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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	)	Subcase No. 27-11375
	)	
Case No. 39576	)	JOINT CONSOLIDATED REPLY BY
	)	UNITED STATES AND SHOSHONE-
	)	BANNOCK TRIBES IN SUPPORT OF
	)	MOTION FOR ENLARGEMENT

INTRODUCTION

The Shoshone-Bannock Tribes (“Tribes”) and the United States of America respectfully submit this Joint Reply Brief in support of their Joint Motion for Enforcement of the Fort Hall Consent Decree.¹ In doing so, the Tribes and United States consolidate in one brief their responses to the filings of several other parties to this sub-proceeding, including the State of Idaho², the Committee of Nine³, Patrick Taney⁴

¹ Motion for Enforcement of Fort Hall Indian Water Rights Consent Decree, dated October 28, 2010 (“Motion for Enforcement”). The Motion was accompanied by a Memorandum in Support and the Affidavits of Woldezion Mesghinna (“Mesghinna Aff.”) and David Jarvis (“Jarvis Aff.”).

² State of Idaho’s Response to the United States’ and the Shoshone-Bannock Tribes’ Motion for Enforcement of the Fort Hall Consent Decree, dated April 1, 2011 (“Idaho’s Response”).

³ Committee Of Nine’s Response to Shoshone-Bannock Tribes’ and United States’ Motion for Enforcement, dated April 4, 2011 (“C9 Response”)

and FMC Corporation.⁵ The Court has ordered that the Motion for Enforcement be bifurcated, and that “[r]esolution of the legal issues pertaining to entitlement will be treated as a partial summary judgment.”⁶ Therefore, this reply will address only those legal issues raised by the original motion and the responses of the other parties.

In our Motion for Enforcement, the United States and Tribes asked the Court to enforce the terms of water right no. 27-11375.x.d of the Fort Hall Indian Water Rights Decree related to the Tribes’ water right No. 27-11375.⁷ In particular, we asked this Court to find that the 45,000 acre-feet per year (“AFY”) limit of non-Indian diversions has been exceeded frequently in the past, that the parties have tried and failed to negotiate an equitable adjustment to the Tribal water rights as required by the terms of the Consent Decree, and to judicially determine an “equitable adjustment” within certain specified parameters. The proposed findings regarding historic diversions exceeding 45,000 AFY and the failure of negotiations were amply supported by historic diversion data, as well as recent efforts by the Idaho Dept. of Water Resources (IDWR) and other representatives of the parties who jointly concluded that, even with stricter administration of water rights in Basin 27, future diversions by non-Indians would likely be approximately 50,000 AFY. *See* Memorandum in Support of Motion for Enforcement of Fort Hall Consent Decree (“Mem. Support”) at 11-16; Mesghinna Aff. at 12-16.

⁴ Patrick Taney’s Response to the United States’ and Shoshone-Bannock Tribes’ Motion for Enforcement of the Fort Hall Consent Decree, dated April 4, 2011 (“Taney Response”).

⁵ FMC filed a “Notice of Partial Withdrawal” and “defers to the position of the State of Idaho” in this matter and “otherwise withdraws from further participation in the motion to enforce.”

⁶ Second Scheduling Order on State’s Motion for Accounting and United States’ and Tribes’ Motion to Enforce, entered February 18, 2011, at 3.

⁷ The Partial Final Decree for that water right provides in part that,

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

The primary substantive responses were filed by the State of Idaho and the Committee of Nine. The State argues that, no matter how much water non-Indians are decreed, the Tribes' "equitable adjustment" is limited to the use of groundwater and storage water from Blackfoot Reservoir and Grays Lake, which are separately provided for in another clause of this right. 27-11375.x.a. The State's interpretation essentially renders the "equitable adjustment" clause of 27-11375x.d meaningless. The State's position enjoys no support in the Consent Decree or Agreement, and it simply makes no sense. The Court should reject the State's interpretation.

The Committee of Nine contends that the request for an equitable adjustment is premature because the non-Indian diversions in one year – 2010 – did not exceed the 45,000 AFY limit. And, even if the 45,000 AFY limit were exceeded "under a proper accounting", any equitable adjustment should not come from the Snake River since to do so would injure the water users in Water District 01. These arguments are meritless and should be summarily rejected.

