

2-2/
RECEIVED

FEB 25 2013

DEPARTMENT OF
WATER RESOURCES

LAWRENCE G. WASDEN

Attorney General

CLIVE J. STRONG

SHASTA KILMINSTER-HADLEY (ISB #7889)

Deputy Attorney Generals

P.O. Box 44449

Boise, Idaho 837 1 1-4449

Telephone: (208) 334-2400

Facsimile: (208) 334-2690

Counsel for the State of Idaho

PETER C. MONSON

Assistant Chief, Indian Resources Section
Environmental and Natural Resources Div.

U.S. Department of Justice

999 18th Street

South Terrace, Suite 370

Denver, Colorado, 80202

Phone: (303) 844- 1384

Fax: (303) 844-1350

Counsel for the United States

JEANETTE WOLFLEY (ISB #3948)

Special Counsel for Shoshone-Bannock Tribes

202 N. Arthur

Pocatello, ID 83202

Telephone: (208) 232-1922

Facsimile: (208) 232-7472

Counsel for the Shoshone-Bannock Tribes

JOHN K. SIMPSON (ISB #4242)

TRAVIS L. THOMPSON (ISB #6168)

PAUL L. ARRINGTON (ISB #7198)

SARAH W. HIGER (ISB #8012)

Barker Rosholt & Simpson, LLP

1010 W. Jefferson, Suite 102

P.O. Box 2139

Boise, Idaho 83702

Telephone: (208) 336-0700

Facsimile: (208) 344-6034

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

Case No. 39576

) Subcase No. 27-11375

)

) **JOINT REPLY BRIEF**

)

The signatories of the 1990 Fort Hall Indian Water Rights 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 Joint Reply Brief.

///

///

///

I. ARGUMENT

Respondents base their opposition to the Blackfoot River Equitable Adjustment Settlement Agreement (“EA Agreement”) on two assertions. First, that the EA Agreement results in a 45,000–46,000 AFY “cap” on Respondents’ water rights¹, and second, that it constitutes or requires an amendment to the 1990 Fort Hall Indian Water Rights Agreement and Partial Final Consent Decree Determining Rights of the Shoshone-Bannock Tribes to the water in the Upper Snake River Basin (hereinafter referred to together as the “Consent Decree”). Both of these assertions are erroneous.

The EA Agreement does not impose a *de facto* “cap” on Respondents’ water rights. Rather, as intended by the Consent Decree, the EA Agreement recognizes that out-of-priority diversions permitted by provision 27-11375.x.d will in some years exceed 45,000 AFY and provides for an equitable adjustment to the Tribal water right in those instances. Thus, what the Respondents characterize as a “cap” is in fact a trigger for consideration of an equitable adjustment pursuant to provision 27-11375x.d.²

There is no need to amend the Consent Decree because the EA Agreement does not change but rather implements provision 27-11375.x.d. of the Consent Decree. Approving the EA Agreement no more requires an amendment to the Consent Decree than approving the performance of other obligations required by the Consent Decree,

¹ The Response Brief in Opposition to Joint Motion impermissibly makes arguments on behalf of the Basin 27 Water Users as a whole. As parties to subcase no. 27-11375, Respondents may object to the EA Agreement based upon alleged harm to their individual water rights, but should be precluded from advancing arguments on behalf of Basin 27 Water Users as a whole.

² In the April 23, 2012 *Joint Status Report Re: Motion for Enforcement*, the Signatory Parties advised the Court that “the question of whether the 45,000 afy estimate of non-Indian surface water use from the Blackfoot River is being exceeded is one which will vary from year-to-year, depending on a number of unpredictable factors, including the weather and the Blackfoot River water users’ needs for irrigation water. Consequently, the parties have been exploring a system to “smooth out” fluctuations in supply and demand in a manner consistent with the spirit of the 1990 Fort Hall Indian Water Rights Settlement Agreement. The parties have agreed in principle upon an approach that utilizes the Blackfoot Water Management Plan as a foundation and a credit and debit accounting system to ensure that Blackfoot non-Indian water users can continue to divert the historic cumulative volume diverted of (sic) their water rights while at the same time providing water to the Shoshone-Bannock Tribes in the event the cumulative volume diverted exceeds 45,000 AFY.”

such as the creation of the Blackfoot River Water Management Plan or the required accounting.

