

To the University of Wyoming:

The members of the Committee approve the Plan B Thesis of Jared Fluckiger
presented on April 1, 2016

Jason Robison, Chairperson

Robert McGregor Cawley, Outside Member

Kristi Hansen, UW Faculty

APPROVED:

Dr. I. Burke, Director, Environment and Natural Resources

Fluckiger, Jared S., Assessing Idaho's Future Water Administration Needs: An Idaho Water Court?, M.A., Haub School of Environment and Natural Resources, May 2016.

Idaho recently finished the Snake River Basin Adjudication (SRBA). It is now commencing a few other Idaho adjudications. Idaho will soon have to decide what its future water administration will look like once the SRBA court is done with its adjudicative work. Idaho follows the prior appropriation doctrine like most other western states. This doctrine has evolved to meet modern demands, and will continue to do so in the future. There are other western states that have implemented prior appropriation differently than Idaho. Montana and Colorado are two examples that illustrate some of the merits, and drawbacks of alternative approaches. Idaho should consider its future needs, as well as the potential benefits to be gained, as it begins to decide how it will administer water rights in the future and which elements to incorporate. Some of Idaho's future needs include smaller adjudications, as well as administrative appeals from the Idaho Department of Water Resources, and conjunctive management issues. There will also be water implications from climate change and population growth that will result in increased disputes. There is a growing need for judicial expertise in Idaho's future to resolve water conflicts. Because there are considerable benefits to be gained from a specialized judge, Idaho should designate one district court as the de facto state water court once the SRBA court is done. This approach is the most practical considering Idaho's circumstances. Idaho should begin identifying future needs and potential solutions now.

ASSESSING IDAHO'S FUTURE WATER ADMINISTRATION NEEDS: AN IDAHO
WATER COURT?

by
Jared S. Fluckiger*

A Plan B thesis submitted to the University of Wyoming
in partial fulfillment of the requirements for the degree of

MASTER OF ARTS
in
ENVIRONMENT AND NATURAL RESOURCES

Laramie, Wyoming
May 2016

* An Idaho native from the Magic Valley completing a JD/MA degree at the University of Wyoming. This paper is written in satisfaction of the MA thesis requirement. Anticipated graduation date of May 2016. He received his undergraduate degree from Utah State University in Political Science.

Acknowledgements

Foremost, I would like to thank my committee chair and thesis advisor Jason Robison, Water Law professor at the University of Wyoming College of Law. For making himself readily available at all times to mull over any aspect of this project and helping guide me through developing the thesis. His thorough and thoughtful consideration and encouraging pressure has been essential to my success through each step of the planning, research, and writing of this thesis. His enthusiasm and immense knowledge have also been a source of motivation. I credit all that I know about water law to his mentoring as a professor and academic advisor over the past three years.

I would also like to thank my other two committee members: Dr. Robert McGregor and Dr. Kristi Hansen, both at the University of Wyoming. They each provided unique and insightful perspective to this thesis that I relied upon. I appreciate the time and thought that they each invested into considering my thesis through the research and writing phases.

I would like to thank each of the individuals who shared their time and expertise in this area by allowing me to interview and quote them in this thesis. Their interested participation was invaluable to my research. Many of them are in Idaho and are sincerely invested in the future of Idaho water administration. This thesis would not have been possible without getting the insights and opinions from the following individuals:

- Gary Spackman, Director of Idaho Department of Water Resources in Boise, Idaho.
- Garrick Baxter, Water Resources Section Chief at the Idaho Attorney General's Office in Boise, Idaho.
- Judge Eric Wildman, Judge at the SRBA court in Twin Falls, Idaho.
- Terrence A. Dolan, Former Special Master at the SRBA court in Twin Falls, Idaho.
- Lawrence MacDonnell, Water Law professor at the University of Colorado Law School in Boulder, Colorado.
- John E. Thorson, Federal Water Master in Plains, Montana
- Barbara Cosens, Water Law professor at the University of Idaho College of Law in Moscow, Idaho.
- Judge Doug Ritter, Associate Water Judge at the Montana Water Court in Bozeman, Montana.
- Jerry Rigby, Idaho Attorney at Rigby, Andrus & Rigby Law in Rexburg, Idaho.
- Travis L. Thompson, Idaho Attorney at Barker Rosholt & Simpson in Twin Falls, Idaho.

Finally, I must express thanks to my wife Michelle for her enduring patience and unflinching support and encouragement over the past three years of study. She too has made a significant sacrifice of time into my academic pursuits including this thesis.

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I. INTRODUCTION

“Water is the lifeblood of Idaho. The optimum use of our water will keep Idaho a vital and prosperous state as we grow and change in the future”¹ Considering the importance of water in Idaho, it is equally important that Idaho has an adequate way to legally administer the water needs of the state. Soon Idaho will be at a pivotal decision point regarding how water disputes in the state are resolved. The Snake River Basin Adjudication (SRBA) court is the de facto state water court for now. It will remain so while it is tasked with other general stream adjudications in Idaho. However, once those adjudications are complete, the future of the court is uncertain.

