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JUN 06 2011
DEPARTMENT OF
WATER RESOURCES

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

In Re SRBA	)	
Case No. 39576	)	Subcase No. 27-11375
	)	
	)	JOINT RESPONSE OF THE
	)	SHOSHONE-BANNOCK TRIBES
	)	AND UNITED STATES TO THE
	)	STATE OF IDAHO'S
_____	)	MOTION FOR ACCOUNTING

INTRODUCTION

On May 24, 2011, the Court held a scheduling conference regarding the State of Idaho's Motion for Accounting and subsequent list of water rights filed by the State. The

parties have requested additional briefing on the Fort Hall Agreement subordination provision 27-11375.x.d., and the Court has Ordered such briefing be filed by the parties on or before June 3, 2011. The Shoshone-Bannock Tribes of the Fort Hall Reservation (hereinafter referred to as the "Tribes"), and the United States of America as Trustee on behalf of the Shoshone-Bannock Tribes (hereinafter referred to as the "United States") respectfully file this Joint Response to the State's Motion for Accounting and the Committee of Nine's Response to the Content of the State's List of Rights.

ARGUMENT

I. Provision 27-11375 Is Not Ambiguous; The Plain Language Does Not Include Inactive Water Users

The instant issue before the Court is a basic contract issue: whether inactive water rights, which were not included in the State of Idaho's estimated 45,000 AFY of water being diverted during the Fort Hall Agreement negotiations (1986-1987), should be included under provision 27-11375.x.d. which "ensures persons diverting natural flow from the Blackfoot River prior to January 1, 1990," will receive the provision's protections. Some parties have proposed that this phrase is ambiguous. The determination of whether contract language is ambiguous is a question of law. *Klamath Water Users Protective Assoc. v. Patterson*, 204 F.3d 1206 (9th Cir. 2000).

It is well established that "contract terms are to be given their ordinary meaning, and when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself." See *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1549 (9th Cir. 1989). Whenever possible, the plain language of the contract should be considered first. See *Textron Defense Systems v. Widnail*, 143 F.3d 1465, 1469 (Fed. Cir.

1998). “We begin with the plain language.” *McAbee Constr., Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996) . The fact that the parties dispute a contract’s meaning does not establish that the contract is ambiguous; it is only ambiguous if reasonable people could find its terms susceptible to more than one interpretation. *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1032 (9th Cir. 1989). Indeed, it is not enough that the parties differ in their interpretation of the contract clause. *See Heating and Plumbing Co. v. Kelso*, 987 F.2d 1575, 1578 (Fed. Cir. 1992). Nor may a court look to extrinsic evidence in determining whether a contract is ambiguous. *See McAbee Constr., supra* 97 F.3d at 1435.

Here, 27-11375.x.d. is not ambiguous. On its face, the language is quite clear; the provision explicitly states “persons diverting natural flow from the Blackfoot River prior to January 1, 1990,” receive the benefit of the subordination protection. The use of the verb “diverting” clearly limits in time the water rights which were documented and accounted for by the State in estimating the 45,000 AFY of water being used by the water users. The provision further refers to “existing diversion” which again denotes water being used at the time of the negotiations, not inactive water rights. Nothing in the provision illustrates an intention of the parties to include water rights which began diverting after January 1, 1990. By its terms, it does not confer any rights or benefits to inactive water users.

The language clearly evinces the intent of the parties to limit intended beneficiaries of the subordination clause to the water users diverting water prior to January 1, 1990. To allow inactive water uses and other uses would expand the benefit of the subordination to all decreed non-Tribal water rights in Basin 27, a result not intended by the plain language of the provision.

The Tribes and United States agreed in provision 27-11375 to subordinate their water right to existing estimated diversions (45,000 AFY) at the time of the negotiations and nothing more. We bargained for certainty as to the amount of water being diverted by water users and the State of Idaho reviewed the current water being diverted in Basin and agreed to a date certain, January 1, 1990, to define the class of water users entitled to the benefit of subordination of the Tribal rights. The plain language of the provision is sufficient to rebut the contention that the inactive water users are intended beneficiaries. The words of the provision should be given their ordinary meaning as the parties did not intend or agree to any alternative meaning.

II. The Parties to the 1990 Agreement Intended To Include Only Those Water Users Diverting Water Prior to January 1, 1990

Even if the provision were determined to be ambiguous, the contemporaneous understanding of the parties to the Fort Hall Agreement supports the interpretation that the subordination provision does not extend to water rights which were not actively diverting during the time of the negotiations. The Tribal understanding is evidenced by the testimony of their consultant, Dr. Woldezion Mesghinnawho who participated in the negotiations of the subject provision and who has testified that his understanding of provision 27-11375 is,

that the reasons for inclusion of this provision on the Tribal water right to the Blackfoot River were: (1) to protect the existing non-Indian water users diverting from the Blackfoot River, whose water right priority dates would be junior to the Tribal water right; and (2) to limit the extent of protection provided to the non-Indian water users such that the Tribes would still have a useable water right to the natural flows of the Blackfoot River. As stated in the 1990 Agreement, the protection provided to the non-Indians only applies to those water users diverting from the natural flows of the Blackfoot River and only to those users who were diverting prior to January 1, 1990.

