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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

JUL 14 2011

By

Clerk
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

) Subcase No. 27-11375

) (*Motion for Accounting*)

Case No. 39576

)

) MEMORANDUM DECISION AND ORDER ON

) MOTION TO STRIKE AFFIDAVITS AND

) MOTION FOR ACCOUNTING

Holding: Water rights that were inactive during the 1986-87 timeframe are protected by unambiguous express terms of paragraph 27-11375.x.d. provided water was being diverted under the water right prior to January 1, 1990, and the water right is decreed in the SRBA. No award of attorney's fees.

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.

Shasta Kilminster-Hadley, Deputy Attorney General of the State of Idaho, Natural Resources Division, Boise, Idaho, attorneys for the State of Idaho.

Thomas J. Budge, Randall C. Budge, Racine, Olson, Nye Budge & Bailey Chtd, Pocatello, Idaho, attorneys for P4 Production LLC, Blackfoot Spring Ranch, LLC, Alma Hubbard, Ohasian & Associates and Lewis Brothers Inc.

Luke H. Marchant, Robert L. Harris, Holden, Kidwell, Hahn & Krapo, P.L.L.C., Idaho Falls, Idaho, attorneys for Bear Lake Grazing Co., P. Thomas Blotter Family and Stucki Revocable Trust.

Nick Spencer, Deputy Attorney General of the State of Idaho, Idaho Department of Water Resources, Boise, Idaho, attorney for the Idaho Department of Water Resources.¹

¹ The following are also parties of record to the *Motion for Accounting* who did not file briefs or present argument on this matter but appeared at the oral argument: David Stanish, Deputy Attorney General of the State of Idaho,

I.

HISTORICAL, FACTUAL AND PROCEDURAL BACKGROUND

A. Nature of the case.

This case before the Court involves a dispute over the interpretation and application of paragraph 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* entered in the SRBA on August 2, 1995 (“*Consent Decree*”) and *The 1990 Fort Hall Indian Water Rights Agreement* (“*1990 Agreement*”) on which the *Consent Decree* is based. The matter comes before the Court pursuant to the State of Idaho’s *Motion for 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* (“*Motion for Accounting*”). The purpose of the *Motion for Accounting* is to achieve a full accounting of those non-Indian water rights in the Blackfoot River recommended and/or decreed in the SRBA that benefit from the protections provided for in paragraph 27-11375.x.d. of the *Consent Decree*. At issue is the interpretation and application of a term included in paragraph 27-11375.x.d. It should be noted that also presently pending before the Court in the above-captioned subcase is a *Motion For Enforcement of Fort Hall Indian Water Rights Consent Decree* (“*Motion for Enforcement*”) filed by the Shoshone-Bannock Tribes and the United States of America as Trustee on behalf of the Tribes, which also seeks an interpretation and enforcement of a different term of paragraph 27-11375.x.d. of the *Consent Decree*. Resolution of the *Motion for Enforcement* is not at issue here.

B. Historical Background.

On June 3, 2011, this Court issued a *Memorandum Decision and Order on Motions for Summary Judgment and Instructions on Future Proceedings* in the *Motion for Enforcement* proceedings. In the *Memorandum Decision*, the Court set forth the historical background surrounding the *Consent Decree*, however, not all participants in the *Motion to Enforce* are participants in the *Motion for Accounting*, and therefore a certain amount of historical background is included for context. The Fort Hall Indian Reservation is located in southeastern

Natural Resources Division, Boise, Idaho, attorneys for State of Idaho Fish & Game; Scott Axline, Blackfoot, Idaho, attorney for Patrick Taney; Marvin R. Yancey, Blackfoot Idaho, *pro se*.

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. 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.

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 *1990 Agreement*.² 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*.³ 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.

² 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.

³ A copy of the *Consent Decree* is attached as Exhibit 1 to the *Affidavit of David A. Jarvis*.

C. Water Right No. 27-11375.

Water right 27-11375 is one of 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 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).

