

MINUTES

RESOURCES AND CONSERVATION COMMITTEE

January 17, 1985

TIME: 2:15 PM

PLACE: Room 412 - Statehouse

PRESENT: All members except:

EXCUSED: Representative Winchester

GUESTS: Mr. Lyla Swank, Engineer, Water District 01; Mr. Patrick Kole, attorney, office of the Attorney General; Mr. T. C. Nelson, attorney, Idaho Power Company; Mr. Kenneth Dunn, Director, Department of Water Resources; Mr. Dick Gardner, Department of Financial Management; Mr. Patrick Costello, attorney, office of the Governor; Ms. Sharon Barnett, Idaho Women in Timber and Ms. Amber Thieme, Idaho Women in Timber.

Senators Noh and Tomings and Crapo.

Chairman Chatburn called the meeting to order.

MOTION: Representative Sutton moved and Representative Dewey seconded that the Minutes of January 15, 1985, be approved.

MOTION CARRIED.

Mr. Swank showed a slide presentation on adjudication.

Mr. Kole presented a historical outline of the Swan Falls controversy. (Attachment #1). He stated in August, 1984, Mr. Costello, Mr. Nelson and he entered into a series of negotiations to present a resolution, part of which is before the committee today.

Mr. Costello reported the Governor's perspective on this agreement is that it is almost fortunate that an impasse occurred because a much more comprehensive treatment of the issue was reached. He concluded that it was his opinion that the state should be responsible for the water rights - not private enterprise.

Mr. Nelson reported that on the point of adjudication, this is an integral part of the settlement agreement which includes four bills in the Senate. It is Idaho Power's position that the river should be adjudicated but it does not make sense if the mechanics are not in place. There may be concerns about the cost and that, at first glance, it may seem expensive. There are about 4 million acres irrigated in the Snake basin and if that land were worth \$1,000 an acre, that's 4 billion dollars worth of real property. The piece of property with a decreed water right on it is a lot easier to transfer. He said Idaho Power is in favor of adjudication and a great share of the cost will be born by hydropower.

RS 10961C2: RELATING TO THE ADJUDICATION OF WATER RIGHTS; AMENDING CHAPTER 14, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION-1406A, IDAHO CODE, TO PROVIDE FOR THE COMMENCEMENT OF AN ADJUDICATION OF THE WATER RIGHTS OF THE SNAKE RIVER BASIN; AMENDING SECTION 42-1414, IDAHO CODE, TO MODIFY THE SCHEDULE OF FEES FOR FILING A NOTICE OF CLAIM IN A WATER RIGHTS ADJUDICATION PROCEEDING AND TO PROVIDE A PROCEDURE FOR COLLECTION OF THE FEES; AND AMENDING CHAPTER 17, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-1777, IDAHO CODE, TO PROVIDE FOR THE CREATION OF THE WATER RESOURCES ADJUDICATION ACCOUNT.

Mr. Costello told the committee about the cost sharing portion briefly and said the bill gives the department the authority and the mandate to commence the general adjudication of the Snake River. He said it is their intention to limit the adjudication to anything below Murphy gage at Swan Falls if they can get the consent of the Federal government.

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Mr. Gardner said a Swan Falls agreement summary (Attachment #2) had been distributed to the committee. He discussed the manner in which each faction would participate in cost sharing. The end result in reaching an equitable figure was that there would be a flat \$50 for a water-right fee and then an additional variable water fee depending on the amount used. It was suggested \$1 per acre for irrigation, a \$25 cfs hydropower fee, \$10 per cfs for aquaculture and \$100 cfs for municipal, industrial, commercial, mining, heating, cooling, public instream flow, public lake level maintenance and wildlife. With this formula, they were able to come up with a figure of \$19,487,700. (Attachment #3)

Representative Little asked if the Payette River would be included after they had just completed adjudication.

Mr. Gardner answered that was correct.

Mr. Dunn made a point of clarification on the Payette River. He said there are two basins in which adjudication has been completed - the Payette and the Lemhi. The Payette and Lemhi rivers have been filed with the district court and they will not be done again.

Representative Echohawk inquired that under the fee system specified in the bill, what would be the effect on the users in the Fort Hall Indian reservation.

Mr. Dunn answered that to his knowledge, there would not be a charge.

Representative Johnson questioned whether, under the McCarren amendment, adjudication would not have to include an entire river.

Mr. Dunn answered that is an unknown. The McCarren amendment talks about a river system. The extent that they have to adjudicate is a decision that will be made in the process of defining the boundaries. The court will define that based on all the parties involved.

Representative Johnson said he felt the whole system should be adjudicated.

Mr. Dunn agreed that all the rights be decreed by the court.

Mr. Nelson remarked that some of the comments he has heard here and at the water users meeting seem to be more concerned about the mechanics of adjudication rather than if we should have it. He said he has concern that the statutes now in place may prove to be somewhat inadequate mechanically to handle this large of an adjudication. The questions have to be addressed separately and probably there will be some proposals to amend the statutes in this session but that is different as to whether we should have adjudication.

