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DEPARTMENT OF
WATER RESOURCES

Randall C. Budge (ISB# 1949)
Thomas J. Budge (ISB# 7465)
RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED
201 E. Center Street
Post Office Box 1391
Pocatello, Idaho 83204
(208) 232-6101 – Telephone
(208) 232-6109 – Facsimile

Robert L. Harris (ISB# 7018)
Luke H. Marchant (ISB # 7944)
HOLDEN KIDWELL HAHN & CRAPO,
P.L.L.C
1000 Riverwalk Dr., Ste. 200
Post Office Box 50130
Idaho Falls, Idaho 83405
(208) 523-0620 – Telephone
(208) 523-9518 – Facsimile

*Attorneys for Alma Hubbard, Blackfoot Springs
Ranch, LLC, Lewis Brothers, Inc., Ohanesian &
Associates, P4 Production, LLC, Eastern Idaho
Water Company, Mark B. Pratt, Brett McDaniel,
Gary and Sonja Wright, Marvin Yancey, Merlin
Yancey, and Patrick Taney*

*Attorneys for Natural Guardian LLC, Bear
Lake Grazing Co., P. Thomas Blotter Family,
and Stucki Revocable Trust*

**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

Case No. 39576

Subcase No. 27-11375

**RESPONSE BRIEF IN OPPOSITION
TO JOINT MOTION**

Alma Hubbard, Blackfoot Springs Ranch, LLC, Lewis Brothers, Inc., Ohanesian & Associates, P4 Production, LLC, Eastern Idaho Water Company, Mark B. Pratt, Brett McDaniel, Gary and Sonja Wright, Marvin Yancey, Merlin Yancey, and Patrick Taney, represented by Racine Olson Nye Budge & Bailey, Chartered, and Natural Guardian, LLC, Bear Lake Grazing Co., P. Thomas Blotter Family, and Stucki Revocable Trust, represented by Holden, Kidwell, Hahn & Crapo, PLLC (collectively the “Respondents”) submit this brief pursuant to the Court’s *Order Setting Procedure on Proposed Settlement Re: Equitable Adjustment* dated December 19, 2012. This brief opposes the *Joint Motion for Approval of Fort Hall Equitable Adjustment Settlement Agreement* (the “Joint Motion”) filed by the State of Idaho, United States, Shoshone-Bannock Tribes, and Committee of Nine (collectively the “Signatory Parties”) on January 31, 2013.

INTRODUCTION

The *Joint Motion* asks the Court to approve a proposed *Blackfoot River Equitable Adjustment Settlement Agreement Pursuant to the 1990 Fort Hall Indian Water Rights Settlement Agreement* (the “Proposed Settlement”) over the objection of the Respondents. The Respondents all own water rights in Basin 27 that will be subject to curtailment by the Shoshone-Bannock Tribes if the *Joint Motion* is granted and the Proposed Settlement is approved.

The *Joint Motion* and Proposed Settlement stem from The 1990 Fort Hall Indian Water Rights Agreement (the “1990 Agreement”). The 1990 Agreement defined the water rights of the Shoshone-Bannock Tribes, and was submitted to the Snake River Basin Adjudication (SRBA) Court in lieu of a standard SRBA notice of claim. Parties to the SRBA had the opportunity to object to the terms of the 1990 Agreement on or before June 1, 1994. *See Notice of Filing Director’s Report of the Shoshone-Bannock 1990 Fort Hall Indian Water Right Agreement* (March 31, 1994). This opportunity to object was provided for in the 1990 Agreement, which states that persons other than the Signatory Parties would be given the opportunity to object to the Agreement once it was submitted to the SRBA Court. (1990 Agreement, Article 10.1, p. 63.) On August 2, 1995, the Court ratified, confirmed, and approved the provisions of the 1990 Agreement by entering a *Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin* (the “Consent Decree”).

