

FEB 01 2013

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Counsel for Committee of Nine**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

) MEMORANDUM IN SUPPORT OF
) JOINT MOTION FOR APPROVAL OF FORT
) HALL EQUITABLE ADJUSTMENT
) SETTLEMENT AGREEMENT

The signatories of The 1990 Fort Hall Agreement, the Shoshone-Bannock Tribes,
 the United States, the State of Idaho, and the Committee of Nine of Water District 01,

(hereinafter “the Signatory Parties”), by and through their counsel of record, submit this Memorandum in Support of the Joint Motion for Approval of Fort Hall Equitable Adjustment Settlement Agreement (“Motion”).

BACKGROUND

In 1990, the Signatory Parties entered into The 1990 Fort Hall Indian Water Rights Agreement (“Fort Hall Agreement”), which was subsequently approved by this Court in 1995, in the *Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin* (“Fort Hall Consent Decree”). The Fort Hall Agreement provided for continuation of diversion of Blackfoot natural flow by junior non-Indian water users whose rights are decreed in the SRBA,¹ through the subordination of Blackfoot River Tribal water rights.² Paragraph x.d of tribal water right no. 27-11375 provides as follows:

The Tribes and the United States agree to 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 that 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 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.

This provision was necessary to protect the junior non-Indian water rights (hereinafter “Basin 27 Water Users”), which, absent the protection afforded by this paragraph, would have been perpetually unfilled because of the senior Tribal water right.

¹ The Idaho Water Resource Board’s approval of the 1990 Fort Hall Agreement was conditioned on its understanding that the Agreement was “consistent with the Board’s established policy that any negotiated agreement must provide for the protection of existing water uses” Affidavit of Shasta Kilminster-Hadley, filed in the SRBA District Court Apr. 4, 2011, Exhibit 2, Resolution No. ___, Idaho Water Resource Board, June 14, 1990.

² See Affidavit of David B. Shaw (“Shaw Affidavit”), at ¶¶ 10 and 11.

As Deputy Attorney General Clive Strong described in a letter to Ed Hall, the Blackfoot Watermaster, the subordination mechanism was necessary to allow the non-Indian water rights to continue to divert out of priority:

The Blackfoot water right would be characterized as a federal reserved water right with an 1867 priority date; however, the Tribes would recognize all existing state-created water rights in the Blackfoot River basin as senior to the Tribes' right. Thus, as a practical matter, even though the Tribes would be advancing the priority date of their existing Blackfoot water right, there would be no change in the way the rights are currently delivered.³

The September 1, 1989 Accord between the Signatory Parties set forth the parameters of the Blackfoot Tribal water right subordination: "hold harmless non-Indian Blackfoot users to *present diversion*; if short on Blackfoot, go to reservation groundwater." (Emphasis added.)⁴

The Signatory Parties assigned David Shaw, the IDWR Adjudication Bureau Chief, the task of quantifying the present diversions of Blackfoot natural flow by Basin 27 Water Users⁵ at the time of the Fort Hall Agreement. Since claims had not yet been filed in the SRBA for Basin 27, and because the IDWR water rights records were incomplete, Mr. Shaw developed an estimate of actual Blackfoot natural flow water diversion under state created Basin 27 water rights.⁶ Mr. Shaw used 1986-87 Landsat data to estimate the actively irrigated acreage.⁷ He then applied a duty of water to the estimate of actively irrigated acreage to derive an estimate of actual diversions under

³ Kilminster-Hadley Affidavit, Exhibit 3, Letter from Clive Strong to Ed Hall, dated Sept. 8, 1989.

⁴ Kilminster-Hadley Affidavit, Exhibit 4, Exhibit A to Resolution 16 of the Committee of Nine, dated March 12, 1990.

⁵ Shaw Affidavit at ¶ 12. As defined in the Blackfoot River Management Plan, "Basin 27 water users" refers to persons diverting natural flow from the Blackfoot River Basin prior to January 1, 1990, whose water rights are decreed in the SRBA, exclusive of the Fort Hall Irrigation Project and *de minimis* domestic and stock water uses.

