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DEPARTMENT OF
WATER RESOURCES

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

JUL 26 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 to Enforce)

Case No. 39576

)

) ORDER CLARIFYING

) MEMORANDUM DECISION AND

) ORDER ON MOTIONS FOR

) PARTIAL SUMMARY JUDGMENT

) AND INSTRUCTIONS ON FUTURE

) PROCEEDINGS

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.

William F. Bacon, Fort Hall, Idaho, 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.

I.

BACKGROUND

On June 3, 2011, the Court entered a *Memorandum Decision and Order on Motions for Partial Summary Judgment and Instructions on Future Proceedings* ("Memorandum Decision") in the above-captioned matter. The *Memorandum Decision* was entered in response to a *Motion for Enforcement of Fort Hall Indian Water Rights Consent Decree* filed by the Shoshone-Bannock Tribes ("Tribes") and the United States. The factual, historical and procedural background set forth in the *Memorandum Decision* is incorporated herein and will not be repeated.

On June 17, 2011, the State of Idaho filed a *Motion to Alter or Amend* ("Motion") the *Memorandum Decision* pursuant to Idaho Rule of Civil Procedure 59(e). The Committee of

Nine filed its *Response* to the State's *Motion* on July 14, 2011, indicating that it did not oppose the *Motion*. The Tribes and the United States filed a *Joint Response* in opposition to the State's *Motion* on July 15, 2011. Oral argument on the State's *Motion* was heard before the Court on July 25, 2011.

II.

ANALYSIS

A. The State's *Motion* will be treated by the Court as a motion for clarification.

At the hearing the State clarified to the Court that its *Motion* was intended solely as a request that this Court clarify to the parties whether the "equitable adjustment" contemplated by paragraph 27-11375.x.d. of the *Consent Decree*¹ may include the supplementation of Tribal water rights with storage water and groundwater. Although the State's *Motion* was filed pursuant to Rule 59(e) and was styled as a *Motion to Alter or Amend*, this Court finds that the substance and content of the *Motion* merely requests that this Court clarify an asserted discrepancy that exists in the *Memorandum Decision*, and which will be identified and discussed below. The Court will therefore treat the State's *Motion* as a motion for clarification. As such, the Court need not reach the issue raised by the Tribes and United States as to whether a Rule 59(e) motion is procedurally proper at this stage in the proceedings.

B. It was not the intent or effect of the *Memorandum Decision* to preclude the parties from exploring all possible avenues in negotiating an "equitable adjustment" to the Tribal water rights.

In its *Motion* the State asks this Court to clarify whether the "equitable adjustment" contemplated by paragraph 27-11375.x.d. of the *Consent Decree* may include the supplementation of Tribal water rights with storage water and groundwater. The State argues that the ability of the parties to negotiate an equitable adjustment, should such negotiations be ordered by this Court, should be as broad and open as possible, and that no avenues of potential resolution should be foreclosed to the parties via the Court's *Memorandum Decision*. The

¹ The term *Consent Decree* refers to 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 Twin Falls County Case No. 39576 on August 2, 1995.

State's concern stems from following two statements set forth on pages 1 and 19 respectively of the *Memorandum Decision*:

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*.

vs.

If the 45,000 afy estimate is exceeded, the Tribes are entitled to an "equitable adjustment." 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*.

The first statement quoted above was contained in the summary of the Court's holding set forth on the first page of the *Memorandum Decision*. The second statement was contained in Section VI of the *Decision* entitled "Instructions on Future Proceedings."

It was not the effect of the *Memorandum Decision* to limit in any way the mechanisms available to the parties to negotiate an equitable adjustment to the Tribal water rights in the event the 45,000 afy estimate contained in paragraph 27-11375.x.d. of the *Consent Decree* is exceed by non-Indian diversions diverting natural flow from the Blackfoot River prior to January 1, 1990, as a result of the Decree in the SRBA. That such is the case is evidenced by the second statement quoted above which was contained in the section of the *Memorandum Decision* governing instructions on future proceedings. That section addresses the possible future scenario wherein the parties may be ordered by this Court to participate in settlement negotiations with the assistance of a settlement moderator. To be clear, the Court's *Memorandum Decision* does not place any limitations on the avenues the parties may pursue to resolve this matter in the context of the above-referenced settlement negotiations.

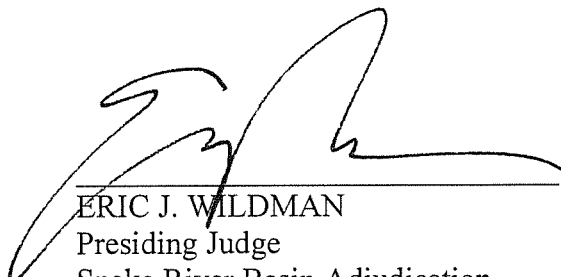
That said, the *Memorandum Decision* (specifically pages 13–18) does reject the State's argument that under the plain language of the *Consent Decree* the Tribes' ability to utilize water pursuant to its 27-02007 and 25-02160 storage rights, and its ability to use groundwater under the *Consent Decree*, constitutes the "equitable adjustment" contemplated by paragraph 27-11375.x.d. of the *Consent Decree* as a matter of law. The Court rejected the State's argument in this respect for the reasons set forth in the *Memorandum Decision*, and the first statement quoted above is a summary of the Court's holding in this respect. However the Court reiterates and clarifies that its holding in this respect does not place any limitations on the parties' ability to

negotiate an equitable adjustment to the Tribal water rights in any manner they see fit should the Court order such negotiations take place.

III.
ORDER

The *Memorandum Decision* does not limit the ability of the parties to negotiate an “equitable adjustment” to the Tribal water rights in any fashion they see fit in the event such negotiations are deemed necessary and ordered by this Court.

DATED: July 26, 2011.


ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I hereby certify that true and correct copies of the **ORDER CLARIFYING MEMORANDUM DECISION AND ORDER ON MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND INSTRUCTIONS ON FUTURE PROCEEDINGS** were mailed on July 26, 2011, by first-class mail to the following:

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