Representative Echohawk asked Mr. Nelson how important adjudication is to the entire package. If that were the only part that did not pass, would Idaho Power Company reject the entire package or would it be possible for renegotiation without adjudication.

Mr. Nelson replied that if that happens the principals will have to get together to see if what comes out conforms to their desires. He said he could not speculate as to what Idaho Power Company would do if the whole package passed except for adjudication.

MOTION: Representative Johnson moved and Representative Brackett seconded that RS 10961C2 be introduced for printing.

AMENDED MOTION: Representative Hawkins moved and Representative Bateman seconded that RS 10961C2 be held until next week in order that the committee have more time to study it.

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MOTION CARRIED.

MOTION: Representative Haagensoen moved and Representative Edwards seconded that the committee rescind the amended motion and introduce for printing RS 10961C2.

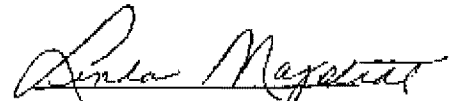
MOTION FAILED.

RS 10961C2 will come before the committee on Monday, January 21, 1985.

The meeting adjourned at 4:00 PM.



J. VARD CHATBURN, CHAIRMAN



Linda Magstadt, Secretary

HISTORICAL OUTLINE OF THE SWAN FALLS CONTROVERSY

This outline presents the facts leading to the settlement agreement between the State of Idaho and Idaho Power Company (IPCo).

I.

1901, 1910, 1918--IPCo Water Rights acquired at Swan Falls.

II.

1923--Department of Interior negotiates to obtain water rights for projects above Milner.

III.

1926--Citizen concern with the use of a downstream non-consumptive right preventing future development.

IV.

1928--Constitutional amendment limiting hydropower water rights.

V.

1936--IPCo's Twin Falls hydro right subordinated.

VI.

1947--Hells Canyon controversy begins--controversy concerns--Federal versus Private dam's impact upon vested water rights.

VII.

1951--IPCo agrees with Idaho to subordinate CJ Strike state water right.

VIII.

1953--IPCo given subordinated water right at Hells Canyon. It was assumed that the company's water rights in the Snake River system above Hells Canyon were subordinated by the federal power license.

IX.

1974--IPCo's pioneer coal fired power plant turned down.

X.

1976--IPCo's ratepayers filed P.U.C. complaint charging that Idaho Power Company has vested water rights at Swan Falls and by failing to protect those rights, electric rates have increased.

XI.

1979--District Court rules that all of IPCo's rights were subordinated.

XII.

1982--Idaho Supreme Court rules that although the IPCo water rights at Hells Canyon were subordinated IPCo rights at Swan Falls were not subordinated, by the Hells Canyon license.

XIII.

1983-1984--Legislative attempts to resolve Swan Falls fail.

RECOMMENDED ADJUDICATION COST SHARING  
For Snake River Above Lewiston

ADJUDICATION COST	\$ 27,369,000
(Discounted at 10% to July 1, 1986)	19,035,000
CLAIM FEES	
\$50 per claim X 61,694 water rights	\$ 3,084,700
\$25 per claim X 52,332 domestic & stockwatering rights	1,308,300
VARIABLE WATER USE FEES*	
Irrigation: \$1.00 per acre X 3,700,000 acres	\$ 3,700,000
Hydropower:	
\$25/CFS x 259,441 CFS Private or Municipal	6,486,000
\$25/CFS X 29,815 CFS USBR or COE	745,400**
Aquaculture: \$10 per CFS X 13,631 CFS water rights	136,300
Municipal: \$100 per CFS X 1,161 CFS water rights	116,100
Industrial: \$100 per CFS X 6,493, CFS water rights	649,300
Miscellaneous: filing fee only	0
Public: \$100 per CFS X 20,315.6 CFS water rights	<u>2,261,600***</u>
	\$ 18,487,700
STATE SEED MONEY	<u>1,000,000</u>
	\$ 19,487,700

\* Claimants are allowed to spread variable water use fees exceeding \$3,000 over as many as five annual payments with 10% interest accruing on the unpaid balance. Monies in the Adjudication Account would be invested by the Treasurer, with interest accruing to the Account.

\*\* This revenue is based upon the power plant capacities of the federal facilities.

\*\*\*\$2,131,300 of this is a state obligation. This figure includes \$230,000 for raising the minimum flow at Murphy gauge from 3,300 CFS to 5,600 CFS in the winter. It does not include a \$1,300,000 fee that would result from setting a new minimum flow of 13,000 CFS at Lime Point.

CAUTIONS:

- 1) Water use numbers may be overestimated due to doublecounting, thus lowering revenues. The amount of water use on unrecorded rights is unknown.
- 2) The number of actual water rights is similarly unknown.
- 3) If all parties are not assessed within one year, revenues will be lower.
- 4) While domestic and stockwatering rights have been included in the adjudication, the cost of processing these claims has not been included and is unknown.