A. Protected Rights under the 1990 Agreement

Based upon the clear and unambiguous language of the 1990 Agreement as it related to the Respondents’ Basin 27 water rights, the Respondents had no reason to object to the 1990 Agreement, and they did not object to it. As part of the 1990 Agreement, the Shoshone-Bannock Tribes agreed to subordinate their Blackfoot River water right number 27-11375 to all non-Indian water rights from the Blackfoot River in existence at the time the 1990 Agreement was entered into. The 1990 Agreement reads:

The Tribes and 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. (1990 Agreement, ¶ 27-11375.x.d., p. 37)

This same provision is included in the Consent Decree on page 31.

On October 29, 2010, the Tribes and the United States of America as Trustee on Behalf of the Tribes filed a *Motion for Enforcement of Fort Hall Indian Water Rights Consent Decree* (“*Motion to Enforce*”), asking the Court to interpret paragraph 27-11375.x.d. of the Consent Decree. One issue raised was “whether the 45,000 afy estimate contained in paragraph 27-11375.x.d. constitutes an absolute cap or limit on non-Indian diversions from the Blackfoot River.” *Memo. Decision and Order on Motions for Partial Summ. J. and Instructions on Future Proceedings (Motion for Enforcement)* at 12-13 (June 3, 2011). The Court found it “clear that the 45,000 afy estimate was not to be treated as an absolute cap,” holding that such an interpretation would be “inconsistent with the Tribes’ and United States’ agreement to allow those certain identified water users ‘to continue to receive their full legal entitlement under state law.’” *Id.* at 13. The Court explained that “the remarks qualifying the 27-11375 water right are structured to protect the rights [of] non-Indian water users.” *Id.* at 17.

On March 18, 2011, the Committee of Nine attempted to limit the scope of the protections afforded to non-Indian water users by arguing that the provision quoted above only protects water rights that were actively being used in the 1986-87 timeframe. The Court disagreed, finding the provision to be “clear and unambiguous regarding the intended scope of non-Indian diversions,” holding that all water rights with priority dates prior to January 1, 1990, which are decreed in the SRBA, are protected by the express terms of Paragraph 27-11375.x.d. of the Consent Decree. *Memo. Decision and Order on Motion to Strike and Motion for Accounting* at 10 (July 14, 2011). The Court referred to these rights as the “protected rights.” *Id.* This brief likewise refers to these rights collectively as the “Protected Rights.”

B. Equitable Adjustment to the Tribal Water Rights

The *Joint Motion* is another attempt to limit the protections granted by the 1990 Agreement and the Consent Decree to the Respondents and other holders of Protected Rights.

At the time the 1990 Agreement was entered into, the SRBA Court had not yet inventoried Basin 27 water rights. The parties did not know at that time the precise quantity of water that would ultimately be decreed under the Protected Rights. Therefore, the parties agreed to specifically enumerate all water rights protected by paragraph 27-11375.x.d. once the SRBA decree was final. They further agreed that if the amount of water diverted under the Protected Rights exceeds 45,000 acre-feet per year (AFY) the parties would negotiate an equitable adjustment to the Tribal water rights. The specific language of the 1990 Agreement reads:

These state created water rights are estimated to divert not more than 45,000 AFY of water from the Blackfoot River. In the event this estimate of the amount of existing diversions under state created water rights is exceeded as a result of the decree in the SRBA, the parties shall negotiate an equitable adjustment to the Tribal water rights to account for this change. (1990 Agreement, ¶ 27-11375.x.d., p. 37)

This same provision is included in the Consent Decree on page 31.

C. Proposed Settlement

The Proposed Settlement is presented to the Court as the “equitable adjustment” that the 1990 Agreement and the Consent Decree require. Because the 1990 Agreement and the Consent Decree require that “the parties shall negotiate an equitable adjustment to the Tribal water rights,” the Signatory Parties chose to exclude the Respondents and other affected Basin 27 water users from participating in the negotiations of the equitable adjustment.

