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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	)	Subcase No. 27-11375
Case No. 39576	)	
	)	SECOND AFFIDAVIT OF
_____	)	DAVID A. JARVIS
STATE OF COLORADO	)	
	)ss.	
City and County of Denver	)	

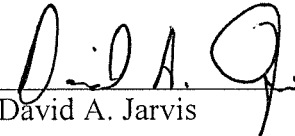
AFFIDAVIT

I, DAVID A. JARVIS, being of lawful age and having been first duly sworn, state
the following:

1. I make the following statements based upon personal knowledge and am
competent to testify thereto.

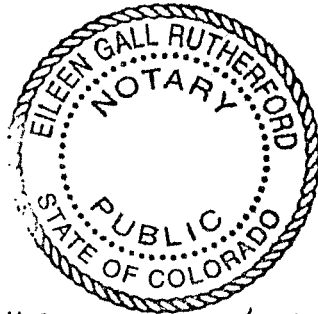
2. I attest that attached as Exhibit 7 is a true and correct copy of **Record of Decision Document and Analysis in Support of Interior Department Approval of 1990 Fort Hall Water Rights Agreement for In Re Snake River Basin Adjudication**, dated May 23, 1990.

DATED this 28th day of April, 2011.

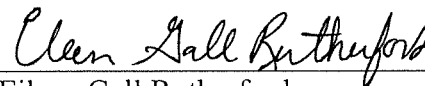


David A. Jarvis

SUBSCRIBED AND SWORN to before me this 28TH day of April, 2011



My Commission Expires 8/27/2012



Eileen Gall Rutherford
Notary Public for Colorado
Residing at:
My Commission Expires: 8/27/2012

CERTIFICATE OF SERVICE

I certify that on April 28, 2011, I served true and correct copies of the foregoing
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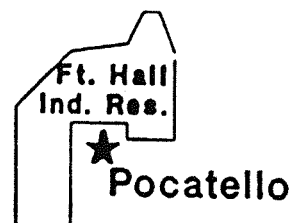
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A handwritten signature in cursive script, reading "Peter C. Mann", is written over a horizontal line.

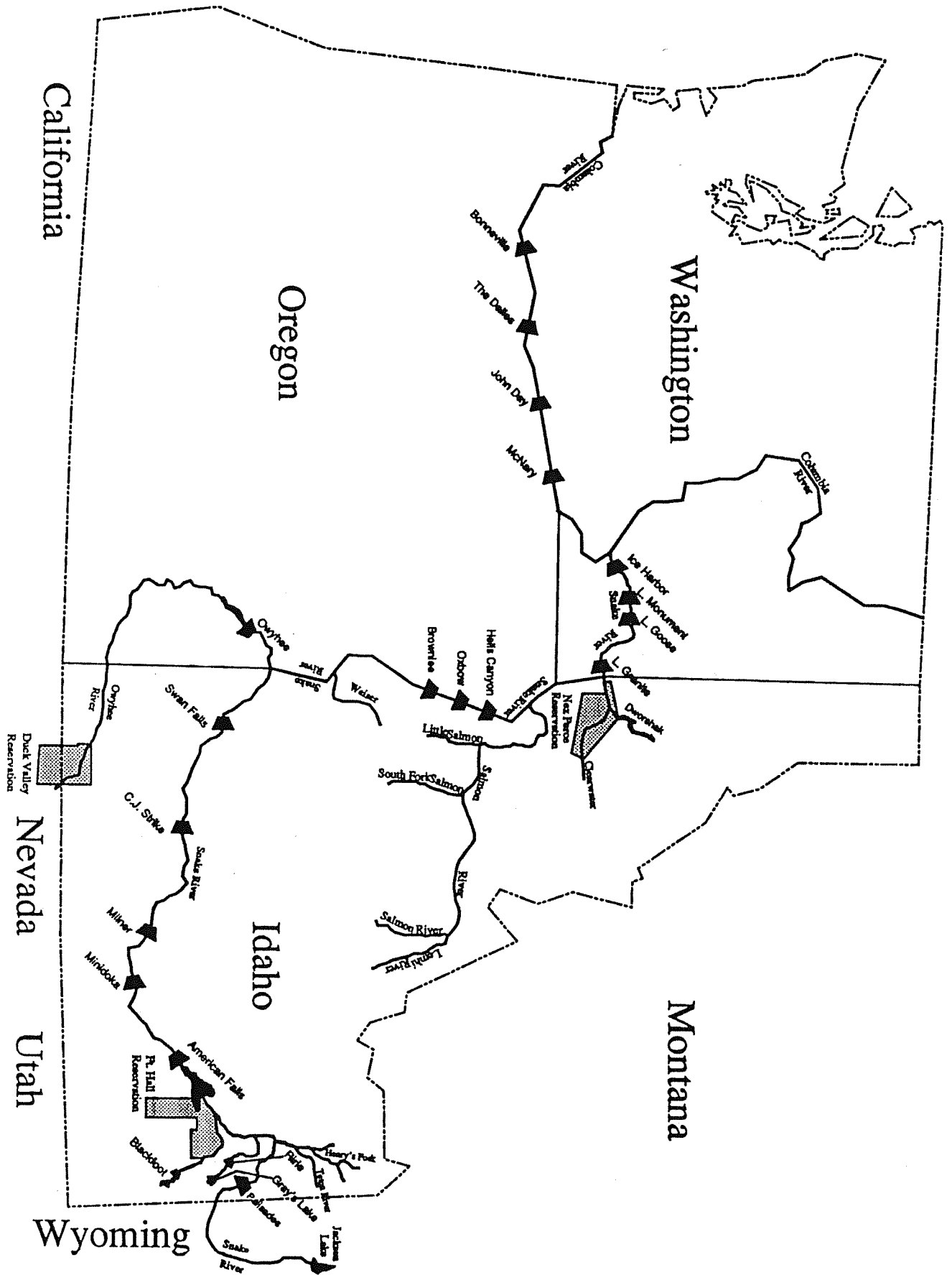
Exhibit 7

An outline map of the state of Idaho is positioned in the background, with the title text overlaid on it.

***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***



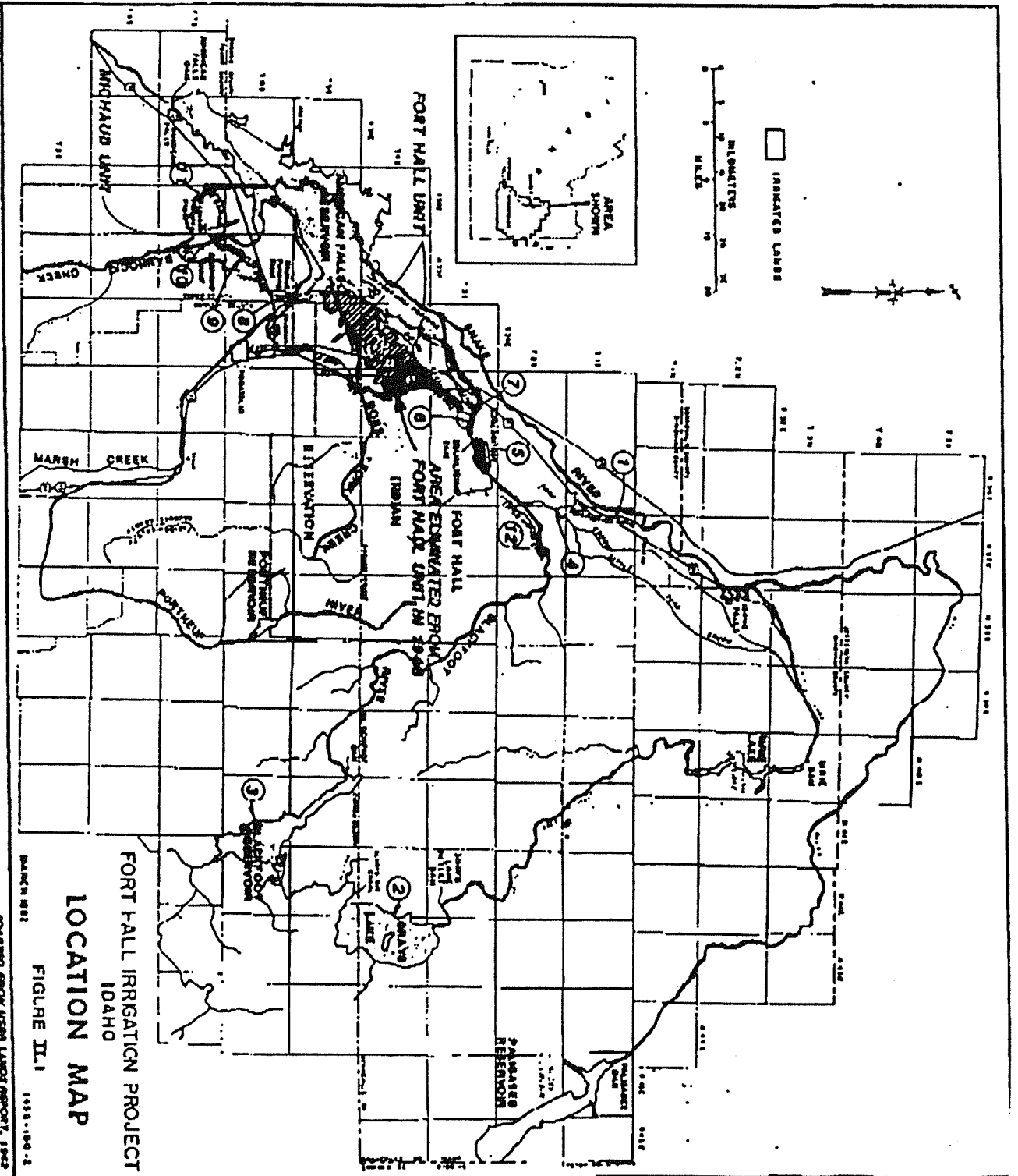
May 23, 1990



MAJOR IRRIGATION FACILITIES

LEGEND

1. RESERVATION CANAL
2. GRAYS LAKE
3. BLACKFOOT RESERVOIR
4. SAND CREEK INLET
5. EQUALIZING RESERVOIR
6. FORT HALL MAIN CANAL
7. FORT HALL NORTH CANAL
8. MICHAUD PUMPING PLANT
9. MICHAUD MAIN CANAL
10. BARROCK PUMPING STATION
11. OWL CANAL
12. LITTLE INDIAN CANAL



FORT HALL IRRIGATION PROJECT
IDAHO
LOCATION MAP

FIGURE II.1

MARCH 1951

1955-196-2

ADAPTED FROM USFS LAND REPORT, 1962

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United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20245



IN REPLY REFER TO:

MAY 23 1990

To : Working Group on Indian Water Rights Settlements

From: Chairman, DOI, Fort Hall Reservation Water Rights
Negotiation Team (Idaho) John S. Bushman

Re : Record of Decision Document (RDD) and Analysis in Support
of Interior Department Approval of 1990 Fort Hall Water
Rights Agreement for In re Snake River Basin Adjudication

The Department's Fort Hall Reservation Water Rights Negotiation Team is recommending that the Secretary or his designee approve the 1990 Fort Hall Water Rights Agreement (the Agreement). This memorandum shall provide our detailed analysis of the Agreement together with our reasons for recommending Interior Department approval.

The Agreement does not become effective until several events have occurred, as provided in Article 18. These include: entry of a final, non-appealable decree by the state court quantifying the federal and Indian water rights in the Agreement; Congressional approval of the Agreement and authorization of the expenditure of federal funds; approval of the Agreement by the membership of the Shoshone-Bannock Tribes; approval of the Agreement by the Idaho Legislature; and several other items discussed infra.

Notwithstanding, these contingencies, the parties negotiators desire to have their principals execute this Agreement at a formal signing ceremony to be held on the Fort Hall Indian Reservation on or about June 15, 1990. The Court has extended the deadline for filing this Agreement to June 19, 1990. In as much as this is the first Indian water rights settlement for the State and the Bush Administration, it is intended that very high level officials of the tribal, state and federal governments shall attend the signing ceremony.

This Agreement is a substitute for the water right claims the United States were to have filed on April 2, 1990. Pursuant to a telephonic conference with State District Court Judge Daniel Hurlbutt, the deadline was extended to April 17, 1990. On April 17, Judge Hurlbutt again extended the deadline to June 19, 1990, to allow the negotiators time to obtain approval from their principals. Once the Agreement has been approved by all the parties, a consent decree embodying the water rights described in this Agreement will be submitted to the Court for entry as a final decree.

I. EXECUTIVE SUMMARY AND OVERVIEW OF THE AGREEMENT

After five years of negotiations, the parties have finally reached an historic water rights agreement. In many ways, this is a model Indian reserved water rights settlement agreement. The United States and the Tribes will be decreed a full water supply, from both surface and groundwater sources for irrigation, domestic, commercial, municipal, industrial (DCMI), hydropower, fish propagation, and instream flow needs. The Tribes also are able to receive full value of their water rights by being able to market a portion of their water rights on terms which are somewhat more favorable than currently exist for non-Indians, while avoiding philosophical disputes as to whether and under what conditions, federal Indian reserved water rights may be marketed. The Tribes and the United States have retained their administrative authority over their water rights and have considerable flexibility to manage the tribal water right within the Reservation. The State and Non-Indians achieve a great deal of certainty, and for the most part, are able to avoid or mitigate any adverse effects of the Agreement on their water supplies. All parties save what would be enormous litigation costs--\$5 million for the United States and between \$10 and \$20 million for state and local parties--and promote good faith cooperation as opposed to animosity.