⁶ See Shaw Affidavit at ¶ 15.

⁷ Shaw Affidavit at ¶ 13.

Basin 27 water rights.⁸ He concluded that the Basin 27 Water Users historically diverted approximately 45,000 acre feet of Blackfoot natural flow.⁹

The Signatory Parties reviewed Mr. Shaw's 45,000 AFY estimate of actual diversions prior to January 1, 1990 and incorporated it into provision x.d of water right no. 27-11375 as the trigger for an equitable adjustment to the Tribal water rights.¹⁰ There is no record of any objection at the time to the use of actual diversions prior to January 1, 1990 as the measure of the extent of the subordination.

During the Fort Hall Consent Decree proceedings, the Court and the Signatory Parties discussed the potential need for future adjustments to the Decree based on the Blackfoot equitable adjustment provision.¹¹ The anticipation, pursuant to the plain language of the provision, was that, in the event the actual diversions by Basin 27 Water Users exceeded 45,000 AFY, the Signatory Parties would negotiate an adjustment to the Tribal water rights and submit a proposed resolution to the Court.¹² With that in mind, the Court acknowledged, "it seems to me that the parties do intend that this court essentially maintain continuing jurisdiction over those matters which in all likelihood will require some adjustment as noted in the proposed consent decree."¹³ The Court, finding the Fort Hall Agreement to be fair, adequate, and reasonable, and determining that it did not unnecessarily interfere or injure third party rights, then issued the Fort Hall Consent Decree.¹⁴

⁸ Shaw Affidavit at ¶ 14.

⁹ Shaw Affidavit at ¶15.

¹⁰ See Shaw Affidavit at ¶16.

¹¹ See Reporter's Transcript, Hearing on the Proposed Consent Decree on 1990 Fort Hall Indian Water Rights Settlement Agreement ("Transcript"), pp.143-49.

¹² Transcript, p. 146; See Shaw Affidavit at ¶17.

¹³ Transcript. p. 143-44.

¹⁴ Hearing Transcript, p. 167, Ll. 5-6.

Pursuant to the Court's continuing jurisdiction over this provision of the Fort Hall Consent Decree, the Tribes and the United States filed a Motion for Enforcement of the Fort Hall Consent Decree in this subcase on October 29, 2010, requesting that the Court enforce the Consent Decree and order the Signatory Parties to negotiate an equitable adjustment. On June 3, 2011, the Court issued an Order and instructed the parties to participate in settlement negotiations.¹⁵ *Memorandum Decision and Order for Partial Summary Judgment and Instructions on Future Proceedings*. This Motion presents the Signatory Parties' resolution of the equitable adjustment issue, and their request for this Court's approval of the proposed adjustment mechanism in satisfaction of provision 27-11375.x.d.

ARGUMENT

1. The EA Agreement Fulfills the Signatory Parties' Obligation to Provide a Mechanism for Equitable Adjustment Under Provision 27-11375.x.d and Is Consistent With the Purpose of This Provision

The attached Equitable Adjustment Settlement Agreement ("EA Agreement") represents the Signatory Parties' compliance with their duties under provision 27-11375.x.d. It provides a mechanism for adjusting Tribal water rights in the event that primary volume¹⁶ diversions under Basin 27 water rights exceed 45,000 AFY. It does this on an acre foot-by-acre foot basis, and in such a way that the Basin 27 Water Users

¹⁵ On July 26, 2011, the Court issued an *Order Clarifying Its Memorandum Decision and Order of June 3, 2011*, and reiterated "[i]t 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 45,000 afy estimate contained in paragraph 27-11375.x.d. of the *Consent Decree* is exceed [sic] 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." *Order Clarifying Memorandum Decision and Order on Motions for Partial Summary Judgment and Instructions on Future Proceedings*, at 3.

