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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

**COMMITTEE OF NINE'S
RESPONSE TO SHOSHONE-
BANNOCK TRIBES' AND UNITED
STATES' MOTION FOR
ENFORCEMENT**

COMES NOW, the Committee of Nine (“Committee”), by and through its counsel of record Barker Rosholt & Simpson LLP, pursuant to the Court’s February 18, 2011 *Second Scheduling Order on State’s Motion for Accounting and United States’ and Tribes’ Motion to Enforce*, hereby submits this *Response to the Shoshone-Bannock Tribes’ and United States’ Motion for Enforcement of the Fort Hall Indian Water Rights Consent Decree*.

INTRODUCTION

The 1990 Fort Hall Agreement and 1995 Consent Decree entered by the SRBA Court established the Shoshone-Bannock Tribes' water rights, including water right 27-11375, and resolved certain water issues in the Upper Snake River Basin. Even though water right 27-11375 has a senior priority date (1867), the Fort Hall Agreement subordinates the Tribes' right to non-Tribal members' diversions up to 45,000 acre-feet per year (AFY) of natural flow from the Blackfoot River without adjustment to the Tribes' water right. Should the non-Tribal diversions exceed 45,000 AFY, the Fort Hall Agreement provides that the Tribes may seek an "equitable adjustment" to water right 27-11375. Through their present motion, the Tribes and United States seek such an "equitable adjustment" from the SRBA Court.

The Committee, on behalf of the water users in Water District 01, negotiated settlement with the Shoshone-Bannock Tribes ("Tribes") in the Fort Hall Agreement. Water District 01 encompasses all natural flow and storage water rights on the Snake River (including the Henry's Fork and South Fork) above Milner Dam. Although the Blackfoot River (Water District 27 or Basin 27) is tributary to the Snake River, Water District 01 has no jurisdiction to administer water rights on the Blackfoot River. Through the Fort Hall Agreement negotiations, the Committee surrendered a senior Snake River water right with an 1867 priority date to the Tribes. Resting upon the finality of the Fort Hall Agreement and the fact that it had no authority to represent any other water users, the Committee did not take part in negotiations involving Basin 27 and in particular, the terms of the Tribes' water right 27-11375 and its subordination provision.

The Tribes' request for an "equitable adjustment" to water right 27-11375 is flawed in two respects: (1) the remedy sought by the Tribes will injure water right holders in Water District

01; and (2) the most recent accounting of implicated non-Tribal water right diversions in Basin 27 does not exceed 45,000 AFY. In other words, the Tribes' request, if granted, would remedy a non-existent injury to the Tribes' water right and instead result in injury to third party water users contrary to the Fort Hall Agreement and Consent Decree. The Committee respectfully requests the Court to deny the Tribes' attempt to reopen those settlement provisions in a manner that will injure Water District 01 water right holders.

ARGUMENT

The United States and the Tribes assert that the total annual 45,000 AFY limit has been exceeded. Consequently, they seek an "equitable adjustment" to increase the Tribes' water right 27-11375. *See Tribes' Memorandum* at 2. Remarkably, although the provision concerns a Basin 27 water right to the Blackfoot River, the Tribes request additional water from either the Snake River or tributary groundwater at no cost to the Tribes. Since this request, if granted, would injure third party water users in violation of the Fort Hall Agreement and Consent Decree, the Tribes' motion should be denied.

First, the Fort Hall Agreement and the Consent Decree were intended by all parties to prevent injury to any party. The Tribes' request for additional water supplies from the Snake River or groundwater would immediately injure the water users of Water District 01 in violation the Fort Hall Agreement and the Consent Decree.

Second, the Committee negotiated the provision in the Fort Hall Agreement that led to the Tribes' senior Snake River water right 01-10223. That negotiation is final pursuant to the Fort Hall Agreement and the Consent Decree. Any readjustment of the Tribes' Basin 27 water right to include Snake River water or tributary groundwater, will directly injure Water District 01 water users in violation of the purposes of the Agreement.

Third, Water District 01 and the Committee of Nine had no role in the negotiations that resulted in the subordination provision for the Tribes' water right 27-11375, which was entirely drafted and negotiated by the State of Idaho, the United States and the Tribes. Therefore, the Agreement cannot be construed to the detriment of Water District 01 water users, a non-party to that provision's negotiations and resolution.

