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Movant: United States, Shoshone-Bannock Tribes and the State of
Idaho

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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) Sub-Case Nos. 01-10223; 01-10248;
) 25-02160; 25-13615;
) 27-02007; 27-11560;
Case No. 39576) 27-11561

JOINT MEMORANDUM SUPPORTING
MOTIONS TO DISMISS OBJECTIONS TO 1990
FORT HALL INDIAN WATER RIGHTS AGREEMENT

DESCRIPTIVE SUMMARY

Memorandum supporting the joint motion of the United States, the Shoshone-Bannock Tribes and the State of Idaho to dismiss objections filed by the Fort Hall Water Users Association and Kim Bodily to the proposed consent decree implementing the 1990 Fort Hall Indian Water Rights Agreement.

Statement of Facts

In 1985, the Idaho Legislature, as part of the legislation initiating the Snake River Basin Adjudication (SRBA), directed the State of Idaho to engage in good faith, government-to-government negotiations with the Shoshone-Bannock Tribes to settle the nature and extent of the Tribes' water rights. H. Con. Res. 16, 1985 Sess. Laws at 745. Executive Orders 85-9 and 87-9 provide that it is in the interest of the State of Idaho to settle through negotiated settlements claims for federal reserved water rights. The Shoshone-Bannock Tribes, pursuant to a July 17, 1985 resolution and the United States, acting as trustee for the Tribes and for the benefit of the federal Fort Hall Irrigation Project, also recognized that it was preferable to negotiate these claims. Pursuant to those policy directives, the State of Idaho, acting by and through the Idaho Water Resource Board, entered into negotiations with the Shoshone-Bannock Tribes ("Tribes") and the United States to negotiate a reasonable settlement of the water right claims of the Tribes. The Agreement quantified all the Tribes' claims in the Snake River

Basin upstream from Hells Canyon Dam. The negotiations resulted in the 1990 Fort Hall Indian Water Rights Agreement, signed by the principal parties on July 5, 1990. The Agreement was approved by Congress on November 16, 1990.

The Director's Report for the 1990 Fort Hall Water Rights Agreement was submitted to this Court on March 31, 1994. Approximately 210 objections were filed to the Director's Report. All but nine of the objections were either withdrawn or resolved by stipulation. Of the remaining objections, two were filed by Kim Bodily, a Fort Hall Irrigation Project water user, and seven were filed by the Fort Hall Water Users Association. This memorandum supports the Joint Motions of the United States, the Shoshone Bannock Tribes and the State of Idaho to dismiss the objections filed by Kim Bodily and the Fort Hall Water Users Association.

A. The objections filed by the Fort Hall Water Users Association violate the adjudication provisions of the Idaho Code and the Idaho Rules of Civil Procedure.

The objections filed by the Fort Hall Water Users Association (FHWUA) do not meet the criteria of Idaho Code §§ 42-1401A(7) and 42-1412. Idaho Code § 42-1412 provides that objections to water right claims or negotiated settlements may be made by "[a]ny party." Idaho Code § 42-1401A(7) defines "party" to mean "the director, any person who is a claimant, or any person who is served or joined." The FHWUA has not filed water right claims in the SRBA, Affidavit of David B. Shaw Dated

February 23, 1995, nor has the FHWUA filed a motion to intervene or otherwise been served and joined as a party to the SRBA. Therefore, under the terms of the adjudication provisions of the Idaho Code, the FHWUA may not file objections in the SRBA.

The objections also fail to comply with the Idaho Rules of Civil Procedure. It is axiomatic that a person seeking judicial relief must first be joined as a party to the case. The Rules provide the methods by which persons may be made a party to a court proceeding: they may file a complaint, they may be named as a defendant in a complaint, they may be made parties to a counterclaim or cross-claim pursuant to Rule 13(h), they may be joined as a third-party defendant under Rule 14, they may intervene pursuant to Rule 24, or they may be substituted for an existing party under Rule 25. The FHWUA has not been joined as a party pursuant to the above rules.

The record clearly demonstrates that the FHWUA is not a party to the SRBA. Thus, in order to proceed, the FHWUA must identify members of the Association that have filed claims in the SRBA and demonstrate that the FHWUA fulfills the requirements for the participation of unincorporated associations in litigation involving members of such associations. Idaho Code § 53-707. Absent such a showing, the objections of the FHWUA must be dismissed.

B. Even if Mr. Bodily and the FHWUA are properly joined as parties to the SRBA, their objections fail to raise issues within the limited scope of the SRBA.

As this Court recognized in its decision denying a motion to intervene by various conservation groups, the SRBA Court "is a court of limited subject matter jurisdiction." *Order Denying Motion for Leave to Intervene and Motion For Leave To File Nonconforming Objections* at 2. The Court noted that its jurisdiction is limited to defining the elements of water rights in accordance with the terms of Idaho Code § 42-1411. In other instances, the Court has noted that its jurisdiction is limited by "the legislative intent to make the SRBA a process of inventorying water rights." *Memorandum Decision on Basin-Wide Issue No. 3* at 25. It also described the SRBA process as limited to "[d]etermining the relative rights to the use of water by setting the *prima facie* elements of those rights in a decree" *Id.* at 26.