A. The EA Agreement is Consistent With the Subordination Provision .x.d of Water Right No. 27-11375

Respondents assert that the EA Agreement “caps” the amount of water they can divert under their water rights. Respondents’ concerns illustrate a fundamental misunderstanding of the extent of the subordination provided for in provision 27-11375.x.d. of the Consent Decree, and a lack of understanding of the concept of “Primary Volume” and the role it plays in the equitable adjustment.

1. Provision 27-11375.x.d Allows Basin 27 Water Users to Continue to Divert Out-of-Priority That Amount of Water They Had Historically Put to Beneficial Use Under Their Decreed Water Rights Prior to January 1, 1990

The purpose of provision 27-11375.x.d of the Consent Decree was to subordinate the Tribal water right to Basin 27 state-created natural flow water rights decreed in the SRBA to the extent of historic beneficial use under those rights occurring prior to January 1, 1990—not to provide the Basin 27 Water Users with an open-ended ability to expand their water diversions in the future.

Provision 27-11375.x.d provides that “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.**” (emphasis added). The plain language of this provision requires that the term “full legal entitlement” be defined consistent with the Idaho water law. A water right holder, in Idaho, is not entitled to divert more water under a water right than can be put to beneficial use. *Am. Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Res.*, 143 Idaho 862, 880, 154 P.3d 433, 451 (2007). Accordingly, the Basin 27 Water Users are not entitled to divert under the 27-11375x.d subordination provision more than their actual beneficial use.

As discussed in the Memorandum in Support of Joint Motion for Approval of the Equitable Adjustment Settlement Agreement (“Memorandum”), the Signatory Parties’ intent, as expressed in the September 1, 1989 term sheet, was to hold the Basin 27 Water Users “harmless” to the extent of their “present diversion.” Memorandum at 3. Provision 27-11375.x.d, consistent with the intent of the term sheet, defined “present diversion” as that amount of water diverted under the Basin 27 water rights prior to January 1, 1990.

The subordination of the Tribal water right was necessary because the junior Basin 27 water rights would have been subject to curtailment but for the subordination of water right no. 27-11375. This was so because during most of the irrigation season there is insufficient natural flow of the Blackfoot River Basin to satisfy the Tribal water right as well as the Basin 27 Water Users’ rights. Contrary to Respondents’ contention, the subordination provision was not an open-ended subordination allowing the Basin 27 Water Users to expand their use in the future. Rather, the subordination provision was carefully crafted to preserve the status quo for the Basin 27 Water Users while recognizing the Tribes’ senior right to the natural flow of the Blackfoot River Basin. As outlined below, the EA Agreement is entirely consistent with the balance struck in the 1990 Fort Hall Indian Water Rights Agreement and the 27-11375.x.d subordination provision.

2. The “Primary Volume” Is Not a “cap” on the Basin 27 Water Users’ Diversions

Respondents’ assertion that the EA Agreement does not provide the protection required by provision 27-11375.x.d. is rooted in a misunderstanding of the mechanics of the EA Agreement. Respondents’ confusion begins with a lack of understanding regarding the nature and meaning of the term “Primary Volume.” As detailed in the Affidavit of David Shaw ¶ 23, the term “Primary Volume” refers to 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 flow ahead of the Tribes as provided for by provision 27-11375.x.d. Not all diversions from the Blackfoot River under Basin 27 water rights take water that would otherwise accrue to the Tribal water right. Specifically, water diverted on the shoulders of the irrigation season, injected Snake River water diverted from the Blackfoot River, and water diverted when the Tribes are not exercising water right no. 27-11375, do not affect the Tribal water right and, therefore are not counted in the determination of the Primary Volume for purposes of the equitable adjustment.³ For this reason, total Basin 27 water diversions are substantially more than the Primary Volume in many years. For example, in 2011, the Blackfoot Watermaster's Annual Report shows that total Basin 27 Water Users diversions were 55,296 AFY, but the Primary Volume was 12,542 AFY.⁴ This data refutes any assertion that the 45,000 AFY is a "cap" on the Basin 27 Water Users diversions. Rather, Primary Volume is used to identify those Basin 27 water diversions that count toward the determination of whether the estimated 45,000 AFY of cumulative diversions has been exceeded and thereby triggering consideration of the need for an equitable adjustment.⁵

Respondents' assertion that, in the event there are no remaining credits to offset diversions of Primary Volume, the Tribes may refuse to request Equitable Adjustment Water and seek curtailment of Basin 27 water rights misconstrues the EA Agreement. The intent behind the EA Agreement is precisely the opposite—to the extent that credits or Equitable Adjustment Water are available to offset Primary Volume diversions in excess of the 45,000 AFY trigger, they will be used to offset Basin 27 Water Users' Primary Volume diversions in excess of 45,000 AFY.

