

Edmund C. Goodman, ISB No. 10288
HOBBS, STRAUS, DEAN & WALKER, LLP
215 SW Washington Street, Suite 200
Portland, OR 97204
Tel: 503.242.1745
Fax: 503.242.1072
Email: egoodman@hobbsstrauss.com

William F. Bacon, ISB No. 2766
SHOSHONE-BANNOCK TRIBES
P.O. Box 306
Fort Hall, ID 83203
Telephone: 208.478.3822
Facsimile: 208.237.9736
Email: bbacon@sbtribes.com

Counsel for Amicus Curiae The Shoshone-Bannock Tribes

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF IDAHO; IDAHO
DEPARTMENT OF WATER RESOURCES
An agency of the State of Idaho; and GARY
SPACKMAN, in his official capacity as
Director of the Idaho Department
Water Resources,

Defendants.

v.

IDAHO HOUSE OF
REPRESENTATIVES; MIKE MOYLE,
in his official capacity as Majority Leader
of the House; IDAHO SENATE; and
CHUCK WINDER, in his official
capacity as President Pro Tempore of the
Senate,

Case No. 1:22-cv-00236-DKG

**BRIEF OF AMICUS CURIAE
THE SHOSHONE-BANNOCK
TRIBES**

Intervenor-
Defendants.

BRIEF OF *AMICUS CURIAE* THE SHOSHONE-BANNOCK TRIBES

Table of Contents

Statement of Counsel1

Background and Statement of Interest1

Argument5

 I. The Idaho State Legislature’s Actions Unlawfully Seek to Revise Settled Water Rights5

 II. The Idaho Legislature’s Statutory Scheme Seeks to Alter the Terms of Settled and Decreed Water Rights in Violation of Both the U.S. and Idaho Constitutions6

 1. The Idaho Legislature’s Actions Violate the Contracts Clause of the United States Constitution and the Contracts Clause of the Idaho State Constitution.....7

 A. Legal Standard for Contracts Clause Analysis7

 B. Idaho’s Statutory Scheme Substantially Impairs a Contractual Relationship.....10

 C. Idaho’s Statutory Scheme is Not Reasonable or Necessary to Serve an Important Public Purpose13

 2. The Idaho Legislature’s Actions Violate the Retroactivity Clause of the Idaho Constitution.....15

 A. Legal Standard for Retroactivity Clause Analysis.....15

 B. Idaho’s Statutory Scheme is Retroactive in Violation of the Retroactivity Clause.....17

 3. Idaho’s Statutory Scheme Constitutes an Impermissible Taking Under the United States and Idaho Constitutions.....18

 A. Legal Standard for Takings Analysis.....18

 B. Idaho’s Statutory Scheme Involves a Taking19

Conclusion20

Table of Authorities

Cases

<i>A & B Irrigation Dist. v. Idaho Dep't of Water Res.</i> , 153 Idaho 500, 284 P.3d 225 (2012).....	9, 17
<i>Allied Structural Steel Co. v. Spannaus</i> , 438 U.S. 234 (1978)	7
<i>Bennett v. Twin Falls North Side Land & Water Co.</i> , 27 Idaho 643, 150 P. 336 (Idaho 1915) ...	17
<i>Big Wood Canal Co. v. Chapman</i> , 45 Idaho 380, 263 P.45 (1927).....	16
<i>CDA Dairy Queen, Inc. v. State Ins. Fund</i> , 154 Idaho 379, 299 P.3d 186 (Idaho 2013)	7, 8, 13
<i>Clear Springs Foods, Inc. v. Spackman</i> , 150 Idaho 790, 252 P.3d 71 (2011).....	17
<i>Colville Confederated Tribes v. Walton</i> , 647 F.2d 42, (9th Cir. 1981)	5
<i>Crow v. Carlson</i> , 107 Idaho 461, 465, 690 P.2d 916, (1984).....	19
<i>Eden v. State</i> , 164 Idaho 241, 252–53 ,429 P.3d 129 (2018)	12
<i>Energy Rsrvs Group, Inc., v. Kansas Power & Light Co.</i> , 459 U.S. 400 (1983).....	8, 13
<i>Fort Hall Water Users Association v. U.S.</i> , 129 Idaho 39, 921 P.2d 739 (1996).....	3
<i>Frisbie v. Sunshine Mining Co.</i> , 93 Idaho 169, 457 P.2d 408 (Idaho 1969)	16
<i>Gen. Motors Corp. v. Romein</i> , 503 U.S. 181 (1992)	7
<i>Guzman v. Piercy</i> , 155 Idaho 928, 318 P.3d 918 (Idaho 2014).....	16, 17
<i>Home Bldg. & Loan Ass'n v. Blaisdell</i> , 290 U.S. 398 (1934)	8, 11
<i>In re: SRBA Case No. 39576. Fort Hall Water Users Association v. U.S.</i> , 129 Idaho 39, 921 P.2d 739 (1996).....	3, 12, 16
<i>Joyce Livestock Co. v. United States</i> , 156 P.3d 502 (Idaho 2007)	14, 15
<i>Lynch v. United States</i> , 292 U.S. 571 (1934).....	19
<i>Matter of Hidden Springs Trout Ranch, Inc.</i> , 102 Idaho 623, 636 P.2d 745 (1981)	16
<i>Norfolk and Western Ry. Co. v. American Train Dispatchers Ass'n</i> , 499 U.S. 117 (1991).....	8, 11
<i>Olson v. Idaho Dept. of Water Res.</i> , 105 Idaho 98, 666 P.2d 188 (Idaho 1983)	19
<i>Rangen, Inc. v. Idaho Dep't of Water Res.</i> , 159 Idaho 798, 367 P.3d 193 (2016).....	9
<i>Ruckelshaus v. Monsanto Co.</i> , 467 U.S. 986 (1984)	19
<i>Snake River Basin Water Sys.</i> , 115 Idaho 1, 764 P.3d 78 (Idaho 1988).....	12
<i>Sveen v. Melin</i> , 138 S. Ct. 1815 (2018)	7, 11
<i>Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency</i> , 535 U.S. 302 (2002).....	19
<i>Thompson v. Enomoto</i> , 915 F.2d 1383 (9th Cir. 1990).....	9
<i>Transp. Co. v. Chicago</i> , 99 U.S. 635 (1878)	19

U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1 (1977)..... 8, 14
United Com. Ins. Serv., Inc. v. Paymaster Corp., 962 F.2d 853, 856 (9th Cir. 1992) 8
United States v. Armour & Co., 402 U.S. 673 (1971) 9
United States v. ITT Cont'l Baking Co., 420 U.S. 223 (1975)..... 9
United States v. Winters, 207 U.S. 564 (1908)..... 5
VanDesande v. United States, 673 F.3d 1342 (Fed. Cir. 2012)..... 9

Statutes

Fort Hall Indian Water Rights Act of 1990, 104 Stat. 3059 (1990)..... 3, 4

Rules

Idaho Rules of Civil Procedure (I.R.C.P.) Rule 60(b)(6) 12

Regulations

Idaho Code § 42-113(2)(b) 15
 Idaho Code § 42-222(2) 15
 Idaho Code § 42-224..... 15, 17, 18
 Idaho Code § 42-224(9) (2022) 17
 Idaho Code § 42-224(14) (2022) 5, 6
 Idaho Code § 42-501..... 14, 15
 Idaho Code § 42-502..... 15

Constitutional Provisions

U.S. CONST. art. 1, § 10, cl.1..... 7
 IDAHO CONST. art. 1, § 16 7
 IDAHO CONST. art. XI, § 12..... 15, 18

Other Authorities

Ann Y. Vonde et al., *Understanding the Snake River Basin Adjudication*, 52 IDAHO L. REV. 53, Section VII.A.1, 153–168 (2016) 2
 Final Unified Decree, *In Re SRBA*, Case No. 39576 (Idaho 5th Jud. Dist. Ct., Aug. 26, 2014) 3
 Fort Hall Agreement, July 10, 1990..... 2
 Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of the Water in the Upper Snake River Basin, *In Re SRBA*, Case No. 39576 (Idaho 5th Jud. Dist. Ct., Aug. 26, 2014)..... 3, 5, 6

STATEMENT OF COUNSEL

No other party's counsel was involved in authoring this brief in whole or in part, and no other party, party's counsel, or person contributed money that was intended to fund preparing or submitting this brief.

BACKGROUND AND STATEMENT OF INTEREST

The Shoshone-Bannock Tribes of Fort Hall are comprised of the eastern and western bands of the Northern Shoshone and the Bannock, or Northern Paiute, bands.¹ Ancestral lands of both tribes occupied vast regions of land encompassing present-day Idaho (including the upper Snake River watershed), Oregon, Nevada, Utah, Wyoming, Montana, and into Canada. The Tribes generally subsisted as hunters and gatherers, traveling during the spring and summer seasons, collecting foods for use during the winter months. They hunted wild game, fished the region's abundant and bountiful streams and rivers (primarily for salmon), and collected native plants and roots such as the camas bulb. Buffalo served as the most significant source of food and raw material for the Tribes.

The Shoshones and Bannocks entered into a peace treaty in 1868 known today as the Fort Bridger Treaty. The Fort Hall Reservation was reserved for the various tribes under the treaty agreement. The Fort Hall Reservation is located in the eastern Snake River Plain of southeastern Idaho. It is comprised of lands that lie north and west of the town of Pocatello. The Snake River, Blackfoot River, and the American Falls Reservoir border the reservation on the north and northwest. The reservation was established by an Executive Order, dated June 14, 1867, and under the terms of the Second Treaty of Fort Bridger of July 3, 1868. It originally contained 1.8

¹ Except where otherwise noted, the fact statements set out in this Background and Statement of Interest are supported by the Declaration of Tribal Chairman Nathan Small (December 20, 2022) (hereinafter "Chairman Small Decl.").

million acres, an amount that was reduced to 1.2 million acres in 1872 as a result of a survey error. The reservation was further reduced to its present size through subsequent legislation and the allotment process.

By agreeing to reside on the Fort Hall Reservation, the Tribes did not agree to give up their hunting and fishing rights on ceded lands off-reservation, and indeed the Tribes still retain those reserved rights. But the Tribes were enticed to reside on the reservation by the promise that the lands *and waters* of the reservation would be available to them as a means of developing an agricultural-based economy, specifically through farming crops and raising livestock.

In 1985 the Shoshone-Bannock Tribes initiated legal proceedings to perfect water rights for the Fort Hall Reservation based on the Treaty, Executive Order, and aboriginal claims. On August 30, 1985, the Tribes and the State of Idaho entered into a Memorandum of Understanding to “commence good faith, government-to-government negotiations.” Fort Hall Agreement, July 10, 1990 (FHA) at Art. 3.7 (The FHA is attached as Exhibit 1 to the Chairman Small Decl.). Those proceedings led to five years of intense negotiations between the Tribes, the United States, the State of Idaho, and other water users in the Snake River Basin.

Those negotiations resulted in the FHA, a comprehensive settlement of the Tribes’ water rights claims. The parties to the FHA were the Tribes, the State of Idaho, the Idaho Water Resource Board, the United States (through the Bureau of Indian Affairs (BIA) and Bureau of Reclamation (USBR)), and the Committee of Nine, which represented the Idaho water users’ interests.² The FHA was negotiated, agreed-to, and filed in lieu of federal reserved water right claims. Through the FHA, the parties avoided significant and contentious litigation, and instead

² See Ann Y. Vonde et al., *Understanding the Snake River Basin Adjudication*, 52 IDAHO L. REV. 53, Section VII.A.1, 153–168 (2016).

“achieve[d] a fair, equitable, and final settlement of all claims of the [Tribes] ... to water rights in the Upper Snake River Basin.” Fort Hall Indian Water Rights Act of 1990 (“Fort Hall Act”) 104 Stat. 3059, 3060 (1990). On April 2, 1991, the FHA was approved by the Idaho legislature, and on May 31, 1991, the Agreement was approved by the general membership of the Shoshone-Bannock Tribes. *In re: SRBA Case No. 39576. Fort Hall Water Users Association v. U.S.*, 129 Idaho 39, 40, 921 P.2d 739, 740 (1996).

As mandated by the Fort Hall Act, the Snake River Basin Adjudication (SRBA) court finalized and incorporated the FHA into the decree for the Tribal water rights. Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of the Water in the Upper Snake River Basin, *In Re SRBA*, Case No. 39576 (Idaho 5th Jud. Dist. Ct., Nov. 12, 2014) (hereinafter “Consent Decree”).³ Further, the United States and Idaho agreed to non-Indian claims for the Fort Hall Irrigation Project and the BIA, Fort Hall Agency, which were entered into pursuant to Administrative Order No. 1 and incorporated into the Consent Decree. Consent Decree at 1–2.

As with all such settlement agreements, the FHA involved compromises on certain claims, including compromises by the Tribes, to reach agreement and achieve the certainty, stability, and savings of time and costs that would have been involved in adjudicating the claims. In exchange for settling its claims, and for the water rights described in the FHA, the Tribes agreed to forego certain surface and groundwater claims altogether. *See* Fort Hall Act, § 8, 104 Stat. at 3062–63 (generally describing the waiver and release of all Tribal claims against the

³ On August 25, 2014, the SRBA court entered a Final Unified Decree that incorporated all the partial decrees (including the Consent Decree) into one final order covering 158,600 water rights. *See* Final Unified Decree, *In Re SRBA*, Case No. 39576 (Idaho 5th Jud. Dist. Ct., Aug. 26, 2014).

State, the United States, and all other parties); *see also* FHA at Art. 7.1.18.x.d, 7.1.19.x.c, and 7.1.20.x.c (Tribes and United States agreeing not to exercise certain surface water rights so as to avoid impacts to certain other users or to mitigate such impacts). The FHA also contained a substantial mitigation provision for any impacts to other water rights that might be asserted to have resulted from the Agreement. FHA at Art. 12.3.

At the time that the FHA was finalized, and in the more than 30 years since, the Tribes and the United States have relied on the settled expectations negotiated through the FHA and the resulting Consent Decree.

The actions by the Idaho State legislature at issue in this litigation are thus of great concern to the Tribes.⁴ While the Tribes are not aware of any attempt (to date) by the Idaho Water Resources Department to enforce these statutes against any Tribal water rights, the Tribes have an express interest and perspective that is valuable for the Court to consider. In particular, the actions by the Idaho legislature seek in many instances to unwind or reverse the recognition and use of water rights by the United States that were negotiated and agreed-upon through various water rights settlement agreements that were, like the FHA, incorporated into the SRBA Final Unified Decree. It is thus imperative for the Court to consider, and to make clear to the State of Idaho, that legislative attempts to unwind such settlement agreements are unlawful. Such a ruling is necessary to avoid any attempt to apply these statutes to the Tribes or any attempt to adopt such statutes that might impact Tribal water rights settled under the FHA and contained within the Consent Decree.

⁴ The Tribes adopt and incorporate by reference the United States' Statement of Undisputed Facts (Dec. 16, 2022), ¶¶ 13-33.

ARGUMENT

I. The Idaho State Legislature’s Actions Unlawfully Seek to Revise Settled Water Rights.

The State of Idaho’s statutory scheme targeting the forfeiture of United States-owned state-based stockwater rights as challenged in this litigation currently applies only to stockwater rights obtained pursuant to the substantive law of the state (i.e. “state-based rights”) as opposed to Federally reserved water rights, in which a water right is obtained pursuant to federal law, including water rights for which the basis is the *Winters* Doctrine.⁵ See Idaho Code § 42-224(14) (2022) (forfeiture procedures apply to “all stockwater rights except those stockwater rights decreed to the United States based on federal law.”). As such, the Tribal water rights held in trust by the United States contained within the Consent Decree remain expressly excluded from the State’s statutory scheme at issue in this litigation because the vast majority of these water rights expressly list the basis of each right as the *Winters* doctrine. Consent Decree at 12–41 (Section II(A)). Only two of the listed Tribal water rights have a different basis, license and permit, but neither of these water rights are stockwater rights that are the subject of the State’s statutory scheme here.⁶ Yet such bargained-for non-*Winters*’ rights are similar to the type of rights unlawfully targeted by the Idaho legislature.

The Idaho legislature’s challenged statutes have the consequence of potentially being applicable to several stockwater rights owned by the United States which were settled in various

⁵ The *Winters* doctrine is the basis for a water right where an implied federal reservation of water rights was created where necessary to fulfill the purposes of the reservation and is therefore created under federal law. See *United States v. Winters*, 207 U.S. 564 (1908); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 46 (9th Cir. 1981).

⁶ See Consent Decree, Section II(A), 32–34 (Right No. 27-02007 – Basis of Right: License; Purposes: Irrigation from Storage and Storage for Irrigation and Right No. 25-02160 – Basis of Right: Permits; Purposes: Irrigation from Storage and Storage for Irrigation).

settlement agreements and incorporated into consent decrees and the Final Unified Decree. For example, the Tribal Consent Decree includes three state-based constitutionally created stockwater rights held by the United States, which rights are the general subject of the State's statutory scheme of forfeiture.⁷ *See* Idaho Code § 42-224(14) (2022).