ARGUMENT

A. SUMMARY JUDGMENT IN FAVOR OF THE TRIBES AND UNITED STATES IS APPROPRIATE

The State of Idaho, Committee of Nine and other parties have not met their respective burdens of proof and persuasion as a matter of law, that there are no material facts, and therefore, summary judgment should be rendered in favor of the Tribes and United States as to their Motion for Enforcement.

The instant Motion by Order of the Court is treated as a partial summary judgment. Pursuant to Idaho Rule of Civil Procedure Rule 56, "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there no genuine issues as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. Rule 56(c). To withstand a motion for summary judgment, the opposing party's case must be anchored in something more than speculation. A mere scintilla of evidence is insufficient to create a genuine issue of material fact. *Edwards v. Conchemco, Inc.*, 111 Idaho 851, 853, 727 P.2d 1279, 1281

(Idaho App. 1986). The party opposing the motion may not merely rest on the allegations contained in the pleadings; rather, evidence by way of affidavit or deposition must be produced to contradict the assertions of the moving party. I.R.C.P. 56(e); *Ambrose v. Buhl Joint School Dist. #412*, 126 Idaho 581, 584, 887 P.2d 1088, 1091 (Idaho App. 1995). Supporting and opposing affidavits must be made on personal knowledge, must set forth facts as would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to the matters stated therein. I.R.C.P. 56 (e).

In the SRBA, matters are tried without a jury. Under those circumstances,

When an action is to be tried without a jury, however, the court is not compelled to draw inferences in favor of the party opposing the motion; rather, the court is ‘free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts.’

Land O’Lakes, Inc. v. Bray, 138 Idaho 817, 819, 69 P3d 1078, 1080 (Idaho App. 2003).

Significantly, the opposing parties, here, have failed to produce any affidavits or evidence contradicting the assertions and evidence provided by the Tribes and United States in their Motion for Enforcement of the Consent Decree. Indeed, the parties do not deny the reports and affidavits, reports, data or memoranda. Rather they argue the motion is premature, may injure their rights (without any supporting evidence) or contend equitable adjustment is not necessary. Given the absence of any specific factual disputes related to the Motion, it is appropriate to find equitable adjustment is warranted for which the Tribes’ and United States’ claim.

B. IDAHO’S INTERPRETATION OF EQUITABLE ADJUSTMENT CANNOT BE SQUARED WITH THE PLAIN LANGUAGE OF THE CONSENT DECREE AND THE AGREEMENT

1. The State’s Argument Distorts the Equitable Adjustment Provision.

The main argument posited by Idaho is that there is no need for equitable adjustment because the Tribes have the right, under the Agreement to use storage water and groundwater to augment Blackfoot River natural flow in times of shortage, pursuant to 27-11375.x.a and .f. A reading of these provisions,

however, clarify that they stand for no such proposition. The State ignores the limited import of these provisions. These provisions provide:

.a If the natural flow of the Blackfoot River is not sufficient to satisfy this right and other rights to divert Blackfoot River Natural Flow pursuant to state law, the Tribes may satisfy this right by using water right nos. 27-02007 [Blackfoot Reservoir storage] and 26-02160 [Grays Lake storage], provided that the combined use in satisfaction of this right shall not exceed 150,000 AFY.

* * * * *

.f If the water supplied under this right and water right nos. 27-02007 and 25-02160 does not provide 150,000 AFY, the Tribes may divert groundwater within the Reservation under this right, exclusive of right nos. 27-11376 [groundwater within the Reservation] and 29-12052 [Bannock Basin Groundwater], such that the combined water supply from water right nos. 27-02007 and 25-02160 and surface and groundwater under this right yields 150,000 AFY.

Consent Decree at 30-31. By their terms, these provisions, distinct and separate from subsection 27-1135.d, were included to protect the Tribes water right from reductions in *natural flow of the Blackfoot River*, such as drought. Critically, these two provisions do not cross-reference to subsection d., expressly provide that they will be utilized in conjunction with the equitable adjustment provision, nor state they will be charged against water rights for Grays Lake or the Blackfoot River Reservoir or groundwater.