There are several approaches to administer water rights under the prior appropriation doctrine that can be seen across the western states.² Idaho has taken a predominately administrative approach historically.³ Montana has been chiefly administrative as well; however, it is currently considering the future role of its state water court. The Montana Water Court is similar to the SRBA court in its purpose and scope. The destiny of the Montana Water Court is also in question. Colorado on the other hand has taken a predominately judicial approach to water administration.⁴ Both of these approaches have merit, as well as faults. Each will be considered in turn in an attempt to

¹ IDAHO WATER RESOURCE BOARD, IDAHO STATE WATER PLAN iv (2012). Many of the documents cited in this thesis are available in both print and electronic format. For those sources the URL's to electronic versions where available can be found in the bibliography.

² Approaches to “administering water rights” refers to the type of entity used to monitor, regulate, and enforce water rights between parties. This includes implementing laws created by the legislature.

³ “Administrative approach” refers to an executive agency being created and tasked with the monitoring, regulation, and enforcement of water rights. Idaho has created the Idaho Department of Water Resources (IDWR) to fill that role. IDWR can trace its creation back to 1895.

⁴ “Judicial approach” refers to the judicial branch, or courts primarily being responsible for the regulation and enforcement of water rights as opposed to an agency.

identify some of the features that Idaho should seek to incorporate into its future water administration approach.

Even after the SRBA court has completed its adjudicative work and is gone, Idaho has several water law issues that it is going to have to address prospectively. There are ongoing adjudicative matters, as well as potential post adjudication issues that may arise. Additionally, there will continue to be administrative appeals from the Idaho Department of Water Resources (IDWR).⁵ Also, Idaho will need to address complications resulting from conjunctive management.⁶ The final concern that Idaho should be aware of involves the unknown impacts of climate change and population growth on water availability and disputes in the future.

Specialized courts and judges are one way to ensure that Idaho will always be able to adequately resolve conflicts, and to promote the most efficient use of resources.⁷ Just as the SRBA court is a specialized court, and has done well at what it was created to do, there is a future need for water specialization in the Idaho judiciary. It will be considered within this paper if a permanent, independent, specialized court is the right option for addressing Idaho's future water administration needs, or if some alternative approach is more suitable. Four characteristics are considered to evaluate the

⁵ Under certain circumstances, if an Idaho water right holder disagrees with a decision made by IDWR, they may appeal that decision to a court in order to have the decision reviewed by a judge. Agencies are required by state and federal laws to designate processes for appealing a decision. This process is known as an "administrative appeal."

⁶ "Conjunctive management" refers to the integrated administration of surface and ground water resources. Because they are hydrologically connected, the legal framework for regulating and enforcing water rights should reflect that connection. Historically, water has not been managed that way.

⁷ "Specialized courts and judges" refer to a court or judge that works exclusively in one area of law. For example, a Traffic Court judge only hears cases having to do with violations of traffic laws in his or her respective jurisdiction. That judge would be a "specialist" with respect to traffic laws.

effectiveness of a specialized court in Idaho's case: efficiency, competence, uniformity, and public perception.

After identifying all the future needs for Idaho water law, Idaho should consider how best to incorporate the advantages of both the administrative and judicial approaches going forward. This paper proposes that Idaho should create a hybrid entity, similar to what it has done in the past with the SRBA court, retaining an expert water judge on at a designated district court, and continuing to direct IDWR appeals and other water matters to that court. Idaho should not establish a new, permanent, freestanding water court. There is insufficient workload to merit that action. Yet, there is ample evidence that an expert water judge is necessary for Idaho's future. Idaho policy makers should begin the process now of identifying future water administration needs rather than wait until the SRBA court is finished with its current adjudicative work. There is no compelling reason to procrastinate this task.

II. THE RESOURCE

This Part will overview some of Idaho's water resources as well as its predominate demands. Most of Idaho's water comes from winter snowpack. Idaho's largest use of water is irrigated agriculture. Although there is confidence in Idaho's current water needs, there is some uncertainty when it comes to future demands. Some of those uncertainties will be considered in this Part as well.

A. Idaho Water Supply

Water is one of the fundamental elements required for human survival. "People have written the lyrics of Idaho's history, but water has been the music."⁸ Idaho would in

⁸ Idaho Public Television, *Water History of Idaho* (PBS television broadcast 1990), <http://video.idahoptv.org/video/2197386113/>.

no way be what it is today if it were not for its water resources. This liquid, more precious than diamonds, is a finite resource. The greatest battle of Idaho's history, and across the West generally, is the ongoing struggle to harness and conquer water for the benefit of man. Water is a servant in the minds of many Idahoans, and nothing is more beautiful than seeing water at work.

