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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT-SRBA Fifth Judicial District County of Twin Falls - State of Idaho
JUN - 3 2011
By _____ Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA

Case No. 39576

) Subcase No: 27-11375
) (*Motion to Enforce*)
)
) MEMORANDUM DECISION AND
) ORDER ON MOTIONS FOR
) PARTIAL SUMMARY JUDGMENT
) AND INSTRUCTIONS ON FUTURE
) PROCEEDINGS
)
)

Holding: Denying in part and granting in part Tribes' *Motion*; granting in part and denying in part State's *Motion* as follows:

The 45,000 afy quantity was not intended as a cap or limit on the protection of rights of qualifying non-Indian users. The intent of the parties was that the rights of all qualifying non-Indian water users be protected.

Genuine issues of material fact exist regarding whether the estimated quantity of 45,000 afy has been exceeded by non-Indian water users.

If the 45,000 afy estimate is exceeded, the Tribes are entitled to an "equitable adjustment."

The remedy of "equitable adjustment" was not intended by the parties to refer to the supplementation of the 27-11375 right with storage rights and/or groundwater as provided for in the *Consent Decree*.

The remedy of "equitable adjustment" was not intended to be limited in scope to the 27-11375 water right. The parties intended a remedy much broader in scope such that the "equitable adjustment" provision could apply to any of the Tribes' rights confirmed by the *Consent Decree*.

Instructions on future proceedings are provided at conclusion of this opinion.

MEMORANDUM DECISION AND ORDER ON MOTIONS FOR PARTIAL SUMMARY
JUDGMENT AND INSTRUCTIONS ON FUTURE PROCEEDINGS (*MOTION FOR
ENFORCEMENT*)

Appearances:

Peter C. Monson, U.S. Department of Justice, Indian Resources Section, Environment and Natural Resources Division, Denver, Colorado, attorney for the United States of America.

Jeannette Wolfley, Pocatello, Idaho, Special Counsel for the Shoshone-Bannock Tribes.

John K. Simpson of Barker Rosholt & Simpson, LLP, Boise, Idaho, attorneys for Committee of Nine.

Scott E. Axline, Blackfoot, Idaho, attorney for Patrick Taney.

Shasta Kilminster-Hadley and Clive Strong, Deputy Attorneys General of the State of Idaho, Natural Resources Division, Boise, Idaho, attorneys for the State of Idaho.

Andrea L. Courtney, Deputy Attorney General of the State of Idaho, Idaho Department of Water Resources, Boise, Idaho, attorney for the Idaho Department of Water Resources.

I.**FACTUAL, HISTORICAL AND PROCEDURAL BACKGROUND****A. Historical Background.**

This case involves a dispute between various parties over the interpretation and application of the *Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin* entered in Twin Falls County Case No. 39576 on August 2, 1995 (“*Consent Decree*”). The Fort Hall Indian Reservation is located in southeastern Idaho near Pocatello and is supplied with water from the Upper Snake River Basin. Prior to the commencement of the SRBA, the Shoshone-Bannock Tribes’ (“Tribes”) claims to water rights associated with the Fort Hall Indian Reservation were unsettled. Therefore in February 1985, the Idaho legislature adopted House Concurrent Resolution No. 16, directing that the Governor and Attorney General attempt to settle the extent of the Tribes’ water right claims in the Upper Snake River Basin by way of negotiation. 1985 Idaho Session Law, H.C.R. No. 16, p.745.

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Following several years of negotiations, an agreement was reached between the United States, the Tribes, the State of Idaho, and the Committee of Nine, and in July 1990 the parties entered into *The 1990 Fort Hall Indian Water Rights Agreement* (“1990 Agreement”).¹ By its terms, the 1990 Agreement was made “in settlement of litigation involving claims made by the United States on behalf of the Shoshone-Bannock Tribes to water rights in the Upper Snake River Basin and its tributaries.” *Agreement*, p.1. Article 7 of the 1990 Agreement sets forth the list of tribal water rights agreed to by the parties, the stated basis of which is the Winters Doctrine. *Agreement*, pp.17–56. In total, the parties to the 1990 Agreement agreed that “the Tribal water rights for the present and future uses in the Upper Snake River Basin amount to a right to divert up to 581,031 AFY from the Snake River Basin for present and future irrigation, DCMI, instream flow, hydropower and stock water uses as set forth in Article 7 of this Agreement.” *Agreement*, p.17.

The 1990 Agreement was subsequently approved by Congress, the General Membership of the Tribes, and the Idaho legislature, after which the parties presented the 1990 Agreement to the SRBA District Court along with a proposed consent decree. On August 2, 1995, after a hearing was held on the contents of the proposed consent decree, the court entered the *Consent Decree*.² The *Consent Decree* ratified, confirmed and approved the provisions of the 1990 Agreement, and partially decreed all water rights “of the United States for the Shoshone-Bannock Tribes in the Upper Snake River Basin, for the Bureau of Indian Affairs, Fort Hall Agency and for the Fort Hall Irrigation Project.” *Consent Decree*, p.2.