³ Shaw Affidavit at ¶ 23.

⁴ Shaw Affidavit at ¶ 25.

⁵ The Basin 27 Advisory Committee participated actively in the creation of the Blackfoot River Management Plan, which contains the methodology for calculating the Primary Volume and its relevance to the 45,000 AFY trigger. Additionally, representatives from the State and the Committee of Nine have offered to provide Respondents with technical information as needed in order to clarify any questions Respondents might have about the way the EA Agreement operates.

3. The EA Agreement Creates a Mechanism for Making an Equitable Adjustment to the Tribal Water Right When Basin 27 Users' Cumulative Primary Volume Diversions Exceed 45,000 AFY

Respondents argue that they expect “actual diversion to eventually exceed 60,000 AFY on a long term basis.” Response Brief at 10. Therefore, they argue, the EA Agreement does not adequately protect their rights as required by Provision 27-11375.x.d. Respondents, however, have offered no evidence to support this assertion or to counter the Shaw Affidavit.

It is unclear from Respondents' Brief whether their expectation that actual diversions will exceed 60,000 AFY on a long-term basis refers to total diversions under their water rights, or to Primary Volume diversions under their rights. If Respondents mean their total diversions will be 60,000 AFY, they have failed to demonstrate a flaw with the EA Agreement because, as the Shaw Affidavit discusses, Primary Volume is used for purpose of the equitable adjustment.⁶ The Results of Blackfoot Annual Accounting Model, attached hereto, illustrates that the EA Agreement recognizes that total diversions have and will continue to exceed 45,000 AFY in many years.

To the extent that Respondents are asserting that they expect their Primary Volume diversions to exceed 60,000 AFY on a long-term basis in the future, they are impermissibly seeking to expand the subordination provided for in provision 27-11375.x.d. As discussed above, the subordination of the Tribal water right allows diversions under Basin 27 natural flow water rights to the extent of historic beneficial use occurring prior to January 1, 1990. The Blackfoot River Annual Accounting Model⁷, indicates that, over the past 36 years, Primary Volume diversions by Basin 27 Water Users have exceeded the 45,000 AFY trigger in only seven years and only twice have they exceeded 60,000 AFY. Even in those years, the mechanism provided by the EA

⁶ Shaw Affidavit at ¶¶ 22-30.

⁷ The Blackfoot River Annual Accounting Model was created by the EA technical group. Shaw Affidavit at ¶ 29. The model simulated the water supply and water use in the Blackfoot River for the period 1976-2011. *Id.*

Agreement would have allowed the Basin 27 Water Users to continue to divert natural flow from the Blackfoot River to the extent of their historic beneficial use without being subject to curtailment.⁸

The EA Agreement accounting mechanism would have even allowed the Basin 27 Water Users to continue to divert Blackfoot natural flow in a four year period in which the 45,000 AFY trigger was exceeded four years in a row. In the years 1983 to 1986, the Primary Volume was 56,989 AF, 63,603 AF, 47,263 AF and 62,385 AF, respectively. Despite these large Primary Volume numbers, the Blackfoot River Annual Accounting Model indicates that the EA Agreement would have allowed the Basin 27 Water Users to continue to divert the amount of water they used prior to January 1, 1990.⁹

In summary, Respondents have offered no evidence that Primary Volume diversions have in the past or will in the future regularly exceed 60,000 AFY. Moreover, Respondents have presented no evidence to refute Mr. Shaw's Affidavit, and can show no basis in fact for their contention that the EA Agreement prevents them from diverting their full legal entitlement. Respondents' primary argument thus rests on the premise that they intend to regularly divert *much* more water under their decreed rights than they have ever done in the past. This argument misapprehends what they are legally entitled to under both Idaho law and the Consent Decree. The EA Agreement protects the Basin 27 Water Users to the extent of their historic beneficial use prior to January 1, 1990, just as provided for by the Consent Decree. Accordingly, Respondents have failed to establish either a legal or factual basis for their objections to the EA Agreement.

B. Approval of the EA Agreement Neither Constitutes Nor Requires Amendment of the Consent Decree

⁸ See also Shaw Affidavit at ¶ 31.

⁹ The Basin 27 Water Users have previously expressed concern that currently unused Basin 27 water rights may resume use in the future and thereby increase the amount of Blackfoot natural flow diversions. As discussed in paragraph 37 of the Shaw Affidavit, the EA Agreement mechanism accounts for the impact of resumption of use under these rights.