The pleadings filed by the FHWUA fail to allege matters relating to the elements of water rights at issue in the SRBA. Nowhere does the FHWUA allege that the Association or its members hold water rights cognizable in the SRBA. Instead, they admit that their interests in the use of water are limited to "contracts with the U.S. for the delivery of 3.5 acre feet of water and have had our land encumbered to the U.S. to guarantee payment and delivery." *Objection, Water Right Nos. 01-10223-0002; 01-10248-002; 25-02160-0017; 25-13615-0001; 27-02007-0017; 27-11560-0002; 27-11561-0002.* The FHWUA also admits that the

water rights it seeks to protect are "held by the United States for use on Non-Indian lands on the Fort Hall Irrigation Project & for the Bureau of Indian Affairs. Objection, Water Right Nos. 01-10248-0002; 25-13615-0001; 27-11560-0002; 27-11561-0002.

The objection for Water Right No. 25-13615-0001, in which the FHWUA alleges that a certain percentage of storage rights in the Blackfoot Reservoir and Grays Lake "belong" to the non-Indian water users of the Fort Hall Irrigation Project is not a claim to a water right. *Id.* Again, however, this allegation is meaningless unless accompanied by the filing of a claim for a water right in the SRBA, and merely restates the previous allegations of contractual rights. Thus, by the FHWUA's own admission, the only water rights at issue are those of the United States. Whatever rights the members of the FHWUA have, they are created through contracts with the United States, not through the appropriation of water and its application to beneficial use.

The FHWUA's assertion that the United States has breached its contractual obligations to deliver water to the non-Indian water users within the Fort Hall Irrigation Project is outside the scope of the SRBA and is not ripe in any event. The issues raised by the FHWUA do not address any elements of the water rights for the Fort Hall Irrigation Project that are within the authority of the Court to decree. As the FHWUA itself admits, the Agreement does not reduce the total amount of water rights for the Project. The United States retains a right to divert 600

cfs from the Snake River and Sand Creek and storage rights of 448,000 acre feet in the Blackfoot Reservoir and Gray's Lake. "Attachment belonging to 3a," Water Right Nos. 01-10223-0002; 01-10248-002; 25-02160-0017; 25-13615-0001; 27-02007-0017; 27-11560-0002; 27-11561-0002. Indeed, as the FHWUA recognizes, total diversions will increase because the water right from the Snake River and Sand Creek will rise from 600 cfs to 650 cfs. Explanation of Objection 3.a, Water Right No. 01-10223-0002.

Given the FHWUA's admissions that the only water rights at issue are those held by the United States and that the total amount of water diverted for the Fort Hall Irrigation Project is not reduced, the only issue raised by the FHWUA is the allotment of the United States' water right between Indian and non-Indian water users. The allocation of water to the non-Indian water users on the Fort Hall Irrigation Project is determined solely by the terms of the federal legislation and the contracts for water delivery entered into between the Bureau of Indian Affairs and the non-Indian water users. What the Fort Hall Irrigation Project water users are entitled to receive under their water delivery contracts is not one of the elements of a water right that may be adjudicated and decreed by this Court under the terms of Idaho Code § 42-1411. Indeed, the only courts with jurisdiction to hear the case are the federal courts. See 17 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4101 (Court of Federal Claims has exclusive jurisdiction over actions

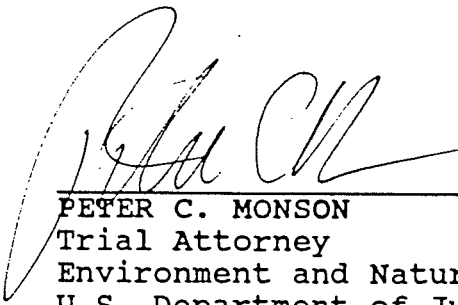
against United States founded on contracts when amount in controversy exceeds \$10,000); see e.g., *San Carlos Irrigation and Drainage District v. United States*, 877 F.2d 957 , 961 (Fed. Cir. 1989); see also 28 U.S.C. §§ 1346 (federal district courts have jurisdiction over contract claims for less than \$10,000). Moreover, any allegations that the project will not supply its contractors with their contract entitlements to water are speculative and not ripe for review by any court.

The objections filed by Mr. Bodily are less explicit, but it is clear that his allegations are also limited to the proper allocation of water under water delivery contracts between Mr. Bodily and the Bureau of Indian Affairs. As with the objections of the FHWUA, such allegations are outside the scope of the SRBA.

Conclusion

The objections of Kim Bodily and the Fort Hall Water Users Association must be dismissed due to the fact that Mr. Bodily and the FHWUA are not parties to the SRBA and because the objections do not raise issues within the jurisdiction of the SRBA Court.

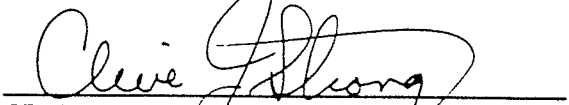
DATED this 23rd day of February, 1995.



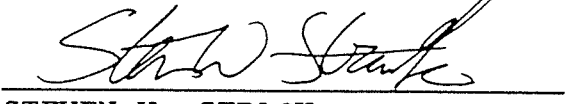
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