In Idaho, snowmelt typically contains between 50 to 80 percent of the annual water supply.⁹ In the spring, snow crystals wait on the steep sides of the Rockies until the 32 degree isotherm is achieved, at which point melting Idaho mountain snow starts its incredible journey towards the Pacific Ocean. Water travels as much as 1,078 miles from the peaks of the Rockies to join the Columbia River.¹⁰ It is an unstoppable force that humans have tried to divert and hinder for centuries.

Average annual precipitation across the state varies widely depending where you look. As depicted in Figure 1, the average precipitation ranges from eight to about eighty inches annually. The Snake River Basin, which is the source of approximately eighty-seven percent of Idaho's water use¹¹ is mostly semi-arid, even desert climate which on

⁹ *Id.*

¹⁰ KAMMERER, J.C., LARGEST RIVERS IN THE UNITED STATES (1990), <http://pubs.usgs.gov/of/1987/ofr87-242/pdf/ofr87242.pdf>.

¹¹ RANDY STAPILUS, UPSTREAM: ADJUDICATING THE SNAKE RIVER BASIN 7 (2009).

average, receives less than 12 inches of precipitation per year.¹²

The basin is fed primarily by mountain runoff from the western slopes of the Rocky Mountains running between Idaho and Wyoming.

Idaho, like most of the West is in drought conditions. Many reservoirs are below acceptable levels and it will take a lot of precipitation to get

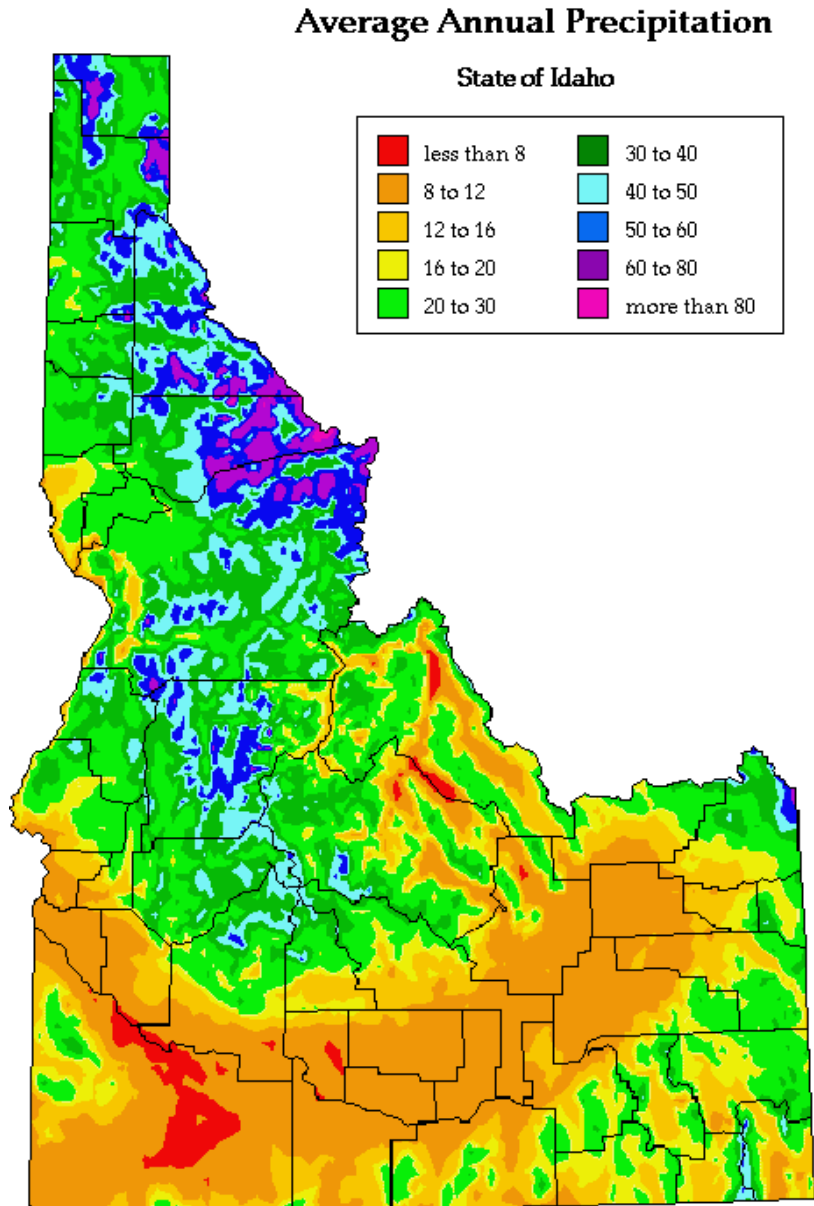


Figure 1: Idaho Average Annual Precipitation

them up to capacity. We are in the midst of global climate change that will bring numerous effects on water. Many scientists suggest that given current trends, we can safely predict that there will be increased variability in water availability, both seasonally

