVISIONS IN THE WATER AGREEMENT

A. NATURE OF TRIBAL WATER RIGHTS

The Agreement provides for satisfaction of the Winters Doctrine water rights for Indian lands of the Shoshone-Bannock Tribes, its members and allottees in the upper Snake River Basin. HB-258 approves, ratifies and confirms the mix of tribal water rights in the Agreement.

Article 6.1 of the Agreement makes clear that the basis of the Tribes' rights to water in the Agreement is to satisfy the purposes of the Reservation pursuant to the Winters Doctrine.

In Article 6.2, the Agreement quantifies the tribal water rights for present and future uses in the Upper Snake River basin as an annual diversion of 581,031 acre-feet per year from the water system for irrigation, DCMI, instream flow, hydropower, stockwater and other purposes..

B. TRIBAL NATURAL FLOW WATER RIGHTS

1. SNAKE RIVER WATER RIGHT

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. As of the effective date of the Agreement, 100,000 AFY may be diverted from this source. 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 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. The annual volume of consumptive use is 60,986. The priority date assigned to this water right is June 14, 1867, 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 headgates. The maximum rate of diversion is measured at these headgates. 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.

The Equalizing Reservoir was originally designed to store approximately 3,000 acre-feet. However, the present active storage capacity of the Equalizing Reservoir is severely limited by sedimentation and other physical characteristics which limit the ability to control Black foot River flows.

The parties estimate that even if the Equalizing Reservoir was rehabilitated so that its active storage was 5,000 AF, approximately fifteen percent of the flows from Sand Creek would still not normally be useable 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 AF would cost between \$5 and \$15 million initially and annual maintenance would require annual expenditures of about \$150,000.

The Agreement provides a novel means of allocating Sand Creek flow which avoids the costs of rehabilitating and maintaining the Equalizing Reservoir to provide 5,000 acre-feet of active storage. In partial satisfaction of the Tribes' right to divert natural flow from the Snake River provided in Article 7.1.1 of the Agreement, of the eighty-five percent of the flow of Sand Creek which might be used if the Equalizing Reservoir were rehabilitated, the Tribes agree to accept and be credited for only that portion of such Sand Creek flow which can be rediverted by the Fort Hall Main Canal and the North Canal for actual use within the FHIIP.

The amount of Sand Creek flow which is charged against the Snake River water right in Article 7.1.1 is based on the amount of flow computed at the drop and the amount demanded by the North and Main Canals less the amount supplied from the Blackfoot River natural flow, Blackfoot Reservoir, Grays Lake storage, and other sources.

Of the computed flow of Sand Creek which is returned to the Snake River because of lack of control provided by the present Equalizing Reservoir in excess of the demands of the North and Main Canals, eighty-five percent of such water---up to a maximum of 50,000 AFV---will be bypassed into American Falls Reservoir for delivery to the credit of the North Side Canal Company. An equal amount of stored water which that company owns in Palisades Reservoir and/or Jackson Lake Reservoir will be released by the North Side Canal Company to augment the natural flow of the Snake River and be available to meet Snake River diversion requirements of the Tribes and other water users. This water shall be deemed the first storage water released from American Falls Reservoir by North Side Canal Company.

The remaining fifteen percent of the computed flow of Sand Creek which is not useable by the FHIIP and therefore returned to the Snake River shall be considered as natural flow and credited to downstream water users without any exchange of storage water required.

The quantification of the Tribes' Snake River water right is based on irrigation of as many as 23,359 acres between mid-March and mid-November of each year. Article 7.5 of the Agreement provides that the Tribes may transfer or lease all or any portion of this water right anywhere within the Reservation so long as the transfer: (1) is to any beneficial use; (2) does not exceed the maximum diversion rate notwithstanding the period of use; (3) does not exceed the annual volume of diversion and annual volume of consumptive use; and (4) does not change the water source.

As a special condition on changes in points of diversion and periods of use for the tribal water right in Article 7.1.1 only, the Tribes agree in Article 7.6 that any change in periods of use or point of diversion of their Snake River natural flow right will not result in an injury to another water right pursuant to the injury provision in Article 7.8.

2. BLACKFOOT RIVER WATER RIGHT

The basis for the Tribes' right to divert natural flow from the Blackfoot River Basin in Article 7.1.18 of the Agreement is the Winters Doctrine. Under the Winters Doctrine, the Tribes shall have the right to divert a maximum of 150,000 AFY with a priority date as of the creation of the Reservation. 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. This water right may be transferred and/or leased within the Reservation on the conditions set forth in Article 7.5 of the Agreement.

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. This protection is expressed in remarks contained in Articles 7.1.18(x)(d), 7.1.19(x)(a) and 7.1.20(x)(a). In addition, the Tribes and the United States agree to exercise this right in a manner which does not impair the respective project entitlements of water users in the FHIIP. This arrangement is made possible by the federally-owned storage rights in Blackfoot Reservoir and Grays Lake.

If the water supplied under this right does not provide the full entitlement to natural flow under the Winters Doctrine, the Tribes may divert groundwater within the Reservation without crediting such diversions against any other Tribal water right.

If, on the other hand, the Tribes elect to divert in excess of 150,000 AFY from the Blackfoot River, such excesses are credited against the Tribes' right to divert natural flow of the Snake River in Article 7.1.1.

The Agreement commits the parties to develop a Blackfoot River Water Management Plan to assist in the implementation of the Water 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 SRBA as provided in Article 18 of the Agreement.

3. ROSS FORK CREEK AND LINCOLN CREEK WATER RIGHTS

The Tribes shall have the right to divert a combination of 10,700 AFY of natural flows from Lincoln Creek and Ross Fork 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 credited against tribal groundwater rights in Articles 7.2.1.

The lease or transfer of the tribal water rights in Articles 7.1.2 and 7.1.3 are governed by Article 7.5 of the Agreement.

4. BANNOCK CREEK WATER RIGHTS

Article 7.1.4 through 7.1.13 list tribal water rights to divert natural flows of Bannock Creek and tributaries thereto. The basis for such rights is the Winters Doctrine. The combined maximum diversion volume of such rights amounts to 24,384 AFY. When used for agricultural purposes during the irrigation season, seventy-seven percent of the volume is diverted under the tribal water right listed in Article 7.1.13. The priority date of the water right in Article 7.1.13 is the creation of the Reservation. 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).

The lease and/or transfer of the tribal water rights to divert natural flows from Bannock Creek and its tributaries are governed by Article 7.5 of the Agreement.

The Tribes and the United States agree that the water right in Article 7.1.13 will be exercised in a manner which ensures that persons diverting water under the Bannock Creek decree continue to receive their full legal entitlement.

5. PORTNEUF RIVER WATER RIGHTS

Articles 7.1.14 through 7.1.17 list tribal water rights to divert natural flows to the Portneuf River and tributaries thereto. 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 Reservation was created. Priority dates for 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 according to 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.

Transfer and/or lease of the water rights in Articles 7.1.14 through 7.1.17 are governed by Article 7.5 of the Agreement. As a special condition on the transfer of the water right in Article 7.1.14 only, the point of diversion of the water right in Article 7.1.14 may be transferred anywhere within the Portneuf River basin upstream from the point the Portneuf River is impounded within the Portneuf Reservoir.

C. TRIBAL GROUNDWATER RIGHTS

1. RESERVATION-WIDE GROUNDWATER RIGHT

Article 7.2.1 lists the Tribes' right to divert groundwater from any location within the Reservation. The basis for this right is the Winters Doctrine and the priority date is the day the 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 7.1.3, excesses will be credited against this 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 Reservation-wide groundwater right in Article 7.2.1. The

Tribes may also divert groundwater for Indian lands within the City of Pocatello and for other Indian lands within the Portneuf River Basin under this Reservation-wide groundwater right.

2. BANNOCK CREEK BASIN GROUNDWATER RIGHT

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 entire annual yield of surface water and groundwater from Bannock Creek Basin, provided that if such combined diversion exceed 48,500 AFY, excesses will be credited against the Tribes' Reservation-wide groundwater right listed in Article 7.2.1.

The Tribes and the United States agree to exercise this water right in a manner which ensures that persons diverting as much as 2,400 AFY of groundwater off the Reservation from the Bannock Creek Basin continue to receive their legal entitlement.

The Tribes may transfer and/or lease all or any portion of the tribal water rights listed in Articles 7.2.1 and 7.2.2 in accordance with Article 7.5 of the Agreement.

D. TRIBAL STORAGE WATER RIGHTS

1. AMERICAN FALLS RESERVOIR AND PALISADES RESERVOIR STORAGE RIGHTS

Federal contract storage water rights held in trust for the benefit of the Tribes 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 are equivalent to 46,931 acre-feet of storage space in American Falls Reservoir and 83,900 acre-feet in Palisades Reservoir.

Article 7.3.3 indicates that the Tribes and the Secretary agree to continue the past practice of exchanging 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.

The tribal water rights listed in Article 7.3.1 may also be rented through the Shoshone-Bannock Water Bank to be established under Article 7.3.4 of the Agreement and pursuant to congressional approval of such activities.

The terms and conditions under which the Tribes may rent such stored water off the Reservation are set forth in Article 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 rights listed in Article 7.3.1 for instream flow in river reaches on or adjacent to the Reservation.