B. Water Right No. 27-11375.

Water right 27-11375 is one of the several water rights partially decreed in favor of the United States for the use and benefit of the Tribes in the *Consent Decree*. It provides the Tribes with the right to divert 150,000 afy from the Blackfoot River to

¹ A copy of the 1990 Agreement is attached to Exhibit 2 of the *Affidavit of David A. Jarvis*. The term “parties” as defined by the 1990 Agreement means “the United States, the State of Idaho, the Tribes, and the Committee of Nine of Water District 01.” *Agreement*, p. 11.

² A copy of the *Consent Decree* is attached as Exhibit 1 to the *Affidavit of David A. Jarvis*.

irrigate 30,469 present and future acres within the Fort Hall Indian Reservation. *Consent Decree*, pp.29–30. Based upon the agreement of the parties, paragraph 27-11375.x. of the *Consent Decree* contains the following remarks regarding the administration of water right 27-11375:

- a. If the natural flow of the Blackfoot River is not sufficient to satisfy this right and other rights to divert Blackfoot River natural flow pursuant to state law, the Tribes may satisfy this right by using water right nos. 27-02007 and 25-02160, provided that the combined use in satisfaction of this right shall not exceed 150,000 AFY.
- b. If the diversions under this right exceed 150,000 AFY, the amount in excess of 150,000 AFY shall be charged against water right no. 01-10223.
- c. This right combined with water right nos. 01-10223, 27-02007 and 25-02160 can be used to irrigate up to 53,828 present and future acres from the combined water sources.
- d. The Tribes and United States shall exercise this water right in a manner that ensures persons diverting natural flow from the Blackfoot River prior to January 1, 1990, whose rights are decreed in the SRBA will continue to receive their full legal entitlement under state law. 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 diversions under state created water rights is exceeded as a result of the Decree in the SRBA, the parties shall negotiate an equitable adjustment to the Tribal water rights to account for this change.*
- e. The Tribes and the United States shall exercise this right in a manner that will not impair the project entitlements of the Fort Hall Irrigation Project water users.
- f. If the water supplied under this right and water right nos. 27-02007 and 25-02160 does not provide 150,000 AFY, the Tribes may divert groundwater within the Reservation under this right, exclusive of the water right nos. 27-11376 and 29-12052, such that the combined water supply from water right nos. 27-02007 and 25-02160 and surface and groundwater under this right yields 150,000 AFY.

Paragraph 22-11375.x.a.–x.f. of the *Consent Decree*, pp.30–32 (emphasis added).

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Thus, although the *Agreement* and the *Consent Decree* recognize the Tribes' right to 150,000 afy from the Blackfoot River under water right 27-11375, the Tribes agreed to limit their use of that water in favor of certain non-Indian Basin 27 water users as set forth in paragraph 27-11375.x.d. It is water right 27-11375 and its corresponding remarks – particularly paragraph 27-11375.x.d – that are the focus of the issues at dispute here.

C. Procedural Background.

The instant proceedings commenced on October 29, 2010, when the Tribes and the United States of America as Trustee on behalf of the Tribes filed a *Motion For Enforcement of Fort Hall Indian Water Rights Consent Decree* in the above-captioned matter, requesting that this Court interpret and enforce paragraph 27-11375.x.d. of the *Consent Decree*. Specifically the *Motion* requests that this Court: (1) find that the 45,000 acre-feet per year limit in paragraph 27-11375.x.d. has been exceeded; (2) find that the parties have failed to negotiate an equitable adjustment to the Tribal water rights; and (3) interpret the term “equitable adjustment” “as requiring an increase to the Tribal Water Right by an amount equal to the annual diversions by persons diverting natural flow from the Blackfoot River minus 45,000 acre-feet per year.” *Motion for Enforcement*, p.2.

It should be noted that also presently pending before the Court in the above-captioned matter is a *Motion for an Accounting* filed by the State of Idaho on October 25, 2010. The purpose of the *Motion for an Accounting* is to achieve a full accounting of those non-Indian water rights in the Blackfoot River Basin recommended and/or decreed in the SRBA that benefit from the protections provided for in paragraph 27-11375.x.d. of the *Consent Decree*. Resolution of the *Motion for an Accounting* is not at issue here.

At a scheduling conference on the *Motion for Enforcement* held in the above-captioned matter on February 17, 2011, the parties agreed upon and recommended to the Court that the proceedings on the *Motion for Enforcement* be bifurcated between those legal issues pertaining to the Tribes' “entitlement” under paragraph 27-11375.x.d. of the *Consent Decree* and those pertaining to the Tribes' “remedy” under the same. The

parties further agreed that resolution of the legal issues pertaining to “entitlement” could be pursued first by way of partial motions for summary judgment.

