UNDERSTANDING THE SNAKE RIVER BASIN ADJUDICATION

ANN Y. VONDE, CHRISTOPHER M. BROMLEY, MEGHAN M. CARTER, ANDREA L. COURTNEY, SUSAN E. HAMLIN NYGARD, HARRIET A. HENSLEY, SHASTA J. KILMINSTER-HADLEY, MICHAEL C. ORR, DAVID I. STANISH, AND CLIVE J. STRONG

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* The authors are current or former Idaho Deputy Attorneys General that represented the State of Idaho or the Idaho Department of Water Resources during the course of the SRBA. The article is based upon their first-hand knowledge of the events discussed. Collectively, the authors have over 100 years of work experience on the Snake River Basin Adjudication.

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I. INTRODUCTION

On August 25, 2014, Judge Eric Wildman signed the 275,000-plus page Final Unified Decree ("FUD") [1] bringing to an end the Snake River Basin Adjudication ("SRBA"). Initially envisioned as a 10-year process to catalog water rights at a cost of $27.3 million dollars, the SRBA instead evolved into a 27-year long general stream adjudication that addressed some of the most complex water issues in the State's history.[2] State judicial and administrative costs for the SRBA were

1. Clive J. Strong, *SRBA Retrospective: A 27-Year Effort*, THE ADVOCATE , Nov./Dec. 2014, at 28.

2. Geographically, the Snake River Basin within Idaho encompasses more than 87% of the land mass of the State of Idaho. The Snake River rises along the continental divide near Yellowstone and Grand Teton National Parks in Wyoming, and travels across southern Idaho in a broad crescent. At the western

approximately $94 million.[3]

The sheer magnitude of the SRBA cannot be overstated. More Idaho water law decisions were issued by the SRBA Court and Idaho appellate courts in 27 years than in the prior 97 years of Idaho's existence as a State.[4] More than 158,600 water rights were decreed. More than 158,600 water rights were decreed.[5] United States Supreme Court Justice Antonin Scalia succinctly captured the enormity of this effort when he observed that the number of water rights decreed over 27-years "works out to around one claim every 90 minutes—an astonishing pace by anyone's standard."

This article is intended to serve as a roadmap for those seeking to understand the SRBA. It documents the SRBA adjudication process and how major substantive issues were resolved. The authors learned the hard way that failure to adequately document past conflicts inevitably leads to future conflicts over the same issues. Indeed, the most contentious issues in the SRBA were primarily arguments over interpretation of past decisions and agreements. As philosopher George Santayana is famous for saying: "Those who cannot remember the past are condemned to repeat it."[6]

The need for the SRBA arose out of the Swan Falls Controversy, [7]—a dispute

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boundary of Idaho, the Snake River leaves the State of Idaho and flows into the State of Oregon for a short distance, then turns north. The Snake River then forms the boundary between Idaho and the States of Oregon and Washington while passing through the nation's deepest gorge, Hells Canyon. The Snake River travels north to Lewiston where it leaves the State Idaho and flows west to the Columbia River.

3. Betsy Z. Russell, *Scalia Praises Idaho's Snake River Basin Water Rights Adjudication*, SPOKESMAN-REV., Aug. 26, 2014 (Blogs/Eye on Boise), http://www.spokesman.com/blogs/boise/2014/aug/26/scalia-praises-idahos-snake-river-basin-water-rights-adjudication/.

4. The SRBA Court resolved 43,822 contested cases. The Idaho Supreme Court issued thirty-six opinions and the United States Supreme Court issued one SRBA decision. Hon. Eric J. Wildman, *Completion of the SRBA and Status Update Regarding the CSRBA* at 8 (Aug. 25, 2014), http://legislature.idaho.gov/sessioninfo/2014/interim/resources0917_wildman.pdf. *See also* Strong, *supra* note 1, at 28.

5. At the time of entry of the Final Unified Decree the SRBA Court had issued 158,591 partial decrees. The SRBA Court retained jurisdiction over 72 claims pending at the time of entry of the Final Unified Decree. Thus, when the remaining claims are resolved the Final Unified Decree will contain over 158,600 partial decrees.

6. GEORGE SANTAYANA, REASON IN COMMON SENSE 284 (1905).

7. The so called "Swan Falls Controversy" is a reference to two actions brought by Idaho Power Company against the State of Idaho and certain junior upstream water right holders. In 1977, Idaho Power Company sued the Idaho Department of Water Resources, the Idaho Public Utility Commission, and numerous canal and irrigation companies asserting that junior upstream water users were interfering with its Swan Falls hydropower water rights. Complaint, Idaho Power Co. v. State of Idaho, Case No. 62237, (4th Jud. Dist. Idaho Oct. 21, 1977). Judge Jesse Walters issued a Memorandum Decision and Order holding that the Federal Power Commission License No. 1971 for the Hells Canyon Complex subordinated Idaho Power Company's hydropower water rights at Swan Falls to junior water rights. Memorandum Decision and Order, Idaho Power Co. v. State of Idaho, Case No. 62237 at 39 (4th Jud. Dist. Idaho Dec. 10, 1979). In Idaho Power Co. v. State, 661 P.2d 741, 745, 104 Idaho 575, 590 (1983), the Idaho Supreme Court reversed Judge Walter's decision and remanded the case to the SRBA Court for "further proceedings on the affirmative defense issues raised below and not there decided." Upon remand, Idaho Power Company filed a new action known as the 7500 lawsuit because of the number of junior water rights listed in the complaint. Complaint, Idaho Power Co. v. Idaho Dep't of Water Res., Case No. 81375 (4th Jud. Dist. Idaho March 30, 1983). Both cases were resolved by an October 25, 1984 Agreement between Idaho Power Company and the State of Idaho, the so called "Swan Falls Agreement." Agreement, Governor John Evans, Attorney General Jim Jones, James Bruce CEO Idaho Power Co. (Oct. 28, 1984). For a more detailed account of the Swan Falls Controversy consult Clive J. Strong and Michael C. Orr, *The Origin and Evolution of Hydropower Subordination Policy on the Snake River: A Century of Conflict and Cooperation*, 46 IDAHO L. REV. 119 (2009).

over whether Idaho Power Company had subordinated[8] its hydropower water rights to upstream junior uses. In 1983, in response to an Idaho Supreme Court decision that put in doubt the long-held belief that Idaho Power Company's hydropower water rights were subordinated to upstream uses,[9] the Idaho Legislature created the Swan Falls Water Rights subcommittee "to address matters related to the existing hydropower base as it affects existing electrical consumers as well as future agricultural and industrial development."[10] A Snake River Technical Advisory Committee ("Advisory Committee") was formed to assist the legislative subcommittee in developing recommendations to respond to the controversy. The Advisory Committee consisted of fifteen members representing state and federal water resource agencies, the Idaho Public Utility Commission, consulting hydrologists, Idaho Power Company, the Idaho Water Energy Resources Research Institute, and the Swan Falls Water Rights subcommittee of the Legislative Council. The purpose of the Advisory Committee was to "determine the scope and priority of needed hydrologic studies required to assist in the planning, management, water rights administration, regulation and litigation of the Snake River system in Idaho above Swan Falls."[11] Among the findings of the Advisory Committee, in its November 1983 report, was that the water rights of the Snake River Basin needed to be adjudicated:

> If the water resources of the Snake River are to be managed for maximizing beneficial use within the constraints of the Constitution, laws of the State and new directives of the legislature, the priority of those rights must be quantified. There are presently a number of decrees affecting surface and ground-water tributaries of the Snake River Plain. They do not acknowledge the existence of other tributaries or systems they may affect, nor the fact that the rights listed in the decrees are or may be subordinated to other rights not listed. These decrees are not effective as vehicles for management of the entire system.

The procedure to quantify all rights to use waters of the Snake River system within Idaho is a general adjudication pursuant to I.C. Section 42-1406 et seq. This statute permits the State to require the federal government to quantify its reserved rights, in addition to permitting the quantification of statutory claims. Delay could cause piecemeal adjudication of federal claims in federal court.[12]

As noted by the Advisory Committee, while some water use in Idaho had been cataloged through licenses or judicial decrees, many had not. When Idaho first

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8. The terms "subordinated" and "subordination" refer to a condition on a water right that precludes the exercise of the priority of the right against junior water rights. Idaho Power Co. v. State, *supra* note 7, at 579 ("Therein water rights of power companies did not contain the customary total priority of right but, rather, would be inferior to future upstream depletion.").

9. *Id.*

10. The Swan Falls Water Rights subcommittee was created by concurrent resolution. S. Con. Res. 110, 47th Leg. (1983); 1983 Idaho Sess. Laws page 726–727. The legislative subcommittee was directed "to undertake and complete a study of the status of existing water rights and future water needs for the waters of the Snake River, its tributaries and the aquifer." *Id.* at 727.

11. *See* Snake River Technical Advisory Committee, Water Resources Management Needs in the Snake River Basin to Swan Falls Study Committee of the Legislative Council State of Idaho, 47th Sess., at 5 (Nov. 1983) (on file with authors).

12. *Id*. at 40.

became a state, a water right could be acquired under the constitutional or beneficial use method. This method allowed a person to establish a water right simply by diverting the water and putting it to beneficial use.[13] There was no requirement that the water user record his or her water use with the state. In 1963, statutes were enacted that required water users to acquire a permit before appropriating ground water.[14] In 1971, the permit requirements were extended to surface water.[15] These variations in appropriation requirements meant that many water rights had been established without there being any record of them. This uneven recordation of water rights made administration of the rights difficult.

On October 1, 1984, Governor John V. Evans, Attorney General Jim T. Jones, and James Bruce, the Chief Executive Officer of Idaho Power Company signed the *Framework for Final Resolution of Snake River Water Rights Controversy* ("Framework"). While this Framework set forth the principals for resolving the Swan Falls litigation, the Framework also sought to achieve a broader purpose of "putting in place legislation and policies which will govern the rest of the Snake River and other watersheds also."[16] Consistent with the finding of the Snake River Technical Advisory Committee, the Framework recommended commencement of a general stream adjudication:

> The key to effective management of the Snake River lies in a comprehensive determination of the nature, extent and priority of all of the outstanding claims to water rights. Only through a general adjudication will the state be in a position to effectively enforce its minimum streamflow rights, protect other valid water rights, and determine how much water is available for further appropriation. A general adjudication will also result in quantification of federal and Indian water rights which until now have been unresolved. A further benefit of adjudication is that it will enable the establishment of an efficient water market system, which will encourage the highest and best use of our water resources.[17]

The Governor's Office described the benefits of the adjudication as follows:

1. Clearly defined water rights.
2. Security against future challenges.
3. Knowledge to enable the state to better manage and protect the river basin.

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13. *See* State v. United States, 996 P.2d 806, 811, 134 Idaho 106, 111 (2000) ("Under the other method, usually referred to as the 'constitutional method of appropriation,' a water user could make a valid appropriation without a permit, most commonly by diverting the water and putting it to beneficial use. A 'constitutional appropriation' is an appropriation made under this latter method. It should be noted that a 'constitutional appropriation' is not pursuant to specific procedures specified by the constitution, but instead is allowed by the grant of authority of the constitutional language. Although new appropriations could not be made under the constitutional method after 1971 the validity of existing constitutional appropriations continues to be recognized.") (internal citations omitted).

14. IDAHO CODE § 42-229; 1963 Idaho Sess. Laws, ch. 216.

15. IDAHO CODE § 42-201; 1971 Idaho Sess. Laws, ch. 177.

16. Framework for Final Resolution Of Snake River Water Rights Controversy, Governor John Evans, Attorney General Jim Jones, Idaho Power CEO James Bruce at 8 (1984). The Framework concluded that "[t]he definition and implementation of a known and enforceable state policy will make the Swan Falls controversy an asset in the history of the state." *Id.*

17. *Id.* at 6.

4. More easily valued and transferred rights should water markets be established.
5. Resolution of currently unquantified federal reserve[d] claims.
6. Clear the way to resolve Swan Falls subordination issue.
7. Define waters available for future development.[18]

Thus, the adjudication was envisioned as a necessary step for active administration of water rights in the Snake River Basin. Through active administration the State sought to provide greater certainty for both present and future water users.

II. SRBA COMMENCEMENT

Commencement of the SRBA necessitated that new legislation and new judicial rules and procedures be developed to enable the court to process such a massive litigation. The legislation had to comply with the McCarran Amendment so that the United States could be brought into the adjudication as a party. The District Court also had to make determinations early on with regard to the scope of the adjudication to ensure that it remained within the terms of the McCarran Amendment.

A. Authorizing the Adjudication Through Legislation

In 1985, the Idaho Legislature added a new section to chapter 14, title 42, Idaho Code commencing the SRBA.[19] The legislation required that the adjudication satisfy the requirements of the McCarran Amendment, 43 U.S.C. § 666,[20] and included a funding mechanism for the adjudication by charging a flat filing fee for all claims and an additional variable fee for certain types of claims.[21] The fees collected were intended to fund the entire adjudication effort.

In 1986, the adjudication statutes were amended. The purpose of the amendments was "to provide a statutory procedure for incorporating a negotiated agreement between a federal reserved water right claimant and the State of Idaho into an adjudication, to provide a more efficient method for adjudication of the rights of all claimants, and to assure that state laws and procedures are adequate as a matter of federal law to adjudicate the rights of all federal reserved water right claimants."[22] The 1986 Amendments made procedural changes to the existing laws and rules governing the conduct of general adjudications in Idaho's district courts. These changes included detailed requirements regarding the contents of a petition for a general adjudication, service of process on claimants, and filing of notices of claim and objections to notices of claim.[23]

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18. H.B. 70, House Resources and Conservation Committee, Minutes, 48th Leg., 2nd Sess. at Attachment 1 (January 17, 1985).
19. 1985 Idaho Sess. Laws, ch. 18, ch. 118.
20. *Id.* at ch. 118. The McCarran Amendment will be discussed in detail in Section II.C below.
21. *Id.* at ch. 18.
22. H.B. 642, Statement of Purpose, 48th Leg., 2nd Sess. (1985).
23. 1986 Idaho Sess. Laws, ch. 220.

B. Commencing the Adjudication with the District Court

Idaho Code § 42-1406A[24] directed the Director of the Idaho Department of Water Resources ("IDWR") to petition the district court to commence an adjudication of the Snake River that would meet the terms of the McCarran Amendment.[25] The statute required that the petition describe the geographic boundaries of the water system to be adjudicated, the class of water users who must participate, and those water uses that would be excluded from the adjudication.[26]

On June 17, 1987, the State of Idaho filed a petition in the District Court of the Fifth Judicial District of the State of Idaho in and for the County of Twin Falls requesting the general stream adjudication be commenced.[27] The Petition proposed that the boundary of the adjudication should include "all surface and ground waters of the Snake River basin water system . . . within the state of Idaho upstream from and including the Salmon River basin," including any tributaries.[28] The Petition proposed that "no classes of uses" of water be excluded from the adjudication."[29] The Petition also proposed procedures for notifying water users of the adjudication.[30] The Petition asked the SRBA Court to determine the appropriate geographic scope of the adjudication, approve the proposed service procedures, and to commence the adjudication. [31]

Idaho Code § 42-1408 required that the Idaho Supreme Court determine the venue for the SRBA and "assign the judge to preside over the general adjudication."[32] On June 26, 1987, the Idaho Supreme Court issued its *Order Appointing District Judge and Determining Venue of Petition for General Adjudication of Water Rights in Snake River Basin* designating the District Court of the Fifth Judicial District of the State of Idaho in and for the County of Twin Falls as the venue for the adjudication and assigning Judge Daniel C. Hurlbutt Jr. as the first presiding judge of the SRBA.[33] The Supreme Court gave the presiding judge authority to modify the procedures for serving pleadings, motions, and notices in the SRBA and to appoint

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24. IDAHO CODE § 42-1406A (repealed by 1994 Idaho Sess. Laws, ch. 454).

25. *Id.* at (1); 43 U.S.C. § 666 (2012).

26. IDAHO CODE § 42-1406A(1)(a)–(c) (repealed by 1994 Idaho Sess. Laws ch. 454).

27. Petition, *In re* the General Adjudication of Rights to the Use of Water from the Snake River Basin Water System Case No. 39576 (5th Jud. Dist. Idaho June 17, 1987). The SRBA was a single litigation with one case number 39576. Some documents, not associated with a subcase, were filed under the main case number only. Hereinafter, documents filed in the main case number 39576 will be cited as *In re* SRBA Case No. 39576. Subcases, which arose through the litigation of individual water right claims, were sub-parts of the main litigation. Subcases will be cited with the main case number, as well as the seven-digit subcase designation. For the sake of brevity, only the order name and date will be used for documents filed in the SRBA. The Fifth Judicial District Court information will be omitted.

28. *Id.* at 4–5.

29. *Id.* at 9.

30. *Id.* at 10–12.

31. *Id.* at 12–13.

32. IDAHO CODE § 42-1408 (redesignated as IDAHO CODE § 42-1407 by 1994 Idaho Sess. Laws, ch. 454, sec. 13).

33. Order Appointing District Judge and Determining Venue of Petition for General Adjudication of Water Rights in Snake River Basin, *In re* SRBA Case No. 39576 at 1–2 (Jun. 26, 1987). The portion of the SRBA Court of the Fifth Judicial District that was responsible for handling the SRBA litigation would become known as the Snake River Basin Adjudication Court ("SRBA Court"). However, the SRBA Court was not separate from the Fifth Judicial District Court. The judge of the SRBA Court was also responsible for a regular civil and criminal docket.

Special Masters to assist with the SRBA.[34] The Commencement Order also required the Director of IDWR serve notice of the commencement of the general adjudication and required that all water users within the system file a notice of claim with IDWR.[35] The Idaho Supreme Court affirmed the Commencement Order[36], and the U.S. Supreme Court denied discretionary review of the matter in 1989.[37]

C. Commencing the Adjudication Under the McCarran Amendment

The SRBA Court entered its Order commencing the adjudication on November 19, 1987.[38] The SRBA was commenced as a general stream adjudication. A general stream adjudication is defined by Idaho Code as:

> [A]n action both for the judicial determination of the extent and priority of the rights of all persons to use water from any water system within the state of Idaho that is conclusive as to the nature of all rights to the use of water in the adjudicated water system, except as provided in section 42-1420, Idaho Code, and for the administration of those rights.[39]

Unlike a private adjudication,[40] a general stream adjudication must include all users on a given source. To make general stream adjudications more efficient, and avoid piecemeal adjudication of water rights,[41] Congress passed the McCarran Amendment,[42] waived the United States' immunity to suit in state court. This waiver allows states to adjudicate federal water rights in their general stream adjudications. For the waiver to take effect, the adjudication must be "comprehensive."[43] All claimants to a water source must be included in the adjudication to meet the "comprehensiveness" requirement.[44] The United States may challenge a state's general stream adjudication. Specifically, the United States may assert that the waiver of its sovereign immunity does not apply because the adjudication is insufficiently comprehensive.[45]

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34. Supplemental Order Granting Additional Powers to District Judge, Case No. 99143 (Idaho Sup. Ct. Feb. 20, 1988).
35. Commencement Order, *In re* SRBA Case No. 39576 (November 19, 1987).
36. *In re* the General Adjudication of Rights to the Use of Water from the Snake River Basin Water System, 764 P.2d 78, 115 Idaho 1 (1988).
37. Boise-Kuna Irrigation Dist. v. United States, 490 U.S. 1005 (1989).
38. Commencement Order, *supra* note 35.
39. IDAHO CODE § 42-1401A(5).
40. *See* IDAHO CODE § 42-1404.
41. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 819 (1976):

> [T]he clear federal policy evinced by that legislation [McCarran Amendment] is the avoidance of piecemeal adjudication of water rights in a river system. This policy is akin to that underlying the rule requiring that jurisdiction be yielded to the court first acquiring control of property, for the concern in such instances is with avoiding the general of additional litigation through permitting inconsistent dispositions of property. This concern is heightened with respect to water rights, the relationships among which are highly interdependent. The consent to jurisdiction given by the McCarran amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals.

42. 43 U.S.C. § 666 (2012).
43. United States v. Oregon, 44 F.3d 758, 766 (9th Cir. 1994).
44. *Id.*
45. United States v. Dist. Ct. in and for the Cnty. of Eagle Colo., 401 U.S. 520, 522 (1971).

1. Inclusion of Tributaries to the Snake River

Early on a dispute arose regarding which tributaries to the Snake River needed to be included in the SRBA. Water users in the Boise, Payette, Weiser, and Lemhi River basins opposed being included in the adjudication because those basins had already been or were currently being adjudicated.[46] The contention that these tributaries should be left out of the SRBA called into question whether the SRBA would be sufficiently "comprehensive" so as to qualify as a general stream adjudication under the McCarran Amendment.

In response to concerns by water users in the Boise and Payette River basins, the Idaho Legislature in authorizing the adjudication provided that these basins could only be included if necessary to gain jurisdiction over the United States. Upon filing the petition to commence, the Court was required to answer this question. The SRBA Court determined that the Boise, Payette, Weiser, and Lemhi River basins must be included for the adjudication.[47] The Court found that I.C. § 42-1406A(3)(b) (1986) was a "carefully balanced legislative compromise between up river and down river interests on the Snake River. . . . The only inquiry needed by [the] court is whether the United States has refused to consent to the jurisdiction of this court to adjudicate all federal and Indian water rights pursuant to the McCarran amendment."[48] Because the United States refused to consent to jurisdiction absent inclusion of the Boise, Payette, Weiser, and Lemhi basins, the Court held that the four basins must be included in the SRBA.[49]

2. Inclusion of Domestic and Stockwater Rights.

An issue also arose as to whether, to meet the requirements of the McCarran Amendment, all domestic and stockwater rights needed to be claimed and adjudicated in the SRBA. In 1989, the SRBA Court issued its *Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses.*[50] The Court recognized that domestic and stockwater uses "divert annually less than one per cent of the 36 million acres feet which leaves the state each year. Yet, claims of these uses represent more than half of the total estimated number of claims in the" SRBA.[51] It was recognized that the adjudication could be processed much more quickly if domestic and stockwater users were not required to file claims. Therefore, the Court ordered that *de minimis* domestic and stockwater[52] users be joined as parties in the SRBA and be bound by all decrees entered in the case, but be given the option to defer filing their claims in the SRBA.[53] The Court also set forth alternative procedures to be followed when

46. Memorandum Opinion on Commencement of Adjudication, *In re* SRBA Case No. 39576 at 13 (Oct. 14, 1987).

47. *Id.* at 28.

48. *Id.*

49. *Id.*at 28–29.

50. Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses, *In re* SRBA Case No. 39576 (Jan. 17, 1989).

51. *Id.* at 1.

52. *De minimis* domestic and stockwater are defined in IDAHO CODE §§ 42-111 and 42-1401A(11).

53. Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses, *supra* note 50, at 4.

determining a deferred *de minimis* domestic or stockwater claim.[54] Because the *de minimis* domestic and stockwater users were joined as parties in the SRBA, the deferral of adjudication of these rights was not in violation of the McCarran Amendment. Ultimately, the United States and the State entered into a stipulation regarding the procedure for adjudication of *de minimis* domestic and stockwater claims in the SRBA.[55]

III. GATHERING THE MAJOR PLAYERS

There were several major players who represented different points of view and who had different interests in the SRBA. From the judiciary, governmental agencies, and the legislature, to private entities, pro se litigants, and conservation groups, these players ability to work together and their commitment to the process made the SRBA possible.

A. The SRBA Court

As noted above, the Idaho Supreme Court designated the District Court of the Fifth Judicial District of the State of Idaho in and for the County of Twin Falls as the venue for the SRBA.[56] To assist in the large adjudication, the SRBA Court, pursuant to Idaho Code § 42-1422, utilized Special Masters.[57] The SRBA Court specified the power and duties of a Special Master in an order of reference.[58] Most SRBA contested water rights were initially decided by the Special Masters. This division of labor allowed the Presiding Judge to focus on reviewing Special Master decisions and on deciding the more complex questions which arose in the adjudication.[59] The SRBA Court was also assigned a case administrator and other support staff to oversee the Court administration and procedures.

B. The United States

The McCarran Amendment, 43 U.S.C. § 666[60], allowed the United States to be

54. *Id.* at 6–10.

55. Stipulation for Establishment of Procedure for the Adjudication of Domestic and Stock Water Claims, *In re* SRBA Case No. 39576 (Dec. 20, 1988).

56. Order Appointing District Judge and Determining Venue of Petition for General Adjudication of Water Rights in Snake River Basin, *supra* note 33, at 1–2. There have been five SRBA presiding judges: Judge Daniel C. Hurlbutt Jr. (1987–1998); Judge R. Barry Wood (1999–2000); Judge John M. Melanson (2003–2009); and Judge Eric J. Wildman (2010–Present).

57. IDAHO CODE § 42-1422(1); Order Appointing District Judge and Determining Venue of Petition for General Adjudication of Water Rights in Snake River Basin, *supra* note 33, at 2.

58. IDAHO CODE § 42-1422(2).

59. THROUGH THE WATERS: AN ORAL HISTORY OF THE SNAKE RIVER BASIN ADJUDICATION 135 (Randy Stapilus and the Idaho State Bar Water Law Section eds., Ridenbaugh Press 2014) [hereinafter THROUGH THE WATERS].

60. The McCarran Amendment provides:

> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be

joined in a suit for determination of water rights in state court. As noted above, while several questions arose regarding the United States' inclusion in the SRBA under the McCarran Amendment, it was ultimately decided that the United States was properly joined as a party.[61] The United States filed claims on behalf of its agencies and it also filed claims on behalf of three Indian Tribes. The United States' participation in the SRBA was essential because it allowed for all of the federal government's state-law and federal-law based claims to be determined in the SRBA. The United States' claims lead to the development of important case law that will be discussed below in Section VI.E.

C. IDWR

IDWR was the Idaho agency charged with taking, investigating, and reporting SRBA water right claims. It developed many of the SRBA procedures and its technical expertise was relied on heavily by the court and the parties. The agencies role evolved over the course of the adjudication. It went from being a party to the litigation to an independent expert assigned to assist the court and the claimants.[62] The changing role of IDWR will be discussed in Section V.

D. The State of Idaho, State Agencies, and the Office of the Attorney General

The State of Idaho was involved in the SRBA, not only via IDWR, but also via other state agencies claiming water rights in the SRBA. The Idaho Office of the Attorney General was tasked with representing IDWR and the state agencies in the SRBA.[63] The role of the state and the Attorney General's Office became a contested issue in the SRBA that will be discussed in Section V.

E. Conservation Groups

Idaho Conservation League, Inc.; Idaho Rivers United, Inc.; Idaho Wildlife Federation, Inc. and Northwest Resources Information Center, Inc. ("Conservation Groups") filed a memorandum and motion to intervene[64] in Basin 36[65] in 1993. Uniquely, the Conservation Groups moved to intervene in Basin 36 as a whole instead of filing objections to individual water rights.[66] The Conservation Groups argued the requirement that a party object to a specific water right claim was "too

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> subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, that no judgment for costs shall be entered against the United States in such suit.

43 U.S.C. § 666 (2012).

61. *Memorandum Opinion on Commencement of Adjudication*, SRBA Case No. 39576 at 22 (Oct. 14, 1987) (holding "the lower Snake River basin must be included in order to obtain complete jurisdiction over all federal water rights" under the McCarran Amendment). The SRBA Court's opinion was upheld by the Idaho Supreme Court in *In re Snake River Basin Water System*, 764 P.2d 78, 86, 115 Idaho 1, 9 (1988), *review denied by* Boise-Kuna Irrigation Dist. v. United States, 490 U.S. 1005 (1989).

62. IDAHO CODE § 42-1401B

63. IDAHO CODE § 42-1401C(2).

64. Memorandum in Support of Motion for Leave to Intervene, *In re* SRBA Case No. 39576 (April 30, 1993).

65. Basin 36 is within Blaine, Butte, Gooding, Jerome, Lincoln, and Minidoka counties.

66. Memorandum in Support of Motion for Leave to Intervene, *supra* note 64.

restrictive" and that participation in the SRBA should be allowed "not only by claimants to particular private rights but also by claimants to general public rights."[67] The court denied the motion and stated that a blanket objection "that is not served on the owner of the water right fails to meet minimum due process requirement of notice."[68] However, the Conservation Groups continued to be involved in the SRBA as objectors and respondents to individual water right claims. The Conservation Groups were also party to a contested case regarding the public trust doctrine that will be discussed in Section VI.D.

F. Private Water Users/Claimants

A vast majority of the claimants in the SRBA were private water users. Many of these users participated in the SRBA as *pro se* litigants. The SRBA rules were drafted to make the SRBA Court an accessible forum for those claimants who wished to participate *pro se*. Fill-in-the blank standard pleading forms simplified the process of objecting and responding to claims.[69] In an effort to reduce litigation costs for claimants, the SRBA Court also put an emphasis on settlement conferences design to resolve disputes before they reached the trial stage.[70] Claimants could also appear at many hearings via telephone,[71] and documents could be filed with the Court by fax.[72] These types of rules allowed private water claimants to participate more easily in the SRBA.

G. The Steering Committee

In 1987, the State of Idaho, United States, and various private water right claimants requested that a steering committee be formed to make recommendations to the SRBA Court with regard to issues of common interest.[73] The steering committee was made up of a group of stakeholders who agreed to sit around a table to discuss issues as they arose in an attempt to deal with conflicts proactively. It provided a forum for consensus building and allowed many issues to be resolved through settlement discussions rather than through litigation.

The Court did not adopt any formal rules with regard to the steering committee,[74] and membership was open to any claimant who wished to participate.[75] An initial list of 75 interested participants was created and notice of all steering committee meetings was sent to those on the list.[76] Early on, the steering committee

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67. *Id.* at 4–5.

68. Order Denying Motion for Leave to Intervene and Motion for Leave to File Nonconforming Objections, *In re* SRBA Case No. 39576 at 3 (July 28, 1993).

69. SRBA Administrative Order 1, Rules of Procedure, *In re* SRBA Case No. 39576 at Section 4; Attachments 1–7, http://164.165.134.61/DOC/AO1NA.HTM#SCOPE.AO1 to AO1 [hereinafter SRBA AO1].

70. *Id*. at Section 17; IDAHO CODE § 42-1412(4).

71. SRBA AO1, *supra* note 69, at Section 12.b.

72. *Id*. at Section 3.h.

73. Notice of Expedited hearing on the SRBA Steering Committee Submission of Stipulations to the Court and Communications with the Court on Pending Cases, *In re* SRBA Case No. 39576 at 1 (Nov. 10, 1993).

74. *Id*. at 2.

75. *Id*. at 1.

76. *Id*. at 1–2.

met on a monthly basis.[77] The steering committee would report on matters it discussed at the SRBA monthly status conferences.[78] Matters discussed included the form of pleadings, notice and Docket Sheet procedure, the appointment of Special Masters, and the staging of claims taking.[79] Over time the role of the steering committee was clarified and evolved in conjunction with the needs of the adjudication.[80] The steering committee was essential in facilitating the smooth progression of the SRBA. It ensured a free-flow of information between the parties, IDWR, and the SRBA Court,[81] allowing the steering committee to identify issues that needed to be addressed and submit suggestions for resolving them to the Court. This allowed the parties to resolve issues prior to instituting formal proceedings with the Court.[82]

IV. SRBA PROCEDURES

The massive size of the SRBA required that careful consideration be given to the procedures that would govern the litigation. Two sets of procedures needed to be developed. One set of procedures would govern how claims were taken, investigated, and reported to the Court by IDWR. The second set of procedures would govern the SRBA Court proceedings, including litigating individual subcases and issuing partial decrees. Both sets of procedures were essentially developed from whole cloth and were subject to experimentation and change.

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77. *Id*. at 2.

78. *Id*.

79. Notice of Expedited hearing on the SRBA Steering Committee Submission of Stipulations to the Court and Communications with the Court on Pending Cases, *supra* note 73, at 2.

80. In 1993, the role of the steering committee in the SRBA changed. After initial claims taking was completed, the SRBA moved from determining overall procedures for claims taking and into a litigation phase focused on resolving issues raised by the Director's Reports. Report of Special Committee to Review Steering Committee and Procedures for Communication with the SRBA Court, *In re* SRBA Case No. 39576 at 3 (Jan. 11, 1994). New guidelines governing the steering committee became necessary to prevent the committee from being used as a vehicle for ex parte communications with the Court or as an adversarial forum. *Id.* at 3–4. To address these concerns, the SRBA Court disbanded the standing steering committee and adopted new procedures governing future steering committees. Order Re: Steering Committee, SRBA Case No. 39576 at 1–2 (April 15, 1994). The SRBA Court, either on its own or at the motion of any party, could establish a steering committee to address procedural matters and the Court appointed a limited number of members to the committee. Order Re: Steering Committee, *In re* SRBA Case No. 39576 at 2 (April 15, 1994). The committees were authorized to address only those issues referred by the Court and remained in existence until dismissed by the Court. *Id.* at 1. The steering committees reported their recommendations to the Court during the Court's monthly status conferences, and the Court was not bound by the steering committee's recommendations. *Id.* at 2.

In 1994, the Court appointed a steering committee to review issues raised by the 1994 amendments to the adjudication statutes. Memorandum Decision and Order on Basin-Wide Issue No. 3, *In re* SRBA Case No. 39576 at 3 (Aug. 25, 1994). Based on the steering committee's recommendation, the Court designated Basin Wide Issue No. 3 to resolve jurisdictional issued raised by the 1994 amendments. *Id.* In 2011, the Court set up a steering committee to identify issues and sub-issues pertaining to the form and content of the Final Unified Decree. Order Establishing Deadline for Late Claim Filings in Basins 23, 24, 25, 43, 51, 55, 57, 61, 81, 82, 83, 84, 85, and 86, Basin-Wide Issue 16, Subcase No. 00-92099, *In re* SRBA Case No. 39576 at 1 (Sept. 23, 2011). The Court used the steering committee's recommendations to close basins to claims taking and to create the Final Unified Decree. Order Establishing Deadline for Late Claim Filings in Basins 23, 24, 25, 43, 51, 55, 57, 61, 81, 82, 83, 84, 85, and 86, Basin-Wide Issue 16, *In re* SRBA Case No. 39576, Subcase No. 00-92099 at 2 (Sept. 23, 2011).

81. Notice of Expedited Hearing on the SRBA Steering Committee Submission of Stipulations to the Court and Communications with the Court on Pending Cases, *In re* SRBA Case No. 39576 at 2 (Nov. 10, 1993).

82. *Id.* at 2–3.

A. Dividing the SRBA into Bite Sized Pieces

The geographic size of the SRBA and the large number of claims required that the SRBA Court divide the adjudication into smaller parts for review and determination.[83] It was practically impossible for IDWR to take and investigate claims in the whole Snake River Basin at the same time. IDWR needed to stage the timing of the reports in a manner to allow IDWR to rotate the investigation and preparation of Director's Reports[84] among its four regions.[85] Initially, IDWR recommended to the SRBA Court that it proceed to determine the water rights for each of IDWR's forty-three sub-basins ("basins").[86] The basis for this recommendation was that the forty-three basins roughly correspond to hydrologic sub-basins within the Snake River Basin.[87]

The United States objected to IDWR's proposal[88], and the SRBA Court ultimately rejected it because it proposed delaying the reporting of federal reserved water right claims and also failed to comply with the requirements of Idaho Code § 42-1411(1).[89] IDWR negotiated with the various interested parties and executed a stipulation regarding the geographic scope and staging of the sub-basins.[90] The stipulation provided that the litigation would proceed with a total of twenty-four Director's Reports and that the Director would initially file Director's Report for three Test Basins.[91] The Stipulation also provided that all state claims and all federal consumptive use claims within each SRBA sub-basin would be reported in the Director's Report for that sub-basin.[92] The SRBA Court approved the Stipulation and the SRBA adjudication proceeded via consideration of the twenty-four sub-basins.[93]

Three of the twenty-four basins were then selected to be "test" basins; Basin 34 (Big Lost River), Basin 36 (Hagerman Valley), and Basin 57 (Owyhee County). These basins were selected to be the first ones adjudicated in part because each of the basins had existing water rights disputes that were ripe for resolution.[94] The three Test Basins were also seen as providing an opportunity to expose and deal with some of the legal questions and issues that might arise in other basins and for IDWR to

83. Scheduling Order, *In re* SRBA Case No. 39576 at Appendix 5, Appendix 9, Appendix 11 (Jan. 28, 1988).

84. Director's Reports will be discussed in further detail below.

85. Stipulation Regarding Establishment of Sub-Basins and Sequence of Director's Report for the SRBA, *In re* SRBA Case No. 39576 at Exhibit 2–3 (April 9, 1992).

86. Amended Proposed Report Schedules, *In re* SRBA Case No. 39576 (Dec. 30, 1991).

87. *Id.* at 4. The division of the Eastern Snake River Plain into hydrologic sub-basins follows county boundaries because the surface topography provides no clear hydrologic boundary.

88. United States' Response to Director's Plan for Filing Director's Reports in the SRBA, *In re* SRBA Case No. 39576 (Nov. 12, 1991).

89. Order Denying the Director's Plan for Filing Director's Reports in the Snake River Basin Adjudication, *In re* SRBA Case No. 39576 (Jan. 30, 1992).

90. Stipulation Regarding Establishment of Sub-Basins and Sequence of Director's Report for the SRBA, *In re* SRBA Case No. 39576 (April 9, 1992).

91. *Id.* at Exhibit 1.

92. *Id.* at 3.

93. Order Re: Idaho Department of Water Resources' Motion to Reconsider; and Order Establishing Adjudication Reporting Areas, General Sequence and Test Reporting Areas, *In re* SRBA Case No. 39576 (May 19, 1992).

94. THROUGH THE WATERS, *supra* note 59, at 129.

hone its claims taking and reporting processes.[95]

B. IDWR's Claims Taking Procedures

After the SRBA was commenced, IDWR had to notify potential claimants of the existence of the adjudication and that claims should be filed.[96] The first notice was sent to people in Adams, Latah, and Shoshone counties in February March 1988 and first round service continued on a county-by-county basis through 1990.[97] Claims taking began shortly after the first notice was served.[98] Claims were completed by the water user and outlined what the claimant thought the scope of his/her water right was. The claim had to include the name and address of the claimant, the source of water, the quantity of water claimed, date of priority, the water right number, the purpose and period of use, and the legal description of the place of use.[99,] Claims forms were filed with IDWR. IDWR had several methods for collecting claims: a mobile office taken to county seats to help claimants put together and file claims,[100] office visits, and mailed in paper claims.[101] Over the course of the approximate two years of initial claims taking, the department received roughly 100,000 claims.[102]

The notice provided to claimants regarding the filing of their claims provided deadlines by which claims needed to be filed in each basin. However, circumstances often arose in which claimants missed the deadlines, but still wanted to file their claims. The SRBA provided procedures that allowed for claimants to file late claims. If the claim was filed prior to IDWR filing a Director's Report in that basin, the claimant simply had to file a late notice of claim with IDWR. [103] If the Director's Report had already been submitted to the SRBA Court, however, a claimant had to file a *Motion to File a Late Notice of Claim* with the Court.[104] The SRBA Court would hold a hearing to allow any individuals who might be harmed by the late claim a chance to oppose it. The Court then reviewed each motion pursuant to I.R.C.P. 55(c) to determine whether to allow the claimant to file the late claim.[105] Generally,

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95. *Id.* at 124–125. The Director's Report for Basin 34 was filed with the SRBA Court in June 1992. Idaho Department of Water Resources Recommended Water Rights Acquired Under State Law, Director's Report Basin 34 (Jan. 12, 2007). The Basin 57 Director's Report was filed in 1992. Idaho Department of Water Resources Recommended Water Rights Acquired Under State Law, Director's Report Basin 57 (Oct. 13, 1992). The Basin 36 Director's Report was also filed in 1992. Idaho Department of Water Resources Recommended Water Rights Acquired Under State Law, Director's Report Basin 36 (Nov. 2, 1992).

96. IDAHO CODE §42-1408.

97. Schedule for Round One Service, Idaho Department of Water Resources (Aug. 4, 1989) (on file with authors).

98. Interview with Steven Clelland, Senior Water Resource Agent, IDWR (Sept. 15, 2015).

99. IDAHO CODE § 42-1409(1). Claims were completed on a standardized Notice of Claim to a Water Right form. Use of the form helped ensure claimants gave IDWR all the necessary information for their claim to be processed. For further description of the elements of a water right see the section outlining a partial decree.

100. Interview with David B. Shaw, Project Manager, ERO Resources Corp., (June 20, 2014).

101. Interview with Steven Clelland, *supra* note 98.

102. Interview with David B. Shaw, *supra* note 100.

103. SRBA AO1, supra note 69, at Section 4.d(2)(a).

104. SRBA AO1, *supra* note 69, at Section 4.d(2)(b). *See* Standard Form 4 Motion to File: Late Notice of Claim, Amended Notice of Claim, *In re* SRBA Case No. 39576, http://164.165.134.61/forms/sf4.pdf.

105. SRBA AO1, *supra* note 69, at Section 4.d(2)(e).

late claims were allowed to proceed.

Filing of a claim had to be accompanied by payment of a filing fee.[106] The filing fees followed a schedule outlined in Idaho Code § 42-1414. It was initially thought by the State and IDWR that the filing fees would cover most of the costs of the adjudication, especially federal and hydropower claims.[107] The fee statute contemplated that the United States would pay filing fees for its claims.[108] The United States, however, asserted that "the McCarran Amendment does not waive federal sovereign immunity from payment of filing fees."[109] Both the SRBA Court and the Idaho Supreme Court found that costs are different than fees in this instance and therefore the United States was required to pay fees prior to IDWR processing the federal claims.[110] However, the United States Supreme Court disagreed holding that that the McCarran Amendment does not subject the "United States to the payment of the sort of fees that Idaho sought to exact . . . ."[111] Therefore, a large portion of the fees that the State anticipated using to pay for the adjudication were never paid. To compensate, the Idaho legislature began using general funds to financially support the adjudication.[112]

C. IDWR Claims Investigation Procedures

The adjudication statutes specify that "the director shall commence an examination of the water system, the canals and ditches and other works, and the uses being made of water diverted from the water system . . . to evaluate the extent and nature of each water right for which a notice of claim under state law has been filed."[113] Claims investigations frequently involved water agents going out into the field and examining the place of use, point of diversion, and taking water flow measurements. Other evidence such as photos[114], maps, affidavits[115], and old records could be used to establish priority date and historical use. Per the adjudication statutes, IDWR did not investigate federal based water right claims.[116] Instead, IDWR assigned each federal based claim a water right number and forwarded them directly to the Court.

The information gathered during claim investigation was used to develop

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106. IDAHO CODE § 42-1414.

107. Interview with David B. Shaw, *supra* note 100.

108. United States v. Idaho ex rel. Director, Idaho Dep't of Water Res., 508 U.S. 1, 3 (1993).

109. *Id*. at 4.

110. Memorandum Decision on the State of Idaho's Motion for Partial Summary Judgment on Filing Fee, *In re* SRBA Case No. 39576 (Dec. 27, 1990); Idaho Dep't of Water Res. v. United States, 832 P.2d 289, 122 Idaho 116 (1992).

111. *Idaho ex rel. Director, Idaho Dep't of Water Res.*, 508 U.S. at 8. While the Court held that the McCarran Amendment did not waive the United States' sovereign immunity with regard to the filing fees, it also held that the United States had waived its sovereign immunity with regard to state "adjective law governing procedure, fees, and the like." This ruling made clear the United States was subject to State procedures in the SRBA. *Id.* at 6.

112. THROUGH THE WATERS, *supra* note 59, 134–135.

113. IDAHO CODE § 42-1410.

114. Old aerial photographs were one tool that was relied on extensively to establish priority dates. IDWR could use the photos to establish whether land looked as though it was irrigated at the time of the aerial photo was taken.

115. Affidavits were often gathered from "old timers" who had lived on the land and could testify as to how water was used by their grandfathers when they were young.

116. IDAHO CODE § 42-1411A(12).

IDWR's recommendation to the Court for what it believed were the correct elements of the water right. Before sending final recommendations to the SRBA Court, IDWR would send a preliminary recommendation to the claimant to verify there were no errors and to attempt to resolve any issues prior to involvement of the Court.[117] Once all recommendations in a reporting area were completed and finalized they were compiled into a Director's Report. The Director's Report was IDWR's recommendation to the Court as to what it thought the water right should be.[118] A Director's Report contained the same information required by a claim plus any conditions, remarks, other matters necessary for definition of the right, or general provisions which IDWR determined were necessary to further define or administer the water right.[119] Once the Director's Report was received by the Court it was sent via personal service to all the claimants whose rights were included in the report. The notice contained: a copy of each claimant's recommendations, filing deadlines for objections and responses, and instructions describing how the claimant could access and review the other recommendations in the Director's Report.[120] Additionally, the notice contained information on how to access the SRBA Docket Sheet[121] to keep informed of actions before the Court. Anyone who filed a claim in the SRBA had standing to file an objection to a water right recommendation.[122] Each claimant had the responsibility to review the full director's report to determine if any claims by other claimants were adverse to his claim.[123]

The Director's Report also appeared on the Docket Sheet. The Docket Sheet was the procedure through which all parties could keep abreast of the filings in the SRBA, even if they were not involved in a specific subcase. The Docket Sheet Procedure was used to "give notice to parties in the adjudication about matters not a part of a subcase . . . ."[124] The Docket Sheet was a list that was published monthly of items filed with the court. It was comprised of six sections, that listed chronologically by filing date: 1) orders, pleadings and other documents that were not part of a subcase; 2) objections and responses filed with the court; 3) hearings scheduled for the proceeding three months, except hearings in subcases); 4) Special Master's Reports and Recommendations; 5) Amended Director's Reports; and 6) Partial Decrees issued.[125] The Docket Sheet was sent to the Clerk of the District Court of each county within the boundaries of the SRBA, IDWR, and any party who had signed up to receive a copy.[126] Because personal service on all parties to the SRBA would be untenable the SRBA Court determined the Docket Sheet provided sufficient notice and all parties were informed to follow the Docket Sheet.[127] Claimants were then able to either object to the recommendation for their own water right or object to the recommendation for another claimants' water right. The

117. Adjudication Memo 40, Re: Proposed Recommendation/Notice of Error Procedure from Lynne Krogh-Hampe, to IDWR Adjudication Staff 1–4 (September 9, 1992); THROUGH THE WATERS, *supra* note 59, at 130.

118. THROUGH THE WATERS, *supra* note 59, at 140.

119. IDAHO CODE § 42-1411.

120. IDAHO CODE § 42-1411(6).

121. *See infra* note 124.

122. IDAHO CODE § 42-1412(1).

123. LU Ranching Co. v. United States, 67 P.3d 85, 138 Idaho 606 (2003).

124. SRBA AO1, *supra* note 69, at Section 6.a.

125. *Id.* at Section 6.b.

126. *Id.* at Section 6.c.

127. *LU Ranching Co.*, *supra* note 123, at 89, 138 Idaho at 610.

objections began the court process known as a subcase.[128]

D. SRBA Court Procedures

Because strict adherence to the Idaho Rules of Civil Procedure ("I.R.C.P") would create delay and inefficiencies in some instances, the SRBA Court issued orders supplementing the applicable I.R.C.P with specialized procedures for serving pleadings, motions, and notices in the SRBA.[129] Contested cases or subcases were created when an objection was filed to a water right recommendation. According to SRBA Administrative Order 1 ("AO1"), a subcase is "[a] water right which is the subject of any post-Director's Report pleading."[130] The court mandated the use of standard forms for pleadings [131] which made the process very user friendly. The standard forms ("SF") covered objections ("SF1"), responses ("SF2"), motions to file late notice of claim/motions to amend a claim ("SF4"), and settlements ("SF5").[132] The parties to a subcase were those who had filed an objection or response. Any documents served in the subcase had to personally served on the parties.

If the parties and IDWR could come to a settlement agreement prior to trial, they would sign and submit an SF5 to the court, containing the agreed upon elements of the water right. Once the SF5 was submitted, the claim would proceed through to partial decree without a trial. The Idaho Supreme Court held that parties outside of the subcase could not object to the SF5 because "[t]o allow a new party to enter a subcase after it has been settled through the SF5 process would unfairly burden the claimant, who would be forced to try a case in which he had just reached a settlement, obviously defeating the purpose of the SF5 process."[133]

If the parties could not come to a settlement agreement the subcase would go

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128. The subcase process is described in further detail below.

129. Scheduling Order, *In re* SRBA Case No. 39576 (Feb. 24,1988); SRBA AO1, *supra* note 69; SRBA Administrative Order 7, Caption for Pleadings, *In re* SRBA Case No. 39576 (January 28, 1994); SRBA Administrative Order 8, Stipulation to Reset Hearing Date or Motion to Reset Hearing, *In re* SRBA Case No. 39576 (Jan. 28, 1994); Order Amending Standard Form 3 Standard Notice of Change of Address or Substitution of Party and Standard form 4 Motion to File a Late Notice of Claim, *In re* SRBA Case No. 39576 (March 22, 1995); Order Directing IDWR to Attend Hearings, *In re* SRBA Case No. 39576 (June 30, 1995); Order Denying, in Part, and Granting, in Part, Motion to Modify Objection and Response Procedures, *In re* SRBA Case No. 39576 (Oct. 3, 1995); SRBA Amended Administrative Order 9, Establishing Mandatory Settlement Conferences, *In re* SRBA Case No. 39576 (May 14, 1996); SRBA Administrative Order 11, Order Establishing Procedures for Incorporating Completed IDWR Administrative Proceedings in the SRBA, *In re* SRBA Case No. 39576 (May 21, 1996); Order Amending SRBA Administrative Order 1, Rules of Procedure, *In re* SRBA Case No. 39576 (July 17, 1996); Order Amending Section 2 of SRBA Administrative Order 1, Rules of Procedure, *In re* SRBA Case No. 39576 (July 22, 1996); SRBA Administrative Order 1, Rules of Procedure, *In re* SRBA Case No. 39576 (Sept. 30, 1996); SRBA Administrative Order 1, Rules of Procedure, *In re* SRBA Case No. 39576 (Oct. 10, 1997); Administrative Order 13, Appeals in the SRBA, *In re* SRBA Case No. 39576 (June 25, 2001); Order Amending SRBA Administrative Order 1 Rules of Procedure, *In re* SRBA Case No. 39576 (June 30, 2003); Order Amending Administrative Order 1, Section 6(e)(2)(C), *In re* SRBA Case No. 39576 (Aug. 19, 2008);

130. SRBA AO1, *supra* note 69, at Section 2.y.

131. *Id.* at Section 4.

132. All Standard Forms are available on the SRBA website at: http://www.srba.state.id.us/srba2.htm

133. N. Snake Ground Water Dist. v. Gisler, 40 P.3d 105, 108, 136 Idaho 747, 750 (2002).

to trial before one of the Special Masters.[134] At trial, a Director's Report "constitute[d] prima facie evidence of the nature and extent of the water rights acquired under state law."[135] As such, "[u]nless that evidentiary presumption [was] overcome by the evidence or the application of that presumption [was] clearly erroneous on its face, the facts set forth in the Director's Report [were] established."[136] The party filing the objection had the burden to present the evidence to rebut the Director's Report.[137] In addition to the Director's Report the court could request IDWR file a supplemental report that presented the basis for the Director's Report.[138] Such reports came to be known as 706 reports due to their partial authorization from Idaho Rule of Evidence 706 with IDWR functioning as a court appointed expert witness. Generally a 706 report set out in detail the evidence and reasoning that IDWR used to make its recommendation.

After the trial, the Special Master would issue a Special Master's Report and Recommendation ("SMRR").[139] The SMRR contained the Special Master's findings of fact, conclusions of law, and the elements of the water right that the Special Master determined were correct based on all the evidence presented.[140] If one of the parties did not agree with the conclusions in the SMRR they could file a challenge with the presiding judge. When reviewing a SMRR the presiding judge was required to adopt a Special Master's finding of fact unless they were clearly erroneous.[141] "The special master's conclusions of law were not binding upon the district court, although they were expected to be persuasive."[142] The presiding judge's decision could then be appealed to the Idaho Supreme Court. Once all challenges in a subcase were resolved, a right would move to partial decree.[143]

E. What is a Partial Decree?

Often judicial resolution of litigation comes in the form of a judgment and an order dismissing the action. In a case involving multiple claims or multiple parties, however, an Idaho court may enter final judgment for less than all of the claims or parties "upon an express determination that there is no just reason for delay and upon an express direction for the entry of the judgment."[144] The SRBA, with its litigation of thousands of subcases, lent itself to partial judgments so the first resolved subcases were not placed on legal hold until the last subcases were resolved. In the SRBA, partial decrees acted as independent, final judgments for each individual subcase/water right akin to those addressed in Rule 54(b) of the Idaho Rules of Civil

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134. SRBA AO1, *supra* note 69, at Section 9.a. ("The Presiding Judge may refer matters, including subcases, to a Special Master by an *Order of Reference* pursuant to I.R.C.P. 53.").

135. IDAHO CODE §42-1411(4).

136. *In re* SRBA Case No. 39576 (Basin-Wide Issue #2 and 3), 912 P.2d 614, 624, 128 Idaho 246, 256 (1995).

137. IDAHO CODE § 42-1411(5).

138. IDAHO CODE §42-1412(4); *see also* Idaho Rules of Evidence 706.

139. SRBA AO1, *supra* note 69, at Section 9.c and 9.d.

140. *Id.* at Section 9.c and 9.d.

141. IDAHO RULES OF CIVIL PROCEDURE 53(e)(2);

142. N. Snake Ground Water Dist. v. Gisler, 40 P.3d 105, 107, 136 Idaho 747, 749 (2002).

143. IDAHO CODE § 42-1412(6) ("The SRBA Court shall enter a partial decree determining the nature and extent of the water right which is the subject of the objection or other matters which are the subject of the objection.").

144. IDAHO RULES OF CIVIL PROCEDURE 54(b).

Procedure. Wrapping up the adjudication, the SRBA Court issued the Final Unified Decree on August 25, 2014, which incorporated all the partial decrees into one final order.[145]

A partial decree is the enumeration of all the elements of a water right.[146] The partial decree contains each element of a water right as outlined in Idaho Code § 42-1411(2).[147] The following is a discussion of each of those elements:

1. Ownership

In Idaho, water rights are usufructary:

> All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose, …and the right to the use of any of the public waters which have heretofore been or may hereafter be allotted or beneficially applied, shall not be considered as being a property right in itself, but such right shall become the complement of, or one of the appurtenances of, the land . . . . [148]

In other words, the State of Idaho "owns all water within the state but allows citizens to appropriate that water for beneficial use."[149] At the same time, a water right is considered real property.[150] Water rights can be conveyed explicitly via deed or, where the deed is silent, as a matter of law because the water right is appurtenant to the land.[151] The water belongs to the State of Idaho; the State recognizes appropriators who put that water to beneficial use; IDWR administers the water rights. So IDWR needs to track the appropriators.

In a partial decree, each right bears the name of the water right holder.[152] The water right holder can be an individual or a group of people, a married couple, an entity (including a business, tribe or local, state, and federal government agencies),

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145. *See* Final Unified Decree, *In re* SRBA Case No. 39576 (Aug. 25, 2014); *infra* Part VIII.

146. IDAHO CODE § 42-1411(2).

147. IDAHO CODE § 42-1412(6).

148. IDAHO CODE § 42-101. *See* Wash. County Irrigation Dist. v. Talboy, 43 P.2d 943, 945, 55 Idaho 382, 388 (1935).

149. *In re* Idaho Dep't of Water Res. Amended Final Order Creating Water Dist. No. 170, 220 P.3d 318, 331, 148 Idaho 200, 213 (2009) (*citing* Nettleton v. Higginson, 558 P.2d 1048, 1051–52, 98 Idaho 87, 90–91 (1977)).

150. *See* IDAHO CODE § 55-101 (defining "real property"). A water right permit is not considered real property. Speer v. Stephenson, 102 P. 365, 16 Idaho 707 (1909). For a thoughtful discussion on when a water right vests along the continuum from permit to license, *see* Idaho Power Co. v. Idaho Dep't of Water Res., 255 P.3d 1152, 1159–61, 151 Idaho 266, 273–75 (2011).

151. *See* IDAHO CODE § 45-1502(3) (specifying a deed of trust conveys real property); Joyce Livestock Co. v. United States, 156 P.3d 502, 515, 144 Idaho 1, 14 (2007) ("Unless they are expressly reserved in the deed or it is clearly shown that the parties intended that the grantor would reserve them, appurtenant water rights pass with the land even though they are not mentioned in the deed and the deed does not mention 'appurtenances.'"); Russell v. Irish, 118 P. 501, 502, 20 Idaho 194, 198 (1911) (noting in Idaho it is "well established that a water right is an appurtenance to the land on which it has been used and will pass by conveyance of the land").

152. *See* IDAHO CODE § 42-1411(2)(a) (the name and address of the water right claimant).

or a mixture of co-owners.[153]

2. Source

The next element of a partial decree is the source of the water.[154] The diversion must be from a natural water course[155] or ground water,[156] as opposed to private water.[157] Diversions from ditches that utilize waste water, seepage, or spring waters are subject to appropriation.[158]

The surface water source names are almost always identified according to the designation on U.S. Geological Survey maps.[159] Typically, surface water sources which are not named on the U.S.G.S. maps are identified as "unnamed stream" or lake, creek, etc., but for those with locally used names, IDWR often included a remark identifying the locally known name.

Additionally, other relevant information was included in the source element portion of a partial decree. Where applicable, the proper tributary was identified (the first named tributary the source flows into, i.e. the Snake River). For rights that involved injection and rediversion, those injection and rediversion sources were described.

Finally, some sources were identified as waste water.[160] Diversions from surface waste and seepage water (leakage from canals, runoff, etc.) have been widely recognized.[161] Such water can be recaptured and reused by the original appropriator, but once the water leaves the control of the original appropriator, a third party can put the waste water to beneficial use.[162] Essentially, a waste water source is a source without guarantee. A waste water right is "subject to the right of the owner to cease wasting it or in good faith to change the place or manner of wasting it, or to recapture it so long as he applies it to beneficial use."[163] "No appropriator of waste water should be able to compel any other appropriator to continue the waste of water which

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153. There are some limitations, however. *See, e.g.*, IDAHO CODE § 42-206 (residency).

154. IDAHO CODE § 42-1411(2)(b).

155. *See generally*, IDAHO CODE §§ 42-101, 42-226. The Idaho Supreme Court defines a natural water course as:

> [A] stream of water flowing in a definite channel, having a bed or sides or banks, and discharging itself into some other stream or body of water. The flow of water need not be constant, but must be more than mere surface drainage occasioned by extraordinary causes; there must be substantial indications of the existence of a stream, which is ordinarily a moving body of water.

Burgess v. Salmon River Canal Co., 805 P.2d 1223, 1229, 119 Idaho 299, 305 (2001) (quoting Loosli v. Heseman, 162 P.2d 393, 398, 66 Idaho 469, 481 (1945)).

156. IDAHO CODE § 42-226.

157. *See* IDAHO CODE § 42-212 (describing private waters as those "of any lake not exceeding five (5) acres in surface area at highwater mark, pond, pool or spring in this state, which is located or situated wholly or entirely upon the lands of a person or corporation . . . .").

158. IDAHO CODE § 42-107.

159. *See* Order Denying Cross Motions for Summary Judgment & Order Setting Scheduling Conference, *In re* SRBA Case No. 39576, Subcase Nos. 45-10480, 45-10481, 45-129006 at 5 (June 13, 2006).

160. When it comes to water rights, general waste water is not defined by statute. Irrigation waste water, however, is defined as "excess surface water from agricultural fields generated during any agricultural operation, including runoff of irrigation tailwater, as well as natural drainage resulting from precipitation, snowmelt and floodwaters." IDAHO CODE 42-3902(10).

161. *See* IDAHO CODE § 42-107; Sebern v. Moore, 258 P. 176, 177, 44 Idaho 410 (1927).

162. Order on Challenge, *In re* SRBA Case No. 39576, Subcase Nos. 36-02080, 36-15127, 36-15192, 36-15193, 36-15194, 3.6-15195, 36-15196 at 16 (April 25, 2003).

163. *Id.*

benefits the former."[164]

Sometimes, that source designation for waste water was seemingly clear, like a particular drain ditch or a slough, but not always. Water rights with a named drain ditch often included a remark that the right remains subject to the right of the original appropriator, in good faith, to cease wasting, to change the place or manner of wasting, or to recapture it.[165] For other rights, the name of the source suggested a natural water course, but in a contested subcase, a party insisted the source contained waste water: "The description of the source element of a water right by means of a geographic name (e.g. Eight Mile Creek) in the *Director's Report* or other document does not necessarily answer the question of whether or not the molecules of water in that named source have been beneficially used pursuant to an up gradient water right."[166] In those instances, the partial decree included a different waste water remark that recognizes the source might have natural water course water and also waste water mixed into it. That remark states the source includes waste water and therefore the right remains subject to the right of the original appropriator, in good faith, to cease wasting, to change the place or manner of wasting or to recapture.[167]

3. Quantity

A water right entitles one "to divert and appropriate the unappropriated waters of any natural stream to beneficial uses." [168] Determining how much one is entitled to divert is sometimes complex. In the beginning of the SRBA, a water right included both the rate of flow of the right[169] and the actual volume consumed for the purposes of use (consumptive use).[170] After the Court and IDWR struggled with how to quantify consumptive use[171], the Idaho Legislature removed it as an element of a

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164. Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc., 619 P.2d 1130, 1134, 101 Idaho 670, 681 (1980). *See also* Colthorp v. Mountain Home Irrigation Dist., 157 P.2d 1005, 1007, 66 Idaho 173, 179 (1945) (finding irrigation district could not be required to continue to waste three-quarters of the water decreed to it for the benefit of a junior appropriator).

165. *See, e.g.*, Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 63-02343, *In re* SRBA Case No. 39576 (Feb. 6, 2009).

166. Memorandum Decision and Order on Motion for Summary Judgment; Order Setting Scheduling Conference, *In re* SRBA Case No. 39576, Subcase No. 63-08447 at 5 (Aug. 28, 2007).

167. *See, e.g.*, Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 63-27475, *In re* SRBA Case No. 39576 (Oct. 6, 2008).

168. IDAHO CONST. art. XV, § 3.

169. IDAHO CODE § 42-1411(2)(c).

170. 1986 Idaho Sess. Laws ch. 220 sec. 13 (amending IDAHO CODE § 42-1411(2)(i)); 1996 Idaho Sess. Laws, ch. 186 sec. 1 and 2 (amending IDAHO CODE §§ 42-1411(2)(i) and 42-1401A(2)).

> 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 purposes of maintaining water quality is required before the water may be returned to the water system. "Consumptive use" for an irrigation water right shall be based upon the most water consumptive crop that can be grown in the area during the period of year when water is used for irrigation. "Consumptive use" is included as a rebuttable presumption in a decree only for the purposes of transfers pursuant to section 42-222, Idaho Code. The determination of the annual volume of "consumptive use" for all uses of water other than irrigation need not be decreed unless reported in the Director's Report. "Consumptive use" amounts not decreed may be quantified, when quantification is necessary, as part of any future transfer proceedings pursuant to section 42-222, Idaho Code.

IDAHO CODE § 42-1411(2)(i) (1996).

171. *See generally*, proceedings in *In re* SRBA Case No. 39576, Subcase Nos. 36-00003A, 36-00003C, 36-00003E, 36-00003F, 36-00034B, 36-00035J, 36-00039E, 36-00039J, 36-00039N, 36-00047, 36-

water right in 1997.[172] Consumptive use is no longer a uniform requirement but because it was on older licenses or made part of earlier SRBA settlement agreements, some partial decrees carried the concept forward.[173]

Once consumptive use was removed from the elements of a water right, the description of the quantity of water for a right was essentially "the rate of water diversion or, in the case of an instream flow right, the right of water flow in cubic feet per second or annual volume of diversion of water for use or storage in acre-feet per year as necessary for the proper administration of the water right."[174]

Surface water rights generally were listed in cubic feet per second ("cfs"). The presumptive diversion rate for an Idaho irrigation water right is one inch of water per acre or .02 cfs.[175] That presumption could be overcome if "it can be shown to the satisfaction of the department of water resources in granting such license, and to the court in making such decree, that a greater amount is necessary . . . ."[176] Quantities for storage and irrigation rights using ground water sources, however, were expressed in terms of both cfs and acre-feet/year.[177]

Aside from the amount diverted, quantity is limited by what an appropriator put to beneficial use. Bookended on one side is the notion that an appropriator cannot waste water.[178] For rights based on licenses in the SRBA, IDWR (or its predecessor) had previously determined the extent of beneficial use by the time of adjudication.[179] For rights based on permits or the constitutional method, the question of "fundamental existence or historic perfection of the water rights at issue" remained to be determined in the SRBA.[180] Appropriators often utilized affidavits and/or aerial photography to establish the extent of beneficial use.[181]

4. Priority Date

This element is the cornerstone of the prior appropriation doctrine:

00061, 36-00062, 36-00063, 36-00064B, 36-00079, 36-00085A, 36-00086C, 36-00092, 36-00103F, 36-00106, 36-00108B, 36-10283B, and 36-10409.

172. 1997 Idaho Sess. Laws, ch. 374.

173. *E.g.*, 1990 Fort Hall Water Right Agreement by and between the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation, the State of Idaho, the United States, and Certain Water Users (July 1990) [hereinafter Fort Hall Agreement].

174. IDAHO CODE § 42-1411(2)(c).

175. *See* IDAHO CODE § 42-220.

176. *Id*.

177. Memorandum Decision and Order on Summary Judgment, Order Denying Motion to Strike, Special Master's Report and Recommendation for Water Rights 63-02529 and 63-10435, Order Setting Scheduling Conference in Subcases 63-03323 and 63-03324, *In re* SRBA Case No. 39576, Subcase Nos. 63-02529, 63-03323, 63-03324, and 63-10435 at 2 (June 11, 2009) (holding IDWR has authority to describe the quantity of a right with an annual volume in its recommendation even if the license for such right did not include an annual volume).

178. IDAHO CODE § 42-916.

179. *See* IDAHO CODE § 42-217 (listing those items a permit holder must submit to IDWR to establish proof of beneficial use for licensing purposes).

180. *See* Order Granting in Part and Denying in Part Motion for Summary Judgment, *In re* SRBA Case No. 39576, Subcase Nos. 01-10614, 01-10615, 01-10616, 01-10617, 01-10618, 01-10620, 01-10621, 01-10622, 01-10623, 63-33732, 63-33733, 63-33737, and 63-33738 at 4 (Jan. 9, 2015).

181. In the SRBA, those were not the only methods for establishing proof of beneficial use (or other elements of a right). Anecdotally, claimants adduced proof via tax documents, family Bibles, newspaper clippings, and books about the development of the area, among other means. *See id.* at 5–6 (highlighting that establishing proof of beneficial use for storage rights in federal Reclamation Act storage facilities under the constitutional method presented "unique obstacles.").