The 1990 Agreement and the Consent Decree indicate that the equitable adjustment should be made once actual diversions exceed 45,000 AFY. The *Joint Motion* does not allege that non-Indian diversions from the Blackfoot River are presently exceeding the 45,000 AFY estimate, but the Respondents agree that it is appropriate to resolve the equitable adjustment issue because SRBA partial decrees issued for Basin 27 allow the diversion of significantly more than 45,000 AFY. There are currently a large number of inactive water rights in Basin 27. If all of the Protected Rights were to divert their full legal entitlement under state law, actual diversions could exceed 80,000 AFY.

The Proposed Settlement purports to make an equitable adjustment to the Tribal water rights, yet its ultimate effect is to cap the Protected Rights at around 45,000 to 46,000 AFY, as explained later in this brief. As such, the Proposed Settlement contradicts the plain language of the 1990 Agreement and the Consent Decree which provides that the Protected Rights “will continue to receive [their] full legal entitlement under state law.” (1990 Agreement, ¶ 27-11375.x.d., p. 37; Consent Decree, p. 31.)

STATEMENT OF ISSUES

The ultimate issue before the Court is whether to approve the Proposed Settlement despite it being contrary to the plain language of the 1990 Agreement and the Consent Decree. In addressing this issue the Court’s *Order Setting Procedure on Proposed Settlement re: Equitable Adjustment* dated December 19, 2012, identifies the following subsidiary issues:

1. Whether the Court has legal authority to accept the Proposed Settlement over the objection of the Respondents and others with affected water rights.

2. Whether the Respondents have standing to contest the Proposed Settlement or any proposed modifications to the 1990 Agreement.

ARGUMENT

As explained below, the Respondents have standing both as third-party beneficiaries to the 1990 Agreement, and as persons interested in and affected by the 1990 Agreement, to contest the Proposed Settlement and any proposed modification to the 1990 Agreement. They additionally have standing as parties to the SRBA to contest any proposed interpretation or modification of the Consent Decree. Based upon the Respondents' standing to contest the Proposed Settlement, this Court should deny the *Joint Motion* because it contradicts the plain language of the 1990 Agreement and the Consent Decree.

I. The Respondents have standing as third-party beneficiaries of the 1990 Agreement to contest the proposed Settlement Agreement.

Under Idaho law, “a contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.” Idaho Code § 29-102. The test for determining whether a person is a third-party beneficiary is whether the agreement reflects an intent to benefit such person. *Idaho Power Co. v. Hulet*, 140 Idaho 110, 112 (2004). The contract must typically express an intent to benefit the third party. *Partout v. Harper*, 145 Idaho 683 (2008). However, third-party beneficiary status will extend to a limited class of individuals, without specific or express identification of such individuals, where the intent to benefit the limited class is manifest from the contract together with the surrounding facts and circumstances. *See Bush v. Upper Valley Telecable Co.*, 96 Idaho 83, 85 (1973); *see also Yellowstone Pipe Line Co. v. Grant Constr. Co.*, 95 Idaho 794, 796 (1974).

In *Bush*, Upper Valley Telecable Co. (“Upper Valley”) entered into a contract with the City of Idaho Falls to provide television cable services to residents of the city based on a fixed rate schedule. *Id.* The plaintiff, a resident of the city and a cable subscriber, brought an action to enforce the rate schedule and to recover against Upper Valley for excess charges that he was charged by Upper Valley. *Id.* The court found that the rate schedule revealed an intent to benefit a limited, well defined class of people, namely, residents of the city who subscribed to cable. *Id.*

Therefore, although the plaintiff was not a party to the contract, as a subscriber he was an intended third party beneficiary, and was entitled to enforce the contract and bring an action for equitable and legal relief.