(emphasis added). Affidavit of Woldezion Mesghinna , at ¶ 8 to Memorandum in Support of Motion for Enforcement of Fort Hall Consent Decree.

Dr. Mesghinna further states,

At the time of the 1990 Agreement, the non-Indian Basin 27 users were diverting an uncertain quantity of water from the Blackfoot River. In order to provide finite protection to these existing non-Indian water users, an estimate of the existing non-Indian Basin 27 diversions from the Blackfoot River was made as 45,000 acre-feet per year. This estimate was generated by the Idaho Department of Water Resources based on available diversion records and estimated diversions for any unmeasured water uses. The estimate represented the best information available at the time of the 1990 Agreement on actual irrigation diversions by non-Indian irrigators in Basin 27.

Aff. of Mesghinna, at ¶ 9.

Similarly, the United States’ contemporaneous understanding of the Blackfoot River water right states that, “[a]s a condition of this right, the Tribes and United States agree to protect the existing non-Indian natural flow water uses on the Blackfoot River, ...” Record of Decision Document and Analysis in Support of Interior Department Approval of 1990 Fort Hall Water Rights Agreement for the In Re Snake River Basin Adjudication, May 23, 1990, p. 19 (Second Affidavit of David A. Jarvis, Ex. 7) to Joint Consolidated Reply by United States and Shoshone-Bannock Tribes in Support of Motion for Enforcement. Furthermore, there is nothing in the 1990 Fort Hall Agreement federal legislative history which supports a contrary interpretation or even suggests any contemplation of protecting inactive water rights.

Moreover, the State’s contemporaneous understanding supports the view that only active non-Indian water users in the Blackfoot River are entitled to the benefits of the subordination. For example, during the hearing on approval of the Fort Hall Consent Decree,

Mr. David Shaw responded to questioning by State's attorney, Clive Strong, and explained that,

[r]emark .d is the rest of the subordination language that clarifies persons diverting natural flows from the Blackfoot River prior to January 1 of 1990 that subsequently have the rights decreed in the Snake River Basin Adjudication up to a maximum of 45,000 acre-feet per year will be entitled to continue to divert those water rights even though their priorities are junior to the priority of this natural flow water right.

Transcript of Proceedings on Proposed Consent Decree on 1990 Fort Hill Indian Water Rights Settlement Agreement, at 26-27 (July 18, 1995) (Exhibit 4 to Affidavit of David Jarvis, submitted with Motion for Enforcement).

More recently, Mr. Shaw submitted sworn affidavit testimony in this proceeding that explained that only active irrigators were intended to be included:

8. The estimate of actively irrigated acreage and duty of water were combined to produce the estimate of 45,000 ac-ft per year of water diverted by the North Side Users.

9. The 45,000 ac-ft per year estimated water requirement did not include water that could have been previously diverted and used on acreage that was inactive in the 1986-1987 timeframe. With the information and tools available, including the records of the Blackfoot River Water District and the Department [of Water Resources], it was not possible to estimate the amount of water that might have been used in prior years on lands not being actively irrigated in the 1986-1987 timeframe.

10. Neither did the 45,000 ac-ft per year estimated water requirement include water diverted and used by *de minimus* domestic or stockwater uses. * * *.

Affidavit of David B. Shaw, at 3-4 (March 18, 2011) (submitted in conjunction with the Committee of Nine's Response to the Content of the State's List of Rights). The Committee of Nine also agrees with this interpretation.

Accordingly, the plain language and contemporaneous understandings of the parties to the 1990 Agreement is that the benefit of provision 27-11375.x.d. extends only to those water users who were actually diverting natural, surface water flows from the Blackfoot River prior to 1990. Ground water users, post-1990 surface water users, inactive water users, *de minimus* domestic and stockwater users, and water users who import water from outside Basin 27, are not entitled to the benefit of this provision.

The State maintains there is a latent ambiguity in provision 27-11375. We disagree. The State aims to include all decreed water rights in the Blackfoot River Basin, regardless of what their cumulative annual diversion amount. Accordingly, it is not surprising that the State argues for an ambiguity while disregarding the 45,000 AFY estimate provided by the State and included in the 1990 Agreement.

Additionally, the State's proposed speculative results if the inactive rights are not included in the 45,000 AFY estimate are also misplaced. "When the terms of a contract are clear and unambiguous [as here], there is no need to resort to extraneous circumstances for its interpretations." *Sea-Land Serv., Inc. v. United States*, 213 Ct.Cl. 555, 567, 553 F.2d 651, 658 (1977), *cert denied*, 434 U.S. 1012 (1978).