Although these three stockwater rights do not appear to be the direct target of the Idaho legislature's actions, these stockwater rights do have the potential to be affected by this statutory scheme as written. However, any attempts by the State of Idaho to apply this statutory scheme to water rights contained within the Consent Decree are unconstitutional as applied. Furthermore, the Tribes have a clear interest in ensuring that the Court, and the State of Idaho, understand that any attempts to apply the State's stockwater statutory scheme to Tribal water rights, or any future unilateral legislative attempts to unwind or alter water rights contained in the FHA and the Consent Decree, are prohibited by law.

II. The Idaho Legislature's Statutory Scheme Seeks to Alter the Terms of Settled and Decreed Water Rights in Violation of Both the U.S. and Idaho Constitutions.

Any attempts by the Idaho legislature to alter or unwind the expectation- and reliance-based water rights of Tribes or the United States contained within the Final Unified Decree, the Consent Decree or the FHA is a violation of both the U.S. and Idaho Constitutions.

⁷ Consent Decree, Section III(A) at 62-65 (The three water rights in this category include: Right No. 27-11562 – Basis of Right: Beneficial Use. Purpose Stock Water. (note “Water will be used for stock water for range cattle for the grazing rights associated with Blackfoot Reservoir.”); Right No. 27-11563 – Basis of Right: Beneficial Use. Purpose Stock water (note “Water will be used for stock water for range cattle for the grazing rights associated with Equalizing Reservoir.”); and Right No. 25-13616 – Basis of Right: Beneficial Use. Purpose Stock water (note “Water will be used for stock water for range cattle for the grazing rights associated with Grays Lake.”)).

1. The Idaho Legislature's Actions Violate the Contracts Clause of the United States Constitution and the Contracts Clause of the Idaho State Constitution.

A. *Legal Standard for Contracts Clause Analysis.*

The Contracts Clause of the United States Constitution prohibits a state and its agents from passing laws that impair the obligation of contracts. U.S. CONST. art. 1, § 10, cl.1. Idaho's Constitution similarly prohibits the passage of a law impairing the obligation of contracts. IDAHO CONST. art. 1, § 16 ("No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall ever be passed."). In Idaho, the Idaho Supreme Court held that challenges based upon Idaho's Contracts Clause should be evaluated under the federal framework and rules because neither the Idaho Constitution, the nature of the state, nor long-standing precedent demonstrate that the protection provided by the Idaho Constitution is greater than the protection provided by the United States Constitution. *CDA Dairy Queen, Inc. v. State Ins. Fund*, 154 Idaho 379, 383–87, 299 P.3d 186, 190–94 (Idaho 2013).

The federal framework for determining whether a legislative act violates the Contracts Clause is a two-step analysis. *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 185 (1992) and *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978); *see also CDA Dairy Queen, Inc.*, 154 Idaho at 387, 299 P.3d at 194. First, a court must determine whether the challenged legislative enactment has operated as a sustainable impairment of a contractual relationship. *Gen. Motors Corp.*, 503 U.S. at 185. This threshold analysis also has three subparts: (1) whether a contractual relationship exists, (2) whether the challenged legislative enactment impairs that relationship, and (3) whether that impairment is substantial. *CDA Dairy Queen, Inc.*, 154 Idaho at 387, 299 P.3d at 194. A court considers the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights. *See Sveen v. Melin*, 138 S. Ct. 1815, 1821 (2018). Notably,

“the laws which subsist at the time and place of the making of a contract, and where it is to be performed, entered into and form a part of it, as if they were expressly referred to or incorporated in its terms.” *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 429–30 (1934); *see also Norfolk and Western Ry. Co. v. American Train Dispatchers Ass’n*, 499 U.S. 117, 129–30 (1991). “Nothing can be more material to the obligation than the means of enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion.” *Home Bldg. & Loan Ass’n*, 290 U.S. at 430.

If the challenged legislative enactment has operated as a substantial impairment of a contractual relationship the analysis proceeds to the next step: determining whether the act reasonably serves a legitimate public purpose. *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 25 (1977). To survive, a state law that substantially impairs a contract must have a “significant and legitimate public purpose” to ensure that it is an exercise of the state’s police power and not merely “providing a benefit to special interests.” *Energy Rsrvs Group, Inc., v. Kansas Power & Light Co.*, 459 U.S. 400, 411–12 (1983); *see CDA Dairy Queen, Inc.*, 154 Idaho at 388, 299 P.3d at 195. Even if a legitimate public purpose exists, the court must still determine whether the act is based on reasonable conditions and is of a character appropriate to the public purpose justifying its adoption. *U.S. Trust Co. of New York*, 431 U.S. at 22.

Importantly, both settlement agreements and consent decrees are contracts that cannot be substantially impaired by State legislation under both the federal and state Contracts Clauses. Indeed, the construction and enforcement of settlement agreements are governed by principles of local law which apply to interpretation of contracts generally, even if the underlying cause of action is federal. *United Com. Ins. Serv., Inc. v. Paymaster Corp.*, 962 F.2d 853, 856 (9th Cir. 1992). Consent decrees have the attributes of both contracts and judicial acts and thus in

construing consent decrees, courts use contract principles and the contract law of the situs state applies. *Thompson v. Enomoto*, 915 F.2d 1383, 1388 (9th Cir. 1990); *see also, e.g., VanDesande v. United States*, 673 F.3d 1342, 1350 (Fed. Cir. 2012) (a settlement agreement, even if it is incorporated into judicial or administrative consent decrees, should be viewed for enforcement purposes as having the attributes of a contract.). Idaho courts interpret water decrees using the same interpretation rules that apply to contracts. *Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 807, 367 P.3d 193, 202 (2016) (citing *A & B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 523, 284 P.3d 225, 248 (2012)). The fundamental issue in any contract enforcement proceeding, including for consent decrees, is whether, absent enforcement, the non-breaching party will have received the benefit of her bargain. *VanDesande* 673 F.3d at 1350. The Supreme Court held as follows:

Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.

United States v. Armour & Co., 402 U.S. 673, 681–82 (1971). Moreover, because

a consent decree or order is to be construed for enforcement purposes basically as a contract, reliance upon certain aids to construction is proper, as with any other contract and such aids include the circumstances surrounding the formation of the consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated in the decree.

United States v. ITT Cont'l Baking Co., 420 U.S. 223, 238 (1975).

B. Idaho's Statutory Scheme Substantially Impairs a Contractual Relationship.

The United States, the Tribes, and the State of Idaho, along with other private parties, settled claims to water rights within the Upper Snake River Basin, and those settlements (including the FHA) were entered as an order of the SRBA Court through the Final Unified Decree. Those settlement agreements, and the resulting SRBA decrees, are thus contracts that cannot be substantially impaired.

By way of illustration, the Tribe's Consent Decree contains three general subparts that operate as a whole. First, the United States, the Tribes, the State of Idaho and certain Idaho water users entered into the 1990 FHA agreement in settlement of claims made by the United States on behalf of the Tribes to water rights in the Upper Snake River Basin. The 1990 FHA was then submitted by the parties to the agreement to the SRBA court in lieu of a claim as provided by Idaho Code § 42-1409(6) (1990). Additionally, the Northside Canal Company agreed to receive natural flow water from Sand Creek in exchange for making storage water available to the Tribes as required in the 1990 FHA. Lastly, the United States and the State agreed on claims submitted for the non-Indian portion of the Fort Hall Irrigation Project and the BIA, Fort Hall Agency. In short, both the Consent Decree and the FHA are complex interwoven contracts between the Tribes, the United States, and all other signatories to these agreements. The State is thus prohibited from unilaterally passing laws that substantially interfere with the bargained-for rights contained within them.

The State statutes challenged in this lawsuit unmistakably impair the parties' expectation- and reliance-based contractual agreement, and that impairment is substantial. First, all the water rights (including the state-law-based rights) contained within the settlements and the Final Unified Decree are an integral part of the overall settlements. In entering into such

comprehensive settlements (such as the FHA), the Tribes, the United States, and other parties were entitled to rely upon the underlying law of forfeiture as it existed at the time such settlements were negotiated. *See Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. at 429–30; *Norfolk and Western Ry. Co.*, 499 U.S. at 129-30. This means that not only are the parties entitled to the water rights as described in those settlements (and incorporated into the Final Unified Decree), the parties are entitled to rely on the established understanding of the process as to how such water rights could be forfeited or otherwise cancelled, as well as the means to safeguard or reinstate those rights. Yet, the statutory scheme challenged here selectively targets certain settled rights and attempts to subject them to a newly created set of laws concerning forfeiture, expressly designed to make it easier to divest the United States of its ownership of those rights, and that further severely limits the ability of the United States to safeguard or reinstate these rights. *See Sveen*, 138 S. Ct. at 1821. Idaho's statutory scheme therefore not only impairs, but substantially impairs, the contractual relationship of some parties to the various settlements included in the Final Unified Decree, and benefits others. Had the State's newly created statutory scheme that risked forfeiture of the rights held by the United States been in place at the time the parties were negotiating the Consent Decree, the parties may have pursued a wholly different bargain. Thus, targeted forfeiture of these water rights fundamentally removes an important contractual right and defeats the express expectations of the parties.

Second, the parties to the settlements relied upon the settled expectations and law regarding the enforcement and remedies available to parties at the time the settlements were negotiated. *See Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. at 430 (the ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion). As the Final Unified Decree (and its various Consent Decrees) is

an order of the SRBA court, the water rights embodied therein can only be changed through a motion to modify the Consent Decree pursuant to the procedures set forth pursuant to Administrative Order 1, Section 14(d) and Rule 60(b)(6) of the Idaho Rules of Civil Procedure (I.R.C.P.), which authorizes the SRBA court to alter or amend a decree for “any other reason that justifies relief.” Importantly, the 60(b)(6) process is designed to protect all parties’ interests rather than allow a unilateral change by one party. As the State itself recently argued, “finality is critical in a general stream adjudication such as the SRBA,” noting the Idaho Supreme Court has repeatedly reaffirmed the principle that finality in water rights is essential.⁸ Finality is also critical because while an Idaho water right “is tantamount to a real property right, and is legally protected as such,” each water right is part of an “interlocking” system in which any one adjudicated right “affects all such rights.” *Eden v. State*, 164 Idaho 241, 252–53, 429 P.3d 129, 140–41 (2018) (internal citation omitted); *In re Snake River Basin Water Sys.*, 115 Idaho 1, 7, 764 P.3d 78, 84 (Idaho 1988)). Here, securing a final decree for these water rights was one of the primary benefits obtained by the Tribes and the United States.

Third, but equally important, the SRBA decrees, and the settlements incorporated therein, represent the result of years of painstaking negotiations that produced a comprehensive resolution for all parties involved. All parties (including the State) were represented by counsel in those negotiations. And, indeed, the Final Unified Decree itself forever and perpetually restrains and enjoins all parties to the SRBA from using the waters in any other quantity or

⁸ See State of Idaho’s Consolidated Response to Joint Motion to Modify Partial Decrees for Purpose of Diversion Rate and “Reset” Administration Remarks, *In Re SRBA*, Case No. 39576, at 29 (Idaho 5th Jud. Dist. Ct., Dec. 20, 2019) ((internal quotations and citations omitted), in which the State of Idaho opposed modification of the Consent Decree under Rule 60(b)(6) even where all parties to the decree, including the State, agreed to a needed clarification with regard to the administration of certain storage rights within the Consent Decree).

manner than is set out in the Decree.⁹ By passing laws specifically weakening certain targeted rights that are an integral and interwoven part of those settlements, the Idaho legislature has substantially impaired the contractual bargain between the parties, and has interfered with the parties' reasonable expectation- and reliance-based water rights within the Final Unified Decree.

Unquestionably, the Tribes have a significant interest in making clear that the Idaho legislature cannot fundamentally alter settled expectations and reliance-based vested water rights, including the agreed-upon remedies that are an integral part of the contractual agreement, by unilateral legislative actions. Allowing these sorts of systematic and persistent attempts by the State legislature to undermine the finality of the SRBA sets a dangerous precedent not only for the Tribes and the United States, but for all parties to the SRBA.

C. Idaho's Statutory Scheme is Not Reasonable or Necessary to Serve an Important Public Purpose.

Because it substantially impairs a contractual right, the legislature's scheme may stand only if it is necessary *and* reasonably designed to serve an important public purpose. *See CDA Dairy Queen, Inc.*, 154 Idaho at 388, 299 P.3d at 195 (*quoting Energy Rsrvs Group, Inc., b. Kansas Power & Light Co.*, 459 U.S. 411–12 (1983) (regulation of utility contracts)). It does neither.

First, the State's statutory scheme was not designed to protect a significant or legitimate public purpose. Rather, the State's newly created statutory scheme is designed to benefit a select few stockwater rights holders at the direct expense of the United States and of the many parties who put in decades of effort and money to resolve their underlying claims to water rights within

⁹ Final Unified Decree, *In Re SRBA*, Case No. 39576, at 8 (Idaho 5th Jud. Dist. Ct., Aug. 26, 2014) (incorporating Section IV(8) of the Consent Decree at 73-74 into the Final Unified Decree).

the Upper Snake River Basin, including other stockwater rights holders and permittees.¹⁰ In short, the Legislature’s scheme is designed to provide a benefit to a few special private interests, not remedy a broad social harm, which is precisely the type of legislation impairing contracts the Contracts Clauses of both the United States and Idaho Constitutions were designed to prevent.

Second, even if an important public purpose could be presupposed from a scheme intended to benefit a few private parties, these laws are not reasonably designed or necessary to advance any of the legislatures’ stated purposes. This court need not give deference to the Idaho legislatures’ own assessment of reasonableness and necessity, because it can review the plain terms of the statutes themselves. *See U.S. Trust Co. of New York*, 431 U.S. at 26. For example, here the legislative intent is stated as follows: “[i]t is the intent of the legislature to codify and enhance” certain aspects of the *Joyce Livestock Co. v. United States*, 156 P.3d 502, 519 (Idaho 2007), “to protect Idaho stockwater rights holders from encroachment by the federal government in navigable and nonnavigable waters” and that “in order to comply with the *Joyce* decision, it is the intent of the Legislature that stockwater rights acquired in a manner contrary to the *Joyce* decision are subject to forfeiture pursuant to sections 42-222(2) and 42-224, Idaho Code.” Idaho Code § 42-501. But the *Joyce* decision is already the law in Idaho with regard to the United States’ ability to acquire constitutionally based stockwater rights, and this legislation is not narrowly designed or necessary to codify that judicial ruling. The *Joyce* decision has already addressed the concerns of federal permittees and required that a landowner does not own a water right obtained by an appropriator using the land with the landowner’s permission unless the

¹⁰ See Declaration of Frederic W. Price (Dec. 15, 2022), Doc. 35 at ¶¶ 20-23, and Declaration of Kathryn Conant (Dec. 16, 2022), Doc. 35 at ¶¶ 10-14. The Tribes note that these few private beneficiaries allowed the United States to fully adjudicate, negotiate, and settle these water rights at great expense to the taxpayer and gain the highest value water rights possible to be owned by the United States *for the benefit of its permittees. Id.*

appropriator was acting as agent of the owner in obtaining the water right. *Joyce Livestock*, 156 P.3d at 519. Rather, this legislation is designed to eliminate or impair the ability of the United States to prove and maintain an agency relationship with federal permittees, thereby specifically attempting to eliminate the judicially recognized agency-relationship defense from the *Joyce* ruling – a defense that is designed specifically to prevent the *Joyce* decision from directly affecting any of the vested water rights already decreed to the United States and thereby run afoul of the Contracts Clause and other constitutional prohibitions.¹¹

By operating as a substantial impairment of a contractual relationship that fails to serve a broad public purpose and is not necessary to even serve the narrow purposes identified by the legislature, the Idaho Code §§ 42-113(2)(b), 42-222(2), 42-224, 42-501, and 42-502 violate the Contracts Clauses of both the United States Constitution and the Idaho Constitution.

2. The Idaho Legislature’s Actions Violate the Retroactivity Clause of the Idaho Constitution.

A. *Legal Standard for Retroactivity Clause Analysis.*

The Retroactivity Clause of the Idaho Constitution provides that “[t]he legislature shall pass no law for the benefit of a railroad, or other corporation, or any individual, or association of individuals retroactive in its operation.” IDAHO CONST. art. XI, § 12. The Idaho Supreme Court has directed that a law is retroactive “when it operates upon transactions which have been completed or *upon rights which have been acquired* or upon obligations which have existed prior to its passage.” *Frisbie v. Sunshine Mining Co.*, 93 Idaho 169, 172, 457 P.2d 408, 411 (Idaho

¹¹ In fact, the SRBA court continued to decree claims sought by the United States for constitutional instream stockwater rights even after *Joyce Livestock*, noting that “[u]nder the ruling in *Joyce*, there are still factual scenarios by which it would be legally possible for the United States to acquire [an instream constitutional] water right[,] such as through an agency relationship or agreement with the appropriator of the water right.” *In Re SRBA*, Case No. 39576, #74-15468, slip op. at 2 (Idaho Dist. Ct. Feb. 28, 2007).