If indeed, the parties had intended these other specific water sources be used for the equitable adjustment, they would have said so as in other Consent Decree provisions. For example, water right no. 27-11373, the Ross Fork Creek/Ross Fork Basin groundwater right provides,

The Tribes shall have the option of using surface water or groundwater diverted within the Ross Fork Creek basin to satisfy this right, in whole or in part, provided that any diversions of surface water or groundwater by the Tribes in excess of 5,000 AFY from the Ross Fork Basin shall be charged against water right no. 27-11376.

See also water right no 27-11374, Lincoln Creek. The State's argument must fail.

In sharp contrast to the State's position, subsection .d is intended to protect the Tribes from man-made reductions in Blackfoot River water supply that result from the decree of state-created water rights which cumulatively exceed the quantity being diverted at the time of the negotiations when then-Idaho employee, David Shaw, developed the estimate that "state created water rights are estimated to divert not more than 45,000 AFY of water from the Blackfoot River." Consent Decree at 31, 27-11375.x.d. Importantly, the Tribes' right under 27-11375.x.a and .f to use its own storage water and groundwater rights in times of natural shortage (drought) is a different type of insurance from the Tribes' right to negotiate an equitable adjustment with the other parties (State and Committee of Nine)⁸ in the event that the State's estimate of total annual diversion of non-Indian water rights decreed in the SRBA proves to be too low. One protects against natural drought, while the other protects against excess diversions pursuant to state-created, judicially decreed, water rights.

Moreover, the plain language of 27-11375.x.d supports this interpretation and contradicts the one advanced by the State. The State's interpretation conflates subsections .a, .f, and .d of 27-11375.x in a way which eviscerates subsection .d. If the only back-up source for the Tribes in the Blackfoot River is groundwater and storage water, then why have a provision for equitable adjustment in the event of decreed non-Indian water rights exceeding the State-provided estimate of 45,000 AFY? Such a result has no support in the Agreement or Consent Decree. Had the parties intended such a narrow, limiting result as the State claims they would have used such clearly defined language in the section. The State's interpretation effectively renders the equitable adjustment subsection null and void.

Of course, that is not how the Consent Decree actually reads. The Tribal right is insured against natural drought by the ability to tap into storage water and groundwater, and is further insured against inaccurate State diversion volume estimates by the equitable adjustment subsection (27-11375.x.d).

⁸ Although the term "parties" is not defined in the Consent Decree, it is defined in the 1990 Fort Hall Indian Water Rights Agreement as follows: "4.34 'Parties' means the United States, the State of Idaho, the Tribes, and the Committee of Nine of Water District 01."

In this case, the Tribes and United States bargained for certainty that the Tribes would be insured in the future definite sources of water which would be of good quality and available at no cost to the Tribes, just as direct diversion of Blackfoot River supplies would have been for the Tribes. The source of this additional water was left open for the State and other parties to decide. The Tribes were promised an equitable water supply to make up the diversions exceeding 45,000 acre-feet per year. *Mesghinna Aff.* at pp. 4- 5. In subsection d. the Tribes promised to permit Basin 27 users to divert water exceeding 45,000 acre-feet per year, but an essential part of the *quid pro quo*, was equitable adjustment. The State's interpretation would impair those property rights and severely limit the promises made in the Agreement.

Since the language in both the decree and the underlying 1990 Agreement are unambiguous, it is not necessary to look beyond the four-corners of those documents. However, should the Court believe there is any ambiguity, we would refer the Court to the contemporary interpretation of the U.S. Department of the Interior, which was memorialized in a document entitled, "Record of Decision Document and Analysis in Support of Interior Department Approval of 1990 Fort Hall Water Rights Agreement for In Re Snake River Basin Adjudication, May 23, 1990 (Second Affidavit of David A. Jarvis, Ex. 7). That 46-page document informed federal decision-makers regarding the 1990 Agreement, and goes into considerable detail about each provision of the Agreement. It addresses the Blackfoot River provision at issue here in the following text:

h. Blackfoot River.

The Blackfoot river is 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, Blackfoot Reservoirs [sic] and Grays Lake, and uses the river to convey the water diverted from the Snake River and Sand Creek to the major canals serving the Reservation.

Article 7.1.18 [decreed as 27-11375] is the right to divert 150,000 AFY from the Blackfoot River, at a diversion rate of 1380 CFS. The water is to be used for irrigation of 30,469 presently irrigated and future acres from March 15 through November 15, with a maximum annual consumptive use of 79,546 AFY. The basis of the right is the Winters Doctrine, with a priority date of June 14, 1867.