Finally, important federal policy goals are achieved with a relatively small federal monetary contribution in comparison with other recent water rights settlements. These goals include the following: (1) Fulfillment of the United States trust responsibility by protecting Indian water resources; (2) Promotion of tribal self-determination together with strong and responsible tribal governments; (3) Assurance that tribes are able to realize the full value of their water rights by providing them with "wet water" and an opportunity to "market" their water for value; (4) Protection of the federal fisc; and (5) Reduction of conflict between Indians and their non-Indian neighbors by mitigating some of the impacts of the full exercise of Indian reserved water rights upon non-Indians, many of whom rely on federal reclamation projects for all or part of their water supplies.

The Agreement achieves these federal goals in the following ways. First, the Tribes and the United States will be decreed a firm water supply from surface and groundwater totalling 581,031 acre-feet per year (AFY), which is sufficient to meet all of their present and reasonably foreseeable future needs for irrigation, DCMI, hydropower, fishery, and other needs on and near the Fort Hall Indian Reservation. See Articles 6 and 7. In drought years, the Tribes will feel little or no adverse impacts in contrast to their neighbors with junior priority dates.

Second, the Tribes have the option to market annually the water accruing to approximately 130,000 AFY of storage space in Palisades and American Fall Reservoirs in accordance with a tribal water bank

run by the Tribes. See Article 7.3. This feature affects several federal policy goals. It provides income to the tribes, thus allowing them to become more self-sufficient. It encourages the tribes to develop a sophistication in financial matters and will promote a strong tribal government. It encourages the tribes and their neighbors to work together to solve problems caused by an insufficient water supply. Finally, it allows for water to be used downstream for anadromous fishery purposes.

Third, the Tribes are encouraged and provided with financial assistance to take a more active role in developing a tribal water code and the infrastructure to manage the tribal water supply, by modernizing the tribal water management system. This assistance promotes a stronger and more responsible tribal government and hopefully will eventually relieve the United States of long term responsibilities in this area. See Article 8 regarding Administration, especially Articles 8.2.1, 8.2.3, and Article 13.2 involving federal funding for tribal water management activities and monitoring in the amount of \$7,000,000 over 20 years.

Fourth, conflict between Indian and non-Indian water users will be reduced by (1) providing certainty as to the tribal water rights, (2) encouraging conflict resolution through an Inter-Governmental Board (Article 9), (3) allowing non-Indians to purchase tribal water during times of shortages, (Article 7.3 within or outside the Reservation, and 7.5 - 7.8 within the Reservation), (4) allowing the non-Indians to mitigate the impacts by contracting for 99,480 AFY of the presently uncontracted storage space in Bureau of Reclamation projects by forgiving the construction costs of those projects, (Article 12.3), and (5) subordinating tribal water rights in certain limited areas to non-Indians currently irrigating in those areas.

Fifth, the Agreement protects the federal fisc because no new economically and environmentally unjustifiable water development projects are to be constructed. Unlike some prior Indian water right settlements involving federal contributions of in excess of \$100 million for water projects of questionable economic justification and substantial environmental costs, the parties here have developed creative exchanges of water supplies which more efficiently use the available water supplies with no added financial or environmental costs, see e.g., Article 7.1.1.x.d (Sand Creek Exchange). The federal negotiation team successfully resisted several efforts to have the federal government rebuild the failed Teton Dam. The Sand Creek Exchange was adopted to avoid the federal responsibility to rehabilitate and dredge out the Equalizing Reservoir which would be necessary for the Sand Creek water to be utilized, at a cost of up to \$15 million and some loss of wetland habitat used by waterfowl.

Further, the Agreement has environmental benefits. In addition to the wetlands preserved by the Sand Creek Exchange, the United

States will agree to continue purchasing lands and grazing rights in Grays Lake which increases the water storage capacity of the Fort Hall Irrigation Project and benefits the United States Fish and Wildlife refuge there, which is critical habitat for whooping cranes and other migratory waterfowl. See Article 13.1. Moreover, the Agreement expressly provides for full compliance with any applicable environmental laws. See Article 11.5.14 Finally, permitting the Tribes to market some of their water will be of great assistance to enhancing the flows of the Snake River which are necessary for migratory salmon and steelhead fish.

Our only regret in negotiating this Agreement are that the State of Idaho's financial contribution is so small (See Article 13.6) and that we were unable to reach an agreement on the respective authorities and powers of the State and the United States to administer certain of the water rights set forth in this Agreement. See discussion of Article 8, infra. These and several other compromises are offset by the achievement of the federal policy goals discussed above. On balance we believe this to be a good Agreement and strongly recommend its approval by the Working Group and the Secretary.

In the next section, this document shall provide a brief summary of the legal basis for the Indian water rights to be settled here, followed by a detailed analysis of the Agreement.

II. LEGAL BASIS FOR THE INDIAN WATER RIGHTS

The primary legal basis for the water rights of the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation is the "Winters doctrine". That case, and its progeny,¹ hold that when the United States withdraws public domain land for the creation of a

¹ See e.g. Arizona v. California, 373 U.S. 546, 601 (1963) (extended the reserved rights doctrine to non-Indian federal reservations, set forth a measure of Indian water rights for agriculture -- "practicably irrigable acreage"); Cappert v. United States, 426 U.S. 128 (1976) (enjoined groundwater diversions which interfere with habitat for Devils Hole pup fish in a national monument); United States v. New Mexico, 438 U.S. 696 (1978) (water reserved only for "primary" purposes of national forests -- timber production and watershed protection -- and not to "secondary" purposes such as recreation, fish and wildlife habitat, etc.); United States v. City and County of Denver, 6567 P.2d 1 (Colo. 1983) (Good example of the many different types of reserved water rights, arising out of a general stream adjudication); In re: Rights to Use Water in Big Horn River, 753 P.2d 76 (Wyo. 1988) aff'd by an equally divided court sub nom. Wyoming v. United States, ___ U.S. ___, 109 S.Ct. 2994, 106 L.Ed. 2d 342 (1989) (purpose of Wind River Reservation is agricultural in nature)

reservation, sufficient water is also reserved to satisfy the purpose of the reservation. In the case of Indian reservations, the purpose is frequently to provide a permanent home for the Indians, so the United States normally claims water for all possible uses, both present and future. However, agriculture is by far the most consumptive use of water, and therefore the most important for most reservations. Thus, of the 581,031 AFY to which the Tribes are entitled, only about 10,000 AFY would be used for domestic, commercial, municipal, and industrial (DCMI) uses on the reservation.

The Fort Hall Indian Reservation was created by Order of President Johnson, dated June 14, 1867, for the Boise and Bruneau Bands of Shoshone and Bannock tribes.² It originally encompassed 1.2 million acres, although it has since been diminished to 543,000 acres, of which 96% or 520,000 acres are Indian owned. Although the executive order is quite terse, the underlying reports recommending the creation of the reservation indicate that the purpose of the reservation was so that, " * * * the Indians of all the bands referred to should have some fixed home set apart for them before the lands occupied by the whites, who are rapidly prospecting the country, * * * ." Letter from the Commissioner of Indian Affairs, dated May 23, 1867, reprinted in I Kappler, Indian Affairs, Laws and Treaties, 835 (1904). The Commissioner further explained that the reservation's

location as a permanent home for those bands is dependent upon the consent of Washakie's band, commonly known and heretofore treated as the eastern bands Shoshones; but there is no doubt of their ready acquiescence in the arrangement. The land referred to is within the limits acknowledged as their hunting range by the treaty of 1863. Believing that the interest of the Government, as well as that of the Indians requires such action should be taken, I recommend that the President be requested to set apart the reservation * * * .

Washakie's Band of Shoshone and the Bannocks entered into a treaty with the United States on July 3, 1868, which is the same treaty that created the Wind River Indian Reservation. 15 Stat, No. 673. Article 3 of the Treaty provided for the Bannocks to be put upon a reservation to be created "in the "Portneuf" and "Kansas" (probably Camas) Prairie countries." Subsequently, the Bannocks were settled on the Fort Hall Indian Reservation, in apparent contravention of the provisions of the 1868 treaty guaranteeing the Bannocks a separate reservation. Executive Order of July 30, 1869, I Kappler 839. Article 4 of the 1868 Treaty also provided that the tribes,

² The same order also created a separate reservation for the Coeur d'Alene Tribe, located in Northern Idaho.

shall have the right to hunt on 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 Indians on the borders of the hunting districts.

The Idaho Supreme Court has inferred from this language a right also to fish and gather roots, berries and the like. State v. Tinno, 94 Idaho 759, 497 P.2d 1380 (1972). This right extends to all unoccupied public lands, including national forests, Id., and some state lands. It is not restricted to ceded aboriginal lands or ceded reservation lands.

The reservation was diminished by two cession agreements. The first one, ratified by Congress on September 1, 1888, ceded lands to the United States to be sold to settlers within the townsite for the town of Pocatello. Act of Sept. 1, 1888, c. 936, 25 Stat. 452.³ In the second Agreement, approved by Congress on June 6, 1900, 31 Stat. 672, the Tribes reserved, "the right, without any charge therefore, to cut timber for their own use, but not for sale, and to pasture their livestock on said public lands, and to hunt thereon and to fish in the streams thereof." Article 4, 31 Stat., at 674. The Ninth Circuit held that the tribes expressly reserved "priority" grazing, hunting and fishing rights in the area ceded in the second Agreement. Swim v. Bergland, 696 F.2d 712 (9th Cir. 1983).

III. ARTICLE BY ARTICLE ANALYSIS

This section will analyze the most significant or controversial provisions in detail, and will summarize the purpose and meaning of all provisions. In the interest of brevity, this memorandum will not restate the provisions. Accordingly, it will be helpful for the reader to read the Agreement in tandem with this section.

³ Interestingly, this agreement gave to the "citizens of the town, * * * the free and undisturbed use in common with the said Indians of the waters of any river, creek, stream, or other spring flowing through the Fort Hall Reservation in the vicinity of said town, * * * as may be necessary to provide said town with proper water and sewage facilities." Section 10, of the Act of Sept. 1, 1888 c. 936, 25 Stat. 452. The City of Pocatello has announced its intention to claim a water right for municipal uses with a 1868 priority, based on this language and the 1868 treaty, and sought to join in the negotiations. The parties concluded, however, that including Pocatello would unduly delay the Shoshone-Bannock negotiations, and have disclaimed any intent to determine Pocatello's rights in Article 11.1.12.

A. Articles 1 (Title) and 2 (Purpose).

The first three articles of the Agreement contain general statements and platitudes. For example, Article 1 states the title of this Agreement. Article 2 is demoninated the purpose, and contains platitudinous statements regarding the cooperation of the parties. The language was proposed by the Tribes and is modeled after similiar language in the Treaty the Eastern Band of Shoshone and Bannock, July 3, 1868, 15 Stat. 673

B. Article 3 (Preamble).

Article 3 is the preamble, and is largely intended to state the parties policies favoring negotiations and a brief history of the negotiations. Of note here is Article 3.4 which restates the federal policy, to facilitate negotiations among Indian tribes, states, private water users and federal agencies to avoid litigation. Cited as authority is the Interior Department Guidelines for Indian water rights settlements published in the Federal Register. 55 Fed. Reg. 9223 (March 12, 1990)⁴

The only other item in Article 3 which merits discussion is the reference in various places in the Agreement to the "Committee of Nine." See e.g. Articles 3.8, 3.9, and 5.7. The Committee of Nine is not a legal entity, but rather an advisory committee of private, non-Indian water users in Water District 01, which encompassess the Upper Snake River Basin above Milner Dam. Although the Committee of Nine has no legal authority to bind any private water user, it is composed of the representatives of the nine largest irrigation companies and accordingly has a great deal of political clout in the State of Idaho. Representatives of the Committee and the State have assured us that if the Committee of Nine supports the Agreement, which it does, then there will be little, if any, opposition by private water users or Idaho legislators. The

⁴ These guidelines, developed jointly by the Department of the Interior, the Office of Management and Budget, and the Department of Justice, were developed at the direction of President Bush in his statement signing H.R. 932, 1989 Puyallup Tribe of Indians Settlement Act. The Preamble to the Federal Register notice states that,

It is the policy of this Administration, as set forth by President Bush on June 21, 1989, in his statement signing into law H.R. 932, the 1989 Puyallup Tribe of Indians Settlement Act, that disputes regarding Indian water rights should be resolved through negotiated settlements rather than litigation.

55 Fed. Reg. at 9223. Several tribes, including the Shoshone-Bannock Tribes, have recently voiced considerable displeasure with these guidelines.

support of the Committee of Nine is also a critical prerequisite for Idaho supporting the Agreement.

C. Article 4 (Definitions).

Article 4 contains a glossary of terms used in the Agreement. Most of the terms are self-explanatory. Consequently, discussion here is limited to those terms which are unusual or controversial.