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 paragraph x.d. of water right 27-11375, and in particular the above-emphasized portion of the paragraph that gives rise to the issue now before the Court.

D. Procedural Background.

The instant proceedings commenced on October 25, 2010, when the State of Idaho filed the *Motion for Accounting*. The *Motion for Accounting* identified 223 water rights the State asserted were entitled to the protections of paragraph 27-11375.x.d. of the *Consent Decree*.

On November 10, 2010, this Court issued an *Initial Scheduling Order Setting Forth Procedures on State's Motion for Accounting and United States' and Tribes' Joint Motion to Enforce Re: Fort Hall Indian Rights Consent Decree* ("Initial Scheduling Order"). The *Initial Scheduling Order* set forth a process for water right holders to object to their water right being excluded from the list of 223 rights. The *Initial Scheduling Order* also provided that parties whose rights appeared on the list were not required to file anything as their rights would remain on the list. The *Initial Scheduling Order* required that the State of Idaho serve copies of the *Motion for Accounting* and *Initial Scheduling Order* on all surface water claimants in Basin 27.

On March 18, 2011, the Committee of Nine filed *Committee of Nine's Response to the Content of the State's List of Rights* ("Committee of Nine's Response") and the *Affidavit of David B. Shaw* ("Shaw Affidavit"). The *Committee of Nine's Response* asserted that "only those non-Tribal Basin 27 water rights actually being diverted at the time of the Fort Hall Agreement was being negotiated [i.e., 1986-1987] were considered part of the estimated 45,000 AFY of water from the Blackfoot River," and as such only those water rights are protected by paragraph 27-11375.x.d. The *Committee of Nine's Response* identified 23 water rights it asserts are not entitled to the protections of paragraph 27-11375.x.d. because the rights were not in use during 1986-1987, despite having priorities pre-dating January 1, 1990.

On April 7, 2011, the Court issued a *Third Scheduling Order on State's Motion for Accounting Re: Fort Hall Indian Water Rights Consent Decree* ("Third Scheduling Order") requiring that the State re-serve the holders of the 23 rights and require that they respond to the

Committee of Nine's Response. Water right holders were further informed that failure to respond would result in removal of their right from the State's list.

Responses were filed on behalf of holders of 11 of the 23 identified rights, including on behalf of P4 Production LLC, Blackfoot Spring Ranch, LLC, Alma Hubbard, Ohasian & Associates, Lewis Brothers Inc., Bear Lake Grazing Co., P. Thomas Blotter Family and Stucki Revocable Trust (collectively, "Respondents"). The Respondents assert their water rights are protected under the express unambiguous language of paragraph 27-11375.x.d. which does not differentiate between active or inactive water rights.

At a scheduling conference held May 24, 2011, the Court determined for purposes of judicial economy the Court should first resolve the legal issue of the meaning and application of paragraph 27-11375.x.d. in regards to the scope of protected rights prior to addressing any specific factual issues raised in the *Responses*.

Following the scheduling conference, the Court issued a *Briefing and Oral Argument Schedule* limiting the scope of this proceeding to addressing the following legal issue:

Whether the language of paragraph 27-11375.x.d. of the *Consent Decree* protects all persons diverting natural flow from the Blackfoot River prior to January 1, 1990, whose rights are decreed in the SRBA, OR whether the language of paragraph 27-11375.x.d. protects only those water users diverting natural flow from the Blackfoot River prior to January 1, 1990 who were diverting water in 1986-1987, and whose rights are decreed in the SRBA.

Although the issue as stated provides "**all** persons" the scope of these proceedings does not address small or "*de minimis*" domestic and stockwater rights as defined by Idaho Code §§ 42-111 and 42-1410A (11).

At oral argument the Respondents moved to strike the *Shaw Affidavit* as well as any other affidavits or parol evidence offered to contradict the unambiguous language of the *Consent Decree*. Additionally the Respondents seek costs and attorney's fees against the Committee of Nine on the basis that the *Committee of Nine's Response* is not grounded in law as it seeks to have the *Consent Decree* construed in a manner that contradicts its plain language without attempting to show the plain language is either ambiguous or that a latent ambiguity exists.