¹² NRCS, IDAHO WATER SUPPLY OUTLOOK REPORT APRIL 1, 2016 (2016), <http://www.nrcs.usda.gov/wps/portal/nrcs/detail/id/home/?cid=stelprdb1241057>.

and geographically.¹³ Those effects would result in increased water litigation across the state as water resources become scarcer in time and place. If that is true, it is also safe to say that Idaho will need a forum to resolve the increased disputes that will arise.

B. Idaho Water Demand

A United States Geological Survey (USGS) report published in 2014 ranked Idaho at the top of the list for domestic per capita water use, and second place for overall irrigation water use.¹⁴ At first glimpse that may be alarming to some people, but it is important to consider that Idaho ranks at a paltry thirty-ninth place for population in the country.¹⁵ It is also important to consider what is actually happening with all of Idaho's water. We are not just a bunch of water hogs as some people would suggest.¹⁶ Idaho's domestic water use only accounts for 1.8 percent of total Idaho water use.¹⁷ So although we may have room for improvement at home, our domestic use is a drop in the bucket so to speak. While it is true that Idaho's domestic uses are not the most efficient in the country, there are far fewer domestic users than in many other states. The real elephant in the room in Idaho's agricultural water use.

¹³ See generally A.F. HAMLET AND D.P. LETTENMAIER, EFFECTS OF CLIMATE CHANGE ON HYDROLOGY AND WATER RESOURCES IN THE COLUMBIA RIVER BASIN, 35 J. AM. WATER RESOURCES ASS'N 1597-1623 (1999).

¹⁴ USGS, ESTIMATED USE OF WATER IN THE UNITED STATES IN 2010 22 (2014), <http://pubs.usgs.gov/circ/1405/pdf/circ1405.pdf>.

¹⁵ UNITED STATES CENSUS BUREAU, NATIONAL TOTALS: VINTAGE 2015 (2015), <http://www.census.gov/popest/data/state/totals/2015/tables/NST-EST2015-01.csv>.

¹⁶ Marie Kellner, We're #1! We're #1! Oh, Wait a Minute... (2014). <http://www.idahoconservation.org/blog/2014-blog-archive/were-1-were-1-oh-wait-a-minute..> "Domestic water use means indoor and outdoor water use where we live. Things like drinking, showers, washing clothes and dishes, flushing toilets, watering lawns and gardens, as well as pools, ponds and other water features. For purposes of this study, domestic use includes private wells and publicly supplied water. Idahoans use 168 gallons/person/day (gpd). The national average is 88 gpd. Ugh." *Id.*

¹⁷ USGS, *supra* note 14 at 22.

At 14 billion gallons per day, Idaho ranks second in the nation for irrigation water use.¹⁸ Only California uses more. Irrigation accounts for 81.4 percent of the water withdrawn from Idaho's lakes, rivers, and streams.¹⁹ Runner-up uses are aquaculture at 16 percent, domestic use at 1.8 percent, and mining, industrial, livestock, and thermoelectric power combining for less than 1 percent.²⁰ Strikingly, our ranking within the national agricultural economy does not parallel our ranking in irrigation water use. For example, despite being the largest contributor of potatoes and trout in the nation, we only rank nineteenth nationally in total value of agricultural crops.²¹

The USGS has conducted water-use compilations for the United States every five years since 1950. The USGS will publish a current report this year reflecting the 2015 figures. These reports summarize population growth and water withdrawal estimates by category of use and source of water. According to the 2010 USGS report, Idaho used approximately 19.3 maf in that year.²² The report also tracks uses to which Idaho's water is allocated.²³ Irrigation works out to be the largest use of Idaho's water by far. In 2010, Idaho had about 3.6 million acres being irrigated at an average application rate of 4.4 acre-feet per acre.²⁴

¹⁸ *Id.* at 26.

¹⁹ *Id.* 14 million gal/day, 43 thousand af/day, 15.7 maf/year. 11.5 maf/year from surface water, 4.3 maf/year from ground water. *Id.*

²⁰ *Id.* at 32.

²¹ USDA, 2012 CENSUS OF AGRICULTURE: IDAHO HIGHLIGHTS 1 (2012), https://www.nass.usda.gov/Statistics_by_State/Idaho/Publications/2012_Idaho_Census_Factsheet.pdf.

²² USGS, *supra* note 14 at 9.

²³ *Id.* at 10.