On February 18, 2011, the Court entered a *Scheduling Order* bifurcating the proceedings as agreed upon by the parties. The *Scheduling Order* required that the Tribes and United States file a *Statement of Issues* pertaining to “entitlement” to be decided by the Court on partial summary judgment. On March 4, 2011, the Tribes and the United States filed a *Joint Statement Identifying Legal Issue(s)*, wherein they identified the following legal issue to be addressed on partial summary judgment:

Whether, under the facts set forth in the Motion for Enforcement of Fort Hall Indian Water Rights Consent Decree, and the Memorandum in Support and accompanying affidavits, the Shoshone-Bannock Tribes and the United States are entitled to an equitable adjustment as provided for in the decree of water right no. 27-11375.x.d?

(*Joint Statement*, p.1).

Responses to the *Joint Statement Identifying Legal Issue(s)* and *Motion to Enforce* were subsequently filed by the Committee of Nine, the State of Idaho, the Eastern Idaho Water County, and Patrick Taney. The Tribes and the United States filed their *Reply* briefing on April 29, 2011. Pursuant to the agreement of the parties, the above-mentioned briefing will be treated by this Court as cross-motions for partial summary judgment.

II.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Argument on the cross-motions for partial summary judgment was heard on May 5, 2011. The parties did not request additional briefing, nor does the Court require any. The matter is therefore deemed fully submitted the following business day, or May 6, 2011.

III.

STANDARD OF REVIEW

Summary judgment is proper if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. I.R.C.P. 56. The burden of demonstrating the absence of a genuine issue of material fact is on the moving party. *Id.* When a court considers a motion for summary judgment, all facts are to be liberally construed in favor of the nonmoving party, and the court must draw all reasonable inferences and conclusions in that party's favor. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991). The filing of cross motions for summary judgment does not change the standard of review; the court must evaluate each party's motion on its own merits. *Farm Bureau Insurance Company of Idaho v. Kinsey*, 149 Idaho 415, 418, 234 P.3d 739, 742 (2010). Where the case is tried without a jury, the district court, as the trier of fact, is entitled to draw the most probable inferences from the undisputed evidence properly before it and grant the summary judgment motion in spite of the potential of conflicting inferences. *Id.*

IV.

DISCUSSION

The *Motion to Enforce* filed by the Tribes and the United States requests that this Court interpret and enforce paragraph 27-11375.x.d. of the *Consent Decree*. Pursuant to the agreement of the parties and this Court's February 18, 2011 *Scheduling Order* this portion of the proceeding is limited to the issue of the Tribes' "entitlement" under paragraph 27-11375.x.d. of the *Fort Hall Consent Decree*. The parties raise several issues in their briefing pertaining to "entitlement." Each will be addressed in turn.

A. Decree interpretation.

Resolution of the legal issues placed before this Court on partial summary judgment requires this Court to determine the legal effect of paragraph 27-11375.x.d. of the *Consent Decree*. Under Idaho law, the interpretation of decrees or judgments is

generally subject to the same rules applicable to construction of contracts. *McKoon v. Hathaway*, 146 Idaho 106, 109, 190 P.3d 925, 928 (Ct. App. 2008). The interpretation of a contract begins with the language of the contract itself. *Independence Lead Mines Co. v. Hecla Mining Co.*, 143 Idaho 22, 26, 137 P.3d 409, 413 (2006). Where the contract's terms are clear and unambiguous, "the determination of the contract's meaning and legal effect are questions of law and the meaning of the contract and intent of the parties must be determined from the plain meaning of the contract's own words." *Page v. Pasquali*, 150 Idaho 150, 152, 244 P.3d 1236, 1238 (2010). Where the contract is determined to be ambiguous, "the interpretation of the document is a question of fact which focuses upon the intent of the parties." *Id.* Determining whether the language of a contract is ambiguous or unambiguous is a question of law. *McKoon*, 146 Idaho, at 109, 190 P.3d, at 928. The Idaho Supreme Court has further instructed that "[i]n determining whether a contract is ambiguous, this Court ascertains whether the contract is reasonably subject to conflicting interpretation." *Page*, 150 Idaho at 152, 244 P.3d at 1238. "The determination and legal effect of a contractual provision is a question of law where the contract is clear and unambiguous, and courts cannot revise the contract in order to change or make a better agreement for the parties." *Id.*

B. Genuine issues of material fact exist as to whether the 45,000 afy estimate has been exceeded by non-Indian water users.