Approval of the EA Agreement neither constitutes nor requires amendment of the Consent Decree. By its plain language, the Consent Decree included the obligation to negotiate the EA Agreement:

In the event this estimate [45,000 AFY] of the amount of existing diversion under state created water rights is exceeded as a result of the decree in the SRBA, the parties shall negotiate an equitable adjustment.

Performance of the terms of a contract cannot be construed to require amendment of the underlying contract. Were it so, the creation of the Blackfoot River Water Management Plan, in satisfaction of Article 8.3 of the 1990 Fort Hall Indian Water Rights Agreement, would require amending the Consent Decree, as would the State's Motion for Accounting, in fulfillment of the obligation to perform an accounting of the water rights benefitting from the protection of provision 27-11375.x.d.

The EA Agreement was contemplated by the Signatory Parties upon the drafting of the Fort Hall Agreement and was expressly foreseen by this Court when the Consent Decree was issued.¹⁰ To argue that the performance of the explicit obligation required by provision 27-11375.x.d necessitates setting aside the Consent Decree under Rule 60(b) runs counter to the plain language of the decree itself, which clearly provided notice that such an EA Agreement may need to be submitted to the Court. Further, in the extensive discussion during the hearing of the potential need for an EA Agreement, there is absolutely no mention of setting aside the Consent Decree.

The same examination of the Hearing Transcript shows no contemplation that the Signatory Parties would be required to seek legislative approval for an EA Agreement, as provided by the amendment provision to the Fort Hall Agreement. In light of the Court's specific questioning as to the method by which the Signatory Parties would bring the EA

¹⁰ At the hearing on the proposed Consent Decree, the SRBA Court stated: "[I]t 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." Reporter's Transcript, Hearing on the Proposed Consent Decree on 1990 Fort Hall Water Rights Settlement Agreement, pp. 143-44.

Agreement before the Court, it is clear that the parties did not contemplate that setting aside the Consent Decree would be necessary.¹¹ Indeed, in six years of litigation and negotiation surrounding this issue, there is no record that the Signatory Parties or the Court ever contemplated the need to set aside the Consent Decree in order to gain this Court's approval of the negotiated resolution of an equitable adjustment to the Tribal water right.

The EA Agreement represents the Signatory Parties' performance of one of multiple obligations created by the Consent Decree. It is consistent with the original language of provision 27-11375.x.d and represents the Signatory Parties' exhaustive efforts to maintain the balance struck in the Consent Decree between recognition of the Tribal water rights and preventing injury to state-based water rights, which was a fundamental precept of the Fort Hall Agreement.¹² Implementation of the EA neither constitutes nor requires amendment of the Consent Decree.

II. CONCLUSION

The EA Agreement is consistent with the plain language and the intent of the Consent Decree. It causes no injury to third-party water rights; but rather, recognizes the protection afforded to Basin 27 Water Users, while providing the Tribes with water in fulfillment of the obligation set forth in provision 27-13375.x.d. For the reasons cited above and in the Joint Motion, the Signatory Parties request that this Court issue an order

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

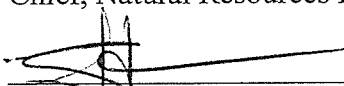
¹² Despite assertions to the contrary, the Basin 27 Water Users were included in the negotiation discussions that lead to the creation of the EA Agreement. As noted in the Joint Status Report re: Equitable Adjustment Proposal dated December 17, 2012, the Signatory Parties presented the proposed settlement to the Basin 27 Water Users and attempted, over the course of several months, to address the Basin 27 Water Users' concerns regarding the EA Agreement. *See also* Joint Status Report re: Motion for Enforcement, April 23, 2013. A member of the Basin 27 Water Users' Advisory Board also represented to the Court that discussions regarding the EA Agreement had been occurring "over the past several months" and that the Basin 27 Water Users "were given the opportunity to become a party to and agree to what was being presented" Reporter's Transcript, Status Conference on Motion for Accounting Water Right No. 27-11375 (December 18, 2012).

approving the EA Agreement, consistent with provision .x.d of water right no. 27-11375
of the Fort Hall Consent Decree.

Respectfully submitted this 21st day of February, 2013.