1969) (emphasis added) (*compare Matter of Hidden Springs Trout Ranch, Inc.*, 102 Idaho 623, 636 P.2d 745 (1981) (a permit applicant applying to appropriate water has no prior individually vested right to the water at the time of the application and therefore no right could be interfered with by retroactive application of the challenged legislation) and *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 263 P.45 (1927) (permittee held only an inchoate or contingent right that had not ripened into a complete appropriation and thus there was no retroactive application of the law to this alleged right)). However, a law creating a change to a forfeiture statute that operates on vested water rights does violate the Retroactivity Clause. *See Memorandum Decision and Order on Challenge, Final Order Disallowing Water Right Claim, In re SRBA Case No. 39576,75-10117* at 10–13 (Idaho 5th Jud. Dist. Ct., Nov. 12, 2014) (a law creating an exception to Idaho’s water forfeiture statutes, known as the mining expectation, was held to be unconstitutional where the application of the statute worked to retroactively diminish vested and established water rights in violation of Article XI, § 12 of the Idaho Constitution). Importantly, when water rights are perfected, the owner is entitled to rely upon the law as it then existed. *Id.* at 12.

Idaho Code § 73-101 provides that “[n]o part of these compiled laws is retroactive, unless expressly so declared.” As such, “a well-settled and fundamental rule of statutory construction is to construe statutes to have a prospective rather than retroactive effect.” *Guzman v. Piercy*, 155 Idaho 928, 937, 318 P.3d 918, 927 (Idaho 2014). “A statute should be applied retroactively only if the legislature has clearly expressed that intent or such intent is clearly implied by the language of the statute.” *Id.* at 938, 318 P.3d at 928. However, the statute need not use the word “retroactive” to be found to be retroactive. *Id.* “It is sufficient if the enacting words are such that the intention to make the law retroactive is clear.” *Id.* at 938, 318 P.3d at 928. The Idaho

Supreme Court has instructed that “if the language clearly refers to the past as well as the future, then the intent to make the law retroactive is expressly declared” *Id.*; *see also*, *A&B Irrigation v. Idaho Dep’t of Water Resources*, 153 Idaho 500, 508, 284 P.3d 225, 232-33 (Idaho 2012) (Idaho’s Groundwater Act determined to be retroactive).

B. Idaho’s Statutory Scheme is Retroactive in Violation of the Retroactivity Clause.

By its terms, Idaho Code § 42-224 is retroactive because it applies to all stockwater rights, including the stockwater rights previously acquired by, and vested in, the United States, including those acquired under the various SRBA settlement agreements and recognized in the SRBA Final Unified Decree. Under Idaho law, those water rights are real property rights. Idaho Code § 55-101; *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 797, 252 P.3d 71, 78 (2011). “When one has legally acquired a water right, he has a property right therein that cannot be taken from him for public or private use except by due process of law and upon just compensation being paid therefor.” *Id.* (Quoting *Bennett v. Twin Falls North Side Land & Water Co.*, 27 Idaho 643, 651, 150 P. 336, 339 (Idaho 1915)).

Here, Idaho Code § 42-224, as amended by H.B. 608 in 2022, fundamentally and retroactively changes the law of forfeiture in Idaho at the expense of the United States and for the benefit and enrichment of a select few federal grazing permittees. Prior to the enactment of H.B. 608, IDWR had discretion over the handling of forfeiture proceedings and if after a hearing the director confirmed that a stockwater right had been lost and forfeited, the director must issue an order declaring the water right forfeited and judicial review of that decision was required to be in compliance with Idaho Code § 42-1701A of the Idaho Code. H.B. 608, as amended in 2022, now provides that any determination by IDWR that a stockwater right has been forfeited “shall have no legal effect” on its own. *See* Idaho Code § 42-224(9) (2022). Instead, such a

determination triggers a mandatory provision according to which “the state of Idaho, by and through the office of the attorney general, must initiate a civil action” in State court within sixty days of IDWR’s determination. *See* Idaho Code § 42-224(10) (2022). In the subsequent judicial proceedings, IDWR “shall not be a party,” but its determination of forfeiture “shall constitute prima facie evidence that the right has been forfeited.” *See* Idaho Code § 42-224(11) (2022).

The plain consequence of the passage of H.B. 608 is that vested and bargained-for stockwater rights can be forfeited pursuant to a retroactive law that provides that forfeiture decisions are not subject to judicial review of the agency’s underlying decision. Rather, the forfeiture determination would be the subject of a novel process specifically designed to provide for forfeiture of federal rights and to limit the ability of the United States to protect and safeguard those rights. The United States and other parties to the settlements and SRBA decrees are entitled to rely upon the scope of those rights under the law as it existed at the time the agreements were negotiated and finalized. In short, because Idaho Code § 42-224 operates retroactively for the benefit of other water users by subjecting previously acquired and vested stockwater rights to a vastly different forfeiture scheme that leaves the United States with no remedy to protect its bargained-for agreement, Idaho Code § 42-224 violates the Retroactivity Clause of the Idaho Constitution. IDAHO CONST. art. XI, § 12.

3. Idaho’s Statutory Scheme Constitutes an Impermissible Taking Under the United States and Idaho Constitutions.

A. *Legal Standard for Takings Analysis.*

The just compensation clause of the Fifth Amendment of the United States Constitution provides that no person shall “be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.” The Idaho Constitution also guarantees its citizens the right of due process if private property is taken for a

public use, pursuant to Article I, § 13, and provides for just compensation for such a taking pursuant to Article I, § 14.

Contracts constitute property within the meaning of the Fifth Amendment to the U.S. Constitution. *See Lynch v. United States*, 292 U.S. 571, 579 (1934) (“The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States.”); *see also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1101, 1003 (1984) (noting the range of “intangible interests,” including contracts, that are “property for purposes of the Fifth Amendment’s Takings Clause”). Further, “[a] water right is tantamount to a real property right, and is legally protected as such.” *Crow v. Carlson*, 107 Idaho 461, 465, 690 P.2d 916, 920 (1984). An agreement to change any of the definitional factors of a water right would be comparable to a change in the description of property. *Olson v. Idaho Dept. of Water Res.*, 105 Idaho 98, 101, 666 P.2d 188, 191 (Idaho 1983). A physical taking occurs when the government’s action amounts to a physical occupation or invasion of the property, including the functional equivalent of a “practical ouster of [the owner’s] possession.” *Transp. Co. v. Chicago*, 99 U.S. 635, 642 (1878), *abrogated on other grounds by Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302 (2002).

B. Idaho’s Statutory Scheme Involves a Taking.

Here, any potential application of Idaho’s statutory scheme to the stockwater rights owned by the United States through a negotiated water rights settlement, or any future attempts by the state legislature to similarly alter Tribal water rights, storage rights, or United States water rights contained with the Consent Decree or FHA, would result in significant adverse impacts to bargained-for settlement of its water rights. Specifically, the legislature’s statutory scheme

challenged here, as applied to negotiated and settled water rights, would hinder the United States from receiving the full amount of its contractual bargained-for property right contained within the larger resolution of the SRBA, which would amount to an uncompensated taking under both the U.S. and Idaho constitutions.

CONCLUSION

The Tribes support the position of the United States and seek to clarify that, although the Tribes are not the direct target of this legislation, the State's statutory scheme has the potential to be applied to certain stockwater rights held by the United States that are an integral and interwoven part of the Tribe's bargained-for settlement of its water right claims as represented in the Consent Decree. Consequently, any attempt by the State to apply its statutory stockwater scheme to water rights contained within the Consent Decree must be held to be unconstitutional as applied. And, further, the Tribes have a distinct interest in making clear that any future attempts to unilaterally legislatively alter or unwind the Tribes' vested water rights as contained in the Consent Decree and the FHA would also be unconstitutional. Allowing such unilateral legislative acts would only embolden the Idaho state legislature to continue its attempts to erode the settled expectations of the parties and the finality of the SRBA.

Respectfully submitted this 22nd day of December, 2022.

s/ Edmund Clay Goodman

Edmund C. Goodman, ISB No. 10288
HOBBS, STRAUS, DEAN & WALKER, LLP
215 SW Washington Street, Suite 200
Portland, OR 97204
Tel: 503.242.1745
Fax: 503.242.1072
Email: egoodman@hobbsstrauss.com

s/ William F. Bacon

William F. Bacon, ISB No. 2766

SHOSHONE-BANNOCK TRIBES
P.O. Box 306
Fort Hall, ID 83203
Telephone: 208.478.3822
Facsimile: 208.237.9736
Email: bbacon@sbtribes.com

Counsel for Amicus Curiae The Shoshone-Bannock Tribes

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2023, I filed the foregoing document with the Clerk of the Court using this Court's CM/ECF system, which will send a notification to all counsel of record pursuant to Fed. R. Civ. P. 5 and D. Idaho L.R. 5.1(k).

Stephen Bartell
U.S. DEPARTMENT OF JUSTICE
Environment & Natural Resources Division
stephen.bartell@usdoj.gov

Thomas Snodgrass
U.S. DEPARTMENT OF JUSTICE
Environment & Natural Resources Division
thomas.snodgrass@usdoj.gov

William Gerry Myers, III
HOLLAND & HART
wmyers@hollandhart.com

Murray D. Feldman
HOLLAND & HART
mfeldman@hollandhart.com

Alison C. Hunter
HOLLAND & HART
ACHunter@hollandhart.com

Jennifer Najjar
U.S. DEPARTMENT OF JUSTICE
Environment & Natural Resources Division
jennifer.najjar@usdoj.gov

Michael C. Orr
State Attorney General's Office
michael.orr@ag.idaho.gov

Joy M. Vega
Office of the Attorney General
Natural Resources Division
joy.vega@ag.idaho.gov

Shane M. Bell
Office of the Attorney General
Natural Resources Division
shane.bell@ag.idaho.gov

Norman M. Semanko
PARSONS BEHLE & LATIMER
nsemanko@parsonsbehle.com

Ivan L. London
Mountain States Legal Foundation
ilondon@mslegal.com

Jeffrey Neel Candrian
U.S. DEPARTMENT OF JUSTICE
Environment & Natural Resources Division
jeffrey.candrian@usdoj.gov

/s/ Edmund Clay Goodman

Edmund Clay Goodman
Hobbs, Straus, Dean & Walker, LLP

Counsel for Amicus Curiae The Shoshone-Bannock Tribes

Edmund C. Goodman, ISB No. 10288
HOBBS, STRAUS, DEAN & WALKER, LLP
215 SW Washington Street, Suite 200
Portland, OR 97204
Tel: 503.242.1745
Fax: 503.242.1072
Email: egoodman@hobbsstrauss.com

William F. Bacon, ISB No. 2766
SHOSHONE-BANNOCK TRIBES
P.O. Box 306
Fort Hall, ID 83203
Telephone: 208.478.3822
Facsimile: 208.237.9736
Email: bbacon@sbtribes.com

Counsel for Amicus Curie The Shoshone-Bannock Tribes

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF IDAHO; IDAHO
DEPARTMENT OF WATER RESOURCES
An agency of the State of Idaho; and GARY
SPACKMAN, in his official capacity as
Director of the Idaho Department of
Water Resources,

Defendants.

v.

IDAHO HOUSE OF
REPRESENTATIVES; MIKE MOYLE,
in his official capacity as Majority Leader
of the House; IDAHO SENATE; and
CHUCK WINDER, in his official
capacity as President Pro Tempore of the
Senate,

Case No. 1:22-cv-00236-DKG

**DECLARATION OF NATHAN
SMALL IN SUPPORT OF BRIEF
OF *AMICUS CURIAE* THE
SHOSHONE-BANNOCK TRIBES**

Intervenor-
Defendants.

I, Nathan Small, in accordance with the requirements of 28 U.S.C. § 1746, declare as follows:

1. My name is Nathan Small. I am over eighteen years old and a member of the Shoshone-Bannock Tribes of the Fort Hall Reservation. The following statements are based upon my personal knowledge.

2. At present I am Chairman of the Fort Hall Business Council, which is the governing body of the Shoshone-Bannock Tribes established under the Tribes' Constitution and Bylaws approved by the Tribes and ratified by the federal government in 1937 under the Indian Reorganization Act. I have served on the Fort Hall Business Council since the late 1980's as a council member and Chairman. I have been a member of the Shoshone-Bannock Tribal Bar Association since 1980 and have worked as both a prosecutor and public defender in the Shoshone-Bannock Tribal Courts.

3. I was on the Fort Hall Business Council while the Fort Hall Agreement was being negotiated and was a member of the Tribal negotiating team.

4. I have also previously worked for the Environmental Waste Program and am a founding Board member of the Coalition of Large Tribes (COLT), which promotes the sovereign rights of Tribes.

5. In those various capacities I have researched, learned about, and become familiar with the background and history of the Shoshone-Bannock Tribes, including but not limited to the Tribes'

water rights, their claims in the Snake River Basin Adjudication, and the settlement of those claims.

6. The Shoshone-Bannock Tribes of Fort Hall are comprised of the eastern and western bands of the Northern Shoshone and the Bannock, or Northern Paiute, bands. Ancestral lands of both tribes occupied vast regions of land encompassing present-day Idaho (including the upper Snake River watershed), Oregon, Nevada, Utah, Wyoming, Montana, and into Canada.

7. The Tribes generally subsisted as hunters and gatherers, traveling during the spring and summer seasons, collecting foods for use during the winter months. They hunted wild game, fished the region's abundant and bountiful streams and rivers (primarily for salmon), and collected native plants and roots such as the camas bulb. Buffalo served as the most significant source of food and raw material for the Tribes.

8. The Shoshones and Bannocks entered into a peace treaty in 1868 known today as the Fort Bridger Treaty. The Fort Hall Reservation was reserved for the various tribes under the treaty agreement. The Fort Hall Reservation is located in the eastern Snake River Plain of southeastern Idaho. It is comprised of lands that lie north and west of the town of Pocatello. The Snake River, Blackfoot River, and the American Falls Reservoir border the reservation on the north and northwest. The reservation was established by an Executive Order, dated June 14, 1867, and under the terms of the Second Treaty of Fort Bridger of July, 3, 1868. It originally contained 1.8 million acres, an amount that was reduced to 1.2 million acres in 1872 as a result of a survey error. The reservation was further reduced to its present size through subsequent legislation and the allotment process.

9. By agreeing to reside on the Fort Hall Reservation, the Tribes did not agree to give up their hunting and fishing rights on ceded lands off-reservation, and indeed the Tribes still retain

those reserved rights. But the Tribes were enticed to reside on the reservation by the promise that the lands *and waters* of the reservation would be available to us as a means of developing an agricultural-based economy, specifically through farming crops and raising livestock.

10. In 1985 the Shoshone-Bannock Tribes initiated legal proceedings to perfect water rights for the Fort Hall Reservation based on the Treaty, Executive Order and aboriginal claims.

11. On August 30, 1985, the Tribes and the State of Idaho entered into a Memorandum of Understanding to “commence good faith, government-to-government negotiations.” Fort Hall Agreement at Art. 3.7. Those proceedings led to five years of intense negotiations between the Tribes, the United States, the State of Idaho, and other water users in the Snake River Basin.

12. Those negotiations resulted in a comprehensive settlement of the Tribes’ water rights claims known as the Fort Hall Agreement (FHA), which was signed on July 10, 1990. A true and correct copy of the FHA is attached hereto as Exhibit 1. The parties to the FHA were the Tribes, the State of Idaho, the Idaho Water Resource Board, the United States (through the Bureau of Indian Affairs (BIA) and Bureau of Reclamation (USBR)), and the Committee of Nine, which represented the Idaho water users’ interests. The FHA was negotiated, agreed-to, and filed in lieu of federal reserved water right claims. Through the FHA, the parties avoided significant and contentious litigation, and instead a comprehensive settlement of claims and defenses. On May 31, 1991, the FHA was approved by the general membership of the Shoshone-Bannock Tribes.

13. As with all such settlement agreements, the FHA involved compromises on certain claims, including compromises by the Tribes, to reach agreement and achieve the certainty, stability, and savings of time and costs that would have been involved in adjudicating the claims. In exchange for settling its claims, and for the water rights described in the FHA, the Tribes agreed to forego certain surface and groundwater claims altogether.

14. At the time that the FHA was finalized, and in the more than 30 years since, the Tribes and the United States have relied on the settled expectations negotiated through the FHA and resulting the Consent Decree.

