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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

**RESPONSE BRIEF IN OPPOSITION
TO THE COMMITTEE OF NINE'S
RESPONSE TO THE CONTENT OF
THE STATE'S LIST OF RIGHTS**

P4 Production, LLC, Blackfoot Spring Ranch, LLC, Alma Hubbard, Ohanesian & Associates, represented by Racine, Olsen, Nye, Budge & Bailey, Chartered, and Natural Guardian Limited Partnership, Bear Lake Grazing Co., P. Thomas Blotter Family, and Stucki Revocable Trust, represented by Holden, Kidwell, Hahn & Crapo, PLLC (collectively, the "Respondents") submit this brief pursuant to the Court's *Briefing and Oral Argument Schedule on State of Idaho's Motion for Accounting* dated May 24, 2011, in opposition to the Committee of Nine's *Response to the Content of The State's List of Rights* (the "Committee's Response") dated March 18, 2011. The Respondents all own water rights in Basin 27 that will become subordinate to water rights of the Shoshone-Bannock Tribes if the *Committee's Response* is granted.

Introduction

In 1990 the State of Idaho, Shoshone-Bannock Tribes, and United States Department of Interior Bureau of Indian Affairs entered into the Fort Hall Indian Water Rights Agreement (the “Agreement”) to define the water rights of the Shoshone-Bannock Tribes. As part of the Agreement, the Tribes agreed to subordinate their Blackfoot River water right number 27-11375 to all existing non-Indian water rights from the Blackfoot River. The Agreement reads: “The Tribes and United States agree to 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 that full legal entitlement under state law.” (Agreement Art. 7, § 18.x.d.)¹

Since historically the Blackfoot River had not been closely regulated by the State of Idaho, and since Blackfoot River water rights had not been adjudicated by the SRBA Court by the time the Agreement was being negotiated, the parties did not know for certain how much water non-Indians could lawfully divert from the Blackfoot River. The parties overcame this obstacle by estimating the amount of water being diverted by non-Indians, and by agreeing to adjust the Tribes’ water rights in the event the total diversions, once the adjudication was complete, exceeded their estimate. The Agreement reads: “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.” *Id.* The parties agreed to “specifically enumerate all rights protected by this provision once the SRBA decree for this basin becomes final.” *Id.*

While the final SRBA decree has not yet been entered, in October of 2010 the State of Idaho filed a *Motion for an Accounting of All Water Rights Benefitting From the Subordination Provisions of the Fort Hall Consent Decree and Insertion of a Remark Memorializing That Benefit on Each Affected Water Right* (the “*Motion for Accounting*”) to specifically identify the water rights that benefit from the subordination of the Tribes’ water right number 27-11375. The State attached to the *Motion for Accounting* a list of protected water rights. The list includes all Blackfoot River water rights with a priority date prior to January 1, 1990.

¹ This section of the Fort Hall Agreement is incorporated verbatim into section 27-11375.x.d 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* (the “Consent Decree”) entered by this Court on August 2, 1995.

With the adjudication of the Blackfoot River nearly complete, it appears that more than 45,000 acre-feet may lawfully be diverted under water rights with priority dates before January 1, 1990. Consequently, the Tribes and the United States have filed a motion in this subcase asking this Court to make an “equitable adjustment” to the Tribes’ water rights as required by the Agreement.

The Tribes argue that the equitable adjustment should include increasing the amount of water it receives from the Snake River. Since the members of the Committee of Nine depend on the Snake River for their own water supplies, they are at risk of having their water supply impacted in consequence of the equitable adjustment, whatever that may ultimately be. The *Committee’s Response* is a novel attempt to reduce its exposure by re-writing the Agreement so that it only protects water rights that diverted water from the Blackfoot River in the “1986-87 time-frame” as opposed to protecting all diversions prior to January 1, 1990, as the Agreement states.