NUMBERS OF IDAHO WATER RIGHTS

USE	ABOVE SWAN FALLS		LEWISTON & ABOVE		ENTIRE STATE	
		%		%		%
Irrigation	32,137	88.4%	51,968	84.2%	61,441	83.3%
Hydropower	651	1.8%	1,267	2.1%	1,620	2.2%
Aquaculture	722	2.0%	1,063	1.7%	1,141	1.5%
Municipal	390	1.1%	773	1.3%	964	1.3%
Industrial	977	2.7%	2,745	4.4%	3,638	4.9%
Miscellaneous	742	2.0%	1,631	2.6%	2,202	3.0%
Public	747	2.1%	2,247	3.6%	2,743	3.7%
TOTAL	36,366		61,694		73,749	
Stockwater	8,601		19,836			
Domestic	10,026		32,496			
Subtotal	18,627		52,332			
GRAND TOTAL	54,993		114,026			

NOTES:

- 1) These numbers have been enlarged from the number of water rights actually on record by a factor of 1.74, which reflects the number of unrecorded water rights that past adjudications have turned up. Thus, these estimates may be high for some uses, particularly those with smaller numbers. In addition, some rights may be doublecounted under more than one use, when, in fact, one use is primary.
- 2) The number of water rights holders varies considerably from the number of water users. A single water right held by a municipality or irrigation district may serve hundreds of users.
- 3) Industrial uses include: industrial, mining, commercial.
- 4) Miscellaneous uses include: recreation, private fire protection, individual heating or cooling, aesthetics.
- 5) Public uses include: wildlife (mostly held by Forest Service and BLM), water quality improvement, minimum instream flows.

MAXIMUM ENTITLEMENT OF WATER RIGHTS

	ABOVE SWAN FALLS		LEWISTON & ABOVE	
	CFS	1000 AF	CFS	1000 AF
Irrigation	140,930.0	101,850	184,770.0	133,533
Hydropower	163,062.0	117,845	289,256.0	209,045
Aquaculture	13,404.0	9,687	13,631.0	9,851
Municipal	723.0	523	1,161.0	839
Industrial	2,268.0	1,639	6,493.0	4,693
Miscellaneous	14,170.0	10,241	15,247.0	11,019
Public	5,802.6	4,194	20,315.6	14,682
TOTAL	340,359.6	245,979	530,873.6	383,662

Notes:

- 1) Water use may be doublecounted, particularly for miscellaneous and public uses. The same water right often lists several beneficial uses, of which one is primary. Thus, these numbers probably represent upper limits for the more minor uses. In addition, these figures include applications not as yet approved for all uses besides hydropower. Hydropower includes only permits, licenses, claims, and decrees.
- 2) Industrial uses include: industrial, mining, commercial.
- 3) Miscellaneous uses include: recreation, private fire protection, individual heating or cooling, aesthetics.
- 4) Public uses include: wildlife (mostly held by Forest Service and BLM), water quality improvement, minimum instream flows.
- 5) Domestic, stock watering, and groundwater recharge uses have been dropped. These rights are not normally disputed, but need to be quantified.

Division of Financial Management  
 1.17.85  
 fmstat/dqmax



## BENEFITS OF ADJUDICATION

1. Clearly defined water rights.
2. Security against future challenges.
3. Knowledge to enable the state to better manage and protect the river basin.
4. More easily valued and transferred rights should water markets be established.
5. Resolution of currently unquantified federal reserve claims.
6. Clear the way to resolve Swan Falls subordination issue.
7. Define waters available for further development.

Division of Financial Management  
8.15.84  
fmstat/DGADJUD

SWAN FALLS AGREEMENT FRAMEWORK SUMMARY

- 1) THE MINIMUM STREAMFLOW IN THE STATE WATER PLAN SHOULD BE ADJUSTED TO 3,900 CUBIC FEET PER SECOND AT MURPHY GAGE DURING THE IRRIGATION SEASON AND TO 5,600 CUBIC FEET PER SECOND DURING THE NON-IRRIGATION SEASON.

By raising the irrigation season minimum streamflow, the state will be able to assure an adequate hydropower resource base and better protect other values recognized by the State Water Plan such as fish propagation, recreational and aesthetic interests, all of which would be adversely impacted by an inadequate streamflow. Conversely, by setting the irrigation season minimum flow at 600 c.f.s. below the current actual minimum, the state can allow a significant amount of further development of water uses without violating the minimum streamflow.

- 2) BECAUSE ADDITIONAL WATER USE DEVELOPMENT POTENTIAL IS LIMITED, EACH NEW DEVELOPMENT SHOULD BE CAREFULLY SCRUTINIZED AGAINST EXPRESS PUBLIC INTEREST CRITERIA.

The right to develop the remaining water resources on the Snake River system should be allocated in a manner which will maximize long-term economic benefit to all sectors of society. Priority should be given to projects which promote Idaho's family farming tradition and which will create jobs.

...Legislation should be adopted which will enunciate state policy regarding the types of water resource development which are deemed to be beneficial, and which expressly recognizes hydropower generation benefits as an element of such public interest determination.

- 3) THE STATE SHOULD COMMENCE A GENERAL ADJUDICATION OF THE ENTIRE SNAKE RIVER BASIN IN IDAHO.

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.

