

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

AUG - 9 2013

By _____

Clerk
Deputy Clerk

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
)
) ORDER GRANTING JOINT MOTION
) TO INCLUDE SUBORDINATION
) REMARK ON WATER RIGHT NO. 27-
) 11375 AND CERTAIN BLACKFOOT
) NATURAL FLOW WATER RIGHTS
)
)

I.

PROCEDURAL BACKGROUND

1. On August 2, 1995, 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") was entered in the Snake River Basin Adjudication ("SRBA").

2. The *Consent Decree* partially decreed all water rights of the United States for the Shoshone-Bannock Tribes ("Tribes") in the Upper Snake River Basin, for the Bureau of Indian Affairs, Fort Hall Agency and for the Fort Hall Irrigation Project.

3. Water right 27-11375 is one of several water rights partially decreed in favor of the United States for the use and benefit of the Tribes in the *Consent Decree*. It provides the Tribes with the right to divert 150,000 afy from the Blackfoot River to irrigate 30,469 present and future acres within the Fort Hall Indian Reservation. Paragraph 27-11375.x.d. of the *Consent Decree* contains the following remark regarding the administration of water right 27-11375:

The Tribes and United States shall 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 their 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. These state created water rights are estimated to divert not more than

ORDER GRANTING JOINT MOTION TO INCLUDE SUBORDINATION REMARK ON WATER RIGHT NO. 27-11375 AND CERTAIN BLACKFOOT NATURAL FLOW WATER RIGHTS - 1 -

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SUPPORT DATA

IN FILE # 27-1A

45,000 AFY of water from the Blackfoot River. In the event this estimate of the amount of existing diversions under state created water rights is exceeded as a result of the Decree in the SRBA, the parties shall negotiate an equitable adjustment to the Tribal water rights to account for this change.

Paragraph 27-11375.x.d., *Consent Decree*, p.31.

4. On October 25, 2010, the State of Idaho filed a *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*”). The *Motion for Accounting* requested permission to begin an accounting of the water rights protected by Paragraph 27-11375.x.d. and for the inclusion of a remark on each of the water rights entitled to the protections of Paragraph 27-11375.x.d. 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 27-11375.x.d.

5. On November 10, 2010, this Court issued an *Initial Scheduling Order* in the above-captioned matter. The *Initial Scheduling Order* directed the State of Idaho, the United States and the Tribes to provide personal service of the *Motion for Accounting* and the *Initial Scheduling Order* to all surface water claimants in Basin 27. It further directed that both documents appear on the docket sheet for November 2010 pursuant to the SRBA docket sheet procedures.

6. Pursuant to the *Initial Scheduling Order*, any party wishing to object to their water right(s) being excluded from Appendix A to the State’s *Motion for Accounting* were required to file and serve an objection to that effect on or before January 4, 2011. The *Initial Scheduling Order* instructed:

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.

Initial Scheduling Order, p.4.

7. On November 22, 2010, certificates of services were filed with the Court demonstrating personal service of the *Motion for Accounting* and *Initial Scheduling Order* on all surface water claimants in Basin 27.

8. One *Objection* to the *Motion for Accounting* was filed by FMC Production, LLC, asserting that three of its water rights should be added to the list of water rights the State had determined were entitled to the protection of Paragraph 27-11375.x.d. FMC Production, LLC's *Objection* was subsequently resolved by stipulation of the parties on July 29, 2011.

9. Additionally, the Committee of Nine filed a *Response to the Content of the State's List of Rights*, seeking removal of 23 water rights from the State's list. The Committee of Nine argued that only those non-Tribal Basin 27 water rights actually being diverted at the time the Fort Hall Agreement was being negotiated (i.e., 1986 -1987) were considered part of the estimated 45,000 AFY of water from the Blackfoot River, and as such only those water rights are protected by Paragraph 27-11375.x.d.

10. In its *Memorandum Decision and Order* dated July 14, 2011, this Court addressed the following legal issue:

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 the language of paragraph 27-11375.x.d. protects only 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.

In its *Memorandum Decision and Order*, the Court held that the plain and unambiguous language 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. As a result, the Committee of Nine's request seeking removal of 23 water rights from the State's list was denied.