> Whenever more than one person has settled upon, or improved land with the view of receiving water for agricultural purposes, under a sale, rental, or distribution thereof . . . as among such persons, priority in time shall give superiority of right to the use of such water in the numerical order of such settlements or improvements; but whenever the supply of such water shall not be sufficient to meet the demands of all those desiring to use the same, such priority of right shall be subject to such reasonable limitations as to the quantity of water used and times of use as the legislature, having due regard both to such priority of right and the necessities of those subsequent in time of settlement or improvement, may by law prescribe.[182]

The basis for establishing a water right was often key to its priority date. For a "constitutional" or beneficial use-based right, the priority date was usually the earliest date the original user first diverted and applied the water to beneficial use. Idaho recognized the constitutional method for acquiring rights, both surface water and groundwater, for many years. However, mid-20th century, a new appropriation required a permit (March 25, 1963 for groundwater[183] and May 19, 1971 for surface water[184]).

For a short time, water users were directed to file claim to their beneficial use water right so IDWR could record historic uses of the waters of the state.[185] Called *statutory claims* or *243 claims*, such a claim was "admissible in a general adjudication of water rights as evidence of the times of use and the quantity of water the claimant was withdrawing or diverting as of the year of the filing . . . ."[186] However, the evidentiary value did not extend to the priority date element.[187]

For a license-based right, the priority was usually the date of the permit application.[188] However, a lapsed permit (resulting from failure to timely provide proof of beneficial use or from a request for extension of time to provide such proof) triggered advancement of the priority date.[189]

5. Point of Diversion

Because the physical essence of a water right is usually diversion from the source, the details about the point(s) of diversion ("POD") are required elements of a right.[190] The partially decreed PODs state the legal description of the POD from the natural watercourse, usually in Township, Range, Section, forty-acre tract or quarter-quarter, and county designations. Some rights boast numerous PODs in the same quarter-quarter or ten-acre tract (quarter-quarter-quarter), the latter usually further

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182. IDAHO CONST. art. XV, § 5.

183. *See* IDAHO CODE § 42-229.

184. *See* IDAHO CODE § 42-201; Order Adopting Special Master's Recommendation in Part and Rejecting in Part, Order Denying Motion to File Late Notice of Claim for Early and Late Season Irrigation, Order Conditionally Granting Motion to File Late Notice of Claim for Stockwater, Order Requiring Amended Notice of Claim, *In re* SRBA Case No. 39576, Subcase Nos. 65-23481 at 5–6 (Feb. 27, 2013).

185. IDAHO CODE § 42-243.

186. IDAHO CODE § 42-246.

187. *See id.* (specifying the statutory claim "shall not otherwise be evidence of the priority of a claimed water right.").

188. IDAHO CODE § 42-217.

189. IDAHO CODE § 42-218a.

190. IDAHO CODE § 42-1411(2)(e).

differentiated via remarks in the POD element. Instream flow rights were described with the beginning and ending points of the instream use.[191] Some purposes of use and certain circumstances do not require diversions for perfection of the water right.[192]

6. Purpose of Use

An appropriation must be for "some useful or beneficial purpose."[193] The Idaho Constitution lists five beneficial uses: domestic, agricultural (stock and irrigation), mining, manufacturing, and power.[194] This is not an exhaustive list. From records of the Idaho Constitutional Convention, "[i]t appears that insofar as particular uses were mentioned in the debates, discussion was confined to the establishment of preferences for certain uses over others under certain circumstances."[195] Courts have recognized other uses including aesthetics.[196] IDWR recognizes approximately 75 different purposes of use including wildlife, fish propagation, heating, cooling, ground water recharge, municipal, recreation, and fire protection.[197]

7. Period of Use

Each partial decree includes a period of use for each different purpose.[198] For example, a partial decree that listed both a domestic and irrigation purpose of use would likely have a year round (January 1 to December 31) season for the domestic use and a growing season for the irrigation use (usually a period between March and October). The period of use is described by specific start and end dates.

Additionally, some irrigation rights benefitted from "shoulder remarks." A shoulder remark extended irrigation to an earlier start and/or a later end date, depending on the circumstances that led to the perfection of the right.[199] The use pursuant to a shoulder remark is subordinated to otherwise junior rights.[200]

8. Place of Use

The place of use ("POU") element of a right is most often a legal description of the real property in Township, Range, Section, quarter-quarter, and county

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191. *Id.*

192. *See* Joyce Livestock Co. v. United States, 156 P.3d 502, 508–09, 144 Idaho 1, 7–8 (2007) (holding no diversion needed to establish a valid stockwater right); Idaho Dep't of Parks v. Idaho Dep't of Water Admin., 530 P.2d 924, 928–29, 96 Idaho 440, 444–45 (1974) (holding neither Idaho Code § 67-4307 nor the Idaho Constitution require an actual physical diversion to perfect a water right).

193. IDAHO CODE § 42-104.

194. IDAHO CONST. art XV, § 3.

195. Idaho, Dep't of Parks v. Idaho Dep't of Water Admin., 530 P.2d at 927, 96 Idaho at 443.

196. *See id.* at 927–28, 96 Idaho at 443–44; *see also* 530 P.2d at 929–34, 96 Idaho at 445–50 (Bakes, J. concurring) (providing a very thoughtful tour of beneficial uses).

197. IDWR Water Use Codes, Idaho Dep't of Water Resources (March 25, 2008) (on file with authors).

198. *See* IDAHO CODE § 42-1411(2)(g). The period of use is also referred to as the season of use.

199. *See, e.g.*, Order Amending Irrigation Period of Use Element in Partial Decree and Incorporating into Partial Decree an Express Statement Regarding General Provisions, Nunc Pro Tunc, *In re* SRBA Case No. 39576, Subcase No. 57-02221A at 1 (Feb. 1, 2002).

200. *See* Special Master's Report and Recommendation for General Provisions in Basin 65, *In re* SRBA Case No. 39576, Subcase No. 00-91065 at 2–3 (June 24, 2008).

terms.[201] Irrigation rights need to further describe the number of irrigated acres within each quarter-quarter subdivision[202] or via digital boundary.[203] Some POU descriptions pinpoint the use to the quarter-quarter-quarter, but more often the description is to the quarter-quarter. Sometimes, federal government lot numbers are used. And, as was the case with the period of use, a POU description is required for each use.

For all the POU element does, there are things it does not do. The POU description does not confer an easement across land of another for the right-holder.[204] Similarly, a water right's POU description does not necessarily signify the right-holder owns the POU.[205] For example, if a farmer holds a water right, he may be able to apply the irrigation water to his fields or the fields he rents, depending on the circumstances.[206]

9. Other Provisions Necessary

The final element of a partial decree is "Other Provisions Necessary."[207] All SRBA partial decrees have the standard remark, "This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the court at a point in time no later than the entry of a final unified decree. I.C. Section 42-1412(6)." That provision reflects the understanding that the SRBA would extend for years and that those who were first partially decreed should enjoy the same provisions applied to those partially decreed last.

While the SRBA Court did not generally include restatements of existing law in a partial decree,[208] the contents of the Other Provisions Necessary section on a partial is nebulous. Examples of some Other Provisions from various partial decrees include caveats regarding waste water,[209] explanation that the quantity decreed for a

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201. *See* IDAHO CODE § 42-1411(2)(h). POU by legal description is a significant improvement over some historical decrees which direct rights to a person's land with no further reference to homestead documents, deeds, or number of irrigated acres.

202. The number of acres per quarter-quarter is often listed via chart form with all irrigated acres summed at the bottom of the chart. *See, e.g.*, Application for Permit to Appropriate Public Waters of the State of Idaho, Idaho Dep't of Water Resources, Water Right No. 74-16008 at 2 (Dec. 4, 2013).

203. *See* IDAHO CODE § 42-1411(2)(h) (referring to IDAHO CODE § 42-219). As technology improved, the utility of digital boundaries became apparent. It is much easier to describe thousands of acres via picture than via pages and pages of legal descriptions. A digital boundary is a map-based representation of the scope of a POU with the unirrigated lands clearly demarcated. *See, e.g.*, Amended Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 21-00110, *In re* SRBA Case No. 39576 at 3 (Apr. 1, 2013).

204. *See* Memorandum Decision and Order on Motion to Alter or Amend Judgment; Order Granting Motion to Strike, *In re* SRBA Case No. 39576, Subcase No. 2-2318A at 5–6, n.4 (Oct. 31, 2011).

205. *See, e.g.*, Memorandum Decision, *In re* SRBA Case No. 39576, Subcase No. 94-00012 at 7 (Aug. 28, 1997).

206. *See* IDAHO CODE § 42-213 (requiring water right applicant who intends to divert private waters to state on the application that the applicant has permission of the owner).

207. *See* IDAHO CODE § 42-1411(2)(j) (providing inclusion of "such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director." Other Provisions Necessary is different from a General Provision. *See infra* Section IV.H for additional explanation about SRBA General Provisions.

208. Memorandum Decision and Order on Motion for Summary Judgment; Order Setting Scheduling Conference, *In re* SRBA Case No. 39576, Subcase No. 63-08447 at 7–8 (Aug. 28, 2007).

209. *See, e.g.*, SRBA Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 63-27475, *In re* SRBA Case No. 39576 (Oct. 6, 2008).

specific use (usually stockwater) is not a determination of historical beneficial use,[210] identification of a right's historical background,[211] acknowledgement of enlargement,[212] acknowledgement of partial forfeiture,[213] subordination implications,[214] recognition of relevant agreements between parties to the adjudication's objection/resolution process,[215] and limitations of use (preventing interference with future beneficial uses).[216]

10. Explanatory Remarks

While not an element of a partial decree, Explanatory Remarks were often included on IDWR's uncontested recommendations and the parties' SF5s in contested subcases. The SRBA Court generally did not include these additional remarks on the face of the partial decree. But their significance is by no means diminished as the remarks "provide[] clarification, guidance and relevant information to the Department when examining the water right for . . . future administrative proceeding[s]."[217] Thus IDWR included in its water rights database those Explanatory Remarks which it, or parties to the rights in the adjudication's objection/resolution process, deemed important for inclusion. Examples of remarks include, among others, the original basis of the water right, number of homes, number and type of stock, and the type of industrial or commercial work.

F. Error Correction

It was inevitable when processing so many water right claims there would be errors in the partial decrees. In Spring 2012, IDWR developed a form and procedure for correcting those errors in partial decrees.[218] The error correction form allowed IDWR staff to identify which element contained the error and what the correction to that error entailed.[219] The error correction process was reserved mostly for clerical errors that did not affect the substance of the water right elements or unduly change the nature of the water right. The form was filed with the SRBA Court and served on the parties to the subcase.[220] Once filed with the court the form followed Docket

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210. *See, e.g.*, SRBA Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 73-12035, *In re* SRBA Case No. 39576 (June 15, 2010).

211. *See, e.g.*, SRBA Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 63-00179C, *In re* SRBA Case No. 39576 (Apr. 2, 2012).

212. *See, e.g.*, SRBA Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 35-13639, *In re* SRBA Case No. 39576 (Oct. 22, 2009).

213. *See, e.g.*, SRBA Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 1-00235A, *In re* SRBA Case No. 39576 (Apr. 8, 2008).

214. *See, e.g.*, SRBA Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 22-13509, *In re* SRBA Case No. 39576 (Aug. 30, 2012).

215. *See, e.g.*, SRBA Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 27-02069, *In re* SRBA Case No. 39576 (Apr. 3, 2012).

216. *See, e.g.*, SRBA Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 3-2019, *In re* SRBA Case No. 39576 (July 9, 2007).

217. Order Denying Request for Attorney's Fees and Costs, *In re* SRBA Case No. 39576, Subcase No. 37-21112 at 5 (May 4, 2012).

218. Interview with Vicki Kelly, Paralegal, Idaho Dep't Water Resources, (June 20, 2014).

219. *See, e.g.*, Request for Correction of Error, *In re* SRBA Case No. 39576, Subcase No. 85-10764 (March 4, 2013).

220. Interview with Vicki Kelly, Paralegal, Idaho Dep't Water Resources, (March 9, 2015).

Sheet procedure allowing interested parties time to object.[221] If no objections were made the SRBA Court would issue and amended partial decree correcting the error.[222]

G. Basin-Wide Issues

Basin Wide Issues ("BWI") were issues that materially affected a large number of parties to the adjudication. [223] Administrative Order 1 set out a procedure for the Court to handle BWI proceedings.[224] Any party to the SRBA could move to designate a BWI.[225] If the SRBA Court determined designation of a BWI was warranted, it provided notice of the BWI via Docket Sheet procedure.[226] Personal service was then provided to the parties who requested designation of the BWI, as well as any party who responded to the notice to designate.[227] Only those parties listed on the certificate of service were allowed to file pleadings and participate in the hearing on the BWI.[228] The BWI could proceed either before the presiding judge or a Special Master.[229] The first BWI issue was designated in 1994. Throughout the course of the SRBA, the Court would entertain motions to designate 17 BWIs and go on to designate and decide 14 of them.[230] Several will be discussed at length below.[231]

H. General Provisions

Unlike BWIs general provisions apply to individual basins. In general, in the Director's Reports for a particular basin, the Director recommends individual claims as well as general provisions that relate to the administration and definition of water rights in those basins. Idaho Code § 42–1411(3) states "[t]he director may include such general provisions in the Director's Report, as the director deems appropriate and proper, to define and to administer all water rights." In addition, Idaho Code § 42-1412(6) states each partial decree shall "contain an express statement that the partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights." Neither statute defines what a general provision is.

When submitting Director's Reports for the Test Basins to the Court in 1992, IDWR included general provisions in the reports. All of the general provision recommendations in the Test Basins drew objections from various parties. The objections were considered global in nature and were consolidated creating three

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221. *Id.*
222. *Id.*
223. SRBA AO1, *supra* note 69, at Section 16.a.(1).
224. *Id.* at Section 16.
225. *Id.* at Section 16.a.(1).
226. *Id.* at Section 16(3).
227. *Id.* at Section 16.b.
228. *Id.* at Section 16.b.(3).
229. SRBA AO1, *supra* note 69, at Section 16.c–d.
230. *See infra* Attachment 4. The SRBA Court declined to designate issue nos. 6, 7, 8, 9A, 11, and 15 as BWIs.
231. *See infra* Sections VI.B.1, VI.E.1.c, VIII.

Basin Wide Issues: BWI 5 to address general provisions broadly,[232] BWI 5A addressing general provisions unique to Basin 57[233], and BWI 5B[234] to address general provisions unique to Basin 34.[235]

The SRBA Court framed BWI 5 as "whether the general provisions were necessary for the definition of the rights or for the efficient administration of the water rights."[236] The Supreme Court determined a "general provision" is "a provision that is included in a water right decree regarding administration of water rights that applies generally to water rights, is not an element of a water right, or is necessary for efficient administration of water rights decreed."[237] It explained, that "while some administrative provisions would clearly apply to a certain type of water right in certain circumstances, other administrative provisions clearly would not apply to a certain type of water right and every circumstance."[238] The court concluded that a general provision is an administrative provision that generally applies to water rights but it need not apply to every water right.[239]

The Idaho Supreme Court decisions regarding the applicability of general provisions put to rest remaining challenges on whether to include general provisions on the face of the partial decrees. A general provision is an administrative provision that generally applies to water rights but it need not apply to every water right. A general provision must be necessary for the definition of the rights or for the efficient administration of the water rights. And finally, general provisions are binding once decreed. The August 25, 2014 Final Unified Decree decreed the general provisions for each Basin and listed each general provision in Attachment 3 to the Final Unified Decree.

V. THE 1994 LEGISLATIVE AMENDMENTS

By the early 1990s, the SRBA was progressing from the claims taking stage to the litigation stage. As the litigation took form, major conflicts arose with regard to the role that the State of Idaho was playing in the adjudication. The State participated in the SRBA, not only through IDWR, but also in a proprietary role as a water right holder and as the sovereign representing the public interest as a whole. Both private water right claimants and the SRBA Court began to question the multiple of roles the State was playing and litigation arose that threatened to derail the progress of the SRBA.

The Idaho Legislature recognized that legislative action was needed to resolve these conflicts and it passed the 1994 Amendments to the adjudications statues[240] in

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232. Memorandum Decision and Order, Re: Basin-Wide Issue 5, *In re* SRBA Case No. 39576, Subcase No. 91-00005 (renumbered as 00-91005) (April 26, 1996).

233. *See* Memorandum Decision Re: Basin-Wide Issue 5A, *In re* SRBA Case No. 39576, Subcase No. 91-00005A (renumbered as 00-91005A) (July 19, 1996); State v. Idaho Conservation League, 955 P.2d 1108, 131 Idaho 329 (1998).

234. *See infra* Section VI.B.1 for discussion on Basin Wide Issue 5.

235. Memorandum Decision Re: Basin-Wide Issue 5B, *In re* SRBA Case No. 39576, Subcase No. 91-00005B (renumbered as 00-91005B) (Feb. 12, 1997); State v. Nelson, 951 P.2d 943, 131 Idaho 12 (1998).

236. Memorandum Decision and Order, Re: Basin-Wide Issue 5, *supra* note 232, at 2.

237. A & B Irrigation District v. Idaho Conservation League, 958 P.2d 568, 571, 131 Idaho 411, 414 (1997).

238. *Id.* at 414.

239. *Id.*

240. 1994 Idaho Sess. Laws, ch. 454.

an effort to alleviate conflict and get the SRBA running smoothly again. The 1994 Amendments, however, gave rise to additional conflict as challenges were brought to the constitutionality of the amendments. It was only after the constitutional challenges were resolved by the Idaho Supreme Court that the SRBA was able to regain traction and move forward toward completion.

A. The Conflicts that Precipitated the Need for the 1994 Amendments

One of the major conflicts that precipitated the need for the 1994 Amendments to the adjudications statutes was with what the SRBA Court called the "multiple-party status" of the State in the SRBA.[241] The State had many distinct legal interests in the SRBA—some proprietary, some regulatory, and some on behalf of the public. IDWR took on the role of disinterested technical advisor when it recommended water right elements to the Court, but it was also a party to the litigation that was perceived by some as an adversary when it defended its recommendations. The State also appeared in the SRBA as a proprietary owner of water rights. State agencies, such as the Idaho Department of Fish and Game ("IDFG") and the Idaho Department of Lands ("IDL"), filed their own water right claims in the SRBA. Sometimes state agencies objected to IDWR recommendations for their water rights, placing IDWR in the position of defending its recommendation against another state agency. In all its facets, the State was represented by the Idaho Attorney General's Office, sometimes with two deputy attorney generals appearing in opposition to each other. Several incidents arose simultaneously that brought the conflict over the role the State was playing in the SRBA to a boiling point.

Tensions arose in 1993 between IDWR and a water right claimant, the Hagerman Water Rights Owner's Association ("HWROA"). IDWR recommended HWROA water rights be decreed with significantly smaller quantities than the HWROA believed was correct. In an effort to understand IDWR's recommendations, the HWROA filed discovery requests with IDWR seeking information about how IDWR quantified the claims. IDWR refused to divulge the contents of its files claiming that it was not subject to the discovery requests.[242] HWROA filed a motion to compel discovery with the SRBA Court.[243] The SRBA granted HWROA's motion and awarded costs and attorney fees against IDWR.[244] The SRBA Court went on to state that the sanction had to be paid out of IDWR's own budget rather than out of Water Resources' Adjudication Account.[245]

The conflict between HWROA and IDWR reflected growing concerns with IDWR's role. Was IDWR a technical advisor that disinterestedly recommended

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241. Memorandum Decision and Order on Basin-Wide Issue No. 3, *In re* SRBA Case No. 39576, Subcase No. 91-00003 (renumbered as 00-91003) at 15 (Aug. 25, 1994).

242. *In re* SRBA Case No. 39576, 912 P.2d 614, 619, 128 Idaho 246, 251 (1995). As IDWR began to investigate claims it started to keep working files with information regarding its investigation of each claim. The working files were put in red file folders and were not accessible to the public. IDWR believed that keeping the work product of the red files confidential until it was ready to be released as a final recommendation would prevent confusion caused by incomplete or draft recommendations. IDWR refused to disclose the red files in response to HWROA's discovery requests. This refusal is what precipitated the motion to compel. *See* THROUGH THE WATERS, *supra* note 59, at 126.

243. *In re* SRBA Case No. 39576, 912 P.2d at 619, 128 Idaho at 251.

244. *Id.*

245. *Id.*

water rights as a technical advisor to the Court? Was IDWR an adversarial party who was tasked with defending its recommendations against objections? Could IDWR play both roles in the adjudication at the same time? Many private water users began to view IDWR, not as a disinterested technical advisor, but as an adversary. The decision by the SRBA Court to grant attorney fees against IDWR changed the landscape of interactions between water right claimants and IDWR, opening a new litigious relationship between the two. It soon became apparent that the SRBA would be stymied with IDWR spending much of its time defending itself against litigation rather than working to adjudicate water rights.[246]

At the same time the conflict between IDWR and the HWROA was taking place, additional conflicts were arising with regard to the proprietary role the State was playing in the SRBA. The issue is best illustrated in the case of *In re SRBA 39576, Rim View Trout Co. v. Idaho Dept. of Fish and Game and Idaho Dept. of Water Resources.* In that case, IDWR recommended a water right claimed by the Idaho Department of Fish and Game ("IDFG") with only one-half the quantity claimed.[247] Both IDFG and a private water user objected to the recommendation.[248] The SRBA Court held a hearing on the objections:

> When the hearing began, a deputy attorney general for the State of Idaho representing the Department of Fish and Game appeared to defend this State right against IDWR. A second deputy attorney general appeared representing IDWR which was contesting the State right claimed by the Department of Fish and Game. Finally, the two deputy attorneys general were defending their respective and different positions against the objection filed by the private Idaho water user.[249]

After the hearing, the Court *sua sponte* ordered the Attorney General's Office to file with the court a single statement of the State's proprietary claim.[250] The pretrial order stated:

> On or before 5 p.m., October 4, 1993, submit a pretrial statement which clearly and specifically defines the actual proprietary claim to the use of water from Niagara Springs that the State of Idaho will advocate at trial and fully explain the legal basis upon which the claim is made. The State of Idaho will not be allowed to present conflicting or inconsistent positions as to what proprietary claim will be advocated on behalf of the sovereign nor to take inconsistent positions as to the legal or factual basis for the proprietary claim. This statement of claim superseded all prior claims, recommendations or positions taken by the State of Idaho with respect to this proprietary claim and is the only basis on which trial of the claim shall

246. In response to the controversy surrounding the role of the IDWR, the SRBA Court designated BWI 2: "What is the role of the Director, i.e., The Idaho Department of Water Resources, as a party in this statutory adjudication requiring the judicial determination of each claimant's right to the use of water in the Snake River Basin." *Id.* at 620, 128 Idaho at 252. Before the SRBA Court could rule on BWI 2, however, the legislature adopted the 1994 amendments to the adjudication statutes. 1994 Idaho Sess. Laws, ch. 454.

247. Memorandum Decision and Order on Basin-Wide Issue No. 3, *supra* note 241, at 15.

248. *Id.*

249. *Id.*

250. State of Idaho's Memorandum in Support of Motion for Reconsideration, and for Stay of Pretrial Order Dated September 22, 1993, or, in the Alternative, For Permission to Appeal, *In re* SRBA Case No. 39576 at 3 (Oct. 1, 1993).

> proceed. Mr. Strong shall designate trial counsel for the State of Idaho in this case.[251]

The State requested the Court reconsider its order.[252] The State argued that it was proper for the State to appear both to advocate for its proprietary, state-owned water rights and to fulfill "the statutory responsibilities of IDWR to recommend in a neutral fashion the nature and extent of every state-law based water right in the SRBA and appear as a party in regards to objections filed to the recommendation."[253] The State also argued that the Court's order interfered with the Attorney General's "constitutional and statutory authority to determine how the State of Idaho will be represented in this litigation."[254] The State sought permission to appeal the SRBA Court's order to the Idaho Supreme Court under I.A.R. 12(b).[255] The State then petitioned the Idaho Supreme Court for emergency relief from the SRBA Court's order.[256]

These conflicts, coupled with additional issues with regard to "practical difficulties in the SRBA including the burden of persuasion and burden of going forward with the evidence in contested cases, the standard of review to be applied by the court in determining contested cases, the nature of the pleadings and the form and content of the decrees to be entered as well as the extent of the court's jurisdiction over the parties and subject matter of the case[,]"[257] created a perfect storm that threatened to derail the SRBA. In an effort to address and alleviate the conflict, the Idaho Legislature passed the 1994 Amendments to the adjudication statutes.[258]

B. The 1994 Amendments

The 1994 Amendments reworked a large portion of the adjudication statutes. The 1994 Amendments clarified the role IDWR would play in the adjudication. Under the new amendments, IDWR retained the duties it had under the 1986 amendment but was no longer authorized to participate as a party in the adjudication.[259] The 1994 Amendments also added a new section, Idaho Code § 42-1401B, which provided that "[t]he director's role under this chapter is as an independent expert and technical assistant . . . [t]he director shall not be a claimant on behalf of the state or any subdivision of the state in the adjudication [and] the director shall not be a party to an adjudication."[260] The amendments also added Idaho Code § 42-1423, which provided that "[n]o judgment for costs or award of attorney fees against the state of Idaho, any state agency, or any officer or employee of the state of Idaho shall be allowed in . . . [the SRBA]."[261] IDWR was also given more

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251. *Id.* at 3–4.
252. *Id.* at 4.
253. *Id.*
254. *Id.*
255. *Id.* at 16–17.
256. THROUGH THE WATERS, *supra* note 59, at 141.
257. Memorandum Decision and Order on Basin-Wide Issue No. 3, *supra* note 241, at 4.
258. 1994 Idaho Sess. Laws, ch. 454.
259. *Id.*
260. *Id.* at sec. 3 (adding IDAHO CODE § 42-1401B).
261. *Id.* at sec. 30 (adding IDAHO CODE § 41-1423).

discretion to decide the form and content of the Director's Reports.[262]

The 1994 Amendments addressed and clarified the procedures for filing and reporting claims,[263] and for objecting and responding to claims.[264] The amendments directed the SRBA Court to use settlement conferences to give claimants an opportunity to discuss and resolve a dispute short of trial. [265] The amendments also provided more detail about the contents of a water right decree. The amendments required that a decree contain all the information necessary to define the right, as well as provide a basis for the proper administration of the water right by IDWR.[266] The 1994 Amendments also addressed the enlargement, and accomplished transfer of water rights,[267] and made clear that the legislature intended to authorize an action within the full scope of the waiver of sovereign immunity in the McCarran Amendment, including the administration of the federal water rights by the Director in accordance with the decree entered by the District Court.[268] The 1994 legislative amendments provided that the SRBA Court could not only decree water rights but also place provisions on the water rights that were meant to govern administration of those rights.[269]

C. Conflicts Over the Legislative Changes

As soon as the 1994 Amendments were passed, they were challenged on constitutional grounds.[270] The SRBA Court stayed almost all SRBA proceedings until the constitutionality of the 1994 Amendments could be resolved.[271] The Court appointed a steering committee to review the issues raised by the 1994 Amendments and to make a recommendation to the Court as to how to move forward.[272]

1. SRBA Court Decision on Constitutionality

Based on the recommendation of the steering committee, the Court designated Basin Wide Issue 3 to "resolve basic jurisdictional issues raised by the 1994 Act." Basin Wide Issue 3 was designated as:

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262. *Id.* at sec. 18 (amending IDAHO CODE § 42-1411).

263. *Id.* at sec. 15 (amending IDAHO CODE § 42-1409); sec. 16 (adding IDAHO CODE § 42-1409A); sec. 17–18 (amending IDAHO CODE §§ 42-1410, 42-1411).

264. 1994 Idaho Sess. Laws, ch. 454, sec. 20 (amending IDAHO CODE § 42-1412).

265. *Id.* (adding language to IDAHO CODE § 42-1412(6)).

266. *Id.* (adding language to IDAHO CODE § 42-1412(8)).

267. *Id.* at sec. 31 (adding IDAHO CODE § 42-1425); sec. 32 (adding IDAHO CODE § 42-1426); Memorandum Decision and Order on Basin-Wide Issue No. 1, Constitutionality of I.C. § 42-1416 and I.C. § 42-1416A, as Written, *In re* SRBA Case No. 39576 (Feb. 4 1994). This portion of the 1994 Amendments will be address in more detail in Section IV.C.1–2.

268. *Id.* at sec. 2 (amending IDAHO CODE § 42-1401A(6)); sec. 12 (amending IDAHO CODE § 42-1406); sec. 13 (amending IDAHO CODE § 42-1407); sec. 14 (amending IDAHO CODE § 42-1408); sec. 15 (amending IDAHO CODE § 42-1409(1)(l)) (This amendment was included because the United States maintained that its water rights had to be administered by a court and not a state agency.).

269. *Id.* at sec. 1–2 (amending IDAHO CODE §§ 42-1401, 42-1401A); *see supra* Section IV.H.

270. Memorandum Decision and Order on Basin-Wide Issue No. 3, *supra* note 241, at 3.

271. Order Staying Proceedings in Subcases in Reporting Areas 1, 2 and 3 and Staying the Objection Period as to the Director's Report of the United States' and Tribal Non-Consumptive Claims and the Director's Report for the 1990 Fort Hall Indian Water Rights Agreement and Staying Proceedings in Twins Falls County Case No. 39576, *In re* SRBA Case No. 39576 (April 19, 1994).

272. Memorandum Decision and Order on Basin-Wide Issue No. 3, *supra* note 241, at 3.

> 1. Can the legislature expand or reduce the court's jurisdiction in the SRBA after jurisdiction attaches to the parties and subject matter of the action following the issuance of the ***Commencement Order*** and the filing of notices of claims?

Specifically, can the following legislative changes to the court's jurisdiction be made during the pendency of the SRBA:

> a. Changes in party status, pleadings and relief to be decreed;
>
> b. Modifications of the Idaho rules of Civil Procedure with respect to the award of costs and attorney fees and the use of mandatory settlement conferences;
>
> c.Modification of the Idaho Rules of Evidence with respect to the designation of expert witnesses, the rules governing expert witness testimony, the admissibility of evidence and the legal weight to be attributed to evidence; and
>
> d. Expansion of the court's jurisdiction to decree provisions controlling the administration of water rights by the Director of the Idaho Department of Water Resources.
>
> 2. Resolution of issue number 1 (above) requires determining whether the SRBA is a court or an administrative proceeding.[273]

The SRBA Court began its analysis by determining that the SRBA is properly characterized as a judicial proceeding and not as a quasi-judicial proceeding or a hybrid administrative/judicial proceeding.[274] The Court noted that, to come within the terms of the McCarran Amendment, the SRBA must be a judicial proceeding.[275]

The Court then considered whether the legislature could properly change the court's jurisdiction over the parties and the subject matter of the action.[276] The Court concluded that the 1994 Amendments were passed for the purpose of obtaining legislatively results which the State was unable to obtain before the Court:

> Provisions changing the party status of IDWR and adding the various state agencies as parties seek to overturn the adverse decision . . . in *Rim View* . . . and the court's decision allowing discovery against IDWR which was brought by the Hagerman Water Right Owners. Portions of the statute which require the decree to include provisions for administration were added, in part, to overcome this Court's ruling on the form and content of the Director's Report and rulings made on the form and content of court decrees in the SRBA.

The Court concluded that "jurisdiction has attached over the parties and the subject matter of the action and any legislature attempt to interfere with the jurisdiction, especially where there legislation would appear to favor the State as a

273. *Id.*
274. *Id.* at 6.
275. *Id.* at 5.
276. *Id.* at 7.

party in the SRBA, is **unconstitutional**."[277]

The SRBA Court found a majority of the 1994 Amendments to be unconstitutional. [278] The Court began by finding that the State could not appear more than once in the SRBA: "There are two legal reasons which require the State of Idaho to appear as one party in the SRBA. First, disputes between executive agencies in the SRBA are political questions over which the court has not constitutional jurisdiction. Secondly, due process principles of fundamental fairness do not allow the State of Idaho to appear as a party more than once . . . ."[279] The Court also noted that having the State appear as a single party in the SRBA was necessary to keep the proceeding within the terms of the McCarran Amendment.[280] The court ordered that IDWR should continue to perform the duties assigned to it under the 1985 adjudication statues.[281] With regard to the State's proprietary claims, the Court ordered that the State resolve any difference between IDWR and the state agency before the Director's Report was filed.[282] The SRBA Court found the Director of IDWR could not serve as an independent expert in the SRBA because IDWR is an executive agent for the State of Idaho and the State of Idaho may appear only once in the SRBA as an adversarial party.[283]

Finally, the Court addressed whether the 1994 Amendments impermissibly provided that administrative provisions could be included in the partial decrees. In addressing the question of whether the SRBA could include administration provisions in the partial decrees, the SRBA Court found that, under the constitutional doctrine of separation of powers, the only administration the SRBA Court could conduct was enforcement of the decree and not the regulation, distribution, or delivery of water.[284] The district court noted that the legislature could not delegate executive authority to regulate water to the court, because under Idaho's Constitution, courts cannot be delegated the police powers of the state.[285] It went on to find that inclusion of administration as part of the process of decreeing rights would violate the McCarran Amendment because the congressional waiver to join the U.S. for administration only operates after a general stream adjudication has been completed.[286] The SRBA Court went on to find that the provisions of the 1994 Amendments modifying the Idaho Rules of Evidence and the Idaho Rules of Civil Procedure were unconstitutional and that the State of Idaho could not withdraw its consent to pay costs and attorney fees after the jurisdiction of the SRBA Court

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277. *Id.* at 1 (emphasis in original).

278. Memorandum Decision and Order on Basin-Wide Issue No. 3, *supra* note 241, at 34–36 (Dec. 7, 1994).

279. *Id.* at 17.

280. *Id.* at 19 ("In consenting to be made a party to a suit for the general adjudication of water rights in an entire system, the United States only consented to a suit as that tern [sic] is commonly used in American jurisprudence. These traditional principles of jurisprudence include the doctrine of separation of powers, the political questions doctrine and due process principles of fundamental fairness. When an adjudication is constructed so as to violate any one or all three of these principles as the 1994 Act does, it is not a McCarran adjudication.").

281. *Id.*

282. *Id.*

283. Memorandum Decision on Basin-Wide Issue No. 2; Role of the Director, *In re* SRBA Case No. 39576, Subcase No. 91-00002 (renumbered as 00-91002) at 3 (Dec. 7, 1994).

284. Memorandum Decision and Order on Basin-Wide Issue No. 3, *supra* note 241, at 28.

285. *Id.* at 30.

286. *Id.* at 23.

attached.[287]

2. Idaho Supreme Court Ruling on Constitutionality

The State of Idaho[288] and the Idaho Ground Water Appropriators, Inc. filed motions for permissive appeal under Idaho Appellate Rule 12, which were granted.[289] The Idaho Supreme Court also granted the Legislature permission to intervene in the appeal as an appellant.[290]

The Idaho Supreme Court upheld most if the 1994 Amendments. The Court began by noting that the Idaho Constitution empowers "the Legislature of this state to enact procedural rules when such rules are necessary because of changing times or circumstances or the absence of a rule from this Court" and that water right adjudications "present unique circumstances, often requiring a departure from established rules of procedure." [291] When the SRBA was authorized "no reasonable method of initiating the proceeding, providing notice to potential claimants, examining the Snake River Basin or preparing a report of that system, or means of objecting to that report or claimed water rights within that system was provided by the existing Rules of Civil Procedure."[292] Thus, the Court held that it was within the Legislature's power to provide that the Director's Reports would constitute prima facie evidence.[293] However, the Court held that the direction that the Director's Report be decreed as reported was in conflict with the rules of civil procedure.[294] The Court must be afforded an opportunity to review the Director's Report before entering a default judgment.[295] The Court also held it was within the power of the legislature to prohibit the aware of costs and attorney fees against the State.[296]

The Court went on to uphold the statue removing the Director as a party.[297] The Court held that, because it was within the power of the legislature to designate the Director as a party to the SRBA, it was also within the power of the legislature to remove the Director as a party.[298] The Court noted that the designation of the Director as a party in the adjudication did not affect the substantive rights of water right claimants and, therefore, the withdrawal did not "change the status of the proprietary rights asserted by claimants in the SRBA."[299] The Court held, however, that, to the extent Idaho Code § 42-1401B(1) (1994) constituted a legislative determination as to the Director's status as an expert under Idaho Rule of Evidence 702, the provision

287. *Id.* at 25–26.

288. Motion of the State of Idaho for Permission to Appeal Pursuant to Rule 12(c), I.A.R., *In re* SRBA Case No. 39576, Subcase Nos. 91-00002, 91-00003 (Dec. 19, 1994).

289. *In re* SRBA Case No. 39576 (Basin-Wide Issue Nos. 2 & 3), 912 P.2d 614, 621, 128 Idaho 246, 253 (1995).

290. Id.

291. *Id.* at 622, 128 Idaho at 254.

292. *Id.* at 623, 128 Idaho at 255.

293. *Id.*

294. *Id.* at 626, 128 Idaho at 258.

295. *In re* SRBA Case No. 39576 (Basin-Wide Issue Nos. 2 & 3), *supra* note 289, at 627, 128 Idaho at 259.

296. *Id.* at 624, 128 Idaho at 256.

297. *Id.* at 625, 128 Idaho at 257.

298. *Id.*

299. *Id.*

was of no effect.[300] Idaho Rule of Evidence 702 prescribes the standards for qualifying a witness to give testimony as an expert. Therefore, the Court held that, to the extent I.C. § 42-1401B(1) attempted to automatically qualify the Director as an expert witness in the SRBA, it was of no effect.[301]

As the SRBA moved forward, the Director continued to appear as an "independent expert and technical assistant" to the SRBA Court. Rather than taking an adversarial position and defending its recommendations, IDWR was brought into active subcases to describe the process and reasoning IDWR used to come to its recommendations.[302] This position allowed IDWR to investigate water right claims and provide its technical assistance to water right claimants, but sheltered the Director and IDWR from the threat of litigation and attorney fees. This change in status of the Director and IDWR was one of the major factors which contributed to the speed with which the SRBA was concluded because the SRBA did not become bogged down in litigation against the Director or IDWR.

The Idaho Supreme Court also overturned the district court's decision with regard to inclusion of administrative provisions in the partial decrees. It held "[i]f this provision [Idaho Code. § 42-1412(6) (1994)] . . . required that the district court actively administer the delivery of water in conformance with its decree, that provision would create an unworkable delegation of authority. . . . However, the requirement that the district court include in its decree those provisions necessary for the executive to administer the rights decreed is not an impermissible delegation."[303] The Supreme Court went on to hold that whether the 1994 Amendments removed the SRBA from the scope of the McCarran Amendment did not present a justiciable controversy.[304] This decision was not challenged further and the United States remained a party to the adjudication.

Finally, the Court held that the political question doctrine does not prohibit state agencies from appearing separately and asserting separate water right claims in the SRBA.[305] The Court noted that "[r]esolution of the competing claims of state agencies by the district court will not create multiple, inconsistent pronouncements from various departments; although executive agencies might assert multifarious claims to water rights, the adjudication of those claims will result in a final decree resolving the rights claimed."[306] The Court also held that there was no basis for concluding that other water right claimants due process rights would be violated by having different state agencies assert conflicting water right claims in the SRBA.[307]

The Supreme Court decision laid to rest the constitutional challenges to the 1994 Amendments, and the statutes remained largely unchanged for the remainder of the SRBA. Once the controversy surrounding the 1994 Amendments was resolved, the SRBA was able to continue toward completion with more efficiency.

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300. *Id.* at 625–26, 128 Idaho at 257–58.

301. *In re* SRBA Case No. 39576 (Basin-Wide Issue Nos. 2 & 3), *supra* note 289, at 626, 128 Idaho at 258.

302. THROUGH THE WATERS, *supra* note 59, at 159.

303. *In re* SRBA Case No. 39576 (Basin-Wide Issue Nos. 2 & 3), 912 P.2d 614, 630, 128 Idaho 246, 262 (1995).

304. *Id.*

305. *Id.* at 629, 128 Idaho at 261.

306. *Id.*

307. *Id.*

VI. SIGNIFICANT WATER LAW DECISIONS

Although originally viewed as a water right cataloguing process, the SRBA evolved into a process for resolving many long-standing water right conflicts. Important water law decisions were made with regard to forfeiture and abandonment of water rights, connected source issues, memorializing historic water use practices from previous adjudications, and ownership and use of federal storage and hydropower projects, to name just a few.

A. Forfeiture & the SRBA

In parts of Idaho, some rivers and streams are fully appropriated for much of the year and water supplies are insufficient to meet all demands.[308] Given the arid nature of much of the state and the ephemeral nature of many of Idaho's rivers and streams, the priority date of a water right can mean the difference between having a stable water supply and having no water supply at all. Forfeiture is a statutory concept whereby a water right may be lost if not applied to a beneficial use for five consecutive years.[309] The five year timeframe is based on the public policy of optimization of the water resource.[310] This policy encourages existing users to consciously use the water or otherwise risk loss of their priority status to a junior water user. Given the scarcity of water in Idaho and how forfeiture provides one of the few avenues for a junior water user to improve their available water supply, it is no surprise that forfeiture was a reoccurring legal issue in the SRBA.

1. Forfeiture Generally

Forfeiture requires no intent by the water user to forgo use of the water right and thus is distinguishable from the common law concept of abandonment, which requires the specific intent to forgo the use of the water right and actual actions demonstrating relinquishment of the water right.[311] Forfeiture is disfavored under Idaho law and must be proven by clear and convincing evidence.[312] There are a number of statutory defenses to forfeiture such as the wrongful interference with a water right or failure to use the water because of circumstances over which the water

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308. *See* Sagewillow, Inc. v. Idaho Dep't of Water Res., 70 P.3d 669, 685, 138 Idaho 831, 847 (2003) (Kidwell, J., concurring) ("[M]ost, if not all, of Idaho's water is appropriated . . . .").

309. IDAHO CODE § 42-222(2); Jenkins v. State Dep't of Water Res., 647 P.2d 1256, 103 Idaho 384 (1982).

310. *See* State v. Hagerman Water Right Owners, Inc., 947 P.2d 400, 408, 130 Idaho 727, 735 (1997):

> The governmental function in enacting . . . the entire water distribution system under Title 42 of the Idaho Code is to further the state policy of securing the maximum use and benefit of its water resources. . . . The water of this arid state is an important resource. Not only farmers, but industry and residential users depend upon it. Because Idaho receives little annual precipitation, Idahoans must make the most efficient use of this limited resource. The policy of the law of this [s]tate is to secure the maximum use and benefit, and least wasteful use, of its water resources. (quotations and citations omitted).

311. *See* Sears v. Berryman, 623 P.2d 455, 101 Idaho 843 (1981). For an overview of the distinction between abandonment and statutory forfeiture, *see* Jenkins v. State Dep't of Water Res., 647 P.2d 1256, 103 Idaho 384 (1982).

312. *See Jenkins*, 647 P.2d at 1261, 103 Idaho at 389.

right holder has no control.[313] Although the owner of the water right has the burden of raising defenses to statutory forfeiture, the burden of persuasion remains on the party claiming that the water right was forfeited, and that party must disprove the defense.[314]Further, if use of the water right is resumed after the five year period, but before any third parties make a claim on the water, then the courts will decline to declare a water right forfeited.[315]A water right lost through forfeiture reverts to the state as unappropriated water and is either subject to further appropriation or serves to satisfy the rights of existing junior appropriators from the same water source.[316]

2. Tolling of Forfeiture

A key forfeiture question in the SRBA was whether the running of the statutory forfeiture period was tolled pending adjudication of the water right. The tolling of forfeiture was litigated not once, but three times in the SRBA before three different SRBA Court judges. In each case, the SRBA Court held that the running of the forfeiture clock was tolled for water rights as of the date they were claimed in the SRBA.[317]

In *Wood v. Troutt*, the SRBA Court provided its most thorough review of the tolling issue.[318] Prior to the enactment of Idaho's adjudication statutes, forfeiture issues were historically treated as quiet title proceedings.[319] The Court drew an analogy between the current SRBA proceeding and prior quiet title actions where the Idaho Supreme Court held that the forfeiture period had to fully accrue prior to the commencement of the quite title action.[320] The SRBA Court also emphasized that any other tolling rule would cause parties to seek expedited action on their water rights in the SRBA, thereby interfering with the orderly processing of water rights in the SRBA and its comprehensive statutory notice requirements.[321]

As one commenter has pointed out, the tolling rule resulted in partial decrees confirming water rights that have not been beneficially used since as early as 1983.[322] The SRBA Court recognized that the tolling rule may allow a period of non-use to be extended during the pendency of the SRBA, but declared that "in this Court's view the timely completion of the SRBA outweighs the potential that a period of

313. *Id*.

314. *See* Sagewillow, Inc. v. Idaho Dep't of Water Res., 70 P.3d 669, 680, 138 Idaho 831, 842 (2003).

315. *Id.*

316. *Id*.

317. *See* Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue, *In re* SRBA Case No. 39576, Subcase Nos. 36-02708, 36-07201, 36-07218, 36-02048, 36-02703, 36-04013B, 36-04013C, 36-07040, 36-07148, 36-07568, 36-02356, 36-07210, 36-07427, 36-07720, 36-07004, 36-07080, and 36-07731 (Dec. 29, 1999); Memorandum Decision and Order on Challenge; and, Order of Partial Decree, *In re* SRBA Case No. 39576, Subcase No. 65-05663B (May 9, 2002); Amended Memorandum Decision and Order on Challenge and Order of Partial Decree, *In re* SRBA Case No. 39576, Subcase No. 02-2318A (Oct. 31 2011).

318. *See* Memorandum Decision and Order on Challenge; and, Order of Partial Decree, *supra* note 317, at 10–19.

319. *Id*. at 16.

320. *Id*. at 18.

321. *Id*. at 19.

322. Jeffrey C. Fereday & Michael C. Creamer, The Maximum Use Doctrine and Its Relevance to Water Rights Administration in Idaho's Lower Boise River Basin, 47 IDAHO L. REV. 67, 111 (2010).

non-use may be temporarily extended in a few situations."[323] The Court went on to distinguish between an administrative proceeding and an adjudication, concluding that administrative proceedings do not toll the running of the forfeiture statute as it "does not automatically operate to clear the title of adverse claims in the same manner as a quiet title action."[324]

The question of when the forfeiture clock begins to run again is addressed in the Final Unified Decree in the SRBA. The Final Unified Decree provides that "[t]he time period for determining forfeiture of a partial decree based on state law shall be measured from the date of issuance of the partial decree and not from the date of [the] Final Unified Decree."[325]

3. Partial Forfeiture

Another key question in the SRBA was whether Idaho Code § 42-222(2) allowed for partial forfeiture of a water right. The Idaho Supreme Court in *State v. Hagerman Water Right Owners, Inc*., answered the question in the affirmative, holding that Idaho Code § 42-222(2) subjects appropriated water rights in Idaho to partial forfeiture when the user fails to put it to beneficial use for at least five consecutive years.[326] The Court held that Idaho Code § 42-222(2) is ambiguous on the question of partial forfeiture and given the ambiguity, the Court would defer to IDWR's interpretation and historical practice of recognizing partial forfeiture.[327] The Court held that partial forfeiture supports Idaho's important public policy goals related to the maximum use and benefit of water:

> If this Court were to find that I.C. § 42-222(2) does not authorize partial forfeiture of a water right, once the amount element of a water right is decreed, a water user could hold the water right against all subsequent appropriators by using only a part of the water. Such a scheme is inconsistent with Idaho water law, which provides that if a water right is abandoned or forfeited it reverts to the state, following which third parties may perfect an interest therein.[328]

The Court concluded that partial forfeiture makes the allocation of water consistent with beneficial use concepts and promotes the economical use of water.[329]

4. Defenses to Forfeiture

Numerous statutorily recognized defenses to forfeiture exist.[330] The Idaho Supreme Court in a case that originated in the SRBA, captioned *McCray v. Rosenkrance*, affirmed that wrongful acts of another and drought conditions are

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323. *See* Memorandum Decision and Order on Challenge; and, Order of Partial Decree, *supra* note 317, at 20.
324. *Id.* at 19.
325. *See* Final Unified Decree, *In re* SRBA Case No. 39576 at 12 (Aug. 26, 2014).
326. *See* State v. Hagerman Water Right Owners, Inc., 947 P.2d 400, 130 Idaho 727 (1997).
327. *Id*. at 407, 130 Idaho at 734.
328. *Id*. at 408, 130 Idaho at 735.
329. *Id*.
330 IDAHO CODE § 42-223; Jenkins v. State Dep't of Water Res., 647 P.2d 1256, 103 Idaho 384 (l982).

defenses to forfeiture, but held that these defenses are not available if there is no physical means of delivering water to the property.[331]

In *Aberdeen-Springfield Canal Co. v. Peiper*, the Idaho Supreme Court held there can be no forfeiture if the appropriator is prevented from exercising his right to the water by circumstances over which he or she has no control.[332] Peiper was a stockholder in Aberdeen-Springfield Canal Company ("ASCC"), a Carey Act operating company, whose property was foreclosed on for failure to pay ASCC assessments. Peiper sought to use forfeiture to avoid foreclosure, arguing that any ASCC water rights appurtenant to the Peiper land had long been forfeited as no canal company water had been applied to beneficial use on their property for thirty years. The Court held that the water rights of a Carey Act canal company are not forfeited by the failure of a stockholder to divert the water and apply it to beneficial use.[333] The Court emphasized that the water rights are held by ASCC and that "a finding of forfeiture in this case, where the appropriator did nothing to cause the nonuse of the water, would have troubling consequences for all Carey Act operating companies. Such a ruling would give stockholders, who are not appropriators, the power to determine the fate of [the company's] water rights."[334]

The SRBA Court held that judicial estoppel may preclude a water user or their successor-in-interest from asserting a right was forfeited or abandoned prior to the filing of the claim.[335] *Wilkerson* involved a water right that had been claimed in the SRBA and later split in two. The district court held the new owner of one portion of the split right was judicially estopped from claiming that the other portion of the water right was forfeited prior to the time the claim was filed.[336]

The SRBA Court rejected the argument by Wood that diverting water from an unauthorized point of diversion can lead to a finding of forfeiture. Wood argued that because Troutt used an unauthorized point of diversion during a span of five years, Troutt forfeited his water right.[337] The district court recognized that Troutt's actions may have resulted in an unauthorized change to an element of a water right, but found that Troutt's use of the unauthorized point of diversion does not result in the forfeiture of the water right: The Idaho statutes regulating changes in points of diversion "do not provide for forfeiture of the water right as the sanction for changing the point of diversion without authorization."[338] The Court distinguished *McCray* case, concluding there are some changes in water use that may result in forfeiture, such as in *McCray* where the water right was not used for five years and the use was resumed on land to which the right was not appurtenant. In this case, however, Troutt was using the water on the appurtenant land, his place of diversion was downstream from the decreed place of diversion, the pump was in the same ditch, and there was no evidence that injury to other water rights would occur because of the move. The court noted its decision did not insulate Troutt from any sanctions that IDWR might

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331. *See* McCray v. Rosenkrance, 20 P.3d 693, 135 Idaho 509 (2001).

332. *See* Aberdeen-Springfield Canal Co. v. Peiper, 982 P.2d 917, 922, 133 Idaho 82, 87 (1999).

333. *Id*.

334. *Id*.

335. *See* Amended Memorandum Decision and Order on Challenge and Order of Partial Decree, *supra* note 317.

336. *Id*.

337. *See* Memorandum Decision and Order on Challenge; and, Order of Partial Decree, *supra* note 317, at 33.

338. *Id*. at 35.

wish to impose for the unauthorized change, but simply meant Troutt had not forfeited his water right.

The SRBA Court addressed the constitutionality of the statutory defense of resumption of use in a case involving long inactive mining water rights.[339] Resumption of use was raised as a defense by Monarch Greenback, LLC, in response to recommendations in the SRBA by IDWR that Monarch Greenback's mining water right claims be disallowed. In response to a motion for summary judgment, Special Master determined that the record established nonuse of the Monarch Greenback water rights well beyond the 5-year statutory forfeiture time period.[340] Instead of finding them automatically forfeited, however, the Special Master looked to the case *Sagewillow v. Idaho Dept. of Water Resources*[341], in which the Idaho Supreme Court detailed the test for resumption of use. In *Sagewillow* the Court held that even if a consecutive five year period of non-use can be established, statutory forfeiture is not effective if, after the five year period of non-use, the use of the water is resumed prior to a third party either: (1) instituting legal proceedings to declare a forfeiture; (2) obtaining a new water right prior to the resumption; or (3) using the water pursuant to an existing right.[342] The Special Master held that the issue to be decided at trial was whether a third party took one of the three enumerated actions, thereby defeating Monarch Greenback's claim of resumption.

Another issue in the Monarch Greenback case was the constitutionality of Idaho Code § 42-223(11), which provides that a mining water rights "shall not be lost or forfeited . . . so long as the nonuse results from a closure, suspension or reduced production" of the mine or mine facility "due in whole or in part to mineral prices, if the mining property has a valuable mineral . . . and the water right owner has maintained the property and mineral rights for potential future mineral production." The Special Master concluded the statutory exception, added in 2008 could unconstitutionally retroactively impair the rights of third parties that may have vested prior to the passage of Idaho Code § 42-223(11) if they met one of the three enumerated criteria in *Sagewillow*. The Special Master concluded the only way to make the statute constitutional if a third party's rights did vest would be to advance the priority date of the resumed water right.[343] Since this issue also rested on whether a third party took one of the enumerated actions and defeated Monarch Greenback's claim of resumption, the Special Master left resolution of the issue to trial.[344] The issue was never tried, however, as Monarch Greenback withdrew its objections to the recommendations prior to hearing and the water right claims were decreed disallowed.

In *Lemhi Gold Trust*, the SRBA Court found the exception to forfeiture outlined in Idaho Code § 42-223(11), known as the mining exception, was unconstitutional as applied to the facts of the case.[345] Lemhi Gold Trust, LLC ("LGT") filed a late

339. *See* Memorandum Decision and Order on Motion for Summary Judgment, *In re* SRBA Case No. 39576. Subcase Nos. 63-02446, 63-02489, and 63-02499 (Dec. 16 2009).

340. *Id*. at 5.

341. *See* Sagewillow v. Idaho Dep't of Water Res., 70 P.3d 669, 680, 138 Idaho 831, 842 (2003).

342. Memorandum Decision and Order on Motion for Summary Judgment, *supra* note 339, at 9.

343. *Id*. at 13.

344. *Id*.

345. Memorandum Decision and Order on Challenge, Final Order Disallowing Water Right Claim, *In re* SRBA Case No. 39576. Subcase No. 75-10117 (Nov. 12, 2014).

claim on water rights that would have been forfeited but for the mining exception.[346] Objector Rabe developed water rights on the source well after water use by LGT's predecessors had ceased.[347] The Special Master found Idaho Code § 42-223(11) unconstitutional as applied to this case but concluded this could be remedied by subordinating LGT's water rights to all rights on the system with priority dates earlier than March 25, 2008.[348] Because March 25, 2008 was the date Idaho Code § 42-223(11) was passed by the legislature.

LGT appealed the Special Master's decision. The SRBA Court agreed with the Special Master's legal conclusion that, as applied the case, Idaho Code § 42-223(11) was unconstitutional. It found the application of the statute worked to retroactively diminish vested and established water rights in violation of Article XI, §12[349] of the Idaho Constitution.[350] The Court reasoned that "[a]t the time Rabe established his water rights, the law as it then existed protected Rabe's vested rights against diminishment resulting from an attempt by Lemhi Gold to resume use under its senior right."[351] Additionally, "[w]hen Rabe developed and perfected his water rights, he was entitled to rely upon the law as it then existed."[352]

Despite agreeing with the Special Master that Idaho Code §42-223(11) was unconstitutional as applied, the SRBA Court determined the subordination remark could not be used as a remedy.[353] Idaho law does not allow a court to graft provisions onto statutes that are not there and Idaho Code § 42-223(11) does not contain provisions for such a subordination remark.[354] Without a way to remedy the unconstitutionality, the LGT water right was disallowed.[355]

In sum, Idaho law reflects a tension between competing policies on forfeiture. On one hand, there is a clear policy of optimization of the water resource. A key principle (and frequently quoted statement) associated with the prior appropriation doctrine is "use it or lose it." On the other hand, there are extensive defenses that provide very broad protections against forfeiture and the courts have emphasized that forfeiture is disfavored. The decisions issued by the SRBA Court and the Idaho Supreme Court in the SRBA reflect this tension. On one hand, both the SRBA Court and the Idaho Supreme Court recognized partial forfeiture, thereby expanding the scope of forfeiture. On the other hand, the SRBA Court and the Idaho Supreme Court broadly applied the defenses to forfeiture, expressly finding forfeiture in few cases. What may seem like conflicting results in these cases make sense given the tension that surrounds doctrine of forfeiture. These decisions added important definition and context to the doctrine, thereby helping guide its future application.

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346. *Id.* at 6.

347. *Id.* at 9.

348. Order on Motion for Summary Judgment and Motion to Strike and Special Master Report and Recommendation, *In re* SRBA Case No. 39576. Subcase No. 75-10117 (June 12, 2014).

349. IDAHO CONST. art., §12 ("The 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, or which imposes on the people of any county or municipal subdivision of the state, a new liability in respect to transactions or considerations already past.").

350. Memorandum Decision and Order on Challenge, Final Order Disallowing Water Right Claim, *supra* note 345, at 9.

351. *Id*. at 12.

352. *Id*.

353. *Id*. at 13.

354. *Id*. at 12–13.

355. *Id*. at 15.

B. Addressing Source Connections

From today's vantage point, it seems fairly simple: the ground water in the Eastern Snake River Plain Aquifer is "hydraulically connected to the Snake River and tributary surface waters at various places and in varying degrees."[356] But in the early stages of the SRBA, the extent to which surface and ground water connectivity should be recognized was a hotly debated.

Conjunctive management[357] of ground water and surface water rights was one of the main reasons for the commencement of the SRBA.[358] As mentioned in Part I, *supra*, at the SRBA's inception, the Snake River Technical Advisory Committee recognized the need to manage the entire Snake River Basin system: "Proper management in this system requires knowledge by the IDWR of the relative priorities of the ground and surface water rights, how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources."[359] The SRBA defined the sources and priority dates for all water rights in the basin. Doing so enabled conjunctive management of the defined surface and ground water rights.[360]

The SRBA also defined which surface water sources in each basin would be considered connected for purposes of administration. Some surface water sources were clearly physically tributary to one another, but were decreed through general provisions to be separate from each other for purposes of administration. Determinations about connectivity made in the SRBA were important for defining the interrelationship of the rights for the purposes of delivery calls in the future.

1. Basin Wide Issue 5

The 1994 Amendments allowed IDWR to include "such general provisions in the Director's Report, as the director deems appropriate and proper, to define and to administer all water rights."[361] After that change, IDWR filed Amended Director's Reports for the three Test Basins, seeking, among other things, inclusion of a general provision on conjunctive management.[362] The SRBA Court was asked to review whether inclusion of a general provision on conjunctive management was "necessary for the definition of rights or for the efficient administration of water rights" in those Test Basins.[363] The Court determined that it was not reasoning that the proposed

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356. Clear Springs Foods, Inc. v. Spackman, 252 P.3d 71, 75, 150 Idaho 790, 794 (2011). The Idaho Supreme Court explained: "When water is pumped from a well, it causes a cone-shaped lowering of the ground water elevation near the well. Surrounding ground water then flows into the cone from all sides, depleting ground water away from the well. When that occurs in an area hydraulically connected to a reach of the river or its tributaries, it results in a loss of water from the river or a loss of gain to the river." *Id.*

357. Conjunctive management is defined as the "[l]egal and hydrologic integration of administration of the diversion and use of water under water rights from surface and ground water sources, including areas having a common ground water supply." IDAHO ADMIN. CODE R. 37.03.11.010.03 (2015).

358. A&B Irrigation Dist. v. Idaho Conservation League, 958 P.2d 568, 579, 131 Idaho 411, 422 (1998).

359. *Id.*

360. *See id.*

361. 1994 Idaho Sess. Laws, ch. 454, sec. 17 (amending IDAHO CODE § 42-1411(3)).

362. *See* Memorandum Decision and Order, Re: Basin-Wide Issue 5, *supra* note 232, at 1.

363. *See id.* at 22–24.

general provisions were not "general" because they did not apply to all rights recommended in the Director's Reports and were not "necessary" because they would overlap IDWR's rules for conjunctive management adopted October 7, 1994.[364] The SRBA Court noted that the "general interconnection of all water in the Snake River System had been pled, supported by testimony and affidavit, and . . . . is so well settled that any further provision on interconnection in the decree is redundant and unnecessary."[365] The Court noted, however, that recognition of a general interconnection of water sources was different than a fact-specific finding of interconnection that would be needed to administer two rights as against each other:[366]

> The long established finding of interconnection of all surface and groundwater in the Snake River System, absent a specific finding of a separate source, is not a finding on the specific degree of the relationship between the interconnected rights for the purposes of administration of water in times of shortage. Findings on the nature and extent of interconnection in order to determine the impact of one right on another, is a determination reserved for the time when a call is made on a source or where the Director [of IDWR] determines, as a part of his statutory duties, to administer conjunctively"[367]

The SRBA Court emphasized that how to respond to a call or administer conjunctively was not a statutory element of a water right, and as such, language about conjunctive management should not be decreed as a general provision.[368]

The SRBA Court also noted the finding of general interconnectivity "only serves to declare that all water adjudicated in the SRBA, unless proved otherwise, is from the same source and must be administered accordingly."[369] The SRBA Court distinguished this general interconnectivity from specific defenses still available to a call or conjunctive administration, like the futile call doctrine. But the SRBA Court specified the futile call doctrine only applied where water was from the same source.[370] "Where water is from a separate source, there exists neither the right to make a call against the non-connected source nor the duty or authority of the Director to administer separate source water conjunctively."[371] The SRBA concluded "all water under the jurisdiction of the SRBA Court is interconnected, unless the party claiming otherwise proves by a preponderance of the evidence that the water is from a separate source."[372]

The Idaho Supreme Court disagreed with the SRBA Court and remanded the case for further proceedings.[373] First, the Idaho Supreme Court noted that, when the SRBA Court made its decision on the conjunctive management general provision, "it was without the benefit of this Court's opinion that general provisions need not

364. *See id.* at 22–23.
365. *Id.* at 23.
366. *Id.*
367. *Id.*
368. *See* Memorandum Decision and Order, Re: Basin-Wide Issue 5, *supra* note 232, at 23.
369. *Id.* at 24.
370. See id.
371. *Id.*
372. *Id.*
373. *See* A&B Irrigation Dist. v. Idaho Conservation League, 958 P.2d 568, 577–78, 131 Idaho 411, 420–21 (1997).

apply to every water right."[374] The Idaho Supreme Court then strongly suggested conjunctive management provisions were necessary for the efficient administration of the water rights to be decreed.[375] And finally the Idaho Supreme Court emphasized the proposed general provisions did not necessarily overlap IDWR's Conjunctive Management Rules, pointing out that each provision was tailored due to the unique characteristics of each basin.[376] The Court remanded the case to the SRBA Court with instructions that each "Basin's conjunctive management provision must be discreetly considered in reaching the factual determination whether the respective general provision is necessary either to define or to more efficiently administer water rights in that particular Basin."[377]

Upon remittitur, the SRBA Court separated Basin-Wide 5 into three parts, one for each of the three basins creating Basin-Wide 5-34, 5-36 and 5-57.[378] The SRBA Court ordered IDWR to file supplemental Director's Reports recommending conjunctive management general provisions for each basin.[379] However, after a hearing on the matter, the parties and Court agreed that the conjunctive management issue should be heard on a Snake River Basin-wide basis and not within each individual subbasin.[380] In June 2000, the SRBA Court ordered the parties to Basin Wide Issue 5 to begin mediation.[381] A settlement proposal was drafted, however, the Surface Water Coalition, a powerful party to the negotiations, ultimately rejected settlement because the issues were "too complicated and a consensus [could] not be reached."[382] The Surface Water Coalition expressed a preference for continuing with BWI 5 in court.[383] As part of the proposed settlement, IDWR had committed to beginning a negotiated rulemaking process to develop new rules that would govern administration of hydraulically connected surface and ground water sources.[384] After the mediated settlement dissolved, IDWR continued with the rulemaking process. Ultimately, it adopted rules governing conjunctive management of surface and ground water from an administrative standpoint.[385]

BWI 5 reverted to the SRBA Court and the State of Idaho filed a motion for summary judgment arguing the general provisions were necessary for the definition and efficient administration of water rights in the Snake River Basin[386] and urging

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374. *Id.* at 578, 131 Idaho at 421.

375. *See id.* at 579, 131 Idaho at 422.

376. *See id.* at 579–80, 131 Idaho at 422–23.

377. *See id.* at 580, 131 Idaho at 423.

378. Amended Order of Consolidation/Separation of Issues (Realignment and Redesignation of Issues) of Basin Wide Issues 5, 5A, 5B; A01 § 11, *In re* SRBA Case No. 39576. Subcase Nos. 91-00005, 91-00005A, and 91-00005B at 1 (Dec. 3, 1999).

379. *Id.* at 3.

380. *Id.* at 6.

381. Order for Mediation; Order Appointing Professor Douglas L. Grant as Mediator; and Order Re: Protective Order for Mediation: Basin-Wide Issue 5 on Remand (Conjunctive Management General Provisions), *In re* SRBA Case No. 39576. Subcase No. 91-00005 at 3 (June 14, 2000).

382. Letter from John A. Rosholt, Attorney Twin Falls Canal Company and North Side Canal Company, to Honorable Robert E. Bakes, BWI 5 Mediator (Nov. 10, 2000) (on file with authors).

383. *Id.*

384. Letter from Karl J. Dreher, Director of IDWR, to Honorable Robert E. Bakes and Participants in Basin-Wide Issue 5 Mediation (Nov. 13, 2000) (on file with authors).

385. IDAHO ADMIN. CODE R. 37.03.11 (1994).

386. State of Idaho's Brief in Support of Motion for Summary Judgment, *In re* SRBA Case No. 39576. Subcase No. 91-00005 at 8–13 (Jan 19, 2001).

the court to accept the wording and format of its proposed provisions.[387] Several cross motions were filed in response.[388] The SRBA Court denied the cross motions for summary judgment. It held that, while some general provision on conjunctive management was necessary to define and administer the rights, the nature of the general provision could not be determined on summary judgment.[389] The Court ordered that an evidentiary hearing take place on the issues of (1) presentation of evidence controverting the Court's finding that a general provision was necessary, and (2) presentation of evidence directed at crafting and wording the general provision.[390]

The SRBA Court's order on summary judgment acted as a catalyst for additional settlement negotiations. Ultimately, the parties were able to draft a new settlement agreement.[391] The parties stipulated that, as a matter of law, the general provision on connected sources was necessary both to define the water rights and to efficiently administer them.[392] The parties also stipulated to a form for the general provision.[393] After the settlement was filed with the SRBA Court, the United States filed a motion for clarification expressing concern with the reference to "Idaho law" in the general provision language "could be construed as a waiver that would preclude the application of federal law in the administration of federal was rights (both federal reserve and state-law based) in the event that such federal law became applicable at some future point in time."[394] The SRBA Court denied the United States' motion declaring it was brought too late in the proceedings, failed to designate a concrete issue for consideration, and pointing out that the United States still had the opportunity to object to the general provision's placement on individual water rights that had yet to be issued.[395]

The SRBA Court went on to approve the settlement[396] finding that the general

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387. *Id.* at 13–19.