Even if the State were correct in its recent view that there exists an ambiguity in 27-11375, any such ambiguity in the 1990 Agreement is to be " * * * resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it." *Winters v. United States*, 207 U.S. 564, 576-577 (1908). This and other canons of construction for Indian treaties and agreements remain valid today. *See Minnesota v. Mille*

Lacs Band of Chippewa Indians, 526 U.S. 172, 196-200 (1999); N. Newton, Ed., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, Section 2.02 (2005 Ed.). Indeed, the standard principles of statutory construction do not have their usual force in cases involving Indian tribes. *See Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

Finally, the State's proposed interpretation would jeopardize the Tribes' useable water rights, because the analysis of available water supply that was completed under the assumption of 45,000 AFY would no longer be accurate. During the negotiations leading up to the 1990 Agreement, the Tribes negotiated for a Federal reserved water right based on past, present, and future water uses. In analyzing future uses, it was necessary to make estimates of both water supply available to the Tribes as well as the water demand requirements associated with particular uses. Balancing available water supplies with projected demand requirements resulted in Tribal water right claims from various sources that could actually be fulfilled.

In terms of the Blackfoot River natural flow supply, the State desired protection for existing uses in the basin by providing that these existing uses would be able to divert from the natural flows of the Blackfoot River ahead of the Tribes. The Tribes needed some assurance that allowing existing water uses to continue would not equate to non-Indian use of the entire natural flow supply of the Blackfoot River, which would jeopardize the Tribes' ability to use their water right. The State estimated that existing uses in the Blackfoot River Basin totaled 45,000 AFY, and this was written into provision 27-11375.x.d.

The Tribes' analyses calculated the supply available to the Tribes from the natural flows of the Blackfoot River as the total natural flow of the Blackfoot River minus the

45,000 AFY promised to the existing non-Indian water users. The Tribes only agreed to subordinate to the non-Indians because their analyses showed that the remaining natural flow water supply was sufficient to fulfill their water rights and meet their projected future water demands while protecting active and decreed water rights of non-Indians up to 45,000 AFY.

The 1990 water supply analysis that was completed by the Tribes in order to agree with the terms of the 1990 Agreement would become inaccurate and meaningless if the inactive water uses were included at this late date, because the remaining water supply available to the Tribes after accounting for non-Indian uses would be a reduced value. Protecting the inactive water uses in addition to the estimated 45,000 AFY of active water users would thus jeopardize the Tribes' ability to utilize the full extent of their Blackfoot River water right to an extent to which the Tribes and United States never agreed.

III. Alternatively, Inactive Water Uses Must Be Included In The 45,000 AFY Calculation

While the Tribes and United States believe that the provision clearly excludes the inactive water users from the benefits of the protection in 27-11375.x.d, should the Court disagree with our interpretation and include those inactive water users, then it necessarily follows that those inactive water users must also be included in any calculations made for purposes of determining whether the 45,000 AFY limit has been exceeded, such that the Tribes would be entitled to an equitable adjustment of the Tribal water rights. The necessity of an equitable adjustment is the subject of the United States' and Tribes' Joint Motion for Enforcement of the Consent Decree, which has been briefed extensively and won't be repeated here. Suffice it to say, that if the inactive water rights are included in the class of

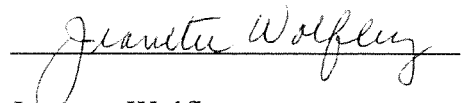
water rights to be protected, it becomes more likely that an equitable adjustment of the Tribal right will be required.

CONCLUSION

Under the plain language of provision 27-11375, as confirmed by the contemporaneous understanding of all parties to the 1990 Fort Hall Agreement, the inactive water users are not entitled to any benefits of the subordination provisions. Only water users diverting natural surface flows from the Blackfoot River prior to January 1, 1990 are included.

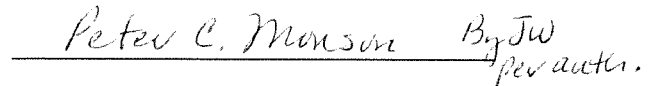
Respectfully submitted this 2nd day of June, 2011.

Shoshone-Bannock Tribes



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CERTIFICATE OF SERVICE

I certify that on this June 2, 2011, I caused to be a true and correct copy of the foregoing Joint Response of the Shoshone-Bannock Tribes and United States to the State of Idaho's Motion for Accounting to be filed with the Court and served on the following parties by the method indicated::

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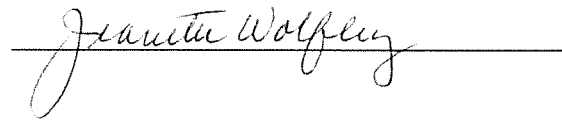
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A handwritten signature in cursive script, reading "Jeanette Wolfley", is written over a horizontal line.