2. BLACKFOOT RESERVOIR AND GRAYS LAKE STORAGE RIGHTS

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 right to divert 150,000 acre feet of natural from the Blackfoot River under Article 7.1.18.

The Tribes' 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 bases of the Tribes' storage rights in Grays Lake are permit number 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.

Grays Lake is situated in the headwaters of the Willow Creek basin. There are no known federal or state water rights of record which are senior to the Grays Lake right. In agreeing to adopt the water rights application process utilized by the United States to secure the Grays Lake storage rights pursuant to the 1907 Act, the Tribes questioned the potential existence of any senior rights to divert flows of Willow Creek. The State assured the Tribes and the United States that, if any such rights previously existed, the adjudication process must find they have been abandoned pursuant to state law for non-use since 1907.

The Tribes may transfer and/or lease the storage water rights in the Blackfoot Reservoir or Grays Lake under Article 7.4 of the Agreement. In addition, the Tribes shall have the right to use as much as 15,000 AFV from the storage water rights in the Blackfoot Reservoir and Grays Lake for instream flows under Article 7.4.3 of the Agreement without crediting such allocations against any other rights.

E. TRIBAL INSTREAM FLOW WATER RIGHTS ON OR ADJACENT TO THE RESERVATION

Articles 7.4.1 through 7.4.3 indicate that the Tribes shall be entitled to allocate water for instream flows on as well as adjacent to the Reservation.

Under Article 7.3.1 and 7.3.3, 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. Article 7.4.2 provides that the Tribes may use the natural flows of all interior waters for instream flow purposes.

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 and pursuant to congressional authorization.

F. TRANSFER AND LEASE OF TRIBAL WATER RIGHTS ON OR ADJACENT TO THE RESERVATION

Article 7.5 provides that the Tribes shall have the flexibility to apply water supplied from all or any portion of the tribal 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 include: (1) irrigation; (2) domestic, commercial, municipal or industrial purposes; (3) hydroelectric power 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.

The Tribes agree that water users served by the FHIIP shall be provided a right of first refusal to lease water made

available for rent through the Shoshone-Bannock Water Bank pursuant to Article 7.3.4.

G. OFF-RESERVATION RENTAL OF TRIBAL STORAGE WATER RIGHTS
THROUGH THE SHOSHONE-BANNOCK WATER BANK

The Agreement provides for off-Reservation rental of storage water through the Shoshone-Bannock Water Bank to be established pursuant to Articles 7.3.4 through 7.3.12 of the Agreement and congressional authorization.

The intent of these provisions is to confirm the value of the Tribes' portfolio of water rights. Storage water rights are the most susceptible to off-Reservation rental through a tribal water bank because the legal entitlements of other waters users do not already depend on return flows from use of stored water.

The commitment of federal assets in the form of allocation of uncontracted storage water to Idaho water users is, in part, mitigation and consideration of the Tribes' ability to rent water off-Reservation. This is especially the case for transactions which deliver water for use below Milner Dam.

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.

Such transactions have the potential for creating regional, national and international benefits. In addition, water rented through the Shoshone-Bannock Water Bank for such purposes has the potential to relieve mounting pressures on consumptive water use by Idaho water users in the upper Snake River Basin.

The success of tribal water rental for purposes such as enhancing and protection of Columbia-Snake River system anadromous fish should bring much needed flexibility to existing water allocation mechanisms and help preclude a direct attack on existing uses.

As part of the bargain struck in the Agreement, the Tribes agree that the Shoshone-Bannock Water Bank will be established pursuant to State law. However, there are a number of protections built into the Agreement which are designed and intended to assure that the Tribes will actually receive the benefits to be derived from off-Reservation rental of their

federal contract storage rights in Palisades Reservoir and American Falls Reservoir.

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 agreed-upon Portneuf 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 the Shoshone-Bannock 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 Agreement also provides that a Tribal Rental Pool Committee will be established and will be responsible for operating the Shoshone-Bannock Water Bank. A majority of the membership of the committee will be appointed by the Tribes and will be responsible for establishing tribal priorities for rental of water.

The State expressly agrees in Article 7.3.6 not to take any action to interfere with transactions involving off-Reservation rental of water through 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 their 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. The State, as a result of the SRBA, will establish such districts throughout the length of the Snake River basin in Idaho.

Based in part on the aforementioned assurances within the Agreement, the Tribes have agreed that, except as authorized pursuant to the Agreement and congressional legislation, no other tribal water rights will be rented off-Reservation.

H. INJURY AND NOTICE PROVISIONS

1. CHANGE IN POINT OF DIVERSION OR PLACE OF USE OF SNAKE RIVER NATURAL FLOW RIGHT

As a special condition on a change in the point of diversion or place of use of the tribal water right in Article 7.1.1 only, Article 7.6 requires that such a change not injure another water right.

Article 7.7 provides that, 120 days prior to altering the points of diversion or period of use of this tribal water right, the Tribes will: (1) prepare a written Notice of Transfer; (2) serve a copy of the Notice of Transfer on each member of the Intergovernmental Board established pursuant to Article 9.2; and (3) publish the Notice of Transfer. The publication will state that any person who believes that such a change will injure a water right shall file a timely Notice of Objection with the Intergovernmental Board.

Article 7.8 stipulates that any person claiming that a change in the point of diversion or period of use of the tribal water right in Article 7.1.1 will injure another water right shall request mediation before the Intergovernmental Board prior to seeking judicial relief. In any proceeding before the Intergovernmental Board, any person claiming that an injury will occur due to a change in the point of diversion or place of use has the burden of proving that injury.

If the consensus of the Intergovernmental Board is that the proposed change will indeed injure an objector's water right, it shall issue recommendations which address measures to mitigate the injury. If the Intergovernmental Board is unable to mediate the dispute, the objector may seek judicial relief.

2. ENLARGEMENT OF ACREAGE IRRIGATED BY AMERICAN FALLS AND PALISADES RESERVOIR

Water accruing to the Tribes' storage in American Falls and Palisades Reservoirs may be used to irrigate up to 33,938 acres of Indian lands as well as transferred and/or leased within the Reservation under Article 7.5.

Similar to State law, Article 7.3.3 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.

Injury to other water users is unlikely as water users are generally not entitled to depend upon return flows due to runoff or recharge from another water user's application of stored water.

I. STOCKWATERING, HYDRO POWER, FUTURE STORAGE

Pursuant to Article 7.10, stockwatering may occur on any Indian lands at any time from any part of the water system. No water need be diverted onto the Reservation solely for this purpose during the non-Irrigation season.

The Tribes have the right to use their water supplies to generate hydro power as provided in Article 7.11. Article 7.12 provides the Tribes the right to build storage projects or reservoirs to utilize their water supplies contained in the Agreement.

V. PROTECTION OF EXISTING USES

The Tribes' water rights in the Agreement are quantified in a manner that minimizes the impact on other Idaho water users.

The inherent conflict between the Tribes' large but unquantified reserved water rights and the system of junior water rights that has evolved in the Upper Snake River could not be resolved by construction of additional storage facilities at the expense of the United States.

Resolution of this conflict required a mix of measures, including: (1) a commitment of already existing federal assets to mitigate the impacts of tribal water rights; and (2) agreement on the part of the Tribes to exercise certain reserved water rights in a manner protective of specific uses.

A. COMMITMENT OF UNCONTRACTED STORAGE

Article 12.3 of the Agreement authorizes and directs the United States Department of Interior to contract with the Idaho Water Resources Board---or another entity acceptable to the Committee of Nine---for 80,500 acre-feet of presently uncontracted storage space in Ririe Reservoir and 18,900 acre-feet of uncontracted storage space in Palisades Reservoir. On average, this combined unallocated storage space will yield approximately 45,000 acre-feet of water annually.

Article 12.3 also provides for "forgiveness of the repayment obligation associated with construction costs" for such uncontracted storage but stipulates that the contracting entity will be required to pay the relative share of the on-going operation and maintenance costs associated with this storage space.

This commitment of federal assets in the form of uncontracted water supplies is provided, in part, as mitigation for implementation of the tribal water rights to natural flow in the Snake River under Article 7.1.1 of the Agreement, as well as mitigation for the impacts on Idaho water users in the upper reaches of the Snake River which will be felt during water-short years due to the Tribes' off-Reservation rental of water accruing to their federal contract storage rights as provided for in Article 7.3.

In addition to the commitment of federal assets in the form of uncontracted water, Article 12.4 of the Agreement contains a provision by which the parties, including the United States, agree "not to unreasonably oppose the efforts of any party to further mitigate the effects of the implementation of the Agreement on existing water users." This provision precludes opposition to reasonable---as opposed to unreasonable---efforts by any party to mitigate impacts, e.g., by construction of additional storage facilities in the upper Snake River Basin.

B. AGREEMENT ON MICHAUD PRIORITIES

Article 12.1 recognizes the existing priorities for water rights for both Indian and non-Indian lands affected by the congressional act of August 31, 1954, 68 Stat. 1026. The 1954 Act authorized the 22,000 acre Michaud Division of the FHIIP.