If the natural flow of the Blackfoot River at time[s] [sic] is insufficient to satisfy this right, the Tribes may satisfy this right by using the rights described in 7.1.19 [Blackfoot Storage]

and 7.1.20 [Grays Lake Storage] infra and by diversion of groundwater with the Reservation provided the combined use to satisfy this right does not exceed 150,000 AFY. If the annual diversions under this right exceed 150,000 AFY, the excess amount will be charged against the Tribes' right to divert from the mainstem Snake River, 7.1.1, supra.

This right, in combination with the rights described in 7.1.1, 7.1.19, and 7.1.20, can be used to irrigate a maximum of 58,828 present and future acres.

As a condition of this right, the Tribes and the United States agree to protect the existing non-Indian natural flow water uses on the Blackfoot River, as determined in the Snake River Basin Adjudication. Should those uses, now estimated by the State to be about 45,000 AFY, be determined to exceed that amount, the parties agree to negotiate an equitable adjustment of the Tribal Water right.

Ex. 7, at 19 (emphasis supplied). Thus, the United States' contemporaneous understanding of this provision is that there exist two separate protections – one, against natural shortages of water, and a second one against decreed non-Indian water rights exceeding 45,000 AFY. This understanding is consistent with the Tribes' view that there would be a separate source of water supply under subsection d. to compensate the Tribes for its agreement to subordinate its senior *Winters* water right to Basin 27 water users. In light of all this, subsection d. provides for a fair and reasonable supply of water to the Tribes, in addition to the water for drought years.

The documents purporting to represent the understanding of the other parties, as proffered by the State of Idaho in the Affidavit of Shasta Kilminster-Hadley In Support of State's Response ("SK-H Aff."), is not in conflict with the contemporaneous understanding of the U.S. Department of the Interior. Although they did not go into the same degree of detail, they do not contradict the federal interpretation of the plain language of the agreement and Consent Decree. Indeed, as the State concedes, "[n]one of the above-referenced statements even mention 45,000 AFY * * *", which casts doubt on their relevance to the matter presently before the Court. Importantly, the Tribes' contemporaneous interpretation as reflected in Ex.1 to SK-H Aff. at 10, does not address the "equitable adjustment" and 45,000 AFY estimate question, although it notes that the Tribes have the right to use groundwater to meet natural shortages. Likewise, the Resolution of the Idaho Water Resource Board does not address the equitable adjustment issue at all, other than to note that that there exists a subordination provision in the Blackfoot

river and Bannock Creek basins. SK-H Aff. at Ex. 2. Exhibit 3, the letter from State Attorney, Clive Strong, makes no mention of the equitable adjustment. The same is true for Exhibit 4, a resolution of the Committee of Nine, which only notes in a parenthetical to a chart, “hold harmless non-Indian Blackfoot users to present diversion; if short on Blackfoot, go to Reservation groundwater.” Exhibit 5 to the SK-H Affidavit, a statement by Senator McClure, is of no help in interpreting the equitable adjustment provision, since it only references the right of the Tribes to turn to storage water or groundwater in times of shortage in natural flow. It does not address the question of what to do if, as a result of the SRBA decree, the State’s estimate of 45,000 AFY of non-Indian diversions in the Blackfoot River proves to be too low. The same is true for Exhibits 6 and 7. The isolated phrases relied upon the State are not dispositive of whether equitable adjustment is fulfilled here. In sum, the Documents proffered by the State are of little or no relevance to the question presently before the Court.

Thus, the only contemporaneous document which addresses the “equitable adjustment” issue at hand is the U.S. Department of the Interior’s Record of Decision Document. It clearly supports the plain language of the Consent Decree: i.e., that the Tribes “may” turn to groundwater and storage space in times of natural shortage, but that in the event the State’s estimate of annual volumes of non-Indian diversions exceed 45,000 AFY, the parties “shall” negotiate an equitable adjustment to the Tribal right.

2. A “Full Legal Entitlement” for Non-Indian Water Users Does Not Preclude Finding That Equitable Adjustment Is Appropriate Under Subsection 27-11375 Nor That There Is A 45,000 AFY Limit.