The costs of the adjudication will be substantial, and legislation should be passed which equitably distributes those costs among water users, ratepayers and other taxpayers.

- 4) THE STATE SHOULD ENCOURAGE THE ESTABLISHMENT OF AN EFFECTIVE WATER MARKETING SYSTEM.

...Some provision must be made to enable people to acquire water rights outside of the appropriation process, over and above the amount reserved for domestic, commercial, municipal and industrial.

The state should make it easier to get willing sellers together with willing buyers, and to facilitate approval of changes in the place of use.

- 5) THE STATE SHOULD FUND HYDROLOGIC AND ECONOMIC STUDIES TO DETERMINE THE MOST COST-EFFECTIVE AND ENVIRONMENTALLY SOUND MEANS TO IMPLEMENT THE STATE WATER PLAN AND TO AUGMENT FLOWS IN THE SNAKE RIVER.

The State Water Plan is the cornerstone of the effective management of the Snake River and its vigorous enforcement is contemplated as a part of the settlement. Much additional information is needed to permit informed management and planning decisions...to determine...economic potential...impact on the environment, and... impact on hydropower generation.

- 6) LEGISLATION SHOULD BE ENACTED TO CLARIFY THAT PROCEEDS FROM UTILITY SALES OF HYDRO-POWER WATER RIGHTS WILL BENEFIT RATE-PAYERS.

Concern has been expressed that current law could permit a utility to sell its water rights to others. An additional concern is that the proceeds of such a sale would go to stockholders. The parties will propose legislation to address these concerns.

## SWAN FALLS ADJUDICATION

### I. Policy Summary

- A. Identification and quantification of water rights in the Snake River Basin will provide the Department of Water Resources the information to manage the river and enforce minimum flows.
- B. Clear definitions of water rights will protect valid claims against future challenges and facilitate transfers and trading of such rights.
- C. A general adjudication will result in quantification of federal and Indian water rights which until now have been unresolved.
- D. The adjudication will define the amount of water available for development over and above the proposed new minimum flows.

### II. Methodology

- A. Include all tributary basins, diversions and uses in a single general adjudication.
- B. Use the information base currently available from water rights records, ongoing and completed adjudications of tributary basins, and from the mandatory claims program.
- C. Use new technological applications including remote sensing equipment, improved orthophoto quadrangle maps and data processing equipment to insure efficiencies.
- D. Constitute a general adjudication within the definition of the McCarren Act to quantify federal and Indian water rights.
- E. Area adjudicated will be divided into smaller units delineated by county, groups of counties or by drainage. Portions of the impact area could then have water rights defined and administerable within law prior to the end of the ten year effort.

### III. Timetable

- A. FY 1986:
  1. Obtaining personnel and equipment.
  2. Setting up and organizing the adjudication.
  3. Determining "critical path" schedule.
  4. Obtaining authorization for joinder from the court.
  5. Conducting initial claims taking.
- B. FY 1987 - FY 1994:
  1. Determination of ownerships.
  2. Research of water right records.
  3. Joinder of additional water right holders.
  4. Additional claim taking, claim review and proposed findings of water rights.
- C. FY 1995:
  1. Finalization and compilation of complete finding of water rights.

Description	Rate	1		2		3		4		5		6	
		FY 1986	FTE	FY 1987	FTE	FY 1988	FTE	FY 1989	FTE	FY 1990	FTE	FY 1991	FTE
<b>PERSONNEL COST</b>													
Bureau Chief	44,500	1	44,500	1	49,061	1	51,514	1	54,030	1	58,735	1	59,634
Wtr Res Sec Supv	38,400	1	38,400	4	169,344	4	177,611	4	186,702	4	196,037	4	205,839
Office Secretary	16,800	2	33,600	6	111,132	6	116,699	6	122,523	6	128,649	6	135,082
Records Mgr	18,500	2	37,000	3	61,189	3	64,248	3	67,461	3	70,834	3	74,375
Wtr Res Agent, Sr	28,000	3	78,000	14	401,310	14	421,376	14	442,444	12	398,200	12	418,110
Attorney	28,700	2	57,400	4	126,567	4	132,885	4	139,540	6	219,776	6	230,764
Wtr Res Anal, Sr	31,600	4	126,400	10	348,390	12	438,971	14	537,740	14	564,627	14	592,838
Programmer Anal, Sr	33,200	2	66,400	4	146,412	4	153,733	4	161,419	4	169,430	4	177,965
Programmer Anal	26,000		0		0		0		0		0		0
Data Entry Oper	15,200	2	30,400	6	100,548	6	105,375	6	110,834	8	133,136	8	162,956
<b>Total Pers Cost</b>		19	512,100	52	1,513,959	54	1,862,819	56	1,822,773	58	1,959,609	58	2,057,583
<b>OPERATING EXPENSE</b>			204,840		605,581		665,125		729,109		783,841		823,033
<b>CAPITAL OUTLAY</b>													
Vehicles			91,500		66,600		20,000		0		33,000		33,600
Equipment			198,400		104,100		90,000		60,000		30,000		30,000
<b>ANNUAL TOTALS</b>			1,006,840		2,290,234		2,437,938		2,611,882		2,807,044		2,944,216