II.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument on this matter was heard before the Court on June 16, 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 June 17, 2011.

III.

DISCUSSION

A. Statement of the Issue.

At issue is the legal effect of paragraph 27-11375.x.d. of the *Consent Decree*, concerning the scope of non-Indian water rights diverting from the Blackfoot River that qualify for protection under the terms of that provision. Paragraph 27-11375.x.d. provides 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.

The issue before the Court is:

Whether the language of paragraph 27-11375.x.d. of the *Consent Decree* protects all persons diverting natural flow from the Blackfoot River prior to January 1, 1990, whose rights are decreed in the SRBA, OR whether the language of paragraph 27-11375.x.d. protects only those water users diverting natural flow from the Blackfoot River prior to January 1, 1990 who were diverting water in 1986-1987, and whose rights are decreed in the SRBA.

The parties have presented several arguments in support of their respective positions. Each is addressed below.

B. Arguments of the Parties.

1. The Committee of Nine.

The Committee of Nine asserts the 45,000 afy estimate of water use by non-Indian users on which the *1990 Agreement* and *Consent Decree* are based, did not account for acreage not actively being irrigated during the 1986-87 timeframe and “therefore any water right not being diverted during the 1986-87 timeframe should not receive the benefit of the Subordination Provision.” *Committee of Nine’s Response*, p.5. The Committee of Nine filed the *Shaw Affidavit* explaining the information and methodology used to calculate the estimate.

2. The State of Idaho.

The State of Idaho asserts the argument raised by the Committee of Nine raises a latent ambiguity in the language of paragraph 27-11375.x.d. if the 45,000 afy is determined to be a total limit on the quantity of non-Indian diversions to which the 27-11375 right is subordinate.⁴ The State argues that reading paragraph 27-11375.x.d. as extending subordination protection to include rights not considered in the estimate (i.e. inactive rights) would result in an insufficient water supply to satisfy the rights of those water users included in the estimate. The State asserts such a reading would be the contrary to the express intent of the provision to “ensure[] 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.”

3. The Tribes and United States.

The Tribes and the United States agree with the Committee of Nine’s position. Contrary to the position taken by the State of Idaho, the Tribes and the United States assert the express language of the paragraph unambiguously applies only to those water rights accounted for in arriving at the 45,000 afy estimate. The Tribes and United States contend:

The provision explicitly states ‘persons diverting natural flow from the Blackfoot River prior to January 1, 1990,’ receive the benefit of 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’

⁴ Whether the 45,000 afy was intended as a limit is an issue that is currently pending in conjunction with the *Motion to Enforce*.

which again denotes water being used at the time of the negotiations, not inactive water rights.

Joint Response of the Shoshone-Bannock Tribes and United States to the State of Idaho's Motion for Accounting, p.3. The Tribes argue this interpretation is consistent with documents filed in conjunction with the *Motion to Enforce* including the *Affidavit of Woldezion Mesghinnna*, the Testimony of David Shaw presented in conjunction with the approval process for the *Consent Decree* and other documents filed by the United States in the *Motion to Enforce* proceedings. The Tribes further argue that such an interpretation is consistent with how they contemporaneously understood the provision would apply and that in accordance with canons of interpretation where an Indian tribe is a party to an agreement, the language is to be read according to the Indian tribe's understanding of the agreement.

4. The Respondents.

The Respondents argue the plain unambiguous language of paragraph 27-11375.x.d. protects all water rights that diverted prior to January 1, 1990, ultimately decreed in the SRBA whether or not the right was inactive during the 1986-87 period. The Respondents assert that because the language is unambiguous the Court may not consider extrinsic or parol evidence in determining the intent of the parties to the *Consent Decree*, including the *Shaw Affidavit* or any other affidavits previously filed by the United States or Tribes in conjunction with the *Motion for Enforce*. The Respondents have also moved to strike any such affidavits.

C. Decree Interpretation.

The legal issue before this Court requires a determination of 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.* Finally, 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).

