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DEPARTMENT OF
WATER RESOURCES

Attorney for Committee of Nine

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
)
) **COMMITTEE OF NINE'S REPLY**
)
)
)

COMES NOW, the Committee of Nine ("Committee"), by and through its counsel of record, Barker Rosholt & Simpson, LLP, and hereby submits this reply in accordance with the Court's *Briefing and Oral Argument Schedule on State of Idaho's Motion for Accounting*, dated May 24, 2011.

INTRODUCTION

The Committee's initial response to the State's Motion for Accounting was premised upon the State's own investigation of water right diversions and the volume of water associated with said diversions. Based upon the State's investigation, it appeared that a number of water rights identified on the State's original Motion for Accounting did not factually comply with the terms of paragraph 27-11375.x.d of the Fort Hall Agreement and Consent Decree. Hence, the Committee questioned the inclusion of those rights on the State's list.

On April 7, 2011, this Court issued its *Third Scheduling Order on State's Motion for Accounting RE: Fort Hall Indian Water Rights Consent Decree*, requiring a response from the holders of each of the twenty three (23) water rights identified in the Committee's briefing. According to the *Third Scheduling Order*, failure to respond by May 13, 2011 would result in automatic exclusion from the State's list without further hearing. No water users objected to the Court ordered procedure. Accordingly, any further briefing and proceedings in this matter will be limited to those rights which filed a response.¹

This Court's May 24, 2001 *Order*, identified a discrete issue before the Court – whether or not the Consent Decree only protected those water rights actually diverting at the time of the negotiations for the Fort Hall Agreement. As discussed in the Committee's March 18, 2011 response, the plain language of the Consent Decree limits its protections to only those rights “diverting” water prior to January 1, 1990. Since not all of the rights identified by the State were “diverting” water, they should not be included on the State's list.

ARGUMENT

I. The Consent Decree Plainly Limits the Subordination Protections Afforded Basin 27 Water Rights.

Only one brief was filed in opposition to the Committee's response. That brief, filed by a number of Basin 27 water users (collectively referred to as the “Basin 27 Water Users”), asserts that the Consent Decree is unambiguous and protects all pre-January 1, 1990 diversions regardless of whether or not water was actually being diverted under those rights at the time of the Fort Hall Agreement negotiations. The Consent Decree cannot be read so broadly.

¹ Of the 23 rights identified by the Committee, only 11 have responded in this matter: 27-4L, 27-49, 27-73, 27-2039, 27-2041A, 27-2041B, 27-4096, 27-7071, 27-11273, 27-11317, 27-11966. As such, pursuant to this Court's orders, the following right should be removed from the State's list without further hearing: 27-47, 27-54, 27-76, 27-2048, 27-4097, 27-4147, 27-7374, 27-12035, 27-12040, 27-12045, 27-12115, 27-12118.

This Court's *Memorandum Decision and Order on Motions for Partial Summary*

Judgment and Instructions on Future Proceedings, dated June 3, 2011, identified the standard for interpreting a decree. *See Memorandum Decision*, at 7-8. According to the Court:

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 (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 (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 (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. 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. "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.*

Id.

The Consent Decree is clear as to the water rights to be subordinated and cannot be read as broadly as the Basin 27 Water Users demand. Indeed, the Consent Decree states that it only protected water users "diverting" water prior to January 1, 1990. Yet, the Basin 27 Water Users would have the Court rewrite the Consent Decree to protect all water users who "diverted" water prior to January 1, 1990. The Consent Decree does not afford such broad protections. The use of the term "diverting" – as opposed to "diverted" makes this point clear. By using the term "diverting," the parties recognized a limit to the scope of the subordination only to those where were actually "diverting" water prior to January 1, 1990 – not those who may have diverted

water at some time prior to January 1, 1990, but, for some reason or another, were not “diverting” at the time of the Fort Hall negotiations. The Consent Decree is clear on this point.

As an illustration of the intent of this plain language, the *Affidavit of David Shaw* provides further support that the parties only intended to grant subordination protection to those rights “diverting” during the negotiations.² Mr. Shaw, who worked for IDWR at that time and was intimately involved in the Fort Hall negotiations, confirms that the term “diverting” is an important limitation on the scope of the subordination. Notably, the State, the United States and the Tribes all agree with the Committee’s understanding of the plain language of the Consent Decree.

Importantly, the Committee does not assert that the 23 identified rights have been forfeited, abandoned or otherwise lost. Rather, the Committee simply asserts, as the IDWR investigation indicated, that these 23 rights were idled – for whatever reason – during the time of the Fort Hall Agreement negotiations – such that they were not “diverting” water at that time and were not, therefore, considered protected under the subordination provisions.

While it is true that they may have “diverted” water at some time prior to January 1, 1990 – and even after 1990 – that fact alone does not afford these water rights the protections of the Fort Hall Agreement’s subordination provision. Only those qualifying rights that meet the criteria identified in paragraph 27-11375.x.d. of the Consent Decree are protected by the subordination provision. In order to qualify for the subordination protections, water rights must have been “diverting” prior to January 1, 1990 and must be decreed in the SRBA.

