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**see page 2 for additional counsel*

**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 MOTION TO INCLUDE
SUBORDINATION REMARK ON
WATER RIGHT NO. 27-11375 AND
CERTAIN BLACKFOOT NATURAL
FLOW WATER RIGHTS**

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Stucki Revocable Trust*

The United States, the Shoshone-Bannock Tribes, the State of Idaho, the Committee of Nine of Water District 01, 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, Patrick Taney, Natural Guardian, LLC, Bear Lake Grazing Co., P. Thomas Blotter Family, and Stucki Revocable Trust, (“Movants”) by and through their respective counsel, hereby jointly move the Court for entry of an order determining that the water rights listed on Attachment E (“Protected Water Rights”),¹ attached hereto and incorporated herein by reference, are entitled to the protections of Paragraph 27-11375x.d of the *Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin* (“Consent Decree”). Movants also move for inclusion of the following remark on each water right listed on Attachment E:

This water right is entitled to the protections of paragraph x.d of water right 27-11375.

Movants further move the Court to amend the Consent Decree to include the list of Protected Rights as Attachment E to the Consent Decree and to amend the first and second sentences of Paragraph 27-11375x.d of the Consent Decree to read as follows:

- d. 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~~ under water rights listed on Attachment E to the Consent Decree and under *de minimis* domestic and stock water rights with a priority date earlier than January 1, 1990, will continue to receive their full legal entitlement under state law. “*De minimis* domestic water right” for purposes of this paragraph means (a) the use of water for homes, organization camps, public campgrounds, livestock and for any purpose in connection therewith, including irrigation of up to one-half (1/2) acre of land, if the total use is not in excess of thirteen (13,000) gallons per day, or 14.5 acre-feet per year or less for storage, or (b) and other uses, if the total use does not exceed a diversion rate of four one-hundreds (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day. Domestic rights shall not include water for multiple ownership subdivisions, mobile home parks, or commercial or business establishments, unless the use meets the diversion rate and volume limitation set forth in (b) above. “*De minimis* stock water right” for purposes of this paragraph means the use of water

¹ Attachment E is the only attachment to this motion and is denominated with the letter E to correspond with its title if the Court grants the Movants’ request for incorporation of the attachment into the Consent Decree.

solely for livestock or wildlife where the total diversion is not in excess of thirteen thousand (13,000) gallons per day or 14.5 acre-feet per year or less for storage. The parties will specifically enumerate all rights protected by this provision once the SRBA decree for this basin becomes final.

The grounds for this motion are:

1. Paragraph 27-11375x.d. of the Consent Decree provides:
“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.”
2. At the time of approval of *The 1990 Fort Hall Indian Water Rights Agreement* the parties to the Agreement could not identify the water rights protected by Paragraph 27-11375x.d because the SRBA claim reporting process for Basin 27 was incomplete.
3. When the Court approved the Consent Decree, it anticipated, based on the plain language of Paragraph 27-11375x.d, there would be a need to enumerate the rights entitled to the protection of Paragraph 27-11375x.d.² Thus, the Court retained jurisdiction to modify Paragraph 27-11375x.d.³
4. On October 25, 2010, the State filed the *State of Idaho’s Motion for an Accounting of All Water Rights Benefitting from the Subordination Provisions of the Fort Hall Consent Decree and Insertion of a Remark Memorializing that Benefit on Each Affected Water Right* (“Motion for Accounting”) which requested permission to begin an accounting of the water rights protected by Paragraph 27-11375 x.d and for inclusion of a remark on each of the water rights entitled to the protections of Paragraph 27-11375x.d.
5. Appendix A to the State’s Motion for Accounting contained a list of water rights the State had determined were entitled to the protection of Paragraph 27-11375x.d.
6. On November 10, 2010, this Court issued its *Initial Scheduling Order Setting Forth Procedures on State’s Motion for Accounting and United States’ and Tribes’ Joint*

² Reporter’s Transcript, Hearing on the Proposed Consent Decree on 1990 Fort Hall Indian Water Rights Settlement Agreement, pp. 143-149 (July 18, 1995).

³ *Id.* at pp. 143-144 ln. 22-2 (The Court stated: “[I]t seems to me that the parties do intend that this court essentially maintain continuing jurisdiction over those matter which in all likelihood will require some adjustment as noted in the proposed consent decree.”)