D. The protections of paragraph 27-11375.x.d. include water rights not actively in use in 1986-87.

1. The express language of paragraph 27-11375.x.d. is unambiguous regarding the scope of protected non-Indian water rights.

This Court finds the express language of paragraph 27-11375.x.d. to be clear and unambiguous regarding the intended scope of non-Indian diversions. The first sentence of the paragraph provides:

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 express language clearly defines the scope of protected rights, namely persons diverting from the Blackfoot River prior to January 1, 1990, and whose rights are eventually decreed in the SRBA. Not even a strained reading of the language supports the assertion that the provision was intended to be limited to only those rights with a priority date prior to January 1, 1990, that were actively in use during the 1986-87 timeframe. Reading such a limitation into the provision is not only inconsistent with the plain language of the provision but would also render meaningless the January 1, 1990, date. It is therefore difficult to conceive that had such a significant limitation been intended that it would have been omitted from the provision. The provision simply could

have expressly protected those active rights of record during the 1986-87 timeframe which eventually received SRBA decrees. Accordingly, the Court concludes as a matter of law the express language of paragraph 27-11375.x.d. is unambiguous regarding the scope of protected non-Indian water rights.

2. The remaining terms of paragraph 27-11375.x.d. are consistent with the conclusion that inactive rights were not intended to be excluded.

The remaining provisions of paragraph 27-11375.x.d. also do not square with reading such a limitation into the paragraph. The second sentence of paragraph 27-11375.x.d. provides:

The parties will specifically enumerate all rights protected by this provision once the SRBA Decree for this basin becomes final.

Reading such a limitation into the paragraph would also eliminate the need for listing protected rights. The failure of a water right holder to actively use a water right during the 1986-87 timeframe would not affect the validity of the right. Consequently, holders of inactive senior rights would not be prevented from making a delivery call or “rebound call” against the holders of junior rights even though such junior rights were listed as protected. As a practical matter, any benefit sought to be gained by listing individual protected rights would be frustrated. For purposes of administration only the total quantity of the rights to which the Tribes’ agreed to subordinate would be relevant.

The third sentence of the paragraph makes clear that the total quantity of non-Indian diversions is only an estimate:

These state created water rights are *estimated* to divert not more than 45,000 AFY of water from the Blackfoot River.

(emphasis added). Indeed if paragraph 27-11375.x.d. was intended to apply to only those water rights actively in use during the 1986-87 timeframe, the parties already possessed that information and would not have to rely on quantities ultimately reflected in forthcoming SRBA decrees. This is true even if some of the water rights included in the 1986-87 data ultimately did not receive SRBA decrees because such a circumstance would only result in a reduction to the 1986-87 estimate. However, the last sentence of the paragraph only addresses the circumstance where the estimate is exceeded:

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.

No corresponding adjustment is provided for in the event the total quantity of rights decreed in the SRBA falls below the estimate. Accordingly, the use of an estimate would not have been necessary as the parties were already in possession of the 1986-87 information on which the negotiations are now alleged to have relied upon.

In sum, a plain reading of the paragraph supports that the 1986-87 information was only intended as an estimate based on then available information and that the total of the quantities reflected in the SRBA decrees may ultimately exceed that estimate. The last sentence of the paragraph accounts for such a situation. Accordingly, reading paragraph 27-11375.x.d. as a whole and giving effect to all of its parts supports the conclusion that the protections of paragraph 27-11375.x.d. were intended to include water rights not actively in use in 1986-87 so long as they were diverting prior to January 1, 1990, and were decreed in the SRBA.

