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DEPARTMENT OF
WATER RESOURCES

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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**

Subcase No. 27-11375

In Re SRBA

Case No. 39576

**RESPONSE BRIEF IN OPPOSITION TO
THE PARTIES' BLACKFOOT RIVER
EQUITABLE ADJUSTMENT
SETTLEMENT AGREEMENT
PURSUANT TO THE 1990 FORT HALL
INDIAN WATER RIGHTS SETTLEMENT
AGREEMENT
REVISED OCTOBER 17, 2012**

**I.
BACKGROUND**

The Basin 27 Water Users' Advisory Board, hereinafter referred to as the "Advisory Board," submit this brief related to the Court's **ORDER SETTING STATUS CONFERENCE** dated September 18, 2012, in which the Parties requested an additional ninety (90) days to "...submit the proposal to the affected non-Indian water users on the

Blackfoot River....” The Advisory Board met with representatives for the State of Idaho and the Committee of Nine on September 21, 2012, to review and discuss the Tech Revised Version dated August 31, 2012 of their proposed Settlement Agreement. The Advisory Board pointed out that the proposed Settlement Agreement imposes limits on the protected water rights of qualifying non-Indian users. Paragraph 27-11375.x.d mandates that when non-Indian diversions exceed the 45,000 afy trigger point, the parties shall negotiate an equitable adjustment to the Tribal water rights; instead, the parties are negotiating limits on the protected water rights of non-Indian users. The representatives of the State of Idaho (Clive Strong) acknowledged the Advisory Board’s concerns and agreed to revisit the matter to address the Advisory Board’s concerns.

The Advisory Board members received an email from Clive Strong as “joint response of the State of Idaho, the Committee of Nine, the United States, and the Shoshone-Bannock Tribes” which stated: “The attached agreement seeks to address most of the concerns you expressed in the meeting with the State and the Committee of Nine....” The attached agreement was the *BLACKFOOT RIVER EQUITABLE ADJUSTMENT SETTLEMENT AGREEMENT PURSUANT TO THE 1990 FORT HALL INDIAN WATER RIGHTS SETTLEMENT AGREEMENT Revised October 17, 2012*, hereinafter referred to as the Revised Settlement Agreement.

On October 19, 2012, the Advisory Board met with the representatives of the State of Idaho and the Committee of Nine to review and discuss the Revised Settlement Agreement. The Advisory Board pointed out that the Revised Settlement Agreement, still places limits on the Basin 27 Primary Volume diversions, dependent on the available balances in the Basin 27 Credit and the Equitable Adjustment Water Accounts. The response from the State of Idaho (Clive Strong) was: “We choose to understand the situation differently.” The State of Idaho, the Committee of Nine and the Advisory Board were not able to agree regarding the meaning of language in the Revised Settlement Agreement. Therefore, the Advisory Board files this Response, as a status conference update, in opposition to the Revised Settlement Agreement.

II.

ANALYSIS OF THE REVISED SETTLEMENT AGREEMENT

Sections 1 and 2 of the Terms and Conditions section defines limits for both Basin 27 Credits and Equitable Adjustment Water. The “Credit” and “Equitable Adjustment Water” are then used in Section 3 with the “45,000 afy” estimate to define and establish limits for Basin 27 Primary Volume diversions.

The following is a summary of Sections 1 through 3 of the “Terms and Conditions” section of the Revised Settlement Agreement.

Section 3--**Exercise of Water Right No. 27-11375** defines Basin 27 Primary Volume diversions as follows:

$$\begin{array}{rccclcl} \text{Basin 27} & & & & \text{Annual} & & \text{Equitable} \\ \text{Primary} & & & & \text{Credit} & & \text{Adjustment} \\ \text{Volume} & \leq & 45,000 \text{ afy} & + & \text{Used} & + & \text{Water Used} \\ \text{Diversions} & & & & & & \end{array}$$

Section 1--**Basin 27 Credit Account** establishes the following limits for the available credits:

Available Credit Limits

Maximum Balance = 40,000 afy

Maximum Accrual = 20,000 afy

Maximum Use = 12,000 afy

Start Balance = 20,000 af

Section 2--**Equitable Adjustment Water** establishes the following limits for the available equitable adjustment water:

