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DEPARTMENT OF  
WATER RESOURCES

**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 | ) |                                   |
|                | ) | <b>STATE OF IDAHO'S REPLY TO</b>  |
|                | ) | <b>THE COMMITTEE OF NINE'S</b>    |
|                | ) | <b>RESPONSE TO THE CONTENT OF</b> |
|                | ) | <b>THE STATE'S LIST OF RIGHTS</b> |
| _____          | ) |                                   |

The State of Idaho, by and through its counsel of record, hereby submits this reply to the *Committee of Nine's Response to the Content of the State's List of Rights* ("Response").

The Committee of Nine's Response seeks to exclude certain water rights from the list provided by the State on the basis that they were not in active use when the Fort Hall Agreement was negotiated and were not included in the calculations of the 45,000 acre foot estimated total diversion of non-Indian Blackfoot natural flow uses. The Committee's argument thus raises the question of whether water uses not in active use at the time of the Agreement should be protected by the subordination provision in 27-

11375.x.d. This question exposes a latent ambiguity in the language of provision 27-11375.x.d of the Fort Hall Consent Decree.

The provision reads as follows:

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

The first part of the provision on its face appears to subordinate the Tribes' water right no. 27-11375 to all decreed water rights diverting natural flow from the Blackfoot River prior to January 1, 1990. The second part of the provision dictates that those water rights that benefit from the provision be identified for the Court, and also includes an estimate of how much water is diverted under those water rights. However, as the Committee's Response points out, the methodology used to develop the 45,000 acre foot estimate necessarily excluded inactive rights.

If the first part of provision 27-11375.x.d governs which water rights receive the benefit of subordination, then subordination protection is due to all "persons diverting natural flow from the Blackfoot River prior to January 1, 1990, whose rights are decreed in the SRBA" and those persons "will continue to receive their full legal entitlement under state law." Under this interpretation, it would seem that any decreed right under which Blackfoot River natural flow was diverted at any time prior to January 1, 1990

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<sup>1</sup> This language is found in provision 27-11375.x.d. of the Fort Hall Consent Decree, entered by this Court in 1995, and in Article 7 of the Fort Hall Agreement (emphasis added).

would benefit from the subordination of the Tribes' right. This interpretation is at odds with the position taken by the United States and the Tribes, however, and the inconsistency is particularly glaring in light of the information presented in the Committee's Response regarding the large number of rights that were not in use at the time the estimated diversion was calculated.

Whether those inactive water rights were included in the calculation of the 45,000 acre feet is of vital importance to this proceeding because the Tribes and the United States have argued that it is the second part of the provision above that controls the extent of the subordination of the Tribes' water right. Their position is that the subordination protection granted by the provision above is the subordination of the Tribes' right to a total of 45,000 acre feet of non-Indian Blackfoot natural flow use, rather than the full legal entitlement of all decreed natural flow rights existing prior to 1990. If this interpretation prevails, then it follows that water rights that were not in use when that estimate was made should not receive the benefit of the subordination.

The water rights identified as not being actively in use at the time of the Fort Hall Agreement negotiations can divert an estimated total of 3,314 acre feet per year. If the Tribes' interpretation of the subordination provision is correct, a return to active status of these water rights would thus negatively impact the ability of the rest of the Basin 27 water users to divert water under their decreed rights. In essence, if those rights were to become active, they would divert 3,314 of the 45,000 acre feet on their own, leaving the rest of the Basin 27 water users only 41,686 acre feet of water, despite decreed rights providing for much greater water use. This result would be inequitable at best, harming the interests of Blackfoot River natural flow users that have been both historically and are

presently active. If it is determined that the rights on the lists do receive the benefit of subordination, and that the Tribes' and United States' interpretation of provision 27-11375.x.d is deemed to be correct, the result will penalize water users whose rights have been active all along, while rewarding water users whose rights have been inactive for years.

### **Conclusion**

The Committee of Nine's Response reveals a latent ambiguity in the Fort Hall Consent Decree that may be resolved in the course of the pending Motion for Enforcement of the Fort Hall Consent Decree. To the extent that the Court deems it necessary in proceeding on this Motion for Accounting, the State is prepared to submit additional briefing on the question of how to resolve the ambiguity described above.

Respectfully submitted this 19<sup>th</sup> day of May, 2011.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19<sup>th</sup> day of May 2011, I caused a true and correct copy of the foregoing STATE OF IDAHO'S REPLY TO THE COMMITTEE OF NINE'S RESPONSE TO THE CONTENT OF THE STATE'S LIST OF RIGHTS to be filed with the Court and served on the following parties by the indicated methods:

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