3. Failure to expressly exclude inactive water rights presents notice issues to holders of inactive water rights.

Finally, the failure to expressly include such a significant limitation in the face of the *Consent Decree* at the time it was proposed and submitted for approval presents a procedural problem with respect to notice to parties to the SRBA and in particular the holders of inactive water rights. Parties to the SRBA relying on the plain language of the paragraph 27-11375.x.d. extended well beyond the negotiating parties as not all water users potentially affected by the provision were parties to the negotiations. In conjunction with the Court's approval process, the proposed *Consent Decree* was included in a *Director's Report* filed with the Court. *See Notice of Filing Director's Report of the Shoshone-Bannock 1990 Fort Hall Indian Water Right Agreement* (March 31, 1994). Parties to the adjudication were afforded the opportunity to file objections to any one of the Tribes' proposed water rights, including water right 27-11375, on or before June 1, 1994. *Id.* This process was contemplated by the parties in the *1990 Agreement*. *See* Article 10.1, p.63 ("other persons not signatory to this Agreement may file objections"). In reviewing the proposed *Consent Decree*, parties would have no other basis from which to evaluate the proposed water right other than relying on a plain reading of the express language of

the provision. The omission of such an important limitation would indeed undermine any meaningful process to water users negatively impacted by the limitation. A party whose water right was inactive during the 1986-87 timeframe, but nonetheless valid, would have no notice that the right was to be excluded from the protections of the *Consent Decree* and therefore no reason to file an objection.

4. The Court may not consider evidence of any prior or contemporaneous agreements or understandings offered to vary or contradict terms of paragraph 27-11375.x.d.

The parol evidence rule provides that when a contract is reduced to a writing the parties intend as a final statement of their agreement, the intent of the parties must be ascertained from the express terms of the instrument. Evidence of any prior or contemporaneous agreements relating to the same subject matter is inadmissible to vary, contradict or enlarge the terms of the written instrument. *Simons v. Simons*, 134 Idaho 824, 828, 11 P.3d 20, 24 (2000) (citing *Tusch Enterprises v. Coffin*, 113 Idaho 37, 44, 740 P.2d 1022, 1029 (1987); *Chapman v. Haney Seed Co., Inc* 102 Idaho 26, 624 P.2d 408 (1981)). An exception to this general rule is that parol evidence may be considered to ascertain the intent of the parties if an ambiguity exists in the instrument. Ambiguities arise in two forms. A patent ambiguity is one that is evident from the face of the instrument. A latent ambiguity is not evident from the face of the instrument but becomes apparent when applying the instrument to the facts as they exist. *Id.* (citing *Williams v. Idaho Potato Starch Co.*, 73 Idaho 13, 20, 245 P.2d 1045, 1049 (1952)). In *Simons v. Simons*, 134 Idaho 824, 828, 11 P.3d 20, 24 (2000), the instrument in question purported to convey “tract #5.” On its face the reference to “tract #5” was unambiguous. However, in applying the instrument it was discovered that no “tract #5” existed. In this regard the Idaho Supreme Court held that extrinsic evidence was admissible for the purpose of explaining the reference to tract #5 but not to vary, contradict or enlarge the terms of the agreement. *Id.* at 828, 11 P.3d at 24.

This Court has already determined that paragraph 27-11375.x.d. is unambiguous on its face and therefore no patent ambiguity exists. The State of Idaho argues that the *Shaw Affidavit* reveals a potential latent ambiguity in the application of paragraph 27-11375.x.d. The State of Idaho asserts if paragraph 27-11375.x.d. is applied to extend subordination protection to include inactive rights not considered in the estimate, the result is an insufficient water supply to satisfy

the water rights actively in use during the 1986-87 timeframe. This Court disagrees. For the reasons already discussed, the interrelation of the various provisions of paragraph 27-11375.x.d. are consistent with the conclusion that the parties intended the 1986-87 information as an estimate and addressed a remedy in the event the estimate was exceeded. Accordingly, having determined no ambiguity exists, either on the face or in the application of paragraph 27-11375.x.d., the Court may not consider evidence of any prior or contemporaneous agreements or understandings offered to vary or contradict the express terms of paragraph 27-11375.x.d.

5. Canons of interpretation involving Indian tribes do not apply to the circumstances of this case.

The Tribes argue that their contemporaneous understanding of paragraph 27-11375.x.d. was that inactive water rights during the 1986-87 timeframe were not protected. At oral argument the Tribes asserted the subject language should be interpreted according to long standing canons of interpretation that apply when interpreting treaties, statutes, agreements and executive orders dealing with Indian affairs.⁵ This Court disagrees.