Summary of the Argument

The Committee of Nine’s assertion that the Fort Hall Agreement protects only those water rights that diverted water in 1986 or 1987 contradicts the plain language of the Agreement and must be rejected. Moreover, the Committee’s attempt to have this Court consider parol evidence, without first establishing an ambiguity in the Agreement, is without any legal support and is in fact directly contrary to well-established Idaho law. The Respondents should be awarded their attorney fees for having to defend against a filing that is not reasonably grounded in law. To the extent the *State of Idaho’s Reply to the Committee of Nine’s Response to the Content of the State’s List of Rights* (the “*State’s Reply*”) supports the *Committee’s Response*, it must be rejected for the same reasons.

The State’s argument that there is a latent ambiguity in the Agreement should not be considered because the State is judicially estopped from taking a position that the Agreement is intended to protect only a limited class of water rights that diverted from the Blackfoot River prior to 1990. Additionally, the State has failed to make a prima facie showing of a latent ambiguity in the Agreement.

In the event the Court considers *sua sponte* whether the Agreement is ambiguous, the evidence clearly shows that it is not.

Argument

1. The plain language of the Fort Hall Agreement protects all water rights that diverted water prior to January 1, 1990.

When interpreting the Agreement, the court must first look to the plain meaning of the language in the Agreement. *Potlatch Educ. Ass'n & Doug Richards v. Potlatch Sch. Dist.*, 148 Idaho 630, 633 (2010). If there is no ambiguity in that language, the Agreement “must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument.” *C & G, Inc. v. Rule*, 135 Idaho 763, 765 (2001). The court may consider parol evidence only if the plain language is subject to “two different reasonable interpretations or the language is nonsensical.” *Swanson v. Beco. Constr. Co.*, 145 Idaho 59, 62 (2007).

The Agreement states that the Tribes will not exercise water right no. 27-11375 against “persons diverting natural flow from the Blackfoot River prior to January 1, 1990 whose rights are decreed in the SRBA” There is no ambiguity in this statement. The only reasonable interpretation is that the Agreement protects all pre-1990 diversions from the Blackfoot River under water rights that are decreed in the SRBA. The Committee of Nine admits this, stating that “the Tribes’ agreed to subordinate their water right, 27-11375, with a June 14, 1867 priority date, to all pre-1990 diversions from the Blackfoot River” (*Committee’s Response 2*; emphasis added)

Despite that admission, the Committee of Nine asks this court to limit the subordination condition to only those water users who diverted water “in 1986-87 timeframe.” *Id.* It argues that “[t]he use of the verb ‘diverting’ is important for purposes of the State’s *Accounting Motion* because, as the *Shaw Affidavit* explains, the Subordination Provision was developed based on acreage being irrigated in the 1986-87 timeframe.” (*Committee’s Response 3*.) In other words, the Committee of Nine argues that the word “diverting” means “diverting in the 1986-87 timeframe.”

The *Committee’s Response* utterly contradicts the plain meaning of the Agreement. By definition, the word “divert” means “[t]o turn aside; to turn out of the way; to alter the course of things. Usually applied to water-courses” Black’s Law Dictionary, 5th Ed. At 429. There is nothing in the definition that limits its application to the 1986-87 timeframe. Thus, the plain meaning of the phrase “diverting natural flow from the Blackfoot River prior to January 1, 1990” necessarily includes all pre-1990 diversions.

2. The *Shaw Affidavit* should be stricken as inadmissible parol evidence.

The *Committee's Response* relies entirely on the *Shaw Affidavit*—parol evidence—to try and persuade this Court to limit subordination protection to water rights that diverted water in the 1986-87 timeframe. The *Committee's Response* fails to offer any legal basis for its presentation of parol evidence without first establishing an ambiguity in the plain language of the Agreement. It is well-established that only *after* a legal instrument is determined to be ambiguous can “evidence as to the meaning of that instrument...be submitted to the finder of fact.” *Knipe Land Co. v. Robertson*, 2011 Ida. LEXIS 65 (Idaho Mar. 23, 2011). The *Committee's Response* does not claim that the word “diverting” is ambiguous, nor does it identify any other word or phrase that it claims is ambiguous. Instead, it audaciously asks the Court to use parol evidence to construe the Agreement in a manner that contradicts its plain, unambiguous meaning. Since the Committee of Nine failed to even argue (let alone prove) that the Agreement is ambiguous, this Court is precluded from considering parol evidence from the *Shaw Affidavit* or elsewhere.