Available Equitable Adjustment Water

Maximum Balance = 10,000 afy

Maximum Accrual = 1,000 afy

Maximum Use = 10,000 afy

Start Balance = 5,000 af

Considering the Revised Settlement Agreement, the future available Basin 27 credits for use in any given year will range between a minimum value of zero (0) and the “maximum use” value of 12,000 afy. Similarly, the future available equitable adjustment water for use in any given year will range between a minimum value of zero (0) and the “maximum use” value of 10,000 afy. Substituting the limits above for the appropriate variables in the following equation as defined in Section 3 of the Revised Settlement Agreement, the corresponding limits for the Basin 27 Primary Volume diversion can be calculated.

$$\begin{array}{ccccccc} \text{Basin 27} & & & & \text{Annual} & & \text{Equitable} \\ \text{Primary} & \leq & 45,000 \text{ afy} & + & \text{Credit} & + & \text{Adjustment} \\ \text{Volume} & & & & \text{Used} & & \text{Water Used} \\ \text{Diversions} & & & & & & \end{array}$$

If the available credit and equitable adjustment water are both at their minimum value of zero (0), the limit on Basin 27 Primary Volume diversions is $\leq 45,000$ afy. If the available credits and equitable adjustment water maximum limits are used, the limit on the Basin 27 Primary Volume diversions is $\leq 67,000$ afy. Thus, the Revised Settlement Agreement, establishes a minimum Primary Volume diversion limit of $\leq 45,000$ afy for the non-Indian water users, providing the natural flow of the Blackfoot River is sufficient to provide the 45,000 afy of non-Indian diversions. The actual limits on Primary Volume diversions for the non-Indian water users in any given year will vary between $\leq 45,000$ afy up to $\leq 67,000$ afy dependent on the annual weather patterns.

Thus, the provisions of the Revised Settlement Agreement clearly establish that Basin 27 non-Indian diversion limits are dependent on weather patterns. These limits can be as low as 45,000 afy not to exceed the maximum limit of 67,000 afy.

In an earlier argument submitted to the Court on the 3rd of June 2011 as part of the *RESPONSE BRIEF IN OPPOSITION TO THE COMMITTEE OF NINE'S RESPONSE TO THE CONTENT OF THE STATE'S LIST OF RIGHTS* (page 4, paragraph 2) it was noted that:

“The Tribes argue that the equitable adjustment should include increasing the amount of water it receives from the Snake River. Since the members of the Committee of Nine depend on the Snake River for their own water supplies, they

are at risk of having their water supply impacted in consequence of the equitable adjustment, whatever that may ultimately be. The committee's response is a novel attempt to reduce its exposure by re-writing the Agreement so that it only protects water rights that diverted water from the Blackfoot River in the "1986-87 timeframe" as opposed to protecting all diversions prior to January 1, 1990, as the Agreement States."

The Revised Settlement Agreement is another novel attempt to reduce the parties exposure for the equitable adjustment by re-writing the 1990 Fort Hall Agreement to limit the water rights of the Basin 27 non-Indian water users thereby reducing the parties exposure for the equitable adjustment to the Tribal water rights to less than or equal to 10,000 afy.

III.

ARGUMENT

- 1. The plain language of the Fort Hall Agreement "...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 attorneys for P4 productions, LLC, Blackfoot Springs Ranch, LLC, Ohanesian & Associates, Alma Hubbard, Natural Guardian Limited Partnership, Bear Lake Grazing Co., P. Thomas Blotter Family and Stucki Revocable Trust made the following argument as part of the *"RESPONSE BRIEF IN OPPOSITION TO THE COMMITTEE OF NINE'S RESPONSE TO THE CONTENT OF THE STATE'S LIST OF RIGHTS"* dated June 3, 2011. The following quote is from their "Argument" section on page 4 and has application for the agreements contained in paragraph 27-11375.x.d:

"When interpreting the Agreement, the court must first look to the plain meaning of the language in the Agreement. *Potlatch educ. Ass'n & Doug Righards v. Potlatch Sch. Dist.*, 148 Idaho 630, 633 (2010). If there is no ambiguity in that language, the Agreement "must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument." *C & G, Inc. v. Rule*, 135 Idaho 763, 765 (2001). The

court may consider parol evidence only if the plain language is subject to “two different reasonable interpretations or the language is nonsensical.” *Swanson v. Beco Constr. Co.*, 145 Idaho 59, 62 (2007).”