Paragraph 27-11375.x.d. of the *Consent Decree* states that non-Indian water users diverting natural flow from the Blackfoot River prior to January 1, 1990 "are estimated to divert not more than 45,000 AFY of water from the Blackfoot River," and provides that "in the event this estimate of the amount of existing diversions under state created water rights is exceeded as a result of the Decree in the SRBA, the parties shall negotiate an equitable adjustment to the Tribal water rights to account for this change." *Consent Decree*, p.31.

The Tribes and the United States argue that the 45,000 afy estimate of non-Indian water diversions from the Blackfoot River has been exceeded. It is their position that

“the 45,000 annual diversion estimate has been consistently exceeded by 5,000 AFY to 15,000 AFY, with a predicted exceedence of about 5,000 AFY in future years.”

Memorandum, p.8. In support of their argument the Tribes submit the *Affidavit of Woldezion Mesghinna*, which concludes that “based on current water rights and measurement information, it is apparent that the non-Indian Basin 27 water users have historically diverted more than 45,000 acre-feet per year and would likely continue to do so in the future.” *Mesghinna Aff.*, ¶10.

The Tribes’ expert cites several statistics and historical data in support of his testimony. He identifies IDWR measurement records for the period of 1922 - 1996, which indicate an average non-Indian annual diversion volume of approximately 76,500 afy from the Blackfoot River. *Id.* at ¶27. He also relies upon two reports prepared by a technical team of federal, state and tribal experts established to facilitate the development of estimates of recent Blackfoot River diversions by non-Indian water users. *Id.* at ¶¶28–31. The first Report, dated February 28, 2008, concludes that diversions by non-Indian water users “in a dry year are 53,900 acre-feet and they increase to 60,500 acre-feet in an average year.” *Id.*, Ex. 1, p.4. The second Report, dated August 27, 2008, is substantially similar although it revises the annual diversion volume for non-Indian users to 56,499 in an average year. *Id.*, Ex. 2, p.5. Last, the Tribes’ expert relies upon a Memorandum dated December 3, 2008, from Water District 27 Water Master James Cefalo, who estimates a total annual diversion by non-Indian water users of 49,000 to 50,000 afy for the years 2004 - 2008. *Id.*, Ex. 3, p.4.

Several of the parties, including the Committee of Nine, argue that summary judgment is improper because the 45,000 afy estimate contained in the *Consent Decree* has not been exceeded. In support of its argument the Committee of Nine identifies the *Water District 27 2010 Corrected Final Accounting for Blackfoot River Diversions* which shows that non-tribal water users diverted 34,401 acre-feet of water from the Blackfoot River in 2010. Additionally, the Committee of Nine relies upon its *Response to the Content of the State’s List of Rights* filed in the above-captioned matter in relation to the State’s *Motion for Accounting*, wherein it challenges the State’s list of those non-Indian

water rights that are entitled to the protections of paragraph 27-11375.x.d. of the *Consent Decree*.

For the following reasons, this Court finds that genuine issues of material fact exist as to whether the 45,000 afy estimate has been exceeded, and as a result summary judgment on this issue is improper. The plain language of paragraph 27-11375.x.d. provides that in the event the 45,000 afy estimate of non-Indian Basin 27 diversions “is exceeded as a result of the Decree in the SRBA, the parties shall negotiate an equitable adjustment” (emphasis added). The record in this case establishes that no accounting presently exists of those non-Indian water users entitled to the protections of paragraph 27-11375.x.d. involved in the SRBA. At present, the State has pending in the above-captioned matter a *Motion for an Accounting*, the purpose of which is to achieve a full accounting of those water users.³ In its *Motion*, the State identifies 223 non-Indian water rights it asserts are entitled to the protections of paragraph 27-11375.x.d. However, the State’s list is contested by the Committee of Nine, which argues that 23 of the 223 listed water rights are not entitled to the paragraph 27-11375.x.d. protections.⁴ At present, the State’s *Motion for an Accounting*, the Committee of Nine’s objection to the State’s list of protected water rights, as well as a present accounting of those non-Indian water users entitled to the protections of paragraph 27-11375x.d. involved in the SRBA are unresolved.

As a result, this Court finds that genuine issues of material fact exist as to whether the 45,000 afy estimate of non-Indian diversion has been exceed “as a result of the Decree in the SRBA.” While the historical data provided by the Tribes regarding non-Indian diversions may certainly indicate, and constitute evidence of, the fact that non-Indian diversions on the Blackfoot River will exceed 45,000 afy as a result of the Decree in the SRBA, the Tribes have not carried their burden of establishing a lack of genuine

³ In its *Motion for an Accounting*, the State asserts that “this accounting should be made now, before final decrees are entered, to minimize the need for reopening parties’ decrees and for purposes of judicial economy.” *Motion for an Accounting*, p.2. No party has opposed the State’s request to complete the accounting at this time.