Motion to Enforce Re: Fort Hall Indian Water Rights Consent Decree (“Scheduling Order”).⁴

7. The Scheduling Order directed the State of Idaho, the United States, and the Tribes to provide personal service of the Motion for Accounting and the Scheduling Order to all surface water claimants in Basin 27. The Court also ordered that both documents appear on the docket sheet for November 2010 pursuant to the SRBA docket sheet procedures.
8. The Scheduling Order provided that all *Objections to the Motion for Accounting* be filed no later than January 2, 2011. The Scheduling Order stated: **“Parties Failing To Object To Their Water Right(s) Being Excluded From The List Of Protected Rights Will Be Precluded From Later Raising And Being Heard On That Issue.”** (Emphasis in Scheduling Order)
9. On November 22, 2010, the United States, Tribes, and State of Idaho filed certificates of service with the Court demonstrating personal service of the Motion for Accounting, and Scheduling Order on all surface water claimants in Basin 27.
10. One Objection to the Motion for Accounting was filed with the Court contending that three stockwater rights should have been on the list albeit, “[t]hrough the process it was explained that the list excluded small domestic and stockwater rights.” *Second Scheduling Order On State’s Motion For Accounting And United States’ And Tribes’ Motion To Enforce* at 2 (February 18, 2011).
11. Through the accounting process, “the issue was brought up regarding whether the list includes water rights with uses not contemplated by the Fort Hall Water User’s (sic) Agreement.” *Id.* As a result the Court established a deadline for parties “to file responses to the State’s list.” *Id.*
12. On March 18, 2011, the Committee of Nine filed *Committee of Nine’s Response to the Content of the State’s List of Rights* (“*Committee of Nine’s Response*”) seeking removal of 23 water rights from the State’s list.

⁴ On October 29, 2010, the Tribes and United States filed a *Motion for Enforcement of the Fort Hall Consent Decree* (“Motion for Enforcement”), requesting that the Court enforce the Consent Decree and order the parties to negotiate an equitable adjustment under Paragraph 27-11375x.d. While the Court’s scheduling order addressed service and scheduling issues for the Motion for Enforcement as well as the State’s Motion for Accounting the present motion is limited to the Motion for Accounting. Accordingly, those aspects of the Scheduling Order of the Motion for Enforcement are not referenced in this motion.

13. On April 7, 2011, the Court issued a *Third Scheduling Order on State's Motion for Accounting Re: Fort Hall Water Rights Consent Decree* requiring the State to re-serve the holders of the 23 rights sought to be excluded from the State's list and required that the holder of these water rights respond to the *Committee of Nine's Response*. Holders of 11 of the 23 water rights filed responses. *Memorandum Decision and Order on Motion to Strike Affidavits and Motion for Accounting* at 6 (July 14, 2011)(“*Accounting Memorandum Decision*”).
14. Following a scheduling conference, the Court limited the scope of the proceeding to the question of “Whether the language of paragraph 27-11375.x.d. of the *Consent Decree* protects all persons diverting natural flow from the Blackfoot River prior to January 1, 1990, whose rights are decreed in the SRBA, OR whether those water users diverting natural flow from the Blackfoot River prior to January 1, 1990 who were diverting water in 1986-1987, and whose rights are decreed in the SRBA.” *Briefing and Oral Argument Schedule* at 2 (May 24, 2011).
15. On July 14, 2011, after a hearing on the State's motion for accounting, the Court held that Paragraph 27-11375.x.d. unambiguously protects and “defines the scope of protected rights, namely persons diverting from the Blackfoot River prior to January 1, 1990, and whose rights are eventually decreed in the SRBA.” *Accounting Memorandum Decision* at 10.
16. On January 31, 2012, the United States, the Shoshone-Bannock Tribes and the State of Idaho filed a *Joint Status Report Re: Motion for Accounting*. In that report, the parties stated that “One issue remained to be resolved in connection with the State of Idaho's Motion for Accounting whether *de minimis* domestic and stockwater rights diverting from the Blackfoot River prior to January 1, 1990 are entitled to the protections of Paragraph 27-11375.x.d of the 1996 Fort Hall Consent Decree.” The report then stated that the parties agreed *de minimis* domestic and stock uses “are entitled to the protections of Paragraph 27-11375.x.d of the *Fort Hall Consent Decree*.”
17. In it *Order On January 31, 2012 Joint Status Report Re: Motion for Accounting*, the Court ordered that “*de minimus* (sic) domestic and stock water rights diverting from the Blackfoot River prior to January 31, 1990 are entitled to the protections of Paragraph 27-11375x.d of the *Fort Hall Consent Decree*.” *Id.* at 2.