- 4.3 "Allotted lands," refers to those lands which were allotted to individual Indians in severalty, pursuant to the General Allotment Act and other statutes. These lands may be held in fee status by the individual Indian or in trust by the United States for the benefit of the individual Indians. The Agreement quantifies water to irrigate all Indian lands within the reservation, including allotted lands which are held in fee or trust status.
- 4.8 "Beneficial use" has been defined to include a broad array of uses. It is used primarily in provisions of the agreement involving transfers of the tribal water right, which permit the right to be transferred to another beneficial use. See e.g. Article 7.3.4 (off-reservation transfers pursuant to the water bank); Article 7.3.6 (Water Bank purposes); Article 7.5 (on reservation transfers); Article 7.6 (changes of Snake River points of diversions). This definition is intended to ensure that any limitations which may be contained in Idaho law do not apply or restrict in any way the uses to which federal water rights may be put. There exists no statutory definition of "beneficial use" in Idaho law.
- 4.10 "Ceded lands" are those lands which were once within the reservation, but which have been ceded to the United States pursuant to certain agreements and statutes. Some lands in the ceded area remain as Indian lands, either because they were never sold or because they have been reacquired by the Tribes. See e.g. Article 7.2.1.x.d. The definition is also relevant to the tribes rights to claim instream flows to fulfill their reserved hunting, fishing, grazing and timbering rights which they have reserved pursuant to certain cession agreements.
- 4.11 "Committee of Nine" is not a legal entity, but rather an advisory committee of private, non-Indian water users in Water District 01, which encompasses the Upper Snake River Basin above Milner Dam. Although the Committee of Nine has no legal authority to bind any private water user, it is composed of the representatives of the nine

largest irrigation companies and accordingly has a great deal of political clout in the State of Idaho.

- 4.14 "DCMI" is a short-hand expression used to refer to domestic, commercial, municipal and industrial uses of water. It excludes agriculture, instream flows, hydroelectric generation and other uses.
- 4.19 "Fort Hall Indian Reservation" is defined by the 1868 Treaty, companion executive orders, and fixed by a federal survey. It excludes those lands ceded by the various cession agreements. The legal description of the reservation was not set forth because of a desire by the parties not to attempt to resolve a boundary dispute between the Tribes and the State. See Article 11.1.10.
- 4.20 "Fort Hall Indian Irrigation Project" is the Bureau of Indian Affairs administered irrigation project which serves both Indian and non-Indian lands within the and adjacent to the Reservation. The definition lists numerous federal statutes authorizing or affecting the Project.
- 4.22 and 4.23. There are two state agencies in Idaho which deal with water. The Idaho Department of Water Resources (IDWR) is the entity responsible for issuing permits to use water, and is the lead agency responsible for prosecuting the adjudication. The Idaho Water Resources Board is a policy making body, which is responsible for, among other things, negotiating with the United States to settle its reserved water right claims. The Director of the IDWR (defined in Art, 4.15) reports to the Governor. The Board is composed of appointees from both parties, Republican and Democratic.
- 4.24 and 4.27 "Impairment in the quality of water," and "Injury to a water right" are defined solely for the purpose of changes in points of diversion or period of use of the Snake River and Sand Creek water right described in Article 7.1.1. Article 7.6 permits changes in points of diversion of that right if, inter alia, other water rights are not injured. Article 4.27 defines "injury to a water right" to mean "a diminishment in quantity or an impairment in the quality of water available to a senior or junior water right holder * * * ." The definition is intended to be fairly broad, defining impairment to mean that the impaired water right is no longer useful for its intended purpose. No attempt is made to tie this definition to applicable water quality standards. It is unclear whether these terms could also apply to Article 7.3.2 which provides

that while the federal contract storage space may be used to irrigate up to 33,938 acres, that storage right may also be used to irrigate more than 33,938 acres only " if no other water rights are injured thereby." Given the marketing opportunities and the limits on diversion rates and consumptive use associated with this right, it is quite unlikely that this issue will ever arise.

- 4.25 and 4.26 are fairly non-controversial definitions of "Indian" and "Indian lands." Indian lands is specifically defined to include those lands within the Fort Hall Indian Reservation which are held in trust for the Tribes or owned by Indians as well as those lands outside the Reservation which are held in trust for the Tribes or an enrolled member thereof. This definition is particularly important to the disclaimer in Article 10.4
- 4.30 "Michaud Contract" refers to a memorandum of understanding entered into between the Bureau of Indian Affairs and the Bureau of Reclamation interpreting the tribal water rights as affected by the Michaud Act, Act of August 31, 1954, c. 1159, 68 Stat. 1026, which authorized the "Michaud Division" of the Fort Hall Indian Irrigation Project. The significance of this agreement is that it recognizes that, in the 1954 Act, Congress waived, on behalf of the Tribes, that portion of the Tribes' reserved water rights which would be used on the Michaud Division in exchange for the Tribes obtaining storage space in American Falls Reservoir (46,931 AFY) and Palisades Reservoir (83,900 AFY), which would be used to irrigate up to 21,000 acres. The Tribes consented to this exchange by Tribal Ordinance No. 1-FY-57, August 31, 1956. Under this Agreement, the Tribes may market the water accruing to this space. See Article 7.3
- 4.43 "Rent" refers to the ability of the Tribes to market a portion of their water accruing to the storage space in American Falls and Palisades Reservoirs, pursuant to state law and this Agreement. "Rent" is synonymous with the term "lease" which is more commonly used in other states. Rent is used here because that term is used exclusively in Idaho law.
- 4.47 "Shoshone-Bannock Water Bank" refers to the entity to be created by the Tribes, and approved by the Idaho Water Resources Board, which will be authorized to rent the tribal storage space. See Article 7.3.
- 4.49 "Snake River Watermaster" refers to the individual who maintains water right records for the mainstem of the

Upper Snake River, also known as Water District 01. The term is used only in Article 8.3. He is elected by the water users, subject to removal by the Idaho Department of Water Resources. I.C. 42-607. He is responsible for administering water rights on the mainstem of the Snake River, which essentially involves complex bookkeeping to determine how much water is available for use from both natural flow and stored water.

- 4.55 "Tribes" means the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation only. Any reference to "the Tribes" or the "United States as trustee for the Tribes" refers only to these tribes, and not for other tribes in Idaho.
- 4.57 "Upper Snake River Basin" means, for purposes of this Agreement only, the portion of the Snake River Basin located upstream from the Hells Canyon complex of dams operated by Idaho Power Company. This definition was fairly contentious because it relates to Articles 10.4 and 15.1 which preclude the assertion by the Tribes, or the United States on their behalf, of any other water right claims in the Upper Snake River Basin. In particular, the Shoshone-Bannock Tribes assert instream flow water rights for the benefit of their off-reservation hunting and fishing rights. Under the Agreement, they would be unable to assert those rights in the Upper Snake River, but all parties understand that claims will be asserted in the lower Snake River below Hells Canyon Dam, including the tributaries such as the Salmon and Clearwater Rivers. The United States is not precluded from asserting water rights in the Upper Snake River on behalf of other tribes or on behalf of other federal agencies.
- 4.58 "Water District 01" refers to an administrative district established by the Idaho Department of Water Resources to administer adjudicated water rights. Water District 01 includes the mainstem of the Snake River above Milner Dam, and is the major agricultural area of the State. The Committee of Nine represents the major water users in this district. The district employs a water master whose function it is to account for water use in accordance with water decreed water rights. See Definition 4.49 discussed supra.
- 4.59 "Walton right" refers to the rights which may be asserted by non-Indian successors to an Indian allottee. Under applicable authority, such non-Indians are entitled to a water right with a date of reservation priority measured by the amount of water necessary to irrigate

the lands which the Indian allottee/seller was irrigating at the time the allotment was conveyed plus any lands which were brought under irrigation by the non-Indian purchaser exercising due diligence, normally within five years. The term is used in the savings clause found in Article 11.1.8 which provides that nothing in the agreement is intended to "quantify or otherwise determine Walton right claims that may be made in the SRBA."

D. Article 5 (Parties and Authorities).

Generally speaking, State negotiators were extremely reluctant to put language in regarding the authority of various elected officials to sign the Agreement and thereby bind State. In fact, one of the contingencies of this Agreement is the ratification of this Agreement by the Idaho legislature. In particular, we insisted for some time that the Director of the Idaho Department of Water Resources must sign the Agreement as well as the Attorney General and the Governor, or at least agree to be bound by the Governor's signature, who appointed him. The Director refused, asserting that he had some statutory power that he could not legally give up by signing the Agreement. The State was never able to explain what those powers were except to note that, pursuant to state law, the Agreement must be submitted to the Director who will abstract it and then send it on to the Court. See Article 10.1 and I.C. 42-1411 (Supp. 1989). State negotiators have assured us, however, that if the legislature ratifies the Agreement, that action will bind the Director as well and preclude any efforts by him to modify or scuttle the Agreement. We will endeavor to make sure that the state legislature does in fact accomplish this goal.

With that background, the state authority provisions are relatively straightforward.

Article 5.1 states that the authority of the Governor to execute the Agreement is found in the Idaho Constitution, Art. IV, sec. 5 and Idaho Code sec. 67-802 (Supp. 1989). Article 5.2 provides the authority of the Idaho Attorney General to settle litigation, which is found in the Idaho Constitution, Art. IV, sec. 1 and Idaho Code sec. 64-1401 (Supp. 1989). Article 5.3 states that the Idaho Water Resources Board has authority to execute the Agreement pursuant to Idaho Code sec. 42-1734 (Supp. 1989) and two executive orders which designate the Board as the negotiator for the State of Idaho.

Tribal authority to execute the Agreement (Article 5.4) resides in the Fort Hall Business Council, which performs both legislative and executive functions pursuant to the Tribes' constitution and bylaws. Although it is likely that the Business Council has authority to bind the Tribes, approval of the Agreement will nevertheless be submitted to the membership of the Tribes for ratification.

United States authority to execute the Agreement primarily resides in the authority of the Attorney General to conduct and settle litigation. 28 U.S.C. sec. 516-517. See Article 5.6. Authority of the Secretary of the Interior to execute the Agreement is somewhat more ambiguous, (see Article 5.5) but inasmuch as the Agreement is to be submitted to Congress for ratification, that action should eliminate any ambiguities. Until the court has entered a final decree confirming the water rights described in this Agreement, and until the parties' legislative bodies ratify the Agreement and appropriate necessary funds, this Agreement is merely a non-binding political document. See Article 18.1.

The Committee of Nine (Article 5.7) is not a legal entity but merely an advisory committee. Nevertheless, its advice is extremely important to Idaho politically, and its support of this Agreement is very important in minimizing any opposition to this Agreement which it might face in judicial or legislative forums. Signatures of the representatives of the Committee of Nine do not legally bind any water users, however.

E. Article 6 (Tribal Water Right For Present and Future Use).

Article 6.1 makes clear that the Winters Doctrine, see Part II "Legal Basis For The Indian Water Rights" at page 4, supra, is the basis for the Tribes' rights to use waters "arising on, under, flowing across, adjacent to, or otherwise appurtenant to the Reservation."

Article 6.2 quantifies the Tribal water right for present and future uses in the Upper Snake River Basin as an annual diversion of 581,031 AFY from the Snake River Basin for irrigation, DCMI, instream flow, hydropower and stockwater purposes as more specifically identified in Article 7, infra. None of the Tribal water rights can be deemed relinquished, forfeited or abandoned because of nonuse. Also see Article 7.3.11, infra, which is a similar provision applying to the Tribes' rental of their contract storage water rights. The actual water available to the Tribes will generally be less than the 581,031 AFY since 130,831 AFY of that total is storage space in American Falls and Palisades Reservoirs, see Article 7.3, infra, which produces less than 100% yield in "dry" years.

F. Article 7 (List of Tribal Water Rights)

Substantively, Article 7, is the single most important Article in the Agreement. It was, therefore, the most time consuming to negotiate, requiring extensive work by and meetings among the various technical experts, as well as the negotiators, representing the Tribes, the United States, the State, and the Committee of Nine.

Article 7 identifies and quantifies, with priority date, each of the discreet surface water (7.1) and groundwater (7.2) rights which collectively comprise the total Tribal water right of 581,031 AFY, see Article 6, supra; establishes the annual diversion volume, diversion rate, annual volume of consumptive use, specific points of diversion, purpose of use, period of use, place of use, and the specific basis or bases, e.g., Winters doctrine, for each right; provides for the Tribes' use of water accruing to 130,831 AFY of contract storage space in the Bureau of Reclamation's American Falls and Palisades Reservoirs (7.3); authorizes the Tribes to establish their own water bank within certain confines of Idaho law, and to market water under certain of their water rights (7.3 and 7.5); establishes the Tribes' right to use water for instream flow purposes (7.4); provides procedures for the Tribes to change the point of diversion or period of use for their mainstem Snake River water right (7.6, 7.7 and 7.8); authorizes the Tribes to generate hydropower as an incident to diversions of water for other purposes (7.11); and allows the Tribes to construct, operate and maintain future storage projects or reservoirs within the Reservation (7.12). It should be noted that the majority of the water rights identified in the Agreement as Tribal water rights are currently held by the United States for the Fort Hall Indian Irrigation Project.

One provision of Article 7 which may raise some concern is 7.9, which prohibits the Tribes from marketing any water except as expressly provided for in the Agreement. The Department of the Interior's negotiating team was advised that staff of the Senate Select Committee on Indian Affairs had cautioned against sending to the Congress any agreement which would restrict the Tribes' future ability to market water. This provision, 7.9, is a condition insisted upon by the State. However, for the reasons set forth, infra, the Tribes and the federal negotiators believe the marketing abilities specifically provided for in this Agreement make this provision acceptable.