⁴ The record in this matter does not contain an accounting of the cumulative water use of the 23 water rights identified by the Committee of Nine.

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issues of material fact with respect to the issue. As an initial matter, the 1922 - 1996 diversion records relied upon by the Tribes are based on historical water diversions, not those water rights claimed, recommended and/or decreed in the SRBA as contemplated by the *Consent Decree*. Likewise, the two Reports prepared by the technical team by their terms “are based on an assessment of actively irrigated lands *which was independent of the IDWR water right recommendations.*” *Meshghinna Aff.*, Ex. 1, p.4; Ex. 2, p.5. (emphasis added). Last, the James Cefalo Memorandum, while based on the IDWR recommendations for Basin 27 water rights, presumably accounts for those 23 water rights for which there is a pending dispute as to whether they are entitled to the protections of paragraph 27-11375.x.d. Since a genuine issue of material fact exists as to whether the 45,000 afy estimate contained in paragraph 27-11375.x.d. has been exceeded “as a result of the Decree in the SRBA,” the Tribes’ request for summary judgment on this issue is denied.

C. If the 45,000 afy estimate is exceeded, the Tribes are entitled to an “equitable adjustment” under the *Consent Decree*.

The United States and the Tribes assert that the legal effect of paragraph 27-11375.x.d. is that in the event the 45,000 afy estimate is exceeded, the Tribes are entitled to an “equitable adjustment” as a matter of law. Again, paragraph 27-11375.x.d. provides in full as follows:

The Tribes and United States shall exercise this water right in a manner that ensures persons diverting natural flow from the Blackfoot River prior to January 1, 1990, whose rights are decreed in the SRBA will continue to receive their full legal entitlement under state law. 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 diversions under state created water rights is exceeded as a result of the Decree in the SRBA, the parties shall negotiate an equitable adjustment to the Tribal water rights to account for this change.*

Consent Decree, p.31 (emphasis added).

This Court finds that the plain and unambiguous language of paragraph 27-11375.x.d. establishes that the Tribes are entitled to an “equitable adjustment” to the Tribal water rights in the event the 45,000 afy estimate is exceeded as a result of the Decree in the SRBA. The use of the terms “the parties *shall* negotiate an equitable adjustment to the Tribal water rights” indicates that an equitable adjustment to the Tribal water rights would be mandatory in the event the stated conditions were met. *See e.g., Henry v. Ysursa*, 148 Idaho 913, 916, 231 P.3d 1010, 1013 (2008) (holding, “this Court has repeatedly construed the word ‘shall’ as being mandatory, not discretionary”). While the language indicates that it should be the parties’ responsibility to reconvene and negotiate an equitable adjustment in the event the 45,000 afy estimate is exceeded, the parties’ inability, despite their efforts, to achieve a negotiated settlement does not negate the Tribes’ entitlement under the plain language.⁵

It has been represented to the Court that the State, the Tribes, and the United States have been involved in negotiations to effectuate an “equitable adjustment” to the Tribes’ water rights pursuant to paragraph 27-11375.x.d. since 2005, when IDWR issued its recommendations for water rights in Basin 27. The Committee of Nine and certain Basin 27 water users got involved in the negotiations in 2009. Notwithstanding, it has been represented to the Court that all efforts to negotiate an equitable adjustment to the Tribal water rights have been unfruitful. The facts in the record are undisputed in this respect. Therefore, this Court finds that if the 45,000 afy estimate contained in paragraph 27-11375.x.d. is exceeded as a result of the Decree in the SRBA, the Tribes are entitled to an “equitable adjustment” under the plain language of the *Consent Decree*.

D. The 45,000 afy does not represent a limit on non-Indian diversions from the Blackfoot River.

There was an additional issue raised by the parties as to whether the 45,000 afy estimate contained in paragraph 27-11375.x.d. constitutes an absolute cap or limit on

⁵ In their briefing, the Tribes describe at length the negotiation efforts undertaken by the parties and assert that all efforts to reach an equitable adjustment between the parties have failed. *Memorandum in Support of Motion for Enforcement of Fort Hall Consent Decree*, pp.14–16. The same was also represented during oral argument. No party has disputed the Tribes’ assertion that all attempts at negotiating an equitable adjustment to the Tribal water rights have been unsuccessful.

non-Indian diversions from the Blackfoot River. Under Idaho law, when a court interprets a legal instrument the court reads the instrument as a whole to give meaning to all its terms to the extent possible. *Twin Lakes Village Property Ass'n, Inc. v. Crowley*, 124 Idaho 132, 138, 857 P.2d 611, 617 (1993). Paragraph 27-11375.x.d. does state that non-Indian water users “are estimated to divert not more than 45,000 AFY of water from the Blackfoot River.” However, when Paragraph 27-11375.x.d. is read as a whole this Court finds that the above-identified language does not create an absolute cap on non-Indian diversions from the Blackfoot River.