¹⁶ "Primary Volume" or "Basin 27 Primary Volume" is the cumulative annual volume of Blackfoot River Basin Natural Flows diverted by the Basin 27 Water Users during the irrigation season as a direct result of being allowed to divert Blackfoot River Basin Natural Flows 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 Blackfoot River Management Plan, attached as Exhibit 1 to the Shaw Affidavit.

can continue to diverting that amount of water they were diverting prior to January 1, 1990.¹⁷

This Court has already found the Fort Hall Consent Decree to be fair, adequate, and reasonable, and that it does not unnecessarily interfere with the rights of third parties.¹⁸ At the time of approval of the Consent Decree, the Signatory Parties acknowledged that an adjustment to the Tribal water rights would be required if the total actual diversions under the decreed Basin 27 water rights were found to exceed the 45,000 AFY estimate. After the Director's Report for Basin 27 was filed with this Court in 2005, the Signatory Parties formed a technical group that included representatives from the Tribes, the United States, and the State, to resolve the Tribes' and United States' objections to the water rights recommended by the Director for the Basin 27 water users.¹⁹ The technical group was tasked with determining whether an equitable adjustment was needed, i.e., whether actual diversions exceeded the 45,000 AFY estimate.²⁰ An additional focus of the group was the creation of a management plan, as required by paragraph 8.3 of the Fort Hall Agreement.

The Signatory Parties' Blackfoot River Management Plan ("Management Plan") is attached to the Affidavit of David Shaw filed in support of this Motion.²¹ The Management Plan provides a comprehensive system for measuring and accounting for water uses in the Blackfoot River Basin, and compiling the data as it is collected as required by paragraph 8.3 of the Fort Hall Agreement.²²

¹⁷ See Shaw Affidavit at ¶¶27 and 39.

¹⁸ Transcript, p. 167.

¹⁹ Shaw Affidavit at ¶20.

²⁰ *Id.*

²¹ As discussed in footnote 1 of the Management Plan, the Parties will address purposes 4, 5 and 8 of paragraph 8.3 of the Fort Hall Agreement in future amendments to the Management Plan.

²² See Shaw Affidavit at ¶¶22 - 24.

Through the development of the Management Plan, the technical group was able to refine the accounting for Basin 27 natural flow diversions. The Management Plan recognizes that only those Basin 27 natural flow diversions occurring during times when water right no. 27-11375 is in priority, is being exercised, and has not yet been filled should count toward the 45,000 AFY equitable adjustment trigger.²³ Based upon an analysis of existing hydrologic data and the refined accounting of Basin 27 natural flow diversions, the technical group concluded that, in most years, the Basin 27 Water Users' primary volume diversions would not exceed the 45,000 AFY trigger.²⁴

The technical group also concluded, however, that the Basin 27 primary volume diversions can fluctuate from year-to-year.²⁵ Given this variability, the Signatory Parties agreed to an equitable adjustment that accounts for the year-to-year variability in primary volume diversions by the Basin 27 Water Users. The framework allows for the accrual of water credits to the Tribes during years in which primary volume diversions are less than 45,000 AFY.²⁶ These credits are then used to offset primary volume diversions that exceed the estimated 45,000 AFY during a given year.²⁷ In this way, the mechanism for equitable adjustment is in place, if and when it is needed, and there is certainty for all

²³ Shaw Affidavit at ¶23.

²⁴ See Shaw Affidavit at ¶25.

²⁵ *Id.*

²⁶ Shaw Affidavit at ¶27.

²⁷ *Id.* Thus, if in Year One, Basin 27 Water Users' diversions amounted to 35,000 AFY, there would be a 10,000 AFY credit to the Tribes. If, in Year Two, the total Basin 27 Water Users' diversions amounted to 50,000 AFY, the Tribal credit would offset, on an acre foot-by-acre foot basis, the amount of water diverted in excess of 45,000 AFY. The EA Agreement contains certain necessary limitations on the accrual of credit: 1) the maximum credit balance cannot exceed 40,000 AFY, 2) the annual maximum accrual of credit cannot exceed 20,000 AFY, and 3) the annual maximum use of credit to offset Basin 27 Water Users' diversions cannot exceed 12,000 AFY. The EA Agreement provides that, for the irrigation season of the calendar year in which this agreement is adopted by this Court, the Tribes shall begin with a 20,000 AF credit balance.

parties that both Tribal water rights and Basin 27 water rights will continue to be administered as intended by the Signatory Parties.