18. As documented above, notice was provided to all Basin 27 Water Users of the Motion for Accounting, and all issues related to the State's Motion for Accounting have been resolved by the Court.
19. Attachment E is an updated version of Appendix A to the Motion for Accounting that reflects approved water right splits that occurred after the submission of Appendix A to the Court on October 25, 2010. The water right splits were identified by the Idaho Department of Water Resources through a review of its water right records. The following table identifies the parent right listed on Appendix A to the Motion for Accounting, and the progeny water right numbers that were substituted for the parent water right in Attachment E.

<u>Retired Water Right on Appendix A</u>	<u>Split Water Rights on Attachment E</u>
27-22D	27-22A and 27-22B
27-26C	27-12229 and 27-12230
27-35D	27-35A and 27-35B
27-2048	27-12246 and 27-12247
27-4147	27-4147 ⁵ and 27-12250

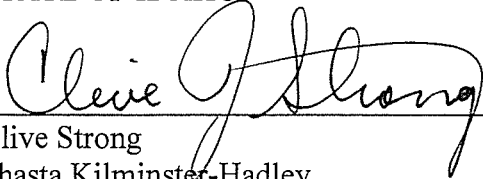
20. The proposed amendments to the Consent Decree set forth above implement Paragraph 27-11375x.d over which this Court retained continuing jurisdiction.
21. A consent decree is subject to Rule 60(b) the same as any other judgment or decree. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992).
22. The proposed amendments to the Consent Decree are a fair and equitable settlement of the accounting required by paragraph 27-11375.x.d of the Consent Decree.

THEREFORE, Movants respectfully request this Court grant the motion.

⁵ Recently, the Department changed its practice of retiring the parent water right number and assigning new water right numbers to the progeny when a water right split occurs. The Department now assigns a new water right number only to the changed portion of the parent right and reduces the elements of the parent water right to reflect split. Thus, water right 27-4147 remains on Attachment E as the residual parent water right.

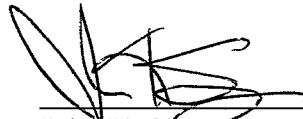
RESPECTFULLY SUBMITTED this 5th day of July, 2013.

STATE OF IDAHO



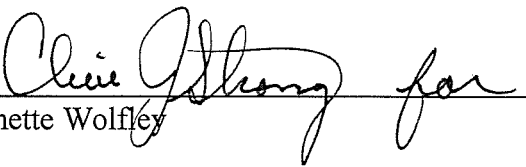
Clive Strong
Shasta Kilminster-Hadley

COMMITTEE OF NINE

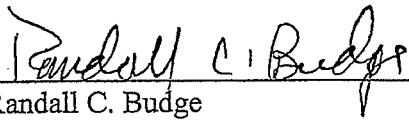


John K. Simpson
Travis L. Thompson
Paul A. Arrington
Sarah W. Higer

SHOSHONE-BANNOCK TRIBES

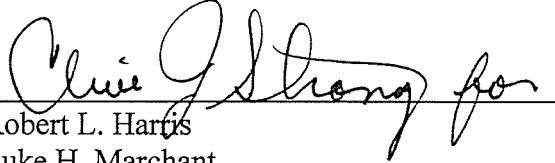

Jeanette Wolfley

RACINE OLSON NYE BUDGE &
BAILEY, CHARTERED

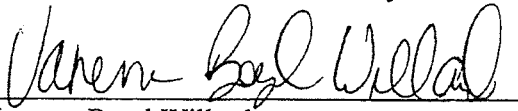


Randall C. Budge
Thomas J. Budge

HOLDEN KIDWELL HAHN &
CRAPO, p.l.l.c.


Robert L. Hartis
Luke H. Marchant

UNITED STATES

A handwritten signature in black ink, reading "Vanessa Boyd Willard", written over a horizontal line.