Pursuant to Section 3(b)(2) of the 1954 Act, Congress implemented a limited waiver of the Tribes' priority reserved rights to the Snake River and its tributaries in the amount

necessary to irrigate the 22,0900 acres in the Michaud Division. In return, Congress provided that the United States would hold in trust for the benefit of the Tribes 46,931 acre-feet of federal contract storage space in American Falls Reservoir and 83,900 acre-feet of storage in Palisades Reservoir for irrigation of the lands in the Michaud Division.

These tribal water supplies carry a priority date obtained under State law. Space in the American Falls Reservoir has a priority date of March 30, 1921 and Palisades Reservoir carries a priority date of July 28, 1939. Under Article 7.3 of the Agreement, the Tribes may rent the water accruing to such space through the Shoshone-Bannock Water Bank to be established pursuant to Articles 7.3.4 through 7.3.12 and congressional legislation.

C. PROTECTION OF FORT HALL INDIAN IRRIGATION PROJECT ENTITLEMENTS

Several protective measures for water rights appurtenant to non-Indian lands within the FHIIP are included in the Agreement. These provisions are inserted as remarks pertaining to tribal water rights listed in Article 7.1.18(x)(e) for natural flow from the Blackfoot River, Article 7.1.19(x)(c) for Black Reservoir storage, and Article 7.1.20(x)(c) for water stored in Grays Lake. Tribal water supplies in the FHIIP will convert to the Winters Doctrine with a corresponding priority date as of the creation of the Reservation.

Article 12.2 of the Agreement maintains the existing water right priorities for non-Indian lands in the FHIIP and assures these water users that the Secretary of the United States Department of the Interior will satisfy their legal project contract entitlements consistent with their existing water right priorities.

Water users in the FHIIP who are entitled to apply water to non-Indian lands within that project are to be met from: (1) the 60,000 AFY Snake River diversion right with a priority of 1891; and (2) 22,000 AFY of storage from either the Blackfoot Reservoir with a priority of 1907 or Grays Lake which carries a priority date of 1919.

Expert analysis based on actual historical water supply records indicates that the water supplied from these sources to non-Indian lands in the FHIIP will actually be more reliable than in the past.

Prior to the Agreement, the FHIIP often transferred Michaud Unit water supplies, consisting of water accruing to the

Tribes' storage space in American Falls and Palisades Reservoir, to all water users in the Fort Hall Unit of the project. Under the Agreement, this transfer of tribal water supplies to the Fort Hall Unit will no longer occur. To mitigate any shortfall to the Fort Hall Unit water users, Article 7.3.8 stipulates that project water users applying water to non-Indian lands will be given a right of first refusal to purchase tribal water supplies through the to-be-established Shoshone-Bannock Water Bank in the event of water shortages. These protective provisions in the Agreement assure that both non-Indian and Indian lands within the FHIIP will be provided their water supply consistent with their respective rights and priorities.

D. PROTECTION OF BLACKFOOT RIVER WATER USERS

Some of the oldest water rights held in Idaho permit diversion of natural flow from the Blackfoot River for irrigation of off-Reservation non-Indian lands. The Blackfoot River is also one of the most important sources of water for the Tribes.

The Bureau of Indian Affairs operates and maintains two water storage facilities in the headwaters of the Blackfoot River Basin, i.e., Blackfoot Reservoir and Grays Lake. Water supplies from these two federal storage facilities are released into the Blackfoot River and conveyed downstream to the headgates of the Main Canal and North Canal for redirection onto the Reservation.

The storage water rights in these reservoirs were created pursuant to the congressional act of March 1, 1907 which directed the United States to secure water rights for the project in accordance with State law. 34 Stat. 1015, 1024.

Article 7.1.18 of the Agreement lists the tribal right to divert 150,000 AFY of natural flow from the Blackfoot River. The basis of this right is the Winters Doctrine, with a priority date of June 14, 1867. Strict application of this priority water right would have preempted these existing water rights for non-Indian lands to natural flow of the Blackfoot River.

To avoid impacting Idaho water users, the Tribes agree to exercise their water right in the Blackfoot River in a manner that protects their entitlement to divert up to 45,000 AFY of natural flow. At the same time, the Tribes will realize their full legal entitlement under the Winters Doctrine by supplementing the tribal natural flow rights to divert 150,000 AFY with water accruing to the 348,000 acre-feet and 100,000 acre-feet of storage in the Blackfoot Reservoir and Grays Lake facilities, respectively.

The agreed-upon process provides for both the Tribes and other Blackfoot River water users to divert available natural flows of the Blackfoot River. When natural flows are insufficient to satisfy both Indian and non-Indian natural flow water rights, the Tribes will satisfy the balance of their natural flow rights by diverting water stored in the Blackfoot Reservoir under Article 7.1.19 of the Agreement and/or diverting water stored in Grays Lake under Article 7.1.20.

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 under the Winters Doctrine.

Thus, when the natural flow of the Blackfoot River is insufficient to meet both Indian and non-Indian demands, the Tribes will switch to diverting their storage in the Blackfoot Reservoir and Grays Lake while non-Indians will continue to use the remaining available natural flow until it runs out.

To assure that all water users receive their full entitlement, the parties have developed a plan to account for and segregate storage rights from natural flow in order to effectuate this arrangement.

E. PROTECTION OF BANNOCK CREEK WATER USERS

The Tribes claim the entire yield of the Bannock Creek Basin, both surface and groundwater, under the Winters Doctrine. A strict application of the Tribes' Winters rights to natural flow would be inconsistent with the federal court decree in United States v. Daniels (April 7, 1907), better known as the "Bannock Creek Decree."

The parties agree to continue historic water allocations pursuant to this decree. Under the decree, the Tribes retain the earliest priority date for natural flow. This water right is listed in Article 7.1.4 and will carry a priority date of June 14, 1867. Thereafter, the decree contains a mix of both Indian and non-Indian water rights, with a corresponding mix of various priority dates. The Tribes hold the majority of these mixed rights which are listed in Article 7.1.5 through 7.1.12. The basis for all these rights is the Winters Doctrine with the relative shares and priority dates determined by the Bannock Creek Decree.

Article 7.1.13 contains the balance of the Tribes' agricultural surface water supply when diverted for irrigation purposes from the Bannock Creek Basin. This water right is also a Winter right with an 1867 priority date. It will be exercised in a manner which protects the aforementioned "mixed" water rights.

The Tribes' groundwater right in the Bannock Creek Basin is listed in Article 7.2.2. This groundwater right is a Winters right with an 1867 priority date. In utilizing this 23,500 AFY of groundwater, the Tribes agree to exercise this right in a manner that will assure no more than 2,400 AFY of groundwater uses upstream in the basin off the Reservation will continue to receive their water entitlement. Since tribal groundwater users are downstream in the basin, they are not expected to affect these minimal non-Indian groundwater uses.

VI. ADMINISTRATION OF WATER RIGHTS

With respect to administration of water rights, Article 8.1 of the Agreement expresses the parties' mutual recognition and respect for the sovereign powers and responsibilities of each governmental party. The parties pledge to work cooperatively in administering water resources within their respective jurisdiction so as to protect the use of all water rights decreed in the SRBA.

Article 8.2 addresses the administrative framework for water resources within the interior of the Reservation, excepting the Snake River and the Blackfoot River which form a significant portion of the northern and western boundaries. Administration of these river reaches is addressed in Articles 8.3 and 8.4.

A. ADMINISTRATION OF WATER RIGHTS WITHIN THE RESERVATION

Article 8.2.1 provides that the Tribes shall be responsible for administering all tribal water rights within the Reservation pursuant to a to-be-adopted tribal water code. The tribal water code shall provide for: (1) a Reservation Watermaster; (2) a tribal Water Commission;; and (3) monitoring and enforcement of tribal water rights. Pending adoption of the tribal water code, the Secretary will "temporarily" administer the distribution of tribal water rights within the Reservation pursuant to Article 8.2.4.

As set forth in Article 8.2.5, the United States shall continue to administer the distribution of the water rights for the FHIIP and the Fort hall Agency from the point the water is delivered to such project facilities.

A minimal number and amount of State law water rights will still exist on the Reservation outside the FHIIP, Fort Hall Agency, and not part of the tribal water rights. Article 8.2.6 provides that these water rights will continue to be administered by the State.

B. ADMINISTRATION OF BLACKFOOT RIVER WATER RIGHTS

The Blackfoot River is an integral component of the Reservation water supply portfolio. The Blackfoot River provides water from both natural flow and storage for the Tribes and the FHIIP, as well as natural flow for other Idaho water users on non-Indian lands.

Historically, the Blackfoot River has been administered by the federal water master or officer-in-charge of the federal project facilities for the Reservation and the FHIIP. A State watermaster regulated use of natural flow by non-Indians under State law. The federal and State watermasters operate on a shared-cost and shared-authority basis with daily communications during the irrigation season.

Although the negotiators and their principals could not agree in detail as to how the Blackfoot River should be administered, the parties agreed that the watermasters on the Blackfoot River have done so without dispute for the past 100 years. Continuation of that system of administration was deemed acceptable.

To further eliminate the potential for dispute, the parties agree to implement the Blackfoot River Management Plan. This plan is an agreed upon process to compute and measure the flows of the Blackfoot River for the purpose of delineating natural flow from storage to ensure proper accounting of water supplies.