This system of credits is fortified by a separate 10,000 acre feet of “equitable adjustment water” provided by the Committee of Nine. The equitable adjustment water acts as insurance water, the goal of which is to provide water to the Tribes in the event existing credits are not sufficient to offset primary volume diversions by Basin 27 Water Users that exceed 45,000 AFY.²⁸ In such event, the equitable adjustment water is available to offset such diversions.²⁹ The Signatory Parties’ technical representatives have determined that the combination of credits and equitable adjustment water will ensure that Basin 27 Water Users can continue to divert consistent with the provisions of the Fort Hall Consent Decree.³⁰

As this Court has already held, the Tribes are entitled to an equitable adjustment if the 45,000 AFY estimate is exceeded. *Memorandum Decision and Order on Motions for Partial Summary Judgment and Instructions on Future Proceedings (Motion for Enforcement)*, issued June 3, 2011, at 19. The EA Agreement allows for the Tribes to be made whole in the event more than 45,000 AFY of primary volume is diverted under Basin 27 water rights, as required by provision x.d of water right no. 27-11375, and it makes possible the acre foot-by-acre foot adjustment³¹ contemplated by the Signatory Parties at the time of the proceedings on the Fort Hall Consent Decree.³² There is no monetary requirement from Basin 27 Water Users, and the outcome does not otherwise

²⁸ See Shaw Affidavit at ¶28.

²⁹ *Id.*

³⁰ See Shaw Affidavit at ¶39.

³¹ Shaw Affidavit at ¶27.

³² “[I]f there needs to be an adjustment, it would be on an acre-foot-per-acre-foot basis; and so it is more a mechanical act than anything else.” Testimony of Clive Strong, Transcript, pp. 146-47.

burden or impact them, as they continue to receive subordination protection as contemplated by the Fort Hall Agreement and confirmed in the Consent Decree. The system of accounting provides adequate notice to all affected parties in the event an adjustment is necessary. In short, the EA Agreement provides an equitable method for maintaining the balance struck by the original signatories to the Fort Hall Agreement, and in concert with the Blackfoot River Management Plan, provides a transparent, easily administered solution to an issue that has plagued the parties and this Court for nearly a decade.

2. Only Third Parties Demonstrating They Have Suffered Injury-in-Fact Have Standing to Object to the EA Agreement

The Court, in its *Order Setting Procedure on Proposed Settlement re: Equitable Adjustment*, issued December 19, 2012, requested that the Signatory Parties address whether third parties have standing to contest the EA Agreement. The Signatory Parties assert that because the EA Agreement, like the original provisions of the Fort Hall Agreement, provides for the exercise of the Tribal water right “in a manner that ensures persons diverting natural flow from the Blackfoot River prior to January 1, 1990, whose rights [were] decreed in the SRBA will continue to receive that full legal entitlement,” non-signatory parties to the Fort Hall Agreement lack standing to object to the EA Agreement. As set forth in the Affidavit of Dave Shaw, available data indicates that the EA Agreement will ensure that Basin 27 Water Users can continue to divert consistent with the provision x.d of water right no. 27-11375.