In *Yellowstone Pipeline*, the Court found that a pipeline company was a third-party beneficiary as result of certain contracts between the State of Idaho and a general contractor, and between the general contractor and a subcontractor. *Yellowstone Pipe Line Co.*, 95 Idaho 794, 796 (1974). The pipeline company granted the State a right-of-way over its pipeline for access to a gravel pit. *Id.* The State then contracted with a general contractor to construct a portion of highway adjacent to the gravel pit. *Id.* The contract between the State and the general contractor provided that the contractor would be liable for all damages caused to the owners and operators of property adjacent to the project. *Id.* In the process of constructing the highway, a subcontractor damaged the pipeline. The court held that the pipeline company was a third-party beneficiary of the contract between the State and the general contractor, enabling the pipeline company to recover against the subcontractor under a contract theory and not just under a tort theory which would have required a showing of negligence. *Id.*

Similar to *Bush* and *Yellowstone Pipeline* is the case of *Just's v. Arrington Constr. Co.*, 99 Idaho 462 (1978). In that case, the court articulated the following rule:

In order to recover as a third party beneficiary, it is not necessary that the individual be named and identified as an individual although that is usually sufficient; a third party may enforce a contract if he can show he is a member of a limited class for whose benefit it was made. The class may be limited either by a narrow description of the injuries to be guarded against and the damages to be paid, or by a similar description of the class to be protected. *Id.* at 464 (quoting *Stewart v. Arrington Constr. Co.*, 92 Idaho 526, 532 (1968)).

In *Just's*, the entity asserting the status of a third-party beneficiary was not expressly identified in the subject contract. *Id.* The underlying contract was between the City of Idaho Falls and a construction company hired to renovate roadways, sidewalks, sewer, water and electrical lines. *Id.* The contract provided that the construction be done in a manner that would limit disruption to surrounding businesses. *Id.* The party asserting the status and rights of a third-party beneficiary operated a retail business located within the renovation area, and brought an action against the construction company for failure to complete the project in a timely manner and failure to provide continuous access to its business as required under the contract. *Id.* The Court ul-

timately held that the retail business owner was “a member of the class of third persons intended to be benefitted” and was entitled to sue for breach of contract. *Id.*

Here, the Respondents are identified in the 1990 Agreement as persons having an interest in it. The Preamble to the 1990 Agreement explains that “the Idaho Water Resource Board appointed an Ad Hoc Committee to recommend how best to provide for the effective involvement of interested Idaho water users and other members of the public in the negotiations.” (1990 Agreement, para. 3.8, p. 3.) It then explains that “the Board designated the Committee of Nine as a party to the negotiations to represent Idaho water users’ interests.” *Id.* The 1990 Agreement further recognizes the interests of the Respondents by requiring that they be given an opportunity to object to its terms before the SRBA Court. *Id.* at ¶ 10.1, p. 63. As Idaho water users, the Respondents are expressly identified as persons having an interest in the 1990 Agreement. As noted by the court in *Just’s*, the identification of a person or persons in a contract is sufficient to establish third-party beneficiary status.

In addition, the Respondents belong to a well-defined and limited class of persons that the 1990 Agreement expressly intends to benefit—holders of water rights diverting natural flow from the Blackfoot River prior to January 1, 1990, whose rights are decreed in the SRBA. The protection of a specific group of protected water rights is sufficient to create the status of third-party beneficiaries in favor of the Respondents.

Thus, the Respondents are third party beneficiaries of the 1990 Agreement both as Idaho water users and as part of the class explicitly benefitted by paragraph 27-11375.x.d. As such, the Respondents have standing to enforce the term of the 1990 Agreement that ensures their ability to divert the full legal entitlement under their water rights.

II. The Respondents have standing to contest the Proposed Settlement as persons interested in and affected by the 1990 Agreement.

Under Idaho law, persons interested under a contract or persons whose rights are affected by a contract can have questions of construction and validity determined and may obtain a declaration of rights, status or other legal relations thereunder. Idaho Code § 10-1202. In order to pursue judicial relief under this statute the party asserting standing must “allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury.” *Schneider v. Howe*, 142 Idaho 767, 772 (2006). “The doctrine of standing focuses on the party seeking relief.” *Id.* Standing does not require an injury to have already oc-

curred; it may also be predicated upon a threatened harm. *Id.* Standing exists where the person seeking a declaratory judgment has a “personal stake” in the matter as evidenced by a “distinct palpable injury” and a “fairly traceable” causal connection between the claimed injury and the challenged conduct. *Miles v. Idaho Power Co.*, 116 Idaho 635, 641 (1989).