DISCOUNTED AT 10%  
 TO YEAR 2 (JULY 1, 1986)

	1,107,514	2,290,234	2,216,308	2,158,579	2,108,974	2,010,918
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Description	Rate	7 FY 1992		8 FY 1993		9 FY 1994		10 FY 1995		11 FY 1996		12 FY 1997		PROGRAM TOTALS
		FTE	AMT	FTE	AMT	FTE	AMT	FTE	AMT	FTE	AMT	FTE	AMT	
<b>PERSONNEL COST</b>														
Bureau Chief	44,500	1	62,616	1	63,747	1	69,034	1	72,486	0	0	0	0	585,477
Wtr Res Sec Supv	38,400	4	216,131	4	226,937	4	236,284	4	250,198	0	0	0	0	1,905,633
Office Secretary	16,800	6	141,836	6	148,928	6	156,374	6	164,193	0	0	0	0	1,259,004
Records Mgr	18,500	3	78,094	3	81,999	3	86,099	3	90,404	0	0	0	0	711,702
Wtr Res Agent, Sr	26,000	10	363,648	10	394,138	10	403,345	10	423,513	0	0	0	0	3,736,282
Attorney	28,700	8	323,070	8	339,224	8	356,185	8	373,994	0	0	0	0	2,299,416
Wtr Res Anal, Sr	31,600	14	622,501	14	653,628	14	686,309	14	720,623	0	0	0	0	5,292,043
Programmer Anal, Sr	33,200	4	186,863	4	196,206	4	206,016	4	216,317	0	0	0	0	1,680,821
Programmer Anal	26,000		0		0		0		0	0	0	0	0	0
Data Entry Oper	13,200	8	171,163	8	179,659	8	186,642	8	196,074	0	0	0	0	1,403,008
<b>Total Pers Cost</b>		59	2,166,060	59	2,276,463	58	2,390,287	58	2,509,801	0	0	0	0	18,873,435
<b>OPERATING EXPENSE</b>			467,224		910,585		956,115		1,003,920		0		0	7,549,374
<b>CAPITAL OUTLAY</b>														
Vehicles			17,200		17,200		17,200		17,200		0		0	314,100
Equipment			30,000		30,000		30,000		30,000		0		0	632,500
<b>ANNUAL TOTALS</b>			3,082,484		3,234,249		3,393,801		3,560,921		0		0	27,369,409

1,913,979

1,825,050

1,741,954

1,661,145

\*19,034,834

DISCOUNTED  
TOTAL COST

## Adjudication in Other States

In the states of Utah, Nevada, Oregon and Washington, the state water resource agency's involvement in adjudications is similar to that of Idaho. The degree to which the various states have been involved in adjudications, however, varies greatly.

In Utah, about one-half of the water rights have been adjudicated. Utah estimates another 20 years to complete adjudication in the state.

In Montana, approximately 200,000 adjudication claims statewide were received by the April 30, 1982 claim filing deadline. With all claims received and a full time staff of 57 state people in addition to one chief judge, three judges, four watermasters and four secretaries, Montana recently estimated it will take another 15 years for entry of decrees.

In Nevada, most adjudications are small in size with 49 presently pending resolution. However, the relatively large Humboldt River system has been adjudicated in the past.

In Washington, the Yakima River Basin is the largest adjudication undertaken to date with approximately 2300 claims filed. Legal obstacles have hindered progress in the adjudication.

Approximately 70% of the water rights in Oregon have been adjudicated with the area east of the Cascades essentially complete.

Nearly all states have experienced the common problems of long delays due to legal problems and lack of personnel and funding.

## Alternatives in the Snake River Adjudication

There are a number of alternatives which need to be considered before an adjudication of the Snake River drainage is initiated, including the extent of the Snake River basin to be included in the adjudication. One alternative is the Snake

River system upstream from Swan Falls dam (55,000 rights estimated). Another is the Snake River system upstream from Lewiston which would include the Salmon and Clearwater drainages (114,000 total rights estimated). In either alternative, the inclusion or exclusion of groundwater must be a conscious decision. The inclusion or exclusion of the numerous minor uses such as domestic and stockwater must be weighed in a benefit/cost forum since domestic and stockwater uses likely will not be physically regulated in the foreseeable future. Of the 114,000 rights, it is estimated 32,000 are domestic rights and 20,000 are stockwater rights.

Joinder of the United States to quantify the federal reserved rights must be carefully considered.

The general scope of the joinder must also be analyzed. As extremes, the joinder of all land owners of record as compared to only the water right holders of record could be made. The expenditure in joining all land owners is several times that of joining only the water right holders of record. Joinder of only the water right holders of record, however, would not include all water users in the adjudication and would result in the unrecorded water rights and expanded uses being missed.

It is possible that, unless the Snake River system from Lewiston upstream, including groundwater and all uses, is included in the adjudication, the federal government could claim it should not be made a party to the adjudication since the McCarran Amendment is written in terms of an adjudication of a "river system or other source." If this were alleged and upheld, the Indian water rights and other federal reserved rights would not be included in the adjudication.