388. Order on Cross Motions for Summary Judgment; Order on Motion to Strike Affidavits, *In re* SRBA Case No. 39576. Subcase No. 91-00005 at 1, 4 (July 2, 2001).

389. *Id.* at 34.

390. *Id.* at 33–34.

391. Settlement Agreement and Stipulation for Entry of Agreed Findings of Fact, Conclusions of Law, and Partial Judgment on Basin-Wide Issue 5 (Connected Sources General Provision), *In re* SRBA Case No. 39576. Subcase No. 91-00005 (Aug. 27, 2001).

392. *Id.* at 2.

393. *Id.* at 2–3. The parties stipulated the general provision would take the following form:

> 1. The following water rights from the following sources of water in Basin ___ shall be administered separately from all other water rights in Basin ___ in accordance with the prior appropriation doctrine as established by Idaho law:
>
> Water Right Source
>
> 2. The following water rights from the following sources of water in Basin ___ shall be administered separately from all other water rights in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law:
>
> Water Right Source
>
> 3. Except as otherwise specified above, all water rights within Basin ___ will be administered as connected sources of water in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law.

394. Order on United States' Motion for Clarification (Second Order Re: Order to Show Cause), *In re* SRBA Case No. 39576. Subcase No. 91-00005 at 3 (Feb. 27, 2001).

395. *Id.* at 3–7.

396. Memorandum Decision and Order of Partial Decree, *In re* SRBA Case No. 39576. Subcase No. 91-00005 (Feb 27, 2002).

provision on surface and ground water connectivity was necessary to define and administer water rights decreed in the SRBA: "The avoidance of potential controversy in the administration of water rights promotes the efficient administration of water rights and can be a valid basis for a general provision. . . . Defining the legal as well as the hydrologic relationship between ground and surface water rights can also be a valid basis for a general provision."[397] The SRBA Court affirmed the form of the general provision set forth in the settlement agreement.[398]

The general provision on connected surface and ground water applied to all sub-basins within the SRBA.[399] As each subsequent sub-basin arose, a determination was made regarding whether any of the streams within the basin should be administered separately as "unconnected" sources. IDWR made a recommendation regarding the sources to be listed in the general provision. If objections arose to the recommendation a new subcase would develop to address concerns regarding the listed sources and to develop a factual record regarding the designations.[400] Many basins designated no sources that would be administered separately.[401] Other basins designated multiple streams that would not be considered connected sources for the purpose of administration.[402]

2. Separate Source Administration Between the Upper and Lower Snake River

In 2006, the Director issued recommendations for the IWRB's claim for a Snake River minimum stream flow water right at Milner Dam[403] and for the general provisions governing water administration in Basin 02.[404] The recommendations sparked a controversy regarding separate administration of water sources above and below Milner Dam. The Director's recommendation for water right 02-00200 had a quantity of 0 cfs with a point of diversion at Milner Dam, which is located in Basin 01.[405] The Director's recommendation for the general provision in subcase 00-92002GP recommended that the provision state: "The minimum daily flows at the Milner gauging station shall remain as zero cubic feet per second. . . ."[406] While the two recommendations were interrelated, the subcases proceeded on separate tracks.

The issues in Subcase 02-00200 centered on whether the IWRB could hold a

397. *Id.* at 3–5.

398. *Id.* at 5, Exhibit A.

399. Order Amending Partial Decree for General Provisions in Administrative Basin 34 to Include General Provision 7 on Connected Sources, *In re* SRBA Case No. 39576. Subcase No. 91-000005 (July 7, 2004).

400. *See* Order Bifurcating and Consolidating the Issue of Separate Sources, *In re* SRBA Case No. 39576, Subcase Nos. 37-00082, 37-02177, 37-02418, 37-02473A, 37-02473B, 37-02473C, 37-02473D, 37-02473E, 37-02473F, 37-02473G, 37-02473H, 37-02473K, 37-02784A, 37-04016, 37-07201, 37-07693, 37-19736, and 00-92037G3 (renumbered as 00-92037G3 (Dec. 11, 2009).

401. *See, e.g.*, Partial Decree Pursuant to I.R.C.P. 54(b) for General Provisions in Basin 02, *In re* SRBA Case No. 39576 (Nov. 20 2012).

402. *See, e.g.*, Partial Decree Pursuant to I.R.C.P. 54(b) for General Provisions in Basin 74, *In re* SRBA Case No. 39576 (April 3, 2012); Stipulation to Partially Resolve Basin 37, Part 3 General Provision Objection (Big Wood River), *In re* SRBA Case No. 39576, Subcase No. 00-92037G3 (April 7, 2011).

403. Idaho Department of Water Resources Recommended Water Rights Acquired Under State Law, Director's Report Subcase No. 2-00200 (Dec. 29, 2006).

404. *Id.*

405. *Id.*

406. *Id.*

water right for a minimum instream flow of 0 cfs at Milner Dam. The basis of the IWRB's claim was I.C. § 42-203B(2) and the State Water Plan.[407] The State Water Plan provides "[t]he exercise of water rights above Milner Dam has and may reduce flow at the dam to zero."[408] Idaho Code Section 42-203B(2) provides: "For the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream from Milner dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered."[409] The IWRB argued that the water right was appropriate because:

> 1) Milner zero minimum flow became effective on December 29, 1976, when the Board adopted the 1976 State Water Plan; 2) zero minimum flow has been reaffirmed by the Board and the Legislature since then; 3) Idaho Power and the canal companies have repeatedly confirmed the flow precludes calls to spill water past the dam; 4) the flow promotes efficiency and reduces uncertainty in water rights administration . . . .[410]

Objections to the water right centered on whether the IWRB had properly created a minimum instream flow at Milner Dam,[411] whether a water right could exist for 0 cfs,[412] and whether the water right should be decreed in Basin 01 or Basin 02.[413]

The SRBA Court held that the IWRB did not properly appropriate a water right for 0 cfs at Milner Dam because it did not appropriate the water "in the same manner and subject to all of the state laws relating to appropriation of water."[414] The Court found that adoption of the State Water Plan was insufficient to establish a minimum stream flow water right at Milner Dam; the IWRB needed to follow the application, permit, and license process but failed to do so.[415] The Court found, however, that the IWRB did create a state policy regarding administration of water between the upper and lower Snake River.[416] The Court stated that a 0 cfs water right at Milner Dam was not necessary to avoid uncertainty and confusion when administering the upper and lower Snake water rights[417] because "a number of provisions exist which effectively memorialize and provide for the enforceability of the Policy. These include the 1976 State Water Plan itself . . . the Swan Falls Agreement . . . [and] [l]ast, and of most significance to this Court, is SRBA General Provision 4 in Basin

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407. Memorandum in Support of State of Idaho's Motion for Partial Summary Judgment Re: Milner Zero Minimum Flow, *In re* SRBA Case No. 39576, Subcase Nos. 00-92002GP, 02-00200, 02-00201, 02-00223, and 02-00224 at 1 (Oct. 19, 2009).

408. *Id.* (quoting IDAHO WATER RESOURCE BOARD, IDAHO STATE WATER PLAN 17 (1996), http://www.idwr.idaho.gov/waterboard/WaterPlanning/StateWaterPlanning/PDFs/ADOPTED%20State%20Water%20Plan%202012.pdf) [hereinafter 1996 IDAHO STATE WATER PLAN].

409. This statute also authorizes the subordination of hydropower rights.

410. Order on Motions for Summary Judgment and Special Master Report and Recommendation, *In re* SRBA Case No. 39576, Subcase No. 02-00200 at 4 (Feb. 28, 2012).

411. Memorandum Decision and Order on Challenge; Final Order Disallowing Water Right Claim, *In re* SRBA Case No. 39576, Subcase No. 02-00200 at 4–5 (Nov. 20, 2012).

412. *Id.*

413. *Id.*

414. *Id.* at 7 (quoting IDAHO CODE § 42-1734(g) (1974)).

415. *Id.*

416. *Id.* at 10.

417. Memorandum Decision and Order on Challenge; Final Order Disallowing Water Right Claim, *supra* note 411, at 11.

02."[418]

General Provision 4 in Basin 02, which was the subject of subcase 00-92002GP, provided for a minimum daily flow of 0 cfs at Milner Dam and separate administration of the upper and lower Snake River water rights.[419] IDWR's recommendation for General Provision 4 was contested by several parties.[420] and the litigation concerning the general provision was closely related to that for the 0 cfs water right at Milner Dam.[421]

Ultimately, the objections to General Provision 4 in Basin 02 were resolved via settlement.[422] The parties to subcase no. 00-92002GP agreed that the language recommended by the Director for General Provision 4 would be replaced by the following language:

> The exercise of water rights above Milner Dam has and may reduce flow at the dam to zero. For the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream from Milner dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered.[423]

The SRBA Court approved the settlement language and decreed General Provision 4.[424] Although the IWRB was not decreed a water right memorializing 0 cfs flow at Milner, the two rivers[425] concept of administering the upper and lower Snake water rights separately was preserved in the SRBA's final decree as General Provision 4 for Basin 2.

C. Memorializing Historic Water Use Practices

As water use in Idaho developed, water users often found it necessary to adapt their historic water use practices to meet new water demands and needs. These changes took various forms, but often included changing the purpose of use or expanding the place of use for a water right. These changes were often made without the consent or knowledge of IDWR. Over time many of these undocumented changes and expansions became an accepted part of the agricultural landscape. When the SRBA began, the question of how to deal with these already existing water use changes arose, and a body of statutes and case law developed to address the problem. The SRBA Court also had to determine how to incorporate certain historic water use practices, such as the use of spring high flow run-off that had been memorialized and recognized in the prior adjudications.

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418. *Id.* at 11–12.
419. *Id.*
420. *Id.* at 12.
421. *Id.*
422. *Id.*
423. Memorandum Decision and Order on Challenge; Final Order Disallowing Water Right Claim, *supra* note 411, at 13.
424. Partial Decree Pursuant to I.R.C.P. 54(b) for General Provisions in Basin 02, *In re* SRBA Case No. 39576, Subcase No. 00-92002GP at 2 (Nov. 20, 2012).
425. *See* IDAHO WATER RESOURCE BOARD, IDAHO STATE WATER PLAN 43–46 (2012), http://www.idwr.idaho.gov/waterboard/WaterPlanning/StateWaterPlanning/PDFs/ADOPTED%20State%20Water%20Plan%202012.pdf [hereinafter 2012 IDAHO STATE WATER PLAN].

1. Recognizing Historic Changes in Water Use

Expansions and accomplished transfers were two of the many hotly contested issues early in the SRBA. Generally speaking, an expansion refers to an increased use of the water right. A common example is when a farmer uses an existing water right to irrigate more land, usually by converting from flood to sprinkler irrigation. By spreading water over more land, the farmer uses more water, returning less water to the system. An injury occurs if this expanded use depletes the water system such that other users cannot obtain sufficient water under their rights. In contrast, a transfer refers to a change in the right, not an increase. A change in the right occurs, for instance, where a farmer moves a water right from one field to another field of equal size. Like expansions, transfers can also negatively impact other water rights, depending upon the circumstances.

Because of their potential to injure other water rights state law requires IDWR approval of these changes.[426] Historically, however, many water users in the state expanded or transferred their rights without complying with the statutes requiring IDWR approval. Over time many of these unauthorized changes and expansions became accepted by the local water users. Rather than upset the settled expectations in agricultural communities, the Legislature determined the public would be better served if many of these preexisting expansions and transfers could be preserved in the SRBA.

As the Legislature was preparing the SRBA legislation, they addressed unauthorized transfers and expansions through enacting the "presumption statutes," Idaho Code §§ 42-1416 (1985)[427] and 42-1416A (1989)[428]. The presumption statutes were the Legislature's first attempt to recognize prior expansions and transfers. The statutes did two things: (1) they created presumptions validating prior expansions, and (2) they permitted prior transfers to be decreed so long as they satisfied the substantive criteria of the transfer statutes. Idaho Code § 42-1416 stated:

> [e]xpansion of the use after acquisition of a valid unadjudicated water right in violation of the mandatory permit requirements shall be presumed to be valid and to have created a water right with a priority date as of the completion of the expansion, in the absence of injury to other appropriators.[429]

Idaho Code § 42-1416A permitted users who had undertaken transfers of water rights without statutory compliance to have the transfer confirmed in the course of the general SRBA.[430]

These presumption statutes were challenged in the SRBA and designated as BWI 1. In 1994, the SRBA Court declared the statutes unconstitutionally vague.[431]

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426. IDAHO CODE §§ 42-108 and 42-222 provide that any changes to a water right must be approved by IDWR.

427. 1985 Idaho Sess. Laws, ch. 19.

428. 1989 Idaho Sess. Laws, ch. 97.

429. IDAHO CODE § 42-1416(2) (repealed by 1994 Idaho Sess. Laws, ch. 454).

430. *See* 1989 Idaho Sess. Laws, ch. 97, sec. 1.

431. *See* Memorandum Decision And Order on Basin-Wide Issue No. 1, Constitutionality of I.C. § 42-1416 and I. C. § 42-1416A, as Written, *In re* SRBA Case No. 39576, Subcase No. 00-91001 (February 4, 1994).

In response, the legislature repealed Idaho Code§§ 42-1416 and 42-1416A[432] and enacted I.C. §§ 42-1425 and 42-1426 ("amnesty statutes")[433]. The new legislation was designed to protect "the water uses originally intended to be protected by the 'presumption' and 'accomplished transfer' statute" and "significant investments by water users and tax base for local governments by helping to maintain status quo water uses."[434]

Idaho Code § 42-1425 provided for the accomplished transfer of an existing water right. An accomplished transfer could consist of a change to the place of use, point of diversion, nature or purpose of use, or period of use made prior to the date of commencement of the SRBA, regardless of compliance with I.C. §§ 42-108 and 42-222.[435] The transfer would be recognized only if "no other water rights existing on the date of the change were injured and the change did not result in an enlargement of the original right."[436]

Idaho Code Section 42-1426 provided for recognition of historic enlargements of a water right that were made without complying with the permit requirement.[437] The enlargement statute provided that the enlarged use could be decreed in the SRBA so long as the enlargement did not exceed the rate of diversion originally authorized or injure water rights existing on the date of the enlarged use.[438] The statute provided for subordination "to a date one (1) day later than the priority date for the junior water right injured by the enlargement," if there was injury that could not be mitigated.[439]

Like their predecessor statutes, the accomplished transfer and enlargement statutes were quickly challenged as Basin Wide Issue 4. The SRBA Court the statutes constitutional. [440] The case was appealed to the Idaho Supreme Court in *Fremont-Madison Irrigation Dist. & Mitigation Group v. Idaho Ground Water Appropriations, Inc.*[441] The court first addressed whether I.C. §42-1425 was constitutional as written. The Court explained that "the purpose of Idaho Code § 42-1425 was to streamline the adjudication process by providing a substitute for the transfer process required by Idaho Code § 42-222 and to protect existing water uses which were the result of past transfers, regardless of compliance with statutory mandates."[442] The court noted that, within the statute, two limitations exist for an accomplished transfer: (1) there must be no injury to other water rights existing on the date of the change, and (2) the transfer cannot constitute an "enlargement" of the original right.[443] While enlargement is not defined in the statutes the Supreme Court

432. *See* 1994 Sess. Laws, ch. 454, sec. 24.

433. *See* 1994 Sess. Laws, ch. 454, secs. 31–33.

434. H.B. 969, Statement of Purpose, 52nd Leg., 2nd Sess. (Idaho 1994); Idaho Code §§ 42-1416 and 42-1416A (repealed by 1994 Sess. Laws, ch. 454, sec. 24). IDAHO CODE §§ 42-108 and 42-222 provide that any changes to a water right must be approved by IDWR.

435. IDAHO CODE § 42-1425(a).

436. IDAHO CODE § 42-1425(2)

437. IDAHO CODE § 42-1426(1)(a); *see* IDAHO CODE §§ 42-201 and 42-229.

438. IDAHO CODE § 42-1426(2).

439. *Id.*

440. Memorandum Decision and Order on Basin-Wide Issue No. 4—The Constitutionality of I.C. §§ 42-1425, 42-1426 and 42-1427, as Written, *In re* SRBA Case No. 39576, Subcase No. 91-00004 (renumbered as 00-91004) (March 21, 1995).

441. Fremont-Madison Irrigation Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc., 926 P.2d 1301, 129 Idaho 454 (1996).

442. *Id*. at 1305, 129 Idaho at 458.

443. *Id.*

explained that the term "enlargement" has been used to refer to any increase in the beneficial use to which an existing water right has been applied, through water conservation and other means.[444] The court found "[t]he limitations in section 42-1425 protect other water users from injury to their rights resulting from a recognition of the transfers that are memorialized in the adjudication."[445] The Supreme Court concluded that, with these protections, I.C. § 42-1425 is constitutional as written.[446]

The court next addressed the constitutionality of the enlargement statute. Idaho Code § 42-1426 allows an enlargement that increases the volume of water used. The Court explained that Idaho Code § 42-1426 "would violate Article XV, § 3 of the Idaho Constitution if it allowed a party with a claim for an enlargement to unconditionally receive a priority date as of the date of enlargement regardless of injury to junior appropriators."[447] The court found, however, that I.C. § 42-1426 also provides two limitations to obtaining a waiver for enlargement: "(1) that the rate of diversion of the original water right and the separate water right for the enlarged use, combined, shall not exceed the rate of diversion authorized for the original water right; and (2) that the enlargement in use did not injure water rights existing on the date of the enlargement of use." [448] The Court then held the limitations, coupled with the mitigation provision,[449]provided adequate protection for junior appropriators and, therefore, I.C. § 42-1426 was constitutional.[450]

In 2005, the Idaho Supreme Court further clarified the enlargement statute. In 1997, IDWR filed an Amended Director's Report based on the holding in *Fremont–Madison*. IDWR recommended enlargement rights in the name of A&B Irrigation District ("A&B").[451] In the recommendation, IDWR included a provision subordinating the rights to all junior appropriators of rights prior to April 12, 1994, the date Idaho Code § 42-1426 was enacted.[452]

Objections were filed to IDWR's Amended Director's Report, particularly to the subordination provision.[453] The Special Master determined that the priority dates for the enlargement rights should be the date the water was first put to beneficial use, subject to the subordination remark recommended by IDWR. Additionally, the Special Master determined the source of the enlargement rights was ground water not waste water as asserted by A&B. On challenge the SRBA Court affirmed the Special Master's decision.[454] A&B appealed.

The Idaho Supreme Court first addressed the source issue. A&B's original

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444. *Id.*
445. *Id.*
446. *Id.*
447. *Fremont-Madison Irrigation Dist., supra* note 441, at 1307, 129 Idaho at 460.
448. *Id.* (citing IDAHO CODE §42-1426(2) (internal quotations omitted)).
449. *See* IDAHO CODE §42-1426(2):

An enlargement may be decreed if conditions directly related to the injury can be imposed on the original water right and the new water right that mitigate any injury to a water right existing on the date of enactment of this act. If injury to a water right later in time cannot be mitigated, then the new right for the enlarged use shall be advanced to a date one (1) day later than the priority date for the junior water right injured by the enlargement.

450. *Fremont-Madison Irrigation Dist., supra* note 441, at 1307–08, 129 Idaho at 460–61.
451. A&B Irrigation Dist. v. Aberdeen Am. Falls Ground Water Dist., 118 P.2d 78, 81, 141 Idaho 746, 749 (2005).
452. *Id.*
453. *Id.*
454. *Id.*

water right is sourced from ground water.[455] However, A&B tried to assert that the source of the enlargement right should be waste water.[456] The Court denied the logic behind the assertion[457] and went on to hold that A&B could not obtain an enlargement right in waste water because an enlargement under Idaho Code §42-1426 must use water originating from an existing right.[458]

Once the Supreme Court determined that the source of A&B's water right was ground water it went on to evaluate the subordination remark. In *Fremont-Madison*, the Court had discussed injury in the case of enlargements stating: "It is difficult, if not impossible, to perceive of a situation in which an enlargement would not injure an appropriator who had an established right if the enlargement receives priority."[459] A&B argued that "*Fremont- Madison* did not state that proposed enlargements create a *per se* injury to junior water rights holders."[460] The Supreme Court disagreed stating, "there is *per se* injury to junior water rights holders anytime an enlargement receives priority."[461] With that the Court determined A&B's enlargement rights must be subordinated and affirmed the inclusion of the proposed subordination remark.[462] All enlargement rights were thereafter recommended with a subordination remark subordinating the rights to all junior appropriators of rights prior to April 12, 1994.

With the Supreme Court's decision that the "amnesty" statutes, I.C. §§ 42-1425 and 42-1426 were constitutional as written and giving "due deference and respect" to the Legislature's power to enact substantive law many of the obstacles in the SRBA were removed. The Court provided confirmation on the recommendations and implementation of the priority dates for the enlargement rights. Prior to these decisions many rights involving accomplished transfers and expansions were stymied. These decisions allowed these rights to move forward in the adjudication.

2. Incorporating Historic General Adjudication Decrees

Prior to the commencement of the SRBA, many water systems within the Snake River Basin had undergone either private or general adjudications. The judgments from these prior private[463] and general adjudications needed to be incorporated into the SRBA. Case law developed that defined the binding effect of prior private and general stream adjudications would have on claimants in the SRBA.

Judgments from private water adjudications were subject to limited reexamination in the SRBA. They were considered binding only on the parties to the private adjudication.[464] They could be lost or reduced based on evidence that the

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455. *Id.* at 80, 141 Idaho at 748.
456. *Id.* at 82, 141 Idaho at 750.
457. *A&B Irrigation Dist., supra* note 451, at 85, 141 Idaho at 753.
458. *Id.* at 84, 141 Idaho at 752.
459. *Fremont-Madison Irrigation Dist., supra* note 441, at 1308, 129 Idaho at 461.
460. *A&B Irrigation District, supra* note 451, at 84, 141 Idaho at 752.
461. *Id.* at 85, 141 Idaho at 753.
462. *Id.*
463. State v. Hagerman Water Right Owners, Inc., 947 P.2d 409, 415, 130 Idaho 736, 742 (1997); I.C. § 42-1401A(8) (private adjudications bind only those persons joined in the action and for the administration of such rights.)
464. *See, e.g.*, Memorandum Decision and Order on Challenge, *In re* SRBA Case No. 39576, Subcase Nos. 01-00217, 01-00218, 01-04024, and 01-04025 (Feb. 9, 2011) (holding that the Eagle Decrees were a private adjudication that were not binding on the United States or the State.).

water right had been forfeited, abandoned, or lost through adverse possession.[465]

A decree entered in a prior general adjudication, however, was considered to be "conclusive as to the nature and extent of all water rights in the adjudicated water system."[466] Water users who participated in the prior general adjudication were bound by its terms and could not collaterally attack it in the SRBA. Although water users in an adjudicated system were bound by its terms and could not attack it in the SRBA, "when water rights outside of the adjudicated basin were joined into the SRBA, water users holding rights outside of the jurisdiction of the respective decrees [were not] bound by the prior decrees."[467]

Two previous general adjudications in the Lemhi River basin and in Reynolds Creek warrant additional discussion. These two general adjudications determined the rights of water users on the Lemhi River and Reynolds Creek, and they also included certain provisions for administration of the water rights. One such provision was for the use of "high flow" or spring runoff water.

Historically, Idaho water users on some river systems have diverted additional water for their shared use when flows exceeded the amount of water required to satisfy all quantified water rights. The ancillary use of "flood water," "high flow water," or "excess water" has been particularly important in basins without storage facilities, where water users are more dependent on the vagaries of spring snowmelt and intermittent rain events. The diversion of high flows complements quantified water rights by saturating the root zone of crops and storing water in the soil for use later in the irrigation season. Several prior water right decrees authorized the shared use of high flow water. Determining how to memorialize this historic water use practice presented a challenge for the SRBA Court.

The first case in which the SRBA Court was called upon to review general provisions concerning the use of high flow water occurred in the Test Basins and was addressed in BWI 5. The Director recommended substantially identical provisions authorizing the ancillary use of "additional water" in conjunction with existing irrigation rights.[468] Because there were no prior decrees authorizing the diversion of additional water in these basins, the language of the proposed provisions was patterned, in part, on decrees in other basins, including the Lemhi Decree.[469]

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465. State v. Hagerman Water Right Owners, Inc., at 414, 130 Idaho at 741.

466. IDAHO CODE § 42-1420(1); Memorandum Decision and Order on Challenge, *In re* SRBA Case No. 39576, Subcase Nos. 74-15051 et. al. at 5-8 (January 3, 2012). This subcase involved 294 claims. For brevity only the lead subcase number has been listed. *See id.* at Exhibit A for complete list of subcases.

467. *Id.* at 22. A decree issued as a result of a summary supplemental adjudication proceeding under former statute IDAHO CODE § 42-1405 (1948) by its express terms did not adjudicate any right to the use of water. A summary supplemental adjudication decree does not carry the binding or *res judicata* effect of a general adjudication decree and therefore could not bind non-parties to its terms. Memorandum Decision and Order on Challenge, *In re* SRBA Case No. 39576, Subcase Nos. 01-00217, 01-00218, 01-04024, 01-04054, 01-02068, 01-04054 at 12 (Feb. 9, 2011). In addition to prior decrees, the elements of a licensed water right could not be changed through the SRBA adjudication process. Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue, *In re* SRBA Case No. 39576, Subcase Nos. 36-0708, 36-07201, 36-07218, 36-02048, 36-02803, 36-04013A, 36-04023B, 36-04013C,36-07040, 36-07148, 36-07568, 36-07071, 36-02356, 36-07210, 36-07427, 36-07720, 36-02659, 36-07004, 36-07080, 36-07731 (Dec. 29, 1999).

468. Report from Karl J. Dreher, Director of IDWR to SRBA District Court, Basin Wide Issue 5 (Irrigation General Provisions), *In re* SRBA Case No. 39576, Subcase No. 91-00005 at 9, 11, n.13, (March 11, 1996).

469. *See* Stipulation Resolving General Objections, In the Matter of the General Determination of the Right to the Use of Surface Waters and Tributaries of the Lemhi River Drainage Basin, Case No. 4948 (7th Jud. Dist. Idaho Feb. 12, 1983); Partial Decree Pursuant to Rule 54(b), I.R.C.P, In the Matter of the

According to the Director, the recommendations were developed because they reflected long standing historic water use practices.[470]

The provisions authorized the diversion of additional flows beyond quantified rights for irrigation under the following conditions: a) the water was applied to beneficial use for irrigation; b) all existing and future quantified water rights must be satisfied first; c) no element of the base water right, other than quantity, was exceeded; d) the diversion and use of additional flows did not conflict with the local public interest; and e) the water user diverting additional flows assumed all risk that the criteria of the general provision was satisfied.[471]

The SRBA Court rejected the "additional water" provisions primarily because they did not apply to all water rights and because they did not set out the elements of a water right required by statute.[472] Focusing on the need to decree enforceable water rights, the SRBA Court pointed out, however, that some claimants may have historically used additional water and therefore may have constitutionally-based rights to such water.[473] If so, the Director must report or a claimant must produce evidence addressing each element of a high flow water right for a right to be decreed.[474]

On appeal, the Idaho Supreme Court agreed that the recommended provision did not establish the elements of a water right because it was "not subject to definition in terms of quantity of water per year, which is essential to the establishment and granting of a water right."[475] The Court went on to determine that, as a matter of law, the "use of excess water cannot be decreed as a water right or a general provision."[476]

The Court also addressed the issue of "excess water" in the context of determining how to memorialize historic water use recognized by prior general water right adjudications. The Director's Report for Basin 57 included a provision authorizing the diversion of "excess water" taken directly from the Reynolds Creek Decree.[477] This provision was litigated in separate proceedings under BWI 5A. After the Director's Report was filed, the parties entered into a stipulation modifying the terms of the provision, inserting the term "high flow" in place of the term "excess water."[478] The stipulated provision was substantially the same as that authorized in the Reynolds Creek Decree and there was evidence before the Court documenting the claimants' reliance on this historic use of water.[479]

The SRBA Court rejected the provision, focusing again on the failure of the provision to establish the required elements of a water right and to apply to all water

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General Determination of the Right to the Use of Surface Waters and Tributaries of the Lemhi River Drainage Basin, Case No. 4948 (7th Jud. Dist. Idaho Jan. 4, 1983).

470. Report from Karl J. Dreher, Director of IDWR to SRBA District Court, Basin Wide Issue 5 (Irrigation General Provisions), *In re* SRBA Case No. 39576, Subcase No. 91-00005 at 7-9.

471. *Id*.

472. Memorandum Decision and Order Re: Basin-Wide Issue 5, *supra* note 232, at 15–20.

473. *Id*. at 16.

474. *Id*. at 18.

475. A&B Irrigation Dist. v. Idaho Conservation League, 958 P.2d 568, 573, 131 Idaho 411, 416 (1997).

476. *Id*.

477. Special Master's Recommendation on Basin-Wide Issue 5A, *In re* SRBA Case No. 39576, Subcase No. 00-91005A at 1 (April 11, 1996).

478. *Id*. at 3.

479. *Id*. at 4.

rights. This finding was bolstered by the language of the decreed provision itself which clarified that the parties to the Reynolds Creek Decree did "not intend . . . to establish or set priorities or quantities of any rights to excess water, or to establish that any presently perfected right does or does not include or authorize the use of excess water."[480] In disallowing the provision, the court reiterated that the Court was required to issue and the claimants deserved enforceable partial decrees for any constitutionally protected rights to "excess water" that included the required elements set out in statute.[481]

Basin Wide Issue 5A was appealed to the Idaho Supreme Court in *State v. Idaho Conservation League* .[482] On appeal, the Supreme Court reaffirmed its central holding in *A&B* that a high flow general provision's elimination of all of the elements of a water right, particularly the essential elements of priority date and quantity, fails to define the existence of a legal water right.[483] The Supreme Court disagreed, however, with the SRBA Court's conclusion that a general provision could not be used to authorize the use of high flow water. As a predicate to its analysis, the Court instructed that "nothing in the statute requires that a general provision be on equal footing with a water right. In other words, the provision need not be a right or set forth a right in and of itself, but may be included in a decree if it is necessary to administer the rights set forth in the body of the decree."[484]

The Supreme Court then turned to the factual record which showed that the diversion of high flow was a system of water use that had been used successfully for decades. Thus, the general provision described "a long-standing system of allowing those who otherwise have water rights in the Reynolds Creek Basin to use excess water when it is available."[485] The provision, according to the Court, avoided controversy and assured the efficient administration of water rights by clearly notifying water rights holders of the mechanism for administration of excess water. The Court concluded therefore that the provision was "necessary to govern the administrative role of the IDWR[,]" and should be decreed.[486]

The *State v. Idaho Conservation League* holding appeared to set out two options for authorizing the continued diversion of high flow, either a general provision describing how such use should be administered, or individual partial decrees that included the required elements of a water right. Ultimately, water rights holders in the Reynolds Creek Basin filed individual late claims for the use of high water; the claims were uncontested or resolved through settlement proceedings before the Special Master.[487] The claims contained all of the statutorily required elements of a water right and were decreed by the SRBA Court.[488]

Like the Reynolds Creek Decree, the Lemhi Decree memorialized and authorized the diversion of high flows in addition to quantified irrigation rights

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480. Memorandum Decision Re: Basin-wide Issue 5A, *supra* note 233, at 3.
481. *Id*. at 6.
482. State v. Idaho Conservation League, 955 P.2d 1108, 1112, 131 Idaho 329, 333 (1998).
483. *Id.*
484. *Id*. at 1112–13, 131 Idaho at 333–34.
485. *Id*. at 1113, 131 Idaho at 334.
486. *Id*. at 1114, 131 Idaho at 335.
487. Special Masters Report and Recommendation Findings of Fact and Conclusions of Law For General Provisions in Basin 57 Designated as Basin-Wide Issue 5-57, *In re* SRBA Case No. 39576, Subcase No. 91-0005-57 at 3 (Sept. 11, 2002).
488. *Id*.

through a general provision.[489] The Lemhi Decree provision was also based upon a court finding of historic use and was the result of stipulation among the parties to the Lemhi Adjudication.[490] Under the Lemhi Decree, the stipulated provision subordinated the diversion of high water to all existing and future quantified water rights within the Lemhi Basin.[491]

Based on the proceedings in the Reynolds Creek Basin, claimants who were parties to the Lemhi Adjudication filed 294 separate claims for high flow water rights.[492] The Director recommended the individual rights as claimed and objections were filed by the United States of America, the Nez Perce Tribe, and individual water users. The objections asserted that the individual water right claims were barred in the SRBA because they should have been filed in the Lemhi Adjudication and that under *A&B*, a general provision authorizing the diversion of high flows was unlawful.[493] In addition, the objectors argued that any high flow water right decrees should be subordinate to existing and future water rights throughout the Snake River Basin.[494]

In summary judgment proceedings, the claimants and the State argued that the individual water right claimants should have the same opportunity as the Reynolds Creek claimants to submit proof of historic beneficial use of high flow water and obtain partial decrees. The Special Master disagreed and recommended the claims be disallowed. In their place, the Special Master recommended continued authorization of high flow water use through a general provision similar to that set out in the Lemhi Decree.[495]

On challenge, the SRBA Court agreed that the claims should be disallowed. Relying on *A&B* and *Idaho Conservation League*, the Court ruled that the Lemhi Decree did not create enforceable water rights for the use of high water. And, because no claims were filed for high flow water rights in the prior adjudication, the Lemhi claimants were barred under principles of *res judicata* from filing such claims in the SRBA.[496] The Court went on to distinguish the Reynolds Creek case on the basis that the Reynolds Creek claims were uncontested or resolved through settlement in proceedings before a Special Master. According to the Court, the Reynolds Creek case had no precedential value because the Court had no opportunity to rule on the merits of the claims.[497]

Consistent with *Idaho Conservation League*, however, the court concluded that the general provision should be decreed. Significant to the decision was the factual similarity between the Reynolds Creek and Lemhi Basin high flow provisions. Both provisions resulted from settlements resolving controversy among water users over when and how high flow would be diverted. Both provisions were decreed in general

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489. Memorandum Decision and Order on Challenge, *supra* note 464 at 5–8.
490. *Id*.
491. *Id*. at 8.
492. *Id*. at 2.
493. *Id*. Other grounds for objection focused on the claimed priority date, place of use, quantity with respect to the reasonable duty of water, and amount beneficially used.
494. *Id*.
495. Memorandum Decision and Order on Challenge, *supra* note 464, at 3.
496. *Id*. at 10–11.
497. *Id*. at 11–12.

adjudications.[498] And in both, the record contained factual evidence documenting historic use. Not only had affidavits been filed by a Lemhi Basin water master and others in conjunction with summary judgment proceedings, the Lemhi Decree itself included specific findings of fact documenting the purpose and necessity of the high flow use.[499] According to the SRBA Court, it had already been "judicially determined in a prior court proceeding that the high flow general provision is necessary for the efficient administration of water rights."[500]

Finally, the SRBA Court ruled on the question of whether the continued diversion of high flow water should be subordinated to existing and future water rights within the Lemhi Basin only, or to all existing and future water rights in the Snake River Basin not bound by the Lemhi Decree. Fundamental to the Court's decision that the subordination provision applied to all water rights outside the basin was the nature of the general provision and the limited jurisdiction of the Lemhi Court.

> The direct consequence of limiting the application of the subordination provision to water rights within the Lemhi Basin *de facto* elevates the status of the high flow use to that of a water right as between in-basin and out-of-basin water users. Since the use of high flow water does not create a water right high flows are therefore unappropriated water. The effect of limiting the subordination provision to in-basin users would make the otherwise unappropriated high flow water unavailable for appropriation by out-of-basin users. Further, limiting the subordination provision would also result in the users of high flow water acquiring a better interest in the water as against those out-of-basin users holding valid existing water rights.[501]

In the Court's view, this outcome would be contrary to law because water right holders in the downstream basins potentially affected by separate administration were not joined in the prior adjudication:[502] "To the extent the Lemhi Decree intended to order administration of high flow water separate from out-of-basin rights such was beyond the jurisdiction of the Lemhi Adjudication."[503]

In sum, the SRBA Court determined that the general provision authorizing the use of high flow water in conjunction with existing rights based on the Lemhi Decree should be decreed "based on the holding in *Idaho Conservation League*, which upheld the use of a general provision authorizing the use of high flow water based on historic practices; the fact that the recommended provision is consistent with a prior decree entered in a general adjudication; and the subordination of the high flow use protects water rights not subject to the prior decree."[504]

D. Public Trust Doctrine

As mentioned above,[505] several Conservation Groups sought to intervene in the

498. *Id*. at 22.
499. *Id*. at 26–27.
500. *Id*. at 27.
501. Memorandum Decision and Order on Challenge, *supra* note 464, at 25.
502. *Id*. at 26.
503. *Id*.
504. *Id*. at 26–27.
505. *See supra* Section III.E.

SRBA. The basis of the intervention was to "ensure that the SRBA includes a comprehensive determination that the State of Idaho, acting through [IDWR], has met its duty under Idaho law to protect public values such as 'navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality' under the Public Trust Doctrine."[506] The Conservation Groups asserted that "recreational and aesthetic interests of the organizations' members will be affected by water rights determinations made during the SRBA."[507]

The SRBA Court denied the conservation group's motion holding that "the limited jurisdiction vested in the court under the statutes creating the SRBA did not provide the district court with the authority to consider the public trust doctrine."[508] The Conservation Groups filed a motion to reconsider.[509] The SRBA Court granted in limited part the motion to reconsider.[510] The court adhered "to its holding . . . that the 'public trust doctrine' is not an enumerated element of a water right to be decreed in the SRBA" but agreed, on reconsideration, that the court had jurisdiction to consider the local public interest where the notice of claim or recommendation in the Director's Report is based on I.C. § 42-1416 or I.C. § 42-1416A.[511] Therefore, the Court granted the conservation group's motion to intervene with regard to all water rights claimed or recommended pursuant to I.C. § 42-1416A.[512] However, the court denied the conservation groups' motion with regard to claims based on permits, license, and constitutional appropriations because there was no statutory requirement that the court consider the local public interest when reviewing the claims.[513]

The Idaho Supreme Court affirmed the SRBA Court's order denying the conservation groups' petition to intervene and reversed the its order on reconsideration granting the petition to intervene.[514] The Court held the SRBA Court correctly concluded that the public trust doctrine is not an element of a water right.[515] During the pendency of the appeal the legislature repealed I.C §§ 42-1416 and 42-1416A.[516] The repeal of these two sections, which referenced the local public interest

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506. Memorandum in Support of Motion to Intervene, *In re* SRBA Case No. 39576 at 4 (April 30, 1993) (internal citations omitted).

507. *Id.* at 3.

508. Idaho Conservation League, Inc. v. State, 911 P.2d 748, 749, 128 Idaho 155, 156 (1995).

509. Conservation Groups' Notice of Motion and Motion to Reconsider Denial of Motion to Intervene, *In re* SRBA Case No. 39576 (July 15, 1993).

510. Order Granting, in Limited Part, Motion to Reconsider Order Denying Motion for Leave to Intervene, *In re* SRBA Case No. 39576 (Jan. 14, 1994).

511. *Id.* at 4. IDAHO CODE § 42-1416A dealt with claims that involve a prior change in point of diversion, place of use, period of use, or nature of use (enacted 1989 Idaho Sess. Laws, ch. 97; repealed 1994 Idaho Sess. Laws, ch. 454, sec. 24). IDAHO CODE § 42-1416 dealt with claims filed for expansions that were accomplished in violation of the mandatory permit statutes (enacted 1985 Idaho Sess. Laws, ch. 19; repealed 1994 Idaho Sess. Laws, ch. 454, sec. 24). Under both IDAHO CODE §§ 42-1416 and 42-1416A the Court was required to determine if the change met the substantive criteria of IDAHO CODE § 42-422, which includes consideration of the local public interest.

512. Order Granting, in Limited Part, Motion to Reconsider Order Denying Motion for Leave to Intervene, *supra* note 510, at 6.

513. *Id.* at 7–9.

514. Idaho Conservation League, Inc. v. State, 911 P.2d 748, 751, 128 Idaho 155, 158 (1995).

515. *Id.* at 750, 128 Idaho at 157. Subsequently, the Idaho legislature adopted IDAHO CODE § 58-1203(2) which made clear the public trust doctrine was to apply only in limited circumstances: "the public trust doctrine shall not apply to: (b) The appropriation or use of water, or the granting, transfer, administration, or adjudication of water or water rights."

516. *Idaho Conservation League, Inc.*, at 750, 128 Idaho at 157; 1994 Idaho Sess. Laws, ch. 454.

standard in I.C. § 42-422, eliminated the grounds on which the SRBA Court had granted the Conservation Groups' petition to intervene.[517] Therefore, the Court held the SRBA Court's order granting in part the petition to intervene was reversed and it affirmed the court's order denying the petition.[518]

E. United States' State Law-Based Water Rights

The United States has for many years played a major role in land and water resource development and management in the Snake River basin. The United States manages large tracts of land in the Snake River basin and operates a number of large reservoirs on the Snake River and its tributaries. Federal agencies filed many SRBA claims for state-law based water rights for these lands and reservoirs, and these claims raised a number of issues in the SRBA.

1. Federal Reservoir Projects.

The 1902 Reclamation Act authorized the Secretary of the Interior to undertake "construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands" in the western states.[519] Section 8 of the Reclamation Act required that the Secretary "in carrying out the provisions of this Act, shall proceed in conformity" with "the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder."[520]

Shortly after passage of the 1902 Reclamation Act, the Bureau of Reclamation (originally the Reclamation Service) initiated development of two large reclamation projects in the Snake River basin. The Minidoka Project of the upper Snake River basin was authorized in 1904 and eventually included, among other works, five major reservoirs: Lake Walcott, American Falls, Palisades, and Jackson Lake reservoirs on the main stem of the Snake River, and Island Park reservoir on the Henry's Fork.[521] The Boise Project (originally the Payette-Boise Project) in southwest Idaho was initially authorized in 1905, and eventually included four major reservoirs: Arrowrock and Anderson Ranch reservoirs on the Boise River system, and

517. *Idaho Conservation League, Inc.*, at 750, 128 Idaho at 157.

518. *Id*. at 751, 128 Idaho at 158.

519. Reclamation Act of 1902, ch. 1093, 32 Stat. 388 (codified as amended at 43 U.S.C. §§ 391, 411 (2012)). The 1902 Reclamation Act was a response to the fact that while "private and state reclamation projects had gone far toward reclaiming the arid lands" by the end of the 1800s, "massive projects were . . . needed to complete the goal and these were beyond the means of private companies and the States." California v. United States, 438 U.S. 645, 663 (1978).

520. The Reclamation Act of 1902, ch. 1093, 32 Stat. 390 (codified as amended at 43 U.S.C. § 383 (2012)). Section 8 of the 1902 Reclamation Act provided in full as follows:

> That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws.

521. Eric A. Stene, Minidoka Project 5 (Bureau of Reclamation 1997), http://www.usbr.gov/projects/Project.jsp?proj_Name=Minidoka+Project; Wm. Joe Simonds, Palisades Project 2, 8 (Bureau of Reclamation 1995), http://www.usbr.gov/projects/Project.jsp?proj_Name=Palisades%20Project. While Bureau of Reclamation documents often refer to "the Palisades Project" separately from "the Minidoka Project," the term "Minidoka Project" as used herein includes the Palisades Dam, Reservoir, and Powerplant.

Deadwood and Cascade reservoirs on the Payette River system.[522] In both projects, some dams have hydropower plants that generate electricity using water released from the dams.

Federal flood control projects, in contrast, are authorized through various flood control acts and fall under the authority of the U.S. Army Corps of Engineers ("Corp of Engineers").[523] Flood control operations at Bureau of Reclamation facilities are governed by Corps of Engineers regulations.[524] Unlike the 1902 Reclamation Act, federal flood control law generally does not require conformity to state law "relating to the control, appropriation, use, or distribution of water."[525]

The Corps of Engineers developed several major flood control reservoir projects in the Snake River basin during the mid-1900s. Lucky Peak reservoir, on the Boise River system downstream of Arrowrock and Anderson Ranch reservoirs, went into operation in 1955.[526] Dworshak Reservoir on the north fork of the Clearwater River was completed in 1972.[527] Ririe Reservoir on Willow Creek, a tributary to the Snake River near Idaho Falls, was finished in 1983.[528] The Bureau of Reclamation's Palisades and Jackson Lake reservoirs in the upper Snake River basin are also operated for flood control purposes (in addition to storing water for irrigation and other purposes).[529]

Obtaining jurisdiction over the United States and adjudicating the water rights for its reservoirs, therefore, was essential to realizing the SRBA's purpose of making "a comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water" from the Snake River system.[530] This is one of the principal reasons it was necessary for the SRBA to be qualified as a "comprehensive water right adjudication" under the McCarran Amendment's waiver

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522. Wm. Joe Simonds, The Boise Project 4(Bureau of Reclamation History Program 1997) (reformatted, reedited, and reprinted by Brit Storey, Dec. 2009), http://www.usbr.gov/projects/Project.jsp?proj_Name=Boise+Project.

523. 33 U.S.C. §§ 701-1, 701a-1, 709 (2012).

524. *Id.*

525. The Reclamation Act of 1902, *supra* note 520. Federal flood control law does provide, however, that use of water at federal flood control operations for navigation "shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes." The Flood Control Act of 1944, ch. 665, §1(b), Pub. L. No. 78-534, 58 Stat. 887, 889 (codified as amended at 33 U.S.C. § 701-1(b) (2012)). This provision is known as the "O-Mahoney-Milliken Amendment." *See* Douglas L. Grant, *The Future of Interstate Allocation of Water*, 29 ROCKY MTN. L. INST. 994 n.65 (1983) ("the O'Mahoney-Milliken Amendment guaranteed that future upstream diversions for consumptive uses would not be curtailed to protect downstream interests in navigation").

526. SUSAN M. STACY, WHEN THE RIVER RISES: FLOOD CONTROL ON THE BOISE RIVER 1943-1985, at 45 (Univ. of Colorado & Boise State Univ. 1993).

527. U.S. Army Corps of Engineers, Dworkshak Dam and Reservoir, http://www.nww.usace.army.mil/Locations/DistrictLocksandDams/DworshakDamandReservoir.aspx (last visited Oct. 27, 2015).

528. Eric A. Stene, The Ririe Project 4 (Bureau of Reclamation 1995), http://www.usbr.gov/projects/Project.jsp?proj_Name=Ririe+Project. After construction, the Corps of Engineers "turned the dam over to Reclamation for operation and maintenance under the administration of the Minidoka Project." *Id.* at 2. Flood control remains Ririe's primary function, however. *Id.* at 6.

529. U.S. Army Corps of Eng'rs, Walla Walla Dist., Reservoir Regulation Manual for Palisades Reservoir 1 (1958) (on file with authors) [hereinafter Palisades Reservoir Regulation Manual].

530. 1985 Idaho Sess. Laws, ch. 28.

of federal sovereign immunity.[531]

a. Ownership Of Irrigation Storage Water Rights

While the Bureau of Reclamation built, owns, and manages its reservoirs, the stored water is delivered to irrigators' fields by entities such as irrigation districts and canal companies and is put to beneficial use by individual irrigators.[532] This arrangement led to disputes over ownership of the water rights for federal reservoirs, and how to properly reflect the roles and interests of the Bureau of Reclamation, the irrigators, and the irrigation entities in the reservoirs' partial decrees. The Idaho Supreme Court resolved these matters in *United States v. Pioneer Irrigation District.*[533]

Pioneer involved water right claims for the federal reservoirs on the Boise River system: Arrowrock, Anderson Ranch, and Lucky Peak.[534] The Bureau of Reclamation held state water right licenses for these reservoirs, and had entered into repayment contracts with the various irrigation districts—"spaceholders"—that distribute the stored water to irrigators.[535] The Bureau of Reclamation filed license-based SRBA claims for the reservoirs in its own name, and the spaceholder irrigation districts filed competing SRBA claims in their names.[536] Upon cross-motions for summary judgment, the SRBA Court ordered that the partial decrees would identify the United States in the "Name and Address" section, but would also include "a Remark under I.C. § 42-1411(2)" stating that ownership was "divided," with the United States holding "nominal legal title" and the irrigation entities holding "[b]eneficial or equitable title in trust" for their landowners.[537]

The United States appealed, arguing that the SRBA Court had incorrectly relied on federal reclamation law as interpreted by the United States Supreme Court in *Ickes*

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531. United States v. Idaho, 508 U.S. 1, 3 (1993); *See* 1985 Idaho Sess. Laws, ch. 28 ("within the terms of the McCarran amendment.").

532. *See* United States v. Pioneer Irrigation Dist., 157 P.3d 600, 604, 144 Idaho 106, 110 (2007).

533. *Id.* at 600, 144 Idaho at 106.

534. *Id.* at 603, 144 Idaho at 108. The legal questions presented in *Pioneer Irrigation Dist.* were not limited to the Boise Project reservoirs. A number of upper Snake River basin irrigation districts and canal companies participated in the *Pioneer Irrigation Dist.* proceedings, as did the "Committee of Nine," which is the water users' "advisory committee" for Water District 1. IDAHO CODE § 42-605(6) (2015). Water District 1 encompasses the Snake River upstream from Milner Dam and most of its surface water tributaries.

535. *Pioneer Irrigation Dist., supra* note 532, at 604, 144 Idaho at 110. As in the upper Snake Basin, the federal storage contracts in the Boise River system generally define each irrigation district's quantity of stored water in terms of a percentage of a reservoir's storage space. The contracting irrigation districts are therefore known as "spaceholders." *See* Kerner v. Johnson, 583 P.2d 360, 365, 99 Idaho 433, 438 (1978) ("The contracts granted these entities water storage space in the reservoir in return for the repayment of a proportional share of the construction costs. These entities with contract rights for water storage space in the reservoir are generally referred to as 'spaceholders'").

536. *Pioneer Irrigation Dist., supra* note 532, at 602, 144 Idaho at 108. The Bureau of Reclamation filed an SRBA claim for Lucky Peak, even though it is a Corps of Engineers flood control project, because Lucky Peak operations are coordinated with those of Arrowrock and Andersons Ranch for multiple purposes, including irrigation storage. Memorandum of Agreement Between The Dep't of the Army and the Dep't Of the Interior for Flood Control Operations of Boise River Reservoirs, Idaho A-4–A-5 (Nov. 20, 1953) (on file with authors); U.S. Army Corps of Eng'rs, Walla Walla Dist., Water Control Manual For Boise River Reservoirs 1-3, 7-1 (1985) [hereinafter Boise River Reservoirs Water Control Manual] (on file with authors).

537. *Pioneer Irrigation Dist., supra* note 532, at 602–03, 144 Idaho at 108–09. IDAHO CODE § 42-1411(2) provides that the Director's SRBA reports shall determine, among other things, "such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director." IDAHO CODE § 42-1411(2)(j) (emphasis added).

v. Fox,[538] *Nebraska v. Wyoming*,[539] and *Nevada v. United States*,[540] and that under Idaho law, the United States was the sole owner of the water rights for the federal reservoirs.[541] The spaceholders cross-appealed that the "remark" should have specifically identified "each irrigation entity and the quantity of water beneficially owned by each irrigation entity."[542]

The Idaho Supreme Court's analysis was based on Idaho's "well-settled rule of public policy that the right to the use of the public water of the state can only be claimed where it is applied to a beneficial use in the manner required by law."[543] It was undisputed "that the [Bureau of Reclamation] does not beneficially use the water for irrigation. It manages and operates the storage facilities."[544] Rather, "[i]rrigation of the lands serviced by the irrigation districts was the basis upon which original water right licenses were issued."[545] Thus, "[w]ithout the diversion by the irrigation districts and beneficial use of water for irrigation purposes by the irrigators, valid water rights for the reservoirs would not exist under Idaho law."[546] The Court also concluded "[t]he underlying principle" of the United States Supreme Court decisions—that application of water to beneficial use is required to perfect a water right—"is the same" as Idaho law, and "[b]eneficial use is enmeshed in the nature of a water right" under Idaho law. [547]

The Court held that under the Idaho Constitution and the Idaho Code, the beneficial users of the water stored in federal reservoirs "have an interest that is stronger than a mere contractual expectancy."[548] The Court grounded this holding in Section 4 of Article XV of the Idaho Constitution,[549] which provides that when water has been "appropriated or used for agricultural purposes under a sale, rental or distribution," the beneficial user "shall not thereafter, without his consent, be deprived of the annual use of the same."[550] The Court also cited Idaho Code § 42-

538. Ickes v. Fox, 300 U.S. 82, 94 (1937).

539. Nebraska v. Wyoming, 325 U.S. 589, 614 (1945).

540. Nevada v. United States, 463 U.S. 110, 126 (1983).

541. *Pioneer Irrigation Dist.*, *supra* note 532, at 603–04, 144 Idaho at 109–10.

542. *Id.* at 603, 144 Idaho at 109.

543. *Id.* at 604, 144 Idaho at 11 (quoting Albrethsen v. Wood River Land Co., 231 P. 418, 429, 40 Idaho 49, 60 (1924)).

544. *Id.* at 604, 144 Idaho at 110.

545. *Id.*

546. *Id.*

547. *Pioneer Irrigation Dist.*, *supra* note 532, at 607, 144 Idaho at 113; *see id.* at 604, 144 Idaho at 110 ("The beneficial use theme [in Idaho law] is consistent with federal law.").

548. *Id.* at 608, 144 Idaho at 114.

549. Id.

550. IDAHO CONST. art. XV, § 4, which provides in full as follows (the portion quoted in *Pioneer Irrigation Dist.* is underlined):

> Continuing rights to water guaranteed—Whenever any waters have been, or shall be, appropriated or used for agricultural purposes, under a sale, rental, or distribution thereof, such sale, rental, or distribution shall be deemed an exclusive dedication to such use; and whenever such waters so dedicated shall have once been sold, rented or distributed to any person who has settled upon or improved land for agricultural purposes with the view of receiving the benefit of such water under such dedication, <u>such person</u>, his heirs, executors, administrators, successors, or assigns, <u>shall not thereafter, without his consent, be deprived of the annual use of the same</u>, when needed for domestic purposes, or to irrigate the land so settled upon or improved, upon payment therefor, and compliance with such equitable terms and conditions as to the quantity used and times of use, as may be prescribed by law.

220,[551] which provides, in part, that "[t]he right to continue the beneficial use of such waters shall never be denied nor prevented for any cause other than the failure . . . to pay the ordinary charges or assessments which may be made or levied to cover the expenses for the delivery or distribution of such water . . . ."[552] The Court further relied on Idaho Code § 42-915, which "uses the word 'title' and provides that once a water right becomes appurtenant to the land, title to the use of the water can never be affected by transfers of the ditch, canal, or by foreclosure . . . ."[553] The Court interpreted these provisions as recognizing a beneficial user's "perpetual right" to continue receiving water provided ordinary charges to cover the cost of delivery and distribution are paid.[554]

The United States nonetheless argued that under the Idaho Supreme Court's decisions in *Washington County Irrigation District v. Talboy*,[555] *Nampa & Meridian*

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551. *Pioneer Irrigation Dist.*, *supra* note 532, at 608, 144 Idaho at 114.

552. IDAHO CODE § 42-220, which provides as follows (the portion quoted in *Pioneer Irrigation Dist.* is underlined):

> Effect of license—Such license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right; and all rights to water confirmed under the provisions of this chapter, or by any decree of court, shall become appurtenant to, and shall pass with a conveyance of, the land for which the right of use is granted. <u>The right to continue the beneficial use of such waters shall never be denied nor prevented for any cause other than the failure</u>, on the part of the user or holder of such right, <u>to pay the ordinary charges or assessments</u> which may be made or levied to cover the expenses for the delivery or distribution of such water, or for other reasons set forth in this title: provided, that when water is used for irrigation, no such license or decree of the court allotting such water shall be issued confirming the right to the use of more than one second foot of water for each fifty (50) acres of land so irrigated, unless it can be shown to the satisfaction of the department of water resources in granting such license, and to the court in making such decree, that a greater amount is necessary, and neither such licensee nor any one claiming a right under such decree, shall at any time be entitled to the use of more water than can be beneficially applied on the lands for the benefit of which such right may have been confirmed, and the right to the use of such water confirmed by such license shall always be held subject to the local or community customs, rules and regulations which may be adopted from time to time by a majority of the users from a common source of supply, canal or lateral from which such water may be taken, when such rules or regulations have for their object the economical use of such water.

553. *Pioneer Irrigation Dist.*, *supra* note 532, at 608, 144 Idaho at 114. The Court quoted the full text of IDAHO CODE § 42-915, italicizing (as shown below) its provision regarding "title to the use" of the water:

> Consumer's title not affected by transfer of ditch—When any payment is made under the terms of a contract, by means of which payment a perpetual right to the use of water necessary to irrigate a certain tract of land is secured, said water right shall forever remain a part of said tract of land, and *the title to the use of said water can never be affected in any way by any subsequent transfer of the canal or ditch property* or by any foreclosure or any bond, mortgage or other lien thereon; but the owner of said tract of land, his heirs or assigns, shall forever be entitled to the use of the water necessary to properly irrigate the same, by complying with such reasonable regulations as may be agreed upon, or as may from time to time be imposed by law. And said payment for said water right shall be a release of any bond or mortgage upon the canal property of the person or company from whom such right is purchased or their successors or assigns, to the amount of such water right thus purchased and paid for, and said person or company from whom such water right is purchased shall furnish to the party or parties purchasing such right a release, or a good and sufficient bond for a release, from said mortgage or bonded indebtedness to the amount of the water right thus purchased.

IDAHO CODE § 42-915 (italics added in *Pioneer Irrigation Dist.*, *supra* note 532, at 608, 144 Idaho at 114).

554. *Id.*

555. Washington County Irrigation Dist. v. Talboy, 43 P.2d 943, 55 Idaho 382 (1935).

Irrigation District v. Barclay,[556] and *Wilterding v. Green*,[557] "the irrigation districts do not have an ownership interest in the Boise Project water rights."[558] The Court dismissed this argument because "none of these cases deals with the BOR or the Reclamation Act," and determined that under United States Supreme Court decisions, the Reclamation Act was not intended "to deprive irrigation entities of an equitable interest in project water rights."[559] The latter consideration was "particularly significant," because the spaceholders had "fully repaid the [contractual] construction costs, except for Lucky Peak, and they have paid for the development of the stored water."[560]

The United States argued that if the water rights were decreed solely in its name, "there will not be a reduction of the irrigation entities' rights to use the water as they have for nearly a century, it will merely preserve the status quo."[561] The spaceholders disagreed, arguing "that without an equitable interest, they are vulnerable" because "recent cases illustrate that the irrigation districts have few, if any, remedies when the United States breaches water distribution contracts."[562] The Idaho Supreme Court sided with the spaceholders, recognizing that in *Klamath Irrigation District v. United States*[563] a federal claims court had held that irrigation entities deprived of storage water as a result of federal reservoir operations "had no constitutional takings claim and must rely on contractual remedies within their distribution contract."[564] The Court also recognized that in *Orff v. United States*[565] the Ninth Circuit had held that the United States was immune from suits filed by individual irrigators because "they were not third party beneficiaries" of the federal contracts.[566]

The Idaho Supreme Court then turned to the question of how the various interests of the United States, the irrigation districts, and the irrigators should be reflected in the partial decrees for the Boise River reservoirs. The Court affirmed the SRBA Court's decision that the United States (acting through the Bureau of Reclamation) would be identified in the "Name and Address" section of the partial decree, and that a "remark" would define the interests of the irrigation districts and the individual irrigators.[567] The SRBA Court's "remark" was modified, however, to set forth the Idaho Supreme Court's analysis.[568] The Court deleted the reference to "divided" ownership, and replaced the statement that the irrigation districts held "[b]eneficial or equitable title . . . in trust" with provisions stating that "as a matter of Idaho constitutional and statutory law title to the use of the water is held by the consumers or users of the water," and the irrigation entities "act on behalf of the

556. Nampa & Meridian Irrigation Dist. v. Barclay, 47 P.2d 916, 56 Idaho 13 (1935).
557. Wilterding v. Green, 45 P. 134, 4 Idaho 773 (1896).
558. *Pioneer Irrigation Dist.*, *supra* note 532, at 608, 144 Idaho at 114.
559. *Id.*
560. *Id.* at 608–09, 144 Idaho at 114–15.
561. *Id.* at 609, 144 Idaho at 115.
562. *Id.*
563. Klamath Irrigation Dist. v. United States, 67 Fed. Cl. 504 (2005).
564. *Pioneer Irrigation Dist.*, *supra* note 532, at 609, 144 Idaho at 115.
565. Orff v. United States, 545 U.S. 596 (2005).
566. *Pioneer Irrigation Dist.*, *supra* note 532, at 609, 144 Idaho at 115. The United States Supreme Court affirmed the Ninth Circuit's decision. *Orff*, *supra* note 565, at 604.
567. *Pioneer Irrigation Dist.*, *supra* note 532, at 609, 144 Idaho at 115.
568. *Id.*

consumers or users to administer the use of the water for the landowners" in the quantities specified in federal spaceholder contracts.[569]

The Idaho Supreme Court did not grant the spaceholder's request that the "remark" include "the identity of each irrigation entity" and "the quantity of the water right owned."[570] The United States argued that the spaceholders' contracts "define which organizations receive water and the quantity they may receive," and "the Boise Project has operated successfully for almost a century without such specificity in licenses or decrees."[571] The Court agreed because the "remark" explicitly confirmed that "ownership of this water right is derived from law and is not based exclusively on the contracts between the Bureau of Reclamation and the irrigation organizations," and "[t]he Boise Project water rights have been administered successfully without the specificity requested by the appellants."[572]

The water rights for Arrowrock, Anderson Ranch, and Lucky Peak reservoirs were decreed with the United States identified in the "Name and Address" section and with the "*Pioneer* Remark,"[573] and the SRBA Court dismissed the competing claims of the spaceholders.[574] The United States, the State of Idaho, and the Minidoka Project spaceholders subsequently stipulated that the license-based water rights for the Minidoka Project reservoirs would also be decreed in the name of the United States and with the *Pioneer* Remark.[575]

b. Hydropower Subordination[576]

The Snake River and its tributaries provide Idaho with significant hydropower resources that and supply approximately 65% of the State's electric energy.[577]

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569. *Id.* The "remark" ordered to be decreed in Pioneer is known as "the *Pioneer* Remark" and provides in full as follows:

> The name of the United States of America acting through the Bureau of Reclamation appears in the Name and Address sections of this partial decree. However, as a matter of Idaho constitutional and statutory law title to the use of the water is held by the consumers or users of the water. The irrigation organizations act on behalf of the consumers or users to administer the use of the water for the landowners in the quantities and/or percentages specified in the contracts between the Bureau of Reclamation and the irrigation organizations for the benefit of the landowners entitled to receive distribution of this water from the respective irrigation organizations. The interest of the consumers or users of the water is appurtenant to the lands within the boundaries of or served by such irrigation organizations, and that interest is derived from law and is not based exclusively on the contracts between the Bureau of Reclamation and the irrigation organizations.

570. *Id.*

571. *Id.* at 610, 144 Idaho at 116.

572. *Id.*

573. *See* Order of Partial Decree for Water Rights 63-0303 and 63-3613, *In re* SRBA Case No. 39576 (June 28, 2007); Order of Partial Decree for Water Right 63-03618, *In re* SRBA Case No. 39576, (Dec. 18, 2008); Partial Decree Pursuant to I.R.C.P. 54(b) for 63-03614, *In re* SRBA Case No. 39576 (Feb. 29, 2009).

574. Order Disallowing with Prejudice All Claims Filed by Irrigation Entities Under Consolidated Subcase No. 91-63, *In re* SRBA Case No. 39576, Subcase Nos. 63-00303A, 63- 03613A, 63-03614A, 63-03614B, 63-03614C, 63-03614D, 63-03614E, 63-03614F, 63-03618A, 63-03618B, 63-03618C, 63-03618D, 63-03618E, 63-03618F, 63-03618G, 63-03618H, 63-03618J, 63-03618K, 63-03618L, 63-03618M, 63-03618N, 63-03618P, 63-05262A, 63-05262B, and 63-05262C (June 29, 2007).

575. Stipulation, *In re* SRBA Case No. 39576, Subcase No. 01-00219 (Sept. 25, 2012).

576. "Subordination" of a water right means it does "not contain the customary total priority of right but, rather, would be inferior to future upstream depletion." Idaho Power Co. v. State, 661 P.2d 741, 745, 104 Idaho 575, 579 (1983).

577. 2012 Idaho State Water Plan, *supra* note 425.

Through enactment of I.C. § 42-203B, the State established a "framework for balancing the use of the flow of the Snake River for hydropower and other instream purposes and the diversion of flow for depletionary purposes," such as irrigation.[578] Idaho Code section 42-203B provides authority for the subordination of a water right for power purposes to water rights for other consumptive purposes.

Irrigation and hydropower have had a complicated relationship in the development of the water resources of the Snake River basin: they are often in conflict[579] but can be symbiotic.[580] This complex interrelationship was recognized in a seminal 1920 water resource development report that addressed future development and useof the water resources of the Snake River in the wake of the severe 1919 drought,[581] as planning for the proposed American Falls project took on added urgency.[582] The report opined that obtaining the maximum use of the waters of the Snake River would involve dedicating essentially all flows upstream from Milner Dam[583] to irrigation use and storage, while "[t]he waters flowing in the [canyon] below Milner Dam are not susceptible of diversion to any considerable amount, and therefore become of primary use in connection with the production of power."[584] Further, even when irrigation diverted all water upstream from Milner, flows in the canyon were "restored" by the numerous springs and irrigation returns:

> The principle involved therefore is to secure as nearly as possible a total use of the waters for irrigation above Milner Dam, and to secure the greatest possible use for power below Milner Dam. To a moderate extent these interests conflict with each other but fortunately on account of the large

578. *Id.*

579. The potential for conflict between hydropower and irrigation uses was recognized in the Idaho Constitutional Convention of 1889. DENNIS C. COLSON, IDAHO'S CONSTITUTION: THE TIE THAT BINDS, 166 (1991). But it was not addressed in the Idaho Constitution until 1928, when Section 3 of Article XV was amended to provide that "the state may regulate and limit the use [of water] . . . for power purposes." IDAHO CONST. art. XV, § 3. Idaho's best-known conflict between hydropower uses and irrigation uses was the "Swan Falls Controversy" of the early 1980s.

580. Idaho Power Company's hydropower projects provided electricity to power the deep-well pumps that made groundwater-based irrigation feasible on the eastern Snake River plain. *See generally*, SUSAN M. STACY, LEGACY OF LIGHT: A HISTORY OF IDAHO POWER COMPANY 129–37 (Idaho Power Co. 1991).