The 1990 Agreement clearly states:

*“The Tribes and United States shall exercise this water right [27-11375] in a manner that ensures person 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.**”* (emphasis added)

There is no ambiguity in this statement. The only reasonable interpretation is that the Agreement protects diversions from the Blackfoot River prior to January 1, 1990 whose rights are decreed in the SRBA to their full legal entitlements under state law.

The Court has given further clarification regarding this matter in the *MEMORANDUM DECISION AND ORDER ON MOTION FOR PARTIAL SUMMARY JUDGEMENT AND INSTRUCTIONS ON FUTURE PROCEEDINGS* dated June 3, 2011, as follows:

“The Court further finds *as a matter of law* that the 45,000 afy estimate contained in paragraph 27-11375.x.d. is not an absolute cap on non-Indian diversion from the Blackfoot River and *that qualifying non-Indian diversions are protected absolutely.*” (Section V., page 18) (emphasis added).

The Revised Settlement Agreement’s concludes, in **Section 3--Exercise of Water Right No. 27-11375**, that “...when the Basin 27 Primary Volume exceeds the above quantities [i.e. 45,000 to 67,000 afy] ... **the provisions of paragraph x.d of water right 27-11375 shall no longer apply.**” This contradicts the plain meaning of the 1990 Agreement.

Paragraph 27-11375.x.d of the 1990 Agreement specifies the following requirement regarding the equitable adjustment:

“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.”

Thus, if as proposed, the provisions of paragraph 27-11375.x.d no longer apply, then the requirement for an equitable adjustment no longer apply, since it is the provisions of paragraph 27-11375.x.d which mandate the equitable adjustment.

As noted in the *MEMORANDUM DECISION AND ORDER ON MOTION TO STRIKE AFFIDAVITS AND MOTION FOR ACCOUNTING* dated July 14, 2011, Section III. D:

“This Court finds the express language of paragraph 27-11375 to be clear and unambiguous regarding the intended scope on non-Indian diversions.”

Regarding non-Indian diversions, the language of paragraph 27-11375 states:

“... 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.”

2. The plain language of the Fort Hall Agreement clearly states: “In the event this estimate [45,000 afy] 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 Revised Settlement Agreement, in Section 2--Equitable Adjustment Water of the Terms & Conditions, places a limit of 10,000 afy or less on the Equitable Adjustment water available for use by the Tribes. Section 2 also places additional limits on the available equitable adjustment water as follows: maximum balance = 10,000 afy, maximum accrual = 1,000 afy, starting balance = 5,000 afy. The Equitable Adjustment water as provided for in the Revised Settlement Agreement does not account for the “change” as specified in paragraph 27-11375.x.d of the 1990 Agreement. The clear language of Paragraph 27-11375.x.d of the 1990 Fort Hall Agreement states that the negotiated equitable adjustment is to account for the changes due the Basin 27 Primary Volume diversions exceeding the 45,000 afy estimate. The Revised Settlement Agreement limits this “change” by placing limits on the protected rights of the Basin 27 non-Indian water users. The provisions of the Revised Settlement Agreement contradicts the clear and unambiguous language of paragraph 27-11375.x.d and is clearly an attempt

to re-write the 1990 Fort Hall Agreement such that "...the provisions of paragraph x.d of water right 27-11375 shall no longer apply." (*Settlement Agreement Revised October 17, 2012, Section 3 of the Terms and Conditions*)

IV.

CONCLUSION

The Revised Settlement Agreement attempts to justify limiting the equitable adjustment water available to the Tribes because of the limits placed on non-Indian water users whose rights are protected by paragraph 27-11375.x.d of the 1990 Fort Hall Consent Decree and subsequent ruling of the Court. The provisions of the Revised Settlement Agreement are in conflict with the clear and unambiguous language of paragraph 27-11375.x.d. Therefore, the Advisory Board opposes the Revised Settlement Agreement.