²⁴ *Id.* at 26. In order to understand water diversions in Idaho or any place else in the West, one must understand specialized units of measure. Direct flow rights are typically measured in cubic feet per second (cfs). One cfs is a rate of flow past a measurement point and equals 449 gallons per minute (gpm). Gpm is another common flow measurement, often associated with ground water well pumping. Water storage rights are typically measured in acre-feet (af), which is a measure of volume. One af is the amount of water required to cover one acre of land one foot deep in water. That is the equivalent of 325,851 gallons. One cfs flowing for 24 hours will amount to about two af. *Supra* note 14 at iv.

To put this into perspective, consider Idaho's iconic pride and joy, the fantastic potato. Potatoes need about 625,000 gallons of water per acre, per season. Idaho planted 320,000 acres of potatoes in 2014.²⁵ The next closest state planted only half that amount. Idaho plants almost one third of the potatoes in the United States by acreage.²⁶ That works out to involve the use of about 200 billion gallons of water per season, for potatoes alone.²⁷ Idaho grows large quantities of other crops as well, and potatoes are not even the thirstiest one.²⁸

Another factor to consider in Idaho's future water demand is growing population. With that growth will come an increase demand for water by municipalities.²⁹ According to Steve Stuebner at the Idaho Water Resources Board, some areas of the state are projected to increase demand as much as 245 to 357 percent over the next fifty years.³⁰ That is inevitably going to increase tensions between agricultural and other uses. Along with growing population will come an increase in recreation and tourism water uses as well. It is likely that we will see some of the current agricultural water allocations make a shift to other uses over the next half century and beyond. There will probably also be an increase in allocations for aesthetic purposes, fish propagation, and other environmental preservation purposes. Many other parts of the western United States are seeing these

²⁵ USDA, POTATOES 2014 SUMMARY, 8 (2015), <http://usda.mannlib.cornell.edu/usda/current/Pota/Pota-09-17-2015.pdf>.

²⁶ *Id.*

²⁷ *Id.*

²⁸ An acre of sugar beets will drink about 760,000 gallons of water a season.

²⁹ STEVE STUEBNER, IDAHO WATER RESOURCES BOARD, FUTURE OF IDAHO WATER USAGE EXPECTED TO RAPIDLY INCREASE (2016), <http://www.kivitv.com/news/idaho-future-water-usage-studied>.

³⁰ *Id.*

changes and trying to adapt water use to accommodate them. Examples of this can be seen throughout the Colorado River Basin.³¹

III. WESTERN WATER LAW HISTORICALLY

This Part will consider the historical developments of western water law generally, and in Idaho specifically. The discussion is intended to give readers a fundamental understanding of the challenges and conflicts that have shaped Idaho water law. Because it was primarily dispute resolution and conflict avoidance that defined western water law, perhaps those same motives can serve as guideposts today while considering what Idaho's future water administration should look like. Understanding the past will hopefully help us to repeat the successes while avoiding the missteps.

Early western water law is dominated by the prior appropriation doctrine. While this approach worked initially, there are several characteristics of the doctrine that make it increasingly difficult to implement as demands for water increase and diversify. Idaho, like all other prior appropriation jurisdictions, has had to grapple with the harshness of the doctrine as well. The culminating controversy in Idaho's water law most recently is known as the Swan Falls dispute. That dispute has resulted in the evolution of Idaho water law.

³¹ There are numerous species conservation programs ongoing in the Colorado River Basin. Almost all of them mandate various water requirements for instream flow rates, particularly those dealing with fish recovery and propagation. For more information on a few of these programs, I would refer readers to the following article: DAVID CAMPBELL ET AL, OVERVIEW OF THE COLORADO RIVER BASIN COLLABORATIVE MANAGEMENT PROGRAMS 15-41 (2008), http://pubs.usgs.gov/sir/2010/5135/pdf/sir2010-5135_low_res.pdf.

A. Prior Appropriation's Evolution in the West

In the eastern states,³² where water is typically more abundant, the more common legal doctrine is the riparian system. The basic historical tenets of that doctrine are that a property owner whose land borders a water body has the right to make reasonable use of the water on the land so long as their use does not interfere with the reasonable use of other adjoining riparian property owners. This doctrine evolved in the early nineteenth century in the United States as a result of the Industrial Revolution.