Reading paragraph 27-11375.x.d. as a whole makes clear that the 45,000 afy estimate was not to be treated as an absolute cap. The first sentence of that paragraph states “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.*” *Consent Decree*, p. 31 (emphasis added). Reading the 45,000 afy estimate as an absolute cap would be inconsistent with the Tribes and United States’ agreement to allow those certain identified water users “to continue to receive their full legal entitlement under state law.” The more appropriate interpretation of the 45,000 afy estimate, as identified above, is that it is the triggering point at which the Tribes are entitled to an equitable adjustment to the Tribal water rights in the event the 45,000 afy estimate is exceeded by non-Indian water users as a result of the Decree in the SRBA.

E. Although the plain language of the *Consent Decree* contemplates an “equitable adjustment” in the event the 45,000 afy estimate is exceeded, the term “equitable adjustment” is ambiguous.

One of the issues placed before the Court by the State of Idaho is the meaning of the term “equitable adjustment,” as contemplated by paragraph 27-11375.x.d. of the *Consent Decree*. The State asks this Court to find as a matter of law that “pursuant to the plain language of the Fort Hall Consent Decree, the equitable adjustment contemplated by the parties to the Fort Hall Agreement is the ability of the Tribes to use storage and groundwater to satisfy their total entitlement to 150,000 AFY under right no. 27-11375.”

State's Response Br., p.14. The Committee of Nine joins in the State's argument in this respect.⁶

More specifically, the State argues that paragraphs 27-11375.x.a. and 27-11375.x.f. of the *Consent Decree* constitute the equitable adjustment referred to in paragraph 27-11375.x.d. Those two paragraphs provide in full as follows:

- a. If the natural flow of the Blackfoot River is not sufficient to satisfy this right and other rights to divert Blackfoot River natural flow pursuant to state law, the Tribes may satisfy this right by using water right nos. 27-02007 and 25-02160, provided that the combined use in satisfaction of this right shall not exceed 150,000 AFY.
- f. If the water supplied under this right and water right nos. 27-02007 and 25-02160 does not provide 150,000 AFY, the Tribes may divert groundwater within the Reservation under this right, exclusive of the water right nos. 27-11376 and 29-12052, such that the combined water supply from water right nos. 27-02007 and 25-02160 and surface and groundwater under this right yields 150,000 AFY.

Consent Decree, pp.30–32. Paragraph 27-11375.x.a. provides that in the event the natural flow of the Blackfoot River is not sufficient to satisfy the Tribes' 150,000 afy right under water right no. 27-11375, then the Tribes may satisfy that right by utilizing two of their other water rights confirmed by the *Consent Decree* – water rights nos. 27-02007 and 25-02160. Water right no. 27-02007 is a storage right for the storage of 348,000 afy of water from the Blackfoot River in the Blackfoot Reservoir for the irrigation of 30,469 present and future acres within the Fort Hall Indian Reservation. *Consent Decree*, p.32. Water right no. 25-02160 is a storage right for the storage of 100,000 afy of water from Grays Lake for the irrigation of 30,469 present and future acres within the Fort Hall Indian Reservation. *Consent Decree*, pp.33–34. Paragraph 27-11375.x.f. further provides that if water available under right nos. 27-11375, 27-02007 and 25-02160 are collectively insufficient to satisfy water right 27-11375, the Tribes may then utilize groundwater within the Reservation to satisfy that right. It is the Tribes' ability to fulfill water right no. 27-11375 with water rights 27-02007 and 25-02160 and

⁶ Although the Committee of Nine did not brief the issue of the meaning of the term "equitable entitlement," at oral argument counsel for the Committee stated "we would join in the State's argument that they put forth both today here in oral argument and in their briefing."

groundwater that the State contends is the Tribes' "equitable adjustment" under the plain language of paragraph 27-11375.x.d.

In response, the Tribes and the United States argue that the State's interpretation of equitable adjustment is inconsistent with the plain language of the *Consent Decree*. It is their position that construing the term as suggested by the State reads paragraph 27-11375.x.d. out of the *Consent Decree* altogether and renders the term equitable adjustment meaningless. The Tribes assert that they already are entitled to resort to storage and groundwater to fulfill their 27-11375 right under the plain language of paragraphs 27-11375.x.a. and .x.f. whether non-Indian diversions exceed 45,000 afy or not. Therefore, the inclusion of paragraph 27-11375.x.d. by the parties under the State's interpretation would be unnecessary and meaningless. The Tribes and United States further contend that paragraphs 27-11375.x.a. and .x.f., by their express terms, provide a protection to the Tribes separate and distinct from the equitable adjustment provision of paragraph 27-11375.x.d. They argue the plain language of paragraph 27-11375.x.d. is intended to protect the Tribes from man-made reductions in the Blackfoot River exceeding 45,000 afy that result from non-Indian diversions, while paragraphs 27-11375.x.a. and x.f. protect the tribe from naturally caused shortages.