In *Schneider*, the court found that a landowner who owned land in the vicinity of a county-owned easement had standing to seek a declaratory judgment regarding the existence of the easement and the obstruction of the easement by another party. *Id.* The landowner alleged a future injury, by affidavit, establishing his intent to subdivide his property and that the easement offered the only possible ingress and egress for a potential subdivision. *Id.* The court held that this demonstration of a specific future injury was sufficient to establish standing to seek a declaratory judgment. *Id.*

In the present case, the Respondents have a clear personal stake in the equitable adjustment because the Proposed Settlement attempts to impose a ceiling on the amount of water that the Respondents and other Basin 27 water users can divert from the Blackfoot River. As explained later in this brief, the Proposed Settlement limits holders of Protected Rights on a long-term basis to an average combined diversion of 45,000-46,000 AFY. Their water rights will be shut off when diversions exceed that number. This is certainly a “palpable injury” that is “fairly traceable” to the application of the 1990 Agreement being proposed by the *Joint Motion*.

In fact, the Court’s presentation of issues to be addressed in this brief reflect a recognition of the Respondents’ “personal stake” in the underlying matter, evident by the request that the parties “address the legal authority of the Court to accept the proposed settlement agreement over the objections of parties to the *Motion to Enforce having affected water rights...*” *Order Setting Procedure on Proposed Settlement Re: Equitable Adjustment* (Dec. 19, 2012) (emphasis added).

III. The Respondents have standing as parties to the SRBA and to this subcase specifically to contest any proposed application or interpretation of the Consent Decree.

The SRBA is a general adjudication, and the Respondents are parties to it. They have participated in this subcase specifically to ensure that their water rights remain protected under the express terms of the 1990 Agreement and the Consent Decree. The Consent Decree is binding upon the Respondents per Idaho Code section 42-1420. The Consent Decree itself recognizes its binding nature on all parties to the SRBA. The final paragraph reads:

Each of the parties, to the Snake River Basin Adjudication, their agents, servants, employees, attorneys, counselors, heirs, administrators, successors, and assigns, and every person or persons acting by, or under, or in assistance of them or any of them, be and they are hereby forever and perpetually restrained and enjoined from in any manner using the waters from the sources described in this Consent Decree, in any other quantity or in any other manner than is herein set out, defined, and decreed, and each of the parties shall respect the superior rights of all others adjudicated in the SRBA. (Consent Decree, p. 73-74)

As parties to the SRBA and to this subcase, the Respondents have standing under the Idaho Rules of Procedure to contest the *Joint Motion* because it seeks to apply the Consent Decree in a manner that adversely affects the Respondents' use of water under the Consent Decree.

IV. The Court should deny the *Joint Motion* because the Proposed Settlement contradicts the plain language of the 1990 Agreement and the Consent Decree.

Any agreement as to the equitable adjustment to the Tribal water rights must fit within the parameters of the plain language of the 1990 Agreement and the Consent Decree. As to the Protected Rights, the Court has found it "clear that the 45,000 afy estimate was not to be treated as an absolute cap," holding that such an interpretation would be "inconsistent with the Tribes' and United States' agreement to allow those certain identified water users 'to continue to receive their full legal entitlement under state law.'" *Memo. Decision and Order on Motions for Partial Summ. J. and Instructions on Future Proceedings (Motion for Enforcement)* at 13 (June 3, 2011). The equitable adjustment cannot operate in a way that caps the Protected Rights, yet this is precisely what the Proposed Settlement does.