581. *See* Lynn Crandall, Watermaster of Water District 36, Address at the Columbia Basin Inter-Agency Commission Meeting (June 24, 1964) (on file with authors) ("The year 1919 was a severe shock to the Snake River waterusers. The river run-off was very low and large crop losses were sustained"). Lynn Crandall was the watermaster of Water District 36 (now Water District 1) for 29 years, retiring at the end of 1958 after "having spent over 48 years in various positions dealing with water matters on Snake River and its tributaries." Water Dist. No. 36, Water Distribution and Hydrometric Work District No. 36 Snake River Idaho 1 (1958) (on file with Water District 1 and IDWR).

582. I. W. McConnell et al., Report of Board of Engineers to Consider Projects in Snake River Valley Which May Affect the Proposed American Falls Reservoir, Idaho (April 10, 1920) (on file with authors). The board was comprised of engineers representing the federal and state governments, and private sector irrigation entities.

583. Milner Dam is located downstream from the Bureau of Reclamation's Minidoka Dam and upstream of Idaho Power Company's Twin Falls project. It was built in 1905 as a diversion structure for the Twin Falls Canal Company. Twin Falls Canal Company, Joe Yost, History of Milner Dam, http://www.tfcanal.com/milner.htm (last visited Dec. 1, 2015). Milner Dam was the subject of the plaintiff's complaints in the *Schodde* case. *See* Schodde v. Twin Falls Land & Water Co., 224 U.S. 107, 116 (1912) ("It is alleged . . . this dam . . . ha[s] destroyed the current in the river by means of which plaintiff's water wheels were driven and made to revolve and raise the water to the elevation required for distribution over plaintiff's lands.").

584. McConnell, *supra* note 582, at 5.

> accretions to the stream below Milner Dam the power resource is restored at Upper Salmon Falls and the injury to that resource which would be susceptible of future development is relatively not very great.[585]

This was an early recognition of the "Milner Divide" and the "two rivers" principle.[586] These principles guided subsequent development[587] and were recognized in the first Idaho State Water Plan as a protected minimum flow of "0 c.f.s." for Milner Dam,[588] which was intended "to maximize the amount of water available for development above the dam, including groundwater development in the [Eastern Snake Plain] Aquifer."[589] The same principles were codified in 1986 amendments to Idaho Code § 42-203B[590] that implemented the Swan Falls settlement and "sought to separate water administration above and below the dam."[591] The Milner Divide and "two rivers" principles were decreed by the SRBA Court in the form of General Provision 4 for Basin 02.[592] The state water right license for Idaho

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585. *Id.* at 5–6.

586. As stated in the most recent revision of the Idaho State Water Plan:

> Upstream from Milner Dam the Snake River is not deeply entrenched, but below the dam the river enters a deep canyon. . . . The physical differences in the reaches above and below Milner Dam, and the corresponding differences in existing and anticipated development . . . evolved over time to the commonly-held view of the Snake as consisting of "two rivers."

2012 IDAHO STATE WATER PLAN, *supra* note 425, at 44.

587. For instance, in 1962 the Assistant Secretary of the Interior sent a letter to the Chairman of the Federal Power Commission commenting on a federal license application filed by Idaho Power Company for its American Falls, Twin Falls, and Shoshone Falls projects. The letter referred to Milner Dam as "the control point for utilization of the waters of the Snake River for development of public lands of the United States through irrigation," and further stated:

> The Idaho Power Company officials have been repeatedly advised, beginning with the early negotiations concerning the development of stored water for irrigation at American Falls, that the best development of the waters of the Snake River require there be no power developments below Milner Dam which rely upon flows of water past Milner Dam for power production. The United States, acting through this Department, has constructed upstream from Milner a reservoir system in excess of 4,500,000 acre-feet, all of which is operated with the objective of conserving the water to minimize spills past Milner Dam.

Letter from Kenneth Holum, Assistant Secretary of the Interior, to Joseph C. Swidler, Chairman, Federal Power Commission (Aug. 30, 1962) (on file with authors).

588. Idaho Water Resource Board, The State Water Plan—Part Two 116 (1976).

589. *Clear Springs Foods, Inc.*, *supra* note 356, at 80, 150 Idaho at 799. The 2012 revision of the Idaho State Water Plan reaffirms the "Milner zero minimum average daily flow policy." 2012 IDAHO STATE WATER PLAN, *supra* note 425, at 43–45.

590. The 1986 amendments to IDAHO CODE § 42-203B added, among other provisions, the following regarding Milner Dam:

> [A]pplication of the provisions of this section to water rights for hydropower purposes on the Snake river or its tributaries downstream from Milner dam shall not place in trust any water from the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam. For the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream from Milner dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered.

1986 Idaho Sess. Laws, ch. 309; IDAHO CODE § 42-203B(2).

591. *Clear Springs Foods*, *supra* note 356, at 80, 150 Idaho at 799. The 1984 Swan Falls Agreement "was not a self-executing instrument, but rather proposed a suite of legislative and administrative action that if implemented would resolve the [Swan Falls] controversy and the legal issues to the mutual satisfaction of the parties." Memorandum Decision And Order On Cross-Motions For Summary Judgment, *In re* SRBA Case No. 39576, Subcase No. 00-92023 at 26 (April 18, 2008). IDAHO CODE § 42-203B, and various other statutory provisions were enacted in 1985 as part of the legislative package implementing the Swan Falls Agreement. Miles v. Idaho Power Co., 778 P.2d 757, 759, 116 Idaho 635, 637 (1989).

592. General Provision 4 for Basin 02 provides as follows:

Power Company's hydropower plant at Milner Dam also reflects these principles, in a condition providing that "[t]he diversion and use of water for hydropower purposes under this water right shall be subordinate to all subsequent upstream beneficial depletionary uses" other than hydropower.[593]

i. Hydropower Development Above Milner

While irrigation storage was the primary purpose of the dams and reservoirs in the Bureau of Reclamation's Minidoka Project, hydropower operations were an important incident of the project "[f]rom the beginning."[594] Minidoka Dam was built with a powerplant that became operational in 1909,[595] and Palisades Dam incorporated a powerplant that started operations in 1957.[596] American Falls Dam, built in the late 1920s, was to also have a federal powerplant, but it was never installed. When American Falls Dam was rebuilt in the 1970s with Idaho Power Company's assistance, the company was allowed to incorporate a hydropower plant into the dam.[597]

Hydropower contributed to development of the Minidoka Project by providing electricity for irrigation and drainage pumping, and surplus power could be sold commercially, partially offsetting project costs.[598] The hydropower benefits of the Palisades powerplant justified allocating a portion of the project construction costs to power,[599] which reduced the potential repayment obligations of irrigators who had contracted for storage. On the other hand, the Minidoka Project's hydropower operations depend on releasing stored water, which always worries irrigators.[600]

> The exercise of water rights above Milner Dam has and may reduce flow at the dam to zero. For the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream from Milner dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered.

Partial Decree Pursuant to I.R.C.P. 54(b) for General Provisions in Basin 02, *In re* SRBA Case No. 39576 at 2 (Nov. 20, 2012).

593. Water Right License 01-7011 at 2 (Nov. 1, 2011). While the Milner Dam hydropower plant is operated by Idaho Power Company pursuant to a Federal Energy Regulatory Commission license, the state water right license is owned by Twin Falls Canal Company and North Side Canal Company. *Id.*

594. Burley Irr. Dist. v. Ickes, 116 F.2d 529, 532 (D.C. Cir. 1940); *see* B.E. Stoutemyer, Memorandum for the Commissioner Concerning the Provisions of the Contracts Between the United States and the Idaho Power Company, U.S. Bureau of Reclamation (March 12, 1940) [hereinafter Stoutemyer Memorandum] (on file with authors) ("power production . . . has been merely incidental to the main purpose of reclaiming the arid lands").

595. Stene, *supra* note 521, at 6–7.

596. Simonds, *supra* note 522, at 19.

597. Public Law 93-206 § 4; 87 Stat. 904 (1973); Falling Water Contract by and between American Falls Reservoir District and Idaho Power Company at 39 (Mar. 31, 1976) (on file with authors).

598. Stene, *supra* note 521, at 7; Minidoka Irr. Dist. v. Dep't of the Interior, 406 F.3d 567, 570 (9th Cir. 2005); Burley Irr. Dist. v. Ickes, 116 F.2d 529, 533 (D.C. Cir. 1940); Stacy, *supra* note 580, at 62–63, 73; U.S. Dep't Interior Bureau Reclamation, Findings of the Secretary of the Interior as to Net Profits from the Black Canyon and Minidoka Power Plant, Through Sales of Power on the Minidoka Project and Towns Adjacent Thereto, During the Year 1935 (Mar. 12, 1936) (on file with authors) [hereinafter Findings of Secretary].

599. *See* H.R. Doc. No. 720, 81st Cong., 2d Sess. at 53 (1950); Bureau of Reclamation, Supplemental Report Palisades Dam and Reservoir Project Idaho 19 (June 1949); Table, Allocations of Total Costs, Palisades Dam and Reservoir Project, Idaho (on file with authors).

600. *See* Letter from Attorney Robert L. Harris, Holden Kidwell Han & Crapo LLC, to Lorri Lee, Director, Bureau of Reclamation Pac. Northwest Reg'l Office (Jan. 17, 2014) (stating that the Bureau

Further, Minidoka Dam, which is located at the downstream end of the Minidoka Project reservoir system, has a hydropower water right that is senior in priority to almost all of the upstream storage water rights.[601] Satisfying this senior hydropower right can require upstream reservoirs to release water that otherwise would be stored.[602] Moreover, while some spaceholders supported curtailing Minidoka Dam power operations to store more water, others had a financial interest in continuing power operations.[603] All of these problems were compounded in times of shortage, such as the drought of the 1930s.[604]

The Bureau of Reclamation addressed these problems over the years through various measures, such as voluntarily curtailing winter power operations at Minidoka Dam to maximize upstream storage, and arranging for substitute sources of electricity, such as Idaho Power Company's plants or the Boise Project's Black Canyon powerplant.[605] The "Palisades Contracts" of the 1950s[606] addressed these issues in provisions for curtailment of winter power operations at Bureau of Reclamation dams so more water could be held in storage, and requiring spaceholders benefitting from the additional storage to make payments for the power losses.[607] These and other provisions of the "Palisades Contracts" were judicially "ratified, confirmed and approved" in 1968 in two summary supplemental adjudication decrees[608] that became known as the *Eagle Decrees*.[609]

ii. The Minidoka And Palisades Hydropower Rights

The Minidoka Project's hydropower operations and water rights became SRBA issues after the Director recommended that the hydropower water rights for Minidoka and Palisades dams be conditioned with a *de facto* subordination remark.

"unnecessarily and unreasonably increased the likelihood of injury to Palisades contract holders" by making winter releases from Palisades "to generate hydropower") (on file with authors).

601. *See* Letter from Lynn Crandall, U.S.G.S. Dist. Engineer, to Dr. Elwood Mead, Comm'r of Reclamation (Feb. 21, 1934) (on file with authors) [hereinafter Crandall Letter] ("The power right of the Government at Minidoka dam, as awarded in the Foster Decree, amounts to 2,700 second-feet of earlier priority than American Falls Reservoir.").

602. *See id.* (referring to "the 600 second-feet now wasting past Milner all winter as a result of operating the Minidoka plant"); Minutes of Meeting of the Committee of Nine, Burley, Idaho at 4 (Dec. 17, 1964) (on file with authors) ("American Falls releases have been maintained to fill the 2,700 cfs Minidoka power right").

603. *See Minidoka Irr. Dist*, *supra* note 598, at 570 (referring to allegations "that the government had breached its contract to credit [Minidoka Irrigation District] with profits derived from the operation of the Minidoka Project power plant"); *Burley Irr. Dist.*, 116 F.2d at 534 ("Pursuant to the contract . . . the Secretary determined that the net profits which had accumulated from leasing excess power from the Minidoka plant should be distributed 95.6% to Burley District and 4.4% to Minidoka District").

604. *See Burley Irr. Dist.*, *supra* note 598, at 535 ("During the years from 1931 to 1935, particularly, there was a serious shortage of water in the Snake River Valley.").

605. Findings of Secretary, *supra* note 598; *See also generally* Stoutemyer Memorandum, *supra* note 594.

606. The "Palisades Contracts" were a group of more than 50 contracts the Bureau of Reclamation and irrigation entities executed in the 1950s to address a number of issues raised in connection with the authorization and construction of the Palisades Dam and Reservoir. Memorandum Decision and Order on Challenge, *In re* SRBA Case No. 39576, Subcase Nos. 01-217, 01-218, 01-4024, 01-4025, 01-2068 and 01-4054 at 8 (Feb. 9, 2011) [hereinafter Memorandum Decision on Minidoka and Palisades Power Rights].

607. *Id.* at 8–10.

608. *See* IDAHO CODE § 42-1424.

609. Memorandum Decision on Minidoka and Palisades Power Rights, *supra* note 606, at 8–10; *see* Supplemental Decree, Burley Irr. Dist. *et al.* v. Henry Eagle, Watermaster, Water District No. 36 (5th Jud. Dist. Idaho July 10, 1968); Supplemental Decree, Aberdeen-Springfield Canal Co., *et al.* v. Henry Eagle, Watermaster, Water District No. 36 (Idaho 7th Jud. Dist. March 12, 1969) (on file with authors).

The recommended remark recognized a "historic practice" under which the use of water for power generation was "incidental" to other uses, and provided that the Bureau of Reclamation "shall not make a delivery call" except against junior hydropower water rights.[610] The recommended remarks also stated the Minidoka hydropower water rights were "subject to the provisions for winter power operation . . . as recognized in" the *Eagle Decrees*.[611] Objections were filed by the Bureau of Reclamation, the Surface Water Coalition, and several other parties.[612]

The State of Idaho subsequently filed a motion for summary judgment proposing alternative hydropower remarks, and the Bureau of Reclamation filed a summary judgment motion that "agreed" with the State's motion.[613] The alternative remarks stated, in part, that the hydropower water rights would be exercised to avoid the loss of water "otherwise storable in the reservoir system" or that "could be stored in the reservoir system,"[614] and that two of the Minidoka hydropower water rights carried "no entitlement to make a delivery call for hydropower generation except as against junior hydropower rights."[615] The alternative remarks for all of the hydropower water rights further provided that their partial decrees would "not alter, amend, or modify the contracts" between the spaceholders and the Bureau of Reclamation "in connection with the Palisades project and the Minidoka project," which would "remain binding among the parties thereto."[616]

The Special Master granted the State's and the United States' motions and recommended their alternative remarks be decreed.[617] The Surface Water Coalition challenged the Special Master's recommendation, arguing the alternative remarks "fail to reflect the 'common plan' established in the *Eagle Decree*[*s*]" and "unlawfully expanded subordination of the rights" beyond the subordination contemplated by the *Eagle Decrees* and the Palisades Contracts.[618] The crux of this challenge lay in contentions that the *Eagle Decrees* were "*de jure* and/or *de facto* general adjudication decree[s] . . . binding on parties and non-parties alike,"[619] that the United States had waived sovereign immunity in the *Eagle* proceedings through

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610. Memorandum Decision on Minidoka and Palisades Power Rights, *supra* note 606, at 2.

611. *Id.* at 2–3.

612. *Id.* at 3. The "Surface Water Coalition" consisted of irrigation districts and canal companies holding spaceholder contracts with the Bureau of Reclamation: A&B Irrigation District, American Falls Reservoir District No. 2, Burley Irrigation District, Twin Falls Irrigation District, Minidoka Irrigation District, North Side Canal Company, and the Twin Falls Canal Company. *Id.* Most or all of these spaceholders were also parties to the "Palisades Contracts" and/or the *Eagle Decrees.*

613. *Id.* at 3–6.

614. *Id.* at 4, 6 ("Priority Date" remarks).

615. *Id.* at 5. (The two hydropower water rights were nos. 01-4024 and 01-4025.).

616. *See* Memorandum Decision on Minidoka and Palisades Power Rights, *supra* note 606, at 4, 5, 6 ("Other Provisions Necessary" remarks).

617. *Id.* at 6.

618. *Id.* at 11. The Surface Water Coalition had previously sought designation of a basin-wide issue on the meaning and effect of the so-called "common plan" of the *Eagle Decrees*. *See* Joint Motion to Designate Basin-Wide Issue at 2, *In re* SRBA Case No. 39576, Subcase No. 00-91015 (Oct. 2, 2009) (requesting designation of a basin-wide issue on the question of "*What is the 'common plan for administering the operation of the Snake River' that should be ratified, confirmed and approved, and incorporated into the water rights decrees in Basin 01?*") (italics in original)). The SRBA Court declined to designate a basin wide issue on this question. Order Denying Motion to Designate Basin-Wide Issue at 11, *In re* SRBA Case No. 39576, Subcase No. 00-91015 (March 1, 2010).

619. Memorandum Decision and Order on Minidoka and Palisades Power Rights, *supra* note 606, at 12–13.

the McCarran Amendment and/or in correspondence between a federal attorney and an attorney for some of the *Eagle* parties,[620] and that the State was bound because the watermaster (Henry Eagle) had been named as the defendant in both *Eagle* cases.[621]

The SRBA Court rejected these arguments, holding that the *Eagle* proceedings were "not a general adjudication" but rather had expressly been initiated under the "summary supplemental adjudication" provisions of the Idaho Code.[622] Under these code provisions and the Idaho Supreme Court's decision in *Mays v. District Court of Sixth Judicial District*,[623] the *Eagle Decrees* were "*not* conclusive as to the nature and extent of any water right, but [were] merely *prima facie* evidence of a right to use water."[624] The SRBA Court determined that "a summary supplemental adjudication may be subsequently attacked by third parties" and "does not carry the binding or *res judicata* effect of a general adjudication."[625]

The SRBA Court also determined "the *Eagle Decree* Adjudication[s] did not fall within the terms of the McCarran Amendment," and the United States "did not otherwise waive its sovereign immunity" through attorney correspondence.[626] The SRBA Court further held that while the watermaster had been named as defendant, "the only 'binding' effect" of the *Eagle Decrees* "on the watermaster, IDWR, or the State of Idaho" was requiring them to "deliver water in accordance with the *prima facie* showing of the unadjudicated right on an interim basis until such time as the water right is either contested or adjudicated in a subsequent proceeding."[627]

The SRBA Court also rejected the Surface Water Coalition's argument that the spaceholders held equitable or beneficial title under *Pioneer* and therefore the hydropower water rights could not be subordinated without the spaceholders' consent.[628] The SRBA Court distinguished *Pioneer* because in that case the Bureau of Reclamation was not the beneficial user of irrigation storage, and "[i]t is undisupted that it is the USBOR that runs the subject water through turbines owned, operated and maintained by the USBOR."[629] Thus, "[w]hile an argument can be made that the SWC [Surface Water Coalition] is the consumer of the resultant byproduct of the water—hydropower electricity—it cannot be said that the SWC members are the consumers or beneficial users of the water itself."[630] The SRBA

620. *Id.* at 14–15.

621. Memorandum Decision and Order on Motion to Alter or Amend Judgment, I.R.C.P. 59(e), *In re* SRBA Case No. 39576, Subcase Nos. 01-002177, 01-00218, 01-04024, and 01-04025 at 3–4 (May 17, 2011) [hereinafter Memorandum Decision on Motion to Alter or Amend Minidoka and Palisades Power Rights].

622. *Id.* at 11–12

623. Mays v. Dist. Court of Sixth Jud. Dist., 200 P. 115, 116, 34 Idaho 200, 206–07 (1921).

624. Memorandum Decision on Minidoka and Palisades Power Rights, *supra* note 606, at 13 (italics in original); *see* Memorandum Decision and Order on Motion to Alter or Amend Judgment, *supra* note 621, at 7 ("The summary supplemental adjudication proceeding not only failed to result in a *de facto* general adjudication for purposes of binding non-parties but it also failed to adjudicate <u>any</u> water rights *de facto* or otherwise.") (italics and underlining in original).

625. Memorandum Decision on Minidoka and Palisades Power Rights, *supra* note 606, at 13.

626. *Id.* at 15–16.

627. Memorandum Decision on Motion to Alter or Amend Minidoka and Palisades Power Rights, *supra* note 621, at 11 (emphasis in original).

628. *See* Memorandum Decision on Minidoka and Palisades Power Rights, *supra* note 606, at 18, 19–21 (referring to United States v. Pioneer Irrigation. Dist., 157 P.3d 600, 144 Idaho 106 (2007)).

629. *Id.* at 19.

630. *Id.* at 20. The SRBA Court also distinguished *Pioneer Irrigation Dist.* in that the Bureau of Reclamation's ownership of the hydropower water rights had been established in previous judicial

Court concluded that "as the diverter and beneficial user,"[631] the Bureau of Reclamation was "sole owner" of the hydropower water rights,[632] and nothing in the Palisades Contracts precluded the Bureau of Reclamation "from exercising its right to voluntarily subordinate its power rights."[633]

The SRBA Court recognized that, while the Bureau of Reclamation may have contractual obligations to the Surface Water Coalition regarding hydropower operations, "a difference exists between pure contractual rights and interests in a water right under state water law," and the question of whether the Bureau of Reclamation breached the Palisades Contracts by subordinating the hydropower water rights "does not create a state law interest in the USBOR's water rights in favor of the [Surface Water Coalition]."[634] The SRBA Court amplified these points in denying the Surface Water Coalition's motion to alter or amend the judgment: "[I]t needs to be pointed out that it is beyond the scope of the authority and function of the watermaster and/or IDWR to resolve private contract disputes as part of their administrative duties. . . . The watermaster and IDWR are not responsible for getting in the middle of private contract disputes."[635]

While the SRBA Court confirmed the *Eagle Decrees* had not adjudicated a "common plan" binding upon all, the parties to the litigation subsequently entered into a stipulation that allowed a key element of the "common plan" to be decreed. The Palisades Contracts and the *Eagle Decrees* had authorized the United States to operate the federal reservoirs upstream from Milner Dam as a coordinated system "rather than a collection of individual reservoirs."[636] This practice, and the related practice of exchanging storage among the reservoirs,[637] had broad support because it gave the Bureau of Reclamation the operational flexibility necessary to maximize the amount of water that could be stored in upstream reservoirs without violating the priorities of the individual reservoirs' water rights.[638] Explicitly authorizing these historic practices in the reservoirs' partial decrees was appropriate because otherwise the only authorized place of storage explicitly identified in each reservoir's partial decree was that particular reservoir. The stipulated remarks explicitly authorized storage "in the unoccupied space of any of the reservoirs upstream of Milner Dam,"

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proceedings. *Id.* at 20–21 (citing Burley Irrigation Dist. v. Ickes, 116 F.2d 529 (D.C. Cir. 1940) and Twin Falls Canal Co. v. Foster (4th. Jud. Dist. June 13, 1913) [hereinafter Foster Decree].

631. Memorandum Decision on Minidoka and Palisades Power Rights, *supra* note 606, at 21.

632. *Id.* at 23.

633. *Id.* at 24.

634. *Id.*

635. Memorandum Decision on Motion to Alter or Amend Minidoka and Palisades Power Rights, *supra* note 621, at 14.

636. U.S. Bureau of Reclamation, Status Report—Workings Of Palisades Water Savings Agreement, at 8 (1968) (on file with authors).

637. *See id.* (stating that Water District 36—which is now Water District 1—"pioneered water exchanges in Idaho.").

638. *See id.* ("Although there is a strict paper accounting of water accruals to individual reservoirs, advantage has been taken of the physical diversity of the system by holding carryover storage as far upstream as possible to the advantage of all."). Downstream reservoirs generally fill more reliably than upstream reservoirs because there is less runoff area above upstream reservoirs. Operating the reservoirs as a coordinated system to hold as much storage as possible in upstream reservoir space increases the chances that all reservoirs will be filled the following year.

to "maximize the storage of water upstream of Milner Dam."[639]

Related remarks stipulated that "the allocation of storage to federal contractors, and the location of that storage" in the reservoir system, "including carryover storage," would "be determined by the United States Bureau of Reclamation pursuant to federal reclamation law" and federal spaceholder contracts,[640] and that the watermaster as supervised by the Director of IDWR "shall distribute the stored water in accordance with allocation instructions from the United States."[641] The remarks also stipulated that the partial decrees did not "alter, amend or modify" the contracts between the Bureau of Reclamation and the spaceholders.[642] These remarks reflected the SRBA Court's determination that "a difference exists between pure contractual rights and interests in a water right under state water law,"[643] and that "it is beyond the scope of the authority and function of the watermaster and/or IDWR to resolve private contract disputes as part of their administrative duties."[644] *Pioneer* also recognized that the allocation and distribution of storage in federal reservoirs is governed by federal spaceholders contracts, not the reservoir water rights.[645]

iii. American Falls Hydropower Rights

The question of hydropower operations and water rights at American Falls Dam centered on private rather than federal development. Idaho Power Company already owned land, power plants, and water rights at American Falls when the United States proposed building a dam and reservoir at the site.[646] These interests were addressed in a complex 1923 contract that, among other things, provided the company with a "primary" storage right of 45,000 acre-feet in the proposed reservoir, and a qualified "secondary" storage right of 255,000 acre-feet.[647] After American Falls was

639. Stipulation, *In re* SRBA Case No. 39576, Subcase Nos. 01-00219, 01-02064, 01-10042, 01-04055, 01-10044, 01-10045, 21-02156, 21-10560, 21-02156, 21-10560, 21-04155, and 25-07004 at 2 (Sep. 25, 2012).

640. *Id*. at 3.

641. *Id.*

642. *Id.*

643. Memorandum Decision on Minidoka and Palisades Power Rights, *supra* note 606, at 24.

644. Memorandum Decision on Motion to Alter or Amend Minidoka and Palisades Power Rights, *supra* note 621, at 14.

645. As previously discussed, the Idaho Supreme Court in *Pioneer* rejected the spaceholders' arguments that the partial decrees for the reservoir water rights should identify each of the irrigation organizations and the quantities of storage to which they were entitled under their contracts with the Bureau of Reclamation. *Pioneer Irrigation Dist.*, 157 P.3d 600, 610, 144 Idaho 106, 116 (2007). The Court's analysis in *Pioneer Irrigation Dist.* relied on Section 4 of Article XV of the Idaho Constitution, which applies to water rights for the "sale, rental, or distribution" of water for agricultural purposes. *Id.* at 608, 144 Idaho at 114; IDAHO CONST. ART. XV, § 4; *see* Clear Springs Foods, Inc. v. Spackman, 252 P.3d 71, 87, 150 Idaho 790, 806 (2011) ("'The framers of our Constitution evidently meant to distinguish settlers who procure a water right under a sale, rental, or distribution, from that class of water users who procure their water right by appropriation and diversion directly from the natural stream.'"). While the terms of a "sale, rental, or distribution" of irrigation storage from a Bureau reservoir are defined by the spaceholder contracts rather than the reservoir water right, *Pioneer Irrigation Dist.* confirmed that storage water users are not limited to contractual remedies against the Bureau of Reclamation if it releases storage for purposes other than irrigation (such as meeting the requirements of federal law). *See Pioneer Irrigation Dist.*, at 610, 144 Idaho at 116 (affirming the SRBA Court's ruling that "'ownership of this water right is derived from law and is not based exclusively on the contracts between the Bureau of Reclamation and the irrigation organizations.'").

646. Stacy, *supra* note 580, at 73–76; Contract Between the United States and the Idaho Power Company Relative to Power Rights at American Falls, Idaho, Symbol I1r-733 at 2–4, 11 (June 15, 1923) [hereinafter 1923 Contract] (on file with authors).

647. 1923 Contract, *supra* note 646, at 17–19, 21–22.

completed in 1927, the company retained and continued to operate one of its American Falls power plants just below the dam.

In the 1970s, American Falls Dam was rebuilt because a chemical reaction in its concrete had caused deterioration.[648] Idaho Power Company played a major role in the effort to secure financing and congressional authorization for rebuilding the dam, and was allowed to build a hydropower plant into the dam.[649] The respective rights, interests, and roles of the Bureau of Reclamation, the spaceholders, and the company in the reconstruction and subsequent operation of the American Falls Dam and Reservoir were addressed in the authorizing legislation[650] and three 1976 contracts: the "Government Contract,"[651] the "Spaceholder Contract,"[652] and the "Falling Water Contract."[653]

In the SRBA, the Director recommended that the Bureau of Reclamation's American Falls storage water right be decreed with a power storage component of 295,163 acre-feet,[654] which was the "entire power storage capacity" [655] under Idaho Power Company's "primary" (45,000 acre-feet) and "secondary" (255,000 acre-feet) storage rights in the 1923 Contract (as adjusted for subsequent reduction in reservoir capacity due to siltation).[656] The main issue raised by this recommendation was that of the nature and extent of the "secondary" storage right, including whether it remained in existence after the 1970s legislation and contracts for the American Falls dam replacement project took effect.[657]

These questions were the subject of several summary judgment motions in proceedings before the Special Master who determined that, as a result of the reconstruction project, the "secondary" storage right had "ceased to exist":

> The Revenue Adjustment Act of 1975 was artfully crafted to afford [American Falls Reservoir District] the tax exemption necessary to quickly move forward with reconstruction of the American Falls Dam. Without that legislation, it is likely the project would have been substantially delayed. The record is replete with evidence the law would not have passed but for recognition that 1) Idaho Power would have no control over and no right to demand releases beyond its storage right, and 2) Idaho Power would have a right to no more than 45,000 acre-feet of storage. Given those conditions, Idaho Power had no choice but to sign the 1976 Spaceholder Contract

648. Stene, *supra* note 521, at 24.

649. The new plant replaced the company's older plant located below the dam.

650. Act of Dec. 28, 1973, Pub. L. No. 93-206, 87 Stat. 904.

651. Contract between the United States of America and the American Falls Reservoir District for Construction and Operation and Maintenance of the American Falls Dam Replacement Program (March 31, 1976) (on file with authors).

652. Spaceholder Contract between the United States and the American Falls Reservoir District for Storage in the America Falls Replacement Dam and for Construction and Operation and Maintenance of the American Falls Dam Replacement Program, No. 11r-733S (Mar. 31, 1976) (on file with authors).

653. Falling Water Contract by and between American Falls Reservoir District and Idaho Power Company (March 31, 1976) (on file with authors).

654. Idaho Department Of Water Resources Recommended Water Rights Acquired Under State Law, Water Right No. 1-02064 (Dec. 16, 2006).

655. Order on Motions for Summary Judgment and Alternative Motion for Declaratory Judgment, *In re* SRBA Case No. 39576, Subcase No. 01-02064 at 21 (Mar. 31, 2011).

656. 1923 Contract, *supra* note 646, at 18–20.

657. Order on Motions for Summary Judgment and Alternative Motion for Declaratory Judgment, *In re* SBRA Case No. 39576, Subcase No. 01-02064 at 2–20 (March 31, 2011).

> agreeing that its storage right was limited to 45,000 acre-feet or 2.65% of storage capacity.
>
> It is evident parties to the 1976 Spaceholder Contract intended to define *all* spaceholder storage rights, whether considered secondary or pass-through. Of course, that meant Idaho Power's secondary storage right was effectively waived, abandoned, relinquished or simply bargained away. [What]ever term is used, that right ceased to exist. The savings clause of the 1976 Spaceholder Contract explicitly said its provisions prevail over provisions of the 1923 Contract in conflict. Therefore, the Contract extinguished Idaho Power's secondary storage right. Idaho Power's claim to a secondary storage right is no longer valid and its active or primary storage right is limited to no more than 45,000 acre-feet or 2.65% of reservoir capacity.[658]

The Special Master subsequently recommended that the "purpose and period of use element" of the Bureau of Reclamation's water right for American Falls Reservoir be decreed with the "power storage" and "power from storage" components limited to "45,000 AFY [acre-feet per year]."[659] Following the Special Master's Decision, the parties stipulated that the "*Pioneer* Remark" should be included in the partial decree for the American Falls water right[660] with the addition of a sentence stating that "[t]he Idaho Power Company uses the water decreed for power purposes herein to generate hydropower."[661] This resolved Idaho Power Company's concerns that the *Pioneer* Remark did not explicitly address the use of storage for hydropower purposes.[662]

c. Flood Control

Nine of the federal reservoirs in the Snake River system in Idaho are operated to prevent or control flooding: Dworshak reservoir on the North Fork of the Clearwater River; Cascade and Deadwood reservoirs in the Payette River basin; Arrowrock, Anderson Ranch, and Lucky Peak reservoirs on the Boise River system; Ririe reservoir on Willow Creek near Idaho Falls; and Palisades and Jackson Lake reservoirs on the uppermost reaches of the Snake River.[663] Dworshak, Lucky Peak, and Ririe were specifically authorized as flood control projects and were built by the

658. *Id.* at 23–24 (italics in original); *see also* Order On Motion to Alter or Amend and Motion for Reconsideration or, in the Alternative, Motion to Alter or Amend, *In re* SBRA Case No. 39576, Subcase No. 01-02064 (July 20, 2011) ("The central legal conclusion in the summary judgment proceedings remains valid: Idaho Power's secondary storage right of 255,000 acre-feet was terminated or extinguished by the 1976 Spaceholder Contract.").

659. Order Granting State's Motion to Alter or Amend, *In re* SRBA Case No. 39576, Subcase Nos. 01-02064 at 2 (Feb. 9, 2012).

660. The *Pioneer* Remark had been included in the Special Master's recommendations for the water rights for all of the Bureau of Reclamation's reservoirs upstream from Milner Dam except American Falls reservoir, Special Master Report and Recommendation, *In re* SBRA Case No. 39576, Subcase Nos. 01-00219, *et al.* (Aug. 15, 2013), because the parties stipulated to reserve Idaho Power Company's objection to the wording of the *Pioneer* remark in the partial decree for the American Falls water right. *See* Stipulation, *supra* note 639, at 6 ¶ 11, Exhibit B at 2.

661. Stipulation Idaho Power Company's Motion to Alter or Amend Special Master Report and Recommendation, *In re* SRBA Case No. 39576, Subcase No. 01-02064 at 4 (Aug. 15, 2013).

662. *See* Stipulation, *supra* note 639 at 6 ¶ 11 (reserving Idaho Power Company's objection regarding "the precise wording of the Ownership Remark for 1-2064").

663. While Jackson Lake reservoir is located in Wyoming, almost all of its storage is committed to Idaho water users.

U.S. Army Corps of Engineers.[664] Cascade, Deadwood, Arrowrock, Anderson Ranch, Palisades, and Jackson Lake are Bureau of Reclamation projects.[665]

While historically the Corps of Engineers has been the lead federal agency for flood control projects and the Bureau of Reclamation has been the lead federal agency for irrigation projects, all of these federal reservoirs except Dworshak are operated for both flood control and irrigation storage purposes. Arrowrock, Anderson Ranch, and Lucky Peak reservoirs on the Boise River are operated as a coordinated system for flood control and irrigation storage, as well as various other objectives, pursuant to federal law and federal storage spaceholder contracts.[666] Federal law and federal contracts also authorize coordinated operation of Palisades and Jackson Lake reservoirs on the upper Snake River system for both flood control and irrigation storage purposes.[667] Ririe reservoir near Idaho Falls was authorized primarily for flood control but is also authorized for irrigation storage.[668]

The flood control operations at all of these reservoirs are under the Corps of Engineers' direct control or its regulatory jurisdiction.[669] The Bureau of Reclamation's Cascade and Deadwood reservoirs in the Payette River basin are the exception. While the congressional authorizations and storage spaceholder contracts for these reclamation reservoirs do not specifically authorize their use for flood control purposes, the Bureau of Reclamation has implemented flood control operations at Cascasde and Deadwood under its own authority.[670]

Federal flood control operations at these reservoirs "use or control"[671] significant volumes of water. Dworshak Dam is the third-highest dam in the United States and creates a reservoir with a gross storage capacity of 3,468,000 acre-feet,[672]

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664. Lucky Peak was authorized by the Flood Control Act of 1946, ch. 596, 60 Stat. 641, 650. Ririe and Dworshak (then known as "Bruce's Eddy") were authorized by the River and Harbor Act of 1962, Pub. L. No. 87-874, 76 Stat. 1173, 1193.

665. Simonds, *supra* note 521, at 2; Stene, *supra* note 528, at 2; Simonds, *supra* note 522, at 2.

666. 68 Stat. 794; Boise River Reservoirs Water Control Manual, *supra* note 536, at 1–3, 7–1 to 7–2; Memorandum of Agreement Between the Department of the Army and the Department of the Interior for Flood Control Operation of Boise River Reservoirs, Idaho (Nov. 20, 1953) (on file with authors); Memorandum Decision and Order on Cross-Motions for Summary Judgment Re: Bureau of Reclamation Streamflow Maintenance Claim, *In re* SBRA Case No. 39576, Subcase No. 63-3618 at 28 (Sept. 23, 2008).

667. Pub. L. 864, 64 Stat. 1083 (1950); Palisades Reservoir Regulation Manual, *supra* note 529, at 12; Contract Between the United States of America and Aberdeen-Springfield Canal Company Concerning Storage Capacity in American Falls and Palisades Reservoirs, and Related Matters, Minidoka and Palisades Projects—Idaho, Contract No. 14-06-W-24 (Oct. 22, 1952).

668. U.S. Army Corps of Engineers, Standing Operating Procedures—Reservoir Regulation—Ririe Dam 5–10 (1978) (on file with authors) [hereinafter Ririe Standing Operating Procedures]. While the Corps of Engineers built Ririe Reservoir, its operations were transferred to the Bureau of Reclamation after construction was completed. Stene, *supra* note 528, at 2

669. The Corps of Engineers has operational control of Dworshak and Lucky Peak reservoirs. Flood control operations at Ririe, Palisades, Jackson, Arrowrock, and Anderson Ranch reservoirs are subject to Corps of Engineers regulations. 33 U.S.C. § 709 (2015). While the congressional authorizations and spaceholder contracts for Cascade and Deadwood do not specifically authorize flood control operations at these reservoirs, the Bureau of Reclamation operates Cascade and Deadwood for flood control purposes under an informal agreement with the Corps of Engineers. Simonds, *supra* note 522, at 48

670. *Id.*

671. *See* Motion to File Late Notice of Claim, *In re* SRBA Case No. 39576, Subcase No. 83-11874 at Enclosure No. 1 (Nov. 17, 2011) (referring to "Federal use and control of water" at Dworshak).

672. U.S. Army Corps of Engineers, Dworshak Dam and Reservoir, http://www.nww.usace.army.mil/Locations/DistrictLocksandDams/DworshakDamandReservoir.aspx (last visited Jan. 25, 2016).

virtually all of which is dedicated to flood control. The remaining projects have variable flood control space allocations that are determined annually from runoff forecasts and "flood control rule curves" or "flood control storage reservation diagrams."[673] Under these parameters, the maximum flood control space allocation of the three Boise River reservoirs together is a total of 969,149 acre-feet[674]; the maximum flood control space allocation for Palisades and Jackson together is a total of 1,400,000 acre-feet[675]; and essentially all of Ririe reservoir's total storage capacity of 100,500 acre-feet can be allocated to flood control.[676]

Despite the size of these projects and the scope of their flood control operations, the Corps of Engineers did not file any SRBA water right claims for these reservoirs; and while the Bureau of Reclamation filed SRBA claims for irrigation storage, it did not file any for flood control storage. Rather, the Corps of Engineers sought to have federal flood control operations decreed in the SRBA through "comity" notices, and the Bureau of Reclamation sought to have federal flood control operations decreed in the SRBA through "refill remarks." These two approaches are discussed in turn below.

i. Dworshak And "Comity"

The Corps of Engineers made SRBA filings for Dworshak Reservoir in 1993 and again in 2011. In both instances the Corps of Engineers stated it was "not assert[ing] water rights" for the project, "nor is the use, storage, or control of water in this project for its authorized purposes amenable to administration by the State."[677] The Corps of Engineers asserted, rather, that "[f]ederal use and control of water" at the project "involves the exercise of [federal] Commerce Clause power" under Article 1, Section 8, Clause 3 of the U.S. Constitution, and the Corps of Engineers' filings were purely informational and made "as a matter of comity."[678]

The Corps of Engineers' "comity" filings, however, looked very much like "claims" for water rights established under state law.[679] The 1993 filings explicitly

673. Boise River Reservoirs Water Control Manual, *supra* note 536, at 7–19 & Plate 7-1; Ririe Standing Operating Procedures, *supra* note 668, at 5–7, Chart 5; Palisades Reservoir Regulation Manual, *supra* note 529, Plate B-1 (Plate 10). The "flood control rule curves" or "flood control storage reservation diagrams" are generally included in a "water control manual" that the Corps of Engineers prepares for the reservoir or reservoir system. *See* 33 C.F.R. § 208.11(d)(4) ("The formal plan of regulation for flood control and/or navigation, referred to herein as the water control plan, will be developed and documented in a water control manual prepared by the Corps of Engineers.").

674. Boise River Reservoirs Water Control Manual, *supra* note 536, at 7–18.

675. Palisades Reservoir Manual, *supra* note 529, at 13.

676. *See* Ririe Standing Operating Procedures, *supra* note 668, at 5-5 and Pertinent Data A.

677. Motion to File Late Notice of Claim, *supra* note 671, at Enclosure No. 1; *see also* General Notice Of United States' Claims to Water Acquired Under State and Federal Law, *In re* SRBA Case No. 39576 at 5–6 (March 24, 1993) (asserting that notices of "water usage" by Corps of Engineers "is provided as a matter of information to the state" that "does not constitute claims to water. The use and control of water . . . by the U.S. Army Corps . . . do[es] not . . . involve water rights . . . . that are subject to this adjudication.") (on file with authors).

678. Motion to File Late Notice of Claim, *supra* note 671, at Enclosure No. 1; *see also* United States' Claims on Behalf of the Department of Defense, Information Filed as a Matter of Comity by the United States Army Corps of Engineers (March 24, 1993) (on file with authors) ("federal use and control of water in connection with these facilities is in the exercise of constitutional powers, specifically the Commerce Clause power, and is not a proprietary right of the United States, and thus is not subject to adjudication in the Snake River Basin Adjudication.") *Id.*

679. General Notice of United States' Claim To Water Acquired under State And Federal Law, *supra* note 677; *see, e.g.*, Motion to File Late Notice of Claim, *supra* note 671, at 2 (Nov. 17, 2011) (referring to an attached "Notice of water usage").

referred to the Corps of Engineers as the "Claimant,"[680] the 2011 filings used modified SRBA water right claim forms,[681] and both sets of filings provided a breakdown of various "informational" parameters such as quantity, purpose, and place of use etc.—that is, the statutory "elements" of a water right claim under Idaho law.[682] Further, the stated objective of the "comity" filings was to have the Corps of Engineers' "use and control of water" at Dworshak explicitly memorialized in SRBA decrees. The Corps of Engineers asserted "the court should include in any decree the information provided . . ."[683] and "[t]he State should acknowledge the quantities of water referenced in the notice . . . without purporting to alter, deny, or restrict such use and control of water . . . ."[684]

While no formal action was taken on the 1993 filings, in 2011 the SRBA Court interpreted the "comity" filings as water right "claims," assigned subcase numbers, and scheduled a hearing.[685] The Corps of Engineers quickly moved to withdraw its filings, asserting "it does not need to assert water rights in this matter . . . ."[686] The Corps of Engineers stated "[t]he United States has not asserted water rights" in connection with Dworshak, "nor is the use, storage, or control of water" at Dworshak "amenable to administration by the State of Idaho," because the Corps of Engineers' flood control operations were authorized by federal flood control statutes and the U.S. Constitution.[687] The Corps of Engineers explained it had made its filings "simply as a matter of comity," and was withdrawing them "[b]ecause it appears that the Court is unable to consider [them] for this purpose."[688] The SRBA Court granted the withdrawal request the same day it was filed.[689]

The Corps of Engineers did not make any further SRBA filings for Dworshak, and the SRBA Court did not decree any water rights for the project. The SRBA's

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680. General Notice of United States' Claim to Water Acquired under State and Federal Law, *supra* note 677.

681. The Idaho Code requires the Director of IDWR to "prepare and furnish" a "standard notice of claim form" for a general stream adjudication such as the SRBA. IDAHO CODE § 42-1409. The standard SRBA claim form is entitled "Notice of Claim to a Water Right Acquired Under State Law." The Corps of Engineers sought to have "information" decreed as "a matter of comity" by hand-modifying the titles of IDWR's standard water right claim forms, re-styling them as "Notices Of Water Usage," and filing them with the SRBA Court.

682. IDAHO CODE § 42-1411(2).

683. General Notice of United States' Claim To Water Acquired under State and Federal Law, *supra* note 677, at 6.

684. Motion to File Late Notice of Claim, *supra* note 671, at Enclosure No. 1.

685. Notice Setting Hearing on Motions to File Late Notice of Claim, *In re* SRBA Case No. 39576, Subcase Nos. 83-11873, 83-11874, 83-11875, 83-11876, and 83-11877 (Dec. 1, 2011). The subcase numbers that were assigned to the Corps of Engineers' late claims were the same subcase numbers that had been tentatively assigned in 1993 to the Corps of Engineers' "information" filings for Dworshak project. United States' Claims on Behalf of the Department of Defense, *supra* note 678.

686. U.S. Army Corps of Engineers' Motion to Withdraw Standard Forms 4, *In re* SBRA Case No. 39576, Subcase Nos. 83-7017, 83-83-7028, 83-11873, 11874, 83-11875, 83-11876, and 83-11877 at 2 (Jan. 23, 2012).

687. *Id.*

688. *Id.*

689. Order Granting Motion to Withdraw; Order Vacating Hearing, *In re* SBRA, Case No. 39576, Subcase Nos. 83-7017, 83-7028, 83-7029, 83-11873, 83-11874, 83-11875, 83-11876, and 83-11877 (Jan. 23, 2012). The dismissal was originally "without prejudice," but was subsequently modified to be dismissal "with prejudice." Amended Order Granting Motion to Withdraw With Prejudice, *In re* SRBA Case No. 39576,Subcase Nos. 83-7017, 83-7028, 83-7029, 83-11873, 83-11874, 83-11875, 83-11876, and 83-11877 (March 20, 2012).

Final Unified Decree, which is binding on the United States under the McCarran Amendment, states that it is "conclusive as to the nature and extent of all rights of the United States to the use of the waters of the Snake River Basin water system within the State of Idaho with a priority date before November 19, 1987 . . . "[690] The Corps of Engineers is therefore foreclosed from claiming any water rights for Dworshak with a priority date earlier than November 19, 1987.

The Corps of Engineers' Dworshak claims, had they been pursued, would have presented interesting issues. The "Master Plan" for Dworshak states that its "primary purpose" is flood control, and that other authorized uses are "Navigation," "Hydropower," "Fish and Wildlife Management," and "Recreation."[691] In particular, by seeking the protections of state water law and SRBA decrees for these federally-authorized operations, the Corps of Engineers' claims would have raised questions of federalism and the application of traditional federal deference to state water law in the western states.

Under Idaho law it is debatable whether the Corps of Engineers' flood control operations at Dworshak are a "beneficial use" of water.[692] Federal flood control operations at Dworshak consist of regulating and confining the flow of water rather than applying it to "use." Excess runoff that otherwise would cause flooding is captured, stored, and subsequently released at a controlled rate. Simply storing water only for the purpose of making controlled releases back into the stream at a later date is not a "beneficial use" under Idaho law, however.[693] Indeed, flood control operations of this type do not make "use" of water at all within the common understanding of the word; rather they simply *control* water without "employing" it for "a particular service or end."[694] While water stored during reservoir flood control operations is often applied to recognized beneficial uses such as irrigation later in the year, such incidental uses are distinct from the flood control operation and should be authorized through water rights for those purposes (such as water rights authorizing

690. *See* Final Unified Decree, *supra* note 145, at 7. The SRBA is a "general stream adjudication *inter se* of all water rights arising under state or federal law to the use of surface and ground waters from the Snake River Basin water system." *Id.* at 6. The United States waived its sovereign immunity in the SRBA and was properly joined as a party. *Id.* at 4, 7; 43 U.S.C. § 666 (2015); United States v. Idaho, 508 U.S. 1, 3 (1993).

691. U.S. Army Corps of Engineers, Dworshak Reservoir Project Master Plan 1-1–1-2 (June 2015), http://www.nww.usace.army.mil/Locations/DistrictLocksandDams/DworshakDamandReservoir.aspx.

692. United States v. Pioneer Irrigation Dist., 157 P.3d 600, 604, 144 Idaho 106, 110 (2007) (citation omitted) ("In Idaho it is 'a well-settled rule of public policy that the right to the use of the public water of the state can only be claimed where it is applied to a beneficial use in the manner required by law.'")

693. *See id.* ("There is no dispute that the BOR does not beneficially use the water for irrigation. It manages and operates the storage facilities."). Even if flood control operations at Dworshak or other federal reservoirs in Idaho could be characterized as a "beneficial use" of water, such a "use" occurs in the river channel and does not consume any water. Hydropower is also a non-consumptive, instream use of water, and therefore Idaho law authorizes the subordination of hydropower uses to future consumptive uses of water. IDAHO CODE § 42-203B; *see* IDAHO CONST. art. XV § 3 (authorizing the state to "regulate and limit" the use of water for power purposes. The policies supporting the subordination of hydropower water rights to future consumptive uses of water weigh even more strongly in favor of subordinating a "flood control" water right because while hydropower operations require water to produce electricity, no water is needed to prevent or control flooding.

694. *See* MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 1301 (10th ed. 1995) (defining "use"); *see also* BLACK'S LAW DICTIONARY 1577 (8th ed. 2004) (use (yoos), *n.* 1. The application or employment of something; esp., a long-continued possession and employment of a thing for the purpose for which it is adapted").

the storage and use of water for irrigation).[695]

Further, federal flood control operations are not a good fit for water rights established under prior appropriation principles unless the flood control water rights are subordinated to existing and future uses of water.[696] Federal flood control operations are intended to address the problem of too much water while prior appropriation addresses the problem of water scarcity.[697] Recognizing a state water right for federal flood control operations would cloak flood control operations with a priority date, and that priority could be exercised to curtail uses under junior priority water rights even when the supply is abundant. Prior appropriation is intended to maximize beneficial use of a limited resource, but an usubordinated water right for federal flood control operations could have the effect of allowing reservoir operations that do not make beneficial use of water to take priority over beneficial development of surplus flood flows.

The Corps of Engineers' Dworshak claims also would have raised questions regarding subordination of the project's "navigation" and "hydropower" purposes to future uses of water. Under federal law, the use or control of water for navigation purposes at Dworshak may not conflict with existing or future consumptive beneficial uses of water.[698] Under Idaho law, the state may "regulate and limit" water rights for hydropower purposes[699] by subordinating them to future water rights for other uses.[700]

The resolution of such issues, had the Corps of Engineers pursued its Dworshak claims in the SRBA, would presumably have been informed by traditional principles of federal-state "comity" and "the consistent thread of purposeful and continued deference to state water law by Congress."[701] The Supreme Court's explication of these principles in *California v. United States*[702] suggests that if the Corps of Engineers seeks the protections of Idaho law and Idaho water right decrees for its flood control operations, the Corps of Engineers like any other Idaho water right holder may also have been required to submit to some measure of state regulation regarding its "use or control" of the water.[703] While ultimately these questions were not presented in the SRBA, they may yet arise in Idaho if the Corps of Engineers files applications for water rights with the Idaho Department of Water Resources.

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695. Under Idaho law, simply storing water to prevent flooding does not confer title to the water. The authority to sell, dispose of, or use the water stored to prevent flooding must be perfected "in the manner provided by law." IDAHO CODE § 42-3119.

696. *See* Meridian, Ltd. v. San Francisco, 90 P.2d 537, 549 (Cal. 1939) (stating that "the storage of water for the purposes of flood control, equalization and stabilization of the flow and future use . . . must necessarily be subordinate to all beneficial uses on the stream").

697. IDAHO CODE § 42-607.

698. 33 U.S.C. § 701-1(b) (2015). This provision, which is known as the "O'Mahoney-Milliken Amendment," was originally enacted in the Flood Control Act of 1944, and was made applicable to the Dworshak project in its authorizing legislation, the Flood Control Act of 1962. *See* 76 Stat. 1180 (providing that the provisions of section 1 of the 1944 Flood Control Act "shall govern with respect to projects authorized in this Act . . . as if set forth herein in full"); *id.* at 1193 (authorizing the Dworshak project, which at the time was known as the "Bruces Eddy Dam and Reservoir").

699. IDAHO CONST. art. XV § 3.

700. IDAHO CODE § 42-203B.

701. California v. United States, 438 U.S. 645, 653 (1978).

702. *Id.*

703. *See* Motion to File Late Notice of Claim, *supra* note 671, at Enclosure No. 1. (referring to "Federal use and control of water" at Dworshak); *see also* 43 U.S.C. § 666 (2015).

ii. Bureau of Reclamation Reservoirs And "Refill"

While Dworshak is not operated for irrigation storage purposes, the other eight federal reservoirs—Arrowrock, Anderson Ranch, Lucky Peak, Cascade, Deadwood, Ririe, Palisades, and Jackson Lake—are operated for both flood control and for irrigation storage.[704] The Bureau operates all of these reservoirs except Lucky Peak (which is operated by the Corps of Engineers), but even there the irrigation storage function is administered by the Bureau of Reclamation.[705]

The Bureau of Reclamation filed SRBA water right claims for irrigation storage at each of these reservoirs and, where appropriate, included claims for other purposes of use, such as hydropower, municipal, streamflow maintenance, etc. The exception was flood control. Like the Corps of Engineers, the Bureau did not file any flood control claims in the SRBA[706]; but unlike the Corps of Engineers, the Bureau did not file "comity" notices of flood control operations at the joint-use reservoirs. Rather, flood control operations at these projects became an SRBA issue under a different name: "refill."[707] The "refill issue," as it became known, arose first in the SRBA subcases for Palisades and American Falls and eventually became the subject of a "Basin-Wide Issue."[708] Certain aspects of "the refill issue" continue to be litigated in the last few SRBA proceedings,[709] or were addressed in administrative proceedings before IDWR.[710]

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704. *See generally*, Boise River Reservoirs Water Control Manual, *supra* note 536; Palisades Reservoir Regulation Manual, *supra* note 529; Ririe Standing Operating Procedures, *supra* note 668.

705. *See generally*, Boise River Reservoirs Water Control Manual, *supra* note 536.

706. Prior to the SRBA, the Bureau of Reclamation had filed with IDWR reservoir "refill" claims for American Falls, Palisades, Island Park, and Arrowrock reservoirs. Claim to a Water Right 01-04052, 01-04056, 21-04156, 63-50262, *In re* SRBA Case No. 39576 (June 30, 1983). The Palisades and Island Park claims were based, in part, on flood control operations. These claims were filed pursuant to a statutory deadline that required filing of claims of "historic use . . . established by diversion and application to beneficial use . . . "be filed 'no later than June 30, 1983.'" IDAHO CODE § 42-243.

707. *See In re* SRBA, Case No. 39576, Subcase 00-91017 (Basin-Wide Issue 17—Does Idaho Law Require A Remark Authorizing Storage Rights To 'Refill,' Under Priority, Space Vacated For Flood Control) (A&B Irr. Dist., et al. v. State of Idaho, et al.) (*Basin-Wide Issue 17*), 336 P.3d 792, 797, 157 Idaho 385, 390 (2014) ("This case arose out of disputes over the effect flood control releases have on storage water right holders.").

708. *Id.*; Order Designating Basin-Wide Issue, *In re* SRBA Case No. 39576, Subcase No. 00-01017 (Sept. 21, 2012).

709. On the same day it entered the Final Unified Decree, the SRBA Court issued an order pursuant to which the Court retained jurisdiction over certain water right claims that remained pending and that upon resolution would be incorporated into the Final Unified Decree. Order Regarding Subcases Pending Upon Entry of Final Unified Decree, *In re* SRBA Case No. 39576, Subcase No. 01-00219 *et. al.* (Aug. 26, 2014) (a complete list of subcases involved is attached to the order. The list is lengthy and for brevity has been omitted here). Several of these subcases remain pending and pertain to "the refill issue" at federal reservoirs. *See, e.g.*, Stipulation, *supra* note 639, at 6 (reserving issues "concerning a 'refill' remark" for the licensed-based and decree-based water rights for several federal reservoirs). Late claims filed by the Bureau of Reclamation and various spaceholders for "refill" storage water rights based on actual beneficial use also remain pending. *See generally*, *In re* SRBA Case No. 39675, Subcase Nos. 01-10620, 01-10621, 01-10622, 01-10623, 21-13161, 37-22806, 63-33732, 63-33733, 63-33734, 63-33737, 63-33738, 65-23531, and 65-23532*; see also* Memorandum Decision, *In re* SRBA Case No. 39576, Subcase No. 00-91017 at 10, n. 7 (March 20, 2013) ("The Court notes that since this issue has arisen some reservoir storage right holders have filed motions to file late claims for separate beneficial use rights to address refill.").

710. The Director in October 2013 initiated "contested cases" under the Idaho Administrative Procedures Act to address "concerns with and/or objections to how water is counted or credited toward the fill of water rights for the federal on-stream reservoirs" in Water District 1 (upper Snake River basin) and Water District 63 (Boise River basin). Notice of Contested Case and Formal Proceedings and Notice of Status Conference, *In re* Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 1, IDWR at 6 (Oct. 24, 2013); Notice of Contested Case and Formal Proceedings and Notice of Status

(1) Allocating Flood Control Risk In Joint-Use Reservoirs

While "the refill issue" can be framed in a various ways and even the definition and significance of the term "refill" remain matters of dispute, the issue is rooted largely in the fact that there is an inherent conflict in operating a reservoir for both irrigation storage and flood control purposes. This problem is succinctly described in the "Use Conflicts" statement in the Corps of Engineers' *Water Control Manual for Boise River Reservoirs*:

> Use Conflicts. Because the Boise River reservoirs are managed as a multiple-purpose system, it is not possible to optimize regulation for each of the separate uses. . . . Flood control use directly conflicts with all of the other system uses to some degree. Optimum flood control protection . . . would require that the reservoirs be maintained empty and available to control floodwaters. . . . Optimum irrigation use would require that the system be maintained as full as possible to provide carryover storage water for the drought years . . . . the key conflict is that of flood control versus refill regardless of the intended use of the stored water.[711]

These "use conflicts" can be significantly aggravated when the respective space allocations for irrigation storage and flood control are not fixed but rather are variable. That is, when most or all of the space in the joint use reservoirs is dedicated to both flood control and irrigation, and the specific volume of storage space allocated to each use is made on a seasonal or annual basis. The seasonal or annual flood control storage allocation is determined on the basis of runoff forecasts and "flood control rule curves" or "flood control storage reservation diagrams," as previously discussed.[712] The flood control storage allocation in any given year can range from zero to almost all of the reservoir capacity, depending on the forecast.[713]

All of the federal reservoirs in Idaho that are used for both irrigation storage and flood control are operated under the forecast and "rule curve" method. In a reservoir operated under this method, any space allocated to flood control in the

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Conference, *In re* Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63, IDWR at 6 (Oct. 24, 2013). The Water District 1 contested case has been stayed pending final approval of a proposed settlement. The Director issued a Final Amended Order in the Water District 63 proceeding on October 15, 2015, and an Order Denying Petitions For Reconsideration on November 19, 2015. Petitions for judicial review of the Director's orders pursuant to the Idaho Administrative Procedures Act were filed by certain Boise River irrigation organizations on December 17, 2015. *See* http://www.idwr.idaho.gov/legal-actions/administrative-actions/WD63-contested-case.html (last visited Jan. 29, 2016).

711. Boise River Reservoirs Water Control Manual, *supra* note 536, at 7-2–7-3; *see* Memorandum Decision, *In re* SRBA Case No. 39576, Subcase No. 00-91017 at 7 (Mar. 20, 2013) ("A conflict exists in many of the reservoirs represented in this proceeding between water used by a reservoir operator for flood control purposes and water diverted and storage right holders for all other purposes"), *vacated* 336 P.3d 792, 157 Idaho 385 (2014).

712. *See supra* Section VI(E)(1)(c); Boise River Reservoirs Water Control Manual, *supra* note 536, at 7-19, Plate 7-1; Ririe Standing Operating Procedures, *supra* note 668, at 5–7, Chart 5; Palisades Reservoir Regulation Manual, *supra* note 529, Plate B-1. While the "flood control rule curves" or "flood control storage reservation diagrams" for the Upper Snake River basin reservoirs (Ririe, Palisades, and Jackson Lake) and Boise River basin reservoirs (Lucky Peak, Arrowrock, and Anderson Ranch) are set forth in the Corps of Engineers' flood control manuals and procedures for those systems, *see also* 33 C.F.R. § 208.11(c)(3)-(4) & (d)(4) (2015) (discussing "water control plans and manuals" and flood control rule curves") the flood control rule curves for the Payette River basin reservoirs (Cascade and Deadwood) were informally prepared and implemented by the Bureau and are not subject to regulation or oversight by the Corps of Engineers..

713. *See, e.g.*, Boise River Reservoirs Water Control Manual, *supra* note 536, at 7–19.

winter or spring represents a potential reduction in the amount of stored water that will be available for irrigation use later in the year, because space allocated to flood control must be vacant and available to catch and control flood waters, if and when they arrive.[714] If the runoff forecast is in error as to the volume, rate, or timing of snowpack runoff, or if the spring and early summer weather is hotter or drier than expected, the flood control space may not completely fill—or "refill" before the end of the flood runoff period. While in many or most such cases the amount of unfilled space is relatively small, it can be and occasionally has been large.[715] Either way, less storage water is available for use later in the year than would have been the case if the reservoir had been operated only for irrigation storage purposes. This is an inherent and unavoidable risk of operating a reservoir jointly for both irrigation storage and flood control purposes under the forecast and "rule curve" method.

This risk was recognized and allocated in the federal spaceholder contracts for the Boise Project and the Minidoka Project. These contracts included the spaceholders' express agreement to joint-use/forecast-based operating plans for the reservoirs in the respective projects.[716] The two projects allocated the risk of flood control operations differently, however. The 1953 Boise Project flood control agreement provided that Lucky Peak storage would be made available to Arrowrock and Anderson Ranch spaceholders if flood control releases resulted in a loss of irrigation storage:

> In the event Anderson Ranch or Arrowrock Reservoirs are not filled by reason of having evacuated water for flood control, storage in Lucky Peak will be considered as belonging to Arrowrock and Anderson Ranch storage rights to the extent of the space thus remaining unfilled at the end of the storage season but not to exceed the amount evacuated for flood control.[717]

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714. *See id.* at 7-2–7-3 ("Use Conflicts"). Ensuring that the required volume of empty flood control space is available on the dates specified by the flood control rule curves sometimes obliges the Bureau of Reclamation to draw down the water level of the reservoir(s), which entails releasing water that previously had been stored for irrigation purposes. At other times the Bureau of Reclamation must keep the reservoir(s) at a constant level, which is done by releasing enough storage to offset new inflows. In either event, water that could have been stored or retained for irrigation purposes is released, often without being used for any purpose authorized under the reservoir water rights other than hydropower generation. (The Bureau of Reclamation operates hydropower plants at and/or below the dams from which it releases water for flood control purposes.) .

715. *See* Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation, *In re* Distribution of Water to Various Water Rights Held by or for the Benefit of A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company, IDWR at 23 (April 29, 2008) ("Flood control releases [in 2007] were greater than anticipated. Consequently, the earlier expectation that the reservoir would fill did not occur, resulting in 264,546.9 acre-feet of storage less than expected."). This opinion was authored by Gerald F. Schroeder, former Chief Justice of the Idaho Supreme Court.

716. *See, e.g.*, Supplemental Contract With New York Irrigation District, Boise Project—Idaho, Contract No. 14-06-W-86 at 3 (July 6, 1954) ("Flood Control Operating Plan; Assent Thereto") (on file with authors); Contract Between the United States of America and Aberdeen-Springfield Canal Company Concerning Storage Capacity in American Falls and Palisades Reservoirs, and Related Matters, Minidoka and Palisades Projects—Idaho, Contract No. 14-06-W-24 at 19 (Oct. 22, 1952) (on file with authors) ("the active capacity of Palisades Reservoir will be used jointly for irrigation and flood control in accordance with the operation plan set forth in House Document No. 720, 81st Congress, and attached hereto as Exhibit A. . . . All of the Company's storage rights are subject to the operation of the reservoir in accordance with this subarticle.").

717. Memorandum of Agreement between the Department of the Army and the Department of the Interior for Flood Control Operation of Boise River Reservoirs, Idaho at A-10 (Nov. 20, 1953).

This provision was recognized and confirmed in an express "Guarantee" in the "Supplemental Contracts" the Boise Project spaceholders executed with the Bureau in 1954.[718] The Supplemental Contracts "guaranteed to those contract holders the use of storage waters in Lucky Peak for irrigation purposes in an amount equal to the unfilled storage capacity resulting from the water having been evacuated for flood control purposes."[719] Spaceholders entered into contracts for Lucky Peak storage "recognizing that the reservoir could be used for purposes other than irrigation."[720] In short, the federal agencies and the Boise Project water users agreed that Lucky Peak storage would be used to make up for any irrigation storage losses incurred by Arrowrock and Anderson Ranch spaceholders as a result of flood control releases from the reservoir system.[721] This framework was decreed by the SRBA Court as an element of the Lucky Peak water right, via the following remark:

> The storage rights in Lucky Peak Reservoir are subject to the flood [control]evacuation provisions which supplement irrigation storage contracts held in Anderson Ranch and Arrowrock Reservoirs as defined by supplemental contracts with the Bureau of Reclamation.[722]

The Minidoka Project allocated the risk of flood control operations to Palisades and Jackson Lake spaceholders, through the following provisions of the Palisades Contracts:

> Under the provisions of the Act of September 30, 1950 [which authorized Palisades], the active capacity of Palisades Reservoir will be used jointly for irrigation and flood control in accordance with the operat[ion] plan set forth in House Document No. 720, 81st Congress, and attached hereto as Exhibit A, as that plan is implemented by rules and regulations issued pursuant to section 7 of the Act of December 22, 1944 (58 Stat. 890) [the Flood Control Act of 1944]. All of the Company's storage rights are subject to the operation of the reservoir in accordance with this subarticle. <u>In the event Palisades Reservoir fails to fill during any storage season by reason of such flood control operations, the amount of storage so attributable shall be prorated equally over all space allocated to the storage of water for</u>

718. Memorandum Decision and Order on Cross-Motions for Summary Judgment Re: Bureau of Reclamation Streamflow Maintenance Claim, *In re* SRBA Case No. 39576, Subcase No. 63-3618 at 7, 34 (Sept. 23, 2008); *see, e.g.*, Supplemental Contract With New York Irrigation District, Boise Project—Idaho, Contract No. 14-06-W-86 at 4-5 (July 6, 1954) (on file with authors).

719. Memorandum Decision and Order on Cross-Motions for Summary Judgment Re: Bureau of Reclamation Streamflow Maintenance Claim, *In re* SRBA Case No. 39576, Subcase No. 63-3618 at 34 (Sept. 23, 2008).

720. *Id.* at 33.

721. Spaceholders can and often do have contracts for storage in more than one reservoir. Thus, spaceholders in Arrowrock and/or Anderson Ranch reservoirs may also be Lucky Peak spaceholders. *Id.* at 34 ("The Court acknowledges that the repayment contract right holders in Anderson Ranch and Arrowrock are the same entities also holding separate repayment contracts . . . in Lucky Peak.").