² Contrary to the Basin 27 Water Users’ scathing and unfounded accusations, the *Affidavit of David Shaw* was not submitted in an effort to circumvent legal principles or gain some improper advantage. Rather it was submitted to aid the Court and parties in the understanding of the factual issue raised by the Committee and provide further context for the plain language of the Consent Decree. As such, it should not be stricken, as the Basin 27 Water Users demand.

The action verb “diverting” – as opposed to the past-tense “diverted” – is an important term in the Consent Decree. During the negotiations for the Fort Hall Agreement, parties attempted to quantify the rights subject to paragraph 27-11375.x.d. based upon historical diversions. *Shaw Aff.* The State’s list identified 23 rights that were not “diverting” during that time. Therefore, the Court required proof by those on the list.

While it is true that the Committee was not an active participant in the Fort Hall negotiation of paragraph 27-11375.x.d, the Committee has relied upon the interpretations of the State, United States, and Tribes as to the scope of the subordination. Importantly, all of these entities agree that the subordination was limited.

Use of the term “estimated” in the subordination provision does not negate the intent of the Consent Decree. The Basin 27 Water Users argue, at page 7 of their brief, that the use of the term “estimated” “clearly indicates that the parties knew that some valid water rights may not have been accounted for.” That is wrong. Use of the term “estimated” does not negate the specific limitations placed on the subordination provision as discussed above – i.e. water rights “diverting” water prior to January 1, 1990. Further, there is no basis in the Consent Decree or otherwise to interpret the term “estimated” to encompass all possible pre-1990 diversions in Basin 27.

The Basin 27 Water Users assert, at page 8 of their brief, that removal from the State’s List would somehow constitute a collateral attack on those rights for which a partial decree has been entered. However, the Committee was unable to find any reference to the Consent Decree or subordination provision on any of the partial decrees that have been issued to date.

Finally, the Basin 27 Water Users claims that limiting the subordination provision to include only those rights “diverting” prior to January 1, 1990 would result in an unconstitutional

rebound call situation. However, this argument fails to recognize that the State negotiated on the water users' behalf and the United States and Tribes have the authority and ability to subordinate their rights as they determine. This Court has recognized the right of a water right holder to subordinate its right. *Memorandum Decision & Order on Challenge*, Water Right Nos. 01-217 *et seq.*, at 23 (Feb. 9, 2011) (“As sole owner, nothing precludes the USBOR from voluntarily obtaining less than the full gambit of rights associated with its water rights”). Just because further administration may be necessary in the event the subordination provision doesn't protect certain rights doesn't mean the provision is unconstitutional.

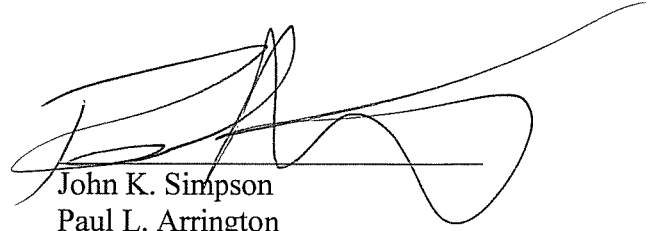
Since the Consent Decree is clear and only protects water users “diverting” prior to January 1, 1990, the Court should remove the 23 water rights identified on Appendix A of the Committee's March 18, 2011 *Response to the Content of the State's List of Rights* from the State's list.

II. Attorneys' Fees are Not Warranted.

Accusing the Committee of being “a power entity throwing its weight around” to “steamroll” “small water rights,” the Basin 27 Water Users demand attorneys' fees in this matter. They assert that the Committee's arguments were not brought in good faith and are frivolous. *Basin 27 Water Users Response* at 8-9. Asserting a party of raising argument without good faith is a serious accusation – particularly, when, as here, such assertions are based on unfounded allegations. As discussed herein, the assertion that the Committee's arguments were not brought in good faith cannot stand. The Basin 27 Water Users' disagreement with the Committee's interpretation of the Consent Decree – an interpretation shared by the State, United States and Tribes – does not give rise to an assertion that the Committee's arguments were raised in bad faith. Indeed, this Court has already determined that the Committee's response to the State's list

raises a question of fact that prevented summary judgment on the Tribes' Motion for Enforcement. *Memorandum Decision* at 10. Accordingly, the request for attorneys' fees should be denied.

DATED this 13th day of June, 2011.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of June, 2011, a true and correct copy of the foregoing was mailed with sufficient first-class postage to the following:

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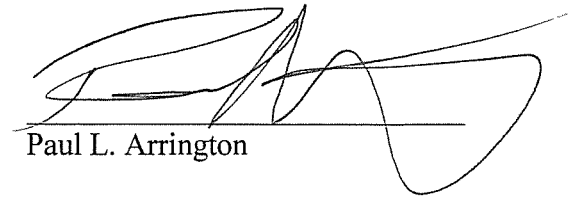
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