

Blackfoot River Equitable Adjustment Settlement Agreement Pursuant to the 1990 Fort Hall Indian Water Rights Settlement Agreement

Introduction

This Settlement Agreement (“Agreement”) by and between the Shoshone Bannock Tribes (“Tribes”), the United States, the State of Idaho (“State”), and the Committee of Nine, hereinafter referred to as the “Parties” sets forth the terms and conditions of the Equitable Adjustment provided for in paragraph x.d of water right No. 27-11375. This Agreement is an addendum to the Partial Final Consent Decree Determining The Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin, dated August 2, 1995 (“Consent Decree”).

Objective

This Agreement implements Article 7 of the 1990 Fort Hall Indian Water Rights Agreement (“Fort Hall Agreement”), and Section II of the Consent Decree pertaining to the diversion of Natural Flows from the Blackfoot River pursuant to paragraph x.d of water right No. 27-11375, recognizing the variability of water supplies available on a year-to-year basis. The Parties have developed and agreed to the Blackfoot River Water Management Plan that tracks the use and quantifies all Blackfoot River Basin Natural Flow diversions occurring as a direct result and benefit of paragraph x.d of water right No. 27-11375.

Paragraph x.d. of water right No. 27-11375 “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 Fort Hall Agreement allows the Basin 27 Water Users to continue to divert that amount of water put to beneficial use under state created water rights prior to January 1, 1990. The credit and water accounting system described below, provides Equitable Adjustment Water to the Shoshone-Bannock Tribes to offset Basin 27 water diversions protected by paragraph x.d. of water right No. 27-11375 that are in excess of the 45,000 AFY of water from the Blackfoot River. All water right holders in Basin 27, including tribal and non-tribal diverters, are responsible for diverting or calling for only the amount of water needed for authorized beneficial uses. This Agreement, together with the Blackfoot River Water Management Plan approved by the Parties, form the basis for the equitable management of the Blackfoot River drainage and for the equitable adjustment of water right No. 27-11375.

Definitions

The following definitions apply for purposes of this Agreement:

- a) “Basin 27 Water Users” means persons diverting Natural Flow from the Blackfoot River Basin prior to January 1, 1990 whose rights are decreed in the SRBA, exclusive of the Fort Hall Irrigation Project and *de minimis* domestic and stock water uses (where the corresponding water right carries a diversion limit of

13,000 gallons per day or less, or 14.5 ac-ft per year or less for storage). “Basin 27 Water Users” includes the Miners Ditch water bypassed as mitigation for water right no. 27-7577 in the name of the City of Blackfoot.¹

- b) “Basin 27 Primary Volume” is 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 Flows ahead of the Tribes as provided by the Fort Hall Agreement and described in water right 27-11375. The calculation of the Basin 27 Primary Volume is described in Section 4.i) of the Plan.
- c) “Committee of Nine” means the advisory committee of Water District 01 and any successor thereto.
- d) "Equitable Adjustment Water" is a supplemental water supply provided to the Tribes for the purpose of protecting water right no. 27-11375 if the Basin 27 Primary Volume exceeds 45,000 acre-feet per year and all available credits, consistent with the terms of this Agreement.
- e) “Fort Hall Agreement” means the 1990 Fort Hall Indian Water Rights Agreement executed by the Shoshone-Bannock Tribes of the Fort Hall Reservation, the State, the United States, and the Committee of Nine.
- f) “IDWR” or the “Idaho Department of Water Resources” means the executive agency of the State of Idaho created by Idaho Code § 42-1701, or any successor agency.
- g) "Natural Flow" means the natural flow of the Blackfoot River Basin that is available for diversion, as referred to in section x.d of water right 27-11375 and as specifically defined and calculated in the Plan. When the term “natural flow” is used in this Agreement rather than “Natural Flow” the classic meaning of natural flow is intended as illustrated in Section 4.k) of the Plan.
- h) “Parties” means the Committee of Nine of Water District 01, State, Tribes, and United States.
- i) “Plan” means the Blackfoot River Water Management Plan.
- j) “SRBA District Court” means the District Court of the Fifth Judicial District, State of Idaho, in and for the County of Twin Falls that is assigned Civil Case No. 39576.