According to paragraph 27-11375.x.d of the 1990 Fort Hall Consent Decree, the parties shall negotiate an **equitable adjustment to the Tribal water rights** to account for the change that occurs when the estimate of the amount of existing non-Indian diversions under state created water rights is exceeded as a result of the Decree in the SRBA. The Courts' instructions are outlined in Section VI of the *MEMORANDUM DECISION AND ORDER ON MOTIONS FOR PARTIAL SUMMARY JUDGEMENT AND INSTRUCTION ON FUTURE PROCEEDINGS* dated June 3, 2011, and provides clarification regarding the *equitable adjustment settlement discussions* noting that the *following issues have been decided*:

- 1) *If the 45,000 afy estimate is exceeded, the Tribes's are entitled to an "equitable adjustment." The remedy of the "equitable adjustment" was not intended by the parties to be limited to supplementation of the 27-11375 right with storage and/or groundwater as already expressed in the Consent Decree.*
- 2) *The 45,000 afy estimate was not intended as a cap on the cumulative quantity of non-Indian water rights protected under the Consent Decree. The intent of the parties was to protect all water rights of qualifying non-Indian water users.*

3) *The remedy of “equitable adjustment” was not intended to be limited in scope to the 27-11375 water right. Although diversions in excess of the 45,000 afy estimate affect the 27-11375 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.* (emphasis added)

V.

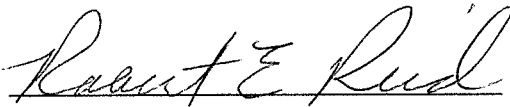
ATTACHMENT

Attached to this response is the true and correct copy of the following document:

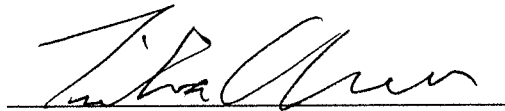
Exhibit 1 **Blackfoot River Equitable Adjustment Settlement Agreement Pursuant To The 1990 Fort Hall Indian Water Rights Settlement Agreement Revised October 17, 2012**, as received by email from Clive Strong on October 18, 2012 for review by the Advisory Board.

RESPECTFULLY SUBMITTED this 12th day of December, 2012.

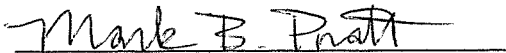
BASIN 27 WATER USERS’ ADVISORY BOARD



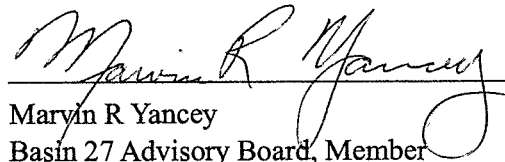
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Basin 27 Advisory Board, Chairman



Trisha Arave
Basin 27 Advisory Board, Member



Mark B. Pratt
Basin 27 Advisory Board, Member



Marvin R. Yancey
Basin 27 Advisory Board, Member

**Blackfoot River Equitable Adjustment Settlement Agreement
Pursuant to the 1990 Fort Hall Indian Water Rights Settlement Agreement
Confidential and Subject to IRE 408
February 23, 2012
Tribes' and United States' Revised Version, April 11, 2012
Parties' Revised Version, April 13, 2012
Tech Revised Version, August 31, 2012
Shoshone-Bannock Tribes' Revised Version, September 28, 2012
State Revised Version, October 1, 2012
Revised October 17, 2012**

Introduction

This Settlement Agreement ("Agreement") by and between the Shoshone Bannock Tribes ("Tribes"), the United States, the State of Idaho ("State"), and the Committee of Nine, hereinafter referred to as the "Parties" sets forth the terms and conditions of the Equitable adjustment provided for in paragraph x.d of water right no. 27-11375. This Agreement is an addendum 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, dated August 2, 1995 ("Consent Decree").

Objective

Implementation of management of Article 7 of the 1990 Fort Hall Indian Water Rights Agreement ("Fort Hall Agreement"), and Section II of the Consent Decree relative to the diversion of natural flows for the benefit of persons diverting natural flow from the Blackfoot River prior to January 1, 1990 ("Basin 27 Water Users") pursuant to paragraph x.d of water right no. 27-11375 recognizing the variability of water supplies available on a year-to-year basis. The Parties have developed and agreed to the Blackfoot River Management Plan that tracks the use and quantifies all Basin 27 diversions occurring as a direct result and benefit of paragraph x.d of water right No. 27-11375.

Pursuant to the credit and water accounting system described below, water is conserved and accrues in good water years to the benefit of the Parties in water scarce years. All water right holders in Basin 27, including tribal and non-tribal diversions, are responsible for diverting or calling for only the amount of water needed for authorized beneficial uses. The terms identified herein, together with the Blackfoot River Management Plan approved by the Parties and this Agreement form the basis for the equitable management of the Blackfoot River drainage and for the equitable adjustment of water right 27-11375.