722. *Id.* at 35; *see also* Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right No. 63-03618, *In re* SRBA Case No. 39576 at 2 (Dec. 18, 2008). The first 60,000 acre-feet of unfilled space is charged only against the Bureau of Reclamation's "streamflow maintenance" storage in Lucky Peak, pursuant to the Boise River Reservoirs Water Control Manual; any further deficit is charged against all Lucky Peak spaceholders. Memorandum Decision and Order on Cross-Motions for Summary Judgment Re: Bureau of Reclamation Streamflow Maintenance Claim, *In re* SRBA Case No. 39576, Subcase No. 63-03618 at 12–13, 33–35 (Sep. 23, 2008).

> irrigation, municipal, or other miscellaneous purposes and shall be charged against all stored water including that, if any, carried over from prior irrigation seasons.[723]

> The United States shall . . . have the right . . . to lower the water surface elevation in Jackson Lake in each storage season in order to avoid damage to the dam . . . and to provide incidental flood control, but . . . such release of water shall not result in the loss of storable water in that storage season. If losses do result, these shall be prorated equally over all space in the reservoir and shall be charged against stored water including that, if any, carried over from prior irrigation seasons.[724]

The difference between the risk allocation approaches of the two Bureau of Reclamation projects arises partly from the 1946 congressional authorization for Lucky Peak, which provides that it "shall be operated in such manner as to not materially interfere with the operation of said Arrow Rock Reservoir."[725] Further, Arrowrock and Anderson Ranch were already in operation prior to the 1953 Boise River flood control agreement. The spaceholders' rights in the reservoirs had already vested and absent the spaceholders' consent or payment of compensation could not be reduced via implementation of system-wide flood control operations under the 1953 plan. The 1953 Boise River flood control agreement, therefore, had to be structured to protect existing spaceholders' storage rights against flood control operations.[726]

This was not the case for Lucky Peak and Palisades: flood control operations were part and parcel of the authorizations for these reservoirs,[727] and thus spaceholder contracts and allocations for Lucky Peak and Palisades could be conditioned upon flood control operations. The Bureau could (and did) explicitly condition the Lucky Peak and Palisades spaceholders' contracts to make their irrigation storage rights subject to forecast-based system flood control operations.[728]

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723. *See, e.g.*, Contract Between The United States Of America And Aberdeen-Springfield Canal Company Concerning Storage Capacity In American Falls And Palisades Reservoirs, And Related Matters, Minidoka And Palisades Projects—Idaho, Contract No. 14-06-W-24 at 1t 19 (Oct. 22, 1952) (underlining added) (on file with authors).

724. Supplemental Decree, Burley Irr. Dist. *et al.* v. Henry Eagle, Watermaster, Water District No. 36 at 19 & Exhibit B at 25 (5th Jud. Dist. Idaho July 10, 1968) (underlining added) (on file with authors).

725. Flood Control Act of 1946, 60 Stat. 650. Anderson Ranch was not completed until 1950.

726. While Jackson Lake reservoir irrigators' storage rights had also vested before the Bureau of Reclamation began operating Jackson Lake and Palisades together for flood control purposes in the 1950s, the flood control operating plan and spaceholder contracts for these reservoirs made the spaceholders' Jackson Lake storage allocations contingent on federal flood control operations. *See, e.g.*, Contract Between the United States of America and Aberdeen-Springfield Canal Company Concerning Storage Capacity in American Falls and Palisades Reservoirs, and Related Matters, Minidoka and Palisades Projects—Idaho, Contract No. 14-06-W-24 at 26-27 (Oct. 22, 1952) (on file with authors).

727. *See* Flood Control Act of 1946, 60 Stat. 641, 650 (authorizing Lucky Peak); 64 Stat. 1083–84 (authorizing Palisades); H. R. Doc. No. 720, 81st Cong., 2d Sess. at 35 (1950) (Bureau of Reclamation, Supplemental Report Palisades Dam and Reservoir Project Idaho (June 1949)) (on file with authors).

728. Memorandum Decision and Order on Cross-Motions for Summary Judgment Re: Bureau of Reclamation Streamflow Maintenance Claim, *In re* SRBA Case No. 39576, Subcase No. 63-03618 at 12–13, 33–35 (Sept. 23, 2008); Supplemental Decree, Burley Irr. Dist. *et al.* v. Henry Eagle, Watermaster, Water District No. 36 (5th Jud. Dist. Idaho July 10, 1968); Supplemental Decree, Aberdeen-Springfield Canal Co., *et al.* v. Henry Eagle, Watermaster, Water District No. 36 (Idaho 7th Jud. Dist. March 12, 1969) (on file with authors). The Bureau of Reclamation also makes storage allocations in Cascade and Deadwood reservoirs in the Payette River basin contingent on flood control operations, although this practice is not explicitly

The *quid pro quo* was that the project authorizations allocated a significant portion of the reservoir construction costs, as well as recurring operations and maintenance charges, to "flood control."[729] Flood control cost allocations are "nonreimbursable" and are paid by the United States, not by irrigation storage spaceholders.[730] Flood control operations thus reduced the spaceholders' repayment and operation and maintenance obligations, and the Bureau of Reclamation had taken the position (at least prior to the SRBA) that contract provisions requiring flood control-caused shortages to "be charged against all stored water, including [carryover]" are "reasonable and fair," because "[t]he cost of space to all water users is reduced by the nonreimbursable allocation to flood control."[731]

(2) The "Refill Issue" in the SRBA.

In the SRBA, however, the Bureau of Reclamation, the Boise Project spaceholders, and the Surface Water Coalition framed flood control operations as a question of water right priorities. The Bureau of Reclamation's claims for its license-based storage water rights at American Falls and Palisades asserted that the quantity elements of the water right decrees should include a "remark" stating the water rights included "the right to refill under the priority date of this water right to satisfy the United States' storage contracts."[732] The State disagreed and filed a summary judgment motion proffering an alternative remark:

> This right is filled for a given . . . season when the total quantity of water that has been accumulated to storage under this right equals the decreed quantity. Additional water may be stored under this right but such additional storage is incidental and subordinate to all existing and future water rights.[733]

The Bureau of Reclamation and the Surface Water Coalition opposed the State's motion, as did the Boise Project spaceholders participating as *amici*.[734]The Special Master determined that "[t]he licenses for American Falls and Palisades Reservoirs contained no such remark" and that "any remark that merely restates Idaho water law is not necessary to define, clarify or administer irrigation storage [water] rights, especially where there are variations between reservoirs and their

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authorized in the spaceholder contracts for these reservoirs, and Cascade and Deadwood were not authorized by Congress as flood control projects.

729. Bureau of Reclamation, U.S. Dep't of the Interior, Boise Project, Idaho—Revised Allocation and Repayment Report at 3, 12, 16 (Sept. 21, 1953) (on file with authors); *see* H.R. Doc. No. 720, 81st Cong., 2d Sess. at 36–37 (1950) (Bureau of Reclamation, Supplemental Report Palisades Dam and Reservoir Project Idaho 2–3 (June 1949)) (on file with authors).

730. Bureau of Reclamation, U.S. Dep't of the Interior, Boise Project, Idaho—Revised Allocation and Repayment Report at 3 (Sept. 21, 1953) (on file with authors); H.R. Doc. No. 720, 81st Cong., 2d Sess. at 42 (1950) (Bureau of Reclamation, Supplemental Report Palisades Dam And Reservoir Project Idaho 17 (June 1949)) (on file with authors); Letter from William Burpee, Field Solicitor, U.S. Dep't of the Interior, to Art Larson, Watermaster, Water District No. 36 (now Water District 1) (Aug. 11, 1969).

731. Letter from William Burpee, Field Solicitor, U.S. Dep't of the Interior, to Art Larson, Watermaster, Water District No. 36 (now Water District 1) (Aug. 11, 1969).

732. *Basin-Wide Issue 17*, 336 P.3d 792, 795, 157 Idaho 385, 388 (2014).

733. *Id.*

734. *Id.*

licenses," and denied the State's motion.[735] The Bureau of Reclamation then filed a motion asserting the Special Master "effectively" had "preclude[d] the United States' proposed remark," held "that no refill remark is appropriate," and "fully resolv[ed] the 'refill' issue."[736] The Bureau of Reclamation therefore requested a ruling that the American Falls and Palisades water rights should be decreed without any "refill" remark.[737]

The "refill issue" remained alive, however: the Special Master declined to fully grant the United States' request, clarifying that he had intended only to deny the State's motion, not to fully resolve the question of a "refill" remark.[738] Indeed, "the refill issue" grew and became the subject of "Basin-Wide Issue 17" after the Boise Project spaceholders petitioned for a basin-wide "refill" issue.[739] The Boise Project spaceholders asserted it was necessary to designate a basin-wide "refill" issue on the grounds that any determination in the upper Snake River subcases "could arguably apply to <u>all</u> storage water rights in all reservoir facilities throughout the State."[740] The Boise Project spaceholders proposed the "refill issue" be framed as: "Does Idaho law require a remark authorizing storage rights to 'refill' space vacated for flood control?"[741] The Bureau of Reclamation and the Surface Water Coalition supported the petition and also requested that the issue be broadened to include additional questions pertaining "to how a storage right is initially filled."[742]

The SRBA Court granted the petition, but held that "the crux of the issue" was "whether Idaho law authorizes the refill of a storage right, *under priority*, where water diverted under that right is released for flood control."[743] The SRBA Court therefore added the words "under priority" to the petitioners' formulation of the issue: "**Does Idaho law require a remark authorizing storage rights to 'refill,' <u>under priority</u>, space vacated for flood control?**"[744] The SRBA Court declined to expand the scope to include the Surface Water Coalition's questions regarding "how a storage right is initially filled" because this issue could "require factual inquiries, investigation and record development specific to a given reservoir, including how the State accounts for fill in each individual reservoir under its accounting program."[745]

The numerous parties to the proceedings on Basin-Wide Issue 17 "coalesced

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735. Order on Motions for Partial Summary Judgment, *In re* SRBA, Case No. 39576, Subcases 01-002064 and 01-02068 at 18 (July 27, 2012).

736. The United States' Motion for Issuance of Special Master's Recommendation on Refill Issue, *In re* SRBA Case No. 39576, Subcase No. 01-002064 at 3 (Aug. 20, 2012).

737. *Id.*

738. Amended Order Granting United States' Motion, Certification, and Partial Special Master Report and Recommendation, *In re* SRBA Case No. 39576, Subcases 01-002064 and 01-02068 at 1–2 (Sept. 14, 2012).

739. Petition To Designate Basin-Wide Issue, *In* re SRBA, Case No. 39576, Subcase No. 00-91017 (June 8, 2012).

740. *Id.* at 3 (underlining in original).

741. *Id.* at 2.

742. Order Designating Basin-Wide Issue, *In re* SRBA Case No. 39576, Subcase No. 00-91017 at 6 (Sept. 21, 2012).

743. *Id.* at 5 (italics in original).

744. *Id.* (underlining and bold in original).

745. *Id.* at 6. The SRBA Court also declined the United States' request to expand the scope of the basin-wide issue to address "all possible operational releases" rather than limiting it to flood control releases. *Id.* at 7.

into two groups."[746] The Boise Project spaceholders, the Surface Water Coalition, and the Bureau of Reclamation argued that a remark authorizing priority "refill" was not necessary under Idaho law because "the right to priority refill is inherent in the nature of a storage water right."[747] The other group—the State, the Minidoka Project's upper valley spaceholders, United Water Idaho, and the City of Pocatello—argued that any remark "authoriz[ing] storage refill, under the priority of the storage right, in excess of the licensed or decreed quantity would be contrary to Idaho law."[748] The SRBA Court determined that "a senior storage holder may not fill or satisfy his water right multiple times, under priority" before junior priority water rights have also been satisfied, and that "[a] remark authorizing such priority refill would be contrary to Idaho law."[749] Further:

> The fact that water diverted and stored pursuant to a valid storage water right is used by the reservoir operator for flood control purposes does not alter the above analysis, *assuming, as the term 'refill' necessarily implies, the storage right has already been filled once during the period of use under priority.*"[750]

The SRBA Court intentionally left unresolved "the more important issue" of "when the quantity element of a storage right is considered filled," because "[t]hat is an accounting issue which this basin-wide proceeding does not address."[751] The SRBA Court concluded that resolving accounting questions would require "factual inquiries, investigation and record development specific to a given reservoir" that "do not lend themselves to review in a basin-wide proceeding."[752] The Court also stated:

> Furthermore, the authority and responsibility for measuring and distributing water to and among appropriators is statutorily conferred to, and vested in, the Idaho Department of Water Resources and its Director . . . The Director has the authority and discretion to determine how water from a natural water source is distributed to storage water rights pursuant to accounting methodologies he employs. The Director's discretion in this respect is not unbridled, but rather is subject to state law and oversight by the courts. When review of the Director's discretion in this respect is brought before the courts in an appropriate proceeding, and upon a properly developed record, the courts can determine whether the Director has properly exercised his discretion regarding accounting methodologies.[753]

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746. Memorandum Decision, *In re* SRBA Case No. 39576, Subcase No. 00-91017 at 8 (March 20, 2013).

747. *Id.*

748. *Id.*

749. *Id.* at 10.

750. *Id.* at 10 (italics in original).

751. *Id.* at 11.

752. Memorandum Decision, *In re* SRBA Case No. 39576, Subcase No. 00-91017 at 11 (March 20, 2013).

753. *Id.* at 11–12. The SRBA is not "an appropriate proceeding" for judicial review of the Director's water distribution decisions. *See* IDAHO CODE § 42-1401D ("Jurisdictional Limitation. Review of an agency action of the department of water resources, which is subject to judicial review or declaratory judgment under [the Idaho Administrative Procedures Act]," shall not be heard in any water rights adjudication proceeding under this chapter.).

On appeal, the Boise Project spaceholders and the Surface Water Coalition asked the Idaho Supreme Court "to answer the question of whether flood control releases count toward the fill of a water right."[754] This, they argued, was an inherently factual question, and the SRBA Court had erred by addressing it as purely legal issue and not allowing factual development.[755] The Idaho Supreme Court stated that while the SRBA Court had initially been "assured . . . that the proposed issue was 'a fundamental legal question,'" the Surface Water Coalition "completely changed its tune once the issue was designated as a basin-wide issue,"[756] and that "[t]he parties' arguments on appeal—that the basin-wide issue presents a question of fact—ignores their previous assertions regarding the nature of the issue."[757] Thus, the Court concluded, the spaceholders' argument that the SRBA Court "should have determined how the fill of a water right is calculated essentially amounts to an argument that the court erred in how it framed the basin-wide issue."[758]

The Idaho Supreme Court determined that "the issue of fill" was the question that the Bureau of Reclamation, the Boise Project, and the Surface Water Coalition had "actually sought to have answered," but the SRBA Court had declined to address.[759] The Court therefore held that designating a basin-wide issue had not promoted judicial economy, and the SRBA Court had erred in granting the petition.[760] The Court promptly clarified that "we are not holding that the SRBA court abused its discretion in declining to designate the question of whether flood control releases count toward the 'fill' of a water right as a basin-wide issue. Nor will this Court address that question on appeal."[761]

The Idaho Supreme Court also rejected arguments that the SRBA Court erred in holding the Director may use "accounting methodologies" to determine when a storage water right has been 'filled' or satisfied, because water rights are property rights and "administration should only be governed by water right decrees."[762] The Court determined that while water rights are property rights, "the main issue is whether the Director is determining water rights . . . when he determines that a water

754. *Basin-Wide Issue 17*, 336 P.3d 792, 797, 157 Idaho 385, 390 (2014).

755. *Id.*

756. *Id.* at 798, 157 Idaho at 391.

757. *Id.*

758. *Id.*

759. *Id.* at 799, 157 Idaho at 392. In fairness to the SRBA Court, it should be noted that while "the issue of fill" may have been the question the spaceholders and the Bureau of Reclamation "actually sought to have answered," it was not the question they actually presented to the SRBA Court in their petition to designate a basin-wide issue. The petition presented a purely legal question of what Idaho law "requires," that is, "Does Idaho law require a remark authorizing storage rights to 'refill' space vacated for flood control?" Petition to Designate Basin-Wide Issue, *supra* note 739, at 2 (underlining added), not the distinctly different question of determining "how the fill of a water right is calculated." *Basin-Wide Issue 17* at 798, 157 Idaho at 391.

760. *Basin-Wide Issue 17* at 797, 157 Idaho at 390.

761. *Id.* at 799, 157 Idaho at 392. The Court stated "[t]here is an administrative procedure for fleshing out these factual interpretations if the SRBA court chooses to address the issue of fill on remand." *Id.* On remand the SRBA Court agreed that the "issue of fill" was an accounting matter to be addressed in administrative proceedings before the Director, which were already pending. *See* Reporter's Transcript, *In re* SRBA Case No. 39576, Subcase No. 01-10614, 01-10615, 01-10616, 01-10617, 01-10618, 01-10620, 01-10621, 01-10622, 01-10623, 21-13161, 37-22806, 63-33732, 63-33733, 63-33734, 63-33737, 63-33738, 65-23531, and 65-23532 at 25 (Sept. 9, 2014) ("THE COURT: . . . I agree there's nothing left to do on Basin Wide 17 . . . .") (on file with authors).

762. *Basin-Wide Issue 17* at 799–800, 157 Idaho at 392–93.

right is 'filled,' or if the Director is just distributing water."[763] The Court held that Idaho Code § 42-602 imposes on the Department "a statutory duty to allocate water" and "gives the Director broad powers to direct and control distribution of water from all natural water sources."[764] The Court stated its previous decisions explicitly "recognized the Director's discretion to direct and control the administration of water in accordance with the prior appropriation doctrine,"[765] and "also recognized the need for the Director's specialized expertise in certain areas of water law." [766] "[T]he Legislature," the Court added, had also expressly "recognized the need for the Director's expertise" in the Idaho Code.[767]

In light of these authorities, the Idaho Supreme Court held that "[w]hich accounting method to use is within the Director's discretion and the Idaho Administrative Procedure Act provides the procedures for challenging the chosen accounting method."[768] The Court therefore concluded that "[t]he SRBA court did not abuse its discretion by declining to address when the quantity element of a storage water right is considered filled or in stating that such a determination was within the Director's discretion."[769]

The Idaho Supreme Court's decision, thus, did not resolve fully the elusive "refill issue," nor was it intended to. The Court's decision did, however, clarify that objections to the Director's methods of accounting for distribution of water to the federal reservoirs are to be presented to the Director in the first instance; and confirmed that challenges to the Director's decisions are not SRBA matters but rather must be presented to the courts via an IDAPA petition for judicial review. As previously discussed, the Director initiated administrative proceedings for this purpose after the SRBA Court issued its decision in Basin-Wide Issue 17.[770]

Also pending at the date of this article are SRBA water right claims that apparently are intended to address "refill" under the "constitutional method" of appropriation.[771] Some of these claims are actively proceeding before the SRBA Court, while others are awaiting the anticipated approval of proposed settlements of

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763. *Id.* at 800, 157 Idaho at 393.

764. *Id.*

765. *Id.* (citing Arkoosh v. Big Wood Canal Co., 283 P. 522, 48 Idaho 383 (1929); DeRousse v. Higginson, 505 P.2d 321, 95 Idaho 173 (1973); Am. Falls Reservoir Dist. No. 2 v. IDWR, 154 P.3d 433, 143 Idaho 862 (2007)).

766. *Basin-Wide Issue 17* at 801, 157 Idaho at 394 (citing Baker v. Ore-Ida Foods, Inc., 95 Idaho 575, 513 P.2d 627 (1973); Keller v. Magic Water Co., 441 P.2d 725, 92 Idaho 276 (1968)).

767. *Basin-Wide Issue 17* at 801, 157 Idaho at 394 (citing IDAHO CODE § 42-1701(2)).

768. *Id.*

769. *Id.*

770. The Director issued final orders addressing water accounting in the Boise River basin (Water District 63). Petitions for judicial review of the Director's orders have been filed and those proceedings remain pending. *See supra* note 761. The administrative proceeding addressing the accounting procedures in the Upper Snake River basin (Water District 1) has been stayed pending approval of a proposed settlement. *Id.*

771. *See Pioneer Irrigation Dist.*, 157 P.3d 600, 604, 144 Idaho 106, 110 (2007) ("When following the constitutional method, one 'must depend upon actual appropriation, that is to say, actual diversion and application to beneficial use.'") (citation omitted). *See* Order Granting in Part and Denying in Part Motion for Summary Judgment, *In re* SRBA Case No. 39576, Subcase Nos. 01-10614, 01-10615, 01-10616, 01-10617, 01-10618, 01-10620, 01-10621, 01-10622, 01-10623, 63-33732, 63-33733, 63-33734, 63-33737 and 63-33738 at 5 (Jan. 9, 2015) ("the burden now rests with the claimants to . . . establish the existence of rights under the constitutional method . . . the claimants must establish the two essentials for obtaining a water right under the constitutional method—diversion and application of the water to a beneficial use.").

"refill" issues in the Upper Snake River Basin and the Little Wood River Basin.[772]

2. Bureau of Land Management Water Rights

Prior to passage of the Taylor Grazing Act in 1934, the public domain was generally open for anyone to graze their stock whether it was done legally or not. Livestock would drink water from whatever source was available while grazing. This practice allowed ranchers to establish early beneficial use stockwater rights. The Taylor Grazing Act established a system to regulate grazing on the public domain by creating grazing districts and issuing permits to graze in the districts. Preference for the permits goes "to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights . . . ."[773] Differing land management practices over time led to questions in the SRBA of whether water rights were established for stockwatering under the constitutional method and if so, what the priority date and ownership of the water right would be.

Ownership of water rights on Bureau of Land Management ("BLM") lands was an issue relatively early in the SRBA. In 1996, several parties sought to designate BWI 9A, "whether the United States can perfect a state law beneficial use appropriation for stock watering through the unwilling agency of private appropriators."[774] The District Court denied the designation stating the issue "is fact specific and, therefore, dependent on factual development in individual subcases."[775] Again in 2000, various parties tried to create test cases concentrating on the same issues and using the same basis, through a joint motion, but were denied.[776]

Two consolidated subcases referred to as *Joyce Livestock*[777] and *LU Ranching*[778] led to resolution of many of the issues raised in 1996 and 2000. LU Ranching Company ("LU") filed thirteen beneficial use claims, with an 1872 priority date, for instream stockwatering.[779] The POU and POD were on federal public lands within grazing allotments held by LU and administered by BLM.[780] The United States filed objections to LU's claims arguing that the priority date should correspond

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772. *See* Motion for Order Decreeing Water Rights, *In re* SRBA Case No. 39576, Subcase No. 01-00219, 01-10622, 01-02064, 01-10042, 01-10620, 01-02068, 01-10043, 01-10621A, 01-10621B, 01-04055, 01-10044, 01-10045, 21-02156, 21-10560, and 21-13161 (Jan. 30, 2015) (Proposed settlement for the upper Snake River Basin); *see also* State Of Idaho's Motion For Order Decreeing Water Rights, *In re* SRBA Case No. 39576, Subcase No. 37-02773, 37-02774, 37-02779, 37-02783, and 37-22806 (Aug. 13, 2015) (Proposed settlement for the Little Wood River Basin).

773. 43 U.S.C. § 315b (2015).

774. Order Designating Basin-Wide Issue No.9; Order Denying Designation of Basin-Wide Issue No. 9A; Order Setting Expedited Schedule and Hearing Date for Basin-Wide Issue No. 9, *In re* SRBA Case No. 39576, Subcase No. 91-00009 (renumbered as 00-91009) at 1 (March 8, 1996).

775. *Id.*

776. Memorandum Decision and Order on Challenge; Order of Partial Decrees, *In re* SRBA Case No. 39576, Subcase Nos. 55-10288B, 55-10289B, 55-10290B, 55-10292B, 55-10293B, 55-10295, 55-10296, 55-10297B, 55-10298, 55-10299B, 55-10300, 55-10301B, 55-10303B, and 55-13451 at 9 n.3 (Jan. 4, 2005).

777. *See generally In re* SRBA Case No. 39576, Subcase Nos. 55-10135, 55-11061, 55-11385, and 55-12452.

778. *See generally In re* SRBA Case No. 39576, Subcase Nos. 55-10288B, 55-1089B, 55-10290B, 55-10292B, 55-10293B, 55-10295, 55-10296, 55-10297B, 55-10298, 55-10299B, 55-10300, 55-10301B, 55-10303B, and 55-13451.

779. Memorandum Decision and Order on Challenge; Order of Partial Decrees, *supra* note 776, at 2.

780. *Id.* at 2.

with the date LU was created as an entity and started beneficially using the water in 1976.[781] The Special Master issued a summary judgment order that found the priority date for LU's rights should be 1976.[782] The Special Master's decision on summary judgment was appealed to the SRBA Court which overruled the Special Master's order and remanded the case for further factual development on the issue of the priority date.[783] On remand the Special Master found that LU Ranching was entitled to an 1876 priority date.[784] Both LU and the United States filed motions to alter or amend the Special Master's recommendation.[785] The issues on challenge were:

> 1) Whether a water user can appropriate a water right when the water user does not hold a possessory interest in the land on which the right is appropriated; 2) What proof is required to establish intent to appropriate an instream stock water right; 3) Can an instream water right with a place of use on federal land transfer as an appurtenance to adjacent patented property when all are used in conjunction with a ranching operation; and 4) If the deed to the patented property is silent, can such a transfer still be made?[786]

The SRBA Court held "that a private party could appropriate a water right on the public domain without having a possessory or ownership interest in the land."[787] Citing an Idaho Supreme Court case,[788] the SRBA Court, explained that three elements were required to establish a beneficial use water right: "1) intent to appropriate; 2) a physical diversion from a natural watercourse: and, 3) the application of water to beneficial use."[789] The SRBA Court further found intent to appropriate for instream stockwater can be inferred from beneficial use of the water,[790] holding "an instream stock water right appropriated on the public domain can transfer as an appurtenance to patented or base ranch property."[791]

The facts and issues in *Joyce Livestock* were similar to *LU Ranching*. In *Joyce Livestock*, both Joyce Livestock Company ("Joyce") and the United States filed beneficial use, instream stockwatering claims on the same stream reaches located on federal public land.[792] Both Joyce and the United States objected to the other's claims.[793] There were two issues on review before the SRBA Court. The first, whether "management of federally administered grazing allotments, without more,

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781. *Id.*
782. *Id.* at 4.
783. Special Master's Report and Recommendation Findings of Fact and Conclusions of Law, *In re* SRBA Case No. 39576, Subcase Nos. 55-10288B, 55-1089B, 55-10290B, 55-10292B, 55-10293B, 55-10295, 55-10296, 55-10297B, 55-10298, 55-10299B, 55-10300, 55-10301B, 55-10303B, and 55-13451 at 1 (Feb. 27, 2003).
784. *Id.* at 2.
785. Memorandum Decision and Order on Challenge; Order of Partial Decrees, *supra* note 776, at 3.
786. *Id.* at 9–10.
787. *Id*. at 17.
788. Hidden Spring Trout Ranch, Inc. v. Hagerman Water Users, Inc., 619 P.2d 1130, 101 Idaho 677 (1980).
789. Memorandum Decision and Order on Challenge; Order of Partial Decrees, *supra* note 776, at 18.
790. *Id*. at 20.
791. *Id*. at 22.
792. Memorandum Decision and Order on Challenge, *In re* SRBA Case No. 39576, Subcase Nos. 55-10135, 55-11061, 55-11385, and 55-12452 at 1–2 (Aug. 3, 2005).
793. *Id*. at 2.

constitutes a beneficial use sufficient to support the United States' beneficial use claims to instream stockwater rights."[794] The second issue concerned intent to appropriate or transfer an instream stockwater right.[795] The SRBA Court held that "The United States is not entitled to a beneficial use state-based water right based solely on its administration of grazing lands."[796]

The SRBA Court decided *LU Ranching* first;[797] however *Joyce Livestock* received the bulk of the analysis by the Supreme Court.[798] In resolving the issues presented in both cases the Supreme Court made three important determinations: 1) Under the constitutional method of appropriation, a water user could make a valid appropriation simply by putting the water to beneficial use without showing any further intent to appropriate;[799] 2) water rights obtained by watering livestock on federal land are appurtenant to a ranches' deeded land[800]; and 3) absent an agency agreement with a rancher, BLM must put the water to beneficial use itself in order to establish a beneficial use stockwatering right.[801] The decisions have changed the way Idaho and Federal agencies approach establishing stockwater right and the way IDWR licenses them. Specifically, IDWR requires all land management agencies to show beneficial use was made by or on behalf of the agency prior to issuing a license in its name.

3. Minidoka Wildlife Refuge

The United States also sought water rights for the Minidoka National Wildlife Refuge on the basis of historic beneficial use. The Minidoka National Wildlife Refuge was established by executive order of President Theodore Roosevelt in February 1909.[802] Water from Smith Springs flows from the banks of the Snake River into a bay of Lake Walcott Reservoir.[803] Smith Springs are within the boundaries of the Minidoka National Wildlife Refuge.[804] The United States filed a beneficial use claim in the SRBA for 1.16 cfs of water from Smith Springs.[805] The claim was for the beneficial use of wildlife. The claim stated that Smith Springs provided a source of fresh water to the refuge when the Minidoka reservoir was drawn down, kept areas of the refuge open during winter, and thereby provided habitat for overwintering birds.[806] The United States acknowledged, however, that there were no developed diversion works at Smith Springs.[807]

The United States' claim was recommended disallowed by IDWR on the basis that a valid appropriation requires a physical diversion of water.[808] The United States

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794. *Id* at 4.
795. *Id.* at 4.
796. *Id*. at 21.
797. Memorandum Decision and Order on Challenge; Order of Partial Decrees, *supra* note 776.
798. Joyce Livestock Co. v. United States, 156 P.3d 502, 144 Idaho 1 (2007).
799. *Id.* at 509, 144 Idaho at 8.
800. *Id.* at 514, 144 Idaho at 13.
801. *Id.* at 520, 144 Idaho at 19.
802. State v. United States, 996 P.2d at 808, 134 Idaho at 108.
803. *Id.*
804. *Id.*
805. *Id.*
806. *Id.*
807. *Id.*
808. State v. United States, 996 P.2d at 808, 134 Idaho at 108.

objected to IDWR's recommendation.[809] At the time of the United States' objection, IDWR was still a party to the SRBA. IDWR filed a response to the United States' objection to defend its recommendation, but no other parties objected.[810] IDWR was eventually removed as a party to the SRBA by the 1994 Amendments. IDWR's removal as a party nullified its response to the United States' claim. The SRBA Court extended the response deadline by almost two years, but no other party responded to the United States claim.[811] The United States, the only remaining party in the subcase, filed a motion for summary judgment on December 7, 1995.[812] Approximately one-year later, various irrigation entities moved the SRBA Court to file late responses, or, in the alternative, to participate in the subcase.[813] The Special Master denied the motion, but allowed the entities to file amicus curiae briefs.[814]

After reviewing the United States' summary judgment memorandum, the Special Master recommended that the United States be adjudicated a beneficial use, instream water right.[815] The Special Master's conclusions were challenged by the State of Idaho and the irrigation entities to the SRBA Court.[816] After hearing the SRBA Court affirmed the Special Master's recommendation that a diversion was not required for an appropriation under the constitutional method.[817] However, the case was remanded to the Special Master for findings on the specific amount of water subject to a water right, intent to appropriate, and priority.[818] The State and the irrigators appealed.[819]

On appeal, the Supreme Court considered, among other issues, whether the United States was properly granted a water right to the waters of Smith Springs under the constitutional method of appropriation simply by putting the water to beneficial use without constructing a diversion device.[820] The Court stated that Idaho water law generally requires an actual diversion and beneficial use for a valid water right.[821] The Court noted that there are only two exceptions to the diversion requirement: 1) no diversion device is needed to establish a valid water right for stockwatering, and 2) state entities acting pursuant to statute may make non-diversionary appropriations for the beneficial use of Idaho citizens.[822] The Court held that neither exception applied to the United States' claims to the use of the water of Smith Springs for wildlife purposes.[823] Therefore, the Court reserved the SRBA Court's holding that a diversion was not required for an appropriation under the constitutional method.[824]

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809. *Id.*
810. *Id.*
811. *Id.*
812. *Id.*
813. *Id.*
814. State v. United States, 996 P.2d at 808, 134 Idaho at 108.
815. *Id.*
816. *Id.*
817. *Id.* at 809, 134 Idaho at 109.
818. *Id.*
819. *Id.*
820. State v. United States, 996 P.2d 806, 811, 134 Idaho 106, 111 (2000).
821. *Id.*
822. *Id.*
823. *Id.* at 812, 134 Idaho at 112.
824. *Id.*

VII. FEDERAL RESERVED WATER RIGHTS

One of the primary objectives of the SRBA was to quantify the federal reserved water right claims of the United States and Tribes. The magnitude of this effort became apparent when the United States filed 20,506 federal reserved water right claims and Idaho tribes filed an additional 7,139 water right claims.[825]

Federal reserved water rights are a creature of federal law.[826] The Supreme Court's *Winters v. United States*[827] decision is often cited as the origin of the federal reserved water rights doctrine.[828] In *Winters*, the United States Supreme Court held that when Congress established the Fort Belknap Indian Reservation it also, by implication, reserved the water necessary to achieve the primary purposes for creation of the reservation. The Supreme Court subsequently extended the federal reserved water right doctrine "to public lands reserved for a particular governmental purpose, such as the creation of national parks and national forests."[829]

Reserved water rights may be created by treaty, agreement, statute, or executive order,[830] and may be either implied or express.[831] If the document creating a reservation is silent with respect to reservation of water, an intent to reserve unappropriated water may be inferred if the previously unappropriated waters are necessary to accomplish the primary purposes for which the reservation was created.[832] "While many of the contours of . . . 'implied-reservation-of-water doctrine' remain unspecified, the [Supreme] Court has repeatedly emphasized that Congress reserved only that amount of water necessary to fulfill the purpose of the reservation, no more."[833] Moreover, "[w]here water is only valuable for a secondary use of the reservation . . . there arises the contrary inference that Congress intended . . . that the United States would acquire water in the same manner as any other public or private appropriator."[834]

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825. Report 1994 Interim Legislative Council Committee Report on the Snake River Basin Adjudication to House and Senate Members at 21 (on file with authors).

826. Cappaert v. United States, 426 U.S. 128, 138 (1976):

> Reservation of water rights is empowered by the Commerce Clause, Art. I, § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.

827. 207 U.S. 564 (1908).

828. While *Winters* is often cited as the origin of the reserved water rights doctrine, the roots of doctrine arose out of *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899). Although the Supreme Court in *Rio Grande* confirmed the states' power to adopt the prior appropriation doctrine, it noted that "in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property." *Id*. at 703.

829. United States v. State, 959 P.2d 449, 452, 131 Idaho 468, 470 (1998); *see Cappaert*, 426 U.S. at 138 (citing Colorado River Water Cons. Dist. v. United States, 424 U.S. 800, 805 (1976); United States v. SRBA Court for Eagle Cty., 401 U.S. 520, 522–523 (1971); Arizona v. California, 373 U.S. 546, 601 (1963); FPC v. Oregon, 349 U.S. 435 (1955); United States v. Powers, 305 U.S. 527 (1939); Winters v. United States, 207 U.S. 546 (1908)).

830. CONFERENCE OF WESTERN ATTORNEYS GENERAL, AMERICAN INDIAN LAW DESKBOOK 260 (Clay Smith, ed. 2004).

831. United States v. New Mexico, 438 U.S. 696, 699–700 (1978).

832. *Cappaert*, 426 U.S. at 139 ("When the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.").

833. United States v. New Mexico, 438 U.S. 696, 700 (1978).

834. *Id.* at 701.

Federal reserved water rights differ from state-based water rights in three important respects: 1) the priority date of a reserved water right relates back to the date the public lands were reserved;[835] 2) they are not limited to current beneficial use; [836] and 3) they are not subject to forfeiture or abandonment.[837]

The tribal reserved water right claims filed in the SRBA are discussed in Section VII.A, and the federal agencies' reserved water right claims are discussed in Section VII.B. The disposition of the claims followed different paths. While most of the tribal claims were resolved through negotiations, most of the federal agency claims were resolved through litigation.

A. Tribal Reserved Water Rights

The United States filed federal reserved water right claims in the SRBA for the benefit of the Shoshone-Bannock,[838] Shoshone-Paiute,[839] and the Nez Perce Tribes.[840] The three tribes adopted the United States claims. The Northwest Band of Shoshoni filed reserved water right claims on its own behalf. [841] In addition to the traditional reserved water right claims for agriculture, domestic, commercial, municipal and industrial uses, the United States and tribes claimed both on and off reservation instream flow water rights.[842]

At the time Idaho embarked on the SRBA, Wyoming, the United States and the Eastern Shoshone and Northern Arapahoe Tribes were enmeshed in acrimonious litigation over the nature and extent of reserved water rights for the Wind River

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835. Arizona v. California, 373 U.S. 546, 600 (1963).

836. *Id.*

837. United States v. Adair, 723 F.2d 1394, 1412 (9th Cir. 1983); AMERICAN INDIAN LAW DESKBOOK, *supra* note 830, at 259.

838. The Fort Hall Agreement was filed in lieu of federal reserved water right claims for the Shoshone-Bannock on-reservation federal reserved water rights. Revised Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin, *In re* SRBA Case No. 39576 at 1 (Aug. 13, 2014).

839. The United States as trustee for the benefit of the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation filed a notice of claim in the SRBA. Revised Consent Decree Approving Entry of Partial Decrees Determining the Rights of the United States as Trustee for the Benefit of the Shoshone-Paiute Tribes to the Use of Water in the Snake River Basin within Idaho, *In re* SRBA Case No. 39576, Subcase Nos. 51-12767, 51-12756, and 51-02002 (Dec. 12, 2006).

840. The United States as trustee for the Nez Perce filed a consumptive use claim for over 238,327 acre-feet of water to meet on reservation needs, 1,133 instream flow water right claims and 1,888 springs and fountain claims in the SRBA. Joint Response of United States, Nez Perce Tribe, and State of Idaho to Objections to Settlement Agreement and Consent Decree, *In re* SRBA Case No. 39576, Subcase Nos. 03-10022, 67-13701, 71-10886, and 92-00080 (Nov. 30, 2006). In addition to filing duplicate claims to those of the United States, the Nez Perce filed an additional federal reserved water right instream flow claim on the Snake River. Steven W. Strack, *Pandora's Box or Golden Opportunity? Using the Settlement of Indian Reserved Water Right Claims to Affirm State Sovereignty Over Idaho Water And Promote Intergovernmental Cooperation*, 42 IDAHO L. REV. 633, 638 n.17 (2006).

841. The Northwest Band of Shoshoni Nation filed twenty-seven claims for instream flow water rights. The United States did not join in the Northwest Band's claims. On November 17, 1998, the SRBA Court issued and order dismissing the claims for lack of prosecution. The Northwest Band appealed the order to the Idaho Supreme Court, but subsequently voluntarily withdrew the appeal. The SRBA Court disallowed the claims. Final Order Disallowing Water Right Claims, *In re* SRBA Case No. 39576, Subcase No. 03-10098 (May 11, 2000).

842. The Shoshone-Bannock Tribes filed 1083 federal reserved water right instream flow claims in the SRBA. The United States refused to file federal reserved water right instream flow claims for the Shoshone-Bannock. Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476 (1995).

Reservation[843] that would ultimately end-up before the United States Supreme Court.[844] This litigation was of particular interest to Idaho because the Fort Hall and Wind Reservations were created by the same treaty.[845]

Aware of the millions of dollars in costs and soured state-tribal relations in Wyoming that resulted from the *Big Horn* litigation, the State of Idaho, with the support of the Shoshone-Bannock Tribes, adopted a policy favoring negotiation of tribal reserved water right claims. House Current Resolution 16 requested the Governor and the Attorney General to "attempt to negotiate with the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation or any other affected tribes to resolve as many issues as possible regarding the extent of their water rights."[846] Governor John V. Evans issued Executive Order 85-9[847] designating the IWRB as the "lead agency to coordinate state activities related to the reserved water rights negotiations and the adjudication," and the Attorney General to "coordinate legal representation for the state and its agencies . . . ."[848] Against this back drop, the State of Idaho embarked upon an extensive and largely successful effort to resolve most tribal reserved water right claims through negotiations. The three Tribal water rights settlements[849] discussed below are a sterling example of the benefits of resolving tribal water right claims through negotiation.[850]

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843. *In re* the General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, Case No. 4993 (5th Jud. Dist. Wyo. Jan. 24, 1977).

844. Jason A. Robison, *Wyoming's Big Horn General Stream Adjudication*, 1977–2014, 15 WYO. L. REV. 243, 285–86 (2015). The United States Supreme Court affirmed the Wyoming Supreme Court's decision on a tie vote. Justice Sandra Day O'Conner after hearing argument in the case recused herself from the decision. *Id.* at 287.

845. Treaty with the Eastern Band Shoshoni and Bannock, July 3, 1868, United States and Shoshonee [sic] Bannack [sic] Tribes, 15 Stat. 673 [hereinafter Second Fort Bridger Treaty].

846. H.R. Con. Res. 16, 48th Leg. Sess. (adopted by House Feb. 6, 1985, adopted by Senate Feb. 19, 1985); *see* 1985 Idaho Sess. Laws 745.

847. Exec. Order No. 85-9 at 1 (Idaho May 24, 1985) (on file with authors).

848. Executive Order 85-9 further provided that commencement of the general stream adjudication should be delayed until negotiations were concluded. *Id.* This provision of the Executive Order was subsequently amended to allow for commencement of the SRBA. Exec. Order No. 87-9 (Idaho May 22, 1987).

849. The Northwest Band of Shoshoni claims are not discussed below because their claims were dismissed for lack of prosecution.

850. The benefits of negotiation become apparent when the outcome of the Fort Hall negotiation is compared to the outcome of the Wind River Reservation reserved right water right litigation in Wyoming's Big Horn River Adjudication. The United States claimed 586,106 acre-feet per year of consumptive use water rights plus non-consumptive use water rights for the Eastern Shoshone and Northern Arapahoe Tribes. Report from Joseph B. Meyer, Wyoming Attorney General to Wyoming Governor and State Legislature, Big Horn River General Adjudication Progress and Current Status at 8 (Dec. 31, 1987) (on file with authors). After 12 years of litigation, the United States was awarded a reserved water right of 499,862 acre-feet per year. *In re* General Adjudication of All Rights to Use Water in the Big Horn River System v. Owl Creek Irrigation Dist. Members, 753 P.2d 76 (1988). Although there is no comprehensive cost figure for the *Big Horn*, the total 12 year litigation costs were estimated to be over $20 million. Teno Roncalio, *The Big Horns of a Dilemma*, *in* INDIAN WATER IN THE WEST 211 (Thomas R. McGuire, William Lord, and Mary Wallace eds. 1993) ("The state of Wyoming . . . spent nearly $9 million to bring and maintain this action. . . . To include the costs of attorneys of the Departments of Justice and the Interior, of the tribes, and of many private parties, plus attorneys and consultants added to the state payroll at work on the case, would surely run the total costs of litigation to well over $20 million."). In contrast, the United States and Shoshone-Bannock Tribes claimed 782,107 acre-feet per year for the Fort Hall Indian Reservation. Table, Present Irrigation Water Source Summary and Proposed Irrigation Water Source Summary (on file with authors). After five years of negotiation, the parties agreed to recognize a tribal water right of 581,000 acre-feet year for the Fort Hall Indian Reservation. The cost to the State of Idaho was less than $1 million including negotiation costs and $500,000 of in kind service contribution to the settlement. Interview with Clive J. Strong, Deputy Attorney

1. Shoshone-Bannock Federal Reserved Water Right Claims

The Fort Hall Indian Reservation was created by the Second Fort Bridger Treaty.[851] Although the original Reservation was 1.2 million acres, subsequent cessions reduced the Reservation to its present size of 544,000 acres.[852] "The Tribes (47 percent) and individual Indians holding allotments subject to restraints on alienation (43 percent) own most of the lands within the exterior boundaries of the Reservation."[853] The United States holds title to approximately six percent of the Reservation lands and four percent of the land is owned by non-Indians.[854] The Reservation is bounded on the North and West by the Snake River and one of its main tributaries, the Blackfoot River.[855] Additionally, about 10 miles of the Portneuf River is within the Reservation, as well as Bannock Creek, which flows north through the southwestern portion of the Reservation.[856] The Eastern Snake Plain Aquifer lies beneath a portion of the Reservation.[857]

A large portion of the Reservation lands are ideally suited for agricultural use. Consequently, the Shoshone-Bannock Tribes' reserved water right claims were primarily based upon the practicable irrigable acreage standard ("PIA") articulated in *Arizona v. California*.[858] The Tribes' claimed a right to 782,107 acre feet of water for irrigation of 197,682 present and future acres within the reservation.[859] In addition to the PIA claim, the United States and the Tribes sought water rights for domestic, commercial, municipal, industrial, hydropower, stockwater and instream flows. As discussed in Section VII.A.1.a.i.(1), the Shoshone-Bannock water right claims in the Snake River above Hells Canyon Dam were resolved through negotiation of the 1990 Fort Hall Indian Water Rights Agreement. Section VII.A.2.A.ii, discusses the disposition of the Shoshone-Bannock off-reservation instream flow claims in the Clearwater and Salmon River Basins. [860]

General, Chief Natural Resources Division, Idaho Attorney General's Office (Sept. 15, 2015). Moreover, through negotiation, the private water users in Idaho were able to secure from the United States 98,000 AF of storage space to mitigate for the impact of recognition of the tribal reserved water rights on existing privately held water rights.

851. Second Fort Bridger Treaty, *supra* note 845.

852. H.R. REP. NO. 101-831 Accompanying H.R. 5308 Approving the Fort Hall Indian Water Rights Settlement, and for Other Purposes, 101st Cong., 2nd Sess. at 2 (1990).

853. *Id.*

854. Testimony of the Shoshone-Bannock Tribes Fort Hall Indian Reservation, Idaho in Support of H.B. 258 Approving the 1990 Fort Hall Indian Water Rights Agreement, Before Senate Committee on Res. and Env., 51st Leg., Reg. Sess. at 5 (March 20, 1991) ("The United States holds title to about six percent of the Reservation lands, most of which – more than 28,000 acres – were ceded to the United States in 1924 to assure construction of the American Falls Reservoir. Act of May 9, 1924, 43 Stat. 117. Non-Indians currently own less than four percent of the Reservation.").

855. *Id.*

856. *Id.* at 5–6.

857. PHILLIP J. RASSIER, INDIAN WATER RIGHTS, A STUDY OF THE HISTORICAL AND LEGAL FACTORS AFFECTING THE WATER RIGHTS OF THE INDIANS OF THE STATE OF IDAHO, IDWR LEGAL AFFAIRS REPORT NO. 1 at 8 (June 1978) (on file with authors).

858. Arizona v. California, 373 U.S. 546, 600–01 (1963).

859. The figures presented in the text are from the United States' and Shoshone-Bannock Tribes' proposed claim. Table, *supra* note 850. The United States and the Shoshone-Bannock Tribes never filed claims in the SRBA because the Fort Hall Agreement was reached prior to the claim filing date. As part of the negotiation, however, the United States and Tribes set forth their proposed claims.

860. The Shoshone-Bannock Tribes also claimed off-reservation instream flows in the Clearwater, Salmon and Snake River Basins based upon their "right to hunt on the unoccupied lands of the United States

a. 1990 Fort Hall Indian Water Rights Agreement

On August 30, 1985, the Shoshone-Bannock Tribes and the State entered into a Memorandum of Understanding to commence good faith, government-to-government negotiations regarding the Tribes' claims in the Snake River Basin above Hells Canyon Dam. Subsequently, the United States and the Committee of Nine[861] representing private water users in the Upper Snake River Basin joined in the negotiation.

It was understood and recognized at the outset of the negotiations that the federal reserved water rights for the Fort Hall Indian Reservation could significantly impact the water supply of numerous state-based water rights held by non-Indian water users. Thus, the parties agreed "to attempt to fashion an agreement that not only satisfied the Tribes' water entitlement from the Upper Snake River, but also protected to the maximum extent possible certain existing users' entitlements under state law."[862]

On September 1, 1989, four years after commencing negotiations, the parties reached agreement on a one page term sheet that fulfilled the duel goal of recognizing the Tribes' entitlement to water rights in the Upper Snake River Basin and protecting existing State Law based water rights.[863] Using the term sheet, the parties over the next six months, crafted The 1990 Fort Hall Indian Water Rights Agreement ("Fort Hall Agreement"),[864] and the SRBA Court entered a Fort Hall Consent Decree approving "the provisions of the Agreement . . . over which this Court had jurisdiction" on August 2, 1995.[865]

i. Shoshone-Bannock Tribal Water Rights

The parties agreed to a total tribal water supply for the Fort Hall Indian Reservation of 581,031acre-feet per year ("AFY"). Although the tribal water right

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. . . ." Second Fort Bridger Treaty, *supra* note 845, at Article 4. Because the Nez Perce Tribe and the Northwestern Band of Shoshoni were also asserting instream flow claims in the Clearwater, Salmon and Snake River Basins, the parties agreed to bifurcate the negotiations and focus the initial negotiations on the Shoshone-Bannock claims above Hells Canyon Dam. The Fort Hall Agreement provided that "[t]he 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 . . .." The 1990 Fort Hall Indian Water Rights Agreement between the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation, the State of Idaho, the United States, and Certain Water Users Article 11.5 (July 5, 1990) [hereinafter Fort Hall Agreement]. As discussed *infra* at Section VII.A.1.c, the Shoshone-Bannock instream flows claim were subsequently decreed as disallowed.

861. The Committee of Nine is the advisory committee of Water District 01. The IWRB appointed the Committee of Nine to represent water users in the negotiation process. Fort Hall Agreement, *supra* note 860, Article 3.8.

862. H.R. REPORT NO. 101-831, *supra* note 852, at 2.

863. The term sheet is titled Accord: Negotiations U.S., Tribes, State, Water Users Date: 9/1/89 (on file with authors).

864. The Agreement was subsequently approved by Congress, the Idaho Legislature, and the general membership of the Shoshone-Bannock Tribes. Fort Hall Indian Water Rights Act of 1990, Pub. L. No. 101–602, 104 Stat. 3059.

865. Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin, *In re* SRBA Case No. 39576 (Aug. 2, 1995). The Fort Hall Consent Decree was subsequently revised on August 13, 2014. Revised Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin, *supra* note 838.

was quantified based upon the PIA standard, the Fort Hall Agreement provides that the rights are "for present and future irrigation, DCMI, instream flow, hydropower and stock water uses . . . ."[866] The primary sources of the tribal water supply are the Snake River, the Blackfoot River and Grays Lake; however, as discussed below, the Fort Hall Consent Decree also decreed tribal water rights on a number of smaller streams flowing through the Reservation as well as ground water within the Reservation.[867] Further, the Fort Hall Consent Decree acknowledged that the Bureau of Indian Affairs holds 130,000 AF of federal storage contracts rights in Palisades and American Falls Reservoirs for the benefit of the Shoshone-Bannock Tribes.[868] A brief summary of the tribal water rights follows.

(1) Fort Hall Project Water Rights

Congress authorized the development of the Fort Hall Indian Irrigation Project ("Project") in 1894[869] and added the Michaud Unit to the Project in 1954.[870] The Project serves approximately 73,480 acres of Indian and non-Indian owned lands.[871]

Although the Snake and Blackfoot River water rights for the Project were originally established under state law, the United States and Shoshone-Bannock Tribes asserted the Project water rights should be decreed as federal reserved water rights.[872] Ultimately, the parties agreed to recognize a federal reserved water right for up to 53,828 acres of present and future tribal lands within the Project,[873] but quantified the water rights for the 12,667.2 acres of non-tribal Project lands under the original state law water rights.[874] This bifurcation of the Project water rights into federal and state based water rights is reflected in the Snake River, Blackfoot and Grays Lake Project water rights.

The United States was decreed federal reserved water right no. 01-10223 from the Snake River. Under this right the United States is entitled to divert up to 115,000 AFY from the Snake River for irrigation of 23,359 acres of tribal lands with a priority date of June 14, 1867. The consumptive use under this water right is limited to 60,986

866. Fort Hall Agreement, *supra* note 860, Article 6.2. Article 7.4 allows the Tribes to use its storage water to provide instream flows and "to use the natural flows of all waters arising wholly within and traversing only Reservation lands for instream flows." *Id.* at Article 7.4.

867. These water rights are not subject to forfeiture or abandonment as the result of non-use. Fort Hall Agreement, *supra* note 860, Article 6.2.

868. The allocation of storage water in federal reclamation projects is a matter of federal contract law and therefore not subject to adjudication in the SRBA.

869. Act of August 15, 1894, ch. 290, 28 Stat. 286, 305 authorized the Secretary of Interior to contract for the construction of canals and to secure a water supply to irrigate lands within the Fort Hall Indian Reservation. Act of March 1, 1907, ch. 2285, 34 Stat. 1015, 1024 created the Fort Hall Irrigation Project and authorized the construction of the Blackfoot Dam.

870. Act of Aug. 31, 1954, Pub. L. No. 741, 68 Stat. 1026 provided for the construction, maintenance, and operation of the Michaud Flats Project for irrigation in the State of Idaho.

871. E-mail from David Bollinger, Irrigation Project Manager, Fort Hall Irrigation Project, to Clive J. Strong, Idaho Deputy Att'y Gen. (Sept. 22, 2015) (on file with authors). The approximate acreage within each of the five units of the Fort Hall Indian Irrigation Project is: Fort Hall Unit—47,000 acres; Michaud Unit—21,000 acres; and Lincoln Creek, Ross Fork Creek and Bannock Creek—5,480 acres combined.

872. The state-based water rights were: 01-10248 (Snake River natural flow), 27-02007 (Blackfoot storage); and 25-02160 (Grays Lake storage).

873. *See* Water Right No. 27-11375.

874. *See* Water Right No. 01-10248.

AFY.[875] In addition, the United States was decreed state law water right no. 01-10248 for the benefit of the non-Indian Project water users.[876] Under this right the United States is entitled to divert 60,000 AFY from the Snake River with a priority date of December 14, 1891. The consumptive use limit under this right is 33,222 AFY. The United States relinquished the balance of water right no. 01-10248 that was previously used on tribal lands.

Remark x.d of Snake River water right no. 01-10223 describes a water exchange agreement between North Side Canal Company and the Project. The Reservation Canal transports Snake River water diverted under water right no. 01-10223 some 11.6 miles before emptying into the Blackfoot River. Along the way, Sand Creek empties into the Reservation Canal. Because of the variability of flow from Sand Creek the BIA constructed an Equalizing Reservoir to regulate the combined Snake River and Sand Creek flows. At the time of the Fort Hall Agreement the Equalizing Reservoir was unable to regulate the combined flow in the Reservation Canal. Rather than incur the cost of rehabilitating the Equalizing Reservoir, the North Side Canal Company agreed to use up to 50,000 AFY of Sand Creek water "not diverted through the Main and North Canals because of the physical limitations of the Equalizing Reservoir" and in exchange to provide "an equal amount of storage water from Palisades or Jackson Lake Reservoirs."[877]

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875. A unique feature of the Project and tribal water rights is the inclusion of a consumptive use element. This element was included in all of the Project and tribal rights to provide protection for existing non-Indian water rights within the Upper Snake River Basin.

876. In addition to the Snake River right, the Project was decreed water right no. 27-11560 from Sand Creek as beneficial use claim with a priority date of April 4, 1914. Water right nos. 01-10248 and 27-11560 are subject to the following combined use remark: "The combined diversion rate of this water right and water right no. 01-10248 shall not exceed 260 CFS and the combined diversion volume shall not exceed 60,000 AFY." Partial Decree for Water Right 27-11560, *In re* SRBA Case No. 39576 at Section 11.a (Aug. 13, 2014); Partial Decree for Water Right 01-10248, *In re* SRBA Case No. 39576 at Section 11.a (Aug. 13, 2014).

877. The remark in its entirety reads:

> 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 [sic] 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.

Resolution of the Blackfoot River water rights was complicated by the absence of comprehensive water right records. The parties agreed to recognize reserved water right no. 27-11375 from the Blackfoot River for use on tribal lands in the amount of 150,000 AFY with a priority date of June 14, 1897.[878] Recognition of this right, however, without qualification would have precluded exercise of junior State Law based Blackfoot natural flow water rights.

To avoid this result, the Tribes agreed to exercise their water right from the Blackfoot in a manner that protects the existing non-Indian entitlements. The process provides for both the Tribes and the non-Indians to divert available natural flows of the Blackfoot River. When natural flow is insufficient to satisfy both Indian and non-Indian natural flow water rights, the non-Indian water users will use the natural flow necessary to meet their entitlements and the Tribes will satisfy their full legal entitlement under the Winters Doctrine by supplementing the Tribal natural flow right with water accruing to the 348,000 AF Blackfoot Reservoir and 100,000 AF Grays Lake facility.[879]

To implement this solution, the Blackfoot River Project storage water rights acquired under state law,[880] like the Snake River Project water right, were bifurcated. However, unlike the Snake River water right, the United States was decreed state-based water right no. 27-02007 for the 348,000 AFY in Blackfoot Reservoir and water right no. 25-02160 for the storage of the 100,000 AFY in Grays Lake.

Remark x.d of Blackfoot River water right no. 27-11375 was crafted to ensure that the tribal natural flow federal reserved water right would yield the expected annual volume. At the time of the negotiations, the amount of water actually diverted under non-Indian water rights was unknown. After much discussion, the parties agreed to a provision that accomplished both goals. Paragraph x.d of tribal water right no. 27-11375 provided that:

> The Tribes and the United States agree to exercise this water right in a manner that ensures persons diverting natural flow from the Blackfoot River prior to January 1, 1990, whose rights are decreed in the SRBA will continue to receive that full legal entitlement under state law. The parties will specifically enumerate all rights protected by this provision once the SRBA decree for this basin becomes final. These state created water rights are 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.

Partial Decree for Water Right 01-10223, *In re* SRBA Case No. 39576 at Section 11.d (Aug. 13, 2014).

878. A combined use remark was included in water right nos. 01-10223, 27-11375, 27-02007 and 25-02160 limiting the total diversion under this rights to that amount of water needed to "provide the water supply for up to 53,828 acres in order to protect non-Indian water users within the Snake River and Blackfoot River Basins." *See e.g. id.* at Section 11.c.

879. H.R. REP. NO. 101-831, *supra* note 852.

880. Water right no. 27-02007 was acquired under State Law by the United States in 1907 for storage of water in the Blackfoot Reservoir. In 1919, the United States acquired under state law-based permit no. 25-02160 for storage of water in Grays Lake.

This subordination provision ensured that Blackfoot junior non-Indian natural flow water users whose rights were decreed in the SRBA ("Basin 27 Water Users"),[881] could continue to divert out-of-priority to the level of their then-existing diversions.[882] The September 1, 1989 Accord between the Signatory Parties to the Fort Hall Agreement set forth the parameters of the Blackfoot Tribal water right subordination in the following notation: "hold harmless non-Indian Blackfoot users to present diversion; if short on Blackfoot, go to reservation groundwater."[883] In the event, however, diversions under the non-Indian natural flow water rights exceed 45,000 AFY, the parties agreed to negotiate an equitable adjustment to this water right.

The 45,000 AFY subordination cap was based upon an analysis done by David Shaw, the IDWR Adjudication Bureau Chief, of Blackfoot natural flow diversions by Basin 27 Water Users[884] at the time of the Fort Hall Agreement. Since claims had not yet been filed in the SRBA for Basin 27, and because the IDWR water rights records were incomplete, Mr. Shaw could only estimate those diversions.[885] Mr. Shaw used 1986-87 Landsat data to estimate the actively irrigated acreage[886] and applied a duty of water to derive an estimate of actual diversions under Basin 27 water rights.[887] He concluded that the Basin 27 Water Users had historically diverted approximately 45,000 acre feet of Blackfoot natural flow.[888]

During the Fort Hall Consent Decree proceedings, the Court and the Signatory Parties discussed the potential need for future adjustment to the Decree based on the Blackfoot equitable adjustment provision.[889] The Court retained "continuing jurisdiction" to address the equitable adjustment,[890] in the event actual diversions by Basin 27 Water Users exceeded 45,000 AFY.[891] The equitable adjustment provision was an innovative way for the Parties to address the "known unknowns" at the time

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881. The IWRB's approval of the Fort Hall Agreement was conditioned on its understanding that the Agreement was "consistent with the Board's established policy that any negotiated agreement must provide for the protection of existing water uses . . . ." Affidavit of Shasta Kilminster-Hadley, *In re* SRBA Case No. 39576, Subcase No. 27-11375 at Exhibit 2 (April 4, 2011) (Resolution No.___, IWRB, June 14, 1990).

882. *See* Affidavit of David B. Shaw, *In re* SRBA Case No. 39576, Subcase No. 27-11375 at ¶¶ 10–11 (March 18, 2011).

883. Resolution 16, Committee of Nine at Exhibit A (March 12, 1990). The Blackfoot River subordination provision led to litigation between the Signatory Parties to the Fort Hall Agreement and the Basin 27 Water Users over the issue of who was responsible for providing equitable adjustment water. Although the Committee of Nine was designated to represent all water users in the negotiations and was a signatory to the Fort Hall Agreement, the Basin 27 Water Users asserted they were not a party to the Fort Hall Agreement and, therefore, were not responsible for providing the equitable adjustment water. See discussion *infra* at Section VII.A.1.b.

884. Affidavit of David B. Shaw, *supra* note 882, at ¶ 12. As defined in the Blackfoot River Management Plan, "Basin 27 water users" refers to persons diverting natural flow from the Blackfoot River Basin prior to January 1, 1990, whose water rights are decreed in the SRBA, exclusive of the Fort Hall Irrigation Project and *de minimis* domestic and stockwater uses.

885. *See id.* at ¶ 15.

886. *Id.* at ¶ 13.

887. *Id.* at ¶ 14.

888. *Id.* at ¶15.

889. *See* Transcript, Hearing on the Proposed Consent Decree on 1990 Fort Hall Indian Water Rights Settlement Agreement, *In re* SRBA Case No. 39576, Subcase No. 27-11375 at 143–49 (July 18, 1995).

890. *Id.*

891. *Id.* at 146; *See* Affidavit of David B. Shaw, *supra* note 882, at ¶17.

of negotiations, while still allowing the Agreement to move forward.[892] As discussed *infra* at VII.A.1.b.ii, the Signatory Parties subsequently negotiated the Blackfoot Equitable Adjustment Agreement that implemented this adjustment.

(2) Other Shoshone Bannock Tribal Water Rights

In addition, to the Blackfoot tribal rights, the United States was decreed 25,500 AFY[893] of storage in Blackfoot Reservoir under state law water right no. 27-11561 and 25,500 AFY of storage in Grays Lake under state law water right no. 25-13615 for the irrigation of not more than 12,667.2 acres of non-Indian Project lands.[894] As protection for the non-Indian Project water users "[t]he first 25,500 AF of water stored each year in Blackfoot Reservoir and Grays Lake will be used to satisfy the 25,500 AFY diversion" described in water right nos. 27-11561 and 25-13615.[895] Additionally, the Tribes and the United States agreed to exercise water right nos. 25-02160, 27-11375 and 27-02007 "in a manner that will not impair the project entitlements of the Fort Hall Irrigation Project water users."[896] Despite these assurances, as discussed *infra* at Part VII.A.1.b.i, the non-Indian Project water users challenged the bifurcation of the Project water rights.

In addition to the Project water rights,[897] the United States was decreed federal reserved water rights on a number of smaller streams flowing through the Reservation. Some of the rights were based upon prior federal decrees. In *United States v. Daniels*,[898] the United States was awarded reserved water rights in Bannock Creek,[899] Rattlesnake Creek,[900] and West Fork Bannock Creek.[901] In *United States v. Hibner*,[902] the United States was awarded reserved water rights in Toponce Creek,[903] and in *Smith v. City of Pocatello*,[904] it was awarded reserved water rights in Mink Creek.[905] The priority dates of these rights were established in the prior decrees.

The United States was also decreed federal reserved surface water rights from

892. A similar equitable adjustment remark is contained in Bannock Creek water right no. 29-12052. Partial Decree for Federal Reserved Water Right 29-12052, *In re* SRBA Case No. 39576 at Section 11.b (Aug. 13, 2014).

893. Remark x.d provides that "[t]he total annual volume of water stored under [water right no. 27-11561] 27-02007 shall not exceed 348,000 acre-feet." Partial Decree for Water Right 27-11561, *In re* SRBA Case No. 39576 at Section 11.d (Aug. 13, 2014).

894. Water right nos. 27-11561 and 25-13615 place of use element viii. *See id.* at Section 9.

895. Remark x.e of water right nos. 27-11561 and 25-13615. *See id.* at Section 11.c.

896. Remark x.e of water right no. 27-11375. Partial Decree for Water Right 27-11375, *In re* SRBA Case No. 39576 at Section 11.e (Aug. 13, 2014). Remark x.c of water right nos. 27-02007 and 25-02160. *See* Partial Decree for Water Right 27-02007, *In re* SRBA Case No. 39576 at Section 11.c (Aug. 13, 2014).

897. This section is limited to a listing of other water rights decreed to the United States for the benefit of the Shoshone-Bannock Tribes. Other water rights decreed to the United States from streams other than those mentioned in the text can be found in Attachment 4 to the SRBA Final Unified Decree.

898. United States v. Daniels (D. Idaho 1907).

899. *Id.* (water right nos. 29-00466, 29-00467, and 29-00471).

900. *Id.* (water right no. 29-00468).

901. *Id.* (water right nos. 29-00469, 29-00470, 29-00472, 29-00473, and 29-00474).

902. United States v. Hibner, 27 F.2d 909 (D. Idaho 1929).

903. *Id.* (water right nos. 29-00231 and 29-00238).

904. Smith v. City of Pocatello, Case No. 6669 (5th Jud. Dist. Idaho June 26, 1926).

905. *Id.* (water right no. 29-12051).

Ross Fork,[906] Lincoln Creek,[907] Bannock Creek,[908] and the Portneuf River.[909] The priority date of these rights is June 14, 1867. Water right no. 27-11373 also lists as a source ground water within the Ross Fork Basin. The right states:

> 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 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.

Article 7.2.1 is a reference to ground water right no. 27-11376. Similar language is found in the Lincoln Creek/Lincoln Creek Basin water right no. 27-11374. Water right no. 27-11376 also explicitly provides that: "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 water right."[910]

The United States was decreed two federal reserved water rights for ground water with a priority date of June 14, 1867. Water right no. 27-11376's source is identified as "[g]roundwater within the Reservation," and provides that future points of diversion for this water right may be developed "on any Indian lands."[911] The annual diversion volume is 125,000 AFY. Water right no. 29-12052 is for 23,500 AFY of groundwater within the "Bannock Creek Basin," and like the Blackfoot natural flow water right, contains an equitable adjustment remark. The right is subordinated to the diversion of up to 2,400 AFY of ground water under junior non-Indian state law based water rights. In the event diversions under the state law based rights exceeds 2,400 AFY, the parties agreed to negotiate an equitable adjustment.[912]

(3) Shoshone-Bannock Federal Storage Contracts

Article 7.3 of Fort Hall Agreement also recognized that the tribal water supply included federal contract storage rights in American Falls and Palisades Reservoirs.[913] As part of the Congressional authorization of the Michaud Unit of the Fort Hall Indian Irrigation Project the United States Bureau of Reclamation was directed to make available to the United States Bureau of Indian Affairs 2.8059% of

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906. Partial Decree for Water Right 27-11373, *In re* SRBA Case No. 39576 (Aug. 13, 2014).