1. Article 7.1 Surface Water Use Rights

a. Snake River and Sand Creek.

Article 7.1.1 establishes the right of the Tribes to divert 100,000 AFY of surface water from the mainstem Snake River, to include usable return flows from Sand Creek. This annual diversion can increase to 115,000 AFY as future lands are put under irrigation by the Tribes, or when lands in the "ceded area" currently served by the Fort Hall Indian Irrigation Project (the Project), are taken out of irrigation production and the water rights are relinquished by the Project.

The diversion rate for this right is 390 cubic feet per second (CFS) to be increased to no more than 470 CFS in proportion to the increase in the annual diversion volume. The annual volume of

consumptive use, under any circumstances, is limited to 60,986 AFY, which contemplates the consumptive use requirement at full development, i.e., diverting 115,000 AFY.

The underlying right is currently held by the United States for the Project, and is for the diversion of 600 CFS from the Snake River at the Reservation Canal. It currently has a priority date of December 14, 1891, under the so-called Rexburg decree. The 390 CFS, increasing to 470 CFS, represents the Indian portion of the Tribal water right.

Under the Agreement, the basis for this Tribal water right is the Winters Doctrine, and the priority date of the executive order establishing the Reservation, June 14, 1867.

The water diverted under this right is to be used for irrigation from March 15 through November 15, on not more than 23,359 (14,687 presently irrigated and 8,672 future) acres of land.

A complicating factor in accounting for this water right is the confluence of Sand Creek with the Reservation Canal, providing surface water flows in addition to those diverted directly from the Snake River. The Sand Creek flows are somewhat unreliable in that they fluctuate to extremes which make it difficult to capture or effectively utilize the water at the most needed times. The waters from Sand Creek which cannot be captured or utilized for Project purposes eventually are captured at American Falls Reservoir.

Historically, the Project has been able to use the Sand Creek water to the extent feasible without any accounting and without crediting against the Project's Snake River diversion. The State and the Committee of Nine insisted that the Tribes be required to account in some way for the Sand Creek water that they utilize, and that those flows be counted as part of the annual diversion volume for this right.

It was asserted by the technical experts that if the Project's Equalizing Reservoir could be rehabilitated and maintained to a capacity of 5,000 AF, approximately 85% of the Sand Creek flows necessary to meet the needs of the Project's North and Main Canals could be effectively utilized. It was estimated that the cost to the Bureau of Indian Affairs to rehabilitate the Equalizing Reservoir would be between five million (\$5,000,000) and fifteen million (\$15,000,000) dollars, based upon 1989 costs. It was further estimated that it would cost approximately \$150,000 per year to maintain the Reservoir, also based on 1989 costs. There is also a real question of whether the Reservoir could, in fact, ever have a capacity of 5,000 acre feet.

A previous draft of the Agreement called for the United States, as part of the federal contribution to the settlement, to pay the cost of rehabilitating the Equalizing Reservoir. This was viewed as a

"program cost," since the reservoir is a facility of the Project.

As an alternative, the Committee of Nine has agreed to an "exchange" of a certain portion of the Sand Creek flows which obviates the need to include rehabilitation of the Equalizing Reservoir as a condition of the Agreement. Under this "exchange," the Sand Creek flows which were utilized by the Tribes, with the control of the Equalizing Reservoir as it existed in 1989, shall continue to be used when the Snake River is under regulation by the Snake River Watermaster, and shall be counted against the Tribes' Snake River diversion volume. Of the remaining Sand Creek flows which the Tribes are unable to utilize and which are returned to the Snake River through the Blackfoot River, 15% shall be deemed "natural flow" and credited to downstream natural flow users. All of the flows in excess of the 15%, up to 50,000 AFY, shall be treated as storage water and delivered to the North Side Canal Company in exchange for an equal amount of the Company's storage water in Palisades or Jackson Lake Reservoirs, which will then be available for use by the Tribes.

The accounting necessary to achieve this exchange will require the installation of gaging stations to accurately measure the Sand Creek flows. The cost of installation and maintenance of these gaging stations will be covered as part of the funds provided for the Tribal water management system under Article 13.2, infra.

b. Ross Fork Basin Surface and Groundwater.

Article 7.1.2 gives the Tribes the right to annually divert up to 5,000 AFY in combination from Ross Fork Creek surface flows and Ross Fork Basin groundwater sources. The basis for this right is the Winters Doctrine, giving it the Reservation priority date of June 14, 1867. It should be noted that while the State and the private water users do not concede that the Tribes are entitled to a reserved or Winters right priority date for groundwater, they have agreed to such for purposes of this Agreement.

The water diverted under this right is to be used for irrigation of 1,503 presently irrigated and future acres from March 15 through November 15, and consumptive use is limited to 3,320 AFY. Any diversions from either surface or groundwater in excess of the total right of 5,000 AFY will be charged against the Tribes' general groundwater right. See Article 7.2.1, infra.

c. Lincoln Creek Surface and Groundwater.

Article 7.1.3 is the right to annually divert 5,700 AFY in combination from Lincoln Creek surface flows and Lincoln Creek Basin groundwater sources. The basis for the right is the Winters Doctrine, with a priority date of June 14, 1867.

The water is to be used for irrigation of 1,701 presently irrigated

and future acres from March 15 through November 15, with the consumptive use limited to 3,768 AFY. Diversions in excess of the total right of 5,700 AFY will be charged to the Tribes' general groundwater right.

d. Bannock Creek Surface Water.

Article 7.1.4 is the right to divert 3,095 AFY of surface water from Bannock Creek. Articles 7.1.4 through 7.1.13 involve rights to Bannock Creek and its tributaries which have been previously adjudicated and decreed by the United States District Court for the District of Idaho in United States v. Daniels (April 7, 1907), the so-called Bannock Creek decree. The basis for the right is the Winters Doctrine, with a June 14, 1867 priority date, but with the caveat that the relative share and priorities of the water allocation are as determined by the Bannock Creek Decree. The water is for irrigation of 774 present and future acres from March 15 through November 15, with a maximum consumptive use of 1,842 AFY.

Article 7.1.5 sets forth the right to divert 629 AFY surface flows from Bannock Creek and the West Fork of Bannock Creek for irrigation of 157 present and future acres from March 15 through November 15, with a consumptive use not to exceed 374 AFY. The basis for the right is the Winters Doctrine; however the priority date is April 1, 1889. There is no known explanation for why the federal district court assigned other than the date of the Reservation as the Winters date. The parties agreed to accept the priority date assigned in the Daniels (Bannock Creek) Decree for this right as well as the priority dates decreed for the rights set forth in Articles 7.1.6 through 7.1.13, infra.

Article 7.1.6 is the right to annually divert 571 AFY surface flow from Rattlesnake Creek to irrigate 143 present and future acres with a maximum consumptive use of 340 AFY. The basis for the right is the Winters Doctrine, with a priority date of April 1, 1892, with relative share and priorities of water allocations as determined in the Bannock Creek Decree, supra. The period of use is March 15 through November 15.

Article 7.1.7 sets forth the right to annually divert 190 AFY from West Fork Bannock Creek for irrigation of 48 presently irrigated and future acres, from March 15 through November 15, and a consumptive use limitation of 113 AFY. The basis of the right is the Winters Doctrine, with a priority date of May 1, 1894.

Article 7.1.8 is the right to divert 248 AFY surface flow from West Fork Bannock Creek for irrigation of 62 present and future acres from March 15 through November 15. Annual consumptive use is limited to 147 AFY. The basis of the right is the Winters Doctrine, with a priority date of April 1, 1894.

Article 7.1.9 is the right to divert 248 AFY surface flow from Bannock Creek. The purpose of use is irrigation and the place of use is 62 present and future acres. The period of use is March 15 through November 15. Consumptive use is limited to 147 AFY. The basis of the right is the Winters Doctrine, and the priority date is April 1, 1894.

Article 7.1.10 sets forth the right to divert 190 AFY from West Fork Bannock Creek from March 15 through November 15, for irrigation of 48 present and future acres. Consumptive use is limited to 113 AFY. The basis of the right is the Winters Doctrine and the priority date is April 1, 1898.

Article 7.1.11 is the right to divert 190 AFY from West Fork Bannock Creek for irrigation of 48 present and future acres from March 15 through November 15. The annual volume of consumptive use is 113 AFY with a priority date of April 1, 1898.

Article 7.1.12 is the right to divert 190 AFY from West Fork Bannock Creek for irrigation of 48 present and future acres (a different 48 acres than those specified in 7.1.11) from March 15 through November 15. Annual consumptive use cannot exceed 113 AFY. The basis for the right is the Winters Doctrine, and the priority date is April 1, 1901.

Article 7.1.13 is the right to divert 18,833 AFY from Bannock Creek. The water is to be used for irrigation of 4,708 presently irrigated and future acres from March 15 through November 15. Consumptive use is limited to 11,205 AFY. The basis for the right is the Winters Doctrine, with a priority date of June 14, 1867.

e. Portneuf River and Jeff Cabin Creek.

Article 7.1.14 is the right to divert 970 AFY from the surface flows of the Portneuf River and Jeff Cabin Creek for irrigation of 485 presently irrigated and future acres. The consumptive use is limited to 727.5 AFY. The basis of the right is the Winters Doctrine, and the priority date is June 14, 1867. The period of use is April 1 through November 1, some 30 days shorter than for other rights because of the higher elevation of the lands irrigated under this right.

f. Toponce Creek.

Article 7.1.15 is the right to divert 259.3 AFY surface flows from Toponce Creek. The water is to be used for irrigation on "Allotment 61", of 79.53 acres. The period of use is year around, January 1 to December 31. The basis of the right is the Winters Doctrine per United States v. Hibner (the Hibner Decree), 27 F.2d 909 (D. Idaho, E.D., 1928, decree dated April 8, 1929). The priority date is February 16, 1869.

Article 7.1.16 is the right to divert 282.5 AFY from Toponce Creek for irrigation of 86.67 acres of "Allotment 71" year round. The annual volume of consumptive use is limited to 168.14 AFY. The basis of the right is the Winters Doctrine per the Hibner Decree. The priority date is February 16, 1869.

g. Mink Creek.

Article 7.1.17 is the right to divert 104.3 AFY from Mink Creek for irrigation of 31.75 acres of "Allotment T-8" from March 15 through November 15. The annual volume of consumptive use is limited to 62.1 AFY. The basis of the right is the Winters Doctrine per the decree in Smith v. City of Pocatello, No. 6669 (5th Jud. Dist., Bannock County, June 5, 1926). The priority date is February 26, 1869.

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 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 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 is insufficient to satisfy this right, the Tribes may satisfy this right by using the rights described in 7.1.19 and 7.1.20, infra and by diversion of groundwater within 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.

The Tribes and the United States also agree to protect the contract entitlements of the non-Indian water users served by the Project from the Blackfoot River source. This language is not a subordination of the Tribal water right to the project users, but merely reflects the agreement of the parties not to interfere with the delivery of project entitlements such as by relocating the reservation canal works to the detriment of the project users. Under the Agreement, however, the Tribes will receive water with the 1867 priority date while the non-Indian water users will receive water pursuant to the priority date obtained by the Project under state law.

Article 7.1.19 is the right of the Tribes to divert and store for purposes of irrigation 348,000 AFY in Blackfoot Reservoir. The diversion to storage may occur year around. The water may be rediverted for irrigation from March 15 through November 15 under the right described in 7.1.18, supra, with all the conditions attendant thereto. The basis for this storage right is the license acquired by the United States pursuant to the Act authorizing the Fort Hall Indian Irrigation Project, with a priority date of September 3, 1907. The Tribes and the United States agree to exercise the storage right so as not to impair the Project entitlements of the non-Indian water users.

Article 7.1.20 is the right to divert 100,000 AFY for storage in Grays Lake on a year round basis. The water may be rediverted for irrigation from March 15 through November 15 to satisfy the Tribal water right described in 7.1.18, supra, with all the conditions specified under that right. Again, the Tribes and the United States agree that in the exercise of this right the Project entitlements of the non-Indian water users will not be impaired.

The bases for this right are Permit Nos. 14247 and R-1161 acquired under State law by the United States pursuant to the Fort Hall Indian Irrigation Project Act, establishing a priority date of August 23, 1919. While there is documentation to indicate that the United States purchased land and water rights in 1908, with the water permitted as early as 1906, these rights were apparently not perfected by the Bureau of Indian Affairs (BIA) until years later. The major concern was to document to the satisfaction of the State a priority date senior to that for American Falls Reservoir. The agreed upon date of August 23, 1919 accomplishes that objective and is consistent with State Permit Application No. 20026 which was filed on behalf of the Project on that date and with State Permit No. 14247 which was issued September 12, 1919. According to BIA records, this permit was challenged by the Quigg Irrigation Company and upheld by the U.S. District Court in 1923. It does leave the Tribal water right junior to several natural flow users on Willow Creek; however, their priority dates are earlier than 1906, so would remain senior even if we could satisfactorily document our earliest possible priority date, short of a Winters date to which the State and Committee of Nine will not agree.