C. ADMINISTRATION OF SNAKE RIVER WATER RIGHTS

The State shall be responsible for administering water rights in the Snake River while such water supplies are in the process of being delivered. This state responsibility requires maintenance of a complex water accounting system to ensure the delivery of water to all water users, including the United States and the Tribes, preventing unauthorized or illegal use by other water users.

The Snake River diversion facility referred to in Article 8.4.1 of the Agreement is the headgate of the Reservation Canal, located off the Reservation, diverting flows from the Snake River. The Agreement expressly reserves exclusive federal authority over the physical operation of these headgates.

It is understood by the parties that the Tribes may contract operation of the FHIIP from the United States and thereby "stand in the shoes" of the federal trustee and assume control of these project works at some future date.

In the event of a dispute over any "directions" issued by the State watermaster to the operator of these project headgates, judicial relief may be sought in the State district court.

Once water is diverted at the headgates of the project facilities, the water will be administered by the United States or the Tribe in accordance with Articles 8.2.1, 8.2.5 and 8.3.

D. INSPECTION OF WATER MONITORING DEVICES

Consistent with the pledge to engage in cooperative management in Article 8.1, the parties have set up practical mechanisms for mutual inspection of water monitoring devices and diversions: (1) within the Reservation interior pursuant to Article 8.2.2 and 8.2.7; (2) on the Blackfoot River in Article 8.3.3; and (3) on the Snake River in Article 8.4.3.

A process for mutual monitoring of diversions is provided for in Articles 8.2.8 and 8.3.2. Articles 8.5 and 8.6 provide a process for mutual notice of use of the respective water rights. Articles 8.2.8, 8.4.1 and 8.4.2 establish reporting requirements whereby each government will disseminate information to all other governmental parties.

E. INTERGOVERNMENTAL BOARD

Article 9 creates a forum---a three-member "Intergovernmental Board"---for the three governments which are party to the Agreement to utilize for communicating, sharing information and resolving disputes arising under the Agreement.

Any disputes which might arise under the Agreement which are incapable of being resolved by the Inter-governmental Board will be reviewed de novo by a court.

VII. CONTRIBUTIONS TO SETTLEMENT

A. TRIBAL DEVELOPMENT FUND

As amended, congressional legislation ratifying the Agreement authorizes a \$10 million appropriation to the Department of the Interior for payment to a tribal development fund. Of that amount, \$4 million will be appropriated in the first fiscal year, \$3 million will be appropriated the second fiscal year, and \$3 million the third fiscal year following the effective date of the agreement.

Once such funds are appropriated, the Secretary will promptly deposit the money in an account for disbursement by the Tribes upon request, subject only to the provision that such funds may not be distributed to tribal members on a per-capita basis.

B. TRIBAL WATER MANAGEMENT SYSTEM

The Agreement also provides for a federal contribution of \$7 million to develop a tribal water management system for the Reservation. This system will enable the Tribes to manage tribal water rights. Without such federal assistance, the likelihood of the Tribes realizing the full value of their water rights is substantially diminished.

In authorizing appropriation of funds for tribal water management activities, Congress agreed to appropriate \$3 million in the first fiscal year following the effective date of the Agreement and \$2 million each year thereafter for two years.

C. LAND ACQUISITION FUND

Congress also authorized appropriation of \$5 million to the Department of Interior, Bureau of Indian Affairs, for the acquisition of up to 9,800 acres of lands, grazing rights and related improvements adjacent to Grays Lake to: (1) enhance the operation and management of the FHIIP; and (2) provide collateral benefits for the United States Fish and Wildlife Refuge.

This appropriation will greatly enhance the flexibility of operations for the FHIIP while simultaneously providing significant incidental benefits for whooping cranes, an endangered species, as well as other wildlife.

Land acquisition funds shall be appropriated beginning the fiscal year following the authorizing legislation and shall remain available until: (1) all funds have been used; or (2) 9,800 acres of land have been purchased from willing sellers, whichever occurs first.

D. PAYMENT OF FILING FEES AND IN-KIND CONTRIBUTION

The State agrees to provide \$250,000 of in-kind services to assist the Tribes in implementing the Agreement. The State also agrees to pay to the SRBA account the necessary filing fees for the Tribes' claims quantified in the Agreement. These fees are estimated at \$250,000.

VIII. DISCLAIMERS AND GENERAL PROVISIONS

A. SATISFACTION OF TRIBAL WATER CLAIMS UPPER SNAKE RIVER BASIN

Article 10.4 provides that the tribal water rights recognized in Article 7 are in full satisfaction of all water rights or claims to water rights of the Shoshone-Bannock Tribes, the Fort Hall Indian Reservation, tribal members, and allottees for present Indian lands within the upper Snake River basin above Hells Canyon Dam.

When the Agreement becomes effective as set forth in Article 18, the Tribes and the United States shall be deemed to have waived and released further rights or claims to water rights for these Indian lands from any sources within the upper Snake River basin other than those set forth in Article 7 of the Agreement.

Article 10.4 also provides that this release does not apply to water right claims under state law of tribal members for lands not defined as Indian lands in the Agreement. This release does not apply to the water right claims of any other Indian tribe, band or community other than the Shoshone-Bannock Tribes at Fort Hall nor to any federal agency other than the Bureau of Indian Affairs, Fort Hall Agency.

However, Article 11.3 provides that nothing in the Agreement precludes the power of the United States to reserve, or of the United States or the Tribes, to acquire land or water rights in the future in accordance with applicable law.

B. WAIVER OF CLAIMS AGAINST THE UNITED STATES AND NON-FEDERAL PERSONS

Article 11.7 states that when the United States performs its obligations contained in the Agreement, including the final payment of funds authorized by the congressional legislation ratifying the settlement, the Tribes will have waived and released any claims it may have had against the United States: (1) as a result of the water rights in the Agreement; and (2) for lands or water inundated by construction or enlargement of the American Falls Reservoir prior to July 10, 1990.

When the final decree is entered confirming the tribal water rights in the Agreement, the Tribes agree in Article 11.10 not to make any claims against non-federal persons for lands or water inundated by construction or enlargement of American Falls Reservoir prior to July 10, 1990.

C. INDIVIDUAL MEMBERS

The water rights described in the Agreement are in full satisfaction of all water rights claims of members of the Shoshone-Bannock Tribes and allottees at Fort Hall for present Indian lands in the upper Snake River basin.

Article 10.4 of the Agreement provides that, since the water rights in Article 7 are based on the amount of Indian lands and the tribal members and allottees at Fort Hall are receiving a water right for these present Indian lands in the Agreement, any individual water right decreed for such Indian lands in the SRBA will be deducted from the tribal water rights in Article 7 of the Agreement.

D. EFFECTIVE DATE OF AGREEMENT

The Agreement becomes effective only upon the express terms set forth in Article 18. No provision of the Agreement or the congressional legislation ratifying and approving the Agreement shall be of any force, effect or validity unless and until all of the events contained in Article 18 of the Agreement have occurred.

For the Tribes, the principal events in Article 18 that must occur before the Agreement becomes effective are: (1) ratification of the Agreement by the Idaho legislature; (2) a vote of the tribal membership approving the Agreement; (3) approval by the Idaho Water Resource Board of tribal rules and regulations governing operation of the Shoshone-Bannock Water Bank; and (4) entry of the final decree by the State court.

E. WATER CLAIMS OF OTHER TRIBES OR INDIANS ARE NOT AFFECTED

The tribal water rights which are quantified in the Agreement and the claims which will be satisfied once the Agreement becomes effective are unique to the Shoshone-Bannock Tribes and the Fort Hall Indian Reservation. Neither the Agreement nor the congressional legislation authorizing the Agreement is intended to settle any water right claims of any Indian tribe, band or community other than the Shoshone-Bannock Tribes.

Tribal or Indian claims not resolved by the Agreement may also include any claims which may be advanced by descendants of pre-1868 Treaty Shoshone and Bannock tribes who were forcibly removed to, or settled upon, Indian reservations other than the Fort Hall Reservation. These may include water right claims of the Duck Valley Reservation on the Idaho-Nevada border and/or the Warm Springs Reservation in Oregon.