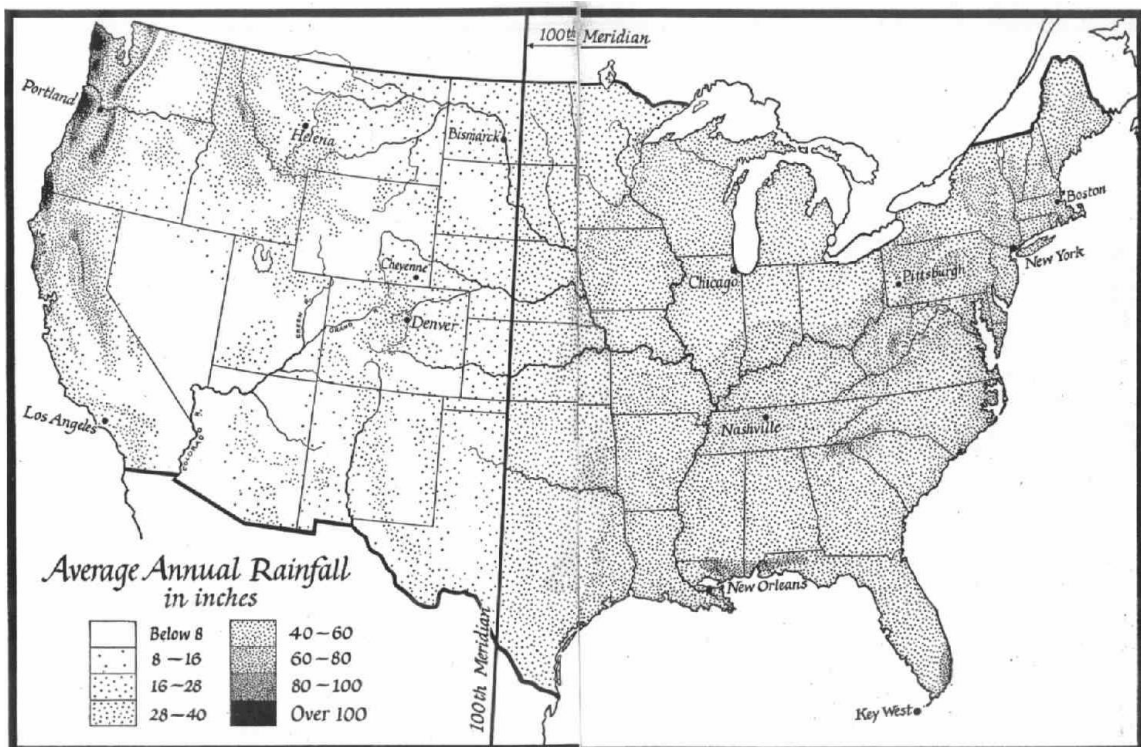


Figure 2: 100th Meridian Line Map

This system worked well enough during the nineteenth century in the East where water is generally plentiful. However, there are several limitations to this approach that proved to be unsuitable to areas where water was less available. For example, riparian doctrine historically did not allow for water use on non-riparian land, which like it or not

³² Typically when I refer to an “Eastern” state or a “Western” state, I am referring to the dividing line of the 100th meridian, which runs approximately right through the middle of the continental United States from north to south as depicted in Figure 2.

is most land in the West. Due to this deficiency and various others,³³ riparianism has generally not been predominant in the West.

Early western states' development was driven largely by mining and irrigation rather than industry. Water in the West is a different creature than in the East, and therefore requires different rules to tame it. In the West, many of the places that people wanted to use water were rarely located adjacent to the source. So various means of diversion were employed in order to get water to the particular mine or field. These actions were more often than not undertaken on public lands. Early California mining settlers, often referred to as the "49ers" adopted a rudimentary version of current prior appropriation doctrine, which was simply along the lines of "I got here and used it first, so the water is mine."³⁴ The fundamental tenant of prior appropriation was established as "first in time, first in right." This held true regardless of the type of use to which the water was put. This created a system based on seniority, meaning that the most senior appropriator would have their full right satisfied before any junior right could use any remainder. This potentially results in some junior water right holders never getting any water depending on the availability at a given time. Proximity to water does not convey rights, nor guarantee that an adjacent party will get any. Shortages are not shared.

³³ Additionally, riparianism does not allow for consumptive uses that would unreasonably diminish the flow of a stream, as that would potentially be detrimental to a downstream neighbor. Most riparian states have modified their water laws in accordance with necessity and common sense to allow for consumptive uses and uses by non-riparians, and uses by municipalities. Another aspect of this doctrine that proved unworkable in the West is that in times of shortage, all water users share the burden of the shortage equally. This means that where water is less abundant, there is far less incentive for economic investment and development, because industries that rely on the availability of water have no guarantee that it will be available in those circumstances.

³⁴ See generally ROBERT G. DUNBAR, FORGING NEW RIGHTS IN WESTERN WATERS (1983).

This approach has an effect on investment decisions. Senior appropriators are rewarded for putting water to a beneficial use³⁵, and juniors can plan their investments accordingly knowing that they may not get all they want sometimes. An underlying principle of this philosophy is that water must always put to a beneficial use and never wasted. There is a means whereby senior users may forfeit their appropriation by abandonment or not putting it to a beneficial use. There is no valuation of competing beneficial uses relative to another. Theoretically, this may sound like a relatively easy system to administer. However, it will soon become evident for those who are not already aware, that prior appropriation in action is not as easy as it sounds.