2. Article 7.2 Groundwater Use Rights.

Article 7.2.1 is the Tribes' general groundwater right to divert up to 125,000 AFY from various points within the Reservation: 115,000 AFY to be used for irrigation of 42,592 present and future acres from March 15 through November 15; and 10,000 AFY for present and future DCMI purposes on any Indian lands year around. Consumptive use is limited to 93,615 AFY.

If the Tribes' combined surface water and groundwater diversions from the Ross Fork Creek Basin exceed 5,000 AFY, or from Lincoln Creek Basin exceed 5,000 AFY, the excess diversions will be charged against this general groundwater right. See Article 7.1.2 and 7.1.3, supra.

The nine wells used to supplement surface water diversions for the Michaud Division of the Project are included within this right. The twenty six unsold lots within the City of Pocatello are Indian lands and can be served under this right, as can Allotment Nos. 45, 46, 48, 50, 60, and 71 within the Portneuf River Basin.

The basis for this right is the Winters Doctrine, and the priority date is June 14, 1867.

Article 7.2.2 is the right to divert 23,500 AFY from the Bannock Creek Basin for irrigation of 8,704 future acres from March 15 through November 15. Consumptive use is limited to 17,843 AFY. The basis for the right is the Winters Doctrine, and the priority date is June 14, 1867.

The Tribes are given the right to the annual yeild of the Bannock Creek Basin up to a combined surface water and groundwater diversion of 48,500 AFY. If the combined diversions from the Basin exceed 48,500 AFY, the excess will be charged to the general groundwater right, 7.2.1, supra.

The Tribes and the United States agree to protect the existing non-Indian groundwater uses within the Bannock Creek Basin, currently estimated to be 2,400 AFY, as those rights are decreed in the Snake River Basin Adjudication. If the decreed rights exceed the 2,400 AFY estimate, the parties agree to negotiate an equitable adjustment of the Tribal right.

3. Article 7.3 Federal Contract Storage Rights Held in Trust by the United States for the Benefit of the Tribes.

Article 7.3.1 describes the rights currently held by the United States for the Michaud Division of the Fort Hall Indian Irrigation Project to contract storage space in American Falls and Palisades Reservoirs, both operated by the Bureau of Reclamation. These contract storage rights are equivalent to 46,931 AFY of storage space in American Falls Reservoir and 83,900 AFY of storage space

in Palisades Reservoir. Of the 21,000 acres in the Michaud Division for which this space is currently allocated by the Michaud Act, all but 187.7 acres are Indian lands. Under the Agreement, this contract storage space is a component of the Tribal water right.

Article 7.3.2 gives the Tribes the right to use the water accruing to the contract storage space to irrigate up to 33,938 present and future acres of Indian lands, with a consumptive use not to exceed 79,542 AFY. It also provides that Indian lands in excess of 33,938 acres may be irrigated subject to the notice provisions of Article 7.7, infra, and provided that no other water rights are injured.

Article 7.3.3 provides that the current practice of exchanging water accruing to the contract storage space for diversions from the Portneuf River under the Michaud Contract will be continued. The Tribes can identify the storage space, i.e., American Falls or Palisades, to be used for the exchange. In the event no specific identification is made, the water used in the exchange will be credited first against the Tribes' space in Palisades Reservoir. Historically, this exchange has involved approximately 35,000-40,000 AFY.

4. Article 7.3.4 Tribal Water Bank.

Article 7.3.4 gives the Tribes the right to create their own water bank consistent with the provisions of Idaho Code Sections 42-1761 through 42-1765. Those sections generally : (1) give the Idaho Water Resources Board the responsibility to operate a "water supply bank" for the purpose of making use of and obtaining the highest duty for beneficial use from water, providing a source of water to benefit new and supplemental uses, and providing a source of funding for improving facilities and efficiencies; (2) direct the Water Resources Board to adopt rules and regulations for governing the water supply bank; (3) provide for approval of any lease or rental of water by the Director of the Department of Water Resources; and (4) authorize the Water Resources Board to appoint local committees to facilitate water marketing.

Presently there are only two water banks in Idaho; the District 01 Water Bank which is the principal water marketing entity, and a recently created water bank on the Boise River drainage. The creation of a water bank by the Tribes is to facilitate their right under this Article to rent for any beneficial use outside the Reservation all or any part of the water accruing to the storage space in American Falls and Palisades Reservoirs, see Article 7.3.1 supra, that is not used on Indian lands (7.3.2) or exchanged for Portneuf River flows (7.3.3).

Water accruing to storage space in Palisades Reservoir may only be marketed above Milner Dam. Water accruing to storage space in American Falls Reservoir can be marketed and delivered for use in

the Snake River Basin anywhere within Idaho. Under this latter delivery into the Lower Snake River Basin, below the Hells Canyon complex of dams, for purposes of anadromous fish flows, hydropower, etc. In fact, several entities, including the Bonneville Power Administration (BPA), are expressing interest in purchasing water to enhance fishery flows in the Lower Snake River.

This right coupled with the Tribes right to transfer or rent (lease) within the Reservation all or any portion of the Tribal water rights in Article 7 subject to certain conditions, see Article 7.5, infra, gives the Tribes a significant and viable water marketing capability, enabling them to realize value from their water rights received in the Agreement, an objective expressed in the "Preamble" to the Criteria and Procedures for Indian Water Rights Settlements, discussed, supra.

Article 7.3.5 provides that the Tribes marketing of the federal contract storage water rights will not be limited by the Michaud contract, except for continuing the exchange described in Article 7.3.3, supra; by any reduction in the quantity of water available under any other existing water rights, or any conflict with public welfare or local public interest since such reductions and conflicts are already mitigated by the United States' commitment with regard to seeking, on behalf of the Committee of Nine, the unallocated storage space in Palisades and Ririe Reservoirs, see analysis of Article 12.3, infra; or any refill penalty which might otherwise result from renting water from American Falls Reservoir for delivery or use below Milner Dam. The latter is important because it permits the Tribes' to exercise their right to market water into the Lower Snake River Basin without being penalized by having to go to the "end of the refill priorities line."

Article 7.3.6 is a statement of the purposes of the Tribes' water bank and is self explanatory. The Tribes wanted such a provision in the Agreement.

Article 7.3.7 provides for the establishment of a "Tribal Rental Pool Committee" to operate the Tribal water bank. The committee is to be composed of six individuals: the Superintendent of the Bureau of Reclamation's Minidoka Project, the Snake River Watermaster, the Reservation Watermaster, and three other persons designated by the Chairman of the Fort Hall (Shoshone-Bannock) Business Council. The organization of the committee can be changed only by mutual agreement of the Tribes, the United States and the State.

Article 7.3.8 states the responsibility of the Tribal Rental Pool Committee to determine and establish priorities for the rental of water from the Tribes' water bank. The water users within the Project are given the right of first refusal for any water to be rented (leased) through the water bank.

Article 7.3.9 gives the Tribes the right to assign any of their available water rights for rental through any other water bank authorized by Idaho above Milner Dam, currently only the District 01 Water Bank, on the same terms and conditions as any other water users. This provision merely gives the Tribes an alternative marketing source. Conversely, no other water bank established in Idaho will have the authority to participate in the Tribal water bank.

Article 7.3.10 provides that legislation will be enacted to make clear that the proceeds derived by the Tribes from marketing their water will be exempt from State and federal taxation. The language makes clear that insofar as federal taxation is concerned, exemption cannot be accomplished by the Departments of Interior and Justice, but must be accomplished through legislation.

Article 7.3.11 makes clear that the Tribes' renting (leasing) of the water accruing to the storage space in American Falls and Palisades Reservoir will not under any circumstances constitute forfeiture, abandonment, relinquishment or other loss of the attendant water rights. The Tribes will not be subject to any constraint on the amount of income or other compensation they may receive from renting (leasing) their storage water.

7.3.12 is a "hold harmless" provision for the State and the United States for any financial loss which may be suffered as a result of any rental of water from the Tribes' water bank. The State is given the responsibility for delivery of any water rented (leased) from the Tribes' water bank within any established water district.

5. Article 7.4 Instream Flows on and Adjacent to the Reservation.

Article 7.4.1 authorizes the Tribes to use otherwise available water from the American Falls and Palisades contract storage space, see Article 7.3.1, supra, for instream flow purposes for river reaches on or adjacent to the Reservation. The limitation imposed does not preclude the Tribes from marketing water from the contract storage space for instream flows in the Lower Snake River to augment fish flows or for hydropower generation.

Article 7.4.2 gives the Tribes the right to use the natural flows of all sources arising within and traversing only Reservation lands for purposes of instream flows within the Reservation.

Article 7.4.3 gives the Tribes the right to use up to 15,000 AFY of their storage water in Blackfoot Reservoir and Grays Lake, see Article 7.1.19 and 7.1.20, supra, for instream flows in reaches of the Blackfoot River. Before doing so, however, they must give notice as required by Article 8.5, infra.

6. Article 7.5 Transfers Within the Reservation.

Article 7.5 gives the Tribes the right to transfer of rent (lease) within the Reservation any of the water rights confirmed to them in Article 7. However, such right can only be exercised if the proposed transfer: is to a beneficial use, see definition 4.8, supra (7.5.1); will not result in exceeding the maximum diversion rate for the particular water right (7.5.2); does not result in exceeding the annual diversion volume (7.5.3) or annual volume of consumptive use for the water right (7.5.4); is to a place of use within the Reservation, except that the Ross Fork Creek Basin water rights set forth in Article 7.1.2, the Lincoln Creek Basin water rights set forth in Article 7.1.3, and the Portneuf River/Jeff Cabin Creek water rights set forth in Article 7.1.14, are restricted to use only within their respective basins (7.5.5); and does not change the source except as otherwise expressly provided in Articles 7.1.2, 7.1.3, and 7.1.18, which specifically permit alternative use of surface and groundwater sources for those water rights.

Article 7.6 provides for the Tribes to change the points of diversion and period of use associated with their mainstem Snake River water right, see Article 7.1.1, supra, provided that any result in exceeding the maximum diversion rate (7.6.1); does not result in exceeding the annual diversion volume (7.6.3) or annual volume of consumptive use (7.6.4); and does not result in an injury to a water right, see definition 4.27, supra (7.6.5).

Article 7.7 requires that when the United States, in operating the Project, or the Tribes intend to change a point of diversion, add a point of diversion, or change a period of use associated with the mainstem Snake River water right, Article 7.1.1, they must, not later than 120 days prior to the proposed change, serve notice on each member of the Intergovernmental Board, see Article 9, infra, and publish the notice at least once a week for two consecutive weeks in an appropriate newspaper. The notice must indicate: the amount of water in AFY or CFS that is to be changed, including any reductions at any existing points of diversion (7.7.1); the legal descriptions of any new or changed points of diversions, including any that will be no longer be used as a result of the change (7.7.2) ; the period during which water will be used or existing uses will be reduced (7.7.3); and that any person who believes an injury to his or her water right will result from the proposed change may, within ten days of the last date of notice or publication, file an objection with the Intergovernmental Board (7.7.4)

Article 7.8 provides that any person claiming injury to a water right resulting from a change under 7.6 must first seek mediation before the Intergovernmental Board before seeking judicial relief. In any administrative or judicial proceeding the burden of proof is upon the person claiming injury to his or her water right (7.8.1).

The Intergovernmental Board must first attempt to mediate any objection made to the proposed change by reviewing all relevant data and information and making a recommendation as to resolution; if the Board determines that injury will occur, it shall address whether the injury can be mitigated in a way that will still allow the Tribes to accomplish the purpose of the change (7.8.2). If the Board fails to satisfactorily mediate the dispute, the objector may seek appropriate judicial relief (7.8.3).

Article 7.9 prohibits the Tribes from marketing or transferring any of their water rights off the Reservation, except the federal contract storage rights in American Falls and Palisades Reservoirs as expressly authorized in Article 7.3, supra. This prohibition was hotly negotiated and was traded off by tribal and federal negotiators for other benefits, including the ability of the Tribes to create their own water bank to market the water accruing to their federal contract storage space. As indicated earlier, this provision is likely to be of some interest in the Congress since we have reason to believe that at least some members of the Senate Select Committee on Indian Affairs and Senate Energy and Natural Resources Committee may be hesitant to support any agreement which would limit the Tribes' future ability to market their water rights including their Winters rights. This issue is very controversial and is perhaps the one issue in this dispute which is most likely to engender questions of administration officials by members of Congress.

Initially, the federal and tribal negotiators attempted to obtain a full marketing right for the Tribes, of both their reserved rights as well as their federal contract storage rights, something we have been unable to achieve in other settlements. We argued that there is no limitation expressed in the Winters doctrine which precludes off-reservation marketing, subject to the approval of the United States. See U.S.C. sec. 177. However, the State and the Committee of Nine have consistently opposed off-reservation marketing of reserved rights on philosophical as well as practical grounds. They contend, as does Senator James McClure, that Winters rights were reserved for use only on the Reservation. Moreover, to permit the Shoshone-Bannock Tribes to market their Winters rights here would prove devastating to non-Indian water users in drought years, and would cast a great cloud over future water related economic development throughout Idaho. They have insisted on this provision to make clear that only water accruing to the storage space, i.e., water rights held under state law, can be marketed off-reservation. Moreover, Idaho and its neighbors, Oregon and Washington, are adamantly opposed to proposals by states such as California to purchase water from the Snake River basin for use outside the basin. They consider this issue a "deal breaker."