F. SHOSHONE-BANNOCK TRIBES' CLAIMS NOT AFFECTED

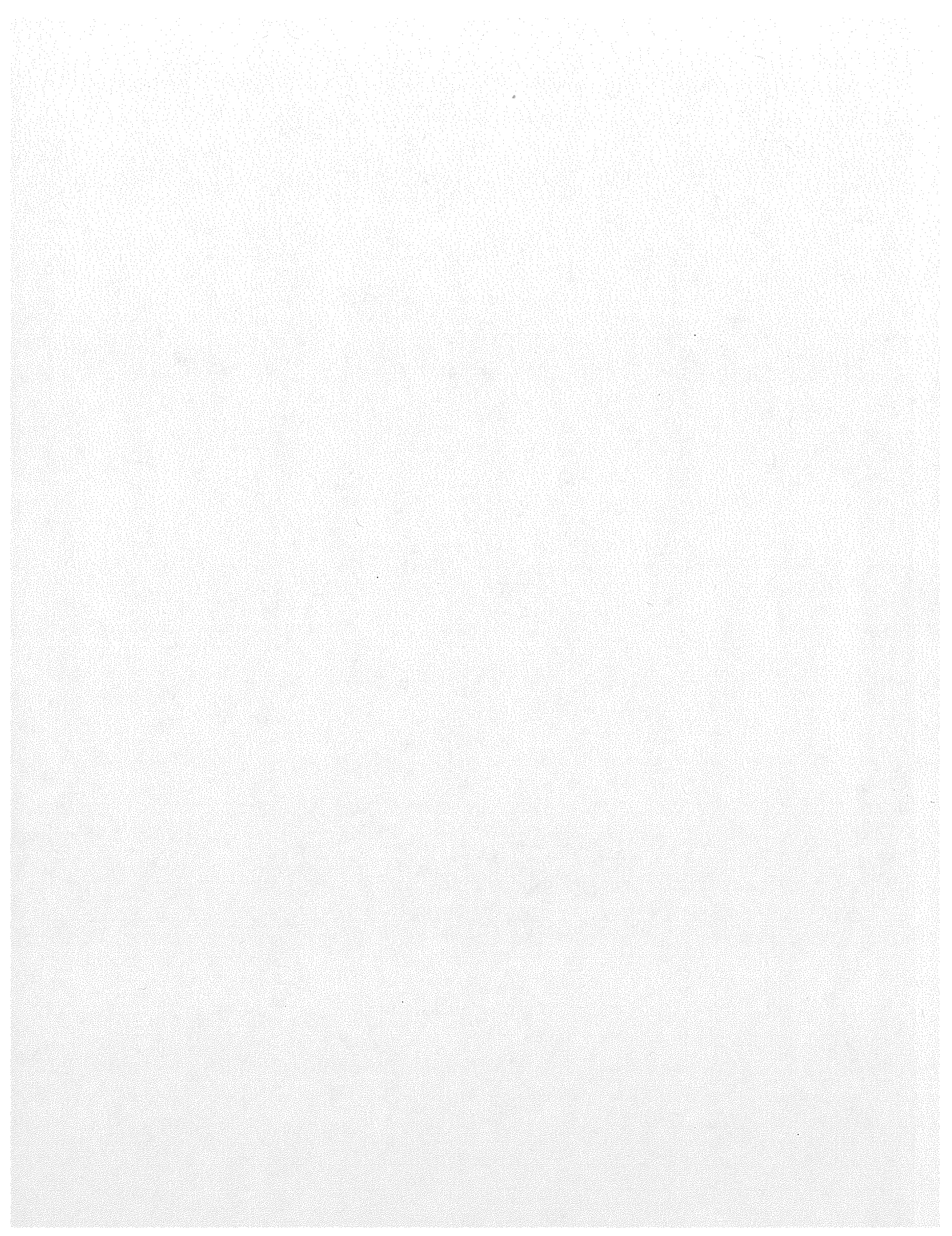
Article 11.2 provides that nothing in the Agreement, or the federal or state legislation ratifying the Agreement, is intended to restrict any future acquisition or exercise of water rights for present tribal or allotted lands, apart from the federal-law rights for such lands recognized in the Agreement, if: (1) such federal rights grounded in the Winters Doctrine have been fully used when the state-law rights are sought; or (2) if the federal rights are not physically available for use through reasonable water diversions facilities.

In addition, neither the Agreement nor legislation approving the Agreement contain or imply any restraints on federal power to otherwise reserve, or federal or tribal power to otherwise acquire, future water rights in accordance with the Agreement and applicable law.

In Article 11.5, the Shoshone-Bannock Tribes, as well as the United States, expressly reserve the right to assert federal-law claims for instream flows in the Salmon River basin, the Clearwater River basin, and the Snake River basin below Hells Canyon Dam, provided that claims for this purpose by the Tribes, or by the United States on behalf of the Tribes, do not require water to be supplied from above Hells Canyon Dam.

Article 11.1.9 provides that nothing in the Agreement is intended to impair or impede the exercise of any off-Reservation use rights reserved by the Tribes in Article 4 of the 1868 Treaty.

The Agreement, pursuant to Article 11.1.10, is also not intended to resolve or in any way prejudice or waive the parties' contentions regarding the location of the Fort Hall Reservation boundaries on the Snake or Blackfoot River as well as ownership of the beds and banks of those rivers below the ordinary high water mark.



BEFORE THE WATER RESOURCE BOARD
OF THE STATE OF IDAHO

IN THE MATTER OF APPROVING)
AND OF RECOMMENDING THE)
APPROVAL OF THE 1990 FORT)
HALL INDIAN WATER RIGHTS)
AGREEMENT)
_____)

RESOLUTION NO. _____

WHEREAS, 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; and

WHEREAS, 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; and

WHEREAS, 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 designated the Idaho Water Resource Board "as lead agency to coordinate state activities related to the reserved water rights negotiations" and the Attorney General to "coordinate legal

SRBA



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representation for the state and its agencies and institutions which may have legal interests to be protected in the reserved rights negotiations and the adjudication..."; and

WHEREAS, Executive Order Nos. 85-9 and 87-9 further directed the Board to "[p]rovide for the effective involvement in the negotiation process of interested water users and other members of the public"; and

WHEREAS, 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; and

WHEREAS, the United States agreed to participate in the negotiations; and

WHEREAS, 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; and

WHEREAS, after five years of intensive negotiations, the negotiating committees for the respective parties have reached a tentative agreement on the water rights claims of the Tribes in the Snake River Basin above Hells Canyon Dam; and

WHEREAS, the tentative agreement is consistent with the Board's established policy that any negotiated agreement must provide for the protection of existing water uses and for the state administration of the waters of the state; and

WHEREAS, the United States will make available to the Committee of Nine storage space in federal reservoirs to mitigate the adverse effects of The 1990 Fort Hall Indian Water Rights Agreement (Agreement) on existing Snake River water users; and

WHEREAS, the Committee of Nine believes that this federal storage space provides acceptable mitigation for Snake River water users; and

WHEREAS, the Agreement provides for the subordination of the rights to the use of the water of the Tribes to existing water rights of users within the Blackfoot River and Bannock Creek basins; and

WHEREAS, the Agreement provides for the continuation of state administration of the water resources of Idaho; and

WHEREAS, the amount of the state contribution does not exceed the state's expected costs of litigating the nature and

extent of the reserved water rights of Shoshone-Bannock Tribes upstream from Hells Canyon Dam; and

WHEREAS, the Agreement represents a balanced and fair resolution of the Tribes claims to water in the Upper Snake River Basin; and

WHEREAS, the Committee of Nine has approved the Agreement; and

WHEREAS, the Tribal Business Council of the Shoshone-Bannock Tribes has approved the Agreement; and

WHEREAS, the Board held public information meetings in Rexburg, Pocatello, Twin Falls, and Boise; and

WHEREAS, the public comment received by the Board supports the Agreement; and

WHEREAS, nothing in the Agreement prevents a person not party to the Agreement from raising challenges with the Court to the approval of the Agreement; and

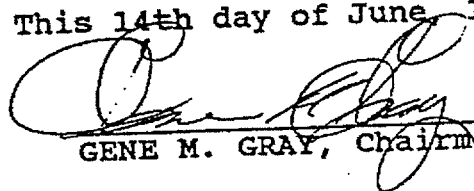
WHEREAS, it is in the public interest to approve the Agreement as an alternative to litigation.

NOW THEREFORE, BE IT RESOLVED that the Idaho Water Resource Board approves The 1990 Fort Hall Indian Water Rights Agreement, as attached hereto, subject to modification only for the purpose of inserting technical descriptions in the water rights that are not presently available; and

BE IT FURTHER RESOLVED that the Board recommend that the Governor execute the Agreement on behalf of the State of Idaho and that the Idaho State Legislature ratify the Agreement; and

BE IT FURTHER RESOLVED that the Agreement be submitted to the Director in lieu of a claim in the Snake River Basin Adjudication for consideration by the District Court for incorporation into a consent decree.

PASSED AND APPROVED UNANIMOUSLY This 14th day of June, 1990.



GENE M. GRAY, Chairman

ATTEST:



F. DAVE RYDALCH, Secretary



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

JIM JONES
ATTORNEY GENERAL

TELEPHONE
(208) 334-2400

September 8, 1989

Ed Hall
Blackfoot River Water Master
Box 6
Firth, ID 83236

Re: Shoshone-Bannock Reserved Water Rights Negotiations

Dear Ed:

As I mentioned in our telephone conversation yesterday, the Idaho Water Resource Board will be considering a conceptual framework for the settlement of the Shoshone-Bannock reserved water right claim at its work session on September 14, 1989 at 1:00 p.m. at the Shilo Inn in Idaho Falls. Because the Blackfoot water users have a significant interest in how the Shoshone-Bannock reserved water rights are quantified, the Board is very interested in discussing this conceptual framework for settlement with representatives of the Blackfoot water users to determine whether the framework adequately addresses your interests.

In general terms, the conceptual framework would provide 580,000 acre feet of water for use on the Fort Hall Indian Reservation. Water to satisfy the Tribes' right would come from the following water sources:

<u>Source</u>	<u>Amount</u>
SNAKE RIVER & SAND CREEK	115,000 afa
Blackfoot River	150,000 afa
Groundwater	125,000 afa
Ross Fork Creek	5,000 afa
Lincoln Creek	5,700 afa
Bannock Creek	48,500 afa



Ed Hall
September 8, 1989
Page 2

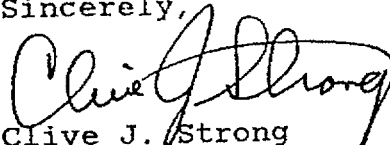
In addition, the Tribes would retain their contract storage water rights in Palisades and American Falls Reservoir.

