

7-10
RECEIVED

JUL 11 2013

DEPARTMENT OF
WATER RESOURCES

Lawrence G. Wasden
Attorney General

Clive J. Strong (ISB #2207)
Shasta Kilminster-Hadley (ISB #7889)
Deputy Attorneys General
P.O. Box 44449
Boise, Idaho 83711-4449
Telephone: (208) 334-2400
Facsimile: (208) 854-8072
Counsel for the State of Idaho

Jeanette Wolfley (ISB #3948)
Special Counsel for Shoshone-Bannock Tribes
706 Paseo Sandia
Bernalillo, N.M. 87004
Telephone: (208) 841-7504
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

William G. Myers III (ISB #5598)
Holland & Hart LLP
P.O. Box 2527
Boise, Idaho 83701
Telephone: (208) 342-5000
Facsimile: (208) 343-8869
Counsel for FMC Production LLC

Vanessa Boyd-Willard
Attorney
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

**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 27-2162, 27-2050,
and 27-2053**

The United States, the Shoshone-Bannock Tribes, the State of Idaho, the Committee of Nine, and FMC Production LLC, (“Movants”) by and through their respective counsel, hereby jointly move for entry of an order requiring the inclusion of the following remark on partial decrees 27-2162, 27-2050 and 27-2053:

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

The grounds for this motion are:

1. 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* (August 2, 1995)(“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.¹ Thus, the Court retained jurisdiction to modify Paragraph 27-11375x.d.²
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.

¹ Reporter’s Transcript, Hearing on the Proposed Consent Decree on 1990 Fort Hall Indian Water Rights Settlement Agreement, pp. 143-149 (July 18, 1995).

² *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.”)

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 Motion to Enforce Re: Fort Hall Indian Water Rights Consent Decree* ("Scheduling Order").³
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 by FMC Production LLC ("FMC") contending that stock water right nos. 27-2162, 27-2050 and 27-2053 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).

³ 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.

11. Following a stipulation, this Court ordered that FMC's three water rights were entitled to the protection of paragraph 27-11375x.d of the Consent Decree. *Order on FMC Production, LLC's Objection* at 2 (August 3, 2011).
12. In subsequent Scheduling Orders, the Court recognized that the form of the subordination remark to be placed in the Partial Decrees of each of the water rights benefiting from the subordination protection of Paragraph 27-11375x.d of the Consent Decree remained unresolved. See *Scheduling Order and Order Setting Status Conference* at 1 (August 3, 2011); *Order Setting Status and Scheduling Conference* at 1, 2 (February 2, 2012); *Order on January 31, 2012 Joint Status Report Re: Motion for Accounting* at 2 (February 2, 2012); *Order Setting Status Conference* at 1 (May 16, 2012).
13. On July 5, 2013, all Movants, except FMC, together with other parties moved this Court for an order amending the first and second sentences of Paragraph 27-11375x.d. to read as follows:

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 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.

That motion also seeks the inclusion of the following remark on all water rights entitled to the protections of Paragraph 27-11375x.d. other than *de minimis* domestic and stock water rights:

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

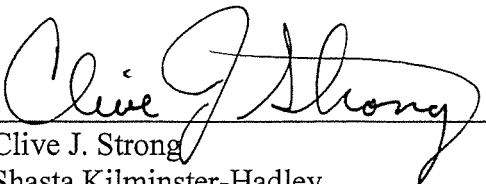
Under that motion *de minimis* domestic and stock water rights entitled to the protection of Paragraph 27-11375x.d. are protected through an express exclusion included in the proposed amendment to Paragraph 27-11375x.d.

14. The purpose of this motion is to fully resolve FMC’s objections to the Motion for Accounting by confirming that partial decrees 27-2162, 27-2050 and 27-2053 are entitled to the protections of Paragraph 27-11375x.d as it currently reads and as it is proposed to be amended and that the above remark should be included on the partial decrees for these three water rights.
15. Movants so stipulate.
16. 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).
17. The proposed amendment to the partial decrees is a fair and equitable settlement of FMC’s objection and does not injure other water right holders.

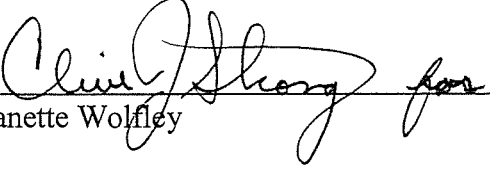
THEREFORE, Movants respectfully request this Court to grant the motion.

RESPECTFULLY SUBMITTED this 10th day of July, 2013.

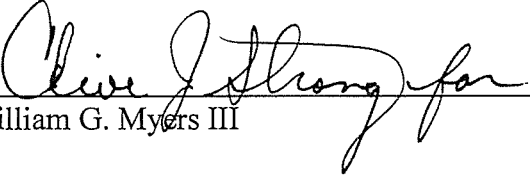
STATE OF IDAHO


Clive J. Strong
Shasta Kilminster-Hadley

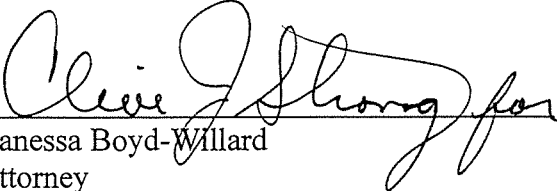
SHOSHONE-BANNOCK TRIBES


Jeanette Wolfley

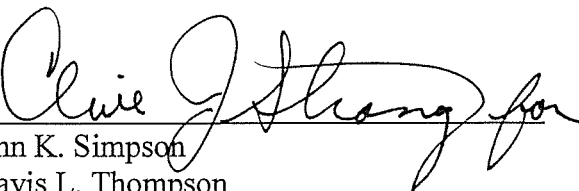
FMC PRODUCTION LLC


William G. Myers III

UNITED STATES


Vanessa Boyd-Willard
Attorney

COMMITTEE OF NINE

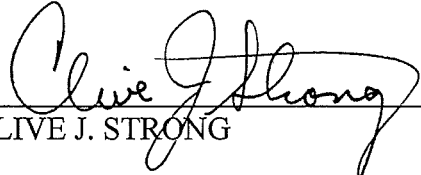

John K. Simpson
Travis L. Thompson
Paul A. Arrington
Sarah W. Higer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of July, 2013, the above JOINT MOTION TO INCLUDE SUBORDINATION REMARK ON WATER RIGHTS 27-2162, 27-2050, and 2053 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
Jeanette Wolfley Special Counsel 706 Paseo Sandia Bernalillo, N.M. 87004	☒ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery ☒ E-Mail: wolfleyje@gmail.com
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: Vanessa Boyd-Willard 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 Randall C. Budge 201 E. Center Street P.O. Box 1391 Pocatello, ID 83204-1391	☒ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery ☐ E-mail
Jerry Rigby Rigby Andrus & Rigby P.O. Box 250 Rexburg, ID 83440-0250	☒ U.S. Mail/Postage Prepaid ☐ Facsimile ☐ Overnight Mail ☐ Hand Delivery ☐ E-mail
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