After due consideration, and much deliberation, it is our view that the inclusion of this provision should not preclude signing the Agreement. This conclusion is based on the fact that the marketing

capabilities given the Tribes in the Agreement as it stands, that is, the right to market any of their water rights within the Reservation, and the right to market water accruing to the federal contract storage space in American Falls and Palisades Reservoirs off-Reservation, are as good as they might reasonably ever expect to have. Practically speaking, the storage water is the water most available for marketing off-Reservation anyway. Ultimately, the matter is one of policy for the Department and, the Secretary must decide that the marketing provisions contained within the Agreement represents a fair compromise on this issue. Thus, all things considered, to lose the Agreement over this issue and engage in costly, protracted, and divisive litigation, which in any event could not alone give the Tribes the marketing rights contained in the Agreement, would be to act solely out of principle and not for the ultimate benefit of the Tribes. The Tribes' representatives to the negotiations are in full agreement that the marketing rights provided, including the right to establish their own water bank, are probably as good as they might ever hope to obtain.⁵

7. Articles 7.10-7.13 Other Uses.

Article 7.10 provides for year around stock watering anywhere on Indian lands from any Tribal water source, except that during the non-irrigation season water may not be diverted for stockwatering from any point off the Reservation.

Article 7.11 gives the Tribes the right to generate hydropower as an incident to delivery of water for any other purpose provided for in the Agreement, including on-Reservation transfers under Article 7.5 supra.

⁵ The only other option would be for the Tribes to await direction from the courts and Congress on this issue, a decidedly risky option. Litigation of this issue would not finally resolve the matter, for even if a court should hold that off-reservation water marketing is not consistent with the Winters doctrine, each tribe would need to have Congress enact legislation waiving the Indian Trade and Intercourse Act prohibitions against selling or leasing tribal property without the consent of the United States. 25 U.S.C. sec. 177. Although Congress has toyed with authorizing the marketing of tribal water rights in recent years, there is a tremendous amount of political opposition to Indians leasing or selling their water rights, especially their Winters rights, which in many cases have never been fully exercised, to buyers located off-reservation. Thus, opponents of water marketing have been able to use tribal water for free and are understandably reluctant to have to pay for it.

Article 7.12 authorizes the Tribes to construct, operate and maintain future storage projects or reservoirs within the Reservation, provided they are not inconsistent with the water rights set forth in the Agreement. Note also Article 11.5.11, infra, with respect to the Tribes' right to participate in future off-Reservation water storage projects within the Upper Snake River Basin.

Article 7.13 provides for a corresponding reduction in the Tribal water rights in the event any allottee or Tribal member is decreed a water right in the Snake River Basin Adjudication for Indian lands associated with the Tribal water rights in the Agreement. That is, the Tribal water right would be reduced if the allottee or Tribal member is granted a water right for lands on the Reservation or otherwise served by the Tribal water rights. It would not be reduced if a Tribal member owns land in another part of the State within the boundaries of the Adjudication and is decreed a water right for that land.

8. Fort Hall Indian Irrigation Project/
Fort Hall Indian Agency Water Rights.

In addition to the tribal water rights, this Agreement will also quantify the rights of the United States for the Fort Hall Indian Agency and for the non-Indian lands within the Fort Hall Indian Irrigation Project. These rights are not described in the attached draft of the Agreement because there remain some technical issues which must be resolved. Once these technical issues are resolved, a description of these water rights will be incorporated into this Agreement and the decree to be entered by the Court.

For the most part, the claims for the Agency and the Project are based on state law and are non-controversial and de minimis in quantity. The only claim for a federal reserved water right is for 224 AFY for the Bureau of Indian Affairs' Agency offices for domestic purposes and irrigation of up to 80 acres of lawn and landscaping around the agency buildings. The Agency was specifically authorized by Articles 3 and 5 of the 1868 Fort Bridger Treaty, 15 Stat. 673, and therefore the United States is claiming a priority date of July 3, 1868. All other rights for the Agency are used in conjunction with the operation of the project (e.g., cooling project pumps, providing domestic water for homesite for Portneuf pump house, etc.) and take whatever priority date they are entitled to under Idaho law. The water rights for the Fort Hall Indian Agency and the Fort Hall Indian Irrigation project facilities are being finalized by United States' technical representatives and will be appended to this Agreement once they are finalized.

Likewise, water right claims for non-Indian lands within the Fort Hall Indian Irrigation Project are based upon state law. In most states, the United States would not make a claim for the irrigation

of non-Indian lands within a federal irrigation project because state law recognizes the landowner to be owner of the appurtenant water right.⁶ In Idaho, however, the law is different. Idaho courts have consistently recognized that the water right belongs to the entity diverting the water and not to the ultimate water users.⁷ Accordingly, the United States must file claims on behalf of the project to serve the non-Indians within the Project. Pursuant to contracts with the Bureau of Indian Affairs, those non-Indian water users are entitled to receive their share of water available under the project water right, so long as the water user has paid his or her assessments for construction, operation and maintenance of the project.

The water rights for the non-Indian water users within the project currently served by water rights awarded in the Rexburg decree, are also being reviewed by the United States' technical representatives and will be appended to this Agreement once they are finalized. All parties have agreed that the water requirements of the non-Indians within the project will be 60,000 AFY from the Snake River with a 1891 priority date and 22,000 AFY from the Blackfoot Reservoir with a 1907 priority date to irrigate approximately 13,221 acres. The water needs of the non-Indians are in addition to the Tribal water rights, and the number of acres to be served is dependent upon verification of the actual number of acres being served by the project.

⁶ See Nevada v. United States, 463 U.S. 110 (1983) (under Nevada law, water users own water rights, not the Bureau of Reclamation); Ickes v. Fox, 300 U.S. 82 (1937) (Washington law provides that water right is appurtenant to the land). Accord, Prosole v. Steamboat Canal Co., 140 P. 720 (Nev. 1914); Slosser v. Salt River Valley Canal Co., 7 Ariz. 376, 65 P. 336 (); Wright v. Irrigation Co., 27 Colo. 313, 61 P. 603 ().

⁷ See Idaho Const., Art. 15 (concerning water appropriated "for sale, rental or distribution"); American Falls Reservoir Dist. No. 2 v. Crandall, 82 F.2d 973, 975-976 (9th Cir. 1936) (Bureau of Reclamation owns water right for Reclamation project and is therefore an indispensable party); Washington County Irrigation Dist. v. Tallboy, ___ Idaho ___, 43 P.2d 943, 945 (1935) (waters in reservoir are property of the appropriator and owner of the reservoir); Nampa & Meridian Irrigation Dist. v. Barclay, ___ Idaho ___, 47 P. 2d 916, 918 (1935) (water "consumers" have no water rights; ditch owner owns right and must defend it in litigation); Farmers Cooperative Ditch Co. v. Riverside Irrigation Dist., 14 Idaho 450, 94 P. 761 (1908) (ditch owners are appropriators and owners of water rights, not "water consumers.>").

F. Article 8 (Administration of the Federal/Tribal Water Rights).

As has been the case in other water right settlements, the issue of administration here has been one of the most contentious issues. The problem is rooted in the tensions inherent in the federal system. The issue, simply stated, is whether and to what extent the State of Idaho may control tribal and federal water use.

Our position throughout the negotiations has been clear. Under the McCarran Amendment, Congress has consented to be sued in two types of cases: (1) a suit for the adjudication of water rights; and (2) a suit for the administration of water rights which have been adjudicated. 43 U.S.C. 666; South Delta Water Agency v. United States et al., 767 F.2d 531, 540-541 (9th Cir. 1985) (Court lacks jurisdiction under McCarran Amendment in absence of prior general stream adjudication); Colville Confederated Tribes v. Walton, 647 F.2d 42, 53 (9th Cir. 1981) (McCarran Amendment does not "expand the state's regulatory powers over water on a federal reservation."); In Re Rights to Use Water in Big Horn River, 753 P.2d 76, 114-115 (Wyo. 1988) aff'd by an equally divided court sub nom Wyoming v. United States, 109 S.Ct. 2994 (1989) (State Engineer has no authority to administer decreed reserved water right but only to "monitor" the decree; any disputes must be resolved by the court.). The Tribes concur with our position.

The State, however, interprets the McCarran Amendment more broadly to permit state control over federal facilities, at least after the rights have been decreed. In other words, the state believes that its watermaster can direct the United States to operate its facilities in a particular way, and if the United States disagreed, the burden would be upon us to go to court. We politely informed them that if a dispute arose, the burden would be upon the state to seek judicial relief, in accordance with the McCarran Amendment's waiver for "suits for the administration of water rights."

This dispute was extremely difficult to resolve, and in the case of the Blackfoot River, we did not resolve it, but rather agreed to administer the river as it had been administered in the past.

Article 8.1 contains platitudes whereby each party recognizes the governmental powers of the Tribes, the State and the United States, and "agree to cooperate in the administration of water resources." This language is intended to set the tone of cooperation and to minimize the divisive nature of this subject.

1. Administration within the Reservation. Article 8.2 sets out the administrative framework for all water sources within the Reservation, except for the Snake and Blackfoot rivers which are either off-reservation or form the boundary of the Reservation and where there are numerous non-Indian water users. Those two rivers are discussed infra. In general, the Tribes shall administer the

Tribal water rights within the Reservation (8.2.1), pursuant to a tribal water code to be submitted to and approved by the Secretary. (Article 8.2.3). The Tribe will employ a tribal watermaster and establish a tribal water commission to administer water delivery on the reservation. Tribal administration will be assisted financially by up to \$7 million of federal money, paid out over 21 years. See Article 13.2

Pending adoption and approval of the Tribal Water Code, the Secretary is to "temporarily administer the distribution of the Tribal water rights within the Reservation." Article 8.2.4. This is consistent with his authority under 25 U.S.C. sec. 381 "to secure a just and equal distribution [of water for irrigation purposes] among the Indians residing upon any such reservation, * * *." The United States shall also continue to "administer the distribution of the Fort Hall Agency water rights from the point the water is delivered to the project facilities." Article 8.2.5 Both of these provisions essentially maintain the status quo.

There are a few water rights used on lands owned by non-Indians within the Reservation but which are located outside the service areas of the Fort Hall Indian Irrigation Project. Article 8.2.6 provides that these water rights will be administered by the State, although the United States and the Tribes have the right to inspect and monitor those diversions, upon reasonable notice and in accordance with applicable law. Article 8.2.7.

The United States and the Tribes have agreed to install monitoring devices on their diversion facilities, "to the same extent as required of other water users in Idaho." Article 8.2.8. Although legally we cannot be required to do so, monitoring devices are inexpensive and demonstrate our good faith and foster a free and open exchange of information. The parties have also agreed to share information and provide access to each other to monitor and inspect diversions, upon reasonable notice and in accordance with law. See Article 8.2.2 (state inspection of tribal and United States monitoring devices and diversions); and Article 8.2.7 (Tribal and federal inspection of state monitoring devices and diversions within the Reservation); Article 8.3.3 (Mutual access to inspect water monitoring devices and diversions on the Blackfoot River); Article 8.4.3 (United States and Tribal access to state diversions on the Snake River).

2. Administration of the Blackfoot River. Article 8.3 concerns administration of the Blackfoot River. The parties could not agree on how the Blackfoot River has been or should be administered, although everyone agreed that the way it had been operated in the past was satisfactory

A brief description of the hydrology will assist in understanding this dispute. The Blackfoot River arises off the reservation, and flows down the Blackfoot Reservoir which is administered by the

Bureau of Indian Affairs (BIA). Storage from a BIA reservoir known as Gray's Lake also feed into the reservoir into the Blackfoot Reservoir via Clarks Cut. The Blackfoot Reservoir was established in 1907 to store water for use on the Fort Hall Indian Irrigation Project. Below the Reservoir, there are several non-Indian water users, whose rights have historically been administered by the State. Further downstream, the River forms the northeastern boundary of the Reservation, at which point it becomes an integral part of the Fort Hall Indian Irrigation Project. In addition to numerous canals feeding off of the Blackfoot River, the River itself is used to carry water diverted from the Snake River and Sand Creek by the Reservation Canal, which dumps water into the Blackfoot River for diversion by the project downstream.

Historically, there have been very few disputes between the State and the United States regarding the administration of the Blackfoot River. There are two watermasters -- one from the State and one from the Bureau of Indian Affairs -- and they have an excellent working relationship. As the Fort Hall project Superintendent explains it, the two watermasters communicate on a daily basis during the irrigation season, and work out any disputes. For example, if the state water users need water to be released from Blackfoot Reservoir to meet their water entitlements, the State watermaster so requests the Bureau of Indian Affairs water master. Likewise, if the Fort Hall Project requires additional water, then it would request the state watermaster to close headgates which might interfere with the project water rights.⁸ Neither watermaster assert control over the other, and should a dispute arise, it is understood that the matter would have to be decided by a court.

Although it was agreed that the status quo was satisfactory, the negotiating parties could not agree as to what the status quo was. The United States and the Tribes agreed that the river was jointly administered by the State and Federal watermasters, as described above. Idaho would not agree to put that status quo in writing, presumably in order to assert state control over the federal reservoir and diversion facilities. Idaho's main argument was that there should only be "one cop" on the river. We could not agree that the "cop" should be the State, inasmuch as the BIA controls Blackfoot Reservoir, Grays Lake, and the project diversions.