The Blackfoot water right would be characterized as a federal reserved water right with an 1867 priority date; however, the Tribes would recognize all existing state-created water rights in the Blackfoot River basin as senior to the Tribes' right. Thus, as a practical matter, even though the Tribes would be advancing the priority date of their existing Blackfoot water right, there would be no change in the way the rights are currently delivered.

Under the proposed framework, the Tribes would be entitled to market their Palisades contract storage water right through a state-created water bank above the Milner Dam. The Tribes' American Falls contract storage water right could be marketed past Milner through a state-created water bank.

The Board looks forward to discussing this matter with you. Your thoughts will be very helpful in determining how to proceed with the negotiations.

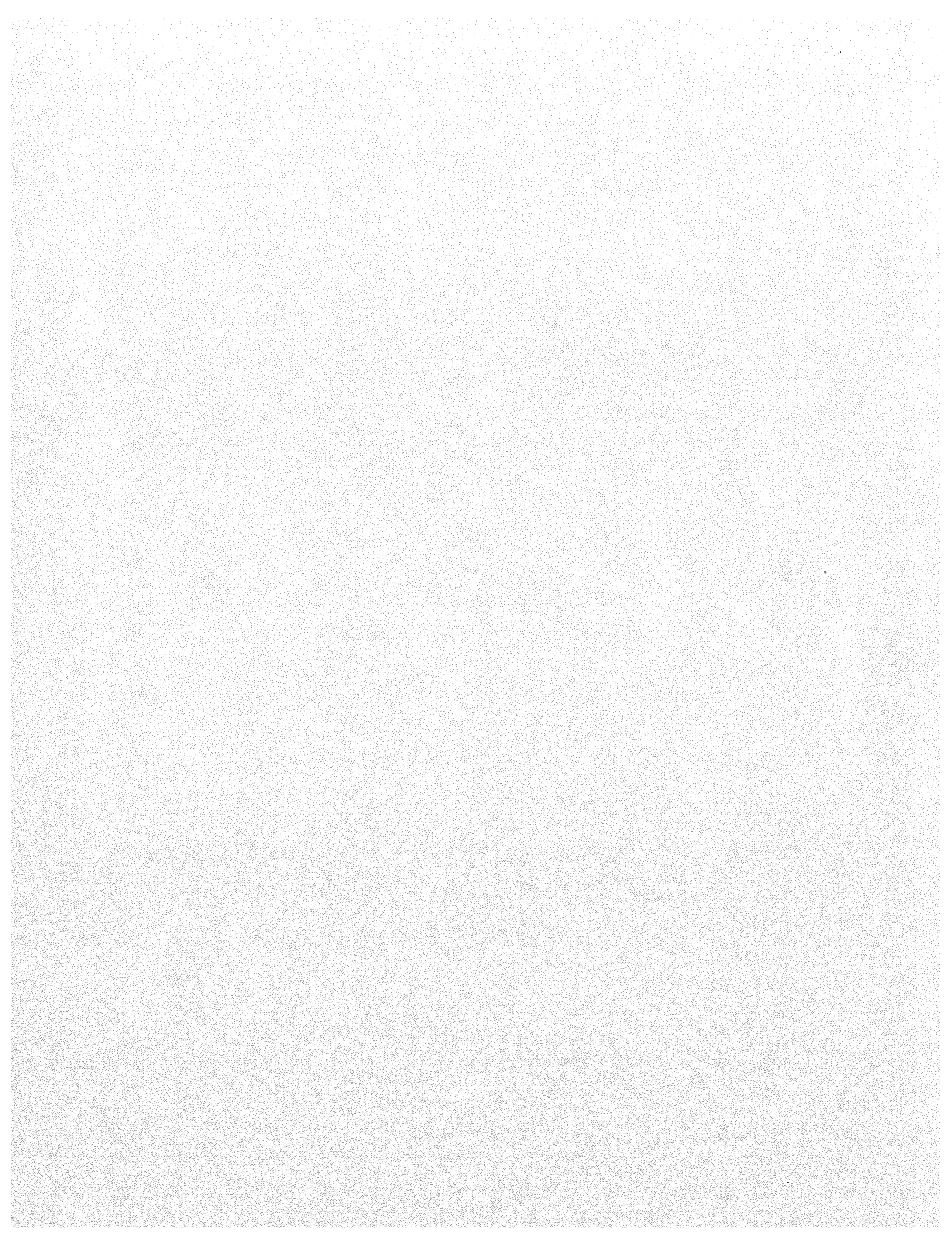
Sincerely,



Clive J. Strong
Deputy Attorney General
Chief, Natural Resources
Division

CJS:cjc

bcc: Dave Shaw
Gene Gray
J.D. Williams
Don Kramer



R E S O L U T I O N 16

WHEREAS, representatives of Water District 1 have participated in negotiations among the United States, State of Idaho and the Tribes in an attempt to define by agreement the Tribes' claim to water in the Snake River Basin above Hells Canyon; and

WHEREAS, generally the provisions of the proposed Settlement Agreement have been agreed to in principle to the satisfaction of the negotiators; and

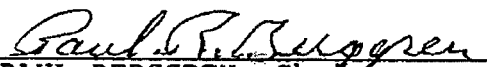
WHEREAS, the United States now seeks to withdraw its previous offer to transfer Ririe and Palisades storage, at no cost, to an entity designated by the Committee of Nine to hold said storage water to use in mitigation of the impacts that will occur to water users in the implementation of the Settlement Agreement; and

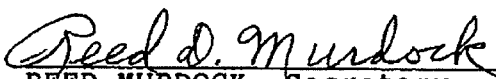
WHEREAS, said transfer was the cornerstone of Water District 1 negotiations December 19, 1989, decision to support the Agreement;

NOW, THEREFORE, BE IT RESOLVED that Water District 1 supports the principles of a negotiated settlement agreement of the Sho-Ban Tribes for the Fort Hall Reservation on the basis of the outlined attached hereto as Exhibit "A", which includes the transfer of Ririe and Palisades storage, without cost, to an entity designated by the Committee of Nine.

NOW, THEREFORE, BE IT RESOLVED that Water District 1 agrees to be responsible for annual operation and maintenance charges for said storage space after the date of the transfer.

Dated this 12 day of March, 1990.


PAUL BERGGREN, Chairman
Committee of Nine


REED MURDOCK, Secretary
Committee of Nine

ACCORD: NEGOTIATIONS
U.S., TRIBES, STATE, WATER USERS
DATE: 9/1/89

WATER SUPPLY

Blackfoot	150,000	1867	(hold harmless
Bannock	50,000	1867	non-Indian
SNAKE & SAND CREEK	115,000	1867	Blackfoot users
Ross/Lincoln	10,000	1867	to present
Storage	130,000	State	diversion; if
Groundwater	125,000	1867	short on
	580,000		Blackfoot, go to
			Reservation
			groundwater)

SNAKE & SAND CREEK	60,000	1891
(Non Indian Project		
Water Users)		

MARKETING

Palisades	80,000+	above Milner only (would
		continue Fortneuf payback
		from Palisades)

Am. Falls	50,000-	below Milner
-----------	---------	--------------

Tribes form own water
bank; I.W.R.B. approve
rules

Unallocated storage to water users.

No fish flows except American Falls storage, including rights
or calls above Hell's Canyon.