Finally, there is no factual basis for an equitable adjustment at this time. The implicated diversions under the decreed water rights protected by the subordination provision do not currently exceed 45,000 AFY. Unless and until the 45,000 AFY limitation is annually exceeded by non-Tribal water users in Basin 27, the equitable adjustment provision is not even triggered. At most, the Tribes' motion is premature and should be denied accordingly.

I. The Fort Hall Agreement Protects Existing Water Uses.

Under Article 8 of the Fort Hall Agreement, "the parties, consistent with applicable law, agree to cooperate in administration of water resources to protect the use of all water rights decreed in the SRBA." *Fort Hall Agreement* Article 8.1 (emphasis added). As the Tribes reference, the "purpose of the hearing [on the Consent Decree]... was to determine whether the proposed consent decree and underlying Agreement 'is fair, adequate, and reasonable and does not unnecessarily interfere or injure third party rights.'" *Tribes' Memorandum* at 4 (emphasis added) (citing Tr., July 18, 1995 at 3 (Jarvis Aff. Ex. 4)).

The water users in Water District 01 divert water from the Snake River which includes surface runoff and tributary ground water reach gains. The river is fully appropriated resulting in curtailed water rights every irrigation season. Any increased Tribal diversions from either source will conversely reduce the water supply available to Water District 01 water users. Therefore, any adjustment that modifies or increases the water available to the Tribes from the Snake River,

storage, or ground water would “unnecessarily interfere or injure third party rights” and should be denied.

II. The Tribes and United States are Bound by the Fort Hall Agreement.

The Tribes and United States request the Court to order an “equitable adjustment” that meets the following list of conditions:

1. The water must be available and delivered to the Tribes at existing points of diversions;
2. The water must come at no cost to the Tribes;
3. The water must come from a source other than the Blackfoot River Basin;
4. The water must not interfere with any of the Tribes’ other decreed water rights;
5. The water must have the same priority date as the Blackfoot River water right – 1867; and
6. The water must be delivered in a timely manner during the irrigation season.

Tribes’ Memorandum at 21.

In this request, the Tribes “propose that the source for the equitable adjustment amount of water shall be derived from either the Snake River with a priority date of June 14, 1867 or reliable stored water having a dependable storage water equivalent to Blackfoot River with a priority date of June 14, 1867.” *Tribes’ Memorandum* at 23.

Importantly, the Fort Hall Agreement provides that “[a]ll parties to this Agreement seek to secure, and pledge their honor to maintain, peaceful settlements of conflicts over water among the parties in the Snake River Basin in Idaho.” *Fort Hall Agreement*, Article 2. By seeking to increase their use of Snake River natural flow, storage water, or tributary groundwater, the Tribes are ignoring this provision in violation of the Agreement. Receiving more water from the requested sources would further impact the balance and distribution of natural flow and storage water rights in Water District 01. Finally, such a resolution would result in an unwarranted enlargement of the Tribes’ water supply, beyond that provided by the terms of the Fort Hall Agreement.

Moreover, there is no evidence in the record indicating a lack of water to meet the Tribes' current annual water needs. In fact it appears that the Tribe has yet to fully develop all of the sources of water available under the Fort Hall Agreement. Given the plain terms of the Fort Hall Agreement, the Tribes cannot request an "equitable adjustment" for its Basin 27 water rights with water from out-of-basin sources. Accordingly, the Tribes' motion should be denied.

III. Water District 01 Water Users Had No Role in the Negotiation of the Basin 27 Subordination Provision and Cannot be Injured by its Implementation.

The State of Idaho, the Tribes, and the United States negotiated and derived the 45,000 AFY number for the subordination provision on water right 27-11375. The water users of Water District 01 and the Committee of Nine did not participate in that negotiation. *See Shaw Affidavit* at 4, ¶12. Therefore, it would be inequitable for the Court to construe or enforce the "equitable adjustment" provision against water users in Water District 01, by granting the Tribes' request. Moreover, the Fort Hall Agreement expressly prohibits the unnecessary interference or injury to "third party rights", which necessarily includes those surface water rights held by water users in Water District 01. *Supra*. The Tribes' motion should be denied accordingly.