While the prior appropriation doctrine may have been well suited for promoting development and efficient water use in the early twentieth century, many people believe that it may not be optimal or even adequate to administer western waters today.³⁶ Some jurisdictions have begun to develop prior appropriation in recent years in order to accommodate some of the modern needs of western waters. It simply has become necessary to evolve the doctrine beyond what it was originally to meet current demands. Arguably, it will continue to require adaptations be made in the future as well. Because circumstances are not stagnant, our laws cannot be either. Prior appropriation must be flexible or it will break. Just as riparianism quickly proved to be ill suited to western

³⁵ “Beneficial uses include such uses as domestic use, irrigation, stockwatering, manufacturing, mining, hydropower, municipal use, aquaculture, recreation, fish and wildlife, among others. The amount of the water right is the amount of water put to beneficial use. Due to the beneficial use requirement, a water right (or a portion of a water right) may be lost if it is not used for a continuous five-year period.” IDWR, A WATER USERS INFORMATION GUIDE – IDAHO WATER RIGHTS A PRIMER 1 (2015). <https://www.idwr.idaho.gov/files/water-rights/water-rights-brochure.pdf>

³⁶ Many of the individuals who are cited in this Plan B Thesis have expressed concern about the viability of the doctrine of prior appropriation going forward given the effects of climate change and growing population. Those who expressed this concern include Gary Spackman, John Thorson, Lawrence MacDonnell, Jerry Rigby, Judge Wildman, Judge Ritter, and Barb Cosens.

needs in the nineteenth century, so too may prior appropriation become in the twenty-first century.

B. Idaho Water Law: 1880's to Swan Falls

Idaho has an extensive and rich legal history when it comes to water. Idaho adopted the doctrine of prior appropriation in the early stages of its settlement like most other western states. In the late 1800's, as the Idaho territory was becoming increasingly popular as an inhabitable area, there were concerns about the amount of water that was available. However, Idaho only appeared dry. There was actually a lot of water passing through the state every year in the Snake River. But the difficulty as ever was getting it to hold still long enough to put it on some crops throughout the growing season.

"Idaho adopted its first water law in 1881, by which time private water companies already exercised considerable power in the territory."³⁷ The Idaho Constitution adopted prior appropriation as the legal basis for water allocation.³⁸ Under the constitutional method, a diversion right could be established by a continuing diversion of water.

Idaho's constitutional convention met in Boise in 1889 and discussed water rights. They ended up with a state constitution that said that a private person could condemn the property of another private person in order to build a ditch.³⁹ No other state had such a provision. No other state put private property rights second place to development. Going

³⁷ DONALD J. PISANI, *TO RECLAIM A DIVIDED WEST* 51 (1992).

³⁸ *ID. CONST.* art. XV, § 3.

³⁹ *ID. CONST.* art. I, § 14. This provision states: The necessary use of lands for the construction of reservoirs or storage basins, for the purpose of irrigation, or for rights of way for the construction of canals, ditches, flumes or pipes, to convey water to the place of use for any useful, beneficial or necessary purpose, or for drainage; or for the drainage of mines, or the working thereof, by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps, or other necessary means to their complete development, or any other use necessary to the complete development of the material resources of the state, or the preservation of the health of its inhabitants, is hereby declared to be a public use, and subject to the regulation and control of the state.

to such lengths illustrates how important water was and is to Idaho. This measure was taken out of fear that Idaho would never succeed as a state unless agriculture and mining development went unhindered. If either needed a canal ditch or railroad, the property owner had to give a right of way.⁴⁰ One of the delegates to the constitutional convention, John S. Gray of Ada County, stood and yelled “the stubbornness of the law must yield for the necessities of a country like this.”⁴¹ Gray was referring to irrigation at the expense of private property rights. Gray would not have dreamed that a hundred years later, the same reasoning would be used to limit irrigation. The key to this provision were the uses designated as permissible. Initially there were only three: domestic use, irrigation, and manufacturing. Electric power later became the fly in the ointment. People wanted electricity, which required leaving water in the river. The Idaho Supreme Court later recognized power generation as a beneficial use.