Standing is a preliminary question to be determined by the Court before reaching the merits of a case. *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002); In Re: SRBA Case No. 39576; *Fort Hall Water Users Association v. United*

States, State of Idaho, Shoshone-Bannock Tribes, and Twin Falls and Northside Canal Companies, 129 Idaho 39, 921 P.2d 739 (1996). It is well established Idaho law that to satisfy the requirement of standing, litigants generally must allege or demonstrate an injury in fact and a substantial likelihood that the relief requested will prevent or redress the injury. *Abolafia v. Reeves*, 152 Idaho 898, 902, 277 P.3d 345, 349 (2012) (citations omitted). “This requires a showing of distinct, palpable injury and fairly traceable causal connection between the claimed injury and the challenged conduct.” *Martin v. Camas County ex rel. Bd. Com’rs*, 150 Idaho 508, 513, 248 P.3d 1243, 1248 (2011).

In the current proceeding, all four signatories to the Fort Hall Agreement have reached consensus on the equitable adjustment issue, as required by the Fort Hall Agreement itself. The EA Agreement is consistent with the original provisions of the Fort Hall Consent Decree, which have already been determined by this Court to be fair, adequate, and reasonable. Furthermore, part of the Consent Decree standard requires a determination that its provisions don’t unnecessarily interfere with or injure third party rights. As the Court stated in 1995, “[t]here is no evidence of record showing that the agreement and the matters contain [sic] therein would unnecessarily interfere with the rights of third parties.”³³ Because the EA Agreement is consistent with the original provisions of the Fort Hall Consent decree, and allows the Basin 27 Water Users to continue to divert Blackfoot natural flow to the same extent as they did prior to the Fort Hall Agreement, no third parties to the Agreement have standing to challenge the EA Agreement.

The Signatory Parties contend that, absent a showing that the EA Agreement unnecessarily interferes with the rights of third parties, third parties are without standing

³³ Transcript, p. 167.

to challenge the EA Agreement. The Fort Hall Agreement and Fort Hall Consent Decree subordinated a senior Tribal water right to junior Basin 27 water rights, as they were exercised as of January 1, 1990. As described above, the EA Agreement maintains precisely the same level of benefit provided by the Fort Hall Agreement, and therefore, does not unreasonably interfere with the rights of the Basin 27 Water Users. Accordingly, the Signatory Parties assert that the Basin 27 Water Users lack standing to challenge the EA Agreement.

Additionally, from a procedural standpoint, only those water users that are currently listed as parties to this subcase have the right to participate in this proceeding. The Court's *Initial Scheduling Order Setting Forth Procedures on State's Motion for Accounting and United States' and Tribes' Joint Motion to Enforce*, entered November 10, 2010, directed that all parties wishing to participate in the *Motion to Enforce* file a *Notice of Intent to Participate* on or before January 4, 2011. As of the deadline, only a handful of individual water users or entities had filed such notices. As the Court indicated in its *Order Granting Motion to Strike*, entered January 4, 2013, the time for filing such a *Notice of Intent* has long expired. Absent a formal motion and leave of the Court, therefore, water users not currently party to this subcase lack the procedural standing to object to the EA Agreement.

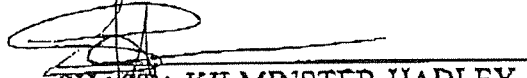
CONCLUSION

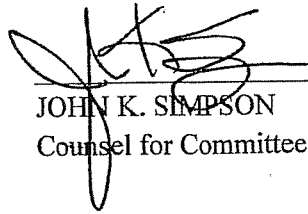
The Signatory Parties request that this Court issue an order approving the EA Agreement, consistent with provision x.d of water right no. 27-11375 of the Fort Hall Consent Decree.

Respectfully submitted this 30th day of January, 2013.

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PETER C. MONSON
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A handwritten signature in cursive script, reading "Jeanette Wofley", written over a horizontal line.