15. The actions by the Idaho State legislature at issue in this litigation are thus of great concern to the Tribes. While the Tribes are not aware of any attempt (to date) by the Idaho Water Resources Department to enforce these statutes against any Tribal water rights, the Tribes have an express interest and perspective that is valuable for the Court to consider. In particular, the actions by the Idaho legislature seek in many instances to unwind or reverse the recognition and use of water rights by the United States that were negotiated and agreed-upon through various water rights settlement agreements that were, like the FHA, incorporated into the SRBA decrees.

Pursuant to the provisions of 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated: December 20, 2022



Nathan Small, Chairman
Fort Hall Business Council
Shoshone-Bannock Tribes

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2023, I filed the foregoing document with the Clerk of the Court using this Court's CM/ECF system, which will send a notification to all counsel of record pursuant to Fed. R. Civ. P. 5 and D. Idaho L.R. 5.1(k).

Stephen Bartell
U.S. DEPARTMENT OF JUSTICE
Environment & Natural Resources Division
stephen.bartell@usdoj.gov

Thomas Snodgrass
U.S. DEPARTMENT OF JUSTICE
Environment & Natural Resources Division
thomas.snodgrass@usdoj.gov

William Gerry Myers, III
HOLLAND & HART
wmyers@hollandhart.com

Murray D. Feldman
HOLLAND & HART
mfeldman@hollandhart.com

Alison C. Hunter
HOLLAND & HART
ACHunter@hollandhart.com

Jennifer Najjar
U.S. DEPARTMENT OF JUSTICE
Environment & Natural Resources Division
jennifer.najjar@usdoj.gov

Michael C. Orr
State Attorney General's Office
michael.orr@ag.idaho.gov

Joy M. Vega
Office of the Attorney General
Natural Resources Division
joy.vega@ag.idaho.gov

Shane M. Bell
Office of the Attorney General
Natural Resources Division
shane.bell@ag.idaho.gov

Norman M. Semanko
PARSONS BEHLE & LATIMER
nsemanko@parsonsbehle.com

Ivan L. London
Mountain States Legal Foundation
ilondon@mslegal.com

Jeffrey Neel Candrian
U.S. DEPARTMENT OF JUSTICE
Environment & Natural Resources Division
jeffrey.candrian@usdoj.gov

/s/ Edmund Clay Goodman

Edmund Clay Goodman
Hobbs, Straus, Dean & Walker, LLP

Counsel for Amicus Curiae The Shoshone-Bannock Tribes

EXHIBIT 1

**THE 1990 FORT HALL INDIAN
WATER RIGHTS AGREEMENT**

* * *

By and Between

**THE SHOSHONE-BANNOCK TRIBES
OF THE FORT HALL INDIAN RESERVATION,
THE STATE OF IDAHO, THE UNITED STATES,
and CERTAIN IDAHO WATER USERS**

THE 1990 FORT HALL INDIAN WATER RIGHTS AGREEMENT

TABLE OF CONTENTS

	<u>Page(s)</u>
ARTICLE 1. TITLE.....	1
ARTICLE 2. PURPOSE.....	1
ARTICLE 3. PREAMBLE.....	1-4
ARTICLE 4. DEFINITIONS.....	4-15
ARTICLE 5. PARTIES AND AUTHORITY.....	15-16
ARTICLE 6. TRIBAL WATER RIGHTS FOR PRESENT AND FUTURE USE.....	16-17
ARTICLE 7. LIST OF TRIBAL WATER RIGHTS.....	17-56
ARTICLE 8. ADMINISTRATION OF WATER RIGHTS.....	56-62
ARTICLE 9. INTERGOVERNMENTAL BOARD.....	63
ARTICLE 10. FINALITY OF SETTLEMENT AGREEMENT.....	63-64
ARTICLE 11. DISCLAIMERS AND GENERAL PROVISIONS.....	64-69
ARTICLE 12. PROTECTION OF EXISTING USES.....	69-70
ARTICLE 13. CONTRIBUTIONS TO SETTLEMENT.....	70-71
ARTICLE 14. SUCCESSORS.....	71
ARTICLE 15. ENTIRE AGREEMENT.....	72
ARTICLE 16. EFFECT OF HEADINGS.....	72
ARTICLE 17. MULTIPLE ORIGINALS.....	72
ARTICLE 18. EFFECTIVE DATE.....	73
ATTACHMENT	

**THE 1990
FORT HALL INDIAN
WATER RIGHTS AGREEMENT**

ARTICLES OF AGREEMENT BY AND BETWEEN THE SHOSHONE-BANNOCK TRIBES OF THE FORT HALL INDIAN RESERVATION, THE STATE OF IDAHO, THE UNITED STATES, AND CERTAIN IDAHO WATER USERS.

In settlement of litigation involving claims made by the United States on behalf of the Shoshone-Bannock Tribes to water rights in the Upper Snake River Basin and its tributaries, the parties agree as follows:

ARTICLE 1. TITLE

These Articles of Agreement collectively comprise, and may be cited as, "The 1990 Fort Hall Indian Water Rights Agreement" or the "Agreement."

ARTICLE 2. PURPOSE

All parties to this Agreement seek to secure, and pledge their honor to maintain, peaceful settlements of conflicts over water among the parties in the Snake River Basin in Idaho.

ARTICLE 3. PREAMBLE

- 3.1 The State of Idaho, pursuant to Idaho Code § 42-1406A (Supp. 1989) has commenced in the Fifth Judicial District Court of the State of Idaho in and for the County of Twin Falls a general adjudication of the rights to the use of the water from that portion of the Snake River Basin located within the State of Idaho.
- 3.2 H. Con. Res. 16, 48th Idaho Leg., 1st Sess. (1985) directed the State 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 reserved under the Winters Doctrine within the Snake River Basin in Idaho to avoid litigation.

- 3.3 The Tribes have a long-standing tradition of favoring negotiation as a means of resolving conflicts. Cong. Globe, 40th Cong., 3d Sess., p. 803, col. 1 (February 2, 1869).
- 3.4 The policy of the Congress and the federal Executive Branch is to facilitate negotiations among Indian tribes, states, private water users and federal agencies to avoid litigation. 55 Fed. Reg. 9223 (March 12, 1990).
- 3.5 Executive Order Nos. 85-9 and 87-9 provide that it is in the interest of the State of Idaho to settle through negotiated agreements, if possible, all claims for water rights reserved under federal law. These executive orders further instructed the Idaho Water Resource Board to represent the State and to provide for the effective involvement of interested Idaho water users and other members of the public in the negotiations.
- 3.6 The Fort Hall Business Council requested, by resolution dated July 17, 1985, that the United States, consistent with federal trust responsibilities to the Tribes, assist and participate in the negotiations leading to this Agreement.
- 3.7 The Tribes and the State agreed in a Memorandum of Understanding dated August 30, 1985, to commence good

faith, government-to-government negotiations as early as October 15, 1985. On January 10, 1986, the Tribes, the State and the United States agreed to extend that August 30, 1985 Memorandum of Understanding. The parties subsequently entered into a Technical Studies Agreement establishing a methodology to review the Tribes' reserved water rights claims and to identify matters for further discussion and analysis.

3.8 On October 31, 1985, the Idaho Water Resource Board appointed an Ad Hoc Committee to recommend how best to provide for the effective involvement of interested Idaho water users and other members of the public in the negotiations. That committee submitted its recommendation for review by the Idaho Water Resource Board on December 6, 1985 and for action by negotiators on December 10, 1985. Based upon the recommendation of the committee, the Board designated the Committee of Nine as a party to the negotiations to represent the Idaho water users' interests and established a notice procedure to notify the general public of negotiation meetings. On December 10, 1985 the United States, the Tribes and the State agreed to the Board's proposal providing for open meetings and public participation in the negotiations.

3.9 On May 19, 1987, the Tribes, the State, and the United States, joined by a committee of private water users, executed a Second Memorandum of Understanding, which provided for the continuation of the negotiations.

3.10 This Agreement is the culmination of negotiations undertaken by the parties since 1985.

ARTICLE 4. DEFINITIONS

The following definitions apply for the purposes of this Agreement:

4.1 "Acre foot" or "AF" means the amount of water necessary to cover one acre of land to a depth of one foot and is equivalent to 43,560 cubic feet or 325,851 gallons of water.

4.2 "Acre feet per year" or "AFY" means the number of acre feet of water used from January 1 to December 31.

4.3 "Allotted lands" means lands within or without the exterior boundaries of the Fort Hall Indian Reservation, which were allotted to individual Indians in accordance with applicable Tribal/federal agreement and federal statutes, and which are presently owned by Indians in restricted fee or trust status, and which are located in the counties of Bannock, Bingham, Caribou, and Power. The applicable Tribal/federal agreement and statutes include:

.1 the Agreement of May 14, 1880, ratified by Act of February 23, 1889, ch. 203, 25 Stat. 687; and

.2 the Act of March 3, 1911, ch. 210, 36 Stat. 1058, 1063.

4.4 "American Falls Reservoir" means a water storage facility of the federal Minidoka Project authorized by the Secretary of the Interior under the Reclamation Act of 1902, 32 Stat. 388-390 (April 23, 1904); examined and reported upon by a

Board of Army Engineers and approved by the President on January 5, 1911, in accordance with the Act of June 25, 1910, 36 Stat. 835-836; and initially constructed in 1927 and subsequently replaced under the authority of the Act of December 28, 1973, Pub. L. 93-206, 87 Stat. 904-905.

- 4.5 "Annual diversion volume" means the maximum volume of water in AFY that can be diverted or stored by the holder of a water right.
- 4.6 "Annual volume of consumptive use" means the maximum volume of water in AFY that can be consumptively used by the holder of a water right.
- 4.7 "Basis of right" refers to the legal authority pursuant to which the water right is established or the document by which the right is evidenced.
- 4.8 "Beneficial use" means any use of water for DCMI, irrigation, hydropower generation, recreation, stockwatering, fish propagation and instream flow uses as well as any other uses that provide a benefit to the user of the water.
- 4.9 "Blackfoot Reservoir" means a water storage facility of the Federal Blackfoot Project authorized by the Act of March 1, 1907, ch. 2285, 34 Stat. 1015, 1024; the Act of April 30, 1908, ch. 153, 35 Stat. 70, 78; Act of April 14, 1910, ch. 140, 36 Stat. 269, 274; and the Act of May 24, 1922, ch. 199, 42 Stat. 552, 568.
- 4.10 "Ceded lands" means those lands within the Reservation as originally established under the Second Treaty of Fort

Bridger of July 3, 1868, 15 Stat. 673 and companion executive orders of June 14, 1867, 1 C. Kappler 835-837 (1904), and July 30, 1869, 1 C. Kappler 838-839 (1904) and as fixed by the federal survey of 1873 that were ceded by the Tribes to the United States pursuant to the following Tribal/federal agreements:

- .1 Agreement of May 14, 1880, ratified by the Act of February 23, 1889, ch. 203, 25 Stat. 687;
- .2 Agreement of July 18, 1881, ratified by the Act of July 3, 1882, ch. 268, 22 Stat. 148;
- .3 Agreement of May 27, 1887, ratified by the Act of September 1, 1888, ch. 936, 25 Stat. 452; and
- .4 Agreement of February 5, 1898, ratified by the Act of June 6, 1900, ch. 813, 31 Stat. 692.

4.11 "Committee of Nine" or "Committee of Nine of Water District 01" means the advisory committee of Water District 01.

4.12 "Consumptive use" means the amount of water that does not remain in the water system after use or is not returned to the water system through return flows or seepage, whether or not treatment for purpose of maintaining water quality is required before the water may be returned to the water system, but does not include water lost through evaporation from storage.

4.13 "Cubic feet per second" or "CFS" means a rate of water discharge equivalent to approximately 448.63 gallons per minute.

4.14 "DCMI" means domestic, commercial, municipal and industrial uses excluding hydroelectric generation. Domestic use means the diversion of water by one or more individuals, family units or households for drinking, cooking, laundering, sanitation and other personal comforts and necessities, stockwatering, and for the irrigation of a family lawn, garden or orchard not exceeding one-half acre of area per household. Industrial and commercial use means the use of water for any purpose that benefits an industrial or commercial enterprise. Industrial and commercial use of water include, but are not limited to, agricultural spraying, irrigation of plants in greenhouses, industrial cooling, mining, energy production, commercial recreation, and losses associated with any industrial or commercial operation. Municipal use means the delivery and use of water through an investor-owned, mutually-owned, tribally-owned or publicly-owned water utility or delivery system for all uses usual and ordinary to such systems. Such use includes but is not limited to uses of water for domestic, irrigation of lawns and gardens, commercial, industrial, fire protection, irrigation and other uses in park and recreation facilities, and street washing.

4.15 "Director" means the Director of the Idaho Department of Water Resources or any successor.

4.16 "Diversion" means the removal of water from its natural course or location by means of a ditch, canal, flume,

bypass, pipeline, conduit, well, pump, or other act of man, or the impoundment of water in a reservoir for rediversion.

4.17 "Diversion rate" means the maximum rate in CFS at which water may be diverted at a point of diversion.

4.18 "Fee lands" means lands within the exterior boundaries of the Reservation held in fee with all federal restrictions on alienation removed.

4.19 "Fort Hall Indian Reservation" or "Reservation" means those lands within the boundaries of the Reservation, as originally established under the Second Treaty of Fort Bridger of July 3, 1868, 15 Stat. 673, and companion executive orders of June 14, 1867, 1 C. Kappler 835-837 (1904), and July 30, 1869, 1 C. Kappler 838-839 (1904), as fixed by the federal survey of 1873 that have not been ceded by the Tribes to the United States pursuant to the following Tribal/federal agreements:

- .1 Agreement of May 14, 1880, ratified by the Act of February 23, 1889, ch. 203, 25 Stat. 687.
- .2 Agreement of July 18, 1881, ratified by the Act of July 3, 1882, ch. 268, 22 Stat. 148.
- .3 Agreement of May 27, 1887, ratified by the Act of September 1, 1888, ch. 936, 25 Stat. 452, excepting those lots within the Pocatello Townsite which were not ceded by such agreement.
- .4 Agreement of February 5, 1898, ratified by the Act of June 6, 1900, ch. 813, 31 Stat. 672, excepting Allotment Nos. T-8, 45, 46, 48, 50, 61, and 71 owned

by the Tribes or held in restricted fee or trust status for the Tribes by the United States.

4.20 "Fort Hall Indian Irrigation Project" means the federal project constructed, in part, to provide water for the irrigation of lands on the Reservation. The following federal statutes authorized the Fort Hall Indian Irrigation Project:

.1 Act of August 15, 1894, ch. 290, 28 Stat. 286, 305.

.2 Act of March 1, 1907, ch. 2285, 34 Stat. 1015, 1024.

.3 Act of April 30, 1908, ch. 153, 35 Stat. 70, 78.

.4 Act of April 4, 1910, ch. 140, 36 Stat. 269, 274.

.5 Act of May 24, 1922, ch. 199, 42 Stat. 552, 56.

.6 Act of May 9, 1924, ch. 151, 43 Stat. 117.

.7 Act of June 30, 1948, ch. 767, 62 Stat. 1167.

.8 Act of September 30, 1950, ch. 1114, 64 Stat. 1083.

.9 Act of August 31, 1954, ch. 1159, 68 Stat. 1026.

.10 Act of August 17, 1961, Pub. L. 87-154, 75 Stat. 390.

4.21 "Grays Lake" means the storage facility used to store water for the benefit of the Fort Hall Indian Irrigation Project.

4.22 "Idaho Department of Water Resources" or "IDWR" means the executive agency of the State of Idaho created by Idaho Code § 42-1701 (1977), or any successor agency.

4.23 "Idaho Water Resource Board" or "IWRB" means the Idaho State Water Resource Agency constituted in accordance with Idaho Const. art XV, § 7, or any successor agency.

4.24 "Impairment in the quality of water," applicable only in the context of a change in the water right described in

Article 7.1.1 pursuant to Article 7.6, means a diminishment in the quality of water being diverted for a water right to the extent that it is no longer useful for its intended purpose.

4.25 "Indian" means any person who:

- .1 is a member of a tribe recognized as eligible for special programs and services provided by the United States because of the person's status as an Indian; or
- .2 is recognized as an Indian person under Tribal law; or
- .3 holds or is recognized by the Secretary as eligible to hold restricted trust property on the Reservation.

4.26 "Indian lands" means all lands within the exterior boundaries of the Reservation that are held in trust for the Tribes or owned by Indians and those lands outside the exterior boundaries of the Reservation held in trust by the United States for the Tribes or an enrolled member thereof.

4.27 "Injury to a water right," applicable only in the context of a change of the water right described in Article 7.1.1 pursuant to Article 7.6, means a diminishment in quantity or an impairment in the quality of water available to a senior or a junior water right holder as a consequence of a change, except that no water right holder is required to continue to waste water for the benefit of any other water right holders.

4.28 "Instream flows" means a quantity of water in a stream reach to maintain or to enhance the integrity of an ecosystem.