On the other hand, inclusion of domestic and stockwater uses (most of which are exempt from statutory filing) will make the adjudication much more costly and cumbersome to manage. Most stockwater and domestic rights likely will never be physically regulated and administered by a watermaster.

Management of groundwater and surface

water together (conjunctive management) in theory is a logical administrative alternative since the diversion of groundwater does affect surface water availability. In the past, however, Idaho has essentially managed groundwater and surface water separately. Because the Snake Plain Aquifer is a tributary to the Snake River, there is a need to determine both groundwater and surface water uses. Unless rights from both groundwater and surface water are known, the minimum flows on the Snake River at Murphy and Weiser cannot be effectively administered. Problems with groundwater users who illegally expand or irrigate land with no water right can be expediently resolved without a separate court action if the existing rights are known and quantified through a general adjudication. Spin off benefits not directly related to water distribution include "certainty" in real property or loan transactions if groundwater rights are quantified.

At some point, Idaho must quantify existing water rights before it can continue to approve new appropriations, with any degree of confidence that unappropriated public water is available for appropriation.

Any alternative that may be selected in the adjudication of an area as large as the Snake River is a long term commitment. An adjudication as ambitious as the Snake River Basin should not be initiated unless the state is committed to continued funding. Idaho can avoid, however, many of the problems experienced by adjacent states if an adequate commitment of funds and personnel is made and consummated.

Idaho Department of Water Resources  
Statehouse  
Boise, Idaho 83720  
334-4440

# Water Right Adjudication Snake River Basin



The decision of the Idaho Supreme Court in Case No. 13794, entitled *Idaho Power Co. v. the State of Idaho, et. al.* 104 Idaho 575 (1983) has resulted in a new awareness of the validity of Idaho water rights, especially in the Snake River Basin. A succession of events has since evolved, including proposed legislation, enacted legislation, additional lawsuits, task force formations, and cessation of new water right approvals. In addition, a contract agreement package was negotiated between the State and Idaho Power Co., requiring certain legislative and administrative actions to allow the matter to be fully resolved.

An important element in the negotiated agreement package is to define all water rights that now exist through an adjudication of those water rights.

The purpose of this pamphlet is to discuss the adjudication process. The procedure, costs, benefits, federal rights and administration of water rights will be discussed to provide a rational basis to decide for or against adjudication of water rights in the Snake River Basin.

is preliminary background information, an understanding of some basic water right principles is desirable when considering the question of adjudication:

### Water Right Appropriation in Idaho

Most Idaho waters, both surface and groundwater, have been declared by the state Constitution to belong to the State of Idaho. Idaho follows the prior appropriation doctrine of water rights, *to develop a water right the water must be diverted from the natural source and applied to beneficial use.* An exception to this is the stream flow water right, recognized by statute, where the water is allowed to remain undiverted in the stream or lake for such beneficial uses as *water quality, transportation, fish/wildlife habitat.* The fact that a person owns land adjacent to a stream, river or lake or above an aquifer does not in itself give that person a water right.

For distribution purposes, the principle of *first in time is first in right* applies. During times of shortage, the oldest right is supplied water first, then the next right later in time and so on. If there is not enough water available to satisfy all rights, the junior (later-in-time) rights will not receive any water.

There have been two basic methods of water appropriation in Idaho. The method to develop a *water right* (constitutional right) is by *diversion and use.* This type of water right can be recorded as a "Claim to a Water Right." The method to develop a *statutory right* (Application/Permit/Lease) is by filing with the state.

Statutory dates after which permits have not been required for new appropriations are:  
*Groundwater:* March 25, 1963 (stockwater or single family domestic use excepted)  
*Surface water:* May 20, 1971.

### Water Right Adjudication in Idaho

Whether initiated by constitutional or statutory procedures, a water right may be confirmed by court decree. A decree is the result of an adjudication. Adjudication can be defined as a process of water right quantification and confirmation through the court system.

The Idaho Department of Water Resources (IDWR) has prepared proposed findings for several large adjudications. The Payette River Drainage adjudication included approximately 9000 water rights in Valley, Gem, Boise and Payette counties, and the Lemhi River Adjudication in Lemhi County included approximately 1900 water rights.

The procedure for an adjudication follows standard court procedures except IDWR acts as a special master to prepare the proposed finding of water rights for the court. Existing water uses are inventoried, land owners determined, existing water right records compiled, and rates of diversion often determined. Upon compilation of the various pieces of information, the potential water users are named (joined) as parties (defendants) to a lawsuit. Each water user then files a Notice of Claim to a Water Right describing each of his water rights. The claims are reviewed using existing data to determine accuracy, completeness and compliance with the law.

The report prepared by IDWR for the court's consideration is termed a proposed finding of water rights or a proposed decree. Claimants are provided an opportunity for fact-finding hearings to resolve differences before the Department submits the proposed finding to the court. After the proposed finding of water rights is filed with the court, claimants may also file objections with the court relative to the recommendation of their own water right or to the rights of others. Objections are resolved by the court.