JEANETTE WOFLEY

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of January, 2013, I caused a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF JOINT MOTION FOR APPROVAL OF FORT HALL EQUITABLE ADJUSTMENT SETTLEMENT AGREEMENT to be filed with the Court and served on the following parties by the indicated methods:

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SHASTA KILMINSTER-HADLEY

ATTACHMENT

Blackfoot River Equitable Adjustment Settlement Agreement Pursuant
to the 1990 Fort Hall Indian Water Rights Settlement Agreement
In Re SRBA, Subcase No. 27-11375

Blackfoot River Equitable Adjustment Settlement Agreement Pursuant to the 1990 Fort Hall Indian Water Rights Settlement Agreement

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

This Agreement implements Article 7 of the 1990 Fort Hall Indian Water Rights Agreement ("Fort Hall Agreement"), and Section II of the Consent Decree pertaining to the diversion of Natural Flows from the Blackfoot River 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 Water Management Plan that tracks the use and quantifies all Blackfoot River Basin Natural Flow diversions occurring as a direct result and benefit of paragraph x.d of water right No. 27-11375.

Paragraph x.d. of water right No. 27-11375 "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 that full legal entitlement under state law." The Fort Hall Agreement allows the Basin 27 Water Users to continue to divert that amount of water put to beneficial use under state created water rights prior to January 1, 1990. The credit and water accounting system described below, provides Equitable Adjustment Water to the Shoshone-Bannock Tribes to offset Basin 27 water diversions protected by paragraph x.d. of water right No. 27-11375 that are in excess of the 45,000 AFY of water from the Blackfoot River. All water right holders in Basin 27, including tribal and non-tribal diverters, are responsible for diverting or calling for only the amount of water needed for authorized beneficial uses. This Agreement, together with the Blackfoot River Water Management Plan approved by the Parties, form the basis for the equitable management of the Blackfoot River drainage and for the equitable adjustment of water right No. 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 Basin prior to January 1, 1990 whose rights are decreed in the SRBA, 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 Blackfoot River Basin Natural Flows diverted by the Basin 27 Water Users during the irrigation season as a direct result of being allowed to divert Blackfoot River Basin Natural Flows 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 Plan.
- c) "Committee of Nine" means the advisory committee of Water District 01 and any successor thereto.
- d) "Equitable Adjustment Water" is a supplemental water supply provided to the Tribes for the purpose of protecting water right no. 27-11375 if the Basin 27 Primary Volume exceeds 45,000 acre-feet per year and all available credits, consistent with the terms of this Agreement.
- e) "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.
- f) "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.
- g) "Natural Flow" means the natural flow of the Blackfoot River Basin that is available for diversion, as referred to in section x.d of water right 27-11375 and as specifically defined and calculated in the Plan. When the term "natural flow" is used in this Agreement rather than "Natural Flow" the classic meaning of natural flow is intended as illustrated in Section 4.k) of the Plan.
- h) "Parties" means the Committee of Nine of Water District 01, State, Tribes, and United States.
- i) "Plan" means the Blackfoot River Water Management Plan.
- j) "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.

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.

- k) "State" means the State of Idaho, admitted to the Union on July 3, 1890.
- l) "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.
- m) "United States" means the United States of America acting through the United States Department of the Interior, Bureau of Indian Affairs.
- n) "Water District 01" means the instrumentality created by the Director of the IDWR pursuant to Idaho Code § 42-604 (1992) and any successor thereto.
- o) "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.
- p) "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 diversions of Natural Flows of the Blackfoot River Basin by the Basin 27 Water Users as contemplated by provision x.d of water right 27-11375, and permitting the Basin 27 Water Users beneficial use of their water rights. The credit account shall be administered as follows:

- a) Credits are accrued when the total annual Basin 27 Primary Volume diversions are less than 45,000 acre-feet per year (afy). 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:

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

The total natural flow supply is described in Section 4.k) of the Plan.

- b) Credits are used if Basin 27 Primary Volume diversions exceed 45,000 acre-feet per year, on an acre-foot for acre-foot basis.
- c) The credit account 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 annually to divert, to the extent of beneficial use, that volume of water as provided for in the Fort Hall Agreement.