TRIBAL CONDITIONS

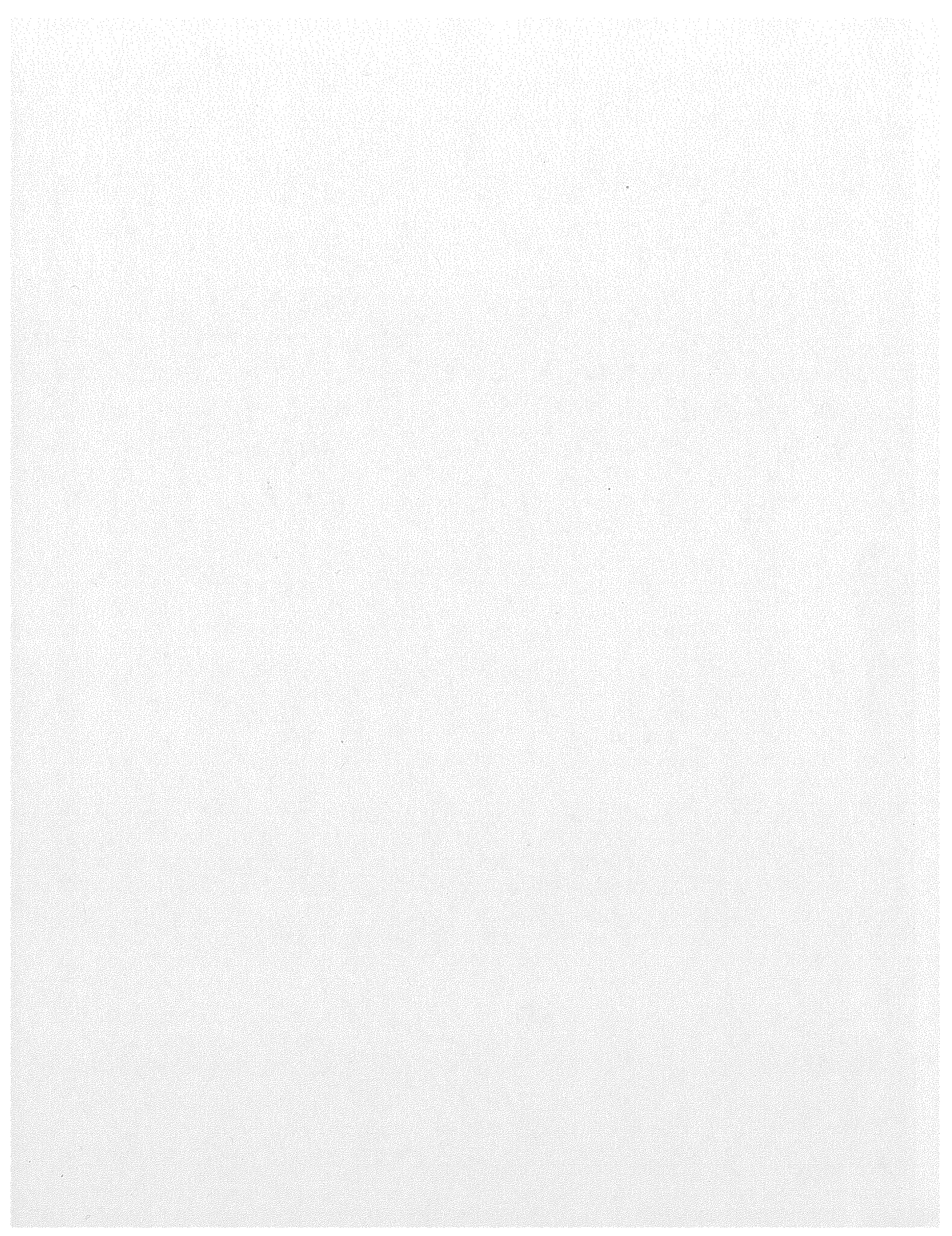
1. Nothing to preclude Tribes' participation in Galloway.
2. Tribes can enter relicensing process in Hell's Canyon (but
no new claim for water from above Hell's Canyon).
3. Development Fund:
 - (a) \$15,000,000 from Feds - for state-of-art management
(any left over used for well field); and
 - (b) \$5,000,000 from State - rehabilitate Equalizing
Reservoir (can be in-kind contribution).
4. Negotiate with B. of R. on using Palisades water for winter
flows.

GENERAL CONDITIONS

1. Supply fee and ceded lands within Fort Hall Project.
2. Designation of PIA and Existing Lands.
3. Consumptive use limitation.

2260m

EXHIBIT A



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STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS (Senate - July 18, 1990)

Mr. McCURE. Mr. President, on behalf of myself and my distinguished colleague from Idaho, Senator **Symms**, I am pleased to introduce for the State of Idaho and the Shoshone-Bannock Tribes a bill to approve 'the 1990 Fort Hall Indian Water Rights Agreement.' The agreement is the product of 5 years of intensive negotiations between the State, the tribes, the United States and the Committee of Nine, which represented the private water users in the Snake River Basin. The agreement will quantify all claims to the use of water by the tribes, its members, its allottees and the United States on behalf of the tribes, its members and its allottees from the Snake River Basin upstream from Hells Canyon Dam, the lowest of three dams authorized by FERC Project No. 1973.

Unlike many Indian water right settlements Congress has considered in the past, the administration has been fully involved in the negotiations from the outset and endorses the agreement. The U.S. Department of the Interior and the Department of Justice signed the agreement, and the Office of Management and Budget has reviewed the entire agreement and supports its implementation.

Under the agreement, the tribes will be entitled to 581,031 acre-feet of water per year. All of the natural flow and ground water rights will be Winters reserved water rights to be used solely on the Fort Hall Indian Reservation. The agreement also quantifies supplemental storage water rights held by the United States in the Blackfoot River basin that will be used to satisfy the Tribes Blackfoot Winters water right when there is insufficient natural flow in the Blackfoot River to meet the tribes' entitlement. Up to 15,000 acre-feet per year of the Blackfoot storage water may be used for instream flows in reaches of the Blackfoot River. Finally, the tribes will retain existing Federal contract storage rights in American Falls Reservoir and Palisades Reservoir acquired pursuant to the Michaud Act. Under the terms of the agreement, water accruing to this federal contract storage space may be rented through a tribal water bank created pursuant to State law for any beneficial use within the Snake River Basin within the State of Idaho. Also, the tribes may use water accruing to the Federal contract storage space for instream flows on or adjacent to the reservation.

The agreement contains several provisions to ensure that the Tribal water rights will not adversely affect historic non-Indian water rights from sources other than the Snake River. First, the agreement provides that the existing non-Indian water users in the Blackfoot River basin, whose rights are decreed in the Snake River Basin Adjudication [SRBA], will be entitled to continue diverting the natural flow of the Blackfoot. In times

when the natural flow of the Blackfoot is insufficient to fill the water rights of the Tribes and the non-Indian water users, the Tribes have agreed to cease use of the natural flow of the Blackfoot and to instead use their storage water entitlement from the Blackfoot Reservoir to fill their 150,000 acre-feet per year Winters water right from the Blackfoot River basin. In the Bannock Creek basin, the parties will continue to allocate surface water pursuant to the Bannock Creek Decree of 1907; however, the tribes will be entitled to the surface water remaining in Bannock Creek after the entitlements under the Bannock Creek decree are satisfied. Also, the tribes have agreed to not assert the priority date of their Bannock Creek groundwater right against historic non-Indian groundwater rights that are decreed in the SRBA. Finally, the agreement provides that Fort Hall Indian Irrigation Project water users shall continue to receive their full project water entitlements pursuant to their project contracts.

The agreement recognizes a water right of 115,000 acre-feet per year for the tribes from the Snake River. Implementation of this right will adversely affect non-Indian Snake River water users. The agreement provides for the

mitigation of the impact on the non-Indian Snake River water users in two ways. First, the agreement provides that the United States will make available to the non-Indian water users approximately 19,000 acre-feet of unallocated storage space in Palisades Reservoir and 80,000 acre-feet of unallocated storage space in Ririe Reservoir. Because of the hydrology, location, and junior status of the storage rights, this space will yield only approximately 40,000 acre-feet of water annually. The stored water will be released as necessary to offset the impact of the tribes' exercise of its Snake River water right. Second, the tribes have agreed to phase in over time 15,000 acre-feet of the Snake River tribal water right. This phase in will provide the non-Indian Snake River water users with some time to find ways of mitigating the balance of the impact created by the tribes' diversion of water from the Snake River.

As can be seen from the brief description of the water rights, the parties have crafted an agreement that results in a true win-win situation. Instead of seeking Federal dollars to develop additional Federal storage projects, the parties have allocated the available water supply in a way that ensures to the extent possible that the needs of each party are met. Where the impact on existing water users could not be avoided, the parties have fairly allocated the responsibility for mitigation among all parties.

There is perhaps no single issue more difficult to resolve in Indian reserved water right cases than the issue of administration of tribal water rights. The agreement provides a process that ensures the delivery of water to Indian and non-Indians alike while giving due respect to the sovereignty of each party. Nothing in the agreement, however, alters the operation of the Fort Hall Indian Irrigation Project or the Bureau of Reclamation storage facilities.

The cost-sharing provided for in the agreement is consistent with the recently adopted settlement policy of the Department of the Interior. The United States will be asked to contribute approximately \$22 million over a 20-year period and approximately 100,000 acre-feet of unallocated storage space. Federal moneys will be used to meet, in part, the Federal trust responsibilities to the tribes. As noted above, the non-Indian Snake River water users share in the cost of this agreement because they will be required to mitigate part of the impact arising from the implementation of the tribes' Snake River water right and to pay the operation and maintenance costs associated with the unallocated storage space they will receive. Finally, the State of Idaho will be required to contribute approximately \$500,000 of cash and in kind services to the settlement. When viewed in

light of past settlements; the cost-sharing provided for in this agreement is equitable and does not amount to a raid on the Federal Treasury.

There are significant environmental benefits to the agreement that bear mention. As part of the Federal cost-share, the United States will acquire through purchase certain grazing rights and lands adjacent to Grays Lake. The acquisition of these grazing rights and lands will permit the storage of water in Grays Lake for a longer period of time, which not only will improve the water supply for the reservation but also provide significant benefits to the migratory birds that use the Grays Lake Wildlife Refuge. The renting of water accruing to the tribal Federal contract storage space for instream flows may also provide needed benefits for the anadromous fish runs of the Snake River.

In summary, the State, the tribes, the United States and the private water users are to be commended for the creative solution they found for resolving what could have been a very divisive fight over the waters of the Upper Snake River Basin. I believe this agreement warrants our support.

Mr. President, I ask unanimous consent that the bill be printed in the Record.

There being no objection, the bill was ordered to be printed in the **Record**, as follows:

[Page: S9979]

S. 2870

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That 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--

(a) The term `Agreement' means the `1990 Fort Hall Indian Water Rights Agreement' between the State of Idaho, the Shosone-Bannock Tribes, the United States, and other participating parties.