Definitions

The following definitions apply for purposes of this Agreement:

- a) "Basin 27 Water Users" means persons diverting natural flow from the Blackfoot River prior to January 1, 1990, exclusive of the Fort Hall Irrigation Project and *de minimis* domestic and stock water uses (where the corresponding water right carries a diversion limit of 13,000 gallons per day or less, or 14.5 ac-ft per year or less for storage). "Basin 27 Water Users" includes the Miners Ditch water bypassed as mitigation for water right no. 27-7577 in the name of the City of Blackfoot.¹
- b) "Basin 27 Primary Volume" is the cumulative annual volume of water diverted by the Basin 27 Water Users during the irrigation season as a direct result of being allowed to divert water ahead of the Tribes as provided by the Fort Hall Agreement and described in water right 27-11375. The calculation of the Basin 27 Primary Volume is described in Section 4.i) of the Management Plan.
- c) "Committee of Nine" means the advisory committee of Water District 01.
- d) "Fort Hall Agreement" means the 1990 Fort Hall Indian Water Rights Agreement executed by the Shoshone-Bannock Tribes of the Fort Hall Reservation, the State, the United States, and the Committee of Nine.
- e) "IDWR" or the "Idaho Department of Water Resources" means the executive agency of the State of Idaho created by Idaho Code § 42-1701, or any successor agency.
- f) "Natural Flow" means the natural flow of the Blackfoot River and its tributaries that is available for diversion by Basin 27 Water Users, as referred to in section x.d of water right 27-11375.
- g) "Parties" means the Committee of Nine, State, Tribes, and United States.
- h) "Plan" means the Blackfoot River Water Management Plan.
- i) "SRBA District Court" means the District Court of the Fifth Judicial District, State of Idaho, in and for the County of Twin Falls that is Assigned Civil Case No. 39576.
- j) "State" means the State of Idaho, admitted to the Union on July 3, 1890.
- k) "Tribes" or "Tribal" means the Shoshone-Bannock Tribes of the Fort Hall Reservation in Idaho as the collective successors-in-interest of Indian signatories to the Second Treaty of Fort Bridger of July 3, 1868, 15 Stat. 673, and subsequent Tribal/federal agreements.

¹ All or part of 16 water rights may be diverted into the Miners Ditch, none of which are in the name of Miners Ditch nor do they include any designation they are to be bypassed for mitigation purposes. Those 16 water rights are: 27-3G, 27-17, 27-20A, 27-20B, 27-22A, 27-23E, 27-35A, 27-10296, 27-10341, 27-10344, 27-10505, 27-10756, 27-10790, 27-10999, 27-11117, 27-11940.

- l) "United States" means the United States of America acting through the United States Department of the Interior, Bureau of Indian Affairs.
- m) "Water District 01" means the instrumentality created by the Director of the IDWR pursuant to Idaho Code § 42-604 (1992).
- n) "Water District 27" means the water district designated by the Director of IDWR pursuant to Idaho Code § 42-604 (1992) for the distribution of water in the Blackfoot River Basin and any successor thereto.
- o) "Watermaster" means the person elected by Water District 27 and appointed by the Director of IDWR to distribute water within Water District 27.

Terms and Conditions

1. Basin 27 Credit Account.

The Parties agree to establish and utilize a credit account based on the natural flows of the Blackfoot River basin. This credit account will be used to allow Basin 27 Water Users to continue to divert Blackfoot natural flow, if available, in years when their actual beneficial use exceeds 45,000 acre-feet. The credit account shall be administered as follows:

- a) Basin 27 Water Users may accrue credits when the total annual Basin 27 Primary Volume diversions are less than 45,000 acre-feet per year. Credit accrual is limited by the natural flow supply of the Blackfoot River basin when the supply is less than 45,000 AFY. Credit accrual is calculated as follows:

$$\text{Credit Accrual} = (\text{Lesser of 45,000 afy or available natural flow supply}) - \text{Basin 27 Primary Volume Diversions}$$

The total natural flow supply available to the Basin 27 Water Users is described in Section 4.k) of the Plan.

