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DEPARTMENT OF
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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	)	Subcase No. 27-11375
	)	
Case No. 39576	)	JOINT RESPONSE BY UNITED STATES
	)	AND SHOSHONE-BANNOCK TRIBES IN
	)	OPPOSITION TO IDAHO'S
	)	MOTION TO ALTER OR AMEND

INTRODUCTION

The Shoshone-Bannock Tribes ("Tribes") and the United States of America respectfully submit this Joint Response to the State of Idaho's Motion to Alter or Amend the Court's June 3, 2011 interlocutory Memorandum Decision and Order on Motions for Partial Summary Judgment¹ and supporting Memorandum (hereinafter cited as "State's Memo."). The Court's Memorandum Decision and Order (hereinafter cited as, "Mem. Dec.") provides well-defined direction and adequate negotiating flexibility to the parties with regard to equitable adjustment and does not require alteration or amendment.

¹ The Motion was filed June 17, 2011, and the supporting memorandum was filed June 29, 2011.

The State contends the Court's Decision and Order is ambiguous as it relates to the sources of water from which the equitable adjustment might be provided if the 45,000 AFY estimated diversion volume is exceeded under 27-11375.x.d. Idaho's Motion is at best premature under Rule 59(e), I.R.C.P. Moreover, the Motion seeks clarification of an order which is perfectly clear. Accordingly, the State's Motion should be denied.

ARGUMENT

A. Idaho's Motion is Premature Because Rule 59(e) Applies Only to a "Judgment", And Not to An Interlocutory Decision and Order.

Idaho asserts authority for its Motion in Rule 59(e), Idaho Rules of Civil Procedure, but fails to explain how Rule 59(e) would apply here. On the contrary, by its terms Rule 59(e) applies only to a "judgment," rendered by the court in favor of one party or another, and can only be filed and served, "not later than fourteen (14) days after entry of the judgment." I.R.C.P. 59(e). No such judgment has been entered. The Memorandum Decision is interlocutory in nature, in no way purports to be a "judgment," and is neither final nor resolves all of the issues presented by the parties in their Cross-Motions for Summary Judgment. Thus, a Motion to Alter or Amend is improper under Rule 59(e). *See generally*, Wright, Miller & Kane, **Federal Practice and Procedure 2d**, Sec. 2817 and authorities cited therein.

Even assuming that Rule 59(e) can apply to an interlocutory order granting partial summary judgment to one party or another, that situation is not presented in the instant case. As best as we can discern, the State's motion seeks clarification regarding the Court's interpretation of the sources of water from which the "equitable adjustment" might be provided if the 45,000 AFY estimated diversion volume was exceeded, as provided by paragraph 27-11375.x.d. The Court granted in part the United States and Tribes' Joint Motion for Enforcement and found, "as a matter of law that the Tribes are entitled to an 'equitable adjustment' to the tribal water rights in the event the 45,000 AFY estimate contained in paragraph 27011375.x.d of the *Consent Decree* is exceeded by non-Indian diversions diverting natural

flow from the Blackfoot River prior to January 1, 1990, * * *.” Mem. Dec. at 18. The Court further granted in part the State of Idaho’s Motion for Partial Summary Judgment finding that the 45,000 AFY estimate is not an absolute cap on non-Indian diversion. However, the Court held that “the remainder of the issues raised by the parties in their Cross-Motions for Summary Judgment **are denied.**” *Id.* (emphasis in original).

To be sure, the Court provided the parties with guidance as to several issues, including that “[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.” Mem. Dec. at 19. However, no judgment was entered as to that issue, and thus there is no judgment to be altered or amended as provided by Rule 59(e). On the contrary, the Court provided the parties with instructions on future proceedings, including participation in settlement negotiations, and failing that, an evidentiary hearing, to resolve the issue of equitable adjustment, clearly indicating that the decision anticipated future negotiations or court proceedings. Mem. Dec. at 19-20. Quite simply, there is no judgment to be altered or amended as requested by the State.