The canons of construction require that treaties “be construed, not according to the technical meaning of its words to learned lawyers, but in the sense they would naturally be understood by the Indians.” *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658, 676 (1979)(quoting *Jones v. Meehan*, 175 U.S. 1, 11 (1899)). Further “[i]f words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.” *United States v. Choctaw Nation*, 179 U.S. 494, 532 (1900). If the words in a treaty are unambiguous, “they must be interpreted according to their natural and ordinary meaning.” *Id* at 532. The Court cannot “by mere interpretation . . . import into a treaty

⁵ The canons of construction unique to Indian affairs first developed in construing treaties between Indian tribes and the United States. The canons have subsequently been applied to statutes, agreements and executive orders involving Indian affairs. See *Felix S. Cohen, Handbook of Federal Indian Law* (1982 e.d), pp. 221-22. These various canons provide, among other things, that in construing Indian treaties, the courts have required that treaties be liberally construed to favor Indians, that ambiguous expressions in treaties must be resolved in favor of Indians, and that treaties be construed as the Indians would have understood them. *Id.* The canons are predicated on the trust responsibility the United States has when dealing with Indian tribes and the presumption that Congressional intent toward Indians is benevolent. The canons also acknowledge the unequal bargaining position between Indian tribes based on the United States’ superior negotiation skills and knowledge of the language. *Id.* Federal action is read when possible as protecting Indian rights. *Id.*

something that was inconsistent with the clear import of its words.” *Id.* at 532. Accordingly, a prerequisite to applying the canons still requires some finding of an ambiguity. For the reasons previously explained, this Court has already ruled as matter of law that the plain language of paragraph 27-11375.x.d. is unambiguous. Furthermore, the language at issue, albeit unambiguous, does not require any special technical understanding or special expertise to comprehend its intended meaning. The Court is being asked instead to include an additional term which for reasons already explained would significantly vary the express terms of the *Consent Decree*. Finally, the agreement at issue in this case does not involve the same historical underpinnings as situations where the canons are typically applied. The Court is not being asked to interpret a treaty, historical document or piece of legislation. Rather this case involves an agreement entered into in conjunction with a present day on-going general adjudication involving well represented parties. The circumstances and principles giving rise to the application of the canons of treaty interpretation are simply not present under the facts and circumstances of this case.

E. Motion to Strike.

At oral argument, the Respondent’s moved to strike the *Shaw Affidavit* as well as any other affidavits relied on to contradict or vary the express terms of the *Consent Decree*. The parol evidence rule forbids the admission of evidence concerning prior or contemporaneous agreements for the purpose of varying or contradicting a later writing. In the case of a fully integrated and executed contract the intent of the parties must be determined by reference to the writing and not to prior or contemporaneous agreements. *See Valley Bank v. Christensen*, 119 Idaho 496, 808 P.2d 415 (1991). There is no dispute concerning the integrated status of the *Consent Decree*. For the reasons previously discussed, the Court concluded the express language of paragraph 27-11375.x.d. is unambiguous on its face and that no latent ambiguity exists. Accordingly, extrinsic evidence is inadmissible to vary or contradict the express terms of the instrument. The *Motion to Strike* is therefore GRANTED.

F. Attorney’s Fees.

The Respondents seek an award of costs and attorney’s fees from the Committee of Nine pursuant to Idaho Code § 12-121 on the basis that the issues raised by the *Committee of Nine’s*

Response and accompanying *Shaw Affidavit* are not supported by existing law and cannot be supported by a good faith argument for an extension, modification or reversal of existing law. Idaho Code § 12-121 provides a statutory basis for an award of attorney fees in civil cases as follows:

Attorney's Fees - In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties, provided that this section shall not alter, repeal or amend any statute which otherwise provides for the award of attorney's fees. The term "party" or "parties" is defined to include any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

Idaho Code § 12-121, however, is subject to the terms of I.R.C.P. 54(e)(1) which states in relevant part:

Attorney Fees. In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract. Provided, attorney fees under section 12-121, Idaho Code, may be awarded by the court only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation. . . .