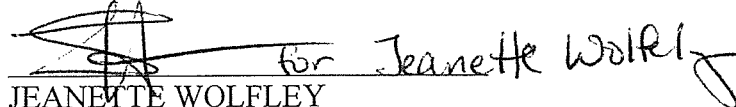
LAWRENCE WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division


SHASTA KILMINSTER-HADLEY
Deputy Attorney General

 for John Simpson
JOHN K. SIMPSON
Counsel for Committee of Nine

 for Peter Monson
PETER C. MONSON
Trial Attorney
U.S. Department of Justice

 for Jeanette Wolfley
JEANETTE WOLFLEY
Special Counsel
Shoshone-Bannock Tribes

ATTACHMENT

Results of Blackfoot River Annual Accounting Model with Current Demands - 1-20-13

Year	Shelley Gage	Basin 27 Diversions	Primary Volume	Credit Account			Equitable Adjustment Account				
				Starting	Credit Use	Accrual	Balance	Starting	Use	Balance	Accrual
1976	394,863	69,643	45,936	20,000	936	0	19,064	5,000	0	5,000	1,000
1977	253,041	55,306	36,023	19,064	0	8,977	28,041	6,000	0	6,000	1,000
1978	196,122	49,552	36,602	28,041	0	8,398	36,439	7,000	0	7,000	1,000
1979	211,220	51,079	34,452	36,439	0	3,561	40,000	8,000	0	8,000	1,000
1980	222,881	52,257	32,952	40,000	0	0	40,000	9,000	0	9,000	1,000
1981	216,476	51,610	33,303	40,000	0	0	40,000	10,000	0	10,000	0
1982	327,687	62,852	38,985	40,000	0	0	40,000	10,000	0	10,000	0
1983	505,787	80,857	56,989	40,000	11,989	0	28,011	10,000	0	10,000	0
1984	571,212	87,471	63,603	28,011	12,000	0	16,011	10,000	6,603	3,397	1,000
1985	346,594	64,764	47,263	16,011	2,263	0	13,748	4,397	0	4,397	1,000
1986	559,158	86,252	62,385	13,748	12,000	0	1,748	5,397	5,385	12	1,000
1987	251,566	55,157	38,728	1,748	0	6,272	8,020	1,012	0	1,012	1,000
1988	216,996	51,662	38,712	8,020	0	6,288	14,307	2,012	0	2,012	1,000
1989	170,471	46,959	32,808	14,307	0	12,192	26,499	3,012	0	3,012	1,000
1990	198,044	49,747	32,982	26,499	0	12,018	38,517	4,012	0	4,012	1,000
1991	150,659	44,956	30,011	38,517	0	1,483	40,000	5,012	0	5,012	1,000
1992	146,656	44,552	30,410	40,000	0	0	40,000	6,012	0	6,012	1,000
1993	138,932	43,771	29,057	40,000	0	0	40,000	7,012	0	7,012	1,000
1994	219,828	51,949	31,330	40,000	0	0	40,000	8,012	0	8,012	1,000
1995	151,331	45,024	29,353	40,000	0	0	40,000	9,012	0	9,012	988
1996	245,020	54,495	34,068	40,000	0	0	40,000	10,000	0	10,000	0
1997	526,590	82,960	59,092	40,000	12,000	0	28,000	10,000	2,092	7,908	1,000
1998	352,233	65,334	41,466	28,000	0	3,534	31,534	8,908	0	8,908	1,000
1999	346,185	64,722	48,297	31,534	3,297	0	28,237	9,908	0	9,908	92
2000	257,105	55,717	39,078	28,237	0	5,922	34,158	10,000	0	10,000	0
2001	205,123	50,462	37,011	34,158	0	5,842	40,000	10,000	0	10,000	0
2002	161,230	46,025	32,474	40,000	0	0	40,000	10,000	0	10,000	0
2003	139,573	43,836	30,183	40,000	0	0	40,000	10,000	0	10,000	0
2004	126,490	42,513	28,630	40,000	0	0	40,000	10,000	0	10,000	0
2005	148,288	44,717	29,243	40,000	0	0	40,000	10,000	0	10,000	0
2006	207,479	50,700	30,551	40,000	0	0	40,000	10,000	0	10,000	0
2007	216,432	51,605	31,339	40,000	0	0	40,000	10,000	0	10,000	0
2008	156,956	45,593	31,122	40,000	0	0	40,000	10,000	0	10,000	0
2009	155,345	45,430	31,245	40,000	0	0	40,000	10,000	0	10,000	0
2010	188,906	48,823	31,045	40,000	0	0	40,000	10,000	0	10,000	0
2011	293,808	59,427	35,560	40,000	0	0	40,000	10,000	0	10,000	0