11. On February 2, 2012, the Court entered an *Order* directing that *de minimis* domestic and stockwater rights diverting from the Blackfoot River prior to January 1, 1990 are entitled to the protection of Paragraph 27-11375.x.d.

12. On July 8, 2013, the United States, the 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 (collectively, "Joint Movants") filed a *Joint Motion to Include Subordination*

Remark on Water Right 27-11375 and Certain Blackfoot Natural Flow Water Rights ("Joint Motion")).

13. The *Joint Motion* requests that this Court enter an order determining that the water rights listed on Attachment E¹ to the *Joint Motion* are entitled to the protections of Paragraph 27-11375.x.d., and for the inclusion of the following remark on each of the listed water rights: "This water right is entitled to the protections of paragraph x.d of water right 27-11375."

14. The *Joint Motion* also requests that this Court 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 sentence of Paragraph 27-11375.x.d. of the *Consent Decree* 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-hundredths (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.

15. On July 10, 2013, the Joint Movants filed an *Errata to Joint Motion to Include Subordination Remark on Water Right 27-11375 and Certain Blackfoot Natural Flow Water Rights*. The *Errata* provided that Attachment E to the *Joint Motion* contained a typographical

¹ Attachment E to the *Joint Motion* 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.

error. Thus, the Joint Movants provided a replacement Attachment E to the *Errata* correcting the error.

16. A hearing on the *Joint Motion* was held before this Court on July 23, 2013. At the hearing, the Joint Movants presented the testimony of Shelley Keen, the manager of the water rights section for the Idaho Department of Water Sources, in support of the *Joint Motion*. No one appeared in opposition to the *Joint Motion*.

17. At the hearing on July 23, 2013, the Court granted the *Joint Motion*, set forth its rationale on the record, and notified the parties that it would follow up its decision with a written order.

II.

ORDER

BASED ON THE FOREGOING, THE FOLLOWING ARE HEREBY ORDERED:

1. The Joint Movants' *Joint Motion* is hereby granted.
2. The water rights listed on Attachment E to the *Joint Motion* are entitled to the protections of Paragraph 27-11375.x.d. of the *Consent Decree*.²
3. The *Partial Decrees* for the water rights listed on Attachment E to the *Joint Motion* shall be amended to include the following remark in the "Other Provision Necessary for Definition or Administration" section: "This water right is entitled to the protections of paragraph x.d of water right 27-11375."
4. The *Consent Decree* shall be amended, via a separate order issued contemporaneously herewith, to include the list of protected water rights set forth as Attachment E to the *Joint Motion* as Attachment E to the *Consent Decree*. In addition, the first and second sentence of Paragraph 27-11375.x.d. of the *Consent Decree* shall be amended 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

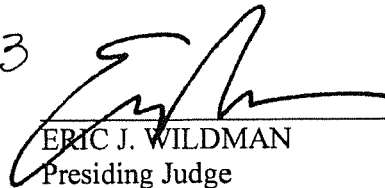
² The term "Attachment E" refers to the replacement Attachment E attached to the Joint Movants' *Errata* filed on July 10, 2013. A copy of Attachment E is attached hereto and incorporated herein by reference.

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.

IT IS SO ORDERED.

DATED:

August 9, 2013



ERIC J. WILDMAN

Presiding Judge

Snake River Basin Adjudication

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	27-12030	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	

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING JOINT MOTION TO INCLUDE SUBORDINATION REMARK ON WATER RIGHT NO 27-11375 AND CERTAIN BLACKFOOT WATER RIGHTS was mailed on August 09, 2013, with sufficient first-class postage to the following:

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ORDER

(Certificate of mailing continued)

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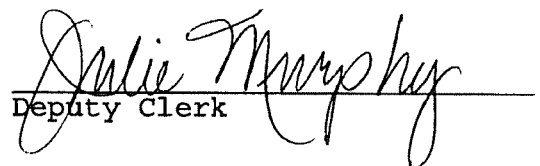
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ORDER

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FILE COPY FOR 00008

Deputy Clerk

A handwritten signature in cursive script, reading "Julie Murphy", is written over a horizontal line. The signature is in dark ink and is positioned to the right of the printed text "Deputy Clerk".