The State argues that subsection d. provides a ‘full legal entitlement’ for the non-Indian water users in Basin 27, and the 45,000 AFY cap is to only understand the “expected extent of the non-Indian water rights.” Resp. at 9. The United States and Tribes do not dispute the full legal entitlement, but never agreed that the water users would have an unlimited supply of water from the Blackfoot River. At the time the Agreement was negotiated, it was presumed that, like the Tribal water rights, all water rights in

the Blackfoot Basin would have a limit on the maximum annual diversion volume. The Director of IDWR has chosen, however, not to report that element of non-Indian water rights and, thus far, the parties have not agreed as to how much water will be diverted to satisfy the full legal entitlement. Indeed, the premise of the Tribes and United States objections to the numerous Blackfoot River water right claims was based on the lack of a water volume. One fact is certain though, historically, the non-Indian water users' diversions have exceeded 45,000 AFY without any equitable adjustment for the Tribes, and the consensus of state, tribal and federal experts is that it is likely to be exceeded in the future. It makes little sense to say – as the State would have it – that the non-Indian water users have an unlimited guarantee of water (because there are no diversion volume limits) but no additional water is provided to the Tribes under the same provision.

That is certainly not what the Tribes and United States agreed to under the 1990 Agreement.

The Tribes testified before the Idaho State Senate Committee on Resources and Environment in 1991,

“... 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. “

(emphasis added) Testimony of the Shoshone-Bannock Tribes Re: HB258, March 20, 1991, *at* 2, *Kilminster-Hadley Aff. Exhibit 1*. The Tribes further stated, “[i]n 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.” *Id.* at 10; *See* also p. 22 of Tribes’ Testimony.

In direct conflict with the State’s litigation position, the State is taking measures to limit the diversions of the water users. At present time the State IDWR has taken a more active role in administering the Basin 27 water rights and controlling diversions, which has resulted in reduced non-Indian diversions. These efforts are visible in the 2008, 2009 and 2010 diversion volume totals. The

Cefalo memorandum of December 2008, however, shows that even under stricter administration, it is estimated that the Basin 27 water users will divert over 45,000 AFY. Mesghinna Aff. Attachment 3.

C. THE COMMITTEE OF NINE'S ARGUMENTS ABSOLVING ITS MEMBERS OF ANY RESPONSIBILITY ARE NOT CONSISTENT WITH THE DECREE'S MANDATE FOR ALL PARTIES TO NEGOTIATE AN EQUITABLE ADJUSTMENT.

The Committee of Nine makes two arguments in response to the Motion to Enforce. First, the Committee contends that, "the remedy sought by the Tribes will injure water right holders in Water District 01" which is somehow inconsistent with the intent of the parties not to injure "any party". C9 Response, at 2-3. Second, the Committee contends that the "most recent accounting of implicated non-Tribal water right diversions in Basin 27 does not exceed 45,000 AFY." *Id.*, at 3. Both arguments are legally meritless and factually unfounded.

At the outset, it is important to note that the Committee of Nine's arguments really go to the remedy phase, and not to the present question as to whether the Tribes have a legal right under the Agreement and Decree to an equitable adjustment should the 45,000 afy limit be exceeded. In other words, the arguments posited are premature at this stage of the litigation. Nevertheless, to the extent that the Committee of Nine's arguments bear on the legal issue, we address them herein.

First, the Committee of Nine argues that "the Fort Hall Agreement and the Consent Decree were intended by all parties to prevent injury to any party." C9 Response at 3. Certainly, that was one goal, but the reality is that all parties experienced some degree of injury in agreeing to the compromises that facilitated the Agreement and Decree. The Tribes and the United States compromised by agreeing to a smaller federal reserved water right than would have been claimed in litigation; the non-Indian water users gave up some legal defenses that they might have asserted in the litigation; the State of Idaho agreed to provide some in-kind services and other benefits, and the federal government agreed to provide certain other benefits to non-Indians as well as the Tribes, to minimize the impact of the Agreement. That is the

nature of settlements – everyone gives a little in order to obtain the greater good of certainty and “peace in the valley.”