¹ All or part of 16 water rights may be diverted into the Miners Ditch, none of which are in the name of Miners Ditch nor do they include any designation they are to be bypassed for mitigation purposes. Those 16 water rights are: 27-3G, 27-17, 27-20A, 27-20B, 27-22A, 27-23E, 27-35A, 27-10296, 27-10341, 27-10344, 27-10505, 27-10756, 27-10790, 27-10999, 27-11117, 27-11940.

- k) “State” means the State of Idaho, admitted to the Union on July 3, 1890.
- l) “Tribes” or “Tribal” means the Shoshone-Bannock Tribes of the Fort Hall Reservation in Idaho as the collective successors-in-interest of Indian signatories to the Second Treaty of Fort Bridger of July 3, 1868, 15 Stat. 673, and subsequent Tribal/federal agreements.
- m) “United States” means the United States of America acting through the United States Department of the Interior, Bureau of Indian Affairs.
- n) “Water District 01” means the instrumentality created by the Director of the IDWR pursuant to Idaho Code § 42-604 (1992) and any successor thereto.
- o) “Water District 27” means the water district designated by the Director of IDWR pursuant to Idaho Code § 42-604 (1992) for the distribution of water in the Blackfoot River Basin and any successor thereto.
- p) “Watermaster” means the person elected by Water District 27 and appointed by the Director of IDWR to distribute water within Water District 27.

Terms and Conditions

1. Basin 27 Credit Account

The Parties agree to establish and utilize a credit account based on the diversions of Natural Flows of the Blackfoot River Basin by the Basin 27 Water Users as contemplated by provision x.d of water right 27-11375, and permitting the Basin 27 Water Users beneficial use of their water rights. The credit account shall be administered as follows:

- a) Credits are accrued when the total annual Basin 27 Primary Volume diversions are less than 45,000 acre-feet per year (afy). Credit accrual is limited by the natural flow supply of the Blackfoot River basin when the supply is less than 45,000 afy. Credit accrual is calculated as follows:

$$\text{Credit Accrual} = (\text{Lesser of 45,000 afy or available natural flow supply}) - \text{Basin 27 Primary Volume Diversions}$$

The total natural flow supply is described in Section 4.k) of the Plan.

- b) Credits are used if Basin 27 Primary Volume diversions exceed 45,000 acre-feet per year, on an acre-foot for acre-foot basis.
- c) The credit account shall have the following conditions and limitations:
 - 1. Maximum Credit Balance: 40,000 acre-feet
 - 2. Annual Maximum Credit Accrual: 20,000 acre-feet per year
 - 3. Annual Maximum Credit Use: 12,000 acre-feet per year

These conditions are put in place to protect the Tribes' ability to utilize natural flows of the Blackfoot River while enabling the Basin 27 Water Users to continue annually to divert, to the extent of beneficial use, that volume of water as provided for in the Fort Hall Agreement.

- d) The Plan includes an annual accounting of the credit balance, credit accrual, and/or credit use each year, and the Watermaster shall provide the Tribes, Basin 27 Water Users, the Bureau of Indian Affairs, and Committee of Nine with this information prior to January 5th of each year. The credit balance at the start of the irrigation season is the available credit for use in that year.
- e) The irrigation season of the calendar year in which this Agreement is adopted by the SRBA District Court shall begin with a credit balance of 20,000 acre-feet.