- 4.29 "Irrigation use" means application of water to the land surface or root zone of the soil for the purpose of producing crops, lawn or landscaping on that land.
- 4.30 "Michaud Contract" means that Memorandum Agreement of April 25, 1957 between the Bureau of Reclamation and the Bureau of Indian Affairs relating to the Water Supply for the Michaud Division of the Fort Hall Indian Reservation.
- 4.31 "Michaud Division" means that division of the Fort Hall Indian Irrigation Project authorized by the Act of August 31, 1954, ch. 1159, 68 Stat. 1026.
- 4.32 "Other rights" means other water rights used on all or a portion of the lands listed as the place of use for the water right described.
- 4.33 "Palisades Reservoir" means a water storage facility of the federal Minidoka Project initially authorized under the provisions of the federal reclamation laws by the presentation to the President and the Congress of the report of December 9, 1941, H.R. Doc. No. 457, 77th Cong., 1st Sess., by the Secretary of the Interior, and reauthorized by section 1 of the Act of September 30, 1950, ch. 1114, 64 Stat. 1083.
- 4.34 "Parties" means the United States, the State of Idaho, the Tribes, and the Committee of Nine of Water District 01.
- 4.35 "Period of use" means the time of the year when water may be used for a particular purpose.
- 4.36 "Person" means an individual, a partnership, a trust, an estate, a corporation, a municipal corporation, the state

of Idaho or any political subdivision or instrumentality thereof, the United States or any political subdivision or instrumentality thereof, an Indian tribe or political subdivision or instrumentality thereof, or any other public or private entity.

- 4.37 "Place of use" means the location where water is used.
- 4.38 "Point of diversion" or "POD" means any location at which water is diverted from the water system. A numeral to the right of the legal description indicates the number of existing points of diversion within a tract.
- 4.39 "Point of injection" means any location at which water that has been diverted from the water system is placed back into the water system. A numeral to the right of the legal description indicates the number of existing points of injection within a tract.
- 4.40 "Point of rediversion" means the location at which water that has been diverted from the water system and then placed back into the water system is again diverted from the water system. A numeral to the right of the legal description indicates the number of existing points of rediversion within a tract.
- 4.41 "Priority date" means the priority date assigned to the water right.
- 4.42 "Purpose of use" means the nature of use of the water right.
- 4.43 "Rent" means a temporary legal conveyance by the Tribes of the right to use storage water pursuant to Idaho Code

§ 42-1761 for a fixed period of time during which ownership of the federal contract storage right is retained for the benefit of the Tribes.

- 4.44 "Reservation Watermaster" means the Tribal officer or any successor designated to administer the Tribal Water Code.
- 4.45 "Right number" means the number assigned to each decreed water right for purposes of identification. The first two numerals of the right number indicate the department's hydrologic basin number assigned by IDWR.
- 4.46 "Secretary" means the Secretary of the United States Department of the Interior or a duly authorized representative thereof.
- 4.47 "Shoshone-Bannock Water Bank" means the Tribal water bank established pursuant to Idaho Code § 42-1761 to provide for rental of stored water outside the Reservation.
- 4.48 "Snake River Basin Adjudication" or "SRBA" means Civil Case No. 39576 filed in the Fifth Judicial District Court of the State of Idaho in and for Twin Falls County on June 17, 1987 entitled In Re the General Adjudication of Rights to the Use of Water from the Snake River Basin Water System, which was commenced pursuant to Idaho Code § 42-1406A (Supp. 1989).
- 4.49 "Snake River Watermaster" means the Watermaster of Water District 01 or any successor.
- 4.50 "Source" means the named or described source of water within the water system.
- 4.51 "State" means the State of Idaho.

- 4.52 "Stockwater" means the use of water solely for livestock or wildlife consumption including associated losses.
- 4.53 "Transfer" means any change in a point of diversion, place of use, period of use or purpose of use for a water right.
- 4.54 "Tribal water right(s)" means those water rights confirmed and recognized in this Agreement in Articles 6 and 7 as rights held in trust for the Tribes by the United States, including those rights so held for the benefit of individual Indians on Indian lands.
- 4.55 "Tribes" or "Tribal" means the Shoshone-Bannock Tribes of the Fort Hall Indian 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.
- 4.56 "United States" means the United States of America.
- 4.57 "Upper Snake River Basin" means that portion of the Snake River Basin upstream from the Hells Canyon Dam, the lowest of the three dams authorized as FERC Project No. 1971.
- 4.58 "Water District 01" means the instrumentality created by the Director of the IDWR pursuant to Idaho Code § 42-604 (1977).
- 4.59 "Walton Right" means a water right claim asserted by a non-Indian based upon the decision in Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981).
- 4.60 "Water system" means all rivers, streams, lakes, springs, groundwater or other water sources within the Snake River Basin within the State of Idaho.

4.61 "Winters Doctrine" means the federal legal principles announced by the United States Supreme Court in Winters v. United States, 207 U.S. 564 (1908).

ARTICLE 5. PARTIES AND AUTHORITY

5.1 The Governor has authority to execute this Agreement pursuant to Idaho Const. art. IV, § 5 and Idaho Code § 67-802 (Supp. 1989).

5.2 The Attorney General, or any duly designated official of the Office of the Idaho Attorney General, has authority to execute this Agreement pursuant to his authority to settle litigation as provided for in Idaho Const. art. IV, § 1, and Idaho Code § 64-1401 (Supp. 1989).

5.3 The Idaho Water Resource Board has authority to execute this Agreement pursuant to Idaho Code § 1734(3) (Supp. 1989) and Executive Order Nos. 85-9 and 87-9.

5.4 The Fort Hall Business Council has authority to execute this Agreement on behalf of the Tribes pursuant to the following:

.1 The sovereign powers reserved by and for the Tribes in the Second Treaty of Fort Bridger of July 3, 1868, 15 Stat. 673 as well as subsequent Tribal/federal agreements; and

.2 Article VI, Section 1(a) of the Tribes' 1936 Constitution and Bylaws, as amended.

5.5 The Secretary has authority to execute this Agreement on behalf of the United States Department of the Interior and in his trust capacity for the Tribes pursuant to Article I,

§ 8, Clause 3 and Article II, § 2, Clause 2 of the Constitution of the United States, as well as 25 U.S.C. §§ 2 and 9 (1982) and 43 U.S.C. § 1457 (1982).

- 5.6 The United States Attorney General, or any duly designated official of the United States Department of Justice, has authority to execute this Agreement on behalf of the United States pursuant to the authority to settle litigation contained in 28 U.S.C. §§ 516-517 (1982).
- 5.7 The Committee of Nine executes this Agreement as an advisory committee of Water District 01.
- 5.8 Each signer for the United States, Tribes, and State, by executing this Agreement, represents and states that the signer has taken or will take the necessary administrative and legal action to procure the actual authority to bind the signer's principal.

ARTICLE 6. TRIBAL WATER RIGHTS FOR PRESENT AND FUTURE USE

- 6.1 The basis for the rights to use waters arising on, under, flowing across, adjacent to, or otherwise appurtenant to the Reservation to satisfy the purposes of the Reservation as set forth in the Second Treaty of Fort Bridger of July 3, 1868 and companion executive orders of June 14, 1867 and July 30, 1869, is the Winters Doctrine. The basis for these rights is reaffirmed in the following acts and agreements between the Tribes and the United States:

- .1 Agreement of May 14, 1880, ratified by the Act of February 23, 1889, ch. 203, 25 Stat. 687.

- .2 Agreement of July 18, 1881, ratified by the Act of July 3, 1882, ch. 268, 22 Stat. 148.
- .3 Agreement of May 27, 1887, ratified by the Act of September 1, 1888, ch. 936, 25 Stat. 452.
- .4 Agreement of February 5, 1898, ratified by the Act of June 6, 1900, ch. 813, 31 Stat. 692.
- .5 Act of May 9, 1924, ch. 151, 43 Stat. 117.

6.2 The parties hereto find and agree that the Tribal water rights for the present and future uses in the Upper Snake River Basin amount to a right to divert up to 581,031 AFY from the Snake River Basin for present and future irrigation, DCMI, instream flow, hydropower and stock water uses as set forth in Article 7 of this Agreement. Nonuse of all or any part of the Tribal water rights shall not be construed as a relinquishment, forfeiture or abandonment of the rights.

ARTICLE 7. LIST OF TRIBAL WATER RIGHTS

The parties agree that water supplied from the following sources shall constitute the Tribal water rights:

7.1 Surface water use rights:

- .1 Right No. A01-10223
 - .i Source: Snake River/Sand Creek
 - .ii Annual Diversion Volume: 100,000 AFY increasing to 115,000 AFY as (1) future reservation lands are irrigated from this source, or (2) as corresponding amounts of the water rights for the ceded lands of the Fort

Hall Indian Irrigation Project are relinquished by the United States.

.iii Diversion Rate: 390.00 CFS increasing to 470.00 CFS at the same relative rate as the volume in ii. above.

.iv Annual Volume of Consumptive Use: 60,986 AFY

.v Priority Date: June 14, 1867

.vi Points of Diversion:

SESWNE Sec 31 Twp 1N Rge 37E BM

(Snake River into Reservation Canal)

NENWNW Sec 7 Twp 2S Rge 37E BM

(Sand Creek into Reservation Canal)

Points of Injection:

NESWSE Sec 24 Twp 2S Rge 36E BM

(Reservation Canal into Blackfoot River)

Points of Rediversion:

NENENE Sec 13 Twp 3S Rge 35E BM

(Blackfoot River into Fort Hall Main Canal)

NWNENW Sec 14 Twp 3S Rge 35E BM

(Blackfoot River into North Canal)

Future points of diversion may be developed in accordance with Articles 7.6, 7.7 and 7.8.

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 14,687 present and 8,672 future acres for a total of 23,359 acres.

.ix Basis of Right: Winters Doctrine

.x Remarks:

- .a The rate of diversion for this water right shall be measured at the head of the Reservation Canal located in SESWNE Sec 31 Twp 1N Rge 37E B.M.
- .b The volume of diversion for this water right shall be measured at the Drop located in SENWSE Sec 13 Twp 2S Rge 36E BM downstream from the point at which Sand Creek empties into the Reservation Canal.
- .c This right combined with the other rights described in Articles 7.1.18, 7.1.19 and 7.1.20 provide the water supply for up to 53,828 acres from the combined water sources but none of the limitations of diversion rate or volume shall be exceeded for this right in providing the water supply.
- .d The available inflow to the Reservation Canal upstream from the Drop, including Sand Creek, shall be counted as part of this water right up to the demand of the North and Main Canals. The parties recognize that the water flow available from Sand Creek fluctuates to such extremes that only approximately 85

percent (85%) of the flows from Sand Creek needed to meet the demand of the North and Main Canals would normally be useable as a part of this water right with the Equalizing Reservoir rehabilitated and maintained at 5,000 acre-feet active capacity. The cost of rehabilitating and maintaining the Equalizing Reservoir are estimated at between \$5 and \$15 million initially and \$150,000 per year based upon 1989 costs. To avoid these great costs, the parties agree that the portion of Sand Creek that was used with the control afforded by the Equalizing Reservoir under conditions existing in 1989 shall continue to be used when the Snake River is under regulation by the Snake River Watermaster and will be considered part of this water right. When the Snake River is under regulation by the Snake River Watermaster fifteen percent (15%) of the computed Sand Creek flows, when returned to the Snake River through the Blackfoot River because of lack of control with the present Equalizing Reservoir, shall be considered as natural flow credited to

downstream water users and for which no exchange of storage will be made under this Agreement. All of the remaining Sand Creek water not diverted through the Main and North Canals because of the physical limitations of the Equalizing Reservoir, in excess of fifteen percent (15%) up to 50,000 AFY as determined by gaging, when the Snake River is under regulation by the Snake River Watermaster shall be delivered to the North Side Canal Company in exchange for an equal amount of storage water from Palisades or Jackson Lake Reservoirs. The actual storage water from Palisades or Jackson Lake Reservoirs will be released to meet the Snake River diversion requirements of the Tribes that would have been met by Sand Creek. This water shall be deemed the first storage water released from the American Falls Reservoir for the North Side Canal Company.

.2 Right No. A27-11373

.i Source: Ross Fork Creek/Ross Fork Basin
groundwater

.ii Annual Diversion Volume: 5,000 AFY

- .iii Diversion Rate: 29.07 CFS
- .iv Annual Volume of Consumptive Use: 3,320 AFY
- .v Priority Date: June 14, 1867
- .vi Existing Points of Diversion:
 - SENWNE Sec 4, SESENE Sec 10, SENWSW Sec 17, SWSESW Sec 21, NESWNW Sec 34 all in Twp 5S Rge 36E BM
 - NWNWSE Sec 31 (2 POD), SWSWSE Sec 33 all in Twp 4S Rge 36E BM
 - NENENE Sec 36 Twp 4S Rge 35E BMFuture Points of Diversion may be developed as needed within the Ross Fork Creek basin to utilize this water right within the Ross Fork Creek basin.
- .vii Purpose and Period of Use:
 - Irrigation 3/15 - 11/15
- .viii Place of Use: 1,503 present and future acres.
- .ix Basis of Right: Winters Doctrine
- .x Remarks:
 - .a The Tribes shall have the option of using surface water or groundwater diverted within the Ross Fork Creek basin to satisfy this right, in whole or in part, provided that any diversions of surface water or groundwater by the Tribes in excess of 5,000 AFY from the Ross Fork Creek Basin shall be charged against the

Tribal groundwater right set forth in Article 7.2.1 of this Agreement.

.3 Right No. A27-11374

.i Source: Lincoln Creek/Lincoln Creek Basin groundwater

.ii Annual Diversion Volume: 5,700 AFY

.iii Diversion Rate: 33.00 CFS

.iv Annual Volume of Consumptive Use: 3,768 AFY

.v Priority Date: June 14, 1867

.vi Existing Points of Diversion:

NENESE Sec 25 Twp 3S Rge 36E BM

NENWSE Sec 31 Twp 3S Rge 36E BM

Future points of diversion may be developed as needed within the Lincoln Creek Basin to utilize this water right within the Lincoln Creek drainage basin.

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 1,701 present and future acres.

.ix Basis of Right: Winters Doctrine

.x Remarks:

.a The Tribes shall have the option of using surface water or groundwater diverted within the Lincoln Creek basin to satisfy this right, in whole or in part, provided that any diversions of surface water or

groundwater by the Tribes in excess of 5,700 AFY from the Lincoln Creek basin shall be charged against the Tribal groundwater right set forth in Article 7.2.1 of this Agreement.

- .4 Right No. 29-00466
 - .i Source: Bannock Creek
 - .ii Annual Diversion Volume: 3,095 AFY
 - .iii Diversion Rate: 16.25 CFS
 - .iv Annual Volume of Consumptive Use: 1,842 AFY
 - .v Priority Date: June 14, 1867
 - .vi Existing Points of Diversion:
 - NENWSE Sec 32 Twp 7S Rge 33E BM
 - SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in Twp 8S Rge 33E BM
 - NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all in Twp 9S Rge 33E BM
 - .vii Purpose and Period of Use:
 - Irrigation 3/15 - 11/15
 - .viii Place of Use: 774 present and future acres.
 - .ix Basis of Right: The basis of the right is the Winters Doctrine with the relative share and priorities of the water allocations determined by the Bannock Creek Decree [United States v. Daniels (D. Idaho April 9, 1907)].
 - .x Remarks:

.5 Right No. 29-00467

- .i Source: Bannock Creek, West Fork Bannock Creek
- .ii Annual Diversion Volume: 629 AFY
- .iii Diversion Rate: 3.30 CFS
- .iv Annual Volume of Consumptive Use: 374 AFY
- .v Priority Date: April 1, 1889
- .vi Existing Points of Diversion:
NENWSE Sec 32 Twp 7S Rge 33E BM
SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in
Twp 8S Rge 33E BM
NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all
in Twp 9S Rge 33E BM
- .vii Purpose and Period of Use:
Irrigation 3/15 - 11/15
- .viii Place of Use: 157 present and future acres.
- .ix Basis of Right: The basis of the right is the Winters Doctrine with the relative share and priorities of the water allocations determined by the Bannock Creek Decree [United States v. Daniels (D. Idaho April 9, 1907)].
- .x Remarks:

.6 Right No. 29-00468

- .i Source: Rattlesnake Creek
- .ii Annual Diversion Volume: 571 AFY

- .iii Diversion Rate: 3.00 CFS
- .iv Annual Volume of Consumptive Use: 340 AFY
- .v Priority Date: April 1, 1892
- .vi Existing Points of Diversion:
NENWSE Sec 32 Twp 7S Rge 33E BM
SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in
Twp 8S Rge 33E BM
NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all
in Twp 9S Rge 33E BM
- .vii Purpose and Period of Use:
Irrigation 3/15 - 11/15
- .viii Place of Use: 143 present and future acres.
- .ix Basis of Right: The basis of the right is the
Winters Doctrine with the relative share and
priorities of the water allocations determined
by the Bannock Creek Decree [United States v.
Daniels (D. Idaho April 9, 1907)].
- .x Remarks:

.7 Right No. 29-00469

- .i Source: West Fork Bannock Creek
- .ii Annual Diversion Volume: 190 AFY
- .iii Diversion Rate: 1.00 CFS
- .iv Annual Volume of Consumptive Use: 113 AFY
- .v Priority Date: May 1, 1894
- .vi Existing Points of Diversion:
NENWSE Sec 32 Twp 7S Rge 33E BM

SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in
Twp 8S Rge 33E BM

NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all
in Twp 9S Rge 33E BM

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 48 present and future acres.