907. Partial Decree for Water Right 27-11374, *In re* SRBA Case No. 39576 (Aug. 13, 2014).

908. Partial Decree for Water Right 29-12049, *In re* SRBA Case No. 39576 (Aug. 13, 2014).

909. Partial Decree for Water Right 29-12050, *In re* SRBA Case No. 39576 (Aug. 13, 2014).

910. Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin, *supra* note 865, at 38.

911. Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin, *supra* note 865, at 35, 38.

912. Remark x.c of water right no. 29-12052. At the time of this article, the rights entitled to protection under the Bannock Creek ground water right have been identified in the partial decree 29-12052 as element 11.c; however, because of the lack of hydrologic data, it is unknown whether an equitable adjustment will be required. Partial Decree for Water Right 29-12052, *In re* SRBA Case No. 39576 (Aug. 13, 2014).

913. While the Partial Final Consent Decree and the Revised Final Consent Decree acknowledged these federal contract storage rights were part of the tribal water supply, they were not decreed by the SRBA because they are federal contracts. Revised Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin, *supra* note 838, at 14–15.

the active capacity of the American Falls Reservoir and 6.9917% of the active capacity of the Palisades Reservoir, which at the time of the Fort Hall Agreement equated to 46,931 acre-feet and 83,900 acre-feet of storage space.[914] The Fort Hall Agreement provided that water accruing to the storage space "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."[915] The Fort Hall Agreement also requires the Tribes and the Secretary "to continue to exchange storage water from the federal contract storage rights . . . for water diverted from the Portneuf River as provided for in Article 8 of the Michaud Contract, which is commonly referred to as the Michaud Exchange."[916]

The Fort Hall Agreement provides, as discussed in the next section, that the Tribes shall be entitled to rent water accruing to the federal contract storage space pursuant to state law.[917] Additionally, the Tribes may use water accruing to the federal contract storage space "not used, exchanged, or rented for instream flows for river reaches on or adjacent to the Reservation."[918]

ii. Rental of Shoshone Bannock Storage Water

The Shoshone-Bannock Tribes sought the right to market their federal reserved water rights. Both the State and water users opposed marketing of the tribal water rights because of the potential injury to junior water rights, the impact on refill of the storage reservoirs, and to ensure the maximum beneficial use of the waters of the Snake River above Milner Dam.[919] A compromise was reached in which the Tribes were granted the right to rent water accruing to their federal storage space in Palisades and American Falls Reservoirs through state-created water bank ("Shoshone-Bannock Water Bank"),[920] and "to transfer or lease within the Reservation all or any portion of the Tribal waters."[921] No tribal water rights other than the storage water "may be sold, leased, rented, transferred or otherwise used off

914. Memorandum of Agreement Between the Bureau of Reclamation and the Bureau of Indian Affairs Relating to Water Supply for Michaud Division Of The Fort Hall Reservation at 3–4 (April 25, 1957) (on file with authors).

915. Fort Hall Agreement, *supra* note 860, at Article 7.3.2.

916. *Id.* at Article 7.3.3. Under the Michaud Exchange, the Bureau of Indian Affairs diverts water from Portneuf River and then releases an equivalent amount of storage to replenish the flow of the Snake River. The Palisades storage water is the first supply used for the exchange. *Id.*

917. *Id.* at Article 7.3.4.

918. Revised Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin, *supra* note 838, at 15.

919. As set forth in the Idaho State Water Plan, Idaho in the early 20th Century established a policy of zero flow at Milner Dam. This policy as described in Clive J. Strong & Michael C. Orr, *Understanding the Swan Falls Agreement*, 52 IDAHO L. REV. 223 (2016), divides the river at the Milner Dam based upon hydrologic characteristics. The objective of the so-called "Two Rivers Policy" is to the maximum extent practicable to use the entire flow of the Snake River above Milner Dam above Milner Dam. The water marketing provisions of the Fort Hall Agreement as well as the consumptive use limits on the exercise of the tribal water rights were designed with the Milner Policy in mind.

920. Fort Hall Agreement, *supra* note 860, at Article 7.3.4.

921. Revised Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin, *supra* note 839, at 15. Paragraph II.C.2, provides however, that the transfer or lease of tribal water rights within the Reservation must be for a beneficial use and must not exceed the diversion rate, volume or consumptive use limits of the tribal water right and does not change the source unless expressly permitted by a partial decree. *Id.* The place of use for water right nos. 27-11373, 11374, and 29-12050 is specifically restricted by the partial decrees. *Id.*

the Reservation."[922]

The Palisades storage water can only be rented for use above Milner Dam.[923] This limitation minimizes the impact of tribal water rentals on the fill of the federal reservoir system above Milner Dam. The rental of Palisades storage water is further limited to stored water in excess of the amount required under the Michaud exchange agreement.[924]

The Fort Hall Agreement allows the tribes to rent their American Falls storage water for use below Milner Dam within the State of Idaho.[925] State water bank rules, at the time of settlement, provided that the space of anyone renting storage water for use below Milner Dam would be the last space to fill in the event the federal reservoir system above Milner Dam failed to fill.[926] Application of the last to fill rule to the Tribes' rental of American Falls storage water below Milner Dam was waived in exchange for the United States conveying the remaining unallocated storage space in Palisades and Ririe reservoirs to the non-Indian Snake River water users.[927]

Pursuant to the Fort Hall Agreement, the Tribes may rent its storage water through the Shoshone-Bannock Water Bank,[928] or any other state created water bank. Although the rental of tribal storage water must be done through a state-created water bank, the Fort Hall Agreement exempts tribal storage water rentals from certain water bank rules. Any rental of water through the Shoshone-Bannock Tribal Water Bank, for example, is not subject to any limitation based upon potential injury to other existing water rights or the local public interest.[929] Additionally, the Tribes' rental of storage water is not subject to forfeiture, abandonment, or relinquishment of the federal contract storage rights nor is it subject to any constraints on the rental rate.[930]

iii. Water Right Administration

The Fort Hall Agreement addresses administration of the tribal water rights because many of the tribal water rights divert from sources that originate outside the exterior boundaries of the Reservation and are shared with non-Indian water users: "In order to strike a balance among [the] sovereign interests, the parties [agreed] to cooperate in administration of water resources to protect the use of all water rights decreed in the SRBA."[931] Except for the Snake River and the Blackfoot River, the Fort Hall Agreement provides for tribal administration of the tribal water rights within the exterior boundaries of the Reservation, and State administration of state-based water rights within the Reservation "that are not a part of the Fort Hall Agency, Tribal, or Fort Hall Indian Irrigation Project water rights."[932]

The three sovereigns agreed to share administration of the Snake River tribal

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922. Revised Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin, *supra* note 838, at 17.

923. Fort Hall Agreement, *supra* note 860, at Article 7.3.4.i.

924. *Id.* at Article 7.3.5.i.

925. *Id.* at Article 7.3.4.ii.

926. The last to fill rule is designed to effectuate the Milner Zero Flow Policy. 2012 STATE WATER PLAN, *supra* note 425, at 43–46.

927. Fort Hall Agreement, *supra* note 860, at Article 7.3.5.iv.

928. IDAHO ADMIN. CODE R. 37.02.04.

929. Fort Hall Agreement, *supra* note 860, at Article 7.3.5.

930. *Id.* at Article 7.l3.11.

931. *Id.* at Article 8.1.

932. *Id.* at Article 8.2.1, 8.2.6.

water right.[933] The Fort Hall Agreement provides that the State will administer all diversions from the Snake River. The United States, however, is responsible for the physical operation of its Snake River diversion "in accordance with the Snake River Watermaster's direction."[934] In the event the United States disputes the Snake River Watermaster's instructions, the dispute will be resolved by the SRBA Court. The State has agreed to provide the United States and the Tribes' access to Snake River water measurement data and reports and allow for their inspection of water monitoring devices and diversions.[935]

The Signatory Parties were unable to agree upon their respective authority to administer water rights from the Blackfoot River so agreed to work on the development of a Blackfoot River Management Plan.[936] As part of the resolution of the Blackfoot Equitable Adjustment, the agreed to and adopted a Blackfoot River Water Management Plan.[937]

An Intergovernmental Board was created to provide a forum to sustain and foster cooperative management of the water resource and to provide a forum for "fairly resolving disputes arising under [the] Agreement without resorting to litigation."[938] The Intergovernmental Board has proven to be an important forum for the three sovereigns. It has allowed the parties to build upon the relationship that developed through the negotiation of the original Agreement.

b. Fort Hall Agreement Litigation

After the Fort Hall Agreement was signed, conflicts arose over the implementation of the Agreement. The first involved the Fort Hall Water Users Association objections to the Tribes' Snake and Blackfoot River water rights. And the second was over the "equitable adjustment" provision in paragraph x.d of the Tribes' water right 27-11375.

i. Fort Hall Water Users Association Objections

Following the May 1994, issuance of the Director's Report containing the Fort Hall Agreement and proposed consent decree the Fort Hall Water Users Association ("FHWUA"), filed objections to seven of the 25 water rights addressed in the Director's Report.[939] The FHWUA were dissatisfaction with the terms of the Fort Hall Agreement that bifurcation the Fort Hall Irrigation Project water rights into federal reserved water rights for the Tribes and state based water rights for the non-Indian Fort Hall Irrigation Project users. The FHWUA believed that splitting of the Project water rights would result in less water being available to them.

The Shoshone-Bannock Tribes, the State of Idaho and the United States filed

933. *Id.* at Article 8.4.
934. Fort Hall Agreement, *supra* note 860, at Article 8.4.1.
935. *Id.*
936. *Id.* at Article 8.3.
937. Revised Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin, *supra* note 838, at Attachment G.
938. Fort Hall Agreement, *supra* note 860, at Article 9.1.
939. Fort Hall Water Users Assoc. v. United States, 921 P.2d 739, 740, 129 Idaho 39, 40 (1996). The FHWUA represented the non-Indian Project water users.

motions to dismiss the FHWUA objections.[940] The SRBA Court granted the motions, ruling that the FHWUA did not have standing to object to the Fort Hall Agreement, because they were not claimants in the SRBA, and their objections were beyond the scope of the SRBA.[941]

The FHWUA appealed to the Idaho Supreme Court. On appeal, the FHWUA argued they had standing in the SRBA because the United States' claims were file don their behalf.[942] The Court, in affirming the SRBA Court, disagreed finding "it is clear that the United States is claiming ownership of the water rights on its own behalf and that the non-Indian individuals that are served by the Fort Hall Irrigation Project may only have use of the water rights."[943] The Court cited the FHWUA's objections as further evidence that they only had a contractual right to use the water.[944] Thus, the Court held that the FHWUA did not have standing to file an objection,[945] and "did not reach the issue of whether the FHWUA's objections [were] within the scope of the SRBA."[946]

ii. Blackfoot Equitable Adjustment

As discussed previously, Blackfoot partial decree 27-11375 provided for an equitable adjustment in the event it was later determined that water use by the the non-Indian Blackfoot natural flow water users enjoying the benefit of the subordination ("Basin 27 Water Users") exceeded 45,000 AFY. On October 20, 2010, pursuant to the SRBA Court's continuing jurisdiction over implementation of the Fort Hall Consent Decree, the Tribes and the United States filed a Motion for Enforcement seeking an equitable adjustment.[947] The United States and Tribes asserted that the Basin 27 Water Users were diverting more than the 45,000 AFY, thereby triggering the equitable adjustment.

The issue became contentious as the Signatory Parties disagreed on the meaning of paragraph 27-11375.x.d that provided:

> The Tribes and the United States agree to exercise this water right in a manner that ensures persons diverting natural flow from the Blackfoot River prior to January 1, 1990, whose rights are decreed in the SRBA will continue to receive that <u>full legal entitlement under state law</u>. 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 to <u>divert not more than 45,000 AFY of water</u> 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.[948]

940. *Id.*
941. *Id.* at 741, 129 Idaho at 41.
942. *See id.*
943. *Id.* at 742, 129 Idaho at 42.
944. Fort Hall Water Users Assoc. v. United States, 921 P.2d 739, 742, 129 Idaho 39, 42 (1996).
945. *Id.*
946. *Id.*
947. Motion for Enforcement of Fort Hall Indian Water Rights Consent Decree, *In re* SRBA Case No. 39576, Subcase No. 27-11375 (Oct. 29, 2010).
948. Fort Hall Agreement, *supra* note 860, at water right no. 27-11375.x.d. (emphasis added).

The Tribes and the United States asserted that the Basin 27 Water Users diversions exceeded the 45,000 AFY, and that they were entitled under paragraph 27-11375.x.c. of the 1995 Consent Decree to an equitable adjustment.[949] On June 3, 2011, the SRBA Court issued an order holding that: 1) there was a question of fact as to whether the 45,000 AFY had been exceeded by Basin 27 Water Users' diversions; 2) if the amount had been exceeded, then the Tribes were entitled to an equitable adjustment; 3) the 45,000 AFY is not a cap, and Basin 27 Water Users are entitled to divert to the full extent of their water rights; and 4) that the term "equitable adjustment" is ambiguous."[950] The order further instructed the parties to participate in settlement negotiations.[951]

As part of the proceeding, the State of Idaho filed a Motion for an Accounting of the Basin 27 water rights that qualified for the subordination under the Fort Hall Agreement.[952] Once that accounting was performed, it became possible to more accurately assess the amount of water historically diverted by the Basin 27 water users. The parties determined that, if the Basin 27 Water Users diverted to the full extent of their paper water rights, the 45,000 AFY limit would be exceeded. However, in most years they did not divert the full amount of their paper rights.[953] Thus, the Signatory Parties agreed a one-time equitable adjustment would not be an appropriate solution. Any adjustment to the Tribes' water right would have to be variable, based on a given year's actual diversions. In addition, determining actual diversions over the course of a year would require consistent management of the resources and better measuring devices in the basin.

The first major step toward resolution of the equitable adjustment issue was the development of a Blackfoot River Management Plan ("BRMP").[954] Approved by the all the parties, the BRMP provides a comprehensive system for measuring and accounting for water uses in the Blackfoot River Basin, for compiling the data as it is collected, and for making it available to interested parties. The BRMP requires continuous monitoring of certain Basin 27 diversions, bi-weekly monitoring of other points of diversion, and mandates measurement device standards. It also sets forth an accounting program with specified flow calculations. In a nutshell, the BRMP

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949. Motion for Enforcement of Fort Hall Indian Water Rights Consent Decree, *supra* note 945, at 2.

950. Memorandum Decision and Order for Partial Summary Judgment and Instructions on Future Proceedings, *In re* SRBA Case No. 39576, Subcase No. 27-11375 (June 3, 2011). On July 26, 2011, the Court issued an Order Clarifying Its Memorandum Decision and Order of June 3, 2011, and reiterated "[i]t was not the effect of the *Memorandum Decision* to limit in any way the mechanisms available to the parties to negotiate an equitable adjustment to the Tribal water rights in the 45,000 afy estimate contained in paragraph 27-11375.x.d. of the *Consent Decree* is exceed [sic] by non-Indian diversions diverting natural flow from the Blackfoot River prior to January 1, 1990, as a result of the Decree in the SRBA." Order Clarifying Memorandum Decision and Order on Motions for Partial Summary Judgment and Instructions on Future Proceedings, *In re* SRBA Case No. 39576, Subcase No. 27-11375 at 3 (July 26, 2011).

951. *Id.*

952. State of Idaho's Motion for An Accounting for All Water Rights Benefitting From the Subordination Provisions of the Fort Hall Consent Decree and Insertion of a Remark Memorializing that Benefit on Each Affected Water Right, *In re* SRBA Case No. 39576, Subcase No. 27-11375 (Oct. 25, 2010).

953. Water right decrees and licenses list a quantity to which the owner is entitled. This amount is known as the "paper" quantity of the water right, i.e. the quantity listed on paper. However, in practice, most water users do not use the entire quantity listed on their paper right. The limit on the diversion amount of a water right is actual beneficial use.

954. Revised Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin, *supra* note 838, at Attachment G.

provides for the efficient monitoring and administration of Tribal and non-Indian water rights in Basin 27.

Following two years of intense negotiation between the United States, the Tribes, the State of Idaho, the Committee of Nine and the Basin 27 Water Users, the parties (including those water users who sought to be part of the formal SRBA proceeding) agreed to and filed a motion with the court to approve the Blackfoot River Equitable Adjustment Settlement Agreement ("EA Agreement").[955] The EA Agreement establishes a credit account for the natural flows of the Blackfoot River. Under its terms, credit accrues when Basin 27 Water Users' diversions are less than 45,000 AFY. If Basin 27 Water Users' diversions in a given year exceed 45,000 AFY, the credits are used on an acre-foot by acre-foot basis to account for the excess. The EA Agreement limits the maximum credit balance to 40,000 AFY, with an annual maximum accrual of 20,000 AFY and maximum annual credit use of 12,000AFY.

The credit accounting system is fortified by a separate 20,000 acre-feet of equitable adjustment water[956] to ensure that that the Tribes have access to water in the event there are not enough credits to offset primary diversions by the Basin 27 Water Users in excess of 45,000 AFY. The parties determined that the combination of credits and equitable adjustment water was enough to ensure that Basin 27 Water Users can divert to the full extent of their legal entitlement, consistent with the Fort Hall Agreement.

In August 2014, the SRBA Court issued a Revised Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin.[957] In addition to incorporating the Blackfoot Management Plan and the EA Agreement into the Consent Decree, the parties agreed to have each of the water rights in the Revised Partial Final Consent Decree issued as separate partial decrees.[958] This was done so that all Shoshone-Bannock tribal water rights

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955. Order Granting Joint Motion to Approve Blackfoot River Equitable Adjustment Settlement Agreement, *In re* SRBA Case No. 39576, Subcase No. 27-11375 at 3 (Aug. 9, 2013).

956. Paragraph 2 of the EA Agreement provides that the Committee of Nine will provide the first 10,000 acre-feet of *equitable adjustment water*, and paragraph 3 provides the Committee of Nine, the State of Idaho and the Blackfoot water users will each provide one-third of the next 10,000 acre-feet of *supplemental equitable adjustment water*. Revised Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin, *supra* note 838, at Attachment F.

957. Final Unified Decree, *supra* note 145.

958. When the Revised Partial Final Consent Decree was issued, provision x.c. to water right no. 27-11375 was renumbered to x.d. and revised to read as follows:

> The Tribes and United States agree to exercise this water right in a manner that ensures persons diverting natural flow from the Blackfoot River under water rights listed on Attachment E to the Consent Decree and under *de minimis* domestic and stock water rights with a priority date earlier than January 1, 1990, will continue to receive their full legal entitlement under state law. "*De minimis* domestic water" for purposes of this paragraph means (a) the use of water for homes, organization camps, public campgrounds, livestock and for any purpose in connection therewith, including irrigation of up to one-half (1/2) acre of land, if the total use is not in excess of thirteen thousand (13,000) gallons per day, or 14.5 acre-feet per year or less for storage, or (b) and other uses, if the total use does not exceed a diversion rate of four one-hundreds (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day. Domestic rights shall not include water for multiple ownership subdivisions, mobile home parks, or commercial or business establishments, unless the use meets the diversion rate and volume limitation set forth in (b) above. "*De minimis* stock water right" for purposes of this paragraph means the use of water

could be reported in one attachment to the SRBA Final Unified Decree.

c. Shoshone-Bannock Instream Flow Water Right Claims

At the time of the execution of the Fort Hall Agreement the United States was still developing, in concert with the Shoshone-Bannock and Nez Perce Tribes, its federal reserved instream flow water right claims in the Salmon and Clearwater River basins. Thus, the Fort Hall Agreement only resolved the Shoshone-Bannock claims in the Snake River basin above Hells Canyon Dam, and the United States and Shoshone-Bannock Tribes reserved the right to assert instream flow water right claims in the Salmon and Clearwater River basins.[959]

On March 5, 1993, the Acting Solicitor of the Department of Interior informed the Shoshone-Bannock Tribes that he had recommended the United States not file off-reservation instream claims for the Tribes.[960] The Shoshone-Bannock Tribes brought suit against the United States Attorney General in the United States District Court for the District of Columbia seeking an order compelling the United States to file instream flow claims in the SRBA on their behalf.[961] On March 24, 1993, the federal district court issued a temporary restraining order requiring the United States to file instream flow claims on behalf of the Tribes.[962]

After the United States filed its instream flow claims on behalf of the Shoshone-Bannock Tribes and the Nez Perce Tribe, the Shoshone Bannock adopted 1,083 of the United States off-reservation instream flow claims as their own.[963] Subsequently, the federal district court dismissed the Shoshone-Bannock Tribes suit against the United States Attorney General for lack of subject matter jurisdiction,[964] and then the United States withdrew its instream flow claims on behalf of the Shoshone-Bannock Tribes.[965]

The Tribes then pursued instream flow claims on their own behalf.[966] After an

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> solely for livestock or wildlife where the total diversion is not in excess of thirteen thousand (13,000) gallons per day or 14.5 acre-feet per year or less for storage.

Revised Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin, *supra* note 838, at 4–5.

> These state created water rights listed on Attachment E are estimated to divert not more than 45,500 AFY of water from the Blackfoot River. The Blackfoot River Equitable Adjustment Settlement Agreement Pursuant to the 1990 Fort Hall Indian Water Rights Settlement Agreement set forth in Attachment F provides for an equitable adjustment to this water right in the event the Primary Volume diversions under the partial decrees listed on Attachment E exceed 45,000 AFY. Each of the water rights listed on Attachment E to the Revised Partial Final Consent Decree was amended to include the following remark: "This right is entitled to the protections of paragraph x.d of water right 27-11375." Order Granting Joint Motion to Include Subordination Remark on Water Right No. 27-11375 and Certain Blackfoot Natural Flow Water Rights, *In re* SRBA Case No. 39576, Subcase No. 27-11375 at 5 (Aug. 9, 2013).

959. Fort Hall Agreement, *supra* note 860, at Article 11.5.

960. Shoshone-Bannock Tribes v. Reno, 56 F.3rd 1476, 1479 (1995).

961. *Id.*

962. *Id.*

963. Letter from Candy L. Jackson, Shoshone-Bannock Tribal Attorney, to Lynne Krogh-Hampe, Idaho Deputy Att'y Gen. (Aug. 4, 1993) (on file with authors).

964. Shoshone-Bannock Tribes v. Reno, Case No. 93-0581 (D.D.C. Feb. 28, 1994).

965. Letter from Peter C. Monson, Trial Attorney for the United States, to David Shaw, Adjudications Bureau Chief for IDWR (March 14, 1994) (on file with authors).

966. Order Dismissing with Prejudice Shoshone-Bannock Tribes' Instream Flow Claims, I.R.C.P. 41(a)(2), *In re* SRBA Case No. 39576, Subcase No. 03-10080 at 2 (May 20, 2002).

unsuccessful effort to negotiate a settlement of the off-reservation instream flow claims through negotiations,[967] the SRBA, upon motion of the Shoshone-Bannock Tribes, issued an order dismissing the Tribes' off-reservation instream flow claims with prejudice.[968]

2. The Nez-Perce Indian Water Right Settlement

Another intensely contentious and complex issue arose out of the Nez Perce Tribal water right claims in the SRBA. The United States filed claims for the benefit of the Nez Perce for over 238,327 AFY of water for on reservation use, 1,888 springs and fountains outside the Nez Perce reservation,[969] and for instream flow water rights on 1,133 stream reaches outside the reservation."[970] To understand this off-reservation claims, it is necessary to look to the historical treaties signed by the Nez Perce in the nineteenth century. In 1855, the Tribes ceded title to 6.5 million acres of land traditionally occupied by the Tribe and received 7.5 million acres of reserved land, of which the Tribe had the exclusive use, including the exclusive right to fish.[971] The Tribe also retained the right of "taking fish at all usual and accustomed fishing places in common with citizens of the Territory."[972] In other words, the Tribe maintained the right to fish where it traditionally had fished, even outside of the reservation.

Subsequent treaties in 1863 and 1893 substantially diminished the size of the Nez Perce Reservation,[973] but retained the language reserving the Tribe's right to fish in all usual and accustomed places. Absent from the treaties, however, was any language addressing whether the Tribe had rights to the preservation of those streams or rivers as fish habitat.[974]

The Tribe's claims in the SRBA asserted that it had the right to the instream flows necessary to preserve the habitat of fish populations located in traditional fishing places. Even though instream water rights impact whole streams and rivers, rather than the specific traditional fishing places described by the treaties, the Tribe's

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967. Report to Court of Shoshone-Bannock Tribes Signing of Articles of Understanding, *In re* SRBA Case No. 39576, Subcase No. 03-10080 (April 12, 2002).

968. Order Dismissing with Prejudice Shoshone-Bannock Tribes' Instream Flow Claims, I.R.C.P. 41(a)(2), *supra* note 964, at 6.

969. The springs and fountain claims were based upon Article 8 of the Treaty with the Nez Perces, 1863, which provides:

> The United States also agree to reserve all springs and fountains not adjacent to, or directly connected with, the streams or rivers within the lands hereby relinquished, and to keep back from settlement or entry so much of the surrounding land as may be necessary to prevent the said springs or fountains being enclosed; and, further, to preserve a perpetual right of way to and from the same, as watering places, for the use in common of both whites and Indians.

Treaty with the Nez Perces[sic], June 9, 1863, United States and Nez Perce Tribe, 14 Stat. 647, art. 8.

970. Joint Response of United States, Nez Perce Tribe, and State of Idaho to Objections to Settlement Agreement and Consent Decree, *In re* SRBA Case No. 39576, Subcase Nos. 03-10022, 67-13701, 71-10886, and 92-00080 (Nov. 30, 2006). In addition to filing duplicate claims to those of the United States, the Nez Perce filed an additional federal reserved water right instream flow claim on the Snake River. Strack, *supra* note 840, at 638 n.17.

971. *Id.* at 640.

972. *Id*.

973. The Nez Perce Indian Reservation is located in Northern Idaho just east of the City of Lewiston and consists of approximately 100,000 acres of trust lands. RASSIER, *supra* note 857, at 14 (This figure is based upon the 86,849 acres of trust land quoted by Rassier combined with the 11,000 acres of Bureau of Land Management land the Tribe received under the 2004 Snake River Water Rights Agreement).

974. *Id.* at 3.

position was that their right to fish at traditional fishing places off the reservation carried the implied right to preserve the fish therein—including the fisheries and stream beds between the traditional fishing places. The resulting instream flow claims covered all streams in the Salmon and Clearwater basins where fish were currently or had formerly spawned, or migrated, as well as nearly all water in the main Snake River from Hells Canyon to Lewiston.[975]

From the State's perspective, the instream flow claims were extremely problematic, as they essentially deprived Idaho of its traditional sovereignty over the free-flowing waters of the state. The State has long asserted that it owns the natural flows of Idaho's streams.[976] For the Tribe to claim a federal reserved water right over much of Idaho's naturally flowing water would essentially remove the State's power to regulate or control the public's water resources. In addition, because the priority date of the claims would be based on the establishment date of the reservation, such claims, if decreed, would preclude the exercise of junior state based rights.

On December 15, 1995, the State, the United States, the Nez Perce Tribe, and certain water user entities entered into a memorandum of agreement for the purpose of negotiating the tribal instream flow claims.[977] After a year, when the negotiations proved fruitless, the parties began litigating the instream flow issue, namely, whether the United States and Nez Perce Tribe were entitled to federal reserved instream flow rights outside of the reservation. Shortly before hearing on the entitlement summary judgment motion, Idaho Power Company and the upper Snake River basin irrigators sought to revive the negotiations.[978] In 1998, the parties agreed to court ordered mandatory mediation,[979] and oral argument on the State's motion for summary judgment was stayed for a year. While the parties made some progress in that time, it was not enough to justify an additional stay, and the summary judgment arguments proceeded in 1999. Shortly thereafter, the SRBA Court granted the State's summary judgment motion and dismissed all the instream flow claims outside the Nez Perce Reservation.[980] The SRBA instream flow decision, combined with listing of the Snake River anadromous fish under the Endangered Species Act, created sufficient

975. Strack, *supra* note 840, at 641.

976. IDAHO CODE § 42-101.

977. Memorandum of Agreement Re: Negotiation of Instream Flow Claims of Bureau of Indian Affairs and Nez Perce Tribe (Dec. 15, 1995) (on file with authors). The water users were represented by the Coalition of Water Users, the Committee of Nice, and Boise-Kuna, New York, Wilder, and Big Bend Irrigation districts.

978. Strack, *supra* note 840, at 648. The State expressed "significant reservations about whether or not this is the proper time to submit these claims to mediation." Transcript, SRBA Monthly Status Conference, *In re* SRBA Case No. 39576, Subcase No. 03-10022 at 11 (Nov. 10, 1998).

979. The State of Idaho agreed to participate in the mediation on the conditions that no injury occur to existing water rights, that any settlement be statewide, and that litigation must continue on a parallel track. *Nez Perce Agreement: Hearing Before the S. State Affairs Comm.*, 58th Idaho Leg. Sess. 3 (Jan. 14, 2005) (statement of Clive J. Strong, Deputy Att'y Gen.), http://www.idaho.gov/sessioninfor/2005/standingcommittees/sstafmin.pdf.

980. Order on Motion to Strike Testimony of Dennis C. Colson, Order on United States and Nez Perce Tribe's Joint Motion to Supplement the Record in Response to the Objectors' Motion for Summary Judgment, I.R.C.P. 56(f), Order on Motion to Strike Exhibit Transcription of Letter from General Palmer to George Manypenny, Commissioner of Indian Affairs, Order on Motions for Summary Judgment of the State of Idaho, Idaho Power, Potlatch Corporation, Irrigation Districts, and Other Objectors who have Joined and/or Supported the Various Motions, *In re* SRBA Case No. 39576, Subcase No. 03-10022 (Nov. 10, 1999).

risk for all parties that they returned to the negotiation table.[981]

Negotiations continued between the parties until 2003, when they announced their intent to implement a term sheet agreement, which was lodged with the SRBA Court in April 2004. In a very short amount of time, it was ratified by Congress,[982] by the Idaho Legislature,[983] and by the Nez Perce Tribal Executive Council.[984]

a. Terms of the 2004 Snake River Water Rights Agreement

The 2004 Snake River Water Rights Agreement ("2004 Agreement")[985] addressed three primary issues: 1) what were the Tribal water rights and what compensation should the Tribe receive to ensure that its interests were met; 2) how to conserve fish habitat in Idaho; and 3) how and under what conditions would Snake River water be provided for incidental take coverage under the Endangered Species Act. Volume 42 of the Idaho Law Review contains a detailed discussion of the 2004 Snake River Water Rights Agreement, so the following discussion will be limited to a discussion of the major elements of the 2004 Agreement.[986]

i. Tribal Claims and Compensation

In return for settlement of its water right claims, the Tribe received a combination of cash, property, and water rights.[987] Over the term of the agreement, the United States was to deposit $50.1 million into a trust for the Tribe's use.[988] The fund can be used to acquire land or water rights, preserve or restore fish habitat, or develop water resources. It can also be used for agricultural development or cultural preservation. In addition, the Tribe will receive $23 million for domestic water supply and sewer systems.[989]

The 2004 Agreement also calls for the Tribe to receive 11,000 acres of federal

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981. In short, the SRBA Court's decision created risk for the United States and the Nez Perce Tribe because of the Court's holding that the Nez Perce Reservation had been diminished. *Id.* at 46. The State and the water users were concerned that even if the SRBA Court's summary judgment order was sustained on appeal that they nonetheless faced the risk that the United States would demand water from Idaho under the Endangered Species Act. Rather than recount the negotiation process, readers should consult the following articles: Francis E. McGovern, *Mediation of the Snake River Basin Adjudication*, 42 IDAHO L. REV. 547 (2006); Heidi Gudgell & Steven Moore, *The Nez Perce Perspective on the Settlement of its Water Right Claims in the Snake River Basin Adjudication*, 42 IDAHO L. REV. 563 (2006); Ann Klee & Duane Mecham, *The Nez Perce Indian Water Right Settlement—Federal Perspective*, 42 IDAHO L. REV. 595 (2006); Strack, *supra* note 840.

982. H.R. REP. NO. 4818-623, 108 Cong. 2nd Sess., Title X, Snake River Water Rights Act of 2004 (2004); S. REP. NO. 108-389, 108th Cong. 2nd Sess. (October 7, 2004); *Hearings on S. 2605 Before the Committee on Indian Affairs United States Senate*, 108th Cong. 2nd Sess. (July 20, 2004) (containing detailed discussions of the 2004 Snake River Water Rights Agreement).

983. 2005 Idaho Sess. Laws ch. 148 (ratifying the 2004 Snake River Water Rights Agreement); 2005 Idaho Sess. Laws ch. 149, 400 (amending IDAHO CODE § 42-1763B to authorize the Snake River flow augmentation program); 2005 Idaho Sess. Law, ch. 150 (establishing the state minimum stream flows provided for in the Agreement). The bills approving the 2004 Snake River Water Rights Agreement were the subject of extensive hearings that are available through the Idaho Legislative Council Office in Boise, Idaho.

984. RESOLUTION, Nez Perce Tribal Exec. Comm., NP05-210 (March 29, 2005).

985. Although referred to as the 2004 Snake River Water Rights Agreement, the settlement document is actually entitled "Mediator's Term Sheet." The parties had originally intended to convert the Mediator's Term Sheet (April 20, 2004) (on file with authors) into a settlement agreement, but because of its specificity it became the final settlement agreement.

986. *See supra* note 981.

987. Mediator's Term Sheet, *supra* note 983, at Section I. A.I.

988. *Id.* at Section I.B.

989. *Id.* at Section I.D.

land, to be held in trust for the Tribe by the BIA.[990] It provides for the Tribe to acquire control of the Kooskia National Fish Hatchery, and for joint management of the Dworshak National Fish Hatchery.[991]

The Tribe was decreed federal reserved water rights in the amount of 50,000 AFY for on-reservation consumptive uses.[992] By providing that the Clearwater River will be the source of most of this water and that any water from tributary sources cannot cause injury to state based water rights, the agreement allayed fears among the local non-Tribal populace that the tribal rights or administration would interfere with non-Tribal state based rights.[993] In exchange for dismissal of springs or fountains claims on privately owned land, the United States and Tribe were decreed water rights for springs and fountains on federal land.[994] Finally, the 2004 Agreement required a contract to be negotiated with the United States and the Tribe as to the use of 200,000 AFY of water in Dworshak reservoir.[995]

ii. Salmon and Clearwater River Basins Instream Flows

The Salmon and Clearwater River basins contain most of the State's ESA-listed anadromous fish populations. The State, the Tribe, and the United States had a shared interest in undertaking measures that would allow for the delisting of the species, as did private landowners, who feared that regulation under the ESA could result in curtailment of diversions thought to harm fish habitat. The primary goal of the 2004 Agreement was to establish voluntary programs for improvement and preservation of fish habitat in the Salmon and Clearwater Basins. Reaching this goal required establishing 203 instream flow water rights held in the name of the IWRB.[996] These rights are subordinate to all existing uses and to future domestic, commercial, municipal and industrial water rights, and in some basins, to other future water uses.[997] In this way, the United States and Tribe gained the protections they sought for fish habitat and the State retained control over the water through state based water rights.[998]

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990. *Id*. at Section I.F.

991. *Id*. at Section I.E.

992. *Id*. at Section I.A.

993. Mediator's Term Sheet, *supra* note 983, at Section A. Section A provides that "the source of most of this water right will be the Clearwater River; however, the source of some [of] this water may be from tributary streams adjacent to tribal lands to the extent unappropriated water is available and no injury to existing water rights will occur." *Id.*

994. *Id*. at Section I.I.

995. *Id*. at Section I.C.

996. *Id*. at Section II.A.

997. *Id*. at Section II.A.3.

998. Much of the habitat in the Salmon and Clearwater River Basins remains in near natural conditions. The state minimum stream flow water rights in these areas are identified on the A List in Appendix I to the Mediator's Term Sheet. Mediator's Term Sheet, *supra* note 983, at Section II.A.1. Streams deemed as flow limited are listed on the B List in Appendix I to the Mediator's Term Sheet. *Id.* at Section II.A.2. The State retained the exclusive right to change the A and B List instream flows. However, the State agreed to provide six months-notice of any change and "to consult with the Nez Perce Tribe on a government-to-government basis prior to making the change." *Id.* at Section II.A.4. Letter from Clive J. Strong, L. Michael Bogart, Don L. Roberts, Roger D. Ling, Terry Uhling, Jim Riley, Josephine Beeman, Jeffery C. Fereday, Bruce M. Smith, Idaho SRBA/Nez Perce Settlement Stakeholders, to Honorable C.L. "Butch" Otter, United States House of Representatives 3 (Sept. 22, 2004) ("Finally, the State retains the exclusive right to change or relinquish these instream flows in the future should it be determined that any of them inappropriately impair or impede future development.") (on file with authors).

The 2004 Agreement also established the Salmon/Clearwater Habitat Management and Restoration Initiative for "the conservation and restoration of habitat within the Salmon and Clearwater River Basins.[999] The initiative consisted of three components: 1) an instream flow program; 2) a forest practices program; and 3) a habitat restoration program.[1000] Funding for the cooperative agreements in this program was provided in the form of a habitat trust fund of $38 million. The intent of the parties was to develop conservation programs under Section 6 of the ESA[1001] for the purpose of providing incidental take coverage to water users and forest owners and operators within the Salmon and Clearwater River Basin.[1002]

iii. Snake River Flow Augmentation

The final component of the 2004 Agreement addressed the use of Snake River water for anadromous fish migration in the Snake River. Juvenile fish, which once migrated from Idaho to the Pacific Ocean in a matter of weeks, now take much longer to migrate through a system of eight dams. In 1992, Idaho authorized the rental of up to 427,000 AF of storage water for fish flow augmentation from the Upper Snake River.[1003] Nonetheless, there were continuing calls by downstream interests for the removal of the Snake River Dams or, in the alternative, greater flow augmentation. Thus, the State and the upper Snake River basin water users sought through the negotiations to obtain a cap on flow augmentation from Idaho and incidental take coverage under the ESA for Bureau of Reclamation reservoir operations in the Upper Snake River Basin.

The 2004 Agreement established the Snake River Flow Augmentation Program.[1004] This program consists of two tiers. Under Tier 1, the State agreed to regulate the Murphy minimum stream flows "in accordance with the Swan Falls Agreement."[1005] Tier 2 provides for the rental of up to 427 AFY of storage water from the Snake River Basin above Hells Canyon dam pursuant to State Law from willing lessors.[1006] The rental water will be added to the Tier 1 base flow. In addition,

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999. Mediator's Term Sheet, *supra* note 983, at Section II.B.

1000. *Id*.

1001. *Id*. at Section II.D.

1002. While the Agreement has led to significant habitat improvement projects and improved forest management practice within the Salmon and Clearwater River Basins, the goal of obtaining incidental take coverage under Section 6 of the ESA has proven to be elusive. This is particularly true with regard to the Idaho Forestry Program. *Id*. at Section II.B.2.a–f. Although the Mediator's Term Sheet set forth in great detail the terms of the program, the U.S. Fish and Wildlife Service and NOAA Fisheries have yet to approve the program as a Section 6 Cooperative Agreement.

1003. IDAHO CODE § 42-163A (The statute sunset on January 1, 1996 and was replaced by IDAHO CODE § 42-1763B).

1004. Mediator's Term Sheet, *supra* note 983, at Section III. The Snake River Flow Augmentation Program contains numerous details that are beyond the scope of this Article. The reader should consult Section III of the Mediator's Term Sheet for the complete details of the program.

1005. *Id.* at Section III.B. In accordance with the Swan Falls Agreement, Idaho established a 3,900 cfs average daily minimum stream flow at the Murphy gage from April 1 through October 31 of each year, and an average daily minimum stream flow of 5,600 cfs measured at the Murphy gage from November 1 through March 31 of each year. Clive J. Strong & Michael C. Orr, *Understanding the 1984 Swan Falls Settlement*, 52 IDAHO L. REV. 223, 242–43 (2016). These minimum flows, however, are fully subordinated to existing uses of water for which water rights had been perfected, or for which claims were filed by June 30, 1985. *Id*. at 243.

1006. Mediator's Term Sheet, *supra* note 983, at Section III.C; IDAHO CODE § 42-1763B (In above average water years, the Bureau of Reclamation may rent up to 487,000 AF consisting of the 427,000 AF of storage water and 60,000 AF of natural flow.).

to the Tier 1 and Tier II flows, the State of Idaho under the Agreement acquired 60,000 AF of natural flow that it has agreed to rent to the United States for a period of thirty-years.[1007] The State also acquired 60,000 AFY of natural flow water rights that it agreed to lease to the Bureau of Reclamation for a period of thirty-years for flow augmentation.[1008] In exchange for implementation of the Snake River Flow Augmentation Program, the 2004 Agreement provides that a Biological Opinion[1009] will be issued that provides incidental take coverage under the ESA for all federal actions and related private actions and all private depletionary effects above the Hells Canyon Complex.[1010] The Snake River Flow Augmentation Program is to run for a period of 30 years.

Section 4 of the 2004 Agreement provides:

> [T]he United States, on behalf of the Nez Perce Tribe, and the Nez Perce Tribe waive and release (1) all claims for water rights within the Snake River Basin in Idaho; (2) injuries to such water rights; and (3) injuries to the Tribe's treaty rights to the extent that such injuries result or resulted from flow modifications or reductions in the quantity of water available in the Snake River Basin in Idaho that accrued at any time up to and including the effective date of the Settlement Agreement, and any continuation thereafter of any such claims, against the State of Idaho, any agency or political subdivision thereof, or any person, entity, corporation, municipal corporation, or quasi-municipal corporation.[1011]

Further, the Tribe waived any claim based upon a reduction in water quality, and the right to assert that any claims made outside of Idaho shall require water within Idaho.[1012] These waivers are permanent regardless of whether other provisions of the 2004 Agreement are terminated.

3. The Shoshone-Paiute Consent Decree

The Shoshone-Paiute Tribes reside on the Duck Valley Indian Reservation, half

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1007. Mediator's Term Sheet, *supra* note 983, at Section III.C.6.

1008. *Id.* Although the 2004 Agreement authorized the United States to acquire the natural flow water rights, the IWRB acquired the water rights and then entered into a 30 year agreement with the Bureau of Reclamation to rent the water for flow augmentation. In most years, the 60,000 acre-feet of natural flow is used to achieve the 427,000 acre-feet flow augmentation goal; however, in above average water years, the Bureau of Reclamation is authorized to add the natural flow on top of storage rentals provided that the total rentals do not exceed 487,000 acre-feet. *Id.*

While the 60,000 acre-feet is intended to augment the Murphy minimum flows, no adjustment for flow augmentation is made to the measured Murphy flow for purposes of distributing water and regulating diversions in accordance with the Swan Falls partial decrees for the hydropower water rights and the minimum flow water rights. The rental water is a cumulative acre-foot volume that must reach Murphy each year between April 10 and August 31 (48,320 acre-feet), rather than an average daily flow measured in cubic feet per second. Water Right Lease Agreement between the IWRB, DIWR, and the United States, Contract No. 1425-05-WL-10-0006 at 3 (June 19, 2003); Strong & Orr, *supra* note 1005, at 272.

1009. NOAA Fisheries issued the Biological Opinion and Magnuson-Stevens Fishery Conservation and Management Act Consultation: Consultation for the Operation and Maintenance of 12 U.S. Bureau of Reclamation Projects in the Upper Snake River Basin above Brownlee Reservoir, National Marine Fisheries Service, Northwest Region (March 31, 2005).

1010. Mediator's Term Sheet, *supra* note 983, at Section III.A.

1011. *Id.* at Section IV.D.

1012. *Id.*

of which is located in southwestern Idaho and the other half in northern Nevada. The United States filed 369 federal reserved water right claims in the SRBA for that portion of the Duck Valley Indian Reservation within Idaho consisting of 263 stockwater claims, 60 domestic, commercial, municipal and industrial claims, 18 irrigation claims, 7 storage/lake level maintenance claims, 11 wildlife habitat claims, 7 instream flow water claims and 3 miscellaneous claims.[1013] At the same time, the United States was pursing separate federal reserved water rights for that portion of the Reservation located in Nevada through the Nevada general stream adjudication.[1014]

From 1990 to 2005, the United States, Shoshone-Paiute Tribes, Nevada, Idaho, and objectors to the claims sought to settle the tribal claims for the entire Reservation. The global settlement discussions faltered over legal and funding issues.

Confronted with mounting expert costs and a looming litigation deadlines, the State of Idaho, the J.R. Simplot Company, and Riddle Ranches, Inc. ("Objectors") made an Offer of Judgment pursuant to I.R.C.P. 68 to the United States to resolve the federal reserved water right claims filed in the SRBA.[1015] Objectors agreed to recognize 345 of the 369 tribal claims consisting of 263 stockwater, 60 domestic and municipal, 17 of the 18 irrigation claims and 5 of the 7 storage claims in exchange for the United States dismissing with prejudice the remaining 24 claims and its objections to the water right claims of the Objectors.[1016] On November 18, 2005, the United States conditionally accepted the Offer of Judgment subject to inclusion of the following language in the court decree: "This water right is a federal reserved water right, is not subject to loss due to non-use, and its exercise on-reservation shall be administered by the Shoshone-Paiute Tribes pursuant to a tribal water code or by the United States as trustee for the benefit of the Tribes."[1017] The United States and Objectors filed a joint motion seeking approval of the terms of the Offer of Judgment. Initially, the Shoshone-Paiute Tribes opposed the motion; however, their objections

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1013. Revised Consent Decree Approving Entry of Revised Partial Final Decrees Determining the Rights of the United States as Trustee for the Benefit of the Shoshone-Paiute Tribes to the Use of Water in the Snake River Basin within Idaho, *In re* SRBA Case No. 39576, Subcase Nos. 51-02002, 51-12756, and 51-12604 (May 25, 2006); Idaho Department of Water Resources Notice of Filing of Federal Reserved Rights Claims in Basins 51 and 55 (November 24, 1998) (listing federal reserved water right claims filed by the United States on behalf of the Shoshone-Paiute Tribes).

1014. Agreement between Shoshone Paiute Tribes of Duck Valley Indian Reservation, United States, and State of Nevada to Establish the Relative Water Rights of the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation and the Upstream Water Users, East Fork Owyhee River (Oct. 24, 2006) [hereinafter Nevada Agreement] (This agreement was signed by all parties other than the United States in 2006. The United States signed the Agreement on February 27, 2015).

1015. Letter from Clive J. Strong, Idaho Deputy Att'y Gen., Terry Uhling, J. R. Simplot Co., Charles Honsinger, & Riddle Ranches Inc., to Vanessa Boyd-Willard & Peter Monson, Assistant Chief Indian Res. Sec. (Oct. 13, 2005) (on file with authors) [hereinafter Offer of Judgment]. *Hearings on S. 462 Before the S. Comm. on Indian Affairs*, 110th Cong. 2–3. (April 26, 2007) (statement of W. Patrick Ragsdale, Director, United States Dep't Interior, Bureau of Indian Affairs). Two unstated but motivating factors behind the Objectors' Offer of Judgment were to avoid the United States' demand for a state contribution to a tribal settlement fund and the Tribes' insistence on a right to market the federal reserved water rights.

1016. *Id*. The Offer of Judgment provided that "total diversion under [the stock] water rights shall not exceed 381 acre-feet per year", and "total diversion under [the domestic, commercial, municipal and industrial] water rights shall not exceed 687 acre-feet per year." Offer of Judgment, *supra* note 1013, at 1. The Offer of Judgment further provided that the storage claims were limited to irrigation storage. *Id.*

1017. Letter from Peter C. Monson, Assistant Chief Indian Res. Sec., to Clive J. Strong, Idaho Deputy Att'y Gen., Terry T. Uhling, J.R. Simplot Co., and Charles L. Honsinger, Riddle Ranches Inc. (Nov. 15, 2005) (on file with authors).

were subsequently resolved and SRBA Court approved the Revised Consent Decree on December 12, 2006.

The Revised Consent Decree in addition to recognizing the federal reserved water rights as stipulated to by the parties contains several provisions documenting other aspects of the settlement. Paragraph 5 of the Revised Consent Decree provides that the federal reserved water rights "shall be administered by the Tribes pursuant to a tribal water code or in accordance with applicable federal law."[1018] Paragraph 6 provides that "the United States, as trustee for the benefit of the Shoshone-Paiute Tribes, waive and release all existing claims for water rights within the Snake River Basin in Idaho", and that no water right claims by the United States on behalf of the Shoshone-Paiute Tribes outside the Snake River Basin in Idaho "shall require water to be supplied from the Snake River Basin in Idaho to satisfy such claims."[1019] Paragraph 6 was included to ensure that any federal water rights decreed for the benefit of the Shoshone-Paiute Tribes in the Nevada adjudication could not be used to curtail water rights in Idaho. Finally, paragraph 6 also recognized that the United States and the Tribes could acquire water rights under state law "provided the water rights confirmed in this Consent Decree have been fully utilized at the time the application is made, or are not physically available for use through reasonable diversion facilities."[1020]

In 2006, the State of Nevada, the Shoshone-Paiute Tribes and non-Indian upstream water users reached a settlement of the federal reserved water right claims of the Nevada portion of the Duck Valley Indian Reservation ("Nevada Agreement").[1021] The Nevada Agreement proposed to recognize a federal reserved water right for 111,476 acre-feet of surface water annually from the East Fork Owyhee River Basin, 2,606 acre-feet of groundwater, and the right to the entire flow of all springs and creeks originating within the exterior boundaries of the Reservation within Nevada.[1022] The Nevada Agreement proposed to authorize the Tribes "to use its water right, off the Reservation, in accordance with applicable Federal law and state law, provided that no portion of the Tribe's water right may be permanently alienated."[1023] The United States declined to sign the Nevada Agreement because of concerns over the $60 million federal contribution required by the proposed federal legislation approving the settlement.[1024]

In 2009, Congress approved the Nevada Agreement, including the $60 million federal contribution to the tribal development fund, subject to certain exceptions.[1025] The most important exception from the State of Idaho's perspective is Section 10804(c) that provides "Notwithstanding any language in the Agreement to the

1018. Revised Consent Decree Approving Entry of Revised Partial Final Decrees Determining the Rights of the United States as Trustee for the Benefit of the Shoshone-Paiute Tribes to the Use of Water in the Snake River Basin within Idaho, *supra* note 1011, at Paragraph 6.

1019. *Id.*

1020. *Id.*

1021. Nevada Agreement, *supra* note 1012.

1022. *Id.* at 3–4.

1023. *Id.* at 4.

1024. *Hearings on S. 462 Before the S. Comm. on Indian Affairs*, *supra* note 1013 (In written testimony, Patrick Ragsdale stated that the Department of Interior opposed S. 462 because it is "inconsistent with our policy that settlement costs reflect the value of the claims being resolved and should also be proportionate to benefits received.").

1025. Pub. L. 111-11, 123 Stat. 1405–14 (2009).

contrary, nothing in this subtitle authorizes the Tribes to use or authorize others to use tribal water rights off the Reservation, other than use for storage at Wild Horse Reservoir for use on tribal land and for the allocation of 265 acre feet to upstream water users under the Agreement, or use on tribal land off the Reservation."[1026] This language was included in the legislation at the request of the State of Idaho to ensure that water not used by the Tribes would continue to flow downstream for use in Idaho. On February 27, 2015, Secretary of Interior Jewell signed the Nevada Agreement finally resolving all of the federal reserved water right claims for the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation. At the time of signing, the Secretary issued an execution statement clarifying that in signing the Nevada Agreement it was with the understanding that "Section 10804(c) of the Settlement Act precludes off-Reservation use or marketing of the Tribes' water rights '[n]otwithstanding any language in the Nevada Agreement to the contrary' among other provisions, envisioned the Tribes' ability to use or market its water right off-reservation 'in accordance with applicable Federal law and state law[.]'"[1027] Thus, while the Nevada Agreement contains reference to off-Reservation marketing of the tribal rights, Public Law 111-11 overrides these provisions of the Nevada Agreement.

B. Non-Tribal Federal Reserved Water Rights

Since *Winters*, the doctrine of federal reserved water rights has been extended to include public lands reserved for a particular governmental purpose.[1028] A reserved water right must be based on a reservation of land.[1029] When the federal Government withdraws its land from the public domain and reserves it for a federal purpose it reserves, by implication, appurtenant water to the extent necessary to accomplish the purpose of the reservation.[1030] Reserved water rights may be either express or implied.[1031] Where Congress does not expressly reserve water rights, an intent to reserve unappropriated water can be inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.[1032] The necessity of water must be so great that the without the water the purpose of the reservation would be entirely defeated.[1033] If water is only valuable for a secondary purpose of the reservation, the United States must "acquire water in the same manner as any other public or private appropriator."[1034] Thus, to determine whether there is a basis for a federal reserved water right claim a court must "assess 1) whether there

1026. *Id.* at 1407–08.

1027. Execution Statement for the Agreement to Establish the Relative Water Rights of the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation and the Upstream Water Users, East Fork Owyhee River (February 27, 2015) (on file with authors).

1028. United States v. City of Challis, 988 P.2d 1199, 1203, 133 Idaho 525, 529 (1999); *see* Cappaert v. United States, 426 U.S. 128, 138 (1976) (citing Colorado River Water Cons. Dist. v. United States, 424 U.S. 800, 805 (1976); United States v. SRBA Court for Eagle Cty., 401 U.S. 520, 522–523 (1971); Arizona v. California, 373 U.S. 546, 601 (1963); FPC v. Oregon, 349 U.S. 435 (1955); United States v. Powers, 305 U.S. 527 (1939); Winters v. United States, 207 U.S. 546 (1908)).

1029. *Cappaert*, 426 U.S. at 138.

1030. *Id.*

1031. United States v. New Mexico, 438 U.S. 696, 699–700 (1978).

1032. *Cappaert*, 426 U.S. at 139.

1033. *New* Mexico, 438 U.S. at 700.

1034. *Id.* at 709.

has been a reservation of land, and, if so 2) whether the applicable acts of Congress contain an express reservation of water, and 3) if not, whether the applicable acts imply a reservation of water."[1035] A federal reserved water right is limited to the minimum amount of water necessary to achieve the purpose of the reservation.[1036]

1. Intent to Reserve

Several congressional acts were reviewed by the SRBA and Idaho Supreme Courts to determine whether they showed an intent by Congress to reserve water. As noted above, where Congress does not expressly reserve water, an intent to reserve unappropriated water can be inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.[1037] The Idaho Supreme Court ultimately made determinations of the intent of Congress to reserve water under the Wilderness Act,[1038] the Wild and Scenic Rivers Act of 1968,[1039] Hells Canyon National Recreation Area Act ("HCNRA"),[1040] Sawtooth National Recreation Area Act ("SNRA"),[1041] the Multiple-Use Sustained-Yield Act of 1960 ("MUSYA"),[1042] and the Deer Flat National Wildlife Refuge ("Deer Flat Refuge").[1043] These decisions played an important role in defining the parameters of the implied federal reserved doctrine.

a. Wilderness Act

The Idaho Supreme Court addressed the issue of intent to reserve a federal law-based water right in *Potlatch Corporation v. United States (Potlatch I)*, 1999 WL 778325 (October 1, 1999)**.** In *Potlatch I*, the Idaho Supreme Court considered whether there was a basis for an implied federal reserved water right under Wilderness Act. In 1964, the United States Congress passed the Wilderness Act,[1044] establishing a National Wilderness Preservation System to be composed of congressionally-designated wilderness areas. Several wilderness areas were created in Idaho under the Wilderness Act including the Selway Bitterroot Wilderness Area (designated in 1964), the Gospel-Hump Wilderness Area (designated in 1978), and the Frank Church River of No Return Wilderness Area (designated 1980).

Before flowing into the Frank Church River of No Return Wilderness Area the Salmon River provides water to a large number of consumptive water users who have state-based water rights. These upstream water users had grown accustomed to receiving their water without being called out by a senior downstream water user. That expectation changed, however, when the United States filed for a federal reserved water right claim in the SRBA. The United States claim for the Salmon River was for "the entire unappropriated flow as of the date of designation,

1035. *City of Challis*, 988 P.2d at 1203–05, 133 Idaho at 529–30 (1999).
1036. Potlatch Corp. v. United States (*Potlatch II)*, 12 P.3d 1256, 1260, 134 Idaho 912, 916 (2000).
1037. *Cappaert*, 426 U.S. at 139.
1038. Pub. L. No. 88-577, 78 Stat. 890 (codified at 16 U.S.C. §§ 1131–1136).
1039. 16 U.S.C. §§ 1271–1287 (2015).
1040. Pub. L. No. 94–199, 89 Stat. 1117 (1975) (codified at 16 U.S.C. §§ 460gg–1 to 460gg–13).
1041. Pub. L. No. 92–400 §§ 1–15, 86 Stat. 612 (codified at 16 U.S.C. §§ 460aa *et. seq*.).
1042. *Id.*; Pub. L. No. 86–517, § 2, 74 Stat. 215 (1960) (codified at 16 U.S.C. §§ 528-531).
1043. *See infra* Section VII.B.1.f.
1044. Pub. L. No. 88-577, 78 Stat. 890 (codified at 16 U.S.C. §§ 1131–1136).

specifically July 23, 1980."[1045] The United States' claim for the Salmon River caused considerable consternation among the upstream water users. Having a senior downstream water use in the Wilderness Area would jeopardize the stability of their water rights. Consequently, objections were filed to the United States' claims by several entities and water users. The United States, the State of Idaho, and a number of other objectors filed cross-motions for summary judgment seeking a determination of whether the Wilderness Act provides a basis for implying a federal reserved water right the wilderness areas.[1046]

The SRBA Court issued an order granting the United States' motions for summary judgment with regard to the Wilderness Act.[1047] The SRBA Court held that the United States was entitled to an implied reserved water right to all unappropriated water within the Frank Church River of No Return, the Gospel-Hump, and the Selway-Bitterroot Wilderness Areas based on the Wilderness Act.[1048] The SRBA Court found that preservation of wilderness was the primary purpose of the Wilderness Act.[1049] The Court went on to find that the prior appropriation doctrine was not compatible with the purpose of wilderness preservation,[1050] and that the purpose of the Wilderness Areas would be entirely defeated without the reservation of water to support the wilderness areas.[1051] The Court declared that the minimum amount of water that must be reserved to fulfill the purposes of the Wilderness Areas was all unappropriated water within each area.[1052]

This decision caused great concern for the State of Idaho and the private water users with rights upstream from the Wilderness Areas. The SRBA Court's decision would mean that any state-based water right with a priority date after 1964 (for the Selway Bitterroot Wilderness Area), 1978 (for the Gospel-hump Wilderness Area, and 1980 (for the Frank Church River of No Return Wilderness Area) would be junior to the United States' right and could be cut off in times of shortage. The upstream water users would have to allow water to flow downstream to fulfill the instream flow requirements within the Wilderness Area. In addition, the fact that the United States was entitled to "all unappropriated flows" meant that the affected rivers were completely appropriated and no water was left for future development.

The State of Idaho, the City of Challis, the City of Salmon, Potlatch Corporation ("Appellants"), and a number of other objectors appealed the SRBA Court decision to the Idaho Supreme Court.[1053] The Appellants set forth several arguments on appeal contending that withdrawals under the Wilderness Act did not

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1045. United States Notice of Claim to Water Right Reserved Under Federal Law, *In re* SRBA Case No. 39576, Subcase No. 75-13605 (on file with authors). The United States also filed claims in the SRBA for federal reserved water rights for the Selway-Bitterroot, and Gospel-Hump Wilderness Areas based on the Wilderness Act. *In re* SRBA Case No. 39576 (*Potlatch I)*, 1999 WL 778325 *1 (Oct. 1, 1999), *rev'd* Potlatch Corp. v. United States (*Potlatch II)*, 12 P.3d 1256, 1260, 134 Idaho 912, 916 (2000).

1046. *Potlatch I* 1999 WL 778325 at *1.

1047. Order Granting and Denying United States' Motions for Summary Judgment on Reserved Water Rights Claims, *In re* SRBA Case No. 39576, Subcase Nos. 75-13605, 63-25239, and 79-13597 at 2 (Dec. 18, 1997).

1048. *Potlatch I* 1999 WL 778325 at *1.

1049. Order Granting and Denying United States' Motions for Summary Judgment on Reserved Water Rights Claims, *supra* note 1042, at 8.

1050. *Id.* at 14.

1051. *Id.* at 14–15.

1052. *Id.* at 15.

1053. *Id*.

constitute reservations of land for purpose of the federal reserved water rights doctrine.[1054] First, they argued that Section 4(a) of the Wilderness Act, which provides that "[t]he purposes of this Act are hereby declared to be within and supplemental to the purposes for which national forests . . . are established" makes wilderness protection and preservation a secondary purpose of wilderness areas and thus do not support federal reserved water rights.[1055] The Supreme Court held, however, that Section 4(a) must be considered in conjunction with Section 4(b) which states that "[e]xcept as otherwise provided in this Act, each agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes which it may have been established as also to preserve its wilderness character."[1056] The Court stated that when the two sections are considered together, they show Congress intended wilderness preservation to be the primary purpose for Wilderness Areas, but that preexisting purposes would continue to the extent they are consistent with preserving the wilderness character of the designated areas.[1057]

Appellants also argued that wilderness preservation could not be considered a primary purpose because the Wilderness Act did not limit the lands strictly to wilderness purposes, but allow other purposes like mining to continue.[1058] The Supreme Court held, however, that the district court properly found that the provisions aim to protect private property rights and are essentially grandfather clauses.[1059] Finally, Appellants argued that a reservation of land may occur only once and that the use of the word "designate" to withdraw the Wilderness Areas was insufficient to constitute a reservation for purposes of the federal reserved water rights doctrine.[1060] The Supreme Court, however, held that the congressional designations of the Wilderness Areas are reservations of land, and that the primary purpose of the Wilderness Areas is protection and preservation of wilderness.[1061]

The Appellants next argued that the Wilderness Act contains an express disclaimer of any federal reserved water rights.[1062] Section 4(d)(6) of the Wilderness Act provides that "[n]othing in this Act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from the State water laws."[1063] The Supreme Court held, however, that Section 4(b)(6) was intended to ensure that no then-existing water rights would be affected.[1064] It was not intended to either disallow or establish a reserved water right under the Wilderness Act.[1065]

The Supreme Court went on to determine that, while the Wilderness Act does not contain an express reservation of water, it does contain and implied reservation of water.[1066] The Court stated that the prior appropriation doctrine is inconsistent

1054. *Potlatch I*, 1999 WL 778325 at *5.
1055. *Id*.
1056. *Id*.
1057. *Id.*
1058. *Id.* at *6.
1059. *Id.*
1060. *Potlatch I*, 1999 WL 778325 at *6.
1061. *Id.*
1062. *Id.* No party argued that the Wilderness Act created an express federal reserved water right.
1063. *Id.*
1064. *Id.*
1065. *Id.*
1066. *Potlatch I*, 1999 WL 778325 at *8.

with the congressional intent to preserve the wilderness character of the Wilderness Areas because human development is incompatible with the premise of wilderness preservation.[1067] Therefore, the Court held that the SRBA Court correctly concluded that Congress impliedly reserved water rights to Wilderness Areas designated under the Wilderness Act.[1068]

The Court went on to consider whether the SRBA Court correctly found that the entire amount of unappropriated water constituting the natural flow in the Wilderness Areas is the minimum amount necessary to fulfill Congress' intent to preserve and protect the Wilderness Areas.[1069] The Court upheld the SRBA Court's reasoning that "[w]ater is required to effectuate the purpose of maintaining wilderness in its pristine natural condition. Because removing water necessarily impairs the natural state of the wilderness lands, Congress must have intended to reserve all unappropriated water."[1070] The Court held that, because it is entitled to the entire unappropriated flows, it was not required to "quantify in cubic feet per second or acre feet per year . . . because the entire amount is necessary to fulfill Congress' intent to preserve and protect the unimpaired and natural character of the Wilderness Areas."[1071]

The majority decision in *Potlatch I* was authored by Justice Silak, who was joined by Justices Trout and Walters. Justices Kidwell[1072] and Schroeder[1073] wrote lengthy dissents to the majority opinion. There was considerable political backlash to the *Potlatch I* decision. Articles and editorials appeared in the Idaho Statesman decrying the decision and calling for voters to unseat Justice Silak, who was to be shortly up for reelection.[1074]

The State of Idaho, Potlatch Corp., Hecla Mining, and other private water users

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1067. *Id.*

1068. *Id.*

1069. *Id.* at *9.

1070. *Id.*

1071. *Id.* *12.

1072. Justice Kidwell concluded that the disclaimer language found in Section 4(b)(7) of the Wilderness Act made it clear that Congress was not silent with regard to the issue of reserved water rights and therefore, there was no need to apply the federal reserved water right doctrine because it "is only intended to be used, or applicable, where Congress is silent on the issues of water." *Id.* at *14–15. Therefore, Justice Kidwell argued, "[i]t is improper for this Court, and the SRBA Court, to employ a canon of legal construction to create congressional intention when Congress has clearly stated its position." *Id.* at *10. Justice Kidwell argued that the purposes of the Wilderness Act are secondary purposes to the MUSYA and that secondary purposes are not enough for an implied federal reserved water right. *Id.* at *15. Finally, he noted that the SRBA Court's decision should be overturned because it failed to establish that the entire unappropriated flow within the Wilderness Areas was required to avoid defeating the purpose of the Wilderness Act. *Id.* at *18.

1073. Justice Schroeder wrote a separate dissent "to emphasize the effect of the Court's ruling which precludes the appropriation or water upstream, outside the wilderness, and invalidates any appropriation that has taken place since 1964 and the dates of subsequent wilderness designations. *Id.* at *21. Justice Schroeder argued that under the majority opinion, the designation of the Wilderness Areas would require that all unappropriated water above that reserved for the wilderness must be allowed to flow into and through the wilderness. *Potlatch I*, 1999 WL 778325 at *22. This extends the wilderness "far beyond its boundaries, locking into place development as it existed" on the dates the Wilderness Areas were designated. *Id.* Justice Schroeder argued the case should be "remanded to the SRBA court for a full exploration of the facts and a determination of the amount of water that must be allowed to flow into the wilderness to fulfill the purposes of the reservation." *Id.* at *25.