IV. The Tribes' Request for an "Equitable Adjustment" is Not Ripe.

The Committee incorporates by reference its *Response to the Content of the State's List of Rights*, filed with this Court on March 18, 2011, which explains the State's computation of the 45,000 AFY subordination provision and identifies water rights that should be removed from the current subordination list.

The Tribes assert that the total annual diversion from the Blackfoot River exceeds the agreed upon 45,000 AFY in diversions by "5,000 AFY to 15,000 AFY, with a predicted exceedence of about 5,000 AFY in future years." *Tribes' Memorandum at 8* (citing *Mesghinna Aff.* attachments 1, 2 and 3). The Tribes assert "[t]here is substantial historical evidence showing

the Basin 27 water users have consistently exceed the 45,000 AFY of diversion volume in the past.” *Id.* at 12 (citing *Mesghinna Aff.* at 25.). The Tribes estimate that from 1922 to 1996, IDWR records indicate water use to be approximately 76,500 AFY. *Id.*

At the time the Subordination Provision was negotiated, David Shaw (IDWR Adjudication Bureau Chief) arrived at the 45,000 AFY over the 1986-1987 irrigation season based on extensive analysis. *See Shaw Aff.* at 3-4. The number in the subordination provision was determined based on acreage that was irrigated in 1986-1987. *Id.* Importantly, not all of the water rights identified by the State were being diverted and used in the 1986-1987 timeframe. *Id.* at 4, ¶14. Those water rights on the State’s list that were not being diverted in 1986-1987 should not receive the benefit of the subordination provision because they were not considered as part of the 45,000 AFY of diversions to which the Tribes subordinated their senior water rights. As thoroughly explained in its *Response to the State’s List of Rights*, the Committee believes that under a proper accounting of protected water rights, the 45,000 AFY limit has not been exceeded and therefore no “equitable adjustment” under the Agreement is required.

Moreover, there is recent data which would be more instructive on this issue. *See* Water District 27 2010 Corrected Final Accounting for Blackfoot River Diversions (on file with IDWR). The 2010 accounting shows that implicated diversions by non-Tribal water users did not exceed 45,000 AFY last year. In fact, the non-Tribal diversions implicated by the subordination provision only totaled 34,401 acre-feet in 2010, over 10,000 acre-feet less than the equitable adjustment trigger provided for in the Fort Hall Agreement. The Tribes therefore have no basis for a proposed “equitable adjustment”. *Cf. Swanson v. United States*, 600 F.Supp. 802, 806 (D. Idaho 1985) (“When determining whether a dispute rises to the level of a justiciable controversy, the court must determine whether the issues presented are currently ripe for judicial

intervention.”); *Idaho ex rel. Kempthorne v. U.S. Forest Service*, 142 F.Supp.2d 1248, 1256 (D. Idaho 2001) (“Ripeness is more than a mere procedural question; it is determinative of jurisdiction”).

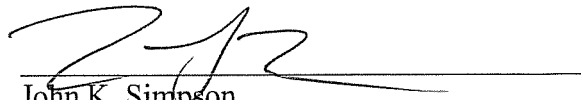
Unless the best available data shows a repeated pattern of implicated non-Tribal diversions from the Blackfoot River exceeding 45,000 AFY, the Court should not even consider the Tribes’ motion. Should the data show a periodic exceedence of the 45,000 AFY limitation, administration of water rights within Basin 27 should be the answer, not a permanent “equitable adjustment” under the Agreement. Given existing water diversion data in Basin 27 as demonstrated in 2010, it is clear the Tribes’ motion is not ripe and should be denied.

CONCLUSION

For the above stated reasons, the Committee respectfully requests this Court to deny the Tribes’ and United States’ *Motion for Enforcement of the Fort Hall Indian Water Rights Consent Decree*.

Dated this 4th day of April, 2011.

BARKER ROSHOLT & SIMPSON LLP


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of April, 2011, a true and correct copy of the foregoing was mailed with sufficient first-class postage to the following:

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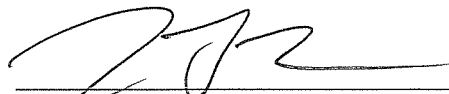
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