3. The State of Idaho is estopped from claiming that an ambiguity exists that would deprive any pre-1990 diversions from the protection of the Tribes' subordination.

The State of Idaho asserts in its *Motion for Accounting* that “[t]he intent of the parties to the 1990 Fort Hall Agreement, and subsequent Fort Hall Consent Decree was to protect the right of non-Indian Blackfoot water users to divert up to the full legal entitlement of their natural flow water rights without regard for senior water right 27-11375.x.d.” (*Motion for Accounting* 2.) Nothing in the motion suggests that the protection is limited to water rights that were actively diverting water in the 1986-87 timeframe. Further, the list of protected water rights attached to the *Motion for Accounting* includes all persons who diverted water prior to January 1, 1990, regardless of whether they diverted water in the 1986-87 timeframe.

The State has also made numerous representations that the Agreement protects all pre-1990 diversions in the *State of Idaho's Response to the United States' and the Shoshone-Bannock Tribes' Motion for Enforcement of The Fort Hall Decree* (“*State's Reply to Motion for Enforcement*”) filed in this subcase on April 4, 2011. For example, the State asserted that “the parties had also agreed to protect the water rights of *all* non-Indian water users diverting prior to January 1, 1990,” *Id.* at 4 (emphasis added), that “the intent of the parties to the Fort Hall Agreement to subordinate the senior Tribal water rights to *all junior non-Indian users* diverting water prior to

January 1, 1990 (emphasis added), and that “these non-Indian water users are to be protected from the Tribes’ water rights to their ‘full legal entitlement,’” *Id.* at 6. The State also quotes and endorses the statement in the Executive Summary of the Agreement that “[o]n the Blackfoot River, water rights will be delivered as they have been *in the past 100 years.*” *Id.* at 9.

Now that the State has been presented with the Committee of Nine’s scheme to reduce exposure under the Agreement, it appears to have done an about-face, stating that “[t]he 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.” (*State’s Reply* 1-2.) While the *State’s Reply* does explicitly state that the intent of the Agreement was to only protect diversions made in the 1986-87 timeframe, it conspicuously fails to oppose the Committee of Nine’s attempt to reach that result.

To the extent that the State attempts to claim that the intent of the Agreement is to protect only a limited class of pre-1990 diversions, it is judicially estopped from doing so. The doctrine of judicial estoppel “precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position.” *Sword v. Sweet*, 140 Idaho 242, 253 (Idaho 2004). The purpose of the doctrine is to “prevent abuse of the judicial process by deliberate shifting of positions to suit the exigencies of a particular action.” *Heinze v. Bauer*, 145 Idaho 232, 235 (Idaho 2008).

Given these numerous representations by the State that the intent of the Agreement is to protect all pre-1990 diversions under water rights that are decreed in the SRBA, the State cannot now argue otherwise.

4. There is no latent ambiguity in the Agreement.

Since the State is precluded from claiming that the Agreement protects only a limited class of pre-1990 diversions, the Court should not consider the State’s latent ambiguity argument to that effect. If the Court nevertheless elects *sua sponte* to consider whether there is a latent ambiguity in the Agreement, it must rule that there is none because the plain language of the Agreement loses no clarity in light of the methodology used to develop the 45,000 acre-foot estimate. Further, the purported ambiguity would violate the Idaho Constitution and constitute a collateral attack on partial decrees already entered by this Court.