- b) Basin 27 Water Users can utilize credits if Basin 27 Primary Volume diversions exceed 45,000 acre-feet per year. Credit use provides the Basin 27 Water Users the ability to divert natural flows of the Blackfoot River, if available, in excess of 45,000 acre-feet and does not represent carryover of water supplies between irrigation seasons or use of storage water.
- c) The credit account available for use by the Basin 27 Water Users shall have the following conditions and limitations:
 - 1. Maximum Credit Balance: 40,000 acre-feet
 - 2. Annual Maximum Credit Accrual: 20,000 acre-feet per year
 - 3. Annual Maximum Credit Use: 12,000 acre-feet per year

These conditions are put in place to protect the Tribes' ability to utilize natural flows of the Blackfoot River while enabling the Basin 27 Water Users to continue to divert that volume of water historically diverted from Basin 27 on an annual basis, as provided for in the Fort Hall Agreement.

- d) The Plan includes an annual accounting of the Basin 27 credit balance, credit accrual, and/or credit use each year, and the Watermaster shall provide the Basin 27 Water Users and Committee of Nine with this information at or prior to the annual meeting of Water District 27 or March 1st, whichever is earlier. The credit balance at the start of the irrigation season is the available credit for use by the Basin 27 Water Users in that year.

The Basin 27 Water Users shall start the irrigation season of the calendar year in which this Agreement is adopted by the SRBA District Court with a credit balance of 20,000 acre-feet.

2. Equitable Adjustment Water.

A separate equitable adjustment water account will be maintained for the Tribes to allow Basin 27 Water Users to continue to divert Blackfoot River natural flows, if available, in excess of 45,000 acre-feet per year plus any available credits. The equitable adjustment water is not intended to be utilized on a regular basis, and represents a supplemental water supply for purpose of allowing the Basin 27 Water Users to continue to divert Blackfoot natural flow, if available, consistent with the terms of this equitable adjustment agreement. The equitable adjustment water account shall be administered as follows:

- a) Equitable adjustment water is only available for use if the Basin 27 Water Users have committed and used the maximum available credits for the current year.
- b) The equitable adjustment water account shall be replenished at a fixed rate of 1,000 acre-feet per year. The account will be replenished prior to the beginning of the irrigation season.
- c) The equitable adjustment water account shall have a maximum balance of 10,000 acre-feet. The account balance at the start of the irrigation season is the available equitable adjustment water for that irrigation season.
- d) Equitable adjustment water will be available to the Tribes on an acre-foot for acre-foot basis of Basin 27 Primary Volume in excess of 45,000 acre-feet per year plus all available credits (up to the annual maximum credit use).

- e) Any Basin 27 Primary Volume diversions in excess of 45,000 acre-feet per year plus available credit shall not exceed the amount of equitable adjustment water available to the Tribes.
 - 1. The Tribes shall inform the Basin 27 Watermaster if delivery of equitable adjustment water is desired and the points of diversion for receipt of the water.
 - 2. The Committee of Nine shall take the necessary steps to ensure that a firm supply of water is available to the Tribes on a yearly basis to fulfill any equitable adjustment water need. On an annual basis, the Parties will confirm the source of water to be provided to the Tribes if equitable adjustment water is needed.
 - 3. The source of equitable adjustment water to be provided to the Tribes shall allow the Tribes to utilize the water source in a manner consistent with water right no. 27-11375, without the need to construct additional conveyance or diversion works.
 - 4. Nothing herein precludes the Committee of Nine from implementing actions to increase the supply of Blackfoot River natural flow. The Parties agree that the obligation of Committee of Nine to provide equitable adjustment water will be reduced to the extent of any increase of the Blackfoot River natural flow resulting from such actions.
- f) The Plan includes an annual accounting of the equitable adjustment water account balance, equitable adjustment water accrual, and/or equitable adjustment water use each year, and the Watermaster shall provide the Basin 27 Water Users and Committee of Nine with this information at or prior to the Water District 27 annual meeting or March 1st, whichever is earlier. The equitable adjustment water account balance at the start of the irrigation season is the amount of equitable adjustment water available for use that same year.

The irrigation season of the calendar year in which this Agreement is approved by the SRBA District Court shall begin with an equitable adjustment water account balance of 5,000 acre-feet.

3. Exercise of Water Right No. 27-11375.

Water right no. 27-11375 shall be exercised pursuant to paragraph x.d, as provided for in the Fort Hall Agreement, to the extent that Basin 27 Primary Volume diversions are less than or equal to the following quantity:

$$45,000 \text{ afy} + \text{annual credit used} + \text{equitable adjustment water used}$$

At any point during the irrigation season when the Basin 27 Primary Volume exceeds the above quantity, water right no. 27-11375 will be administered by water right priority, and the provisions of paragraph x.d of water right no. 27-11375 shall no longer apply.