.ix Basis of Right: The basis of the right is the
Winters Doctrine with the relative share and
priorities of the water allocations determined
by the Bannock Creek Decree [United States v.
Daniels (D. Idaho April 9, 1907)].

.x Remarks:

.8 Right No. 29-00470

.i Source: West Fork Bannock Creek

.ii Annual Diversion Volume: 248 AFY

.iii Diversion Rate: 1.30 CFS

.iv Annual Volume of Consumptive Use: 147 AFY

.v Priority Date: April 1, 1894

.vi Existing Points of Diversion:

NENWSE Sec 32 Twp 7S Rge 33E BM

SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in
Twp 8S Rge 33E BM

NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all
in Twp 9S Rge 33E BM

- .vii Purpose and Period of Use:
Irrigation 3/15 - 11/15
- .viii Place of Use: 62 present and future acres.
- .ix Basis of Right: The basis of the right is the Winters Doctrine with the relative share and priorities of the water allocations determined by the Bannock Creek Decree [United States v. Daniels (D. Idaho April 9, 1907)].
- .x Remarks:

.9 Right No. 29-00471

- .i Source: Bannock Creek
- .ii Annual Diversion Volume: 248 AFY
- .iii Diversion Rate: 1.30 CFS
- .iv Annual Volume of Consumptive Use: 147 AFY
- .v Priority Date: April 1, 1894
- .vi Existing Points of Diversion:
NENWSE Sec 32 Twp 7S Rge 33E BM
SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in
Twp 8S Rge 33E BM
NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all
in Twp 9S Rge 33E BM
- .vii Purpose and Period of Use:
Irrigation 3/15 - 11/15
- .viii Place of Use: 62 present and future acres.
- .ix Basis of Right: The basis of the right is the Winters Doctrine with the relative share and

priorities of the water allocations determined by the Bannock Creek Decree [United States v. Daniels (D. Idaho April 9, 1907)].

.x Remarks:

.10 Right No. 29-00472

.i Source: West Fork Bannock Creek

.ii Annual Diversion Volume: 190 AFY

.iii Diversion Rate: 1.00 CFS

.iv Annual Volume of Consumptive Use: 113 AFY

.v Priority Date: April 1, 1898

.vi Existing Points of Diversion:

NENWSE Sec 32 Twp 7S Rge 33E BM

SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in Twp 8S Rge 33E BM

NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all in Twp 9S Rge 33E BM

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 48 present and future acres.

.ix Basis of Right: The basis of the right is the Winters Doctrine with the relative share and priorities of the water allocations determined by the Bannock Creek Decree [United States v. Daniels (D. Idaho April 9, 1907)].

.x Remarks:

.11 Right No. 29-00473

- .i Source: West Fork Bannock Creek
- .ii Annual Diversion Volume: 190 AFY
- .iii Diversion Rate: 1.00 CFS
- .iv Annual Volume of Consumptive Use: 113 AFY
- .v Priority Date: April 1, 1898
- .vi Existing Points of Diversion:
NENWSE Sec 32 Twp 7S Rge 33E BM
SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in
Twp 8S Rge 33E BM
NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all
in Twp 9S Rge 33E BM
- .vii Purpose and Period of Use:
Irrigation 3/15 - 11/15
- .viii Place of Use: 48 present and future acres.
- .ix Basis of Right: The basis of the right is the
Winters Doctrine with the relative share and
priorities of the water allocations determined
by the Bannock Creek Decree [United States v.
Daniels (D. Idaho April 9, 1907)].
- .x Remarks:

.12 Right No. 29-00474

- .i Source: West Fork Bannock Creek
- .ii Annual Diversion Volume: 190 AFY
- .iii Diversion Rate: 1.00 CFS
- .iv Annual Volume of Consumptive Use: 113 AFY

- .v Priority Date: April 1, 1901
- .vi Existing Points of Diversion:
NENWSE Sec 32 Twp 7S Rge 33E BM
SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in
Twp 8S Rge 33E BM
NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all
in Twp 9S Rge 33E BM
- .vii Purpose and Period of Use:
Irrigation 3/15 - 11/15
- .viii Place of Use: 48 present and future acres.
- .ix Basis of Right: The basis of the right is the
Winters Doctrine with the relative share and
priorities of the water allocations determined
by the Bannock Creek Decree [United States v.
Daniels (D. Idaho April 9, 1907)].
- .x Remarks:

.13 Right No. A29-12049

- .i Source: Bannock Creek
- .ii Annual Diversion Volume: 18,833 AFY
- .iii Diversion Rate: 98.87 CFS
- .iv Annual Volume of Consumptive Use: 11,205 AFY
- .v Priority Date: June 14, 1867
- .vi Existing Points of Diversion:
NENWSE Sec 32 Twp 7S Rge 33E BM
SWSWSE Sec 21, NESWNW Sec 25 (2 POD) all in
Twp 8S Rge 33E BM

NWSENE Sec 9, SWNESW Sec 22, SENESW Sec 27 all
in Twp 9S Rge 33E BM

NESWSE Sec 6 Twp 7S Rge 33E BM

(3 - 20 HP pumps for Michaud Project)

Future Points of Diversion may be developed
within the Bannock Creek basin to utilize this
water right within the Bannock Creek drainage
basin.

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 4,708 present and future acres.

.ix Basis of Right: Winters Doctrine

.x Remarks:

.a The Tribes and the United States agree to
exercise this right in a manner that will
ensure that persons with water rights
decreed in the Bannock Creek Decree
[United States v. Daniels (D. Idaho
April 9, 1907)] and that are confirmed in
the SRBA continue to receive their full
legal entitlement.

.14 Right No. A29-12050

.i Source: Portneuf River/Jeff Cabin Creek

.ii Annual Diversion Volume: 970 AFY

.iii Diversion Rate: 9.70 CFS

.iv Annual Volume of Consumptive Use: 727.50 AFY

- .v Priority Date: June 14, 1867
- .vi Points of Diversion:
Future Points of Diversion may be developed within the Portneuf River basin upstream from the point the river enters the Portneuf Reservoir in Sec 11 Twp 6S Rge 38E BM for use within the Portneuf River basin.
- .vii Purpose and Period of Use:
Irrigation 4/1 - 11/1
- .viii Place of Use: 485 present and future acres.
- .ix Basis of Right: Winters Doctrine
- .x Remarks:

.15 Right No. 29-00231

- .i Source: Toponce Creek
- .ii Annual Diversion Volume: 259.3 AFY
- .iii Diversion Rate: 1.59 CFS
- .iv Annual Volume of Consumptive Use: 154.3 AFY
- .v Priority Date: February 16, 1869
- .vi Points of Diversion: Toponce Creek
- .vii Purpose and Period of Use:
Irrigation 1/1 - 12/31
- .viii Place of Use: Allotment 61 (NESW, SENW, Sec 35 Twp 6S Rge 38E) for 79.53 acres.
- .ix Basis of Right: The Winters Doctrine per the Memorandum Decision in United States v. Hibner, 27 F.2d 909 (D. Idaho, E.D. 1928) and

the decree of the United States District Court, Eastern Division, dated April 8, 1929.

.x Remarks:

.16 Right No. 29-00238

- .i Source: Toponce Creek
- .ii Annual Diversion Volume: 282.5 AFY
- .iii Diversion Rate: 1.733 CFS
- .iv Annual Volume of Consumptive Use: 168.14 AFY
- .v Priority Date: February 16, 1869
- .vi Points of Diversion: Toponce Creek
- .vii Purpose and Period of Use:
Irrigation 1/1 - 12/31
- .viii Place of Use: Allotment 71 (SENW, SWNE, Sec 36 Twp 6S Rge 38E) for 86.67 acres.
- .ix Basis of Right: The Winters Doctrine per the Memorandum Decision in United States v. Hibner, 27 F.2d 909 (D. Idaho, E.D. 1928) and the decree of the United States District Court, Eastern Division, dated April 8, 1929.

.x Remarks:

.17 Right No. A29-12051

- .i Source: Mink Creek
- .ii Annual Diversion Volume: 104.3 AFY
- .iii Diversion Rate: 0.75 CFS
- .iv Annual Volume of Consumptive Use: 62.1 AFY

- .v Priority Date: February 26, 1869
 - .vi Points of Diversion: SWNW Sec 21 Twp 7S Rge 35E BM
 - .vii Purpose and Period of Use:
Irrigation 3/15 - 11/15
 - .viii Place of Use: Allotment T-8 (SWNW Sec 21 Twp 7S Rge 35E BM for 31.75 acres)
 - .ix Basis of Right: The Winters Doctrine per decree of District Court of the Fifth Judicial District Court of the State of Idaho, in and for the County of Bannock dated June 5, 1926, in Smith v. City of Pocatello, Case No. 6669.
 - .x Remarks:
- .18 Right No. A27-11375
- .i Source: Blackfoot River
 - .ii Annual Diversion Volume: 150,000 AFY
 - .iii Diversion Rate: 1380 CFS
 - .iv Annual Volume of Consumptive Use: 79,546 AFY
 - .v Priority Date: June 14, 1867
 - .vi Points of Diversion:
SENWNW Sec 7 Twp 2S Rge 38E BM
(Blackfoot River into Little Indian Canal)
NENENE Sec 13 Twp 3S Rge 35E BM
(Blackfoot River into Fort Hall Main Canal)
NWNENW Sec 14 Twp 3S Rge 35E BM
(Blackfoot River into North Canal)

SWSESW Sec. 3 Twp 7S Rge 32E BM
SENWSE Sec. 3 Twp 7S Rge 32E BM
NWNWSW Sec. 2 Twp 7S Rge 32E BM
NESENW Sec. 2 Twp 7S Rge 32E BM
NWNENE Sec. 1 Twp 7S Rge 32E BM
SWNWNW Sec. 6 Twp 7S Rge 33E BM
NESESW Sec. 6 Twp 7S Rge 33E BM
NESESW Sec. 6 Twp 7S Rge 33E BM
SWSWSW Sec. 30 Twp 6S Rge 33E BM

Future Points of Diversion may be developed to divert water from (1) anywhere on the Blackfoot River or (2) ground water within the Reservation as described in Remarks below.

- .vii Purpose and Period of Use:
Irrigation 3/15 - 11/15
- .viii Place of Use: 30,469 present and future acres.
- .ix Basis of Right: Winters Doctrine
- .x Remarks:
 - .a If the natural flow of the Blackfoot River is not sufficient to satisfy this right and other rights to divert Blackfoot River natural flow pursuant to state law, the Tribes may satisfy this Winters right by using the other rights described in Articles 7.1.19 and 7.1.20, provided that the combined use in

satisfaction of this Winters right shall not exceed 150,000 AFY.

- .b If the diversions under this right exceeds 150,000 AFY, the amount in excess of 150,000 AFY shall be charged against the Tribal water right in Article 7.1.1.
- .c This right combined with other rights described in Articles 7.1.1, 7.1.19, and 7.1.20 can be used to irrigate up to 53,828 present and future acres from the combined water sources.
- .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 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. These state created water rights are estimated to divert not more than 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.

.e The Tribes and the United States agree to exercise this right in a manner that will not impair the project entitlements of the Fort Hall Indian Irrigation Project water users.

.f If the water supplied under this right and the other rights described in Articles 7.1.19 and 7.1.20 does not provide 150,000 AFY under the terms of this Agreement, the Tribes may divert groundwater within the Reservation under this right, exclusive of the water rights described in Article 7.2, such that the combined water supply from the other rights described in Articles 7.1.19 and 7.1.20 and surface and groundwater under this right yields 150,000 AFY.

.19 Right No. A27-02007

.i Source: Blackfoot River

.ii Annual Diversion Volume: 348,000 AFY

.iii Diversion Rate: Not limited

- .iv Annual Volume of Consumptive Use:
Included in the other rights described in
Articles 7.1.1 and 7.1.18.
- .v Priority Date: September 3, 1907
- .vi Points of Diversion:
NWNE Sec 12 Twp 5S Rge 40E BM (Blackfoot River
into Blackfoot Reservoir)
Points of Rediversion:
SENWNW Sec 7 Twp 2S Rge 38E BM
(Blackfoot River into Little Indian Canal)
NENENE Sec 13 Twp 3S Rge 35E BM
(Blackfoot River into Fort Hall Main Canal)
NWNENW Sec 14 Twp 3S Rge 35E BM
(Blackfoot River into North Canal)
- .vii Purposes and Periods of Use:
Irrigation from Storage 3/15 - 11/15
348,000 AFY
Storage for Irrigation 1/1 - 12/31
348,000 AFY
- .viii Place of Use: 30,469 present and future
acres.
- .ix Basis of Right: License acquired pursuant to
Fort Hall Indian Irrigation Project Act.
- .x Remarks:
.a The rediversion from storage under this
right and the other right described in
Article 7.1.20 may be used to satisfy the

Blackfoot River natural flow to meet but not exceed the 150,000 AFY Winters entitlement under the water right described in Article 7.1.18. The Tribes may use water from storage under this right in excess of the amount needed to satisfy the Winters entitlement under Article 7.1.18; provided that uses in excess of that amount necessary to satisfy the 150,000 AFY Winters entitlement described in Article 7.1.18 shall be charged against the Tribal water right described in Article 7.1.1.

- .b This right combined with other rights described in Articles 7.1.1, 7.1.18, and 7.1.20 can be used to irrigate up to 53,828 present and future acres from the combined water sources.
- .c The Tribes and the United States agree to exercise this right in a manner that will not impair the project entitlements of the Fort Hall Indian Irrigation Project water users.

.20 Right No. A25-02160

.i Source: Grays Lake

.ii Annual Diversion Volume: 100,000 AFY

- .iii Diversion Rate: Not limited
- .iv Annual Volume of Consumptive Use: Included in the other rights described in Articles 7.1.1 and 7.1.18.
- .v Priority Date: August 23, 1919
- .vi Points of Diversion:
SWSWSW Sec 1 Twp 5S Rge 42E BM
(Grays Lake/Clarks Cut Canal)
Points of Rediversion:
NWNE Sec 12 Twp 5S Rge 40E BM (Blackfoot Reservoir)
SENWNW Sec 7 Twp 2S Rge 38E BM
(Blackfoot River into Little Indian Canal)
NENENE Sec 13 Twp 3S Rge 35E BM
(Blackfoot River into Fort Hall Main Canal)
NWNENW Sec 14 Twp 3S Rge 35E BM
(Blackfoot River into North Canal)
- .vii Purposes and Periods of Use:
Irrigation from Storage 3/15 - 11/15
100,000 AFY
Storage for Irrigation 1/1 - 12/31
100,000 AFY
- .viii Place of Use: 30,469 present and future acres.
- .ix Basis of Right: Permit numbers 14247 and R-161 acquired pursuant to the Fort Hall Indian Irrigation Project Act

.x Remarks:

- .a The rediversion from storage under this right and the other right described in Article 7.1.19 may be used to satisfy the Blackfoot River natural flow to meet but not exceed the 150,000 AFY Winters entitlement under the water right described in Article 7.1.18. The Tribes may use water from storage under this right in excess of the amount needed to satisfy the Winters entitlement under Article 7.1.18; provided that uses in excess of that amount necessary to satisfy the 150,000 AFY Winters entitlement described in Article 7.1.18 shall be charged against the Tribal water right described in Article 7.1.1.
- .b This right combined with other rights described in Articles 7.1.1, 7.1.18, and 7.1.19 may be used to irrigate up to 53,828 present and future acres from the combined water sources.
- .c The Tribes and the United States agree to exercise this right in a manner that will not impair the project entitlements of the Fort Hall Indian Irrigation Project water users.

7.2 Groundwater use rights:

.1 Right No. A27-11376

- .i Source: Groundwater within the Reservation
- .ii Annual Diversion Volume: 125,000 AFY
- .iii Diversion Rate: 813.40 CFS
- .iv Annual Volume of Consumptive Use: 93,615 AFY
- .v Priority Date: June 14, 1867
- .vi Existing Points of Diversion:

SWSESW Sec. 3 Twp 7S Rge 32E BM

SENWSE Sec. 3 Twp 7S Rge 32E BM

NWNWSW Sec. 2 Twp 7S Rge 32E BM

NESENW Sec. 2 Twp 7S Rge 32E BM

NWNENE Sec. 1 Twp 7S Rge 32E BM

SWNWNW Sec. 6 Twp 7S Rge 33E BM

NESESW Sec. 6 Twp 7S Rge 33E BM

NESESW Sec. 6 Twp 7S Rge 33E BM

SWSWSW Sec. 30 Twp 6S Rge 33E BM

Additional existing points of diversion will be identified by February 1, 1991.