A latent ambiguity exists “where an instrument is clear on its face, but loses that clarity when applied to the facts as they exist.” *Knipe Land Co. v. Robertson*, 2011 Ida. LEXIS 65. For example, a latent ambiguity may exist if application of a particular definition within a document would lead to illogical results. *Mountainview Landowners Coop. Ass’n v. Cool*, 139 Idaho 770 at 773 (Idaho 2004). On the other hand, where a contract contains no illogical absurdity and extrinsic evidence does not clearly show that the parties to a contract meant anything other than what it plainly said, there is no latent ambiguity. *See, Knipe*, 2011 Ida. LEXIS 65.

A. There is no inconsistency between the plain language of the Agreement and the methodology used to develop the 45,000 acre-foot estimate.

The *Committee’s Response* suggests that the manner in which the 45,000 acre-foot estimate was derived creates ambiguity as to whether the Agreement protects all water rights that diverted prior to 1990 or just those who actively diverted water in 1986 or 1987. (*State’s Reply* 2.) Not so. The Agreement expressly states that the 45,000 acre-foot number was an “estimate.” As pointed out in the *State’s Reply to Motion for Enforcement*, the

figure of 45,000 AFY was *an estimate*, as described in the Consent Decree. It was not a cap on the amount of water that could be diverted under non-Indian water rights—these water right holders were assured that they would continue to receive their full legal entitlement under state law.

Id. at 5 (emphasis added.)

Evidence that certain water rights were not accounted for in the 45,000 acre-foot estimate does not make any less clear the provision that the Agreement protects all pre-1990 diversions. In fact, such evidence is entirely consistent with the plain language of the Agreement. The use of this word “estimate” in the Agreement clearly indicates that the parties knew that some valid water rights may not have been accounted for. They addressed this possibility by providing 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.” Had the parties intended to limit the subordination protection to only those water users who diverted water in 1986 or 1987 (a known figure), there would have been no need for the equitable adjustment provision.

If the parties to the Agreement intended to limit subordination protection to water diversions that occurred in the 1986-87 timeframe, they could have easily inserted language to that effect into the Agreement. Instead, the Agreement states that water right 28-11375 is subordinate

to “persons diverting natural flow from the Blackfoot River prior to January 1, 1990,” without exception. Evidence of the methodology used to calculate the 45,000 estimate does not cause this provision to lose any clarity. It simply explains why the parties included the equitable adjustment provision in the Agreement.

Since the plain language of the Agreement loses no clarity even in light of the method used to derive the 45,000 acre-foot estimation, no latent ambiguity exists. Therefore, the Agreement must be construed according to its plain meaning to protect all decreed water rights that diverted water from the Blackfoot River prior to 1990.

B. The purported ambiguity contradicts the Idaho Constitution.

The Committee of Nine offers no legal authority to support its proposition that water rights may be effectively forfeited simply because water was not diverted during a two-year period. Indeed, there is none. A grant of the *Committee’s Response* would violate the constitutional requirement that water rights be administered by priority. Idaho Const., Art. 15, § 3. It would cause the Respondents to become subordinate to other Blackfoot River water rights with later priority dates, potentially as late as 1989. In addition to violating the rule of prior appropriation, it would create a “rebound call” problem that would undermine the intent of the Agreement to protect all existing water uses. To avoid a constitutional violation and a rebound call problem, the Agreement must be construed according to its plain meaning so as to protect all pre-1990 diversions from the Blackfoot River.

C. The Committee’s Response is a collateral attack on partial decrees.

Many of the Respondents’ water rights have been partially decreed in the SRBA. The *Committee’s Response* is an untimely, after-the-fact attempt to condition these water rights in a manner that constitutes a collateral attack on partial decrees already been entered by this Court.

5. The Committee’s Response is without any reasonable basis in law or fact; therefore, the Respondents should be awarded their attorney fees and costs.