2. Equitable Adjustment Water

A separate Equitable Adjustment Water account will be maintained for the Tribes' diversions under water right no. 27-11375 if the Basin 27 Primary Volume is greater than 45,000 acre-feet per year plus all available credits in any year. The Equitable Adjustment Water is not intended to be utilized on a regular basis, and represents a supplemental water supply for the protection of water right no. 27-11375, consistent with the terms of this Agreement. The Equitable Adjustment Water account shall be administered as follows:

- a) Equitable Adjustment Water is only available for use if the maximum available credits have been used for the current year.
- b) The Equitable Adjustment Water account shall be replenished at a fixed rate of 1,000 acre-feet per year. The account will be replenished prior to the beginning of the irrigation season.
- c) The Equitable Adjustment Water account shall have a maximum balance of 10,000 acre-feet. The account balance at the start of the irrigation season is the available Equitable Adjustment Water for that irrigation season.
- d) Equitable Adjustment Water will be available to the Tribes on an acre-foot for acre-foot basis in a quantity equal to Basin 27 Primary Volume in excess of a combined 45,000 acre-feet per year plus the maximum available credits that can be used in the current year.
- e) Any Basin 27 Primary Volume diversions in excess of 45,000 acre-feet per year plus available credit for the current year shall not exceed the amount of Equitable Adjustment Water available to the Tribes.

- f) 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.
- g) The Equitable Adjustment Water to be provided to the Tribes shall be supplied by the Committee of Nine from a source and in a manner that allows the Tribes to utilize the water source in a manner consistent with water right no. 27-11375, without the need to construct additional conveyance or diversion works.
- h) Nothing herein precludes the Committee of Nine from implementing actions to increase the supply of Blackfoot River natural flow. The Parties agree that the obligation of Committee of Nine to provide Equitable Adjustment Water will be reduced to the extent of any increase of the Blackfoot River natural flow available to the Tribes resulting from such actions.
- i) The Plan includes an annual accounting of the Equitable Adjustment Water account balance, Equitable Adjustment Water accrual, and/or Equitable Adjustment Water use each year, and the Watermaster shall provide the Tribes, Basin 27 Water Users, the Bureau of Indian Affairs, and Committee of Nine with this information prior to January 5th of each year. The Equitable Adjustment Water account balance at the start of the irrigation season is the amount of Equitable Adjustment Water available for use that same year.
- j) The irrigation season of the calendar year in which this Agreement is approved by the SRBA District Court shall begin with an Equitable Adjustment Water account balance of 5,000 acre-feet.

3. Exercise of Water Right No. 27-11375

Water right no. 27-11375 shall be exercised pursuant to paragraph x.d, as provided for in the Fort Hall Agreement, to the extent that Basin 27 Primary Volume diversions are less than or equal to the following quantity:

$$45,000 \text{ afy} + \text{annual credit used} + \text{Equitable Adjustment Water used}$$

At any point during the irrigation season when the Basin 27 Primary Volume exceeds the above quantity, provisions of paragraph x.d of water right no. 27-11375 shall be deemed satisfied and all water rights shall be administered in priority.

4. Blackfoot River Diversions and Measurements

The Plan shall govern the diversion, use, and measurement of water. The Parties in conjunction with the Basin 27 Watermaster shall develop a diversion and accounting protocol pursuant to the

Plan, which shall track the credit account and provision of Equitable Adjustment Water deliveries to the Tribes as follows:

- a) On a weekly basis, the Basin 27 Watermaster will calculate and publish the Basin 27 Primary Volume. When the Primary Volume is within 5,000 acre-feet of 45,000 acre-feet per year plus the available credit for use in the current year, then the Watermaster will notify the Tribes, Basin 27 Water Users, and the Committee of Nine that an Equitable Adjustment Water condition is approaching and take further steps as outlined below.
- b) The Basin 27 Watermaster will make a projection of the following quantities for the coming week: total annual Basin 27 diversions, the cumulative Basin 27 Primary Volume, the use of credits, and any Equitable Adjustment Water supply due to the Tribes. These projections shall be based on the pattern of diversions in prior years and the magnitude of diversions occurring the previous week, estimated available natural flow water supplies, and changes in requested Basin 27 diversion demands as per the Plan. The projections shall be provided to the Parties and Basin 27 Water Users for review.
- c) When, based upon the accounting in subparagraph b) above, a delivery of Equitable Adjustment Water is owed to the Tribes in the upcoming week, then that quantity of water shall be provided to the Tribes as governed by paragraph 5 below.
- d) This process is repeated until the Tribes have ceased diversions for the year, until no further Equitable Adjustment Water is available, or if the Tribes' water right no. 27-11375 is filled.