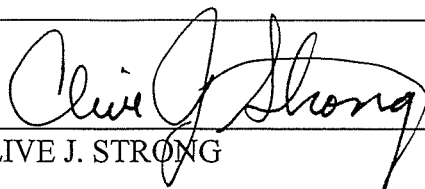
Vanessa Boyd Willard
Indian Resources Section
Environment & Natural Resources Division
United States Department of Justice

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of July, 2013, the above JOINT MOTION TO INCLUDE SUBORDINATION REMARK ON WATER RIGHT NO. 27-11375 AND CERTAIN BLACKFOOT NATURAL FLOW WATER RIGHTS was served on the persons below in the manner indicated:

Clerk of the Court SRBA P.O. Box 2707 Twins Falls, ID 83307	☒ U.S. Mail/Postage Prepaid ☒ Facsimile (208) 736-2121 ☐ Overnight Mail ☐ Hand Delivery
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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
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Trisha Arave 590 N 150 E Blackfoot, ID 83221	☒ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery ☐ E-mail
Robert E. Reid 911 Reid Rd. Firth, ID 83236	☒ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery ☐ E-mail
Lake Family Ranches, Inc. C/O Dennis M. Lake 830 Taber Rd. Blackfoot, ID 83221	☒ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery ☐ E-mail


 CLIVE J. STRONG

ATTACHMENT E

LIST OF BLACKFOOT NATURAL FLOW STATE CREATED WATER RIGHTS PROTECTED BY PARAGRAPH 27-11375x.d.

27-1A	27-21A	27-37J	27-2003A	27-7302	27-10844	27-11997	27-12136
27-1B	27-21B	27-37L	27-2003B	27-7370	27-10847	27-12000	27-12137
27-2A	27-21C	27-37M	27-2008	27-7374	27-10878	27-12002	27-12142
27-2B	27-21D	27-37N	27-2009	27-10096	27-10943	27-12003	27-12151
27-3C	27-22A	27-38	27-2018	27-10116	27-10999	27-12006	27-12152
27-3D	27-22B	27-39	27-2019A	27-10207	27-11016	27-12014	27-12189
27-3E	27-23B	27-40	27-2026	27-10292	27-11117	27-12015	27-12192
27-3G	27-23C	27-41	27-2039	27-10296	27-11233	27-12016	27-12198
27-4AC	27-23E	27-45	27-2040	27-10341	27-11236	27-12027	27-12199
27-4F	27-23F	27-47	27-2041A	27-10344	27-11245	27-12028	27-12200
27-4H	27-25A	27-49	27-2041B	27-10357	27-11261	27-12029	27-12201
27-4L	27-25B	27-50	27-2049	27-10358	27-11262	27-12330	27-12213
27-4M	27-25C	27-51A	27-2052	27-10362	27-11269	27-12031	27-12214
27-4S	27-26A	27-51B	27-2054	27-10370	27-11271	27-12032	27-12229
27-4Y	27-26B	27-52	27-2066	27-10388	27-11273	27-12035	27-12230
27-4Z	27-26D	27-54	27-2078	27-10390	27-11317	27-12040	27-12246
27-5A	27-26E	27-55A	27-2080A	27-10398	27-11330	27-12045	27-12247
27-5B	27-27D	27-55B	27-2165	27-10452	27-11334	27-12050	27-12250
27-12A	27-28	27-56	27-4009	27-10505	27-11918	27-12051	
27-12B	27-29B	27-73	27-4010	27-10539	27-11919	27-12064	
27-13A	27-29C	27-74	27-4058	27-10545	27-11930	27-12068	
27-13B	27-29D	27-76	27-4077	27-10550	27-11931	27-12069	
27-14B	27-29E	27-85A	27-4079	27-10552	27-11939	27-12074	
27-14C	27-35A	27-88	27-4096	27-10555	27-11940	27-12080	
27-14D	27-35B	27-94	27-4097	27-10557	27-11966	27-12081	
27-16A	27-37A	27-102	27-4141	27-10657	27-11988	27-12108	
27-16C	27-37C	27-104	27-4147	27-10667	27-11989	27-12115	
27-17	27-37F	27-105	27-7008A	27-10728	27-11992	27-12116	
27-20A	27-37G	27-106	27-7008B	27-10756	27-11994	27-12118	
27-20B	27-37H	27-2001	27-7071	27-10790	27-11995	27-12121	