4. Blackfoot River Diversions and Measurements

The Plan shall govern the diversion, use and measurement of water. The Parties in conjunction with the Basin 27 Watermaster shall develop a diversion and accounting protocol pursuant to the Plan, which shall track the Basin 27 Water Users' credit account and provision of equitable adjustment water deliveries to the Tribes as follows:

- a) On a weekly basis, the Basin 27 Watermaster will calculate and publish the Basin 27 diversions and Primary Volume. When the Primary Volume is within 5,000 AF of 45,000 AFY plus the available credit, then the Watermaster will notify the Tribes, Basin 27 Water Users and the Committee of Nine that an equitable adjustment water condition is approaching and take further steps as outlined below.
- b) The Basin 27 Watermaster makes a projection of the following quantities for the coming week: total annual Basin 27 diversions, the cumulative Basin 27 Primary Volume, the use of credits, and any equitable adjustment water supply due to the Tribes. These projections shall be based on the pattern of diversions in prior years and the magnitude of diversions occurring the previous week, estimated available natural flow water supplies and changes in requested Basin 27 diversion demands as per the Plan. The projections shall be provided to the Parties and Basin 27 Water Users for review.
- c) When based upon the accounting in subparagraph b) above, a delivery of equitable adjustment water is owed to the Tribes in the upcoming week, then that quantity of water shall be provided to the Tribes as governed by paragraph 5 below.
- d) This process is repeated until the Tribes have ceased diversions for the year, until no further equitable adjustment water is available, or if the Tribes' water right no. 27-11375 is filled.

5. Equitable Adjustment Water Delivery to Tribes

When, based upon the accounting protocol developed and the application of the credit system described above, an equitable adjustment water delivery is owed to the Tribes, then the Tribes and Committee of Nine shall be notified by the Basin 27 Watermaster. The Tribes shall inform the Basin 27 and Water District 01 Watermasters when delivery of the equitable adjustment water is desired and the points of diversion for receipt of that water. The Committee of Nine shall be obligated to deliver equitable adjustment water at the rates specified by the Tribes over the week, at the identified diversion points consistent with water right no. 27-11375.

6. Equitable Adjustment Water Supply to Tribes

The Committee of Nine shall take the necessary steps to ensure that a firm supply of water is available to the Tribes on a yearly basis to fulfill any equitable adjustment water obligation. On an annual basis the Committee of Nine will confirm water is available and the source(s) of said supply with the Parties.

7. Savings Clause

Nothing herein alters or amends the Sand Creek exchange or the mitigation obligations of Mitigation Inc.

8. Binding Effect.

This Agreement shall bind and inure to the benefit of the respective successors of the Parties.

9. Entire Agreement

This Agreement sets forth all understandings between the Parties with respect to the equitable adjustment provided for water right no. 27-11375. There are no other understandings, covenants, promises, agreements, conditions, either oral or written between the Parties other than those contained herein.

10. Effect of Headings

Headings appearing in this Agreement are inserted for convenience and reference and shall not be construed as interpretations of the text.

11. Multiple Originals

This agreement is executed in quintuplicate. Each of the five (5) Agreements with an original signature of each Party shall be an original.

12. Effective Date

This Agreement shall be effective upon approval by the Fifth Judicial District of the State of Idaho in and for the County of Twin Falls, case no. 39576.

The Parties have executed this Blackfoot River Equitable Adjustment Settlement Agreement on the date following their respective signatures.

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ***BASIN 27 ADVISORY BOARD'S RESPONSE BRIEF IN OPPOSITION TO THE PARTIES' BLACKFOOT RIVER EQUITABLE ADJUSTMENT SETTLEMENT AGREEMENT PURSUANT TO THE 1990 FORT HALL INDIAN WATER RIGHTS SETTLEMENT AGREEMENT Revised October 17, 2012*** was mailed on December 12, 2012, with sufficient first-class postage to the following:

CLERK OF THE COURT (Original)
SRBA
P.O. BOX 2707
TWIN FALLS, ID 83303
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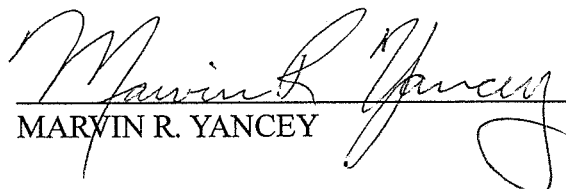
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