Future points of diversion may be developed to utilize this water right on any Indian lands.

.vii Purposes and Periods of Use:

Irrigation 3/15 - 11/15 115,000 AFY

DCMI 1/1 - 12/31 10,000 AFY

- .viii Place of Use: 42,592 present and future acres. Present and future DCMI uses on any Indian lands.
- .ix Basis of Right: Winters Doctrine
- .x Remarks:
 - .a If the Tribes' combined surface water and groundwater diversions from the Ross Fork Creek basin exceed 5,000 AFY, or the Tribes' combined surface water and groundwater diversions from the Lincoln Creek basin exceed 5,700 AFY, such excesses shall be charged against this Tribal groundwater right.
 - .b The nine wells used to supplement the surface water portion of the Michaud Division divert water included in this Tribal water right.
 - .c Lot Nos. 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17 of Block No. 191; Lot No. 1 of Block 192; Lot Nos. 1, 2, 3, 4, 5, 6, 7, and 8 of Block No. 196; Lot Nos. 19 and 20 of Block No. 341; Lot No. 5 of Block No. 593; and Lot No. 7 of Block No. 599 within the City of Pocatello remain Indian lands and may utilize water under this water right.

.d Allotment Nos. 45, 46, 48, 50, 60 and 71 within the Portneuf River basin may utilize water under this right.

.2 Right No. A29-12052

.i Source: Bannock Creek basin groundwater

.ii Annual Diversion Volume: 23,500 AFY

.iii Diversion Rate: 154.93 CFS

.iv Annual Volume of Consumptive Use: 17,843 AFY

.v Priority Date: June 14, 1867

.vi Points of Diversion:

Future points of diversion may be developed as needed within the Bannock Creek basin to utilize this water right within the Bannock Creek drainage basin.

.vii Purpose and Period of Use:

Irrigation 3/15 - 11/15

.viii Place of Use: 8,704 future acres.

.ix Basis of Right: Winters Doctrine

.x Remarks:

.a The Tribes have the right to the annual yield of the Bannock Creek basin up to a combined surface and groundwater diversion of 48,500 AFY.

.b If the Tribes' combined surface and groundwater diversion from this basin exceeds 48,500 AFY, such excess shall be

charged against the Tribal groundwater right in Article 7.2.1.

- .c The Tribes and United States agree to exercise this water right in a manner that ensures persons diverting ground water from the Bannock Creek drainage basin 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 the 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 2,400 AFY of water from the ground water of the Bannock Creek drainage basin. In the event this estimate of the amount of existing diversions under state water rights is changed 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.

7.3 Federal contract storage water rights held in trust by the United States for the benefit of the Tribes:

.1 The United States holds in trust federal contract storage rights for water that accrues to two and eight thousand and fifty nine ten thousandths percent (2.8059%) of the storage space in American Falls Reservoir and six and nine thousand nine hundred and seventeen ten thousandths per cent (6.9917%) of the storage space in Palisades Reservoir for the benefit of the Tribes and 187.7 acres of other lands served by the Michaud Division of the Fort Hall Indian Irrigation Project. These federal contract storage rights are presently equivalent to the following storage space in American Falls and Palisades Reservoirs:

American Falls Reservoir	46,931 AF
Palisades Reservoir	83,900 AF

.2 The federal contract storage rights described in Article 7.3.1 may be used to irrigate up to 33,938 present and future acres of Indian lands with an annual volume of consumptive use not to exceed 79,542 AFY. Indian lands in excess of 33,938 acres may be irrigated with the water that accrues to the federal contract storage rights described in Article 7.3.1 if no other water rights are injured thereby.

.3 The Tribes and the Secretary agree to continue to exchange storage water from the federal contract storage rights described in Article 7.3.1 for water diverted from the Portneuf River as provided for in

Article 8 of the Michaud Contract. The Tribes may identify the reservoir storage space to be used to provide storage water for this exchange. In the event no specific storage is identified, water from the Palisades storage space shall be the first water to be used for this exchange.

.4 The Tribes shall have the right to create a Shoshone-Bannock Water Bank pursuant to Idaho Code §§ 42-1761 through 42-1765 in order to rent as prescribed in Article 7 for any beneficial use outside the Reservation all or any part of the water accruing to the federal contract storage rights set forth in Article 7.3.1 that is not used on Indian lands as provided in Article 7.3.2 or exchanged pursuant to Article 7.3.3; provided that

.i storage water from Palisades Reservoir is rented and delivered for use within the Snake River Basin anywhere above Milner Dam, and

.ii storage water from the American Falls Reservoir is rented and delivered for use in the Snake River Basin anywhere within Idaho.

.5 The rental of the federal contract storage water rights in Article 7.3.1 through the Shoshone-Bannock Water Bank shall not be subject to any limitation based on the following:

.i any provision of the Michaud Contract except as set forth in Article 7.3.3;

- .ii any reduction of the quantity of water available under any other existing water rights since any such reductions are mitigated by the express federal commitments in Article 12.3;
 - .iii any conflict with the public welfare or local public interest of the citizens of Idaho or the conservation of its water since any such conflicts are mitigated by the express federal commitments in Article 12.3; or
 - .iv any refill penalty for renting water from American Falls Reservoir below Milner Dam because of the mitigation provided by the express federal commitments in Article 12.3.
- .6 The parties agree that the purposes of the Shoshone-Bannock Water Bank are to:
- .i put to beneficial use the Tribal water rights set forth in Article 7.3.1;
 - .ii provide a source of adequate water supplies to benefit new and supplemental water uses;
 - .iii provide a source of Tribal funding for improving water user facilities and efficiencies;
 - .iv provide a mechanism for the Tribes to realize the value of their federal contract storage rights resulting from settlement of this litigation; and

.v provide for the continuation of good-faith cooperation among the parties to this Agreement.

The State agrees not to take any action that will interfere with the nature, scope, spirit and purposes of the Shoshone-Bannock Water Bank.

.7 The Shoshone-Bannock Water Bank provided for in Article 7.3.4 shall be operated by a Tribal Rental Pool Committee, which shall consist of the Superintendent of the Minidoka Project, the Snake River Watermaster, the Reservation Watermaster and three individuals designated by the Fort Hall Business Council unless the Tribes, the State and the United States mutually agree otherwise in writing.

.8 The Tribal Rental Pool Committee shall determine and establish priorities for rental of water from the Shoshone-Bannock Water Bank; provided that the Fort Hall Indian Irrigation Project water users shall have a right of first refusal to rent any storage water available for rent pursuant to Article 7.3.4.

.9 The Tribes may elect to assign for rental all or any portion of the water accruing to the federal contract storage rights in Article 7.3.1 that is not rented through the Shoshone-Bannock Water Bank or otherwise used or exchanged pursuant to Article 7 to any water bank created pursuant to state law in the Snake River basin above Milner Dam on the same terms and

conditions as any other water user may assign water to such a water bank.

.10 The parties agree that proceeds from renting all or any part of the federal contract storage rights pursuant to Article 7 shall not be subject to any form of taxation or alienation by the State or the United States, as provided for by legislation required by this Agreement, absent the written consent of the Tribes.

.11 The Tribes' exercise of the right to rent the storage water accruing to the federal contract storage rights described in Article 7.3.1 shall in no event be construed or interpreted as

.i any forfeiture, abandonment, relinquishment, or other loss of all or any part of their federal contract storage rights, or

.ii subject to any constraints on the amount of rental income or other compensation received by the Tribes.

.12 Neither the State nor the United States shall be liable for any financial losses suffered by the Tribes or any other person as a result of any rental of water from the Shoshone-Bannock Water Bank pursuant to Article 7.3.4.

7.4 Instream flows on and adjacent to the Reservation:

.1 In addition to the rental of water for instream flows pursuant to Article 7.3, the Tribes shall be entitled

to use storage water accrued to the federal contract storage space listed in Article 7.3.1 not used, exchanged, or rented pursuant to Article 7.3 for instream flows for river reaches on or adjacent to the Reservation.

- .2 The Tribes shall have the right to use the natural flows of all waters arising wholly within and traversing only Reservation lands for instream flows.
- .3 The Tribes shall have the right to use up to 15,000 AFY from the storage water rights described in Articles 7.1.19 and 7.1.20 for instream flows in reaches of the Blackfoot River. Prior to releasing water for instream flows in reaches of the Blackfoot River, the Tribes agree to give notice as provided in Article 8.5.

7.5 The Tribes may transfer or lease within the Reservation all or any portion of the tribal water rights set forth in this Article 7, if the transfer:

- .1 is to any beneficial use,
- .2 does not exceed the maximum diversion rate not withstanding the period of use,
- .3 does not exceed the annual volume of diversion,
- .4 does not exceed the annual volume of consumptive use,
- .5 is to any place of use within the Reservation, except as to the water rights described in Articles 7.1.2, 7.1.3 and 7.1.14, where the place of use is specifically restricted by this Agreement, and

.6 does not change the source, except as permitted by Articles 7.1.2, 7.1.3, and 7.1.18.

7.6 The Tribes may change the points of diversion and periods of use of the water right described in Article 7.1.1 provided the change:

.1 is to any beneficial use,

.2 does not exceed the maximum diversion rate notwithstanding the period of use,

.3 does not exceed the annual volume of diversion,

.4 does not exceed the annual volume of consumptive use, and

.5 does not result in an injury to a water right.

7.7 Whenever the Tribes or the United States intend to change or add a point of diversion or change the period of use of all or part of the water right described in Article 7.1.1, the Tribes or the United States will prepare a written Notice of Transfer of this water right. The Tribes or the United States shall serve a copy of the Notice of Transfer on each member of the Intergovernmental Board and shall publish the Notice of Transfer at least once a week for two consecutive weeks in a newspaper printed within the county wherein the point of diversion lies, or in the event no newspaper is printed within that county, then in a newspaper of general circulation therein. The Tribes or the United States shall complete the service and publication at least one hundred and twenty (120) days

prior to the intended change. The Notice of Transfer shall contain the following information:

- .1 The amount of water in CFS and/or AFY that is to be changed including any reductions that will occur at any existing points of diversion, if applicable;
- .2 The legal descriptions of the locations of any new or changed points of diversion including any points of diversion that will no longer be used, if applicable;
- .3 The period of use during which the water will be used as a result of the change including periods during which water will no longer be used or periods during which water use will be reduced as a result of the change; and
- .4 A statement that any person who believes that the change will injure a water right shall file a Notice of Objection with the Intergovernmental Board within ten days of the last date of service or publication.

7.8 Any person claiming that a change in a point of diversion or period of use of the Tribal water right in Article 7.1.1 will injure a water right shall first request mediation before the Intergovernmental Board prior to seeking judicial relief.

- .1 In any proceeding, the person claiming that a change will injure the objector's water right shall have the burden of proving that an injury will occur.
- .2 Upon receipt of any objection, the Intergovernmental Board shall attempt to mediate the dispute. After

reviewing all relevant data and information, the Intergovernmental Board shall make a recommendation regarding the change if there is a consensus. In the event the Intergovernmental Board determines that the proposed change would injure an objector's water right, its recommendation shall address whether it is possible to mitigate the injury in a way that will allow the Tribes to achieve the purposes of the change.

.3 In the event that the Intergovernmental Board fails to mediate the dispute, judicial relief may be sought by the objector.

7.9 Except as provided in Article 7.3, no Tribal water rights or water may be sold, leased, rented, transferred or otherwise used off the Reservation.

7.10 Stock watering may occur anywhere on Indian lands from any part of the water system on Indian lands and may be used year around as a part of each water right defined in this Agreement except no diversion from a point off the Reservation for stockwater shall be made during the non-irrigation season.

7.11 The Tribes have the right to generate hydropower incidental to water delivery for the other purposes specified in this Agreement as well as pursuant to Article 7.5.

7.12 The Tribes may construct, operate and maintain future storage projects or reservoirs located within the Reservation to the extent that such projects are not

inconsistent with the water rights set forth in this Agreement.

7.13 If any allottee or Tribal member is decreed a water right in the SRBA for Indian lands, there shall be a corresponding reduction in the Tribal water rights set forth in Article 7.

7.14 The State shall have the responsibility to deliver the federal contract storage water described in Article 7.3.1 within any established water district.

ARTICLE 8. ADMINISTRATION OF WATER RIGHTS

8.1 The Parties recognize and respect the sovereignty of the Tribes, the State, and the United States, as well as the powers and limitations accompanying the sovereignty of each government. In order to strike a balance among these sovereign interests, the parties, consistent with applicable law, agree to cooperate in administration of water resources to protect the use of all water rights decreed in the SRBA .

8.2 Except for the Snake River and the Blackfoot River, the parties agree to administer water rights within the Reservation as follows:

.1 The Tribes shall administer the distribution of all Tribal water rights within the Reservation.

.2 Upon reasonable notice, the Tribes and the United States agree to provide access to the State to inspect water monitoring devices and diversions within the

Reservation. The Tribes and the United States may accompany the State.

- .3 The Tribes shall adopt and submit a Tribal Water Code to the Secretary for approval. The Tribal Water Code shall, in part,
 - .i provide for a Reservation Watermaster,
 - .ii establish a Tribal Water Commission to manage the Tribal water delivery systems on the Reservation, and
 - .iii provide for monitoring of and enforcement of Tribal water rights.
- .4 Pending adoption and approval of a Tribal Water Code, the Secretary, as trustee for the Tribes, shall temporarily administer the distribution of the Tribal water rights within the Reservation.
- .5 Consistent with Article 8.2.1, the United States shall administer the distribution of the Fort Hall Indian Irrigation Project water rights and the Fort Hall Agency water rights from the point the water is delivered to the project facilities.
- .6 The State shall administer the distribution of those rights acquired under state law within the Reservation that are not a part of the Fort Hall Agency, Tribal or Fort Hall Indian Irrigation Project water rights.
- .7 Upon reasonable notice and in accordance with applicable law, the Tribes and the United States may inspect water monitoring devices and diversions within

the Reservation for those water rights administered under Article 8.2.6. The State may accompany the Tribes and the United States.

.8 The Tribes or the United States shall install or cause to be installed monitoring devices for administration of Tribal water rights within the Reservation to the same extent as required of other water users in Idaho. The cost of these monitoring devices shall be paid from the funds authorized by Congress as required by Article 13.2. The United States, the Tribes and the State shall monitor those diversions that each party actually administers within the Reservation and report the diversion records each year to the Intergovernmental Board by March 1 of the year after each reporting year.

8.3 Although the water rights from the Blackfoot River have been delivered for over 100 years without any disputes arising between the Tribes, the United States, and the State over administration, the parties heretofore have been unable to agree upon their respective authority to administer water rights from the Blackfoot River. The parties agree to avoid litigation by continuing to administer the water rights decreed in the SRBA from the Blackfoot River as water rights from the Blackfoot River have been administered in the past. The parties also agree as follows:

- .1 To prepare and implement a Blackfoot River Water Management Plan to satisfy the purposes set forth in the Attachment;
 - .2 To install or cause to be installed monitoring devices on all present and future points of diversion from the Blackfoot River; and
 - .3 To provide access to inspect water monitoring devices and diversions on the Blackfoot River where necessary for administration of rights to divert water from the water system. A party requesting access to a monitoring device shall provide reasonable notice, and the party providing access to the monitoring device or diversion may accompany the inspecting party.
- 8.4 The parties agree to administer water rights from the Snake River as follows:
- .1 The State shall account for and administer the diversion of water from the Snake River by all water users, including the United States and the Tribes, in conformance with the SRBA decree. The State, in administering such waters, shall ensure the delivery to all water users, including the United States and the Tribes, their legal entitlement to water from natural flow and storage. The United States shall be solely responsible for the physical operation of its Snake River diversion facilities in accordance with the Snake River Watermaster's direction. In the event the United States disputes the Snake River

Watermaster's direction regarding the administration of its Snake River diversion, the dispute shall be resolved by the District Court. Distribution of the water after diversion by the United States shall be in accordance with Articles 8.2.1, 8.2.4, 8.2.5, and 8.3.

.2 IDWR shall provide the Intergovernmental board, upon request, any Snake River water measurement data or reports gathered or prepared by or for IDWR.

.3 Upon reasonable notice, the State agrees to provide the Tribes and the United States access to inspect water monitoring devices and diversions on the Snake River where necessary for purposes of the administration of Tribal or Fort Hall Indian Irrigation Project water rights from the water system. The State may accompany the party inspecting the monitoring device or diversion.