The Proposed Settlement has two main components: (i) it creates a credit account for diversions under the Protected Rights, and (ii) it creates an Equitable Adjustment Water account that would provide 1,000 acre-feet of "Equitable Adjustment Water" per year to the Tribes. These components impose a veiled cap on the Protected Rights that limits them to a combined annual diversion of between 45,000 and 46,000 AFY on a long-term basis. Once actual diversions reach that limit, the Protected Rights will be curtailed and will not be permitted to divert their "full legal entitlement under state law." (1990 Agreement, p. 37; Consent Decree, p. 31.)

The Basin 27 credit account is an averaging mechanism. If the holders of Protected Rights divert less than 45,000 acre-feet in a given year, the account will be given a credit for the difference. If the account has a positive balance, the Protected Rights can use the credit to divert more than 45,000 acre-feet. The maximum potential credit balance is 40,000 acre-feet; the max-

imum accrual in a given year is 20,000 acre-feet; and the maximum amount that could be used in any year is 12,000 acre-feet.

The Basin 27 credit account seems favorable at first blush, but upon closer inspection it imposes a cap on the Protected Rights at 45,000 AFY on a long-term basis. While there would be an initial credit of 20,000, it would quickly be exhausted once long-term diversions exceed 45,000 AFY. For example, if diversions averaged 50,000 AFY, the initial 20,000 credit balance would be exhausted within four years, with the Protected Rights restricted to a combined average diversion of 45,000 AFY thereafter. The Respondents expect actual diversions to eventually exceed 60,000 AFY on a long-term basis, effectively cutting their water rights by 25 percent or more. This could result in an annual race between the holders of Protected Rights to divert the 45,000 acre-feet before it is used up each year, creating untold conflicts between water users.

The second component of the Proposed Settlement involves the creation of an Equitable Adjustment Water account and the option for the Tribes to withdraw water from the account. Equitable Adjustment Water may be provided when Basin 27 Primary Volume Diversions are greater than 45,000 acre-feet, and all credits from the Basin 27 credit account have been used. While there would be an initial balance of 5,000 acre-feet in the Equitable Adjustment Water account, the annual contribution is only 1,000 acre-feet with a maximum balance of 10,000 acre-feet. Once Primary Volume diversions exceed 45,000 AFY the Equitable Adjustment Water will quickly be depleted, with only 1,000 AFY being added each year.

While it purports to make an equitable adjustment to the Tribal water rights, it in fact creates an absolute cap on the amount of water that may be diverted under the Protected Rights.

This Equitable Adjustment Water component purports to allow the holders of Protected Rights to divert more than 45,000 AFY; however, that can only occur if the Tribes decide to take any Equitable Adjustment Water in the account. Section 2(f) of the Proposed Settlement states: “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.” If the Tribes elect not to take Equitable Adjustment Water in a given year, then the Protected Rights are limited to diversions of 45,000 AFY plus any water in the Basin 27 Credit Account. Section 2 of the Proposed Settlement acknowledges this, stating: “The Equitable Adjustment Water is not intended to be utilized on a regular basis.” It is difficult to conceive how the holders of Protected Rights could adapt their farming operations to this type of uncertainty.

Even more troubling is that there is little incentive for the Tribes to elect to receive Equitable Adjustment Water. Under section 3 of the Proposed Settlement, once the Protected Rights divert 45,000 AFY plus any available credit and Equitable Adjustment Water, the Protected Rights are curtailed and the Tribes receive the entire flow of the Blackfoot River. It would seem to be to the Tribes' advantage to forego taking any Equitable Adjustment Water and instead curtail all non-Indian diversions from the Blackfoot River once they hit 45,000 AFY.

On paper, the Proposed Settlement could theoretically allow the Protected Rights to divert up to 67,000 acre-feet (45,000 primary diversions + 12,000 acre-feet credit account + 10,000 acre-feet Equitable Adjustment Water). In reality, the Basin 27 credit account will likely provide no water on a long-term basis and the Equitable Adjustment Water account will be limited to 1,000 AFY (if the Tribes elect to take it). The end result is that the Proposed Settlement caps diversions under the Protected Rights at around 45,000-46,000 AFY on a long-term basis. As such, the Proposed Settlement contradicts the plain and unambiguous language of the 1990 Agreement and the Consent Decree by depriving the Protected Rights of the right to divert their "full legal entitlement under state law." (1990 Agreement, p. 37; Consent Decree, p. 31.)

