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DEPARTMENT OF
WATER RESOURCES

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

SHASTA KILMINSTER-HADLEY (ISB # 7889)
Deputy Attorney General
700 W. State Street – 2nd Floor
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-2400
Facsimile: (208) 854-8072
Attorneys for the State of Idaho

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

In Re SRBA	)	
	)	Subcase No. 27-11375
Case No. 39576	)	
	)	STATE OF IDAHO'S MEMORANDUM
	)	IN SUPPORT OF MOTION TO
	)	ALTER OR AMEND
	)	
_____	)	

Comes now, the State of Idaho, by and through its counsel of record, and submits this Memorandum in support of its Motion to Alter or Amend this Court's June 3, 2011 Memorandum Decision and Order on Motions for Partial Summary Judgment, filed June 17, 2011. In its Motion, the State moved this Court to amend its June 3, 2011 Memorandum Decision and Order on Motions for Partial Summary Judgment ("Order")

to provide that potential equitable adjustments to the Tribes' water rights include the supplementation of surface and natural flow rights with storage and/or groundwater.

ARGUMENT

The State's Motion requests that the Court clarify the holding in its Order: "[t]he 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*,"¹ to reflect that the remedy of equitable adjustment *may* include the supplementation of Tribal water rights with storage or groundwater. This is the State's understanding of the Court's holding on this issue.

The State is concerned that as presently drafted, the Court's holding on the first page of the Order, ("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*.")) could prevent the parties from exploring all possible mechanisms for equitable adjustment.

The *Consent Decree* provides that the parties shall "negotiate an equitable adjustment to the Tribal water rights." The Court has found as a matter of law that the term "equitable adjustment" is 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.

Order at 16. The State contends that, while the term "equitable adjustment" was not defined in the *1990 Agreement* or the *Consent Decree*, neither was it limited in any way.

¹ Memorandum Decision and Order on Motions for Partial Summary Judgment, issued June 3, 2011, at 19.

The term “negotiate” indicates that the size and type of adjustment is to be determined by the parties when and if it is deemed necessary. Thus, the potential form of the equitable adjustment is limited only by what the parties, through negotiation, find mutually acceptable.

The need to maintain the maximum degree of flexibility in negotiating an equitable adjustment is underscored by the Court’s holding that “[t]he 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*.” Order at 1. This is consistent with testimony offered to this Court by Dave Shaw in the 1995 hearing on the *Consent Decree*: “this provision leaves the opportunity to come back and make *some adjustments in the Fort Hall agreement* to account for more than 45,000 acre-feet being decreed.”² The *1990 Agreement* was drafted in such a way as to provide the Tribes with the maximum amount of flexibility in the use of the 581,031 acre-feet per year to which they were entitled. The water rights were to be administered in such a way that the Tribes could decide how and where to best use their water. This was accomplished by creating an intricate mechanism balancing water use under one right against water use under another.

For example, when the Blackfoot River is very high and provides adequate natural flow water to satisfy the non-Indian users and to exceed the 150,000 acre-foot Tribal right, the Tribes can divert more than 150,000 acre-feet, but such diversion is charged against Snake River right 01-10223, “thereby remaining under the total cap of

² Reporter’s Transcript, Hearing on the Proposed Consent Decree on 1990 Fort Hall Indian Water Rights Settlement Agreement, July 18, 1995, at 27.

the water supply for the reservation.”³ This give and take between water rights is a feature throughout the *1990 Agreement* and subsequent *Consent Decree*. The mechanism by which the Tribes could divert in excess of one right and charge the excess against the allowable diversion under another right was described in the following way to the SRBA Court:

Q. Mr Shaw, would the purpose of that be to keep the tribal water right within the total cap of water supplied under this agreement to the tribe?

A. Yes. The intent was to have a quantity of water contained within the agreement as a cap, would still provide the Tribe with some flexibility on how they were able to use that water right, and provide non-Indian water users protection where they felt they needed the protection.⁴

In another example, under water right 27-11375, the Tribes can turn to groundwater to fill their right for 150,000 acre-feet if there is not enough natural flow available in the Blackfoot River.