8.5 Because of the need to provide for cooperative planning and management of water resources, the Tribes or the United States agree to prepare a written Notice of Use of a Tribal water right whenever the Tribes or the United States intend to (1) transfer or lease within the Reservation the right to an existing use, (2) put to use within the Reservation any portion of the Tribal water right which is not in present use, or (3) undertake a combination of (1) and (2).

.1 The Notice of Use shall contain the following information:

- .i The Right Number of the Tribal water right(s) described in Articles 7.1.1 through 7.3.1 to be changed or used;
 - .ii A legal description of the location where the Tribes or the United States will use the water right;
 - .iii A legal description of the location where the Tribes or the United States will reduce the use of water as a consequence of the transfer and of the point of diversion where the Tribes or the United States will reduce the diversion, if applicable;
 - .iv The ownership status of the land where the Tribal water right will be used;
 - .v The legal description of the new point of diversion;
 - .vi A narrative description of the proposed diversion works such as the size of pumps, ditches, wells, etc.;
 - .vii The amount of water stated in AFY and in CFS to be used on the location described in Article 8.5.1.ii; and
 - .viii The nature of use of the Tribal water right at the location described in Article 8.5.1.ii.
- .2 Notices involving 25 CFS or more, or 7,500 AFY or more and notices involving any increase in the diversion rate or volume of the right described in Article 7.1.1

shall be served on each member of the Intergovernmental Board at least thirty (30) days prior to the transfer, lease or new use.

.3 Notices involving less than 25 CFS or less than 7,500 AFY shall be served on the Intergovernmental Board annually at the time of the annual report provided for in Article 8.2.8 provided that no notice will be required for transfers, leases or new uses of 0.04 CFS or 2.2 AFY or less.

8.6 The State agrees to provide written notice to the Tribes and the Fort Hall Agency Superintendent whenever an application for a state water right permit is sought for a water use in the Upper Snake River mainstem, the Blackfoot River basin, and the Portneuf River basin. The report shall contain among the following:

- .1 the permit number of the state water right applied for;
- .2 a legal description of the location of the proposed place of use;
- .3 the ownership status of the land where the water will be used, if known;
- .4 the legal description of the proposed point of diversion; and
- .5 a narrative description of the proposed diversion works, such as the size of the pumps, ditches, wells, etc.

ARTICLE 9. INTERGOVERNMENTAL BOARD

- 9.1 In recognition of the concerns of separate sovereigns as well as the hydrologic and economic inter-relationships of water use within the Snake River basin, the parties agree to continue cooperative efforts to efficiently manage water resources and to fairly resolve disputes arising under this Agreement without resorting to litigation.
- 9.2 The parties agree to create a three-member Intergovernmental Board composed of the Chairman of the Fort Hall Business Council, the Director of the Idaho Department of Water Resources, and the Secretary, or their designees.
- 9.3 The Intergovernmental Board shall assist in the implementation of this Agreement and shall mediate disputes arising among the parties regarding the interpretation of this Agreement.

ARTICLE 10. FINALITY OF SETTLEMENT AGREEMENT

- 10.1 In lieu of filing claims by or on behalf of the Tribes in the SRBA and pursuant to Idaho Code § 42-1409(3) (Supp. 1989), the parties agree to submit this Agreement to the Director. The Director shall submit this Agreement and an abstract of the water rights listed in this Agreement to the Fifth Judicial District Court of the State of Idaho, in and for the County of Twin Falls pursuant to Idaho Code § 42-1411 (Supp. 1989). Other persons not signatory to this Agreement may file objections.

- 10.2 At the time the Director submits this Agreement and the abstract of this Agreement to the Fifth Judicial District Court of the State of Idaho in and for the County of Twin Falls, the State and the United States shall file a motion seeking approval of the water rights in the Agreement as a decree in the SRBA. The parties agree to jointly support and defend this Agreement against any and all objections or other challenges that may arise in any phase of the Adjudication, including any appeals, and in securing any necessary ratification of this Agreement.
- 10.3 The United States' and Tribal water rights confirmed in this Agreement shall be final and conclusive as to all parties to the Adjudication once the Agreement becomes effective as provided in Article 18.
- 10.4 The Tribal water rights recognized in Article 7 are in full satisfaction of all water rights or claims to water rights of the Tribes, its members, and its allottees within the Upper Snake River basin. If a member or an allottee is decreed a water right for Indian lands, then a corresponding reduction will be made in the Tribal water rights set forth in Article 7. This Agreement does not apply to state water right claims of Tribal members for non-Indian lands.

ARTICLE 11. DISCLAIMERS AND GENERAL PROVISIONS

- 11.1 Nothing in this Agreement shall be so construed or interpreted:

- .1 To establish any standard to be used for the quantification of federal reserved water rights or any other Indian water claims of any other Indian Tribes in any judicial or administrative proceeding;
- .2 To restrict the acquisition or exercise of an appropriative right to the use of water under state law for present Tribal or allotted lands, provided the Tribal water rights confirmed in this Agreement have been fully utilized at the time the application is made, or are not physically available for use through reasonable diversion facilities;
- .3 To restrict the power of the United States to reserve, or of the United States or the Tribes to acquire water rights in the future, in accordance with this Agreement and other applicable law;
- .4 To limit in any way the rights of the parties or any person to litigate any issue or question not resolved by this Agreement;
- .5 To limit the authority of the United States or the Tribes to administer their respective water rights in accordance with the constitution, statutes, regulations, and procedures of the United States or of the Tribes except as expressly provided herein;
- .6 To restrict, enlarge, or otherwise determine the subject matter jurisdiction of any state, tribal or federal court;

- .7 To commit or obligate the United States, the State, or the Tribes to expend funds which have not been appropriated and budgeted;
- .8 To quantify or otherwise determine Walton Right claims that may be made in the SRBA;
- .9 To impair or impede the exercise of any Treaty rights reserved for members of the Tribe pursuant to Article 4 of the Second Fort Bridger Treaty of July 3, 1868, 15 Stat. 673;
- .10 To waive or prejudice any contention by any party to this Agreement regarding the location and extent of the Reservation's northern and western boundaries along or within the Snake River and the Blackfoot River, as well as the ownership of the beds and banks of those rivers to the ordinary high water mark;
- .11 To preclude the Tribes from participating in future water storage projects in the Upper Snake River basin;
- .12 To quantify or otherwise determine any water right claims of the City of Pocatello under the Act of September 1, 1888, ch. 936, § 10, 25 Stat. 452 or the sources from which such claims may be satisfied, provided that in the event the City of Pocatello is determined to be entitled to such a right, such right shall be in addition to the Tribal water rights set forth in this Agreement;
- .13 To quantify or otherwise determine any water right claims of the Northwestern Band of Shoshone, if any;

- .14 To waive any applicable federal environmental law;
- .15 To impair or impede the exercise of any civil or regulatory authority of the Tribes, the State, or the United States; and
- .16 To quantify or otherwise determine any water right claims for the United States that are not quantified in this Agreement.

11.2 This Agreement represents a settlement of federal reserved water right claims of the Tribes under the Winters Doctrine that are unique to the Reservation. The parties are unable to agree on whether the reserved water rights doctrine extends to ground water. In order to avoid litigation, however, this Agreement recognizes federal reserved water rights to groundwater for the Tribes as described in Article 7. Because this Agreement is a resolution of a disputed claim, it is not and shall not be used as precedent for any other federal reserved water right claim.

11.3 This Agreement has been reached in the process of good faith negotiations for the purpose of resolving legal disputes, including pending litigation, and all parties agree that no offers and/or compromises made in the course thereof shall be construed as admissions against interest or be used in any legal proceeding.

11.4 Entry of judgment as set forth above has been consented to by the parties without trial or adjudication of fact or law herein and without the judgment constituting evidence or an admission by any party, with respect to any issue.

- 11.5 The Tribes and the United States reserve the right to assert federal reserved water right claims for instream flows in the Salmon River basin, the Clearwater River basin, and the Snake River basin below Hells Canyon Dam; however, no such instream flow claims made by the Tribes or the United States on behalf of the Tribes below Hells Canyon Dam shall require water to be supplied from above Hells Canyon Dam to satisfy such claims. All parties to this Agreement agree to engage in good faith negotiations in an attempt to settle these remaining claims.
- 11.6 The Tribes reserve the right to develop geothermal ground water on the Reservation having a temperature of at least two hundred twelve (212) degrees Fahrenheit in the bottom of a well.
- 11.7 Performance by the United States of the actions required by this Agreement, including the Congressional authorization and appropriation of any funds for deposit in the Tribal Development Fund described in Article 13 shall be conditioned on the Tribes executing a waiver and release of any and all existing claims against the United States arising in whole or in part from or concerning water rights finally settled by this Agreement, and for lands or water that have been inundated by the past construction or enlargement of American Falls Reservoir.
- 11.8 None of the parties will assert any claim against another party arising out of the negotiation of this Agreement or the entry by the Fifth Judicial District Court of the State

of Idaho in and for the County of Twin Falls of a decree embodying the water rights listed in this Agreement.

11.9 The United States, in its trust capacity for the Tribes only, and the Tribes agree not to object to water right claims filed by non-federal water users within the Upper Snake River basin in the SRBA that have no potential impact on the Tribal water rights set forth in this Agreement.

11.10 The United States and the Tribes agree not to make any claims against, or seek compensation from, any non-federal party to this Agreement for lands or water that have been inundated by the past construction or enlargement of American Falls Reservoir.

ARTICLE 12. PROTECTION OF EXISTING USES

12.1 Nothing in this Agreement alters the water right priorities as established by Section 3(b) of the Michaud Act, or Article 15 of the Michaud Contract, which the United States and/or the Tribes entered into as part of the authorization of the Michaud Division.

12.2 The Secretary shall continue to provide all project water users within the Fort Hall Indian Irrigation Project their project water entitlements pursuant to their project contracts.

12.3 The United States agrees to seek legislation authorizing the Secretary to contract with the Idaho Water Resource Board or another appropriate contracting entity acceptable to the Committee of Nine for the 80,500 acre feet of noncontracted storage space in Ririe Reservoir and the

18,980 acre feet of noncontracted storage space in Palisades Reservoir, provided that such entity makes application for the space within one year of the date such legislation becomes law. This space is estimated to provide on average approximately 45,000 AFY. The legislation shall provide for forgiveness of the repayment obligation associated with the construction cost for the noncontracted storage space; provided the contracting entity shall be responsible for operation and maintenance costs associated with this storage space.

- 12.4 The parties agree not to unreasonably oppose the efforts of any party to further mitigate the effects of the implementation of this Agreement on existing water users.

ARTICLE 13. CONTRIBUTIONS TO SETTLEMENT

- 13.1 The United States agrees to seek appropriations to continue to acquire up to 9,000 acres of land and grazing rights at Grays Lake, at a cost not to exceed \$5,000,000, for the acquisition of lands, grazing rights and related improvements to enhance the operation and management of the Fort Hall Indian Irrigation Project, particularly through increased storage capacity and retention period of the reservoir, and the operation of the United States Fish and Wildlife Service refuge at Grays Lake.
- 13.2 The United States agrees to assist the Tribes in implementing a Tribal water management system for the Reservation. The total cost of this federal assistance to the Tribes for this Tribal water management system shall

not exceed \$7,000,000. The United States agrees to seek appropriations of the \$7,000,000 as follows:

- .1 \$2,000,000 in the first fiscal year following the effective date of this Agreement as set forth in Article 18, and
 - .2 an additional \$5,000,000 payable over a twenty-year (20-year) period.
- 13.3 The United States agrees to seek an appropriation of \$10,000,000 for a Tribal Development Fund payable in equal amounts of \$2,000,000 each fiscal year for each of the five (5) years following the effective date of this Agreement as set forth in Article 18. Under no circumstances shall these funds be distributed on a per capita basis to members of the Tribes.
- 13.4 Federal financial contributions to this settlement will be budgeted for, subject to the availability of funds, by October 1 of the year following the year of enactment of the authorizing legislation described in Article 18.
- 13.5 The state will seek an authorization to provide \$250,000 of in kind services to assist the Tribes in implementing this Agreement and will seek an appropriation of the monies necessary to pay the filing fees for the Tribes and the United States claims quantified as a part of this Agreement. These fees are estimated to be \$250,000.

ARTICLE 14. SUCCESSORS

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

ARTICLE 15. ENTIRE AGREEMENT

15.1 This Agreement sets forth all understandings between the parties with respect to water rights and claims to water rights for the Tribes, its members, and its allottees in the Upper Snake River basin. There are no other understandings--no covenants, promises, agreements, conditions, either oral or written--between the parties other than those contained herein. The parties expressly reserve all rights not granted, recognized or settled by this Agreement.

15.2 Ratification of the water rights set forth in Article 7 is irrevocable; however, the balance of this Agreement may be modified only upon the joint consent of the legislative bodies of the Tribes and the State, and to the extent an interest of the United States may be affected, the Secretary or the United States Attorney General, as appropriate.

ARTICLE 16. EFFECT OF HEADINGS

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

ARTICLE 17. MULTIPLE ORIGINALS

This Agreement is executed in quintuplicate. Each of the five (5) agreements with an original signature of each party shall be an original.

ARTICLE 18. EFFECTIVE DATE

18.1 This Agreement shall be effective only when all of the following events have occurred:

- .1 This Agreement is executed;
- .2 A decree acceptable to the parties quantifying the water rights in this Agreement and the water rights of the United States for the Fort Hall Indian Irrigation Project and for the Bureau of Indian Affairs Fort Hall Agency has been entered by the Fifth Judicial District Court of the State of Idaho in and for the County of Twin Falls and become final and nonappealable;
- .3 Adoption by the Idaho Water Resource Board of the Shoshone-Bannock Water Bank Rules and Regulations consistent with Article 7.3;
- .4 All federal and state expenditures required by this Agreement have been authorized;
- .5 Ratification of this Agreement by the Legislature of the State of Idaho;
- .6 Approval of the Agreement by the general membership of the Shoshone-Bannock Tribes;
- .7 The Bureau of Reclamation has entered into a storage contract with the Idaho Water Resource Board or a designee of the Committee of Nine in accordance with Article 12.3; and
- .8 Congressional approval of this Agreement.

The parties have executed this Agreement on the date following their respective signatures.

Cecil D. Andrus
CECIL ANDRUS
Governor, State of Idaho

Kesley Edmo
KESLEY EDMO
Chairman, Shoshone-Bannock
Tribal Council

7-5-90
Date

7/5/90
Date

Gene M. Gray
GENE M. GRAY
Chairman,
Idaho Water Resource Board

Howard Funke
HOWARD FUNKE
Tribal Attorney
Shoshone-Bannock Tribes

7-5-90
Date

7/5/90
Date

Clive J. Strong for Jim Jones
CLIVE J. STRONG for JIM JONES
Attorney General,
State of Idaho

Edie F. Brown
EDIE F. BROWN
Assistant Secretary for
Indian Affairs

7/5/90
Date

7-10-90
Date

Paul Berggren
PAUL BERGGREN
Chairman
Committee of Nine

Pete C. Manson
RICHARD B. STEWART
Assistant Attorney General
for Land and Natural Resources
Division
U.S. Department of Justice

7/9/90
Date

7/10/90
Date

BLACKFOOT RIVER WATER MANAGEMENT PLAN
STATEMENT OF PURPOSES
April 20, 1990

A Blackfoot River Water Management Plan shall be developed to assist in the implementation of The 1990 Fort Hall Water Rights Agreement as decreed in the SRBA. This Plan is proposed to encourage the open sharing of data and management resources to assist the effective management of the water resources in the Snake River Basin.

Nothing in the Plan nor in this Statement of Purposes shall be interpreted or implemented to change any portion of the decree in the SRBA.

The purposes of the Plan shall be as follows:

1. Determine the natural flow at each point of diversion on the Blackfoot River.
2. Determine the storage accumulation to Blackfoot Reservoir.
3. Determine the Blackfoot Reservoir storage used for 1) Tribal Lands; 2) non-Indian project lands; 3) instream flows; 4) natural losses and 5) operational losses.
4. Determine the storage accumulation to Grays Lake given any restrictions due to grazing leases.
5. Determine the Grays Lake storage used for 1) Tribal Lands; 2) non-Indian project lands; 3) instream flows; 4) natural losses and 5) operational losses.
6. Determine how gains to the Reservation Canal below the head and above the drop will be measured.
7. Determine when natural flow from the Blackfoot River and gains to the Reservation Canal are not sufficient to meet the Tribal water needs and calls for 1) Blackfoot Reservoir storage or 2) Reservation Canal diversions will be necessary.
8. Determine when water stored in Grays Lake will be moved to the Blackfoot Reservoir given any restrictions due to grazing leases.
9. Distribute Blackfoot River natural flow among the users by priority giving deference to the Tribe's protection of existing non-Indian non-project water users.
10. Deliver Blackfoot Reservoir and Grays Lake Storage to owners.
11. Define the computations that will be used to determine the amount of storage water that is exchanged as a result of the operational limitations of the Equalizing Reservoir to utilize Sand Creek as part of the Tribal water right.