The Respondents ask the Court to deny the *Joint Motion* because the Proposed Settlement contradicts the plain language of the 1990 Agreement and the Consent Decree. As explained below, the Court cannot treat the Proposed Settlement as an amendment of the 1990 Agreement because it fails to comply with the amendment provision in the 1990 Agreement.

V. The proposed Settlement Agreement cannot be implemented without amending the 1990 Agreement and setting aside the Consent Decree pursuant to rule 60(b).

The Proposed Settlement effectively modifies the 1990 Agreement by making an equitable adjustment that contradicts its plain language, yet without complying with the provision requiring that any amendment be formally approved by the legislative bodies of the Tribes and the State. (1990 Agreement, para. 15.2, p. 72.) Even if the Signatory Parties were able to secure legislative approval to amend the 1990 Agreement, a motion would need to be filed to set aside and amend the Consent Decree pursuant to rule 60(b) of the Idaho Rules of Civil Procedure.

The Consent Decree is certified as a rule 54(b) final judgment. (Consent Decree, p. 74.) Any effort to amend the Consent Decree must be made by motion pursuant to rule 60(b). The *Joint Motion* does not cite rule 60(b), nor does it allege the facts necessary to warrant amendment of the Consent Decree under rule 60(b); therefore, the Respondents will not address here

the arguments against amending the Consent Decree pursuant to rule 60(b). Suffice it to say that without the consent of all parties to this subcase there is limited ability to amend a judgment more than seventeen years after it is entered.

VI. The Signatory Parties cannot amend the 1990 Agreement without the consent of the Respondents.

Because the Respondents are third party beneficiaries who have accepted and acted in reliance upon the 1990 Agreement, the Signatory Parties cannot modify or rescind it without their consent. Once a third-party beneficiary accepts or materially changes his position in reliance upon the underlying agreement, the parties to the agreement cannot rescind or modify the agreement absent the third-party beneficiary's consent. *See* Restatement 2d of Contracts, § 311; 17A Am Jur 2d Contracts § 451. This general rule is the rule under Idaho law: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." Idaho Code § 29-102; *see also Baldwin v. Leach*, 115 Idaho 713, 715 (Idaho Ct. App. 1989).

In *Baldwin*, a third-party payee under a lease was entitled to enforce the terms of the lease. *Id.* The court held that the lease could not be rescinded where the third-party payee had filed a financing statement giving notice of their right to the assigned lease payments, had accepted payments for two years, and had brought an action to enforce the lease. *Id.*

Here, the Respondents have both accepted and acted in reliance upon their rights under the 1990 Agreement. Their acceptance and reliance was first manifested by their decision to refrain from objecting to the 1990 Agreement. It is further manifest by their subsequent use and improvement of land and equipment, and incurring of financial obligations related thereto; their participation in SRBA proceedings to obtain decrees for their own water rights; and their participation in the present proceedings and objection to the Proposed Settlement.

Moreover, denying the Respondents the opportunity to participate in negotiations of the equitable adjustment would result in significant due process issues. The Proposed Settlement is a significant limitation upon the Protected Rights that is not expressly included in the Consent Decree. This Court previously noted in its *Memorandum Decision and Order on Motion to Strike and Motion for Accounting* at 12 (July 14, 2011) that "parties to the SRBA relying on the plain language of Paragraph 27-11375.x.d. extended well beyond the negotiating parties," and that other parties would, in reviewing the proposed Consent Decree, have no basis for evaluating the

proposed water right outside of a plain reading of the express terms of the 1990 Agreement. *Id.* The Court explained that “failure to expressly include such a significant limitation in the Consent Decree at the time it was proposed and submitted for approval presents a procedural problem with respect to notice to parties to the SRBA,” and that “the omission of such an important limitation would indeed undermine any meaningful process to water users negatively impacted by the limitation.” *Id.* at 12-13.