⁸ As a practical matter, the state watermaster actually does very little in the way of enforcement of state water rights. The Fort Hall Project Superintendent described one instance where a non-Indian was stealing water that should have gone to the Project. A request was made to the state watermaster and the Director of the Idaho Department of Water Resources and neither would shut down the offending water user. Finally, the BIA requested litigation to be filed, but the request was delayed in the Regional Solicitor's office.

Several new administration schemes were proposed, involving the election of a watermaster and appointment by the Court, but for one reason or another, those options failed to garner the support of all parties.

It was finally agreed to compromise on the language contained in Article 8.3. That Article states that while there have been no disputes historically between the State, the Tribes and the United States over the administration of the Blackfoot River, the parties could not agree on their respective authority to administer. Accordingly, to avoid litigation over this issue, the parties agreed "to administer the water rights decreed in the SRBA from the Blackfoot River as water rights from the Blackfoot River have been administered in the past." The parties also agreed to implement a Blackfoot River Water Management Plan, which will set forth the computations to be used to manage the diversion from the river and storage in Blackfoot Reservoir and Grays Lake. The Plan is to be attached as an attachment to the Agreement. The parties have also agreed to install monitoring devices on present and future points of diversion and to provide access for other parties to inspect monitoring devices and diversions. See Article 8.3.2 and 8.3.3.

3. Administration of the Snake River. The question of administration of the Snake River has also been very contentious. See Article 8.4. The disagreement focused upon the diversion point for the Fort Hall Reservation Canal, located on the Snake River, upstream from and outside the boundaries of the Reservation. The land and the diversion works were acquired by the United States in 1907 from the Idaho Canal Company. The parties thought that an agreement had been reached, but it turned out that the agreed upon language was somewhat ambiguous, and more importantly, the Director of the Idaho Department of Water Resources believed it gave him control over the federal project diversion works, at least in the event of a dispute. At that point, we reopened negotiations on this provision to achieve several goals. First, we wanted explicit recognition that the United States had exclusive control to operate project headgates. We could not permit the state to have any authority to adjust or fasten project headgates or other diversion works, whether on the reservation or not. There is no legal authority for such control.⁹ Second, while we would agree to comply with state watermaster directions or requests which are consistent with the decree, if we disputed such directions the

⁹ The State argued that the McCarran Amendment gave it such control, on the theory that once we are in state court, the United States must comply with all state laws including I.C. sec. 42-607 which authorizes the watermaster to "shut and fasten" headgates. In our view, the waiver of immunity here extends only to consenting to state suits, and does not waive other constitutional immunities from state regulation and taxation.

dispute would have to be resolved by a court. We could not agree to permit the state to utilize "self-help" in shutting federal headgates absent a court order. The burden would be upon the State to obtain such an order, if we disputed the watermaster's directions. The Director of the Idaho Department of Water Resources, hotly contested this issue, arguing that the United States should not be treated any differently than any other water user. Third, we wanted to define or otherwise limit the definition of the term "administration." In our experience, western states are actively asserting broad administrative authority, which encompasses numerous powers over federal and Indian water rights. We could not abide by the ambiguous and far-reaching use of the term sought by Idaho.

Ultimately, the Director backed down on some points and we agreed to language which meets the United States' needs. First, it recognizes that Idaho has authority to administer water rights in the Snake River, including federal and tribal water rights, up to the point of diversion, in conformance with the water rights as decreed in the SRBA. We have limited the term administration, however, to include water right accounting and ensuring the delivery of water to all users, including the United States and the Tribes. The negotiation team sees this point as a significant victory because other western states have refused to recognize Indian or federal water rights and have refused to shut down other state water users who were interfering with our use.¹⁰ The state expressly lacks authority to operate the United States' diversion facilities. If there is a dispute regarding the administration of the United States' Snake River diversion, it must be resolved by the state District Court.¹¹ This language does not preclude us from

¹⁰ For example, in New Mexico, the State Engineer granted Plains Electric's application for a permit to change the location of a well over our objections on the grounds that Acoma and Laguna Pueblos had no water rights. The State Engineer would not even recognize Pueblo rights which were arguably valid under state law, as well as federal law. Although we sued him over this failure in state court, the result was unfavorable because the state court deferred to the State Engineer's "expertise."

¹¹ We would have preferred to have the language leave open the option to resolve the dispute in "any court" rather than limit our venue to the state district court. Nevertheless, we recognize that if we sought relief in federal court, the state would likely move to dismiss on abstention grounds, and we would likely be in state court anyway, especially where the dispute involves interpretation of a state court decree. See Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983) (Federal Court should defer to state courts in adjudication

bringing other water related matters to the attention of any court of competent jurisdiction. For example, if a dispute arises between the United States and a project water user over the interpretation of a contract, that would certainly be handled in federal court. Finally, once the water is diverted, the distribution of the water will be administered either by the United States or the Tribes in accordance with Article 8.2.1, 8.2.4, 8.2.5, and 8.3. The State will have absolutely no administrative authority to administer water within the Fort Hall Indian Reservation or within the Fort Hall Indian Irrigation Project facilities.

4. Notifications of Transfers and Expansion of Use. Articles 8.5 and 8.6 address the sharing of information between the State on the one hand and the Tribes and the United States on the other. Initially, the language was very one-sided. The State wanted to know everything about water use on the Reservation but would not provide any information to the Tribes and the United States regarding state water uses which may affect the federal rights. Ultimately, however, the state agree to provide the Tribes and the United States with a written notice whenever a state water right is applied for. Article 8.6. In exchange, the Tribes shall provide the State with a notice of use regarding any transfer within the Reservation or when the Tribes exercise their rights to use additional water in the future. Article 8.5. If the notice involves 25 CFS or 7,500 AFY or more, the notices are to be provided 30 days in advance of the transfer or new use. Article 8.5.2. If the notices are less than that amount, they can be provided in an annual report after the new use or transfer has occurred. No notice is required for changes less than 0.04 CFS or 2.2 AFY. Article 8.5.3. Transfers of tribal water rights outside the reservation are governed by Articles 7.3, 7.5, 7.6, 7.7, 7.8, and 7.9, discussed supra.

G. Article 9 (Intergovernmental Board).

Article 9 creates a three-member "Intergovernmental Board" (IGB) which is composed of the Chairman of the Fort Hall Business Council, the Director of the Idaho Department of Water Resources, and the Secretary of the Interior, or their designees. It serves two functions. First, it would mediate or otherwise resolve disputes under the Agreement. Article 9.1. and 9.3. It has no legal authority to direct a party to something, and any unresolved disputes would go before a court de novo. The second function is to provide a place for hearing disputes concerning changes in points of diversion or periods of use of the tribal water right to the Snake River and Sand Creek described in Article 7.1.1. See Article 7.7 and 7.8. Because the diversion points are already

of water rights).

located in the best position, it is highly unlikely that the diversion point will ever be changed. Periods of use would change only if the Tribes elected to use the water in 7.1.1 for a period different from the normal irrigation season of March 15 through November 15, which is also somewhat unlikely. Should they do either, however, the Tribes would submit a notice to the IGB along with publication. If any person objects to the Tribes' proposed change, the objector must first seek mediation by the IGB prior to seeking judicial relief. See Article 7.8.¹²

H. Article 10 (Finality of the Settlement Agreement)
and Article 18 (Effective Date)

This Agreement is primarily a political document, and has several contingencies as set forth in Article 18. The ultimate goal, of course, is the entry of a final decree adjudicating to the Tribes and the United States the water rights described in Articles 6 and 7. Thus, until the court enters a final non-appealable order decreeing the water rights, the Agreement is not final.

Article 10.1 provides that the Agreement is to be submitted to the Director of the Department of Water Resources, who shall submit it to the court, together with an abstract of the water rights. This procedure is required by state law. See I.C. sec. 42-1411 (Supp. 1989). We have expressed concern that the Director not be permitted to delay this process unnecessarily, and the state has agreed to develop a specific timetable for this process to occur. It is in Idaho's interest to achieve finality as soon as possible.

At the same time as the Agreement is submitted to the Court, the parties will submit a decree which embodies the exact description of the water right. Article 10.2. Other persons, not signatory to the Agreement will be allowed to object to the Agreement. Article 10.1. The parties to this Agreement, however, agree to support and defend the Agreement against any challenges, including appeals, if any. Article 10.2. The parties also agree to support this Agreement in securing "necessary ratification" by any legislative body of the parties.Id.

The water rights do not become final and conclusive, however, until all events contained in Article 18 have occurred:

18.1.1 The Agreement is executed;

18.1.2 The water rights have been decreed and are

¹² At various stages in the negotiations, it was thought that the IGB could serve a role in the administration of water rights. Ultimately, however, the parties could not reach an understanding on the role of the Board in administration and so that function was discarded.

final and non-appealable;

- 18.1.3 The Idaho Water Resources Board has adopted the Tribal water bank rules;
- 18.1.4 All federal and state expenditures have been authorized (but not necessarily appropriated);
- 18.1.5 The Agreement has been ratified by the Legislature of the State of Idaho;
- 18.1.6 The Agreement has been approved by the General Council of the Shoshone-Bannock Tribes (i.e., a referendum of the voting members of the Tribes);
- 18.1.7 The Bureau of Reclamation has entered into a storage contract with a responsible entity for the uncontracted storage space in Ririe and Palisades Reservoirs in accordance with Article 12.3 which goes toward mitigating the impact of this Agreement on the non-Indian water users; and
- 18.1.8 Congress has approved the Agreement.

Article 10.4 states that the rights described in this Agreement are in full satisfaction of all water rights and water right claims of the Shoshone-Bannock Tribes, its members, and its allottees, in the Upper Snake River Basin, which is defined to be above Hells Canyon. See Article 4.57. It does not include the Tribes' claims for instream flows below Hells Canyon, such as in the Salmon and Clearwater Rivers. Those claims will be negotiated in conjunction with other instream flow claims on behalf of the Nez Perce Tribe and the United States, beginning in 1991, and litigated, if necessary, in 1992 or later. Moreover, this Agreement does not affect the right of individual members of the Shoshone-Bannock Tribes to claim water rights under state law for use "on non-Indian lands." Indian lands are defined by Article 4.26 to be those lands within the Reservation held in trust for or owned by the Tribes or individuals and any lands held in trust for the Tribes or a member which are located outside the Reservation. The term Tribes is defined to be the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation. Thus, a tribal member could make a water right claim for fee-land located outside the Reservation.

I. Article 11 (Disclaimers and General Provisions).

This section is to a large extent a "catch-all" provision, intended to satisfy the concerns of various parties.

Article 11.1 contains a listing of items which the Agreement is intended not to do:

- .1 It does not establish a standard by which federal reserved water rights may be quantified;
- .2 It does not restrict the Tribes or the United States on their behalf from acquiring additional water rights under state law so long as the tribal water rights to be decreed here are fully used or are not physically available;
- .3 It does not restrict the power of the United States to reserve, or of the United States or the Tribes to acquire water rights in the future;¹³
- .4 It does not limit the parties' rights to litigate other issues not resolved by this Agreement;
- .5 It does not limit the authority of the Tribes and the United States to administer their water rights except as expressly provided in this Agreement
- .6 It does not enlarge, restrict or otherwise determine the subject matter jurisdiction of state, tribal or federal courts;¹⁴
- .7 It does not commit or obligate the United States, the State or the Tribes to expend funds which have not been appropriated and budgeted.¹⁵

¹³ The distinction here is that the State could not agree that the Tribes have the power to create by application reserved water rights in the future. They do, of course, have the power to reserve whatever rights they currently hold in subsequent contracts or treaties. See United States v. Winans, 198 U.S. 371 (1905).

¹⁴ This language was inserted at our insistence to permit us to seek relief in federal court, should that be deemed necessary. The parties, of course, have no power to confer or restrict the subject matter jurisdiction of any court, but this language makes us more comfortable, especially in light of the fact that Congress (which does have the power to restrict subject matter jurisdiction) will be approving the Agreement.

¹⁵ This language is fairly standard language used in water settlements to meet the separation of powers concerns identified in the Memorandum of Attorney General Meese, dated March 13, 1986, entitled, "Department Policy Regarding Consent Decrees and Settlement Agreements." The concern is that executive branch officials cannot

.8 It does not quantify or determine "Walton right" claims made by non-Indian successors to an Indian allottee. Walton right is defined in Article 4.59 supra.;

.9 It does not impair or impede the exercise of any rights guaranteed in the Second Fort Bridger Treaty of July 3, 1868. Principally, these would include off-reservation rights to hunt and gather timber, etc.

.10 It does not determine any issue regarding the boundaries of the Reservation. Apparently, there is a dispute between the Tribes and the State concerning title to bed of the Snake and Blackfoot river, which form part of the boundary of the reservation;

.11 It does not preclude the Tribes from participating in future storage projects, such as the Galloway project on the Weiser River;

.12 It does not affect the water right claims of the City of Pocatello, which claims a right to share the Tribes' water supply, pursuant to a federal statute, except to state that whatever right Pocatello is finally decreed, it is in addition to the Tribes' set forth in this Agreement.¹⁶

.13 It does not affect any rights of the Northwestern Band of Shoshone;

.14 It does not waive any applicable environmental law; and

commit the Congress to appropriate funds. The Tribes and the State liked the language too, and so applied it to themselves.