B. In Any Event, the Court’s Order Is Clear Regarding the Issue of Equitable Adjustment and Need Not Be Altered or Amended to Provide the Parties with Guidance

It is uncertain what relief the State’s Motion and Memorandum seeks. The State’s Motion first asks the Court to clarify, “[t]hat potential equitable adjustments to the Tribes’ water rights include the supplementation of surface and natural flow rights with storage and/or groundwater.” State’s Motion at 2. Then, in the conclusion to its Memorandum, it requests the Court to “clarify that the holding in its order is ‘the 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.*’” State’s Memo at 5. (Emphasis in original). The latter statement is precisely how the Court phrased it, Mem. Dec., at 19, so no further clarification is warranted. However stated, we do not

read the Court's Memorandum Decision as unduly constraining the parties' flexibility to consider any appropriate source of water, so long as it results in an equitable adjustment.

The State points to the summary on page 1 of the Memorandum Decision as precluding those sources from being considered as part of an equitable adjustment, and expresses concern about limiting the parties' flexibility to consider all available sources in providing an "equitable adjustment." State's Memo. at 5. We read that text merely as a summary of the decision, and understand the operative language to be contained in the text of the Memorandum Decision itself, but even if the summary was part of the opinion, we do not read it as unduly constraining the parties' flexibility to consider any number of sources for equitable adjustment. As the State observes, "[a]n 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-à-vis other Tribal or non-indian [*sic*] water rights. They could also agree to supplement surface flows with groundwater." *Id.* The Tribes and the United States agree with the State on the necessity for flexibility in negotiating an equitable adjustment, and believe that the parties have helpful guidance and sufficient flexibility under the terms of the Memorandum Decision.

Importantly, the text of the Memorandum Decision itself provides the parties with flexibility, and affirmatively directs the parties to negotiate with the benefit of the Court's guidance on certain issues. For example, the Memorandum Decision states that "[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*." Mem. Dec. at 19. The Court's language itself does not preclude the inclusion of storage water or groundwater as part of the equitable adjustment, but rather notes that any such equitable adjustment should not be limited to the use of Tribal groundwater or storage water, as the State had previously contended. That is because it would be inequitable to require the Tribes to use their own water rights to make up for non-Indian diversions in excess of the 45,000 AFY

estimate. Mem. Dec. at 16-17. Thus, “contrary to the State’s argument, the context in which the equitable adjustment term is used indeed contemplates some modification to ‘the Tribal water rights,’ for redress beyond the supplemental use of storage and groundwater as specified in the *Consent Decree*.” Mem. Dec. at 17.

In short, as the Court’s decision expressly states, the parties are not limited to any particular sources of water in determining an “equitable adjustment” for excess non-Indian diversions over 45,000 AFY. While it would be patently unfair to require the Tribes exclusively to use their other decreed groundwater and storage water rights to make up for the excess non-Indian diversions in the Blackfoot River, nothing in the opinion precludes groundwater or storage water – whether owned by the Tribes or by other entities – to be considered by the parties in negotiations to determine an appropriate “equitable adjustment”. On the contrary, the Court’s opinion provides the parties with ample flexibility to come up with a solution, by looking to any of a number of sources of replacement water, or adjusting one or more tribal water rights to make up for any excess diversions. *See* Mem. Dec. at 17, 19 (equitable adjustment could apply to any of the Tribes’ rights confirmed by the Consent Decree).

In sum, the Court in its Memorandum Decision and Order did not accept the State’s position that existing decreed Tribal water rights for groundwater and storage water should be used as an equitable adjustment provided to the Tribes to resolve the issue. The existing rights do not provide anything of value to the Tribes that they do not already have and therefore they cannot be considered the exclusive water source for equitable adjustment. These Tribal groundwater and storage rights were not intended to be considered an additional water supply and/or equitable adjustment to offset excess non-Indian diversions. Significantly, the Court recognized the value of negotiation and did not foreclose the parties from considering alternatives in the equitable adjustment discussions, including groundwater and storage water.

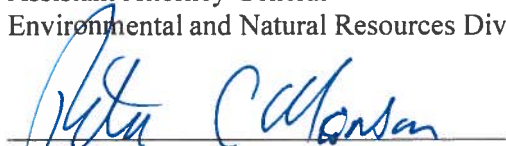
CONCLUSION

The Court's interlocutory Memorandum Decision is clear on its face and needs no further clarification. The State's Motion to Alter or Amend should be denied as both premature and unnecessary.

Respectfully submitted this 14th day of July, 2011.

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CERTIFICATE OF SERVICE

I certify that on July 14, 2011, I served true and correct copies of the foregoing JOINT RESPONSE BY UNITED STATES AND SHOSHONE-BANNOCK TRIBES IN OPPOSITION TO IDAHO'S MOTION TO ALTER OR AMEND as follows:

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