Idaho Code § 12-123 (1)(a) and (b)(ii) define "frivolous conduct" as "asserting a claim, defense, or other position in connection with a civil action" that 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."

Therefore under Idaho Code § 12-121, attorney fees can only be awarded upon a finding by the trial court: (1) that the party requesting the fees is the prevailing party; and (2) that the case was brought, pursued or defended frivolously, unreasonably or without foundation by the opposing party. In addition to the foregoing, the award of attorney fees is committed to the sound discretion of the court. I.R.C.P. 54(d)(1)(B) and (C), and 54(e)(1). The standard applicable to court discretion in Idaho is: "(1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason." *Sun Valley Shopping Center, Inc., v. Idaho Power Company*, 119 Idaho 87, 803 P.2d 993 (1991).

The Court finds an award of attorney's fees to be inappropriate under the particular circumstances of this case. It was acknowledged from the outset of the proceedings that the list of water rights included with the State's *Motion for Accounting* may not be entirely accurate. For purposes of addressing an issue involving a large number of water rights in the most efficient manner, the process adopted by the Court placed the onus on parties opposing the content of the list to file responses. The Court would then address any issues raised in order to arrive at a complete inventory. The *Committee of Nine's Response* alleged factually the process and information used to arrive at the estimate. The Tribes' and the United States' understanding of the alleged intent of the agreement is consistent with these facts. Therefore there is a good faith factual basis to support the allegation. In the event no party came forward in opposition to the *Committee of Nine's Response* and the Tribes' and United States' concurrence the issue of the interpretation of paragraph 27-11375.x.d. would not have arisen. In light of the procedure used to address this issue and in the exercise of the Court's discretion, the request for the award of attorney's fees is DENIED.

G. Status of water rights where no response was filed.

In the *Third Scheduling Order* water right holders were notified that failure to file a response would result in removal of their right from the State's list of protected rights. Initially it was anticipated that the only issue to be addressed was one of fact. In particular, as a result of an inchoate license whether water was physically being diverted under a particular water right prior to January 1, 1990, despite having a priority date pre-dating January 1, 1990. The issue in this matter addressed the legal significance of rights actively diverted during the 1986-87 timeframe. Having determined that there is no significance the Court declines to remove any water rights from the State's list of protected rights solely on that basis.

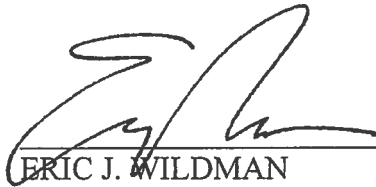
IV.

CONCLUSION

For the reasons set forth above, the Court concludes water rights that were inactive during the 1986-87 timeframe are protected by the express terms of paragraph 27-11375.x.d. of the *Consent Decree* provided water was being diverted under the water right prior to January 1, 1990, and the water right is decreed in the SRBA. The request for award of attorney's fees is denied.

IT IS SO ORDERED.

DATED: July 14, 2011.


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 MOTION TO STRIKE AFFIDAVITS AND MOTION FOR ACCOUNTING was mailed on July 14, 2011, with sufficient first-class postage to the following:

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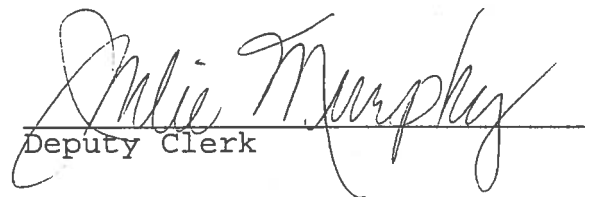
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A handwritten signature in cursive script, reading "Julie Murphy", is written over a horizontal line. The signature is in dark ink and is positioned to the right of the "Deputy Clerk" text.