5. Equitable Adjustment Water Delivery to Tribes

When, based upon the accounting protocol developed and the application of the credit system described above, an Equitable Adjustment Water delivery is owed to the Tribes, then the Tribes and Committee of Nine shall be notified by the Basin 27 Watermaster. The Tribes shall inform the Basin 27 and Water District 01 Watermasters when delivery of the Equitable Adjustment Water is desired and the points of diversion for receipt of that water. The Committee of Nine shall be obligated to deliver Equitable Adjustment Water at the rates specified by the Tribes over the week, at the identified diversion points consistent with water right no. 27-11375.

6. Equitable Adjustment Water Supply to Tribes

The Committee of Nine shall take the necessary steps to ensure that a firm supply of water is available to the Tribes on a yearly basis to fulfill any Equitable Adjustment Water obligation. On an annual basis the Committee of Nine will confirm water is available and the source(s) of said supply with the Parties.

7. Savings Clause

Nothing herein alters or amends the Sand Creek exchange or the mitigation obligations of Mitigation Inc. Mitigation Inc. is the contracting entity that holds the storage contract rights for storage space made available pursuant to Section 5 of the Fort Hall Indian Water Rights Act of 1990, Pub. L. 101-602, 104 Stat. 3059 (November 16, 1990).

8. Binding Effect.

This Agreement shall bind and inure to the benefit of the respective successors of the Parties.

9. Entire Agreement

This Agreement sets forth all understandings between the Parties with respect to the equitable adjustment provided for water right no. 27-11375. There are no other understandings, covenants, promises, agreements, conditions, either oral or written between the Parties other than those contained herein.

10. Effect of Headings

Headings appearing in this Agreement are inserted for convenience and reference and shall not be construed as interpretations of the text.

11. Multiple Originals

This Agreement is executed in quadruplicate. Each of the four (4) Agreements with an original signature of each Party shall be an original.

12. Effective Date

This Agreement shall be effective upon approval by the Fifth Judicial District of the State of Idaho in and for the County of Twin Falls, case no. 39576.

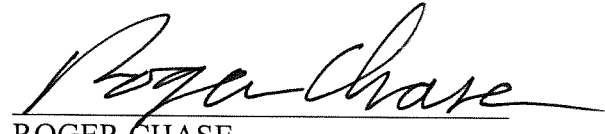
The Parties have executed this Blackfoot River Equitable Adjustment Settlement Agreement on the date next to their respective signatures.

SHOSHONE-BANNOCK TRIBES


NATHAN SMALL
Chairman, Shoshone-Bannock
Tribal Council

Dated: 01/25/13

STATE OF IDAHO

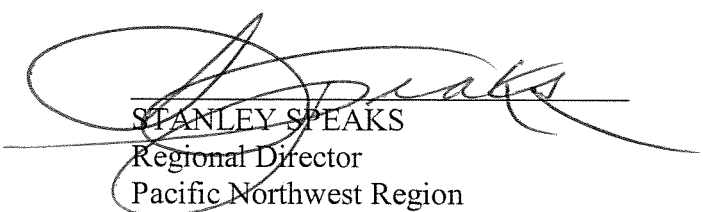
A handwritten signature in black ink, reading "Roger Chase", written over a horizontal line.

ROGER CHASE

Chairman, Idaho Water Resource Board

Dated: 1-25-2013

UNITED STATES



STANLEY SPEAKS

Regional Director

Pacific Northwest Region

Bureau of Indian Affairs

U.S. Department of Interior

Dated: 1/24/2013

COMMITTEE OF NINE OF WATER DISTRICT 01

A handwritten signature in cursive script, reading "Dan Shewmaker", written over a horizontal line.

DAN SHEWMAKER

Chairman, Committee of Nine

Dated: Jan 25, 2013