Contrary to the interpretation proposed by the State, the United States and Tribes assert that the plain language of the term equitable adjustment requires "an increase to the Tribal Water Right by an amount equal to the annual diversions by persons diverting natural flow from the Blackfoot River minus 45,000 acre-feet per year."⁷ *Motion for Enforcement*, p.2. They also seek the following conditions: (1) the water must be available and delivered to the Tribes existing points of diversion; (2) the water must come at no cost to the Tribes; (3) the water must come from a source other than the Blackfoot River Basin; (4) the water must not interfere with any of the Tribes' other decreed water rights; (5) the water must have the same priority date as the Blackfoot River water right – 1867; and (6) the water must be delivered in a timely manner during the irrigation seasons.

⁷ It should be noted that the United States and Tribes do not ask this Court to define the term "equitable adjustment" at this stage of the proceeding as they argue that the definition of the term "equitable adjustment" pertains to remedy, not entitlement.

This Court finds the term “equitable adjustment” as used in paragraph 27-11375.x.d. of the *Consent Decree* to be ambiguous. The term “equitable adjustment” was not defined by the parties in the *1990 Agreement* and hence was not further defined in the *Consent Decree*. The parties have not argued a common or accepted legal meaning for the term was intended or even exists. Since the term “equitable adjustment” is undefined and is subject to a multitude of plausible and conflicting interpretations, the Court finds the term ambiguous as a matter of law.

The Court further finds that genuine issues of material fact exist as to the parties’ intent regarding the meaning of the term “equitable adjustment” at the time of contracting. As an initial matter, certain issues of fact arise from the plain language of the *Consent Decree* itself. For instance, the State’s interpretation disregards the term “negotiate” from the phrase “the parties shall negotiate an equitable adjustment to the Tribal water rights.” Under the State’s interpretation, there would be no reason for the parties to reconvene and “negotiate” an equitable adjustment to the Tribal water rights. The State’s interpretation of an equitable adjustment is self-executing – if the 45,000 afy estimate is exceeded, the Tribes equitable adjustment is that they can use storage water under water right nos. 27-02007 and 25-02160, and if necessary groundwater, as provided by Paragraphs 27-11375.x.a. and x.f. Under the State’s interpretation, there really is no need to, or room for, any negotiations between the parties. Further, based on the inclusion of the term, clearly there was an unresolved issue over exceeding the 45,000 afy estimate notwithstanding the Tribes’ ability to fulfill the right through the use of storage and groundwater.

The State argues that interpreting the equitable adjustment provision to require additional water beyond the supplemental use of storage and groundwater would result in the Tribes’ receiving and controlling more water than authorized under the right, that the ability to use storage water and groundwater ensures the full satisfaction of the 27-11375 right and interpreting the term to require additional water would result in the Tribes’ receiving more water than could be utilized under the right, thereby placing the Tribes’ in a better position than contemplated by the *1990 Agreement*. This Court disagrees. To the extent the Tribes’ must resort to storage to make up for any difference in quantity in

excess of the 45,000 afy then the availability of carryover storage water to ensure water supplies for subsequent years is reduced. In regards to the use of groundwater, the remarks qualifying the 27-11375 water right are structured to protect the rights non-Indian water users while at the same time providing the Tribes' with flexibility regarding the future development of additional acres. The less surface water available from Blackfoot River and the more reliance on groundwater could potentially limit that flexibility based on comparative costs and the logistics of water delivery. In addition, the Tribes are authorized to exceed the 150,000 afy under water rights 27-11375, 27-02007 and 25-02160 provided the excess is offset against water right 01-10223, in effect allowing for an exchange of water. While the quantity of the 27-11375 right may be able to be satisfied through the use of groundwater the differences in source and points of diversion potentially create other issues. Paragraph 27-11375.x.d. acknowledges that the 45,000 afy figure contained therein is an estimate and provides for a remedy in the event the estimate is exceeded. Accordingly, contrary to the State's argument, the context in which the equitable adjustment term is used indeed contemplates some modification to the "the Tribal water rights," for redress beyond the supplemental use of storage and groundwater as specified in the *Consent Decree*.