These same due process problems exist in equal measure with regard to the Proposed Settlement. Given the plain language of the 1990 Agreement stating that the holders of Protected Rights would be able to divert their full legal entitlement under state law, and that the equitable adjustment would be made to the Tribal water rights, the Respondents had no reason to suspect that it would be their own water rights that would be adjusted—and in a manner that precludes them from diverting their full legal entitlement under state law. The failure to expressly include in the 1990 Agreement the restriction on the Protected Rights that is now being proposed certainly undermines the objection process that occurred with then 1990 Agreement was submitted to the SRBA Court and converted into the Consent Decree.

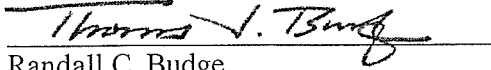
Because the Respondents are third party beneficiaries who have accepted and acted in reliance upon the 1990 Agreement, and because of the notice issues that this Court has already identified that arise in attempting to limit the scope of clear and unambiguous protections under the 1990 Agreement, the Signatory Parties cannot modify or rescind it without the Respondents’ consent. By denying the *Joint Motion*, the Court will enable the Respondents to participate in negotiating an equitable adjustment that is fair to all interested parties.

CONCLUSION

As explained above, the Respondents have standing both as third-party beneficiaries to the 1990 Agreement, and as persons interested in and affected by the 1990 Agreement, to contest the Proposed Settlement or any proposed modification to the 1990 Agreement. They additionally have standing as parties to the SRBA to contest any proposed interpretation or modification of the Consent Decree. Based upon the Respondents’ standing to contest the Proposed Settlement, this Court should deny the *Joint Motion* because the Proposed Settlement contradicts the plain language of the 1990 Agreement and the Consent Decree.

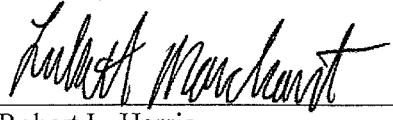
RESPECTFULLY SUBMITTED this 13th day of February, 2014.

RACINE OLSON NYE BUDGE &
BAILEY, CHARTERED



Randall C. Budge
Thomas J. Budge

HOLDEN KIDWELL HAHN &
CRAPO, P.L.L.C.



Robert L. Harris
Luke H. Marchant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of February, 2013, the above document was served on the persons below in the manner indicated:

Document Served: Response Brief in Opposition to Joint Motion

Clerk of the Court SRBA P.O. Box 2707 Twins Falls, ID 83307	☒ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery
Jeanette Wolfley Special Counsel 202 N Arthur Pocatello, ID 83201	☒ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery ☒ E-Mail: wolfleyj@ida.net
John K. Simpson 1010 W. Jefferson, Ste 102 Boise, ID 83701	☒ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery ☒ E-Mail: jks@idahowaters.com
Robert L. Harris Luke H. Marchant Holden Kidwell Hahn & Crapo 1000 Riverwalk Dr Ste 200 PO Box 50130 Idaho Falls, ID 50130	☒ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery ☒ E-Mail: lmarchant@holdenlegal.com ☒ E-Mail: rharris@holdenlegal.com
State of Idaho PO Box 44449 Boise, ID 83711-4449	☒ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery
United States Dept of Justice Environment & Natural Resource 550 West Fort Street, MSC 033 Boise, ID 83701-2527	☒ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery
William G Myers III 101 S. Capital Blvd, Ste 033 Boise, Id 83701-2527	☒ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery ☒ E-mail: wmyers@hollandhart.com

U.S. Department of Justice Attn: Peter C Monson Indian Resources Section 999 18 th St Denver, Co 80202	☒ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery ☐ E-mail
Director of IDWR P.O. Box 83720 Boise, ID 83720-0098	☒ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery


 THOMAS J. BUDGE