1074. *See* Honorable Gregory J. Hobbs, Jr., State Water Politics Versus an Independent Judiciary: The Colorado and Idaho Experiences, 20 QLR 669, 686 (Spring 2001) (quoting Editorial, Idahoans Could Place Water Rights Issue in Their Hands, THE IDAHO STATESMAN, at 6b (Oct. 14, 1999)).

moved the Court for a rehearing.[1075]Rehearing was granted[1076] and the Court issued its opinion in *Potlatch Corp. v. U.S.* (*Potlatch II*), 134 Idaho 916, 12 P.3d 1260 (2000), which reversed its decision in *Potlatch I*. Just prior to issuing its opinion in *Potlatch II*, Justice Silak stood for reelection.[1077] She lost her seat on the Supreme Court, perhaps in large part because of her authorship of the majority opinion in *Potlatch I*.[1078]

On rehearing, the United States decided not to pursue its claim to the mainstem of the Salmon River under the Wilderness Act, but rather made the claim under the Wild and Scenic Rivers Act.[1079] The rehearing was only on the other claims made pursuant to the Wilderness Act.[1080]

The Court recognized in its opinion on rehearing the economic concerns with the federal reserved water right stating: "[t]he creation of the wilderness was not intended to strangle the economic life from areas outside the wilderness."[1081] The Supreme Court held that:

> The components of the Wilderness Act that prevent development of the wilderness areas will preclude claimants from tapping into the water while in the wilderness. No implication of a reserved water right is necessary to prevent the withdrawal of water while in the wilderness. The significance of the claim is the effect upon appropriations of water outside the wilderness areas and the effect upon future claims to water rights outside the wilderness areas. . . . [T]here is no basis to conclude that the effect of the Wilderness Act was to extend beyond the borders of the wilderness areas."[1082]

Thus, the Court reversed the SRBA Court's holding that the Wilderness Act creates an implied water right.[1083] Justices Trout[1084] and Kidwell[1085] specially concurred in the opinion. Justice Silak and Justice Walters issued a lengthy dissent that reasserted the reasoning of *Potlatch I*.[1086]

1075. *See* Order Granting Petitions for Rehearing, Idaho Supreme Court Case Nos. 24546, 24547, 24548, 24557, 24558, and 24559 (Nov. 30, 1999).

1076. *Id.*

1077. Hobbs, *supra* note 1069, at 690.

1078. *See id.* at 686–88.

1079. Potlatch Corp. v. United States (*Potlatch II*), 12 P.3d 1256, 1260, 134 Idaho 912, 916 (2000).

1080. *Id.*

1081. *Id.* at 1267, 134 Idaho at 923.

1082. *Id.*

1083. *Id.* at 1268, 134 Idaho at 924.

1084. Justice Trout specially concurred in the decision arguing that, at the time Congress passed the Wilderness Act, it was aware of the federal reserved water rights doctrine. *Potlatch II*, 12 P.3d at 1271, 134 Idaho at 927. Therefore, "at the time the Wilderness Act was passed, Congress knew how to create a water right if it believed one was necessary. Where, as in this case, Congress has chosen for whatever reason, not to create an express water right despite its knowledge of a potential conflict, I believe it can no longer be inferred that such a right is necessary to fulfill the purposes of the reservation." *Id.*

1085. Justice Kidwell also specially concurred arguing that the language of Section 4(d)(7) of the Wilderness Act was an express disclaimer of federal reserved water right and that, therefore, any application of the implied reservation of water doctrine was unnecessary. *Potlatch II*, 12 P.3d at 1271–72, 134 Idaho at 927–28.

1086. In a lengthy dissent, Justice Silak, in conjunction with Justice Walters, argued that the SRBA Court was correct in finding an implied, federally reserved water right under the Wilderness Act. *Id.* at 1283–84, 134 Idaho at 939–40. Justice Silak argued: "Wilderness areas may not contain an express reservation of water by Congress, but the areas will never retain their 'wilderness character' without water. These areas are to be preserved unchanged, but a change in the flow of streams would change their wilderness character.

The Court's decisions in *Potlatch I* and *Potlatch II*, highlight the importance of the federal reserved water right "intent" issue. Construing congressional language can either ensure or destroy the federal reserved water right. It also makes clear why adjudication of all rights is important given the potential conflicts between state and federal law-based water users.

b. Hells Canyon National Recreation Area Act

In addition, to deciding whether the Wilderness Act created an implied federal reserved water right, *Potlatch I* and *II* also determined whether the United States was entitled to a federal reserved water right for the Hells Canyon National Recreation Area ("HCNRA"). The Court's decision with regard to the HCNRA was must less controversial, in part because of the geography of the HCNRA and because language in the Act expressly precluded any federal reserved water right claim on the Snake River.[1087]

The HCNRA was established in 1975 by the Hells Canyon National Recreation Area Act.[1088] The HCNRA contains the deep Hells Canyon gorge and encompasses portions of the Snake River. The United States filed federal reserved water right claims in the SRBA for all the unappropriated flows originating in the HCNRA based on the HCNRA Act.[1089] The water claimed the tributary streams had their headwaters in the HCNRA and then flowed down into Hells Canyon to the Snake River. This geography ensured that there was very little, if any, consumptive water use occurring either upstream from or within the HCNRA. Therefore, there was little potential for conflict between any federal reserved water rights issued for the HCNRA and state-based water users.

Nevertheless, multiple objections were filed to the United States claims for the HCNRA. The State of Idaho, Idaho Power, and the United States filed cross-motions for summary judgment seeking a determination whether the United States Forest Service was entitled to a federal reserved water right for the HCNRA.[1090] In ruling on the motions for summary judgment, the SRBA Court found that the HCNRA Act resulted in a reservation of land.[1091] The SRBA Court went on to find that Congress expressly reserved water for the HCNRA when it provided in the Act: "the wilderness study areas designated in section 3 of this Act, **shall comprise the lands and waters** generally depicted on the map entitled 'Hells Canyon National

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Therefore, Congress implicitly reserved sufficient water to fulfill the purpose of the Wilderness Act . . . ." *Id.* at 1282, 134 Idaho at 938.

1087. 16 U.S.C. § 460gg-3 (2015) provides:

Waters upstream from boundaries of area No provisions of the Wild and Scenic Rivers Act, nor of this chapter, nor any guidelines, rules, or regulations issued hereunder, shall in any way limit, restrict, or conflict with present and future use of the waters of the Snake River and its tributaries upstream from the boundaries of the Hells Canyon National Recreation Area created hereby, for beneficial uses, whether consumptive or nonconsumptive, now or hereafter existing, including, but not limited to, domestic, municipal, stockwater, irrigation, mining, power, or industrial uses. (b) Flow requirements No flow requirements of any kind may be imposed on the waters of the Snake River below Hells Canyon Dam under the provisions of the Wild and Scenic Rivers Act of this subchapter, or any guidelines, rules, or regulations adopted pursuant thereto.

1088. Pub. L. No. 94–199, 89 Stat. 1117 (1975) (codified at 16 U.S.C. §§ 460gg–1 to 460gg–13).

1089. *Id.*

1090. *Id.*

1091. Order Granting and Denying United States' Motions for Summary Judgment on Reserved Water Rights Claims, *supra* note 1042, at 20.

Recreation Area."[1092] Therefore, the SRBA Court found that the United States was entitled to "all unappropriated flow of water originating in tributaries located within the HCNRA."[1093]

The SRBA Court's decision was appealed to the Idaho Supreme Court in *Potlatch I* and *II*. In *Potlatch I*, the Idaho Supreme Court upheld the SRBA Court's decision with regard to the intent of Congress to reserve a water right for the HCNRA. It held the HCNRA Act constituted a reservation of land,[1094] and held the "SRBA district court correctly held that the United States is entitled to all unappropriated flows of water originating in the Snake River located within the HCNRA."[1095] However, in his dissenting opinion Justice Kidwell noted that, while he agreed a reservation of water was appropriated, he believed the majority erred in its application of the implied federal reserved water rights doctrine to determine the quantity of water reserved.[1096]

In *Potlatch II*, the Court reconsidered its decision in *Potlatch I*. The Court upheld its decision that the United States was entitled to a federal reserved water right for the HCNRA.[1097] However, the Court found that the United States was entitled only to the minimum amount necessary to fulfill the purposes of the HCNRA Act.[1098] The Court remanded the case to the SRBA Court to allow the United States to present evidence on the quantity necessary to fulfill the purposes of the HCNRA reservation.[1099] No trial was held on the issue of quantification because the parties reached a settlement of the issue which will be discussed more fully below.

c. Multiple Use Sustained Yield Act

At the same time the United States filed its claims under the Wilderness Act and the HCNRA Act it also filed claims for federal reserved water rights for the Boise, Payette, Clearwater, Nez Perce, Sawtooth, and Salmon-Challis National Forests[1100] under the Multiple Use Sustained Yield Act of 1960 ("MUSYA"). [1101] There were multiple objections to the claims.[1102] The SRBA Court consolidated these claims with the United States claims under the Wilderness Act and the HCNRA and dealt with them in the same summary judgment motion.[1103] The objectors argued that the MUSYA was a land management statute, not a reservation of land that would entitle the United States to a federal reserved water right.[1104] After reviewing the MUSYA and the United States Supreme Court holding in *United State v. New*

1092. *Id.* at 20 (emphasis in original).
1093. *Id.* at 22.
1094. *In re* SRBA Case No. 39576 (*Potlatch I*), 1999 WL 778325 *11–12 (Oct. 1, 1999).
1095. *Id.* at *13.
1096. *Id.* at *19.
1097. *Potlatch II*, 12 P.3d at 1269, 134 Idaho at 925.
1098. *Id.*
1099. *Id.* at 1270, 134 Idaho at 926.
1100. Order Granting and Denying United States' Motion for Summary Judgment, *supra* note 1042, at 16.
1101. 16 U.S.C. §§ 528–531 (1985); *City of Challis*, 988 P.2d at 1201, 133 Idaho at 527.
1102. Order Granting and Denying United States' Motion for Summary Judgment, *supra* note 1042, at 16.
1103. *Id.*
1104. *Id.*

Mexico,[1105] the SRBA Court found that, because the MUSYA did not create a reservation of land, he MUSYA had only secondary administrative purposes, and therefore, a federal reserved water right did not exist.[1106]

The MUSYA issue was appealed to the Idaho Supreme Court separately from the Wilderness Act and HCNRA issues in *United States v. City of Challis*, 133 Idaho 525, 988 P.2d 1199 (October 1, 1999). On appeal, the United States argued that the MUSYA re-reserved the national forests as of the date of its enactment for the purposes expressed in MUSYA.[1107] The State argued that the MUSYA is a land management statute that did not create a new reservation of land, but established additional purposes for which the national forests are to be managed.[1108]

The Supreme Court held that the MUSYA was not intended to be a reservation of land but was intended to broaden the purposes for administering the national forests already reserved by the Organic Administration Ac of 1897.[1109] The Court went on to note that, even if the MUSYA was intended as a reservation of land, the MUSYA does not create either an express or implied reservation of water.[1110] The purposes of the MUSYA are secondary to the Organic Act purposes and, therefore, "'there arises the contrary inference that Congress intended . . . that the United States would acquire water in the same manner as any other public or private appropriator'" and no intent to reserve water can be inferred.[1111] Accordingly, the Court upheld the SRBA Court's determination that MUSYA did not create federal reserved water rights.[1112] The Court's decision with regard to the MUSYA was important because it solidified the idea that there must be a reservation of land for an implied federal reserved water right to exist. A statute that simply creates a structure for administration of land does not qualify for a federal reserved water right.

d. Wild and Scenic Rivers Act

After the Court's decision in *Potlatch I*, the United States decided to file claims for instream flow for portions of the Mainstem and Middle Fork of the Salmon, Middle Fork of the Clearwater, Lochsa, Selway, and Rapid Rivers,[1113] based on the Wild and Scenic Rivers Act[1114] rather than on the Wilderness Act. Objections were filed to the claims and the United States filed a partial motion for summary judgment with the SRBA Court arguing that the Wild and Scenic Rivers Act expressly reserved water for the purpose of preserving and protecting the rivers.[1115] The United States also argued that it was entitled to the entire unappropriated flows in the Salmon and

1105. United States v. New Mexico, 438 U.S. 696 (1978).

1106. Order Granting and Denying United States' Motion for Summary Judgment, *supra* note 1042, at 19.

1107. *City of Challis* at 1204, 133 Idaho at 530.

1108. *Id.*

1109. 16 U.S.C. § 528 (2015); *City of Challis* at 1205, 133 Idaho at 531.

1110. *Id.*

1111. *Id.* at 1206, 133 Idaho at 532 (citing United States v. New Mexico, 438 U.S. 696, 715 (1978)).

1112. *Id.* at 1207, 133 Idaho at 533.

1113. Notices of Claim to a Water Right Reserved Under Federal Law, *In re* SRBA Case No. 39576, Subcase Nos. 75-13316, 77-11941, 77-13844, 78-10668, 78-11961, 81-10472, 81-10513, and 81-10625 (on file with authors).

1114. Pub. L. No. 90-542, 82 Stat. 906 (1968) (codified as amended at 16 U.S.C. §§ 1271, *et. seq.*).

1115. United States' Memorandum in Support of its Motion for Partial Summary Judgment on its Claims to Federal Reserved Water Rights for Wild and Scenic Rivers, *In re* SRBA Case No. 39576, Subcase No. 75-13316 (Jan. 15, 1998).

Rapid Rivers as a matter of law.[1116] The SRBA Court found that the United States was entitled to a federal reserved water right because the Wild and Scenic Rivers Act expressly reserved water for the purposes of the Act.[1117] It went on to hold, however, that the United States was not entitled to the entire unappropriated flows for the Salmon and Rapid Rivers as a matter of law because there was no support for the United States claim that the purposes of the Wilderness Act should be incorporated into the "other similar values" language of the Wild and Scenic Rivers Act.[1118] Rather, the Court held, the United States was entitled to the minimum amount necessary to fulfill the purposes of the Wild and Scenic Rivers Act.[1119] The Court held that the United States would need to present factual evidence regarding the minimum amount necessary to establish the quantities for each river segment.[1120] The SRBA Court's decision was appealed to the Idaho Supreme Court.

In *Potlatch Corporation v. United States*, the Idaho Supreme Court upheld the SRBA Court's finding that the Wild and Scenic River Act creates an express reservation of water to fulfill the purposes of the Act.[1121] Because the United States did not appeal the SRBA Court's decision that it was not entitled to the entire unappropriated flow of the Salmon and Rapid Rivers, the Supreme Court held that the United States was entitled to the minimum amount necessary to fulfill the purposes of the act.[1122] The Court remanded the case for the purpose of quantifying the United States' claims.[1123] On remand, the parties quantified the rights through settlement, which will be discussed in more detail below.

e. Sawtooth National Recreation Area Act

At the same time the United States filed claims for federal reserved water rights under the Wilderness Act, it also filed claims for federal reserved water rights based on the Sawtooth National Recreation Area ("SNRA") Act.[1124] The SNRA Act was passed by Congress in 1972.[1125] The SNRA Act created two large land reservations consisting of wilderness and non-wilderness portions.[1126] The United States' claims were for both the portions based on the Wilderness Act and the portions based on the recreation area act.[1127] The claims were for the entire unappropriated flow of the

1116. *Id.* at 4. 16 U.S.C. § 1271 provides that rivers may be designated to protect the values specifically enumerated or any "other similar value." The United States argued that the "other similar values" on the Main Salmon and Rapid Rivers demonstrated a need for the entire unappropriated flow of the river and that the language was meant to incorporate the wilderness purposes of the Frank Church Wilderness of No Return and the HCNRA Acts.

1117. Memorandum Decision Granting, in Part, and Denying, in Part, the United States' Motion for Summary Judgment on Reserved Water Rights Claims, *In re* SRBA Case No. 39576, Subcase No. 75-13316 at 5 (July 24, 1993).

1118. *Id.* at 6–8.

1119. *Id.* at 8–9.

1120. *Id.* at 11.

1121. *Potlatch II*, 12 P.3d at 1258–59, 134 Idaho at 914–15.

1122. *Id.* at 1260, 134 Idaho at 916.

1123. *Id.*

1124. Notice of Claims to a Water Right Reserved Under Federal Law, *In re* SRBA Case No. 39576, Subcase Nos. 37-19833, 63-30428, 65-20766, 71-10761, and 72-46272 (on file with authors).

1125. Pub. L. No. 92–400 §§ 1–15, 86 Stat. 612 (1972) (codified at 16 U.S.C. §§ 460aa *et. seq*.).

1126. State v. United States, 12 P.3d 1284, 1286, 134 Idaho 940, 942 (2000).

1127. Notice of Claims to a Water Right Reserved Under Federal Law, *In re* SRBA Case No. 39576, Subcase Nos. 37-19833, 63-30428, 65-20766, 71-10761, and 72-46272 (on file with authors).

water sources within the recreation area.[1128] Various water users and entities filed objections to the claims.

The United States filed a motion for summary judgment with the SRBA Court.[1129] The State of Idaho and Hecla Mining Co. filed cross motions for summary judgment opposing the United States' motion.[1130] The SRBA Court granted in part and denied in part the United State's summary judgment motion.[1131] The SRBA Court found that the SNRA Act created two land reservations, one under the Wilderness Act and one under the SNRA Act.[1132] It went on to find that the United States was entitled to a federal reserved water right for all unappropriated flows in the wilderness area portion and for a quantity to be proven at trial for the recreation area portion of the SNRA.[1133]

The State and Hecla Mining appealed the SRBA Court decision to the Idaho Supreme Court.[1134] The Idaho Supreme Court issued its opinion in the SNRA appeal contemporaneously with its decision in *Potlatch II*.[1135] Thus, when making its decision on the SNRA, the Idaho Supreme Court had the benefit of its previous decision and rehearing of *Potlatch I*. The Court's decision on the SNRA closely tracks its reasoning in *Potlatch II*. The Supreme Court held that federal reserved water rights could not be implied for either the wilderness or non-wilderness areas.[1136] According to the Court, the primary purpose of the Wilderness Act and the SNRA Act was to protect lands from the dangers of unregulated development and mining operations.[1137] Therefore, because the primary purpose of the wilderness and non-wilderness lands could be accomplished without water rights, the Supreme Court reversed the SRBA Court's finding of implied water rights.[1138] In keeping with her decision in *Potlatch I* and her dissent in *Potlatch II*, Justice Silak dissented from the majority opinion.[1139] The Court's decision with regard to the SNRA reemphasized its holding in *Potlatch II* by making clear that an intent to create a federal reserved water right would only be implied if the purpose of the act would be entirely defeated without water.

1128. Notice of Claims to a Water Right Reserved Under Federal Law, *In re* SRBA Case No. 39576, Subcase Nos. 37-19833, 63-30428, 65-20766, 71-10761, and 72-46272 (on file with authors).

1129. The United States' Memorandum in Support of Motion for Summary judgment on Claims to Federal Reserved Water Rights for the Sawtooth National Recreation Area, *In re* SRBA Case No. 39576, Subcase No. 65-20766 (March 20, 1998).

1130. Memorandum Decision Granting, in Part, and Denying, in Part, the United States' Motion for Summary Judgment on Reserved Water Rights Claims, *In re* SRBA Case No. 39576, Subcase No. 65-20766 at 2 (Sept. 15, 1999).

1131. *Id.*

1132. *Id.* at 3–8.

1133. *Id.* at 8–10.

1134. *Id.*

1135. State v. United States, 12 P.3d 1284, 134 Idaho 940 (2000).

1136. *Id.* at 1290, 134 Idaho at 946.

1137. *Id.* at 1289, 134 Idaho at 945.

1138. *Id.* at 1291, 134 Idaho at 947.

1139. Justice Silak dissented from the majority opinion arguing that the majority's analysis of the primary purpose of the SNRA Act was flawed. *Id.* at 1292, 134 Idaho at 948. She noted that the Wilderness Act and the SNRA Act specifically stated that water was necessary to fulfill the areas' primary purposes—protection of scenic and recreational values, and protection of fisheries and lakes and rivers that provide habitat for fish. *Id.* Therefore, Justice Silak would have affirmed the SRBA Court's finding of implied water rights under the *Winters* doctrine, but would have remand the case for a determination of the amount necessary to fulfill the purposes of the non-wilderness areas. State v. United States, 12 P.3d at 1293, 134 Idaho 949 (2000).

f. Deer Flat National Wildlife Refuge

Finally, the Idaho Supreme Court dealt with the issue of intent to create a federal reserved water right with regard to the Deer Flat National Wildlife Refuge. The Deer Flat National Wildlife Refuge was created by several acts over the course of many years. In 1909, the Deer Flat Reservation for the Protection of Wild Birds was withdrawn from the public domain pursuant to Exec. Order No. 1032 (February 25, 1909).[1140] This reservation was located on Lake Lowell Reservoir.[1141] In 1937, the Deer Flat Migratory Waterfowl Refuge was established on the same land that was withdrawn in 1909.[1142] Also in 1937, the Snake River Migratory Waterfowl Refuge was established by executive order.[1143] This order withdrew islands in the Snake River referred to as the 'upper reach' islands.[1144] In 1963, a second section of islands in the Snake River, known as the 'lower reach' islands were reserved by executive order.[1145] The two island reaches and Lake Lowell were later consolidated into a single wildlife refuge known as the Deer Flat National Wildlife Refuge ("Deer Flat Refuge").[1146]

The United States filed claims for reserved water rights for the Deer Flat Refuge.[1147] The State of Idaho, various municipalities, irrigation companies, and private entities objected to the United States' claims.[1148] After conducting a considerable amount of discovery, the State of Idaho filed a motion for summary judgment in the case asking the SRBA Court to disallow the Deer Flat claims[1149] and the United States filed a cross motion for summary judgment.[1150] The SRBA Court considered the question of whether the United States was entitled to a federal reserved water right for the Deer Flat Refuge.[1151] The SRBA Court found that the Deer Flat Refuge was established by executive orders that did not give rise to either an express or an implied federal reserved water right.[1152] The Court found that the primary purpose of the refuge was to reserve islands as a sanctuary for migratory birds and that water was not essential to accomplishing this purpose.[1153] The Court noted that it would only imply a federal reserved water right if is was "absolutely necessary to fulfill the primary purposes of the reservation."[1154] The United States

1140. U.S. v. State, 23 P.3d 117, 120, 135 Idaho 655, 658 (2001).

1141. *Id.*

1142. *Id.* at 121, 135 Idaho at 659.

1143. *Id.*

1144. *Id.*

1145. *Id.*

1146. U.S. v. State, 23 P.3d at 121, 135 Idaho at 659.

1147. Idaho Department of Water Resources Abstracted Claims to Water Rights Base on Federal Law *In re* SRBA Case No. 39576, Subcase Nos. 02-10063, 02-10064, 03-10020, and 03-10021 (March 31, 1994).

1148. *Id.*

1149. Memorandum in Support of Motion for Summary Judgment, *In re* SRBA Case No. 39576, Subcase No. 02-10063 (June 30, 1998).

1150. United States' (Fish and Wildlife Service) Memorandum in Support of its Motion for Partial Summary Judgment, *In re* SRBA Case No. 39576, Subcase No. 02-10063 (June 30, 1998).

1151. Memorandum Decision Granting State of Idaho's Motion for Summary Judgment, *In re* SRBA Case No. 39576, Subcase No. 02-10063 at 2 (Dec. 21, 1998).

1152. *Id.* at 5.

1153. *Id.* at 5–11.

1154. *Id.* at 12.

appealed.[1155]

The Idaho Supreme Court held that the primary purpose of the reservation was to create sanctuaries for migratory birds to protect them from hunters and trappers so they would not become extinct and so they could continue to benefit husbandry.[1156] However, the Court held that "simply reserving an area of land where certain species are attracted, without more, does not constitute a reservation of water."[1157] The Court went on to note that "there is no standard for the amount of water necessary to have an island" and an absence of any standard for quantification is indicative of the fact that quantification was not meant to be determined.[1158] In addition, the Court noted that a reserved water right would frustrate the United States' control and use of its own reclamation activities on the Snake River.[1159] Therefore, the Court affirmed the SRBA Court's decision denying the United States' claim for a federal reserved water right.[1160]

This decision further narrowed the scope of instances where the Court was willing to imply a federal reserved water right. Not only must the purposes of the reservation be entirely defeated, but there must also be a viable means of quantifying the right. Without a standard for quantification the Court would assume that no quantification is possible and therefore Congress did not intend to create a water right.

2. Quantification of Implied Federal Reserved Water Rights

The Idaho Supreme Court cases discussed above were useful in defining the parameters of the implied federal reserved water rights doctrine. The Court's analysis in each of the cases provided important guidance for when it would find an intent to imply a federal reserved water right in an act or executive order. Ultimately, the Court held that the United States was entitled to federal reserved water rights under the Wild and Scenic Rivers Act and the HCRNA Act. The Court established that the quantity reserved for these implied federal reserved water rights was the "minimum amount necessary to achieve the purposes of the reservation."[1161] The Court noted, however, that quantification of the minimum amount necessary was a factual determination that should be determined by the district court.[1162] Thus, the United States and the objectors to the Wild and Scenic and HCRNA claims were left with two avenues to quantify the federal reserved rights. They could return to district court and litigate the quantification of the rights, or they could pursue a negotiated settlement.

a. Negotiations

After litigation the federal reserved water right entitlement issues, the United

1155. U.S. v. State, 23 P.3d 117, 120, 135 Idaho 655, 658 (2001).
1156. *Id.*
1157. *Id.*
1158. *Id.*
1159. *Id.* at 666, 23 P.3d at128.
1160. *Id.* at 667, 23 P.3d at 129.
1161. *Potlatch II*, 12 P.3d at 1260, 134 Idaho at 916.
1162. *Id.* at 1270, 134 Idaho at 926 ("However, the question of the amount of water necessary to fulfill the purpose of the reservation involves a factual inquiry."); *see also id.* at 916, 12 P.3d at 1260.

States and the objectors quantified the amount of the federal reserved water rights through negotiations. Negotiations allowed the parties more flexibility than they would have had within the structure of litigation. The State of Idaho entered the negotiation with a clear set of objectives. It wanted to ensure the federal reserved water rights would not injure existing water users and it wanted to preserve a certain amount of water for future development. The United States entered the negotiations with the objective of maximizing the quantity of water under its rights. In the end, each party compromised to achieve a result that was acceptable to all.

i. The Wild and Scenic Rivers Water Right Agreement

In the absence of a recognized methodology for quantifying Wild and Scenic reserved water rights, the United States, the State, and certain private parties entered into a stipulation[1163] that quantified water rights for the Mainstem Salmon, Middle Fork Salmon River, Selway, Lochsa and Rapid Rivers ("Wild and Scenic Stipulation"). The Wild and Scenic Stipulation provided for entry of partial decrees for each of the Wild and Scenic water rights and set forth how the Wild and Scenic water right decrees would be administered by IDWR.[1164] The partial decrees for the Wild and Scenic water rights are based on two principles, quantification of the United States' instream flow amounts and subordination protection for certain state-based water rights.

First, the quantity of each water right was determined using exceedence flows.[1165] For example, the Main Salmon partial decrees were quantified at an exceedence flow of approximately 40% for the months of August through April and 30% for the months of May through July.[1166] The quantity for the Middle Fork Salmon, Rapid River, Lochsa, and Selway federal reserved water rights was set at an exceedence flow of approximately 20%.[1167] In addition, the United States is also entitled to all flows above a specified high-flow amount.[1168]

Second, the federal reserved water rights were subordinated to five classes of state-based water rights: 1) all water right claims filed in SRBA as of the date of the

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1163. Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees, *In re* SRBA Case No. 39576, Subcase No. 75-13316 (Aug. 20, 2004).

1164. *Id.*

1165. "Exceedence" is a way to describe the percentage of time for which an observed stream-flow is greater than or equal to a defined stream flow. IWRB, Exceedence Flows *available at:* https://www.idwr.idaho.gov/waterboard/WaterPlanning/nezperce/exceedence_flows.htm Exceedence flows can be useful when stream-flow data show that high flow events cause the average flow to be greater than the median flow. *Id.* Low flows have high exceedence percentages, e.g. an 80% exceedence is a low flow because the flow in the river exceeds that amount 80% of the time. *Id.* High flows have low exceedence percentages, e.g. a 10% exceedence is a high flow because the flow in the river exceeds that amount only 10% of the time. *Id.*

1166. *See* Partial Decree for Federal Reserved Water Rights 75-13316 and 77-11941 Salmon Wild and Scenic River, *In re* SRBA Case No. 39576 at Section 3 (Nov. 16, 2004).

1167. *See* Partial Decree for Federal Reserved Water Right 77-13884 Middle Fork Salmon Wild and Scenic, *In re* SRBA Case No. 39576 (Nov. 16, 2004); Partial Decree for Federal Reserved Water Right 78-11961, *In re* SRBA Case No. 39576 (Nov. 16, 2004); Partial Decree for Federal Reserved Water Right 81-10472, *In re* SRBA Case No. 39576 (Nov. 16, 2004); Partial Decree for Federal Reserved Water Right 81-10513, *In re* SRBA Case No. 39576 (Nov. 16, 2004); Partial Decree for Federal Reserved Water Right 81-10625, *In re* SRBA Case No. 39576 (Nov. 16, 2004).

1168. *See e.g.*, Partial Decree for Federal Reserved Water Rights 75-13316 and 77-11941 Salmon Wild and Scenic River, *supra* note 1164, at Section 3.b (providing the United States will all flows between 13,600 cfs and 28,400 cfs.)

Wild and Scenic Stipulation,[1169] 2) all applications for permit, permits, and licenses with proof of beneficial use due after the start of the SRBA that were on file with IDWR as of the date of the Wild and Scenic Stipulation, [1170] 3) new *de minimis* domestic water rights,[1171] 4) new *de minimis* stockwater rights,[1172] and 5) a finite amount of water for other future uses authorized pursuant to state law.[1173] Water

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1169. *See e.g. id.* at Section 10.b.(1) (subordinating the right to "[a]ll water right claims filed in the Snake River Basin Adjudication (SRBA) as of the effective date of the Stipulation to the extent ultimately decreed in the SRBA.")

1170. *See e.g. id.* at Section 10.b.(2) (subordinating the right to "[a]ll applications for permit and permits with proof of beneficial use due after November 19, 1987, on file with IDWR as of the effective date of the Stipulation, to the extent such applications for permit or permits are ultimately licensed; and all water right licenses with proof of beneficial use due after November 19, 1987, on file with IDWR, as of the effective date of the Stipulation.") Collectively, Section 10.b(1) and (2) of the partial decrees subordinate the Wild and Scenic water rights to all junior state based water rights with a priority date prior to September 1, 2003, the effective date of the Stipulation.

1171. *See e.g. id.* at Section 10.b.(3). (incorporating the definition of *de minimis* domestic use from IDAHO CODE § 42-111. ("All domestic uses, which for purposes of this Partial Decree shall be defined as set forth at I.C. § 42-111(1)(a) & (b) to mean the use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half acre of land, if the total use is not in excess of thirteen-thousand (13,000) gallons per day or any other uses, if the total does not exceed a diversion rate of four one-hundreds (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day, provided that this domestic use subordination is limited and defined by I.C. 42-111(2), so that the subordination shall not and does not apply to multiple ownership subdivisions, mobile home parks, or commercial or business establishments, unless the use meets the diversion rate and volume limitations set forth in I.C. 42-111(1)(b) (0.04 cfs/2,500 gpd), and by I.C. 42-111(3), so that the subordination shall not and does not apply to multiple water rights for domestic uses which satisfy a single combined water use that would not itself come within the above definition of domestic use.")).

1172. *See e.g., id.* at Section 10.b.4 (incorporating the definition of *de minimis* stockwater use from IDAHO CODE § 42-1401A(11). ("All de minimus stockwater uses, which for the purposes of this Partial Decree shall be defined as set forth at I.C. § 42-1401A(12) to mean the use of water solely for livestock or wildlife where the total diversion is not in excess of thirteen-thousand (13,000) gallons per day. This de minimus stockwater use subordination is limited and defined by I.C. § 42-111(3), so that the subordination shall not and does not apply to multiple water rights for stockwater uses which satisfy a single combined water use that would not itself come within the above definition of stockwater use.")).

1173. The amount of water available for such uses is specified in each partial decree. *See e.g. id.* at Section 10.b.(6). Section 10.b.6 subordinates the rights to future water rights with a total combined diversion of 150 cfs when the mean daily discharge at the Shoup gage is less than 1,280 cfs, and an additional diversion of 225 cfs when the mean daily discharge at the Shoup gage is equal to or greater than 1,280 cfs. The partial decrees limit the amount of future use for irrigation to no more than 5,000 acres of irrigation when the mean daily discharge at the Shoup gage is less than 1,280 cfs, and no more than 10,000 acres of irrigation when the mean daily discharge at the Shoup gage is equal to or greater than 1,280 cfs. Section 10.b.5 of the partial decree 77-13844 for the Middle Fork Salmon subordinates the right to future water rights with a 1) a total combined diversion of 60 cfs, but limits the subordination to 2,000 acres of irrigation, and 2) to a total combined diversion of 5 cfs within a portion of Monumental and Marble Creek basins for any commercial or industrial uses. *Id.* at Section 10.b.(5). Partial decree 81-10472 for the Selway River and partial decree 81-10513 for the Lochsa River are each subordinated to a total combined diversion amount of 40 cfs for future uses, including not more than 500 acres of irrigation in each basin. Partial Decree for Federal Reserved Water Right 81-10472, *In re* SRBA Case No. 39576 at Section 10.b.(5).(b).(A) (Nov. 16, 2004); Partial Decree for Federal Reserved Water Right 81-10513, *In re* SRBA Case No. 39576 at Section 10.b.(5).(b).(A) (Nov. 16, 2004). The partial decree 81-10625 for the Middle Fork Clearwater is subordinated to future water rights with a total combined diversion of 40 cfs, but limits future irrigation use to no more than 500 acres. Partial Decree for Federal Reserved Water Right 81-10625, *In re* SRBA Case No. 39576 at Section 10.b.(5).(b).(A) (Nov. 16, 2004). The 40 cfs of future use subordination under partial decree 81-10625 is in addition to the amount of future use subordination provided for in partial decrees 81-10513 and 81-10472. Partial decree 78-11961 for the Rapid River is subordinated to future uses with a total combined diversion of 10 cfs, but limits future irrigation use to no more than 300 acres. Partial Decree for Federal Reserved Water Right 81-10625, *In re* SRBA Case No. 39576 at Section 10.b.(5).(b).(A) (Nov. 16, 2004). The subordination for irrigation specifies

rights of the United States, instream flow water rights, nonconsumptive water rights,[1174] and replacement water rights[1175] do not count against the finite future amount of water available for development.[1176] In addition, the federal reserved water rights for the Main Salmon River are also subordinated to municipal uses provided "that any municipal hookup that has a manufacturer's rated maximum flow capacity of equal to or greater than 2 cfs of water on an instantaneous basis, other than capacity for fire protection, . . . counts against the finite future subordination limit of the partial decree."[1177]

The Wild and Scenic Stipulation called for the creation of water districts so that the partial decrees could be administered.[1178] IDWR is tasked with maintaining a database that tracks those water rights enjoying the benefit of subordination under paragraph 10.b.(6) of the Main Salmon River partial decrees and paragraph 10.b.(5) of the other Wild and Scenic partial decrees.[1179] IDWR was also tasked with maintaining an accounting database that identifies 1) all accepted applications for permit and claims with points of diversion upstream from the ending points of the Wild and Scenic partial decrees, 2) those applications and claims that enjoy the benefit of subordination, 3) the applicable subordination provision, and 4) for those "water rights decrees, permits and licenses that come within the future use subordination [of paragraph 10.b.(6) for the Main Salmon and 10.5(5) of the other

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a maximum diversion rate of .02 cfs/acre. *Id.* In addition, the subordination for storage is limited to incidental storage, which is "defined as storage of not more than a 24 hour water supply for any beneficial use." *Id.*

1174. Partial Decree for Federal Reserved Water Rights 75-13316 and 77-11941 Salmon Wild and Scenic River, *supra* note1164, at Section 10.b.4

> Nonconsumptive water rights mean all beneficial uses of water having these characteristics: i) the use involves no diversion from the designated reach of the Wild and Scenic River as identified in this Partial Decree; ii) all return flows from the use accrue to the Wild and Scenic reach; and iii) the use does not cause a depletion or a change in timing of the flow (other than incidental evaporation or seepage) as determined at the point(s) of return, whether or not the depletion or change in timing can be measured within the designated reach. Examples of such uses include: i) run-of-the-river hydroelectric facilities; ii) fish propagation uses; and iii) other similar uses.

1175. *Id.*

> Replacement water rights means all irrigation appropriations issued for the same purpose of use and place of use covered by an existing water right with no increase in period of use, diversion rate, and, if applicable, volume of water. To be considered a replacement water right: i) no element of the new appropriation may exceed that of the original water right; ii) only the original or the replacement water right or part of each water right may be used at the same time; and iii) the replacement water right cannot be used when water would not be legally and physically available under the original water right.

1176. *See supra* note 1161.

1177. *Supra* note 1161.

1178. Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees, *supra* note 1158, at Section 2.b.2. Section 2 of the Stipulation called for the creation of a water district in the Salmon River Basin. *Id.* at Section 2. When IDWR issued an order creating the district, Thompson Creek Mining Company challenged the order alleging denial of due process, takings, and violation of the Administrative Procedure Act. Both the SRBA Court and the Idaho Supreme Court affirmed the Director's Order creating the water district. Amended Order Approving Stipulation and Entry of Partial Decrees, *In re* SRBA Case No. 39576, Subcase No. 75-13316 at 2 (Nov. 17, 2004); Thompson Creek Mining Co. v. Idaho Dep't of Water Resources, 220 P.3d 318, 148 Idaho 200 (2009). The SRBA Court found that the provisions of Section 2 of the Stipulation "are covenants among the signatory parties only and shall not be binding on this Court or non-signatory parties with regard to administration of water rights by IDWR." *Id.* at 208, 220 P.3d at 327.

1179. Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees, *supra* note 1161, at Section 3.d.

Partial Decrees] the diversion rate, and for irrigation rights, the number of irrigated acres, decreed, permitted or licensed, including any reductions in permitted amounts as licensed, to be credited to the applicable future use subordination."[1180] In addition the subordination database identifies adjustments made to the future subordination amounts as a result of the forfeiture, abandonment, or lapse of water rights or that IDWR determines are water rights of the United States.[1181] Finally, the database lists a running total of the amounts of future use subordination that remains available for appropriation under paragraph 10.b.(6) of the Main Salmon River partial decrees and 10.b.(5) of the other partial decrees.

The Stipulation also set forth a dispute resolution process to be used in case any disputes arises regarding implementation of the Wild and Scenic Stipulation.[1182] The first step in the process requires the parties to engage in a good faith effort to resolve any dispute.[1183] If the parties are unable to resolve a dispute, any party may seek judicial review "within six months of the challenged action, or within six months of the notification of the challenged action (if notice is required under the terms of the Stipulation), whichever is later."[1184] Review of any challenged action is de novo and any disputed factual issues will be decided based upon a preponderance of the evidence.[1185] The SRBA Court retained continuing jurisdiction for purposes of enforcement of the subordination provisions.[1186]

ii. Hells Canyon Negotiated Agreement

As discussed above, the Idaho Supreme Court held in *Potlatch II*, [1187] that the HCNRA Act expressly reserved the minimum amount of water in the tributary streams of the Snake River within the HCNRA necessary to achieve the purposes of the HCNRA. [1188] The Court remanded the case to the SRBA Court for a factual determination of the amount of water necessary to achieve the purposes of the HCNRA.[1189] On remand, the parties negotiated a stipulated agreement quantifying the federal reserved water rights for the HCNRA that was subsequently approved by the SRBA Court with the exception of paragraph 2, which like the Wild and Scenic River Stipulation, addressed administration of water rights.[1190]

1180. *Id.* at Section 3.e.

1181. *Id.*

1182. *Id.* at Section 4.

1183. *Id.*

1184. *Id.*

1185. Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees, *supra* note 1161, at Section 4.

1186. Amended Order Approving Stipulation and Entry of Partial Decrees, *supra* note 1176, at 2

1187. *Potlatch II*, 12 P.3d 1260, 134 Idaho 916.

1188. *Id.* at 1269, 134 Idaho 925 ("In reserving waters within the boundaries of the HCNRA, Congress exempted from the reservation the mainstem of the Snake River and all tributaries upstream and downstream from the boundaries of the HCNRA").

1189. *Id.* at 1270, 134 Idaho at 926.

1190. Order Approving Stipulation and Entry of Basin 79 Partial Decrees, *In re* SRBA Case No. 39576, Subcase No.79-13597 (Nov. 16, 2004); Order Approving Entry of Basin 78 Partial Decrees, *In re* SRBA Case No. 39576, Subcase No. 79-13597 (May 2, 2005). The Order Approving Stipulation and Entry of Basin 79 Partial Decrees provides "that the provisions of paragraph 2 of the Stipulation ("paragraph 2") that address administration of water rights are covenants among the signatory parties only and shall not be binding on this Court or non-signatory parties with regard to administration of water rights by IDWR." Order Approving Stipulation and Entry of Basin 79 Partial Decrees, at 2.

The HCNRA Stipulation[1191] provided for entry of thirty-two partial decrees for streams and lakes within the HCNRA.[1192] Each partial decree has a priority date of December 31, 1975; however, the partial decrees provide that the water rights are subordinated to junior water right claims filed in the SRBA prior to September 1, 2003 to "the extent ultimately decreed in the SRBA," and "all applications for permit and permits with proof of beneficial use due after November 19, 1987, on file with IDWR as of [September 1, 2003] to the extent such applications for permit or permits are ultimately licensed; and all water right licenses with proof of beneficial use due after November 19, 1987, on file with IDWR as of [September 1, 2003]."[1193] Additionally, each partial decree is subordinated to all *de minimis* domestic uses as defined in Idaho Code § 42-111 and all *de minimis* stockwater uses as defined by Idaho Code § 42-1401A(11).[1194] The partial decrees for Corral[1195] and Kirkwood[1196] Creeks are also subordinated to specified amount of water for other future uses. The Corral Creek right is subordinated to future water uses with "a total combined diversion of 0.10 cfs for any purposes."[1197] The Kirkwood Creek right is also subordinated to future water uses with "a total combined diversion of 0.10 cfs for any purposes."[1198]

Paragraph 2 of the HCNRA Stipulation describes the process for administration of water rights upstream from the ending point of the partial decrees.[1199] Because of the remoteness of the HCNRA and the limited number of water rights above the ending point or point of the federal reserved water rights, the parties agreed creation of water districts for purposes of distribution of the HCNRA water rights was not necessary.[1200] Instead, the HCNRA Stipulation provides that IDWR will: "A) collect and record diversion data; B) enforce the water rights in priority; and C) curtail unauthorized or excessive diversion based on the authorities of Chapter 6, Title 42, Idaho Code."[1201]

Paragraph 3 of the HCNRA Stipulation describes the process for administration of the subordination provisions.[1202] IDWR is tasked with maintaining an accounting database for the purpose of tracking the amount of water allocated under the future

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1191. Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees, *supra* note 1158. The Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees has an effective date of September 1, 2003.

1192. *Id.* at Section 1 (Aug. 17, 2004).

1193. *See e.g.* Partial Decree for Federal Reserved Water Right 78-12200, *In re* SRBA Case No. 39576 at Section 10.b.(1), (2) (May 2, 2005).

1194. *See e.g. id.* at Section 10.b.(3), (4).

1195. Partial Decree for Federal Reserved Water Right 79-14056, *In re* SRBA Case No. 39576 (Nov. 16, 2004).

1196. *Id.* at Section 10.b.(5).

1197. Partial Decree for Federal Reserved Water Right 79-14061, *In re* SRBA Case No. 39576 (Nov. 16, 2004).

1198. Partial Decree for Federal Reserved Water Right 79-14056, *supra* note 1189, at Section 10.b(5)(b); Partial Decree for Federal Reserved Water Right 79-14061, *supra* note 1191, at Section 10.b(5)(b) (providing that water rights established by the United States, nonconsumptive water rights and replacement water rights shall not be deducted from the subordination amount in paragraph 10.b(5)(A).).

1199. Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees, *supra* note 1158, at Section 2.

1200. *Id.* at Section 2.b.

1201. *Id*. Section 2.d. also provides that IDWR will pursue civil enforcement actions as appropriate under Idaho Code §§ 42-351 and 42-1701B.

1202. *Id.* at Section 3.

use subordination provisions for the Corral and Kirkwood Creek water rights.[1203] This accounting database is similar to the one IDWR set up to track the subordination amounts under the Wild and Scenic water rights. The SRBA Court retained jurisdiction "for the purpose of resolving disputes among the signatory parties regarding the implementation and enforcement of the Stipulation."[1204]

As with the Wild and Scenic Stipulation, negotiation allowed the parties to determine the quantity for the HCNRA water rights without having to resort to the expense of litigation. By the time the HCNRA Stipulation was entered, a pattern for settling federal reserved water rights had developed. The HCRNA Stipulation and the Wild and Scenic Stipulation provided a template for future federal reserved water rights negotiations, most notably in the Owyhee Wild and Scenic Agreement discussed below.

iii. Owyhee Wild and Scenic Stipulation

During the pendency of the SRBA, Congress enacted the Omnibus Public Land Management Act of 2009 ("Owyhee Act") that, among other things, designated 517,000 acres of federal land in southwestern Idaho for inclusion in the federal Wilderness system and 384 miles of rivers in the federal Wild and Scenic river system. [1205] The Owyhee Act sought to resolve many of the contentious natural resources issues in Owyhee County. One of these issues was whether designation of lands and rivers under the Wilderness Act and the Wild and Scenic Rivers Act would create federal reserved water rights. Consistent with the Idaho Supreme Court's decision in *Potlatch II*,[1206] Section 1503 of the Owyhee Act expressly disclaimed any intent to reserve unappropriated water under the Wilderness Act.[1207] The Owyhee Act, however, expressly recognized Congressional intent to reserve water to fulfill the purposes for designation of river reaches under the Wild and Scenic River Act.[1208]

In recognition of the past conflict over quantification of federal reserved water rights for Wild and Scenic rivers, the Owyhee Working Group[1209] crafted the Owyhee Initiative Wild and Scenic Rivers Water Right Agreement ("OI

1203. *Id.*

1204. *Id.* at Section 5.

1205. Pub. L. 111-11, 123 Stat. 991, 1037–39 (2009).

1206. In *Potlatch Corp. v. United States* (*Potlatch II*), 12 P.3d 1256, 1268, 134 Idaho 912, 924 (2000), the Idaho Supreme Court held the Wilderness Act did not contain a clear intent to create an implied federal reserved water right for lands designated for inclusion in the wilderness system. In the companion *Potlatch Corp.* case, the Idaho Supreme Court held that section 13(c) of the Wild and Scenic Rivers Act expressly reserved water to fulfill the purposes of the Act. 12 P.3d at 1258, 134 Idaho at 914.

1207. "The designation of areas as wilderness by subsection (a) shall not create an express or implied reservation by the United States of any water or water rights for wilderness purposes with respect to such areas." 123 Stat. 991, *supra* note 1199, at Section 1503(b)(12)(A). This provision was included in the legislation at the insistence of the State of Idaho, which sought to avoid future litigation over whether designation of the federal lands for inclusion in the federal wilderness system created federal reserved water rights.

1208. *Id.* at Section 1503(b)(12)(B).

1209. The Owyhee Working Group is a "coalition of representatives of landowners, ranchers, environmental organizations, county government, and recreation groups appointed in Owyhee County, Idaho by the Board of Commissioners," that developed the Owyhee Initiative Agreement. Owyhee Initiative Agreement (Sept. 17, 2010) (on file with authors) [hereinafter OI Agreement]. The Owyhee Initiative Agreement was the foundational document that provided the foundation for enactment of the 2009 Omibus Act. 123 Stat. 991, *supra* note 1199.

Agreement").[1210] In Appendix B to the OI Agreement ("OI Appendix B"),[1211] the Owyhee Working Group expressed a desire that "the Interior Department or other appropriate federal agencies . . . file federal reserved water right claims in the Snake River Basin Adjudication and take such other actions necessary to assure that the reserved water rights are quantified and administered consistent with the understanding of the parties as set forth [in the Agreement]."[1212] Consistent with the Salmon and Clearwater Wild and Scenic River Agreement, OI Appendix B provides that the federal reserved water rights are "subordinate to future uses of water for new water rights for domestic and *de minimis* stockwater purposes"[1213] and to a specified amount of "unappropriated water in each of the watersheds containing the Designated Rivers for future in-basin irrigation, commercial, municipal, industrial and other state-recognized beneficial uses."[1214]

The United States filed reserved water right claims for the newly established Owyhee Wild and Scenic Rivers in the SRBA and the State objected, based largely on the issue of quantification. Rather than litigating the claims, the United States and the State entered into negotiations to quantify the claims. Guided by the OI Appendix B, and using the Salmon and Clearwater Wild and Scenic Agreement as a template, the United States and the State negotiated a stipulation that proposes to quantify sixteen Wild and Scenic federal reserved water rights for river reaches designated under the 2009 Omnibus Act ("Owyhee Stipulation"). At the time of this article, the stipulation has been agreed to in principle but has not yet been signed by the parties.

The Owyhee Stipulation and water rights generally follow much the same pattern as was used in the Salmon and Clearwater Wild and Scenic Agreement and in the HCRNA Agreement. Each Owyhee Wild and Scenic federal reserved water right is subordinated to all *de minimis* domestic[1215] and *de minimis* stockwater

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1210. Owyhee Initiative Agreement, Owyhee Initiative Wild and Scenic Rivers Water Rights Agreement at Appendix B (May 10, 2006) [hereinafter OI Appendix B].

1211. *Id.*

1212. *Id.* at 31.

1213. *Id.*

1214. *Id.* at 32. The OI Appendix B recommended that the subordination of the federal reserved water rights to "unappropriated water in each of the watersheds containing the Designated Rivers for future in-basin irrigation, commercial, municipal, industrial and other state-recognized beneficial uses," be subject to a number of conditions. OI Appendix B, *supra* note 1204, at 32. The OI Appendix B recommended an unconditional subordination to all *de minimis* domestic and stockwater rights. *Id.* at 31–32.

1215. All "*de minimis* domestic water rights," for purposes of the Partial Decrees,

> mean[s] (a) the use of water for homes, organization camps, public campgrounds, livestock, and for any other purpose in connection therewith, including irrigation of up to one-half (1/2) acre of land, if the total use is not in excess of thirteen-thousand (13,000) gallons per day, or (b) any other uses, if the total does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day. Th[e] subordination to *de minimis* domestic water rights does not apply to domestic purposes or domestic uses for subdivisions mobile home parks, or commercial or business establishments, unless the use meets the diversion rate and volume limitations set forth in (b) above. This subordination to *de minimis* domestic purposes or domestic uses does not apply to multiple water rights for domestic uses or domestic purposes that satisfy a single combined water use or purpose that would not itself come within the definitions above. [For purposes of the subordination] 'subdivision' is defined as set forth in Owyhee County Code Section 10-2-2.

See e.g. Partial Decree for Federal Reserved Water Right 51-13089, *In re* SRBA Case No. 39576 at Section 10.b.(1) (on file with authors) (as of the date of publication these partial decrees have not yet been entered by the SRBA Court).

rights.[1216] In addition each reserved water right is subordinated to a specified a specified amount of water for future in-basin irrigation, commercial, municipal, industrial, and other state-recognized water rights during March, April, May and June, "or the amount available above the base flow amount for each of those semi-monthly periods" as specified in the right, whichever is less.[1217] There is no subordination for these uses in other months. Water rights of the United States, instream flow water rights, nonconsumptive water rights, and replacement water rights do not count against the subordination amounts provided for in each right. In a departure from the Salmon and Clearwater Wild and Scenic and HCNRA templates, the Owyhee Wild and Scenic water rights also provide for a base flow amount. Because of the small amount of water available in these desert rivers, the United States insisted on including protections to prevent dewatering of the streams. Therefore, the Owyhee Wild and Scenic rights provide for an 80% exceedance flow that acts as a base flow and prevents junior water users from dewatering the streams.

The Owyhee Stipulation sets forth an agreed upon process for administering the subordination provisions. IDWR will maintain a database for purposes of tracking the applications that it determines should enjoy the benefit of subordination. IDWR will provide notice of new applications that will include the water right number, source, priority date, quantity, purpose of use, ownership, and the Wild and Scenic reach in which the appropriation is sought. IDWR will also maintain a current GIS data set of new well logs on its website. For each water right other than *de minimis* domestic and *de minimis* stockwater right, IDWR will include on the permit or license the amount of "subordination for each semi-monthly period March–June."

In the event of a dispute over IDWR's implementation of the Owyhee Stipulation, any party may seek judicial review before the SRBA Court or any successor court. Upon a satisfactory showing of IDWR's failure to properly implement, enforce, or administer the Stipulation or Partial Decrees, such party is entitled to an order compelling IDWR to properly administer the Stipulation and/or Partial Decrees. "Review shall be de novo and any disputed factual issues shall be decided based upon a preponderance of the evidence."[1218]

The Owyhee Stipulation was built on the foundation laid by the Idaho Supreme Court's decisions regarding intent to reserve and on the Wild and Scenic and the HCRNA Stipulations. When the OI Agreement was signed, the parties had the benefit of the Court's decisions in the *Potlatch* line of cases. Therefore, the State specifically required the United States disclaim a water right under the Wilderness Act. And, because the Owyhee Act expressly reserved water under the Wild and Scenic Rivers Act, it eliminated the need for additional litigation on the issue of intent to reserve water. Moreover, when it came time to quantify the Owyhee Wild and Scenic rights, the parties had the benefit of OI Appendix B, which set forth general principles for the quantification of the rights. These factors allowed the Owyhee Wild

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1216. All "*de minimis* stock water rights" for the purposes of the Partial Decrees is "defined to mean the use of water solely for livestock or wildlife where the total diversion is not in excess of thirteen-thousand (13,000) gallons per day. Th[e] *de minimis* stock water use subordination is further limited and defined so that the subordination shall not and does not apply to multiple water rights for stock water uses which satisfy a single combined water use that would not itself come within the above definition of *de minimis* stock water use." *See e.g. id.* at Section 10.b.(2).

1217. OI Agreement, *supra* note 1207.

1218. OI Agreement, *supra* note 1207.

and Scenic rights to be settled in much less time than was required by other agreements.

iv. Craters of the Moon

The area known as Craters of the Moon is located in southern Idaho and contains unique volcanic features including craters and lava flows. The Craters of the Moon National Monument was created by Presidential Proclamation No. 1694, 43 Stat 1947 on May 2, 1924. The Monument was subsequently enlarged three times by Presidential Proclamation No. 1843, 45 Stat. 2959 (July 23, 1928); Presidential Proclamation No. 1916, 46 Stat. 3029 (July 9, 1930); and Presidential Proclamation No. 3506, 77 Stat. 960 (November 19, 1962). Presidential Proclamation No. 2499, 55 Stat. 1660 (July 9, 1930) excluded certain lands from the Monument. The purpose for the creation of the Monument was to preserve the "volcanic features" of the area.

The water rights agreement between the State of Idaho and the United States for the Craters of the Moon National Monument ("Craters of the Moon Agreement") provided for recognition of nine federal reserved water rights for the Monument.[1219] The Court subsequently entered partial decrees consistent with the Craters of the Moon Agreement.[1220] A consumptive use water right was decreed for each of the areas reserved under the four presidential proclamations that created the Monument.[1221] The purpose of use for these water rights is commercial, domestic, and irrigation use within the Monument.[1222] A combined use remark in each partial decree limits the total annual diversion under the four consumptive use water rights to not more than 54.5 acre feet, and a total consumptive use of 19.9 acre feet. The partial decrees also provide that "the United States is not entitled to maintain any specific water table elevation in the [Eastern Snake Plain Aquifer], beneath the Craters of the Moon National Monument."[1223]

1219. Water Rights Agreement between the State of Idaho and the United States for the Craters of the Moon National Monument at Section 5.2–5.9 (May 14, 1992) [hereinafter Craters of the Moon Agreement].

1220. Partial Decree Pursuant to I.R.C.P. 54(d) for Water Right 34-12383/36-15342, *In re* SRBA Case No. 39576 (Dec. 1, 1990); Partial Decree Pursuant to I.R.C.P. 54(d) for Water Right 34-12384/36-15343, *In re* SRBA Case No. 39576 (Dec. 1, 1990); Partial Decree Pursuant to I.R.C.P. 54(d) for Water Right 34-12385/36-15344, *In re* SRBA Case No. 39576 (Dec. 1, 1990); Partial Decree Pursuant to I.R.C.P. 54(d) for Water Right 34-12386, *In re* SRBA Case No. 39576 (Dec. 1, 1990); Partial Decree Pursuant to I.R.C.P. 54(d) for Water Right 34-12387, *In re* SRBA Case No. 39576 (Dec. 1, 1990); Partial Decree Pursuant to I.R.C.P. 54(d) for Water Right 34-12388, *In re* SRBA Case No. 39576 (Dec. 1, 1990); Partial Decree Pursuant to I.R.C.P. 54(d) for Water Right 34-12389, *In re* SRBA Case No. 39576 (Dec. 1, 1990); Partial Decree Pursuant to I.R.C.P. 54(d) for Water Right 36-15345, *In re* SRBA Case No. 39576 (Dec. 1, 1990); Partial Decree Pursuant to I.R.C.P. 54(d) for Water Right 36-15346, *In re* SRBA Case No. 39576 (Dec. 1, 1990).

1221. Water Right No. 34-12383/36-15342 was decreed for the area reserved under Proclamation No. 1694, 43 Stat. 1947 with a priority date of May 2, 1924. Water Right No. 34-12385/36-15344, was decreed for the area reserved under Proclamation No. 1843, 45 Stat. 2959 with a priority date of July 23, 1928. Water Right No. 34-12388 was decreed for the area reserved under Proclamation No. 1916, 46 Stat. 3029 with a priority date of July 9, 1930. Water Right No. 36-15345 was decreed for the area reserved under Proclamation No. 3506, 77 Stat. 960 with a priority date of November 19, 1962. Upon entry of the federal reserved water right partial decrees, the United States abandoned state water right licenses 34-2381 and 34-2254.

1222. Craters of the Moon Agreement, *supra* note 1211, at Article 5.10. Article 5.10 of the Craters of the Moon Agreement provides that the United States may also divert water for fire suppression. *Id.*

1223. As described in Article 5.13 of the Craters of the Moon Agreement, the parties stipulated that the source of water for the federal reserved water rights was surface water within the Monument boundaries and perched ground water underlying the Monument. *Id.* at Article 5.13. Accordingly, Article 5.14 provides

In addition to the four consumptive use water rights, the Craters of the Moon Agreement provided for the recognition of five non-consumptive federal reserved water rights. Two non-consumptive water rights are recognized for the area reserved under Presidential Proclamation No. 1843[1224] and there is one non-consumptive use water right for each of the other three reserved areas.[1225]

The quantity of each of the non-consumptive federal reserved water rights is the "entire flow of surface water" in excess of the amount of the companion consumptive use water right for each of the respective areas. The lack of a specific quantity of water for these rights is an aberration from Idaho Code §§ 42-1411A and 42-1412, which require that a partial decree include a defined rate of water flow in cubic feet per second.[1226] This aberration is based on the Idaho Supreme Court decision in *Avondale Irrigation District v. North Idaho Properties, Inc*.,[1227] which held that the volume and scope of particular reserved rights, are federal questions . . . ."[1228] The Court found that if the United States can prove a right to the entire natural flow is in fact necessary to accomplish the purpose for the reservation of the federal land, then the United States is entitled to that amount under federal law.[1229] Based upon the United States disclaimer of any right to seek maintenance of any specific water table elevation in the Eastern Snake Plain Aquifer and the relative isolated nature of the Monument, the State of Idaho did not contest the United States claim to the entire flow of the surface water and perched ground water within the boundaries of the Monument.

v. Yellowstone National Park Agreement

A small portion of Yellowstone National Park lies within Idaho. The SRBA Court decreed one consumptive use and ten non-consumptive use federal reserved water rights[1230] for Yellowstone National Park consistent with the terms of the Water

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that "the United States disclaims any right to seek on behalf of the Monument the maintenance of any specific water table elevation in the Snake River Regional Aquifer." *Id.* at Article 5.14. The United States, however, may seek relief for any injury caused by junior water rights from surface water or perched ground water sources. *Id.*

1224. *See supra* note 1212. Water Right No. 34-12386 reserved the surface waters of Little Cottonwood Creek, and Water Right No. 34-12387 reserved the surface waters of an unnamed stream tributary to Little Cottonwood Creek. Both water rights were decreed a priority date of July 23, 1928.

1225. *See supra* note 1212. Water Right No. 34-12384 reserved all surface water in the area set aside by Proclamation No. 1694, 43 Stat. 1947 with a priority date of May 2, 1924. Water Right No. 34-12389 reserved the surface water within the area reserved by Proclamation No. 1916, 46 Stat. 3029 with a priority date of July 9, 1930. Water Right No. 36-15346 reserved all surface water within the area reserved by Proclamation No. 3506, 77 Stat. 3029 with a priority date of November 19, 1962.

1226. In *A&B Irrigation District v. Idaho Conservation League*, 958 P.2d 568, 573, 131 Idaho 411, 416 (1997) the Idaho Supreme Court stated that definition of a water right in terms of quantity of water per year "is essential to the establishment and granting of a water right."

1227. 577 P.2d 9, 99 Idaho 30 (1978).

1228. *Id.* at 19, 99 Idaho at 40.

1229. *Id*. Similarly, the Idaho Supreme Court held in *Potlatch II* that the "the question of the amount of water necessary to fulfill the purpose of the reservation involves a factual inquiry." Potlatch Corp. v. United States (*Potlatch II)*, 916, 12 P.3d 1256, 1270, 134 Idaho 912, 926 (2000).

1230. Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 21-11958, *In re* SRBA Case No. 39576 (Feb. 28, 2012); Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 21-11959, *In re* SRBA Case No. 39576 (Feb. 28, 2012); Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 21-11960, *In re* SRBA Case No. 39576 (Feb. 28, 2012); Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 21-11961, *In re* SRBA Case No. 39576 (Feb. 28, 2012); Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 21-11962, *In re* SRBA Case No. 39576 (Feb. 28, 2012); Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 21-11963, *In re* SRBA Case No. 39576 (Feb. 28, 2012); Partial Decree Pursuant to I.R.C.P. 54(b) for Water

Rights Agreement between the State of Idaho and the United States for Yellowstone National Park ("Yellowstone Agreement"). [1231] Water Right No. 21-11958 allows for the diversion and consumptive use of up to one acre foot per year of surface or ground water within Yellowstone National Park for commercial, domestic, and irrigation use.[1232] Seven of the non-consumptive water rights are for maintenance of instream flows[1233] and three are for maintenance of lake levels.[1234] Like the Craters of the Moon non-consumptive water rights, all of the instream flow and lake level partial decrees are decreed as the entire flow of the source in excess of the amount diverted under the consumptive use water right.[1235] All of the water rights were decreed with a priority date of March 1, 1872—the date the lands located in Idaho were withdrawn and reserved.[1236]

The Yellowstone Agreement did not address the United States' claim to ground water "necessary to maintain the natural thermal features such as geysers, mudpots, hot springs, and similar features of the Park."[1237] In the absence of any facts demonstrating the amount, sources, or temperature of ground water needed to protect the natural thermal features, the United States and Idaho agreed to defer this issue until the need arises. [1238] The Yellowstone Agreement, however, resolved all other ground water right claims of the United States.

vi. Department of Energy Agreement

The United States Department of Energy and the State of Idaho entered into the Water Rights Agreement Between the State of Idaho and the United States for the United States Department of Energy ("Department of Energy Agreement") which

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Right 21-11964, *In re* SRBA Case No. 39576 (Feb. 28, 2012); Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 21-11965, *In re* SRBA Case No. 39576 (Feb. 28, 2012); Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 21-11966, *In re* SRBA Case No. 39576 (Feb. 28, 2012); Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 21-11967, *In re* SRBA Case No. 39576 (Feb. 28, 2012); Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 21-11968, *In re* SRBA Case No. 39576 (Feb. 28, 2012).

1231. Order of Partial Decree on Uncontested Federal Water Right Claims, *In re* SRBA Case No. 39576, Subcase Nos. 21-11958, 21-11959, 21-11960, 21-11961, 21-11962, 21-11963, 21-11964, 21-11965, 21-11966, 21-11967, and 21-11968 (Feb. 28, 2012) (incorporating and approving the Water Rights Agreement between the State of Idaho and the United States for Yellowstone National Park (Jan. 16, 1992)).

1232. Partial Decree Pursuant to I.R.C.P. 54(b) Water Right 21-11958, *supra* note 1222.

1233. *See supra* note1222.

1234. *See supra* note 1222.

1235. *See supra* note 1222. Because the instream flow and lake level claims were on headwater streams, the State of Idaho chose not to contest the United States claim to the entire flow of the water sources. Article 5.7 of the Yellowstone Agreement requires the United States to "manage the Park for the preservation of the natural flow regime of the water system and [to] retain the water system in its natural condition," which serves to protect the water supply for downstream uses in Idaho. Order of Partial Decree on Uncontested Federal Water Right Claims, *supra* note 1223, at Article 5.7.

1236. See supra note 1222. The lands in Idaho were reserved by the Act of March 1, 1872, 16 U.S.C. § 21 et seq., 17 Stat. 32.

1237. Order of Partial Decree on Uncontested Federal Water Right Claims, *supra* note 1223, at Section 5.8.

1238. Water in excess of 212 degrees Fahrenheit is classified as a geothermal resource rather than a water resource. IDAHO CODE § 42-4002 ("Geothermal resources are found and hereby declared to be sui generis, being neither a mineral resource nor a water resource, but they are also found and hereby declared to be closely related to and possibly affecting and affected by water and mineral resources in many instances."). Thus, the SRBA Court lacked jurisdiction to adjudicate the high temperature geothermal water rights. In contrast, water below 212 degrees Fahrenheit is classified as a water resource, IDAHO CODE § 42-233, and therefore was required to be claimed in the SRBA. The question of whether the SRBA Court has jurisdiction to address any impact of a ground water right on a geothermal resource remains unresolved.

quantified the water rights for the Idaho National Engineering Laboratory ("INEL").[1239] The INEL was set aside by several public land orders and condemnation cases.[1240] The Department of Energy Agreement quantified "all existing rights and claims to water rights of the United States under state and federal law for the use by the Department of Energy in the Snake River Basin . . . ."[1241] The Department of Energy Agreement, as approved by the SRBA Court, recognized a single federal reserved water right for the Laboratory,[1242] which was partially decreed as water right 34-10901.[1243]

Partial decree 34-10901 provides that "the maximum rate of diversion from any and all wells shall not exceed 80 CFS, and the maximum annual diversion shall not exceed 35 AFY."[1244] The place of use is anywhere within the "boundaries of the INEL" and the water right may be used for the "primary purposes authorized by Congress."[1245] Partial decree 34-10901 provides that the exercise of the right "is subject to the terms of . . . the 'Agreement.'"[1246]

Two terms of the Department of Energy Agreement regarding administration of partial decree 34-10901 warrant discussion. First, the United States "disclaim[ed] any right to seek the maintenance of any specific pumping level . . . ."[1247] Thus, the United States has no right to seek curtailment of junior ground water rights diverting from the Eastern Snake Plain Aquifer, but rather must chase the water by deepening its wells. Second, while the parties were unable to agree "whether the Director has authority to administer federal reserved water rights,"[1248] the United States agreed to provide access to INEL for the purpose of "installation and utilization of measuring

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1239. INEL "refers to an area of land approximately 890 square miles in size and 50 miles west of Idaho Falls . . . ." Water Rights Agreement between the State of Idaho and the United States for the United States Dep't of Energy at Section 2.1.10 (July 20. 1990) [hereinafter Department of Energy Agreement]. INEL is currently known as the Idaho National Laboratory and is "dedicated to supporting the U.S. Department of Energy's missions in nuclear and energy research, science, and national defense." https://inlportal.inl.gov/portal/server.pt/community/about_inl/259

1240. *See* Department of Energy Agreement, *supra* note 1231, at Section 2.1.10.i–viii. (Public Land Order 318 (May 13, 1946); Public Land Order 545 (Jan. 7, 1949); Public Land Order 637 (April 7, 1950); Public Land Order 691 (Dec. 5, 1950); Public Land Order 1770 (Dec. 19, 1958)); United States v. 18,217.58 Acres of Land, More or Less, in Butte and Jefferson Counties, Idaho, Case No. 1227E (D. Idaho Oct. 29, 1945); United States v. 15,357.16 Acres of Land In Butte, Bingham, and Jefferson Counties, State of Idaho, Case No. 1624 (D. Idaho Sept. 19, 1951); United States v. 8617.87 Acres of Land, More or Less, in the Counties of Clark, Butte, Jefferson, Bonneville, and Bingham, State of Idaho, Case No. 2160 (D. Idaho April 27, 1959)).