Technology available to more efficiently manage present day adjudications includes computer compiled water right data, computer readable map information, and satellite imagery.

### Why Adjudicate and Why Now?

There are important reasons to adjudicate now. The Department of Water Resources needs to be able to manage the delivery of water to protect those who are entitled to its use and to determine if additional rights can be granted in accordance with the Swan Falls agreement. Also, the extent of Indian and federal reserved rights needs to be quantified and determined.

Under existing Idaho statutes, water rights may not be regulated by a watermaster until the existing rights from the same water source have been adjudicated. Without an adjudication there is no reasonable means to prevent a water user from diverting and using twice his entitlement, or to shut off users who have no legal right to divert and use water.

An existing decree of water rights is binding only on those persons or their successors in interest who were parties to the suit. Many existing decrees were not comprehensive in nature (basin- or drainage-wide) and involved only some of the water users. Water rights of users not named in a suit cannot be administered to protect the rights of those involved in the suit.

Water rights decreed decades ago do not have adequate information to provide continuing protection for the owners. Most recorded water rights have been essentially reconfirmed in past adjudications with appropriate changes unless the rights have been forfeited or abandoned.

### Cost of Adjudication

Preparation of the proposed finding of water rights for the Snake River Adjudication has been estimated to require 10 years and \$27.4 million. The cost will be proportionately less if the scope of the adjudication is reduced by limiting the area included or the types of water rights involved. These projections have been made based on personal and time requirements experienced by the Department in the conduct of past adjudications.

The general funds of the state provided by the legislature through the appropriation process financed adjudication efforts conducted by the Department in the past. Funding for major adjudications in the future can only be determined by the legislature but a citizen advisory group has suggested that the water users provide up-front funding through a fee schedule based on use criteria. The advisory group has suggested that \$19 million collected in the first two years of the adjudication will provide the funds needed.

### Indian and Federal Water Rights

Various court cases during the past eight decades have established that certain Indian and Federal water users are entitled to reserved water rights. Based on the "Winters" doctrine, the United States is considered to have reserved water rights for use on Indian lands, by creating Indian reservations. In addition, based on the Arizona v. California case, the United States is considered to have reserved water rights on other types of federal reservations such as national parks, forests, etc., as a consequence of creating the reservations.

### McCarran Amendment

The McCarran Amendment is a federal statute enacted in 1952, 43 USC 666, which consents to the joinder of the United States as a defendant in a suit for the adjudication of rights to the use of water of a river system or other source. Joinder of the United States provides the mechanism to determine the Indian rights and other federal reserved rights. The extent of an adjudication necessary to satisfy the McCarran Amendment is open to question. Whether all tributaries must be included, whether groundwater rights must be determined, and what uses such as domestic and stockwater can be omitted will be resolved as the court enters an order authorizing the adjudication.

10 copies please

*J.V.C.*  
WATER RIGHT ADJUDICATION

Department of Water Resources

January, 1985



## WATER RIGHT ADJUDICATION

### PREFACE

The decision of the Idaho Supreme Court in Case No. 13794 entitled Idaho Power Co. v. the State of Idaho, et. al. 104 Idaho 575 (1983) has resulted in a new awareness in Idaho among all water users concerning the security of their water rights. A succession of events has since evolved including proposed legislation, enacted legislation, additional lawsuits, task force formations, cessation of new water right approvals, and a contract agreement package negotiated between the State and Idaho Power Co. which requires certain legislative and administrative actions to allow the matter to be fully resolved.

An important element in the negotiated agreement package is to define all water rights that now exist through an adjudication of those water rights.

The purpose of this paper is to discuss the adjudication process. The procedure, costs, benefits, federal rights and administration of water rights will be discussed in order to provide a rational basis to decide for or against adjudication of water rights in Idaho.

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This was an optional procedure for many years. As time passed, the legislature enacted statutes requiring an application be submitted for a new appropriation of water.

- Mandatory dates after which permits were required for new appropriations are:
  - March 25, 1963 for groundwater - There is an exception for stockwater or single family domestic use
  - May 20, 1971 for surface water. There is no exemption for domestic use
- A licensed water right is considered real property and is conveyed with the land unless specifically withheld from the land in the instrument of conveyance.
- A licensed right is considered "prima facie" evidence of a water right.

## II. WATER RIGHT ADJUDICATION IN IDAHO

- Whether initiated by constitutional or statutory procedures, a water right may be confirmed by court decree. A decree is the result of an adjudication.
- Adjudication can be defined as a process of water right quantification and confirmation through the court system. The court's final product is commonly termed a decree.
- Many of the existing decreed or adjudicated water rights in Idaho are the result of private lawsuits filed among the water users.
  - The Department has prepared proposed findings for several large adjudications. The Payette River Drainage adjudication included approximately 9000 water rights in Valley, Gem, Boise & Payette counties and the Lemhi River Adjudication in Lemhi County included approximately 1900 water rights. The procedure for an adjudication follows standard court procedures except IDWR acts as a special master to prepare the proposed finding of water rights for the court. Existing water uses are inventoried, land owners determined, existing water right records compiled, and rates of diversion often determined. Upon compilation of the various pieces of information, the potential water users are named (joined) as parties (defendants) to a lawsuit. The water user then files a Notice of Claim to a Water Right describing his water rights. The claims are reviewed using existing data to determine accuracy, completeness and compliance with the law. The report prepared by IDWR for the court's consideration is termed a proposed finding of water right or proposed decree. Claimants are provided an opportunity for fact finding hearings to resolve differences before the Department submits the proposed finding to the court. After the proposed finding of water rights is filed with the court, claimants may also file objections with the court relative to the recommendation of their own water right or to the rights of others.