(b) 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.

(c) 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*.

(d) 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.

(e) The term `Idaho Water Resource Board' means the Idaho State Water Resource Agency constituted in accordance with Idaho Const. art XV, 7, or any successor agency.

(f) 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.

(g) The term `Indian lands' means (i) all lands within the exterior boundaries of the Reservation that are held in trust for or owned by the Shoshone-Bannock Tribes or an Indian and (ii) 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.

(h) The term `Michaud Act' means the Act of August 31, 1954, chapter 1159, 68 Stat. 1026.

(i) 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.

(j) The term `Michaud Division' means that division of the Fort Hall Indian Irrigation Project authorized by the Act of August 31, 1954, ch. 1159, Stat. 1026.

(k) The term `Party' or `Parties' means any entity or entities that are party to the Agreement.

(l) The term `Reservation' means the Fort Hall Indian Reservation.

(m) The term `Secretary' means the Secretary of the Interior.

(n) The term `Tribes' or `Tribal' means the Shoshone-Bannock Tribes, its members and its allottees.

(o) The term `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.

[Page: S9980]

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 (hereinafter referred to as 'AF') of storage space in the Palisades Reservoir and the 80,500 AF of storage space in the Ririe Reservoir provided that the contracting entity makes application for the noncontracted storage space within one year of the date of this act and the contracting party agrees to pay all operating 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 provided, further, that 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 one 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 AF 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 subsection (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 subsection (a), (b), and (c) of the proprietary rights described in Article 7 of the Agreement.

(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 either the State or the United States.

(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.

(a) **Tribal Development Fund:** There is hereby authorized to be appropriated to the United States Department of the Interior Bureau of Indian Affairs \$2 million each year for the five fiscal years 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 monies 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 United States Department of the Interior Bureau of Indian Affairs the sum of \$2 million to be paid in the first fiscal year following the effective date of this Act and an additional \$5 million payable in not less than equal annual installments in not more than a twenty-year period 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 monies 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 is hereby authorized to be appropriated to the United States Department of the Interior Bureau of Indian Affairs \$5 million 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 United States Fish and Wildlife Service Refuge at Grays Lake.

(d) **Limitation on Per-Capita Distributions:** Under no circumstances may any appropriated funds authorized by Congressional authorization, appropriation and payment of any 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.

(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.

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 monies 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 monies 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 amend, construe, supersede or preempt any state law, federal law, tribal law or interstate compact that pertains to the Snake River or its tributaries.

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EXECUTIVE SUMMARY

THE 1990 FORT HALL INDIAN WATER RIGHTS AGREEMENT

The State of Idaho and the Shoshone-Bannock Tribes have reached a tentative agreement in settlement of litigation involving water rights claims in the Snake River Basin upstream from Hell's Canyon Dam.

It has been the stated intention and policy of the State, the Tribes, and the federal government to negotiate rather than litigate water rights issues whenever possible.

The negotiating parties emphasize that this is a draft agreement, and that it requires the approval and ratification by the Shoshone-Bannock Tribes, the State, and the United States. Public meetings are planned to explain and answer questions about the agreement. This summary in no way proposes to speak for or against this agreement as it is the constituents of the governing bodies who must ultimately consent to the signing of this agreement. If approved by the parties, the court will conduct a hearing on the agreement to accept comments prior to the court taking action on the agreement.

The legislation implementing the 1985 Swan Falls agreement provided for the adjudication of water rights within the Snake River Basin in Idaho. It directed the Department of Water Resources to commence the adjudication under the terms of the McCarran Amendment to identify federal reserved water rights held by the United States and the Indian Tribes in Idaho.

The State, represented by the Idaho Water Resource Board, and pursuant to legislative and executive direction, and the Shoshone-Bannock Tribal Business Council, have been engaged in good-faith, government-to-government negotiations since 1985. Also, a citizen's committee advised the Idaho Water Resource Board to appoint the Committee of Nine to represent other diverse Idaho water user interests. The Committee of Nine is an advisory body to Water District 01.

The essential elements of the proposed agreement include:

---The Winters Doctrine, which guarantees water supplies sufficient for the present and future needs on Indian Reservations, is reaffirmed in this agreement. A total of 581,031 acre feet per year of water has been agreed to as the water sufficient for present and future needs of the Tribes upstream from Hells Canyon dam.

SRBA



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The proposed water right is made up of the following elements:

- * 100,000 AFY increasing to 115,000 AFY from the Snake River, 46,931 AF of American Falls storage space and 83,900 AF of Palisades storage space.
- * 150,000 AFY from the Blackfoot River, Blackfoot Reservoir and Grays Lake. This right is subordinated to protect existing non-Indian water users on the Blackfoot and to provide 22,000 AFY for non-Indian Fort Hall Indian Irrigation Project water users.
- * 5,000 AFY from the Ross Fork Creek Basin.
- * 5,700 AFY from the Lincoln Creek Basin.
- * 1,616 AFY from the Upper Portneuf River Basin.
- * 24,384 AFY from surface water and 23,500 AFY of ground water in the Bannock Creek Basin. These rights are subordinated to existing surface and ground water users respectively.
- * 125,000 AFY from ground water within the Reservation.

-----The agreement provides for a Shoshone-Bannock Tribal Water Bank established pursuant to State law. The Water Bank will allow the Shoshone-Bannocks to rent storage water held in the American Falls and Palisades federal storage projects. Non-use of all or any part of Tribal storage water shall not cause forfeiture or abandonment of the storage rights.

The Water Bank will not conflict with existing contracts including the Michaud and Fort Hall projects and will provide a source of water to benefit new and supplemental uses; will provide a source of revenue for Tribal funding for improvements to water use facilities and efficiencies; will ensure that the Tribes realize the full value of their federal contract storage rights.

The Water Bank will be operated by a Tribal Rental Pool Committee consisting of the Superintendent of the Minidoka Project, the Snake River Watermaster, the Reservation Watermaster, and three individuals designated by the Chairman of the Fort Hall Business Council.

The Shoshone-Bannock Tribal Water Bank may rent Tribal water supplies in the Palisades Reservoir for use anywhere in the basin above the Milner Dam near Twin Falls.

Storage water held in the American Falls Reservoir may be rented and delivered for use in the Snake River Basin anywhere within Idaho and may be used to sustain minimum streamflows.

-----None of the Tribes' water rights, except the American Falls and Palisades storage water may be used off the Fort Hall Indian Reservation.

-----Storage water from American Falls and Palisades not used, rented or exchanged may be used to maintain instream flows on or adjacent to the Fort Hall Indian Reservation.

Up to 15,000 acre feet per year of storage water from Blackfoot and Gray's Lake Reservoirs may be used to maintain instream flows in the Blackfoot River.

-----The agreement establishes a framework for the administration of water rights. The Tribe will administer the Tribal water rights within the Fort Hall Indian Reservation. To accomplish this the Tribes will adopt a Tribal Water Code which will provide for a Tribal Watermaster, and a tribal Water Commission.

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

The State shall administer the distribution of water from the Snake River. On the Blackfoot River, water rights will be delivered as they have been in the past 100 years.

-----Finally, the United States and the State agree to assist the Tribes in implementing a Tribal water management system. The total cost of this federal assistance over twenty years shall not exceed \$22 million.

The State of Idaho will seek an authorization to provide \$500,000 which includes in-kind services to assist the Tribes in implementing the agreement, and monies necessary to offset filing fees in the SRBA.

TRIBES' RESPONSE TO STATE/W/U PROPOSAL (09-01-89):

SUGGESTED WATER SUPPLY

Blackfoot	150,000	1867	(hold harmless
Bannock	50,000	1867	non-Indian
Snake	100,000 +15,000	1867	Blackfoot users
Ross/Lincoln	10,000	1867	to present
Storage	130,000	State	diversion; if
Groundwater	<u>140,000</u> -15,000	1867	short on Black-
	580,000		foot, go to
			Reservation
			groundwater)

MARKETING

Palisades	80,000+	above Milner only (Would continue Portneuf payback from Palisades)
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Am. Falls	50,000-	below Milner
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Tribes form own water bank;
I.W.R.B. approve rules.

Unallocated storage to water users.

No fish flows except American Falls storage, including rights
or calls above Hell's Canyon.

OTHER TRIBAL CONDITIONS

1. Nothing to preclude Tribes' participation in Galloway.
2. Tribes can enter relicensing process in Hell's Canyon
(but no new claim for water from above Hell's Canyon).
3. Development Fund:
 - (a) \$15,000,000 from Feds - for state-of-art
management (any left over used for well field); and
 - (b) \$5,000,000 from State - rehabilitate Equalizing
Reservoir (Can be in-kind contribution).
4. Negotiate with B. of R. on using Palisades water for
winter flows.

9/1/89

STATE W/U REPLY TO TRIBES' RESPONSE

SUGGESTED WATER SUPPLY:

Snake & Sand Creek	115,000	1867
Snake & Sand Creek (Non Indian Project Water Users)	60,000	1891

MARKETING:

No instream flows, including rights or calls above Hell's Canyon.

CONDITIONS:

1. Supply fee and ceded lands within Fort Hall Project.
2. Designation of PIA and Existing Lands.
3. Consumptive use limitation.

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