The *Committee’s Response* can only be characterized as a “shot in the dark” to gain ground under the Agreement. To the Respondents, it reeks of a powerful entity throwing its weight around in an attempt to steamroll a handful of small water rights that have tried to avoid being caught in the middle of costly of litigation over the Agreement. Of course, that does not warrant

an award of attorney fees. What does justify such an award is the fact that the *Committee's Response* is without any supporting legal authority.

Idaho Code §12-121 provides that “[i]n any civil action, the judge may award reasonable attorney’s fees to the prevailing party or parties.” This statute has been construed to warrant an award of attorney fees where the court finds that an action has been “brought, pursued or defended frivolously, unreasonably or without foundation.” *Landvik v. Herbert*, 130 Idaho 54, 61 (Ct. App. 1997) (internal quotations omitted). A case is frivolous if it is “not supported in fact or warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.” Idaho Code § 12-123.

The *Committee's Response* is not warranted under existing law and cannot be supported by a good faith argument for an extension or modification of existing law. When interpreting legal instruments, Idaho law firmly prohibits courts from considering parol evidence until after an ambiguity is established. Yet, the Committee of Nine relies wholly on inadmissible parol evidence to try and persuade the Court to interpret the Agreement in a manner that is contrary to its plain language, without even attempting to establish an ambiguity. The Committee’s cavalier approach to litigation is without any legal foundation and has forced the Respondents to needlessly incur substantial legal expenses.

Idaho Code § 12-121 and Idaho Rule of Civil Procedure 54(d)(1) are designed to avoid the very waste of judicial recourses and unjustified litigative burden that the *Committee's Response* has imposed upon this Court and the Respondents. Therefore, the Court should award the Respondents’ attorney fees and costs incurred in defending against the *Committee's Response*.

Conclusion

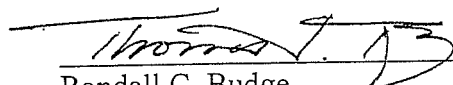
Article 7.1.18.x.d of the Fort Hall Agreement unambiguously subordinates water right 27-11375 to all pre-1990 diversions from the Blackfoot River. Neither the Committee of Nine nor the State has made a *prima facie* showing of either a patent or latent ambiguity with respect to this provision of the Agreement; therefore, this Court need not consider any argument to that effect. Even if the Court considers *sua sponte* whether the Agreement is ambiguous, the evidence of the methodology used to reach the 45,000 acre-foot estimate does not make it so. The methodology used to calculate the 45,000 acre-foot figure is entirely consistent with the parties’ cha-

racterization of the figure as an estimate and their inclusion of the equitable adjustment provision, and does not contradict the Agreement's protection of all pre-1990 diversions.

The *Committee's Response* is without any legal support since it asks this Court to construe the Agreement in a manner that contradicts the plain language of the Agreement, without even attempting to show that the plain language is ambiguous or that a latent ambiguity exists. The Idaho legislature has enacted statutes and the Idaho judiciary has implemented rules that prohibit the filing of pleadings that are not warranted by existing law or a good faith extension of the law, and that enforce the prohibition by requiring anyone making such filings to pay the expenses of persons required to defend such filings. Therefore, the Respondents should be awarded their fees and costs incurred to defend against the *Committee's Response*.

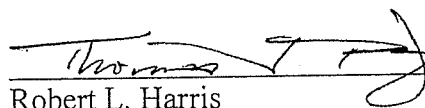
RESPECTFULLY SUBMITTED this 3rd day of June, 2011.

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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
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CERTIFICATE OF SERVICE

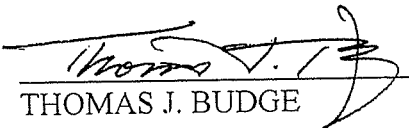
The undersigned hereby certifies that the *Response Brief in Opposition to the Committee of Nines Response to the Content of the State's List of Rights* was served upon the following in the manner(s) indicated on the 3rd day of June 2011.

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