However, contrary to the Tribes' argument, any such potential adjustment to "the Tribal water rights" is not limited to the 27-11375 water right. The term "Tribal water rights" is a defined term in the *Consent Decree* meaning "those water rights confirmed and recognized in this Decree as rights held in trust for the Tribes by the United States, including those rights so held for the benefit of individual Indians on Indian lands." *Consent Decree*, p.11. This is significant because in the event the *Consent Decree* contemplated allocating the entire flow of the Blackfoot River in an average water year based on the 45,000 afy year estimate, the parties would have therefore acknowledged at the time of contracting that exceeding the 45,000 afy estimate would result in an over allocation. As a practical matter, beyond the use of groundwater, there may be no more water available for augmentation. Consistent with this possibility, the remedy, whatever it may be, expressly extends beyond the 27-11375 right.

MEMORANDUM DECISION AND ORDER ON MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND INSTRUCTIONS ON FUTURE PROCEEDINGS (*MOTION FOR ENFORCEMENT*)

Since the Court finds that the term “equitable adjustment” as used in the *Consent Decree* is ambiguous, and because the Court finds that genuine issues of material fact exist as to the contracting parties’ intent regarding the meaning of the term “equitable adjustment,” summary judgment on the meaning of the term “equitable adjustment” is denied.

V.

ORDER

The Court finds as a matter of law that the Tribes are entitled to an “equitable adjustment” to the Tribal water rights in the event the 45,000 afy estimate contained in paragraph 27-11375.x.d. of the *Consent Decree* is exceeded by non-Indian diversions diverting natural flow from the Blackfoot River prior to January 1, 1990, as a result of the Decree in the SRBA. The United States and Tribes’ *Motion for Partial Summary Judgment* is **granted in part** in this respect. The Court further finds as a matter of law that the 45,000 afy estimate contained in paragraph 27-11375.x.d. is not an absolute cap on non-Indian diversions from the Blackfoot River and that qualifying non-Indian diversions are protected absolutely. The State of Idaho’s *Motion for Partial Summary Judgment* is **granted in part** in this respect. The remainder of the issues raised by the parties in their *Cross-Motions for Summary Judgment* are **denied**.

VI.

INSTRUCTIONS ON FUTURE PROCEEDINGS

The following instructions govern how the Court intends to proceed further in this matter:

1. At this stage it has yet to be determined whether the 45,000 afy estimate has been exceeded. Once the *Motion for Accounting* is finalized the Court will schedule an evidentiary hearing to determine by what quantity, if any, the 45,000 afy estimate is exceeded by non-Indian water users based on the partial decrees issued in the SRBA.

MEMORANDUM DECISION AND ORDER ON MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND INSTRUCTIONS ON FUTURE PROCEEDINGS (*MOTION FOR ENFORCEMENT*)

2. In the event the Court finds the 45,000 afy estimate is exceeded, consistent with the terms of the *Consent Decree*, the Court will order the parties to participate in settlement negotiations with the assistance of a settlement moderator. The parties will be permitted to either agree on a settlement moderator, or jointly submit a list of three mutually acceptable moderators and the Court will select from the list. The parties will thereafter be given a time certain within which to hold a yet to be determined series of settlement discussions. While the Court acknowledges the parties were previously unsuccessful in negotiating a settlement, the parties did not have the benefit of the resolution of the *Motion for Accounting* or this decision, which decided the following issues:

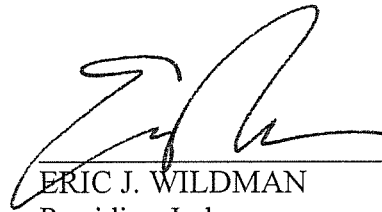
- i) If the 45,000 afy estimate is exceeded, the Tribe's are entitled to an "equitable adjustment." The remedy of "equitable adjustment" was not intended by the parties to be limited to the supplementation of the 27-11375 right with storage and/or groundwater as already expressed in the *Consent Decree*.
- ii) The 45,000 afy estimate was not intended as a cap on the cumulative quantity of non-Indian water rights protected under the *Consent Decree*. The intent of the parties was to protect all water rights of qualifying non-Indian water users.
- iii) The remedy of "equitable adjustment" was not intended to be limited in scope to the 27-11375 water right. Although diversions in excess of 45,000 afy estimate affect the 27-11375 right, the parties intended a remedy much broader in scope such that the "equitable adjustment" provision could apply to any of the Tribes' rights confirmed by the *Consent Decree*.

The resolution of the foregoing issues may assist in guiding the direction of the settlement negotiations.

3. At the conclusion of the period ordered for settlement negotiations, the Court will hold a status and scheduling conference. If it is represented that the parties were unsuccessful in negotiating a settlement the Court will schedule an evidentiary hearing for the purpose of taking evidence on the intended meaning of the term "equitable adjustment."

IT IS SO ORDERED.

DATED: June 3, 2011.

A handwritten signature in black ink, appearing to read 'Eric J. Wildman', is written over a horizontal line.

ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER ON MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND INSTRUCTIONS ON FUTURE PROCEEDINGS was mailed on June 03, 2011, with sufficient first-class postage to the following:

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