¹⁶ Pocatello's claim is novel. The Act of September 1, 1888, c. 936, 25 Stat. 452, ratified an agreement between the Tribes' and the United States which ceded reservation lands to the United States to be sold, thus permitting the creation of the town of Pocatello. Section 10 of the Act provides that the "citizens of the town hereinbefore provided shall have the free and undisturbed use in common with the said Indians of the waters of any river, creek, stream, or spring flowing through Fort Hall Reservation in the vicinity of said town, * * * as may be necessary to provide said town with proper water and sewerage facilities." Pocatello claims approximately 20,000 AFY for these purposes. Pocatello wanted to have the claim resolved in these negotiations, but the parties declined. It may become an issue later.

.15 It does not affect the civil regulatory powers of any government within the Reservation.¹⁷

Article 11.2 is a disclaimer requested by the State of Idaho to allow it to argue in another instance that the reserved water rights doctrine does not extend to underground water. The United States and the Tribes take the position that the reserved water right doctrine extends to groundwater and the State has essentially agreed as it has recognized a reserved water right for in excess of 150,000 AFY from groundwater. See Article 7.2.1 (125,000 AFY anywhere within the Reservation); 7.2.2 (23,500 AFY from Bannock Creek basin groundwater); 7.1.2 (up to 5,000 AFY from Ross Fork Creek and Ross Fork Basin groundwater); 7.1.3 (up to 3,768 AFY from Lincoln Creek Basin groundwater). Nevertheless, Idaho wanted this language for political reasons and to protect it in future negotiation or litigation.¹⁸

Article 11.3 is a more general disclaimer which is intended to preclude the use of any offers or compromises made in these negotiations to be used in any other legal proceedings. It is intended to be consistent with applicable rules of evidence which likewise preclude the admission of compromises and offers to compromise in legal proceedings. See e.g., Rule 408, F.R.Evid. The language here arguably would cover the groundwater disclaimer above, but Idaho felt that it needed the specific groundwater language.

Article 11.4 has a similar purpose in that no party may use the judgment as constituting evidence or an admission by another party with respect to any issue. Thus, principles of collateral estoppel would not apply, except that the decree entered by the Court would be binding on all parties. This language was proposed by the State and in support thereof, State negotiators noted that this identical language had been interpreted by the Second Circuit as precluding a consent agreement in that case to be used to collaterally estop one party in collateral litigation. See McShan v. Omega Louis Brandt et Frere, S.A., 536 F.2d 56, 519 (2d Cir. 1976).

¹⁷ This provision was agreed to at the last minute at the request of the Tribes in order to preserve whatever civil regulatory power the Tribes have over non-Indians on land within the Reservation. See e.g. Brendale v. Confederated Tribes of the Yakima Indian Nation, ___ U.S. ___, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989) (Tribe has land use regulatory authority over non-Indians on fee lands within "closed" area of reservation but not within "open" area).

¹⁸ There is some confusion in the caselaw as to whether reserved rights extend to groundwater. See e.g., In Re Adjudication of the Big Horn River, 753 P.2d 76 99-100 (Wyo. 1988) and authorities cited therein.

Notwithstanding this language, Article 10.3 provides that "the water rights confirmed in this Agreement shall be final and conclusive as to all parties to the Adjudication once the Agreement becomes effective as provided in Article 18," which includes the entry of a final non-appealable decree. Thus, we have certainty as to the water rights and other matters in the decree, which are the main issues resolved by this Agreement.

Article 11.5 preserves the right of the Tribes and the United States to assert claims for minimum stream flows below Hell Canyon and in the Salmon and Clearwater Rivers. The Tribes have agreed, however, that no claim made by the Tribes or the United States on behalf of the Tribes, shall require water to be supplied from above Hells Canyon Dam to satisfy such claims. This provision does not, however, limit the United States to make such claims on behalf of other tribes such as the Nez Perce Tribe or on its own behalf, since Tribes is defined in Article 4.55 to the Shoshone-Bannock Tribes only. Consequently, the United States gives up effectively nothing by agreeing to this provision.

Article 11.6 reserves the Tribes' right to develop whatever high-temperature (212 F and above) geothermal resources which exist on the Reservation. Low temperature geothermal resources are not addressed, but presumably would be included in the Tribes' groundwater right.

Article 11.7 requires that, in exchange for the funds to be provided to the Tribes in the Agreement, the Tribes execute a waiver and release of all existing claims against the United States, including claims related to water rights and the inundation of Reservation land resulting from enlargement of the American Falls Reservoir. The Tribes have on occasion indicated that they may wish to assert a claim against the United States, specifically because the United States acquired fee simple title to the inundated lands, rather than a flowage easement, as the Tribes supposedly understood at the time. In our view, any such claim would probably be barred by the applicable statute of limitations, and the tribal attorney has not been able to demonstrate otherwise. Nevertheless, to be safe we have insisted on this waiver.¹⁹

¹⁹ This disclaimer, together with the one in Article 11.8 discussed infra, were drafted by U.S. negotiators in consultation with Jim Brookshire of the General Litigation section, which would handle any claims brought by the Tribes against the United States. We note that in 1984, the Tribes and the United States reached a settlement in the amount of \$5.8 million on a claim against the United States for alleged mismanagement of their water resources. Shoshone-Bannock Tribes of the Fort Hall Indian Reservation v. United States,

This waiver is related to similar waiver contained in Article 11.10, whereby the United States and the Tribes agree not to seek compensation from any non-federal party for the inundation of lands adjacent to American Falls Reservoir. We are not sure how we could ever recover from either the state or private water users, inasmuch as the Reservoir is operated by the Bureau of Reclamation. Nevertheless, the water users, who have contracts with Reclamation to store water in the Reservoir, desire to limit any exposure which they may have in this regard. Since the Tribes have agreed not to sue the United States on this claim, everyone is held harmless and nobody has lost anything, with the possible exception of the Tribe.

Article 11.8 contains an agreement by all parties not to sue any other party for claims arising out of the negotiation of this Agreement or the entry of a decree embodying the rights listed in this Agreement. This clause was proposed by the United States in order to preclude the Tribes from asserting a breach of trust claim against the United States should they later become dissatisfied with this Agreement. Other parties then proposed that the same language also apply to them.

Article 11.9 states that the United States, in its trust capacity for the Tribes, and the Tribes agree not to object to water right claims filed by non-federal water users within the Upper Snake River basin in the SRBA that have no potential impact on the Tribal water rights set forth in this Agreement. This language was requested by the Committee of Nine to give them some certainty that the United States would not object to overstated claims unless they had some effect on the Tribes' water rights. This language does not preclude the United States from objecting to water right claims on its own behalf, such as on behalf of the Fish and Wildlife Service or the Forest Service, or on behalf of other Indian tribes other than the Shoshone-Bannock.

J. Article 12 (Protection of Existing Uses).

The purpose of this section is to preserve the status quo with respect to certain water users, and to mitigate the effects of this Agreement on non-Indian water users.

Article 12.1 preserves the status quo regarding the priority of the storage rights of the Tribes in Palisades and American Falls Reservoirs. See Article 7.3. Pursuant to Section 3(b) of the Michaud Act, c. 1159, 68 Stat.1026,1028 (August 31, 1954), the United States agreed to give up the Winters rights for certain lands within the Reservation in exchange for a fixed amount of

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storage space in Palisades and American Falls Reservoirs. The applicable language is not as clear as one might hope,²⁰ but the legislative history is quite clear that it is intended to effect a limited waiver of the Tribes' Winters rights only for those lands within the Michaud Division of the Fort Hall Indian Irrigation Project.²¹ That storage space is held for the Tribes pursuant to contracts with the Bureau of Reclamation. The priority dates for the facilities are based on state law. American Falls Reservoir has a priority date of March 30, 1921, and Palisades Reservoir has a priority date of July 28, 1939.

Article 12.2 maintains the existing priorities for the non-Indian water users within the Fort Hall Indian Irrigation Project. In other words, those non-Indians will be entitled to receive water under their contracts with the Bureau of Indian Affairs, in accordance with the Project's priority,¹ which is generally 1891 or 1907. Indian lands, however, will be served water from the project pursuant to the reserved water right, with a priority of

²⁰ Section 3(b)(2) states that the construction of the project will be undertaken only if, "appropriate arrangements as may be required under the circumstances are first made * * * which among other things, * * * (2) consent to a priority in time and right in such beneficial consumptive uses of the water of the Snake River, and its tributaries, as are established under the laws of the State of Idaho * * *."

²¹ After noting the potential conflict between non-Indian water rights under state law to natural flow and the Indian rights under the Winters case, the Senate Committee Report states the following:

This bill would not affect the conflicting claims except to the extent of the water rights involved in the project authorized by this bill. It is not to be construed as a waiver by the Indians of any rights to water for any land in the Fort Hall Reservation under the Winters case, their treaties, or acts of Congress except as to the land in the Michaud division of the Fort Hall irrigation project, to the extent provided in the bill, and is not otherwise to be construed as a precedent adverse to Indian claims under the Michaud division of the Fort Hall irrigation project to the extent provided in the bill, and is not otherwise to be construed as a precedent adverse to Indian claims under the Winters case, their treaties, or acts of Congress.

1867. Previously, the non-Indians in the Project had shared shortages with the Indians. Under the Agreement, however, in times of shortage, non-Indian lands could potentially be shut off if necessary to serve Indian lands. Article 12.2 does not alter this "split-priority" system. It merely recognizes that the project rights for the non-Indians will remain unchanged.

Article 12.3 contains the Interior Department's agreement to seek legislation authorizing the Secretary to contract with the Idaho Water Resource Board or another appropriate entity, for the presently unallocated storage space in Palisades and Ririe reservoirs. At present, while numerous parties have expressed interest in this space, no party has yet entered into a contract for it. Thus, the government continues to absorb the construction and operation and maintenance costs associated with these projects. Under the Agreement, Congress would be asked to authorize the Secretary to enter into a contract whereby the contracting entity would pay for its share of the annual operation and maintenance charges but would not be required to reimburse the United States for its share of the construction cost. The Office of Management and Budget has indicated that this would be acceptable.

Article 12.4 contains a mutual agreement by the parties not to oppose the efforts of other parties to mitigate the effects of the implementation of the Agreement on the other. This language was requested by the private water users. Our only concern would be that it not bind the Executive branch in the future should the water users propose further mitigation which requires federal money. We are comfortable with the language because of the express disclaimer in Article 11.1.7 that nothing obligates the United States *** to expend funds which have not been appropriated and budgeted."

K. Article 13 (Monetary Contributions to the Agreement)

This settlement is, for the United States and other parties, one of the least expensive Indian water rights settlements reached in recent years. No new project is proposed to be built. Rather, water is made available through increased efficiencies and cooperation among the parties. Nonetheless, we are disappointed that the State of Idaho has not agreed to contribute more money to the settlement, since it is the principle beneficiary of the settlement.

Article 13.1 would allow the acquisition of up to 9,000 acres of land, at a cost of no more than \$5,000,000, to buy out grazing rights and certain fee interests in lands that are inundated by the storage in Grays Lake. This has two significant federal benefits. First, it allows Grays Lake to be more efficiently used to benefit the project. Presently, water must be released early in the spring to provide access for the cattle, instead of later in the summer

when it is needed for irrigation. Second, storing water later in the year would benefit the Fish and Wildlife Service Refuge, thus benefitting waterfowl such as the endangered whooping crane.

Article 13.2 provides for federal contributions of \$7 million -- 2 million the first year, and an addition \$5 million over a 20 year period toward a tribal water management system. This will allow the Tribes to bring their antiquated water supply facilities up to date and allow for more efficient use of the water.

Article 13.3 provides for a Tribal Development Fund. This Fund would be used to assist the tribes to find other economic opportunities to replace their mining operations, which are gradually being mined out. There shall be no per capita distributions to individual members.

The Office of Management and Budget has indicated their approval of the funding amounts and arrangements contained in the Article.

Article 13.4 provides that federal contributions are subject to the availability of funds and will be provided in the fiscal year following the enactment of authorizing legislation.

Article 13.5 sets forth the State of Idaho's contribution of \$250,000 of in kind services and a waiver of filing fees, in an amount of approximately 250,000. We view these contributions as nominal. The in-kind contributions are not specified, but the state may assist the Tribes in developing a water management system. The waiver of fees may amount to nothing should we prevail in our challenge to the filing fees which Idaho has sought to require of the United States.

L. Articles 14,15,16 and 17 (Standard Provisions)

These provisions are noncontroversial. Article 14.1 states that the Agreement shall bind and inure to the benefit of successors to the parties. Article 15.1 restates the parol evidence rule -- the Agreement is a complete statement of all understandings between the parties. Article 15.2 notes that while the water rights described in Article 7 are final and irrevocable, the other provisions of this Agreement may be modified with the joint consent of the parties. Article 16.1 notes that headings are for convenience only. Article 17 notes that there will be four originals -- one for each party.

Conclusion and Recommendation

This is a good Agreement. It provides the Tribes with an adequate water supply for now and in the future and it achieves federal policy goals at a relatively small cost. We recommend that the Working Group and the Secretary approve this Agreement and that a high-level official of this Department attend the signing ceremony

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to be held at Fort Hall, Idaho, in mid-June.