1241. Department of Energy Agreement, *supra* note 1231, at Section 3.1. The Department of Energy Agreement did not apply to water right claims 25-07263, 35-12693, 36-13983, and 86-10673. *Id.* at Section 3.1. Subsequent to the Agreement, the SRBA Court entered partial decrees for water right nos. 25-07263, 35-12693, 36-13983 and 86-10673. Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 25-07263, *In re* SRBA Case No. 39576 (Sept. 30, 2005); Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 35-12693, *In re* SRBA Case No. 39576 (Sept. 30, 2005); Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 36-13983, *In re* SRBA Case No. 39576 (Sept. 30, 2005); Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 86-10673, *In re* SRBA Case No. 39576 (Sept. 30, 2005).

1242. Department of Energy Agreement, *supra* note 1231, at Section 5.2.

1243. Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 34-10901, *In re* SRBA Case No. 39576 (June 20, 1013). The partial decree superseded two water right licenses, 34-2292 and 34-2278. The Department of Energy Agreement provided that water right 34-10901 was not subject to forfeiture or abandonment. Department of Energy Agreement, *supra* note 1231, at Section 5.4.

1244. Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 34-10901, *supra* note 1235.

1245. *Id.*

1246. *Id.*

1247. Department of Energy Agreement, *supra* note 1231, at Section 9.2.

1248. *Id.* at Section 6.1.

devices needed for management of the water resources on INEL"[1249], and "to provide the State with a comprehensive inventory of all wells (monitoring, production and disposal) at or relating to activities at the INEL."[1250] The Department of Energy also is required to maintain water measurement devices on all wells at INEL.[1251] While the United States reserved the right to seek new appropriative rights under state law in addition to partial decree 34-10901, the United States is required to demonstrate that the federal reserved water right is "fully used at the time the application is made."[1252]

b. Other Federal Reserved Water Rights Cases

The Idaho Supreme Court also decided several federal reserved water rights cases that did not deal directly with the issue of intent to reserve or quantification. They include a decision regarding whether Public Water Reserve 107 provided a valid basis for a federal reserved water right, whether a non-federal entity could make a claim to a federal reserved water right, and whether a physical diversion was necessary to establish a federal reserved water right.

i. PWR 107

The SRBA Court designated BWI 9 to address the question of "[w]hether Public Water Reserve 107 is a valid basis for a federal reserved water right."[1253] Public Water Reserve 107 ("PWR 107") withdraws from entry public lands which surround water sources.[1254] The purpose of PWR 107 was to keep homesteaders from controlling large land tracts by settling around the only water supply available for public use.[1255] The United States argued that PWR 107 reserved the amount of water necessary to fulfill the purpose of the reservation.[1256] The State of Idaho and several private water users opposed the United States' position.[1257]

The SRBA Court found that PWR 107 reserved land immediately surrounding water sources to ensure that water would remain available for public use and appropriation.[1258] The Court noted, however, that water found in the land reserves was not intended to be used by the federal government:[1259] "[T]he federal government may obtain reserved rights when, and only when, the reservation serves

1249. *Id.* at Section 6.2.1.

1250. *Id.* at Section 6.2.2. The inventory is to "include information on the total depth of each well and depth to water, detailed well construction information, well logs, usage information, including detailed information on quantity and quality of fluids discharged, and dates of installation and retooling." *Id.* The Department of Energy has duty to update the information "to reflect any plans to construct and actual construction of new wells. As long as paragraph C.4 of Attachment A of the Environmental Oversight and Monitoring Agreement remains in effect, submission of the report required by paragraph C.4 constitutes compliance with the requirements of Paragraph 6.2.2 of the Agreement." *Id.*

1251. Department of Energy Agreement, *supra* note 1231 at Section 6.2.3.

1252. *Id.* at Section 9.7.2.

1253. Memorandum Decision and Order Re: Basin-Wide Issue 9, *In re* SRBA Case No. 39576, Subcase No. 91-00009 (renumber as 00-91009) (Dec. 9, 1996).

1254. 43 C.F.R. § 292.1 (1938).

1255. *Id.*

1256. Memorandum Decision and Order Re: Basin-Wide Issue 9, *supra* note 1251.

1257. *Id.* at 1.

1258. *Id.* at 3.

1259. *Id.*

from federal purpose. However, implied reservations cannot be found where the reservation is intended to benefit only those individuals operated on the public lands for their own private purpose."[1260] The SRBA Court also noted that the purpose of PWR 107 reservations was abrogated by passage of FLPMA.[1261] Thus, the Court concluded that no implied reservation of water was made pursuant to PWR 107.[1262]

The Idaho Supreme Court reversed the SRBA Court's decision. The Court held that PWR 107 created an implied federal reserved water right. It noted that the purpose of PWR 107 was "to prevent the monopolization by private individuals of springs and waterholes on public lands needed for stockwatering" and that the purpose of PWR 107 would be entirely defeated without water "because Taylor Grazing permittees would not have water needed for stockwatering purposes."[1263] The Court also held that the United States could administer and supervise use of PWR 107 water by grazing permittees and that FLPMA did not abrogate the purpose of PWR 107.[1264]

ii. City of Pocatello

In *Pocatello v. State*, the Idaho Supreme Court considered a claim by the City of Pocatello to a federal reserved water right.[1265] An 1867 executive order signed by President Andrew Johnson designated the Fort Hall Indian Reservation for use of certain bands of the Shoshone and Bannock Tribes.[1266] In 1878 the Utah Northern Railway Company built two intersecting rail lines across the reservation.[1267] A settlement of non-Indians sprang up at the intersection of the two rail lines at present-day Pocatello.[1268] The settlers were trespassers on the reservation lands.[1269] In 1885 the trespassers were ordered by the United States Department of Interior to leave the area, but eventually the federal authorities realized they would not be able to remove the settlers from the reservation without violence and bloodshed.[1270]

In 1887 the Secretary of Interior sent an agent to negotiate with the Tribes to cede the land where the Pocatello townsite was located.[1271] The negotiated Cession Agreement transferred the Pocatello townsite to the citizens of Pocatello and granted a right-of-way to the railroad company for its existing tracks.[1272] The Cession Agreement made no mention of water.[1273] In 1888, questions began to arise over how the new city of Pocatello would obtain its water supply.[1274] In response Congress added Section 10 to the 1888 Act approving the Cession Agreement.[1275] Section 10 provided:

1260. *Id.* at 6. (emphasis in original).
1261. *Id.*
1262. Memorandum Decision and Order Re: Basin-Wide Issue 9, *supra* note 1247, at 8.
1263. U.S. v. State, 959 P.2d 449, 453, 131 Idaho 468, 472 (1997).
1264. *Id.*
1265. 180 P.3d 1048, 145 Idaho 497 (February 19, 2008).
1266. *Id.* at 1048, 1049, 145 Idaho at 498.
1267. *Id.* at 1049–50, 145 Idaho at 498–99.
1268. *Id.* at 1050, 145 Idaho at 499.
1269. *Id.*
1270. *Id.*
1271. *Id.*
1272. *Pocatello*, 180 P.3d at 1050, 145 Idaho at 499.
1273. *Id.*
1274. *Id.*
1275. *Id.*

> That the citizens of the town hereinbefore provided for shall have the free and undisturbed use in common with said Indians of the waters of any river, creek, stream, or spring flowing through the Fort Hall Reservation in the vicinity of said town, with right of access at all times thereto, and maintain all such ditches, canals, works, or other aqueducts, drain, and sewage pipes and other appliances on the reservation, as may be necessary to provide said town with proper water and sewerage facilities.[1276]

In 1990, the City of Pocatello filed a claim in the SRBA asserting it had been granted a federal reserved water right under the 1888 Act.[1277] The State of Idaho and Shoshone-Bannock Tribes filed objections to the City's federal claim.[1278] All parties moved for summary judgment.[1279] In its motion for summary judgment, the City of Pocatello abandoned its federal reserved water right claim and asserted instead that Section 10 of the 1888 Act expressly granted it a water right under the Property Clause of the United States Constitution.[1280] The Special Master granted summary judgment to the objectors and recommended that the City of Pocatello's claim be disallowed.[1281] The City appealed the Special Master's recommendation to the SRBA Court.[1282] The SRBA Court disallowed the City's claim holding that Section 10 granted, at most, a right of access to the City of Pocatello for appropriating water, not a water right.[1283] The City of Pocatello appealed.[1284]

On appeal, the Idaho Supreme Court first noted that Congress has the power to grant water rights under the Property Clause.[1285] However, the Court held that the SRBA Court correctly concluded that Section 10 of the 1888 Act did not "contain historically recognized and accepted terms of conveyance such as 'grant', 'bargain', 'sell', or 'convey' evidencing a transfer in a property interest."[1286] Because statutes in which the federal government grants privileges or relinquishes rights are to be strictly construed, the lack of explicit conveyance terms demonstrated the City of Pocatello was not granted a federal water right.[1287]

The City of Pocatello also argued on appeal that the SRBA Court erred by failing to interpret the "in common with" language of Section 10 as granting the City a portion of the Tribes' water right, not merely a right of access.[1288] The City argued that the "in common with" language was part of the Tribes' treaty and that, as such, the treaty canons of construction should apply.[1289] The Court noted, however, that

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1276. *Id.* (quoting Act of September 1, 1888, ch. 936, 25 Stat.452).
1277. *Id.* at 1051, 145 Idaho at 500.
1278. *Pocatello*, 180 P.3d at 1051, 145 Idaho at 500.
1279. *Id.*
1280. *Id.* (citing CONST., ART. IV, § 3, CL.2.)
1281. Special Master's Report and Recommendation; Findings of Fact and Conclusions of Law, *In re* SRBA Case No. 39576, Subcase No. 29-11609 (Sept. 26, 2005).
1282. City of Pocatello's Notice of Challenge, *In re* SRBA Case No. 39576, Subcase No.29-11609 (Feb. 22, 2006).
1283. Memorandum Decision and Order on Challenge and Order Disallowing Water Right Based on Federal Law, *In re* SRBA Case No. 39576, Subcase No. 29-11609 (Oct. 6, 2006).
1284. *Id.*
1285. *Pocatello* at 501, 180 P.3d at 1052.
1286. *Id.*
1287. *Id.* at 1052–53, 145 Idaho at 501–02.
1288. *Id.* at 1056, 145 Idaho at 505.
1289. *Id.*

the "in common with" language appeared in Section 10 of the 1888 Act, not in the treaty agreement with the Tribes.[1290] Therefore, the language should be construed under statutory rules of construction, not the treaty canons of construction.[1291] The Court went on to note that even if the "in common with" language of Section 10 was part of a treaty, the canons of construction would require the Court to construe the language in favor of the Tribes, not the City of Pocatello.[1292] Abrogation of treaty rights must be clear and unambiguous.[1293] The Court held that the language of Section 10 was ambiguous as to whether or not it granted the City of Pocatello a water right and therefore Congress did not clearly abrogate the Tribes water rights.[1294] In addition, any abrogation of the Tribes treaty rights would have had to been ratified by a majority of all adult male Tribal members, which was not the case.[1295] Therefore, the Court held that the City of Pocatello did not have a federal reserved water right.[1296]

VIII. BASIN-WIDE ISSUE 16 AND THE FINAL UNIFIED DECREE

Idaho Code § 42-1412(8) provides for the entry of a "final decree" "[u]pon resolution of all objections to water rights acquired under state law, to water rights established under federal law, and to general provisions . . . ." With that statute in mind, and foreseeing that the SRBA was in the process of coming to an end, the SRBA Court, on May 17, 2011, held a status conference with interested parties regarding the form and content of the final decree.[1297]

A. Basin-Wide Issue 16

Shortly after the status conference, the Court entered an Order Designating Basin-Wide Issue 16 [1298] to address: "The issue pertaining to the form and content of the final unified decree to be entered upon completion of the SRBA . . . ."[1299] Because a hallmark of the SRBA was cooperation, the Court formed a steering committee ("Committee") to address the issue posed in Basin Wide Issue 16.[1300] The Committee was charged with the following duties:

> [I]dentifying issues and subissues pertaining to the form and content of the final unified decree to be entered upon completion of the SRBA.
>
> [R]ecommending a logical order and time frame in which these issues and sub-issues should be addressed.

1290. *Id.* at 1057, 145 Idaho at 506.
1291. *Pocatello* at 1048, 1057, 145 Idaho at 506.
1292. *Id.*
1293. *Id.* at 1057–58, 145 Idaho at 506–07.
1294. *Id.* at 1058, 145 Idaho at 507.
1295. *Id.*
1296. *Id.*
1297. Memorandum Decision and Order on Motion to Alter or Amend Judgment, I.R.C.P. 59(e), *In re* SRBA, Subcase Nos. 01-217, 01-218, 01-4024, 01-4025, 01-2068, and 01-4054 (May 17, 2011).
1298. Order Designating Basin-Wide Issue 16, *In re* SRBA Case No. 39576, Subcase No. 00-92099 (July 12, 2011).
1299. *Id.* at 1.
1300. Order Establishing Steering Committee and Notice of First Scheduled Meeting, *In re* SRBA Case No. 39576, Subcase No.. 00-92099 (July 15, 2011).

> [R]ecommending the most appropriate mechanism for resolving these issues; for example mandatory settlement conference, declaratory judgment action, trial of the issue, etc.
>
> [S]ubmitting a written report with the Court setting forth the Committee's recommendations, where consensus can be reached, and indicating issues or recommendations about which the Committee is unable to agree.[1301]

B. Basin Closure Orders

The first recommendation of the Committee was a request that the SRBA Court close the basins to new claims, unless those claims were for *de minimis* domestic or stockwater or claims that were necessary to resolve pending litigation.[1302] The SRBA Court agreed with the recommendation to close the basins to new claims: "The Committee's recommendation of basin closure for late claims is well taken. Completion of claims taking in individual basins is an essential first step to completion of the SRBA. Without it, completion of the SRBA will not occur."[1303] Thus, the SRBA Court entered a series of orders notifying claimants of the impending basin closures and setting deadlines for the filing of late claims.[1304] Included in the basin closure orders were lists of unclaimed water right numbers that were on record with IDWR, but had not been claimed in the SRBA.[1305] When the deadlines for the filing of late claims expired, the Court entered orders closing the basins to the taking of late claims, as well as decreeing all of the unclaimed water right numbers disallowed.[1306]

C. Proposed Final Unified Decree

In the summer and fall of 2011, the Committee met to discuss the form and content of the final unified decree. On November 30, 2011, the Committee submitted

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1301. *Id* at 1–2.

1302. Preliminary Report of Steering Committee Re: Proposed Order Establishing Deadline for Late Claim Filings in Basins 23, 24, 43, 51, 55, 57, 61, 81, 82, 83, 84, 85, and 86, *In re* SRBA Case No. 39576, Subcase No. 00-92099 (Sept. 20, 2011). As defined by the SRBA Court: "'Pending litigation' refers to an active, related subcase(s) pending at the time of the basin closure deadline wherein an additional late claim(s) is required to resolve the related water right(s)." Order Establishing Final Deadline for Late Claim Filings in Basins 23, 24, 43, 51, 55, 57, 61, 81, 82, 83, 84, 85, and 86, *In re* SRBA Case No. 39576, Subcase No. 00-92099 at 4 (Sept. 23, 2011).

1303. *Id.* at 2.

1304. *See Id.*; Order Establishing Final Deadline for Late Claim Filings in Basins 01, 02, 03, 31, 34, 35, 36, 37, 41, 45, 47, and 63, *In re* SRBA Case No. 39576, Subcase No. 00-92099 (Oct. 12, 2012).

1305. *Id.*

1306. Amended Order Closing Claims Taking in Basins 23, 24, 43, 51, 55, 57, 61, 81, 82, 83, 84, 85, and 86/Disallowal of Unclaimed Water Rights, *In re* SRBA Case No. 39576, Subcase No. 00-92099 (Jan. 3, 2012); Order Closing Claims Taking in Basins 21, 22, 29, 32, 33, 65, 67, 69, 71, 72, 73, 74, 75, 77, 78, and 79/Disallowal of Unclaimed Water Rights, *In re* SRBA Case No. 39576, Subcase No. 00-92099 (April 25, 2012); Order Amending in Part Order Closing Claims Taking in Basins 21, 22, 29, 32, 33, 65, 67, 69, 71, 72, 73, 74, 75, 77, 78, and 79/Disallowal of Unclaimed Water Rights, *In re* SRBA Case No. 39576, Subcase No. 00-92099 (Sept. 12, 2012); Order Closing Claims Taking in Basins 01, 02, 03, 31, 34, 35, 36, 37, 41, 45, 47, and 63/Disallowal of Unclaimed Water Rights, *In re* SRBA Case No. 39576, Subcase No. 00-92099 (Feb. 13, 2013).

its proposed final unified decree to the SRBA Court for consideration.[1307] The proposal specifically identified where the Committee agreed and where it did not.[1308] The Committee suggested that the SRBA Court make any changes to the Committee's proposal and serve a copy of the Court's proposal on the parties, who would then have an opportunity to file challenges. The SRBA Court agreed with this process, and, on January 30, 2012, entered its Order Re: Proposed Final Unified Decree and Adopting Proposed Procedures and Deadlines.[1309] The SRBA Court's Proposed Final Unified Decree was served on the parties and became subject to challenge.

D. Memorandum Decision and Order on Challenge

After the notices of challenge were received, eight issues were identified by the SRBA Court for review. The first four issues were uncontested.

1. Issue No. 1: All Persons are Bound by the Final Unified Decree

The Court confirmed in BWI 16 that the Final Unified Decree is binding on all "persons" not just "parties" to the SRBA. Because certain water rights were deferrable in the SRBA, or other water users chose not to file a claim, use of the word "persons" was consistent with the legal principle that a general stream adjudication is binding on all persons, regardless of whether they appeared in the action. Thus, even if a person did not appear as a party in the SRBA, they nonetheless are bound by the Final Unified Decree.

2. Issue No. 2: Partial Decrees are Subject to Federal Settlements

The second issue was with regard to which attachment to the Final Unified Decree the partial decrees for federal reserved water rights should be included. It was proposed that the Final Unified Decree would include several attachments. Attachment 2 was to include all partial decrees that had been issued in the SRBA. Attachment 4 was to include all the documents pertaining to the federal reserved water rights including the partial decrees, consent decrees, and other settlement documents. However, rather than issuing separate partial decrees for all the federal reserved water rights, some of the partial decrees that were issued for the federal reserved water rights were imbedded in the federal reserved water right settlement documents. Attachment 2 to the Final Unified Decree has been envisioned as a "one stop shop" where all partial decrees could be accessed at one time. If some of the partial decrees for the federal reserved water rights were only included with the federal reserved water rights in Attachment 4, and not included in Attachment 2, then future readers of the Final Unified Decree would have to cross reference the two attachments to be sure they had reviewed all the partial decrees. To alleviate the need for cross referencing between Attachments 2 and 4 the Committee recommended that duplicates of the federal reserved water right partial decrees be included in

1307. Report of Steering Committee Re: Proposed Final Unified Decree, *In re* SRBA Case No. 39576, Subcase No. 00-92099 (Nov. 20, 2011).

1308. *Id.*

1309. Order Re: Proposed Final Unified Decree and Adopting Proposed Procedures and Deadlines, *In re* SRBA Case No. 39576, Subcase No. 00-92099 (Jan. 30, 2012).

Attachment 2. A remark would be included on the face of each partial decree cross-referencing the settlement documents contained in Attachment 4. The SRBA Court accepted the Committee's recommendation and specifically stated in the Final Unified Decree that "duplicates of partial decrees entered pursuant to federal reserved water right settlements in Attachment 2 . . . will include a remark cross-referencing the applicable settlement documents included in Attachment 4 to the Final Unified Decree."[1310]

3. Issue No. 3: Issuance of a Superseding Order Clarifying Definitions and Procedures for Deferrable Domestic and Stockwater Claims

On December 20, 1988, shortly after the SRBA was commenced, the United States and the State of Idaho entered into a Stipulation for Establishment of Procedure for the Adjudication of Domestic and Stock Water Claims.[1311] The Stipulation recognized that the SRBA proceedings could be streamlined if *de minimis* domestic and stockwater claimants were given the opportunity to "elect to have their claims fully adjudicated now or to postpone the adjudication of their claims" by following an alternative procedure after the close of the SRBA.[1312] On January 17, 1989, this Court issued its Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses ("1989 Order"), which accepted the Stipulation and provided procedures for the adjudication of deferred *de minimis* domestic and stockwater claims as defined in Idaho Code § 42-1401A(5) and (12) (Supp. 1988). [1313] In 1990, the legislature changed the definition of domestic and stockwater. In response, the Court issued its SRBA Administrative Order No. 10 Order Governing Procedures in the SRBA for Domestic and Stock Water Uses, which superseded the January 17, 1989 Findings of Fact and incorporated new statutory definitions of *de minimis* domestic and stockwater. [1314] Despite superseding the 1989 Order, however, the new order did not incorporate many of the procedure provisions from the 1989 Order, leaving the document incomplete.

On June 28, 2012, the SRBA Court issued the Order Governing Procedures, which consolidated the 1989 Order and Administrative Order No. 10 to create "a unified order setting forth both the description of those *de minimis* 'domestic use' and 'live stock use' claims that were not required to be immediately adjudicated in the SRBA, the conditions applicable to such deferral, and the procedure for adjudication of such claims . . . ."[1315] The Order Governing Procedures closed the SRBA to the taking of *de minimis* domestic and stockwater rights and implemented the procedures of adjudication of *de minimis* domestic and stockwater claims on an

1310. Memorandum Decision and Order on Challenge in the Matter of the Final Unified Decree, *In re* SRBA Case No. 39576, Subcase No. 00-92009 at 6 (June 28, 2012).

1311. Stipulation for Establishment of Procedure for the Adjudication of Domestic and Stock Water Claims, *supra* note 55.

1312. *Id.* at 2.

1313. Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses, *supra* note 50.

1314. SRBA Administrative Order No. 10 Order governing Procedures in the SRBA for Domestic and Stock Water Uses, *In re* SRBA Case No. 39576 (March 22, 1995).

1315. Order Governing Procedure in the SRBA for Adjudication of Deferred *De Minimis* Domestic and Stock Water Claims, *In re* SRBA Case No. 39576 at 2 (June 28, 2012).

interim basis until the SRBA Final Unified Decree was entered.[1316] After, the Final Unified Decree was entered, the Order Governing Procedures took full effect as the procedures for adjudication of *de minimis* domestic and stockwater rights. The procedures provided that adjudication of the deferred claims would be completed by the SRBA Court under its continuing jurisdiction.[1317]

4. Issue No. 4: Subsequent Licenses and Transfers are not Altered

The Final Unified Decree states as follows: "Any water rights with a priority date subsequent to November 18, 1987, were not required to be claimed in the SRBA, but to the extent any such water right were claimed in the SRBA and a partial decree issued, the partial decree is conclusive as to the nature and extent of the right."[1318] While this provision was not challenged, and remains in the Final Unified Decree, parties to BWI 16 were concerned that the sentence could be construed to impact partial decrees that were based on permits, and partial decrees that were subsequently altered by a valid transfer. Language was added to the Proposed Final Unified Decree to address these occurrences.

i. Permits/Licenses

An important discussion in the Final Unified Decree concerned SRBA recommendations made by IDWR that were based on permits. In the SRBA, water users were required to file an SRBA claim for permits where proof of beneficial use was submitted prior to commencement of the adjudication.[1319] If proof of beneficial use was submitted after commencement, water users could elect to file a claim in the SRBA.[1320] Because it is not uncommon for IDWR to take many years to issue a license, in some circumstances, IDWR did not have a license upon which to base a recommendation for a claim. In some cases, when no objection was filed to IDWR's permit-based recommendation, the permit-based recommendation went to partial decree. After issuance of the SRBA partial decree, licenses were later issued by IDWR. Sometimes, the elements of the license differed from the elements of the permit-based partial decree.

Thus, the question raised in BWI 16 was: which water right controlled, the permit-based partial decree or IDWR-issued license? To resolve the question, the Court stated that any partial decree "issued based on a permit prior to the issuance of the license[,]" would be superseded by the license.[1321]

ii. Transfers

Many water users, after receiving a partial decree, filed transfers with IDWR to change an element of the decreed water right. A concern in BWI 16 was whether

1316. Order Granting State of Idaho's Motion for Interim Order Implementing the Order Governing Procedures of Adjudication of Deferred *De Minimis* Domestic and Stock Water Claims, *In re* SRBA Case No. 39576 (Dec. 18, 2013).

1317. Order Governing Procedure in the SRBA for Adjudication of Deferred *De Minimis* Domestic and Stock Water Claims, *supra* note 1305, at 6.

1318. Final Unified Decree, *supra* note 145, at 10.

1319. IDAHO CODE § 42-1420.

1320. IDAHO CODE § 42-1420.

1321. Memorandum Decision and Order on Challenge in the Matter of the Final Unified Decree, *supra* note 1300, at 7.

the partial decree or the subsequent administrative transfer, which was approved before entry of the Final Unified Decree, would control. To address this potential discrepancy, the Court held as follows: "the Final Unified Decree does not supersede the results of water right transfers initiated and completed after the entry of a partial decree but prior to entry of the Final Unified Decree."[1322]

5. Issue No. 5: Specific Factual Investigation

While Issues 1–4 were uncontested, Issues 5–8 were heavily briefed and argued by many of the parties. These issues appeared in BWI 16, mostly as an outgrowth of the on-going conjunctive management delivery calls. Issue No. 5 was raised in BWI 16 and briefed at length, but ultimately the SRBA Court declined to include the issue in the Final Unified Decree. Issue No. 5 was stated as "Whether the Final Unified Decree should include a finding that 'Each partial decree was the result of a specific factual investigation related to the underlying water right,' and that 'Because the evidence adduced for each partial decree varied, the Final Unified Decree does not address what evidence is admissible in any subsequent proceeding?'"[1323] The proponents of Issue 5 wanted the SRBA Court, "to make clear that despite the fact that all partial decrees are included in the Final Unified Decree, each partial decree was litigated separately, and the litigation considered separate facts and may have been limited in its scope of inquiry by operation of law. [F]urther, the proposed provisions are necessary to establish that litigants are bound only as to those specific issues that were actually litigated in the SRBA."[1324]

The SRBA Court declined to include the language proposed in Issue No. 5. It held that, because most water rights claimed in the SRBA did not receive objections, "not every element of the right was necessarily contested."[1325] Even when no objections were filed to IDWR's recommendations, and the recommendations went to partial decree as recommended, the SRBA Court was still free "to apply law to the facts and render its own conclusion regarding uncontested water rights."[1326] Inclusion of Issue 5 would "call[] into question the binding effect of the partial decrees as to all such uncontested rights and/or elements"[1327] and it "would have the unintended consequence of putting every uncontested right or element at issue in the future. The SRBA would have accomplished nothing as concerns these rights."[1328] Therefore, the proposed language of Issue No. 5 was not included in the Final Unified Decree.

6. Issue No. 6: Effectiveness of the 1987 Commencement

Issue No. 6 was also proposed but was not included in the Final Unified Decree. Issue No. 6 stated: "Whether the Final Unified Decree should include a finding that

1322. *Id.*
1323. *Id.* at 5.
1324. *Id.* at 9-10.
1325. *Id.* at 10.
1326. *Id.* at 11 (citing Order on Motion to Set Aside Partial Decrees and File Late Objections; Order of Reference to Special Master Cushman, *In re* SRBA Case No. 39576, Subcase No. 65-07267 (Jan. 31. 2001)).
1327. Memorandum Decision and Order on Challenge in the Matter of the Final Unified Decree, *supra* note 1300, at 10.
1328. *Id.* at 11.

the elements of each water right reflect the extent of beneficial use as of November 19, 1987."[1329] The SRBA was commenced on November 19, 1987, and has been referred to by the SRBA Court, on at least one occasion, as a "point in time" adjudication; meaning "IDWR reports the status of a water right as of the date of inception of the SRBA."[1330] The proponents of Issue No. 6 sought to definitively state that, "except for partial decrees for water rights with a priority date subsequent to November 19, 1987 . . . the elements contained in the partial decrees attached to the Final Unified Decree are based on the extent of beneficial use of the water right on or before the commencement of the SRBA, November 19, 1987."[1331]

While recognizing the commencement date of the adjudication, the SRBA Court declined to include Issue No. 6 in the Final Unified Decree because it "consists of another 'blanket' provision which does not apply to all rights."[1332] While "[IDWR] may have based its recommendations on the conditions as they existed as of the commencement date of the SRBA . . . parties were not precluded from contesting a recommendation based on post-commencement circumstances."[1333] The SRBA Court stated that, after commencement of the SRBA, "approximately 13,000 water rights" underwent administrative transfers.[1334] While beneficial use for those rights may have originally been established before 1987, post-commencement transfers may have altered the pre-commencement elements. Therefore, the SRBA Court held: "Because the proposed provision would not apply to all partial decrees, the Court finds the provision to be somewhat misleading."[1335] Lastly, the SRBA Court voiced concerns that the language could lead to ambiguity concerning the binding effect of the partial decrees: "A water right holder [could] then [be] left with the burden of establishing the use of the right for the period between commencement of the SRBA and the issuance of the partial decree."[1336]

7. Issue No. 7: Maximum Diversion Rate

The proponents of Issue 7 asked the SRBA Court to specifically state "that a water user can accomplish his or her beneficial use with less than the full rate of diversion shown on their SRBA decree . . . [and] that consideration of such evidence is [not] a collateral attack on the SRBA decree."[1337] In rejecting inclusion of the proposed provision, the SRBA Court cited its previous decision, as well as those of the Idaho Supreme Court, that a water user's present beneficial use may be less than

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1329. *Id.* at 5.

1330. *Id.* at 21. IDWR's "point-in-time" approach to recommendations made in the SRBA was confirmed by IDWR: "The [1987] 'point in time' approach works in concert with the accomplished transfer, enlargement, and ambiguous decree/license statutes. IDAHO CODE §§ 42-1425-1427." Memorandum from Carter Fritschle, Manager, Adjudication Section, to BWI 16 Steering Committee at 2 (Oct. 17, 2011) (on file with authors).

1331. Memorandum Decision and Order on Challenge in the Matter of the Final Unified Decree, *supra* note 1300, at 13.

1332. *Id.*

1333. *Id.* (emphasis in original).

1334. *Id.*

1335. *Id.*

1336. *Id.*

1337. Memorandum Decision and Order on Challenge in the Matter of the Final Unified Decree, *supra* note 1300, at 14.

the diversion rate listed on the partial decree.[1338] Because the amount of water needed for present beneficial use is being addressed in the courts the SRBA Court held that "this issue is more appropriately addressed through case law on a more developed record."[1339]

8. Issue No. 8: Forfeiture Tolling

Issue No. 8 was stated as: "Whether the tolling of the forfeiture period during the SRBA precludes the Director from considering beneficial use in water distribution proceedings?"[1340] The proponents of Issue No. 8 sought a definitive ruling from the SRBA Court "not to construe the tolling of the forfeiture period from prohibiting the Director from considering actual beneficial use of a water right in response to water delivery calls."[1341] The SRBA Court rejected inclusion of Issue No. 8 in the Final Unified Decree for two reasons. First, the SRBA Court definitively stated "the tolling rule was limited solely to preventing forfeiture actions that relied on any period of non-use following the filing of the claim through the entry of partial decree. The tolling rule did not address water rights administration and what evidence of pre-decree use, if any, may or may not be relevant in any subsequent administrative proceeding."[1342] Second, "the issue of what pre-decree evidence may be discoverable, relevant and/or admissible in a given future post-decree proceeding is not properly before this Court. Trying to address the issue in the hypothetical on an undeveloped record through the inclusion of a 'blanket' provision not only invades the province of a future tribunal but also results in unintended consequences."[1343]

9. Issues Excluded

The SRBA Court rejected inclusion of Issues 5–8, because of their breadth and possible inconsistent application amongst all partial decrees:

> For the reasons set forth below the Court rejects the inclusion of the proposed provisions. As a general matter, the Court declines to include provisions in the Final Unified Decree for the purpose of advising or influencing tribunals in future proceedings as to the legal effect of a partial decree issued in the SRBA. The issue of what pre-decree evidence may be discoverable, relevant and/or admissible in a given future post-decree proceeding is simply an issue not properly before this Court at this time and will not be considered. Furthermore, as explained below, the adopting of "blanket" provisions such as those proposed in an attempt to address

1338. *Id.* at 14–16 (citing A&B Irrigation Dist. v. Idaho Dept. of Water Res., 284 P.2d 225, 153 Idaho 500 (2012); American Falls Res. Dist. No. 2 v. Idaho Dept. of Water Res., 154 P.3d 433 , 143 Idaho 862 (2007); Memorandum Decision and Order on Petition for Judicial Review, A&B Irr. Dist. v. IDWR, Case No. 2009-647 (5th Jud. Dist. Idaho May 4, 2010); Memorandum Decision and Order on Challenge, *In re* SRBA Case No. 39576, Subcase No. 36-00003A (Nov. 23, 1999)).

1339. Memorandum Decision and Order on Challenge in the Matter of the Final Unified Decree, *supra* note 1300, at 16.

1340. *Id.* at 1.

1341. *Id.* at 16.

1342. *Id.*

1343. *Id.* at 16–17.

> hypothetical post-decree situations not presently before the Court would result in significant unintended consequences.
>
> . . . .
>
> Attempting to address issues of administration in the hypothetical with "blanket" provisions is not only unnecessary but runs the risk of undermining the effect of the Final Unified Decree. This is particularly true when such issues can be addressed in an appropriate forum if and when they arise.[1344]

Even though the SRBA Court decided not to include issues 5–8 in the Final Unified Decree, these issues will likely be raised in future proceedings—either in a contested case before IDWR, or in a judicial proceeding before the Court.

E. Other Issues of General Legal Significance in the Final Unified Decree

The Final Unified Decree also addressed several other issues of general legal significance including the effective date of the partial decrees for determining forfeiture, disallowal of unclaimed water rights, that the Final Unified Decree would supersede all previous decrees, the effect of the Final Unified Decree on third party beneficiaries to the Swan Falls Agreement, procedures for modifications of Final Unified Decree, and over what issues the SRBA Court would retain jurisdiction. These issues were included to help clarify the intent of the Final Unified Decree and aid in administration of the rights.

1. Effective Date of Partial Decrees, Forfeiture

While the SRBA Court declined to opine on the meaning of the November 19, 1987 date of commencement as it related to the extent of beneficial use by including the proposed language of Issue No. 6 in the Final Unified Decree, the SRBA Court did provide clear guidance on the import of the date each partial decree was issued. For purposes of determining forfeiture, the SRBA Court stated as follows: "The time period for determining forfeiture of a partial decree based upon state law shall be measured from the date of issuance of the partial decree by this Court and not from the date of this Final Unified Decree. State law regarding forfeiture does not apply to partial decrees based upon federal law."[1345]

2. Water Rights not Claimed in SRBA are Disallowed

With the exception of deferrable *de minimis* domestic and stockwater rights, all water rights with priority dates before November 19, 1987 had to be claimed in the SRBA. The SRBA Court provided clear guidance on the status of water rights that were required to be claimed, but were not: "All other water rights with a priority before November 19, 1987, not expressly set forth in this Final Unified Decree are hereby decreed as disallowed."[1346]

In some rare instances, the Director of IDWR required water users with priority

1344. *Id.* at 9, 17.
1345. Final Unified Decree, *supra* note 145, at 12.
1346. *Id.* at 10.

dates after November 19, 1987 to file claims in the SRBA.[1347] If a water user was required to file a claim, but did not, the Court made clear that the right was disallowed: "All water rights based on beneficial uses, licenses, permits, posted notices, and statutory claims required to be claimed in this proceeding are superseded by this Final Unified Decree."[1348]

3. Prior Water Right Decrees are Superseded by Final Unified Decree

Courts throughout Idaho's history issued water right decrees across the Snake River Basin in private adjudications and general adjudications. The Final Unified Decree clearly states that all prior water right decrees and any general administrative provisions contained therein, would be superseded by the Final Unified Decree: "All prior water right decrees and general provisions within the Snake River Basin water system are superseded by this Final Unified Decree except as expressly provided otherwise by partial decree or general provision of this Court."[1349] The exception that is referenced by the SRBA Court is for any language that is expressly contained on the face of a partial decree or general provision that specifically references back to a prior decree or general provision. Unless a partial decree specifically references back to a prior decree, any provisions contained in that prior decree are no longer valid. However, one exception applies to certain classes of water users who were determined to be third party beneficiaries to the Swan Falls Agreement. The rights of these third party beneficiaries are not superseded by the Final Unified Decree: "[T]his Final Unified Decree does not supersede the third-party beneficiary contractual rights conferred on certain classes of water rights pursuant to the 'Contract to Implement Chapter 259, Sess. Law 1983' as authorized by 1983 Idaho Sess. Laws 689 and codified as Idaho Code § 61-540 (2002). The scope of third-party beneficiaries and contract rights are defined in this Court's Order on State of Idaho's Motion for Partial Summary Judgment on Issue No. 2.[1350]

4. Modifications to the Final Unified Decree

Recognizing the possibility that changes may need to be made to the Final Unified Decree, or its attachments, the SRBA Court stated as follows:

> Any order amending or modifying this Final Unified Decree, including the attachments hereto, will be entered on the register of action for Civil Case No. 39576 in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls, and will be filed with the Idaho Department of Water Resources in lieu of issuing an Amended Final Unified Decree.[1351]

1347. *See* IDAHO CODE §§ 42-1408, 42-1420.
1348. Final Unified Decree, *supra* note 145, at 11–12.
1349. *Id.* at 12.
1350. Order on State of Idaho's Motion for Partial Summary Judgment, *In re* SRBA Case No. 39576, Subcase No. 00-91013 (July 12, 2011); Final Unified Decree, *supra* note 145, at Attachment 9.
1351. Final Unified Decree, *supra* note 145, at 13.

5. Retained Jurisdiction

Lastly, the SRBA Court established a line of demarcation between its continuing, retained jurisdiction over the Final Unified Decree (including its contents), and the role of IDWR in administering water rights that were partially decreed.

> This Court retains jurisdiction of this proceeding to: a) resolve any issue related to the Final Unified Decree that are not reviewable under the Idaho Administrative Procedures Act and/or the rules of the Idaho Department of Water Resources; and b) adjudicate any domestic or stock water rights defined under this Court's June 28, 2012, *Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims*.[1352]

The SRBA Court also enter an Order Regarding Subcases Pending Upon Entry of Final Unified Decree that governed the few subcases that could not be resolved before entry of the Final Unified Decree.[1353]

F. Final Unified Decree

The Final Unified Decree was signed August 25, 2014. Now the Final Unified Decree has been signed, and the Director is tasked with recording the Final Unified Decree in "each county in which the place of use or point of diversion of the water rights contained in the decree is located."[1354] The Final Unified Decree will be recorded in the following thirty-eight (38) Idaho counties:

Ada	Camas	Fremont	Lewis	Power
Adams	Canyon	Gem	Lincoln	Shoshone
Bannock	Caribou	Gooding	Madison	Teton
Bingham	Cassia	Idaho	Minidoka	Twin Falls
Blaine	Clark	Jefferson	Nez Perce	Valley
Boise	Clearwater	Jerome	Oneida	Washington
Bonneville	Custer	Latah	Owyhee	
Butte	Elmore	Lemhi	Payette	

Once the Final Unified Decree is recorded, it will constitute "constructive notice of the contents of the decree within the county in which the decree or transcript is recorded to subsequent purchasers and mortgagees."[1355] However, because of the voluminous nature of the Final Unified Decree, an actual, physical copy of the Final Unified Decree will not be recorded with each county.

Two paper copies of the Final Unified Decree were assembled. One copy is housed with the SRBA Court, while the other resides with IDWR in its main office, located in Boise. Electronic versions of the Final Unified Decree may be accessed from the SRBA and IDWR websites. Importantly, the electronic version of the Final

1352. *Id.*

1353. Order Regarding Subcases Pending Upon Entry of the Final Unified Decree, *In re* SRBA Case No. 39576, Subcase No. 01-00219 (Aug. 26, 2014).

1354. IDAHO CODE § 42-1413(1).

1355. IDAHO CODE § 42-1413(5).

Unified Decree is searchable. The Final Unified Decree contains the following eight (8) attachments:

Attachment 1	Snake River Water System Map
Attachment 2	Partially Decreed Water Rights, including name index, consisting of 770 pages.
Attachment 3	General Provisions, consisting of 113 pages
Attachment 4	Federal and Tribal Reserved Water Right Settlements, including all Consent Decrees and all Attachments thereto, all Partial Decrees issued by this Court as part of the Respective Settlements, and all Federal, State and/or Tribal Legislation Necessary to Enact and Approve the Water Right Settlements consisting of 2,857 pages.
Attachment 5	List of Water Right Numbers for Filed Water Right Claims Decreed as Disallowed consisting of 66 pages.
Attachment 6	List of Water Right Numbers for Unclaimed Water Rights Decreed as Disallowed, consisting of 66 pages.
Attachment 7	June 28, 2012, Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims, consisting of 6 pages.
Attachment 8	Instructions on Searching the Final Unified Decree, consisting of 5 pages.
Attachment 9	Order on State of Idaho's Motion for Partial Summary Judgment on Issue No. 2. Subcase No. 00-91013 (Basin-Wide Issue 13) (July 12, 2011).
Attachment 10	*Register of Actions*, Twin Falls County Case No. 39576 (i.e., SRBA Main Case).

Even if a water right was partially decreed in the SRBA, the decree may not be an accurate description of the water right today because the right may have been sold, split, transferred, or its elements changed administratively in some way. Therefore, for the most current information associated with any water right number listed in the Final Unified Decree, all research should conclude with consultation of the IDWR website.[1356] Additionally, because changes could have been made to the Final Unified Decree after its issuance, one should consult the SRBA's register of actions for Civil Case No. 39576 in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls.[1357]

1356. Water Right Research, IDAHO DEP'T OF WATER RESOURCES, http://www.idwr.idaho.gov/apps/ExtSearch/WRAJSearch/WRADJSearch.aspx.

1357. Subscase Summary Reports 00-39576, Idaho Water Adjudications, SRBA (Feb, 25, 2016), http://164.165.134.61/S0039576XX.HTM.

IX. CONCLUSION

Upon passage of the McCarran Amendment in 1952, many Western States undertook basin wide general stream adjudications. As many of these adjudications stretch into the 21st Century with no end in sight, some have begun to question whether they are worth the cost.[1358] The SRBA stands as a shining example that not only is it possible to complete a general stream adjudication within a reasonable period of time, but that it achieved the goal of providing a foundation for effective management of water rights within the Snake River basin.

Today, Idaho knows with certainty the nature and extent of all water rights within the Snake River basin. As an outgrowth of the adjudication, Idaho has undertaken active administration of water rights through the creation of nineteen new water districts.[1359] Issues regarding implementation of the Swan Falls Settlement, which in part precipitated the SRBA, are now resolved, and Idaho Power Company and the State are working cooperatively to manage the resource consistent with the settlement. Federal reserved water rights have been quantified and no longer cast a cloud over water development in the Snake River Basin. Endangered Species Act issues that impact the the operation of the Federal Reclamation Projects and diversions in the Upper Snake River Basin have been addressed. And, although work still remains to be done, Idaho is a long way down the road toward conjunctive administration of surface and ground water rights. Since 2005, the Director of IDWR has issued decisions in five delivery call proceedings that have led to four Idaho Supreme Court decisions[1360] establishing the legal framework for conjunctive administration of surface and ground water rights, the 2009 Eastern Snake Plain Aquifer Comprehensive Aquifer Management Plan, and to a settlement that establishes a process for stabilizing the ground water level of the Eastern Snake Plain Aquifer.[1361] All of this has occurred through the concerted and focused effort of the Legislature, the Executive Branch, the Judiciary, and the water users of Idaho in a twenty-seven year period. Idaho can with pride point to its commitment to effective management of Idaho's most precious resource— its water.

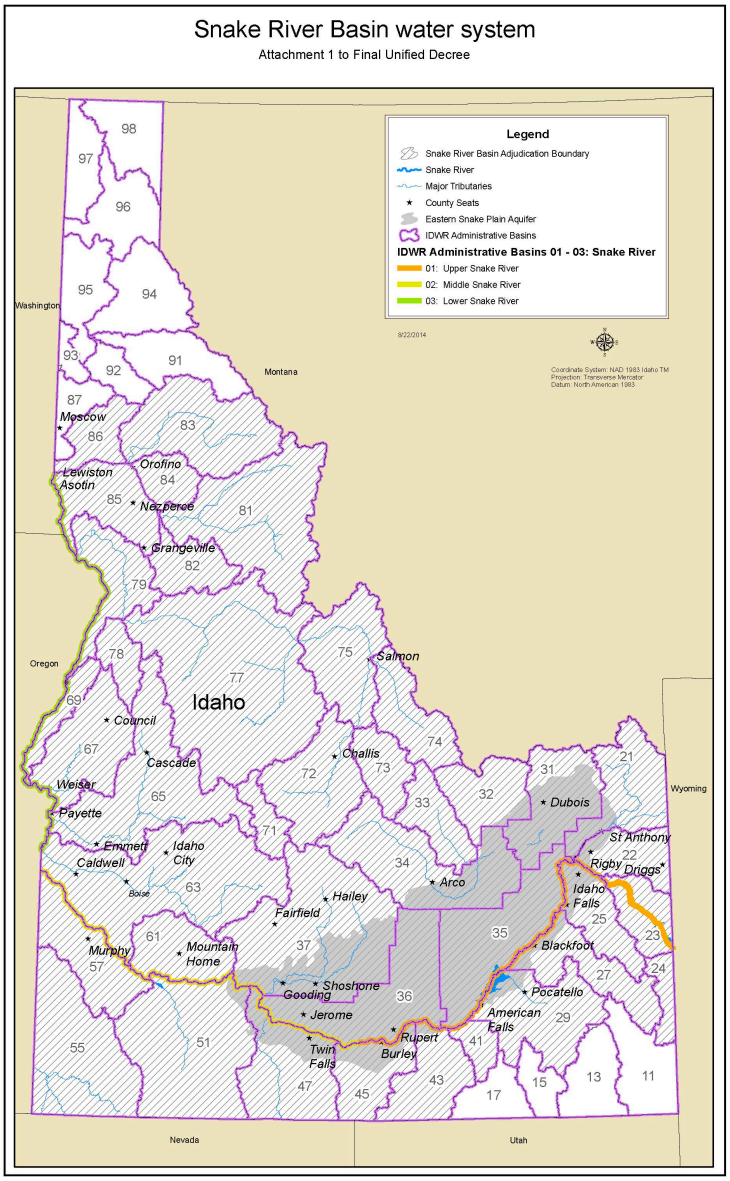
1358. L. McDonnell, Rethinking the Use of General Stream Adjudications, 15 WYO. L. REV. 347 (2015).

1359. Clive J. Strong, *SRBA Retrospective*, 57 IDAHO ADVOCATE 28 (November/December 2014).

1360. Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res., 154 P.3d 433, 143 Idaho 862 (2007); Clear Springs Foods, Inc. v. Spackman, 252 P.3d 71, 150 Idaho 790 (2011); A & B Irr. Dist. v. Idaho Dep't Of Water Res., 284 P.3d 225, 153 Idaho 500 (2012); In Matter of Distribution of Water to Various Water Rights Held By or For Ben. of A & B Irrigation Dist., 315 P.3d 828, 155 Idaho 640 (2013).

1361. Settlement Agreement between Participating Members of the Surface Water Coalition and Participating Members of the Idaho Ground Water Appropriators, Inc. (June 30, 2015) (on file with authors).

ATTACHMENT 1: MAP



ATTACHMENT 2: JUDGES AND SPECIAL MASTERS

Presiding Judges:

Daniel C Hurlbutt, Jr. 1987–1998
R Barry Wood 1999–2000
Roger S Burdick 2000–2003
John M Melanson 2003–2009
Eric J Wildman 2009–SRBA End

Special Masters:

Brigette Bilyeu 1993–SRBA End
Terrence A Dolan 1993–SRBA End
Richard A Simms 1993 (4 months)
Fritz Haemmerle 1995–1999
Thomas C Cushman 1999–2004
Theodore R Booth 2004–SRBA End

ATTACHMENT 3: DIRECTOR'S REPORTS TIMELINES

1/12/2007

Adjudication Report Progress

Reporting Area	Basin	Nature Of Rights	Director's Report	Federal Reserved	Date	Objection Deadline	Response Deadline	Uncontested Hearing
-	US Non-Consumptive Claims			7270	3/31/1994	10/16/1995	2/14/1996	5/21/1996
1	34	All	6903	902	6/18/1992	3/1/1993	7/1/1993	12/1/1993
		SOU Suppl			6/25/1999	7/30/1999	9/10/1999	10/19/1999
2	57	All	3479	354	10/13/1992	3/1/1993	7/1/1993	12/1/1993
		SOU Suppl.			7/23/1999	9/3/1999	11/12/1999	11/18/1999
3	36	All	7735	5	11/2/1992	5/1/1993	9/1/1993	12/1/1993
		SOU Suupl.			8/2/1999	9/10/1999	11/12/1999	11/16/1999
4	71	D & S	360	2	4/30/1997	8/28/1997	10/27/1997	10/27/1997
		I&O	292	0	11/10/1998	1/14/1999	5/17/1999	3/18/1999
	72	D & S	1797	2	4/30/1997	8/28/1997	10/27/1997	10/27/1997
		I&O	771	3	1/29/1999	6/2/1999	10/4/1999	8/6/1999
5	35	D & S	2786	0	5/23/1997	9/29/1997	12/2/1997	12/2/1997
		I & O	476	0	6/18/1998	8/24/1998	9/28/1998	10/27/1998
		I & O	497	0	9/15/1998	11/20/1998	12/31/1998	1/19/1999
		I & O	1392	0	1/29/1999	6/2/1999	10/4/1999	8/6/1999
		I&O	60	1	6/22/1999	08/20/99	12/20/99	10/19/99
6	51	D & S	1241	0	7/31/1997	12/5/1997	2/3/1998	2/3/1998
		I & O	586	78	11/24/1998	3/31/1999	7/31/1999	6/1/1999
	55	D & S	1803	1	7/31/1997	12/5/1997	2/3/1998	2/3/1998
		I & O	385	305	6/30/1998	9/4/1998	10/16/1998	11/4/1998
	61	D & S	1158	0	7/31/1997	12/5/1997	2/3/1998	2/3/1998
		I&O	672	7	2/16/1999	6/15/1999	10/14/1999	8/17/1999
7	41	D & S	146	0	3/2/1998	7/3/1998	9/1/1998	9/1/1998
		I&O	222	0	11/2/1999	1/7/2000	3/3/2000	3/21/2000
	43	D & S	533	0	3/2/1998	7/3/1998	9/1/1998	9/1/1998
		I&O	1806	1	9/28/2001	2/8/2002	4/12/2002	6/18/2002
8	31	D & S	899	0	1/30/1998	6/4/1998	10/2/1998	8/4/1998
		I&O	1369	3	5/10/2001	8/7/2001	11/9/2001	1/15/2002
	32	D & S	603	0	1/30/1998	6/4/1998	10/2/1998	8/4/1998
		I & O	428	0	10/18/1999	12/17/1999	4/21/2000	2/23/2000
	33	D & S	437	0	1/30/1998	6/4/1998	10/2/1998	8/4/1998
		I & O	472	1	2/1/2000	4/7/2000	8/11/2000	6/20/2000
9	29	D & S	2447	7	1/30/1998	6/4/1998	10/2/1998	8/4/1998
		I&O	2308	5	7/10/2003	11/14/2003	1/16/2004	1/20/2004
10	45	D & S	2276	0	3/2/1998	7/3/1998	9/1/1998	9/1/1998
		I&O	2036	1	9/7/2004	1/7/2005	3/11/2005	3/15/2005
11	27	D & S	1610	2	6/11/1998	9/16/1998	11/20/1998	11/20/1998
		I&O	747	1	11/10/2005	3/17/2006	5/19/2006	6/20/2006
12	47	D & S	5507	0	8/14/1998	2/12/1999	4/16/1999	4/16/1999
		I&O	1650	2	2/2/2007	9/19/2007	11/21/2007	1/15/2008
13	63	D & S	13745	17	11/5/1998	5/7/1999	9/8/1999	7/8/1999
		I&O P1	557	5	9/30/2002	1/31/2003	4/4/2003	4/15/2003
		I&O P2	1576	14	12/16/2005	4/21/2006	6/23/2006	7/18/2006
		I&O P3	2710	5	12/19/2006	6/20/2007	8/20/2006	12/18/2007
14	23	D & S	897	4	5/11/1998	9/16/1998	11/20/1998	11/20/1998
		I&O	302	1	6/11/2004	8/13/2004	10/15/2004	10/19/2004
	24	D & S	497	2	5/11/1998	9/16/1998	11/20/1998	11/20/1998
		I&O	185	0	11/21/2006	1/23/2007	3/27/2007	5/15/2007
	25	D & S	3567	0	5/11/1998	9/16/1998	11/20/1998	11/20/1998
		I&O	763	1	1/26/2005	6/22/2005	8/31/2005	9/20/2005
15	65	D & S	7736	6	4/6/1998	8/6/1998	10/6/1998	10/6/1998
		I&O Part 1	912	1	12/13/1999	4/14/2000	8/18/2000	12/19/2000
		I&O Part 2	374	3	4/13/2000	6/16/2000	8/18/2000	12/19/2000
		I&O Part 3	2068	0	9/18/2001	1/18/2002	3/22/2002	6/18/2002
16	37	D & S	6050	6	3/5/1999	9/10/1999	1/10/2000	11/12/1999
		I&OGWP1	365	0	8/8/2002	10/11/2002	12/10/2002	12/11/2002
		I&OSWP1	696	0	11/4/2005	3/10/2006	5/12/2006	5/18/2006
		I&O Part 2	541	0	12/5/2006	5/23/2007	7/23/2007	9/18/2007
		I&O Part 3	2199	0	2/21/2007	11/14/2007	1/15/2008	3/18/2008
17	21	D & S	1727	2	8/31/1998	1/8/1999	3/9/1999	3/9/1999
		I&O	759	0	1/17/2006	5/26/2006	7/28/2006	8/15/2006
	22	D & S	2462	0	8/31/1998	1/8/1999	3/9/1999	3/9/1999
		ESPA I&O	129	0	2/27/2006	5/5/2006	7/7/2006	7/18/2006
		Rest I&O	1682	0	12/22/2006	7/25/2007	9/26/2007	11/20/2007
18	1	D & S	147	0	8/31/1998	1/8/1999	3/9/1999	3/9/1999
		Lower 01	178	1	5/15/2006	10/6/2006	12/8/2006	3/20/2007
		Upper 01	673	0	12/19/2006	4/20/2007	6/20/2007	8/21/2007
19	67	D & S	2947	5	3/9/1999	9/17/1999	1/21/2000	11/19/1999
		I&O	2037	3	12/22/2006	8/22/2007	10/22/2007	1/15/2008
	69	D & S	519	5	3/9/1999	9/17/1999	1/21/2000	11/19/1999
		I&O	159	1	3/24/2006	5/26/2006	7/28/2006	11/21/2006
20	2	D & S	44	0	3/9/1999	5/10/1999	9/10/1999	7/12/1999
		I&O	741	0	12/29/2006	12/5/2007	2/5/2008	3/18/2008
21	3	D & S	42	0	3/9/1999	5/10/1999	9/10/1999	7/12/1999
		I&O	182	0	8/15/2006	11/1/2006	1/3/2007	3/20/2007
22	81	D & S	360	1850	3/18/1999	9/17/1999	1/21/2000	11/19/1999
		I & O	176	16	1/14/2005	3/18/2005	5/17/2005	5/17/2005
	82	D & S	833	**See B81	3/18/1999	9/17/1999	1/21/2000	11/19/1999
		I & O	219	5	1/20/2005	3/25/2005	5/24/2005	6/21/2005
	83	D & S	423	11	3/18/1999	9/17/1999	1/21/2000	11/19/1999
		I & O	86	4	9/20/2004	12/3/2004	2/4/2005	2/15/2005
	84	D & S	962	4	3/18/1999	9/17/1999	1/21/2000	11/19/1999
		I & O	280	12	1/14/2005	3/18/2005	5/17/2005	5/17/2005
	85	D & S	2061	**See B81	3/18/1999	9/17/1999	1/21/2000	11/19/1999
		I & O	585	68	1/20/2005	5/27/2005	7/26/2005	8/16/2005
	86	D & S	822	**See B81	3/18/1999	9/17/1999	1/21/2000	11/19/1999
		I & O	264	12	9/20/2004	12/3/2004	2/4/2005	2/15/2005
23	73	D & S	745	0	12/7/1998	4/6/1999	8/9/1999	6/15/1999
		I&O	494	0	1/25/2007	12/19/2007	2/18/2008	4/15/2008
	74	D&S	2406	1	12/7/1998	4/6/1999	8/9/1999	6/15/1999
		I&O	2008	1	1/23/2006	6/30/2006	9/1/2006	9/19/2006
	75	D&S	1729	7	12/7/1998	4/6/1999	8/9/1999	6/15/1999
		I&O	1388	7	1/11/2007	10/17/2007	12/18/2007	2/18/2008
24	77	D & S	641	39	3/9/1999	9/17/1999	1/21/2000	11/19/1999
		I&O	303	29	3/31/2006	7/28/2006	9/29/2006	10/17/2006
	78	D & S	730	6	3/9/1999	9/17/1999	1/21/2000	11/19/1999
		HCNRA		6	10/29/2004	1/14/2005	1/28/2005	2/15/2005
		I&O	662	3	1/5/2007	5/8/2007	7/8/2007	10/16/2007
	79	D & S	1318	10	3/9/1999	9/17/1999	1/21/2000	11/19/1999
		I&O	525	2	10/24/2006	6/13/2007	8/13/2007	12/18/2007
Totals			137,901	11,126		149,027		

** The United States and the Nez Perce Tribe filed collectively 1,820 claims in RA 19, 22,and 24.
The United States on behalf of the Nez Perce Tribe as a result of the Nez Perce Agreement of 2004 filed 101 claims in RA 22 that are reflected in the Basins above.

Late Claim Report included by basin above

88	claims in assorted basins	11/22/2000	1/22/2001	5/22/2001	5/15/2001
118	claims in assorted basins	3/5/2001	5/4/2001	9/7/2001	11/20/2001
106	claims in assorted basins	03/04/02	05/03/02	07/12/02	09/17/02
9	claims in B55 & 57	10/31/02	01/03/03	03/07/03	03/18/03
56	claims in assorted basins	02/18/03	04/23/03	06/25/03	07/15/03
42	claims in assorted basins	03/09/04	05/14/04	07/16/04	07/20/04
144	claims in assorted basins	04/22/05	06/24/05	09/09/05	08/16/05
72	claims in assorted basins	05/04/06	07/21/06	09/22/06	01/16/07
217	claims in assorted basins	04/27/07	07/06/07	09/07/07	09/18/07
852					

DWR/70/SRBA schd.xls

ATTACHMENT 4: BASIN WIDE ISSUES SUMMARY

Basin Wide Issues

Basin-Wide Issue No.	Issue	Status
# 1	Are Idaho Code sections 42-1416 and 42-1416A constitutional?	The SRBA Court held the statutes constitutional. No appeal was filed.
# 2	What is the role of the Director of the IDWR in a general adjudication?	The Idaho Supreme Court reversed the SRBA Court and affirmed the Legislature's power to remove the Director as a party to the SRBA. 128 Idaho 246, 912 P.2d 614 (1995). The Court also reversed, in a later opinion, the SRBA Court's award of attorney fees under the private attorney general doctrine against the State of Idaho. 947 P.2d 391, 130 Idaho 718 (1997).
# 3	Are the 1994 Amendments to chapter 14, title 42, Idaho Code valid?	The Idaho Supreme Court reversed the SRBA Court and held the 1994 Amendments to the Adjudication Code constitutional. 912 P.2d 614, 128 Idaho 246 (1995).
# 4	Are Idaho Code sections 42-1425, 42-1426 and 1427 constitutional?	The Idaho Supreme Court affirmed the SRBA Court's decision finding the statutes constitutional as written. 129 Idaho 454, 926 P.2d 1301 (1996).
# 5	Whether the general provisions in the Amended Director's Report for Reporting Area 2 (Basin 57) are necessary for the definition of the rights or for the efficient administration of the water rights.	The Idaho Supreme Court reversed the SRBA Court's holding that a general provision must apply to all water rights. The Supreme Court also reversed the SRBA Court's holding excluding the firefighting general provision. The Court affirmed the SRBA Court's holding excluding the irrigation season of use and excess flow general provisions. The Court set the general provisions regarding conjunctive use for reargument on January 21, 1998. Idaho Supreme Court 1997 Opinion No. 122. Idaho filed a Petition for Rehearing October 24, 1997, regarding the portion of the opinion on season of use. On April 22, 1998, the Idaho Supreme Court issued its decision on reargument and rehearing. Idaho Supreme Court 1998 Opinion No. 42. The Court vacated the SRBA Court's

		decision regarding conjunctive management and remanded the matter for an evidentiary hearing on whether the proposed general provisions are necessary to either define or efficiently administer the water rights to be decreed. The Court reversed the SRBA Court decision regarding the irrigation season and held that the irrigation season must be set forth as specific dates. The Court remanded for hearing the issue of whether general provisions on early and late season irrigations should be included in the decree.
#5A	Whether general provision no. 2 in the Amended Director's Report for Reporting Area 2 (Basin 57) is necessary for the definition of the rights or for the efficient administration of the water rights.	On April 6, 1998, the Idaho Supreme Court affirmed in part and reversed in part the SRBA Court's decision excluding the excess flow general provision for Reynolds Creek from the SRBA decree. The Court held that the general provision did not create a water right; however, it was necessary for administration of the Reynolds Creek water rights. Idaho Supreme Court 1998 Opinion 40.
#5B	Are general provisions 2 and 4 in Basin 34 necessary for the definition or administration of water rights?	The Idaho Supreme Court reversed the SRBA Court's holding that the general provisions from the Big Lost River decree were not necessary for the definition or administration of the recommended water rights. The case was remanded for a factual hearing on the necessity for inclusion of the general provisions. The Supreme Court also held that IDWR could not change a water right through administrative rules. 951 P.2d 943, 131 Idaho 12 (1998).
# 6	Are the Indian Tribes entitled to any instream flow water rights based on the authorities stated by them?	The SRBA Court heard argument on this motion on December 18, 1995. The SRBA Court never designated the issue.
# 7	Is the US Forest Service entitled to any instream flow water rights based on the authorities stated by the USFS?	The SRBA Court heard argument on this motion on December 18, 1995. The SRBA Court never designated the issue.
# 8	Is the USFWS entitled to any instream flow water rights based on the authorities stated by the	The SRBA Court heard argument on this motion on December 18, 1995. The SRBA Court never designated the issue.

	USFWS?	
# 9	Whether Public Water Reserve 107 is a valid basis for a federal reserved water right?	The SRBA Court held that PWR 107 did not reserve water. On April 6, 1998, the Idaho Supreme Court reversed the SRBA Court decision. The Court concluded that the plain and ordinary words of the enabling statutes and executive order "evidence an express intention by Congress that reserves a water right in the United States."
#9A	Does the BLM own the water rights associated with private livestock use of the public domain prior to regulation by the United States of that land for grazing purposes?	The SRBA Court declined to certify this issue as a basin-wide issue.
# 10	Are water rights in Idaho subject to partial forfeiture for non-use?	The Idaho Supreme Court reversed the SRBA Court, and held that Idaho Code § 42-222(2) provides for partial forfeiture of water rights. 947 P.2d 400, 130 Idaho 727 (1997).
# 11	If some diversion rate less than the full amount of water previously appropriated has been continuously used, does an unconstitutional taking result from a reduction of the right by the amount not continuously used?	The SRBA Court declined to certify this issue as a basin-wide issue.
# 12	What should the form and content of decrees for state-law based claims to *de minimus* amounts of stockwater? This issue includes six sub-issues. The primary area of dispute is whether a claim to an instream water right for wildlife can be perfected under state law outside of the procedures under chapter 15, title 42, Idaho Code.	The SRBA Court affirmed the Special Master's decision, which held as follows: 1) Annual volume of consumptive use for *de minimis* rights need not be defined; 2) Combined usage remark is not necessary; 3) The number of head of cattle is not necessary; 4) The quantity of use may be stated in an hourly rate as long as it is capped at no more than 13,000 gallons per day; 5) A wildlife use is not part of a livestock use under Idaho Code § 42-1401A(12); and 6) A water right cannot be decreed with both a federal and state basis. Memorandum Decision and Order Re: Basin-Wide Issue 12 (April 28, 1997).

# 13	To what extent should the Swan Falls Agreement be addressed in the SRBA or be memorialized in a Decree?	The SRBA Court held that the partial decrees for water rights affected by the Swan Falls Agreement include subordination language.
# 14	Are aesthetic wildlife and recreation beneficial uses of water if the water right is held by a private party?	The SRBA Court held that under Idaho law, any person may establish a diversionary water right, including to and from storage, for aesthetic, recreational, or wildlife purposes.
# 15	What is the "common plan for administering the operation of the Snake River" that should be ratified, confirmed, and approved?	The SRBA Court declined to certify this issue as a Basin Wide Issue
# 17	Does Idaho law require a remark authorizing storage rights to refill space vacated for flood control?	The SRBA Court held that under prior appropriation doctrine, as established under Idaho law, a senior storage water right holder may not refill his storage water right under priority before junior appropriators satisfy their water rights. The Court did not address the issue of whether water that is diverted and stored under a storage right is rightfully accounted toward the quantity of that right if it is used by the reservoir operator for flood control purposes. The decision was appealed to the Idaho Supreme Court. Oral argument was heard on January 24, 2014. Awaiting decision as of time of publication.