It is the reverse, if you will, of some of the language in the other water rights we’ve described where the intent was to keep the total water supply within the cap included in the agreement. This provision insures access to a water supply to reach the cap, to be sure the supply is actually available in wet water.⁵

This flexibility was the hallmark of the *1990 Agreement*. The Tribes, with a right to divert up to 581, 031 acre-feet per year, could exercise their various water rights when and where it was most convenient, based on a complicated system of checks and balances. In a sense, the 1990 Agreement set forth a series of well defined “equitable adjustments,” allowing the Tribes to take more water in one spot, if they took less in another.

³ *Id.* at 25.

⁴ *Id.* at 18.

⁵ *Id.* at 30.

Under 27-11375.x.d, the parties recognized the continued need for flexibility in the determination of Tribal rights by providing for a negotiated “equitable adjustment” to Tribal water rights without defining or limiting the term. An equitable adjustment negotiated by the parties can take any number of forms; the parties could decide on compensation, either monetary or in the form of wet water, or they could agree to modify the way Tribal water rights are delivered or administered vis-a-vis other Tribal or non-indian water rights. They could also agree to supplement surface flows with groundwater. The scope of equitable adjustment was left open in the 1990 Agreement for a reason, and should continue to be left open to negotiation by the parties. In keeping with the plain language of the *Consent Decree* and consistent with the broader purpose of the *1990 Agreement*, therefore, the State requests that it be left to the parties to negotiate the terms and/or limitations of any equitable adjustment.

CONCLUSION

Placing limitations on what form a negotiated equitable adjustment can take deprives the parties of the flexibility granted by the plain language of the equitable adjustment provision of 27-11375. The potential adjustment negotiated is not constrained by any express limitations in the *Consent Decree*, and should not be limited by this Court’s holding. The State, therefore, requests that the Court clarify that the holding in its Order is “[t]he 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*,” and that the remedy of equitable adjustment *may* include the supplementation of Tribal water rights with storage or groundwater, but

is not *limited to* supplementation of the 27-11375 water right with storage or groundwater.

Respectfully submitted this 29th day of June, 2011.

LAWRENCE WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division


SHASTA KILMINSTER-HADLEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of June 2011, I caused a true and correct copy of the foregoing STATE OF IDAHO'S MEMORANDUM IN SUPPORT OF MOTION TO ALTER OR AMEND THE COURT'S MEMORANDUM DECISION to be filed with the Court and served on the following parties by the indicated methods:

Original via Facsimile

Clerk of the District Court
Snake River Basin Adjudication
P.O. Box 2707
253 Third Avenue North
Twin Falls, Idaho 83303-2707

Copies via U.S. Mail, First Class Postage Prepaid to:

Special Counsel for Shoshone-Bannock Tribes
202 N. Arthur
Pocatello, ID 83202
FAX: (208) 232-7472

U.S. Department of Justice
Environmental and Natural Resources Div.
999 18th Street
South Terrace, Suite 370
Denver, Colorado, 80202
Fax: (303) 844-1350

Committee of Nine
Represented By:
Barker, Rosholt & Simpson LLP
1 13 Main Ave. W, suite 303
PO Box 485
Twin Falls, ID 83303-0485

Randall C Budge
20 1 E Center, Suite A2
PO Box 1391
Pocatello, ID 83204-1391

Ray W. Rigby
25N2dE
PO Box 250
Rexburg, ID 83440-0250

State of Idaho
Office of Attorney General
PO Box 44449
Boise, ID 8371 1-4449

Robert Harris
1000 Riverwalk Dr., Suite 200
PO Box 50130
Idaho Falls, ID 83405

Jerry R. Rigby
25 N 2nd E
PO Box 250
Rexburg, ID 83440-0250

Scott E. Axline
PO Box 100
Blackfoot, ID 83221

Scott Smith
201 E. Center
PO Box 1391
Pocatello, ID 83204-1391

Director of IDWR
PO Box 83720
Boise, ID 83720-0098


SHASTA KILMINSTER-HADLEY