At the same time, however, every party sought in the Agreement to limit their risk of injuries resulting from the settlement. Notably, the water users represented by the Committee of Nine were the beneficiary of provisions committing uncontracted storage space in federal reservoirs, which were intended to mitigate the impact of the settlement on non-Indian water users. *See* Agreement, at Section 12.3, Ex. 2 at 69-70. Likewise, the Tribes agreed to subordinate their rights to non-Indian water users on the Blackfoot River (thereby limiting their risk of injury), but sought to limit their exposure to annual diversions up to 45,000 AFY. Should the diversions exceed that amount, the parties (including the Committee of Nine) agreed to go back and negotiate an equitable adjustment. Whether any such negotiated equitable adjustment will injure the members of the Committee of Nine cannot be known at this time and will depend on the good faith and creativity of the parties in the next, remedy, phase of these proceedings on the Motion to Enforce. Presently, the arguments are speculative and unsupported by any evidence.

In any event, the prospect of possible reductions in water supply for users in District 01 or elsewhere does not alter the fact that all parties to the Agreement agreed to all provisions in the Agreement, including but not limited to the equitable adjustment clause of water right no. 27-11375. It is particularly ironic that the Committee of Nine entitles a section of its brief “The Tribes and United States are Bound by the Fort Hall Agreement,” C9 Response at 5, while at the same time arguing that it is not similarly bound to the Agreement and Decree. The Committee of Nine now says that they were not involved in negotiating that part of the Agreement, and should be absolved of any responsibility to contribute to solving this equitable adjustment issue. C9 Response at 6. This contention is contradicted by the Committee of Nine’s statement that, acting “on behalf of the water users in Water District 01, negotiated settlement with the Shoshone-Bannock Tribes (“Tribes”) in the Fort Hall Agreement.” C9

Response, at 2. It is further belied by the fact that the Chairman of the Committee of Nine, Paul R. Berggren, signed the Agreement on July 9, 1990, with no qualifications or exclusions. Ex. 2, at 74. All signatories, including the Committee of Nine and its water users, are bound by the Fort Hall Agreement. Moreover, this Court's entry of a Partial Final Decree, after several years of litigation over its approval, makes it binding on all parties to the Snake River Basin Adjudication. Thus, like the Shoshone-Bannock Tribes, the State of Idaho, and the United States, the Committee of Nine, its members, and its water users are all equally bound to the terms of the Agreement and Decree, and all must participate in negotiations to determine an equitable adjustment to the Tribal water right should the 45,000 AFY limit be exceeded.

Finally, the remainder of the Committee of Nine's response is at best premature and must await the remedy phase of these proceedings. For example, the Committee argues that the motion to enforce should not be considered because it is unknown whether the 45,000 AFY limit will be exceeded. The Committee points to 2010 data, but ignores the data from prior years as well as the conclusions in the Cefalo memorandum that the 45,000 AFY limit is likely to be exceeded in most years. C9 Response at 7-8. The Committee also argues that a ruling on the Motion to Enforce should await a decision on the State's Motion for Accounting, noting that the list of rights propounded by the State may include certain water rights that are not entitled to the benefit of subordination and thus should not count against the 45,000 AFY limit. These are issues that can be addressed in negotiations or litigation on the remedy, following a ruling on the legal issues presently before the Court.

CONCLUSION

For the foregoing reasons, as well as those presented in our Motion for Enforcement and supporting memorandum, affidavits, and documents, the Court should find that the Tribes and United States are entitled to equitable adjustment, and enter an order granting partial summary judgment to the United States and Shoshone-Bannock Tribes. The Court should also set a status conference to determine the best procedure to address the nature and extent of the equitable adjustment due to the Tribes and United States.

Respectfully submitted this 28th day of April, 2011.

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CERTIFICATE OF SERVICE

I certify that on April 28, 2011, I served true and correct copies of the foregoing JOINT CONSOLIDATED REPLY BY UNITED STATES AND SHOSHONE-BANNOCK TRIBES IN SUPPORT OF MOTION FOR ENLARGEMENT as follows:

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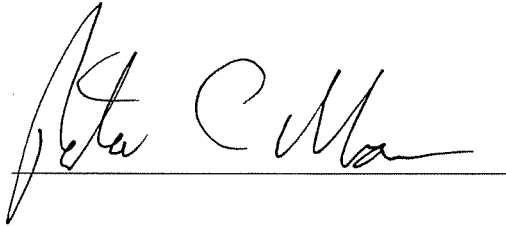
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A handwritten signature in black ink, appearing to read "Peter C. Ma", is written over a horizontal line.