past has primarily been from the general funds of the State provided by the legislature through the appropriation process. Funding for major adjudications in the future can only be determined by the legislature but a citizen advisory group has suggested that the water users provide up-front funding through a fee schedule based on use criteria. The advisory group has suggested that 19 million dollars collected in the first two (2) years of the adjudication will provide the funds needed.

#### V. INDIAN AND FEDERAL WATER RIGHTS

The Winters Doctrine or federal reserved water rights evolved from a 1908 U.S. Supreme Court Case entitled Winters v. United States, 207 U.S. 564 (1908). The case concerned water availability from the Milk River for use by the Indians living on the Fort Belknap Indian Reservation in Montana. The court concluded that when the reservation was established, the Indians did not intend to give up their rights to the use of water for irrigation. Nor, the court decided, was it the intent of the United States in agreeing to the reservation to deny the Indians use of such waters as would be needed for irrigation.

The holding of Winters, which forms the basis of the Indian reserved water rights doctrine, was that the United States had reserved certain water rights for the Indians with a priority dating from the establishment of the reservation in 1888. The quantity of the water right reserved for Indian use was an amount sufficient to irrigate the irrigable Indian lands on the reservation. The reserved right was further described as being "for a use which would be necessarily continued through years."

By far, the most important Indian water case following Winters is the case of Arizona v. California, 373 U.S. 546 (1963). This case was important first of all as an endorsement of the Winters doctrine established by the court more than fifty years earlier.

Arizona v. California involved a claim by the United States on behalf of several reservations for a fair share of water from the Colorado River System. The Supreme Court decided that the amount of water reserved for each of the specific Indian reservations should be measured on an irrigable acreage basis.

The decision in Arizona v. California is significant to Western water users for the additional reason that the case extends the Winters Doctrine rationale beyond Indian reservations to meet water needs on other federal reservations created from public domain lands. Such reservations include national parks, national forests, wildlife refuges, national monuments and the like. The doctrine of impliedly reserved water rights applied to non-Indian federal lands created the same open-ended problem of quantification and permissible usage which is experienced under application of the doctrine to Indian reservation lands. Unlike rights held by private citizens, reserved rights do not have to be developed and used to remain valid.

The Federal District Court for the District of Colorado recently considered claims by the Sierra Club brought against the Secretary of Agriculture for failing to claim federal reserved water rights in twenty-four wilderness areas in Colorado. The matter, however, is presently unresolved.

Joinder of the United States to quantify the federal reserved rights must be carefully considered.

The general scope of the joinder must also be analyzed. As extremes, the joinder of all land owners of record as compared to only the water right holders of record could be made. The expenditure in joining all land owners is several times that of joining only the water right holders of record. Joinder of only the water right holders of record, however, would not include all water users in the adjudication and would result in the unrecorded water rights and expanded uses being missed.

It is possible that unless the Snake River system from Lewiston upstream including groundwater and all uses are included in the adjudication, the federal government could claim they should not be made a party to the adjudication since the McCarran Amendment is written in terms of an adjudication of a "river system or other source." If this were alleged and upheld, the Indian water rights and other federal reserved rights would not be included in the adjudication.

On the other hand, inclusion of domestic and stockwater uses (most of which are exempt from statutory filing) will make the adjudication much more costly and cumbersome to manage.

Management of groundwater and surface water together (conjunctive management) in theory is a logical administrative alternative since the diversion of groundwater does affect surface water availability. In practice, however, Idaho has in the past essentially managed groundwater and surface water separately. Because the Snake Plain Aquifer is a tributary to the Snake River, there is a need to determine both groundwater and surface water uses. Unless rights from both groundwater and surface water are known, the minimum flows on the Snake River at Murphy and Weiser cannot be effectively administered. Problems with groundwater users who illegally expand or irrigate land with no water right can be expediently resolved without a separate court action if the existing rights are known and quantified through a general adjudication. Spin off benefits not directly related to water distribution include "certainty" in real property or loan transactions if groundwater rights are quantified.

At some point in time, Idaho must quantify existing water rights before it can continue on with approval of new appropriations with any degree of confidence that unappropriated public water is available for appropriation.

Any alternative that may be selected in the adjudication of an area as large as the Snake River is a long term commitment. An adjudication as ambitious as the Snake River Drainage should not be initiated unless the State is committed to continued funding. Idaho can avoid, however, many of the problems experienced by adjacent states if an adequate commitment of funds and personnel is made and consummated.