- d) The Plan includes an annual accounting of the credit balance, credit accrual, and/or credit use each year, and the Watermaster shall provide the Tribes, Basin 27 Water Users, the Bureau of Indian Affairs, and Committee of Nine with this information prior to January 5th of each year. The credit balance at the start of the irrigation season is the available credit for use in that year.
- e) The irrigation season of the calendar year in which this Agreement is adopted by the SRBA District Court shall begin 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' diversions under water right no. 27-11375 if the Basin 27 Primary Volume is greater than 45,000 acre-feet per year plus all available credits in any year. The Equitable Adjustment Water is not intended to be utilized on a regular basis, and represents a supplemental water supply for the protection of water right no. 27-11375, consistent with the terms of this Agreement. The Equitable Adjustment Water account shall be administered as follows:

- a) Equitable Adjustment Water is only available for use if the maximum available credits have been used 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 in a quantity equal to Basin 27 Primary Volume in excess of a combined 45,000 acre-feet per year plus the maximum available credits that can be used in the current year.
- e) Any Basin 27 Primary Volume diversions in excess of 45,000 acre-feet per year plus available credit for the current year shall not exceed the amount of Equitable Adjustment Water available to the Tribes.

- f) 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.
- g) The Equitable Adjustment Water to be provided to the Tribes shall be supplied by the Committee of Nine from a source and in a manner that allows 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.
- h) 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 available to the Tribes resulting from such actions.
- i) 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 Tribes, Basin 27 Water Users, the Bureau of Indian Affairs, and Committee of Nine with this information prior to January 5th of each year. 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.
- j) 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, provisions of paragraph x.d of water right no. 27-11375 shall be deemed satisfied and all water rights shall be administered in priority.

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 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 Primary Volume. When the Primary Volume is within 5,000 acre-feet of 45,000 acre-feet per year plus the available credit for use in the current year, 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 will make 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. Mitigation Inc. is the contracting entity that holds the storage contract rights for storage space made available pursuant to Section 5 of the Fort Hall Indian Water Rights Act of 1990, Pub. L. 101-602, 104 Stat. 3059 (November 16, 1990).

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

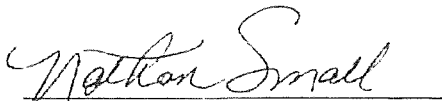
This Agreement is executed in quadruplicate. Each of the four (4) Agreements with an original signature of each Party shall be an original.

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.

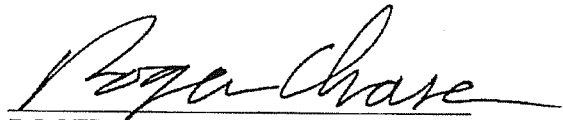
The Parties have executed this Blackfoot River Equitable Adjustment Settlement Agreement on the date next to their respective signatures.

SHOSHONE-BANNOCK TRIBES


NATHAN SMALL
Chairman, Shoshone-Bannock
Tribal Council

Dated: 01/25/13

STATE OF IDAHO

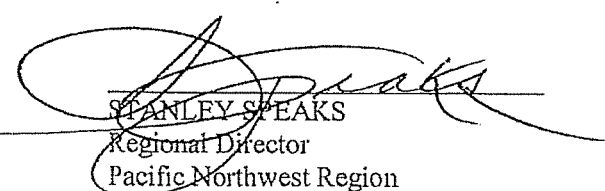
A handwritten signature in cursive script, appearing to read "Roger Chase", written over a horizontal line.

ROGER CHASE

Chairman, Idaho Water Resource Board

Dated: 1-25-2013

UNITED STATES



STANLEY SPEAKS

Regional Director

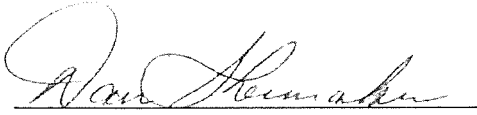
Pacific Northwest Region

Bureau of Indian Affairs

U.S. Department of Interior

Dated: 1/24/2013

COMMITTEE OF NINE OF WATER DISTRICT 01

A handwritten signature in cursive script, appearing to read "Dan Shewemaker", is written over a horizontal line.

DAN SHEWMAKER
Chairman, Committee of Nine

Dated: Jan 25, 2013