During the 1880s when settlement along the Snake River really started to take off, farmers were withdrawing all the water they needed, sometimes without regard to prior rights. By the early twentieth century, they had put a heavy demand on the water of the Snake River. In 1890, there was drought, which motivated several enterprising individuals to invest in some irrigation infrastructure that would make water available beyond the banks of the river. Primarily local area farmers were the ones who initiated these projects. In 1905, farmers in Blackfoot had limited water for their crops because of overuse upstream by farmers near Idaho Falls. Contests over water were common

⁴⁰ *Id.* “Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor.” *Id.*

⁴¹ JOHN S. GRAY (delegate from Ada County), PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO 1889 299 (Edited and annotated by I.W. Hart 1912), <https://archive.org/stream/proceedingsdebat00idah#page/n11/mode/2up>.

between farmers in Minidoka and Twin Falls and between people in Blackfoot and Rigby. The need for storage reservoirs to resolve over-allocation, combined with the availability of unclaimed public lands suitable for irrigated agriculture, made southern Idaho a logical place for irrigation development.⁴²

Ira Perrine, an early Idaho rancher, farmer, and businessman in the Twin Falls area, felt strongly that the water of the Snake River should be used first for irrigation, and that tourism was to take a second seat to agriculture when it came to southern Idaho's water.⁴³ Beginning in 1893, Perrine worked to convince private financiers to build a dam on the Snake River along with a corresponding canal system in order to be able to irrigate the area. His efforts culminated in the 1900 founding of the Twin Falls Land and Water Company and the subsequent completion of Milner Dam in 1905. Perrine recruited Salt Lake banker Stanley Milner, and eastern investors Frank Buhl and Peter Kimberly.⁴⁴ Milner was interested in the dam in order to provide hydroelectric power to some mines that he owned. Idahoans have enshrined Perrine in memorial by naming one of its most

⁴² The King Hill irrigation project, undertaken by the U.S. Bureau of Reclamation (USBR), was one of the earliest to be attempted. Jedediah S. Rogers of the Bureau of Reclamation accounts the occurrence of this project and states that despite the failure of King Hill project due to financial difficulties, "[n]owhere in the West is irrigation more successful than in Idaho." JEDIDIAH S. ROGERS, THE KING HILL PROJECT, IDAHO 2008 20 (Reformatted, reedited, reprinted by Andrew H. Gahan August 2013), [http://www.usbr.gov/history/ProjectHistories/King%20Hill%20\[revisions\].pdf](http://www.usbr.gov/history/ProjectHistories/King%20Hill%20[revisions].pdf).

The USBR has been involved in many other irrigation projects in Idaho since this time. In 1976, another Bureau of Reclamation project, the Teton reservoir, was quickly filling for the first and last time. Water was underestimated that year, as it percolated through porous lava rock and eroded the soft core of the earthen dam. The catastrophe that followed resulted in billions of dollars of property damage and lost agriculture revenues. USBR, TETON DAM HISTORY (2016), <http://www.usbr.gov/pn/snakeriver/dams/uppersnake/teton/index.html>.

⁴³ In the late nineteenth century, Shoshone Falls was quickly becoming quite a spectacle. There was even talk of building a railroad spur near the falls so that tourists would not have to take a long stage coach ride to access them. Eventually, there was an effort made to establish the falls as a national park. In 1902, there was a court case between irrigation interests, and proponents of a national park at Shoshone. The case was resolved in favor of irrigation.

⁴⁴ JOE YOST, HISTORY OF MILNER DAM, <http://www.tfcanal.com/milner.htm> (last visited Apr. 21, 2016).

prominent land marks after him. The Perrine Bridge at Twin Falls Idaho is constructed near the area Perrine settled.⁴⁵



Figure 3: Perrine Bridge at Twin Falls, Idaho.

Because of efforts of individuals like Perrine, irrigation was quickly established as the state religion, and irrigators were all working hard to create their paradise by making the desert bloom like a rose. The first commandment and mantra of Idaho irrigators to this day is that water in the river is wasted water. Initially, water in Idaho was abundant and cheap, so irrigators were not as mindful of how it was diverted and used. But that approach is revealing itself now more than ever to be an unsustainable one. In the past, irrigators have only been deterred to the extent of the high cost of pumping the water out to their lands, not because water has been scarce.

Once irrigation became glorified as the destiny of Idaho water, power companies came courting for a match made in heaven. Dams were marketed as providing flood

⁴⁵ The Perrine Bridge at Twin Falls Idaho in the namesake of Ira Perrine. Perrine had a small ranch and farming operation located near the base of this bridge in a place now called Blue Lakes. Perrine used a narrow old Indian trail to herd his cattle down the steep walls of the canyon about 480 feet to the water below. Perrine had an orchard here at the bottom of the canyon so that he could easily use all the water he needed.

control, hydropower, and irrigation benefits, all solutions to the early irrigators' most troublesome predicaments. Dams would make more water to grow the crops available, and would supply more power to move the water. What could possibly be better? Opposition to irrigation projects was almost nonexistent. Although mining was probably the earliest use of water in Idaho, irrigated agriculture was the earliest dominate water use in the state. Hydropower also became a competitor towards the end of the 1800's. Agricultural and hydropower uses of water became much intertwined in the nineteenth and twentieth centuries, and they have remained so ever since. Specifically, Idaho agricultural water users often require large amounts of electricity for groundwater pumping. Conversely, all the irrigation and groundwater pumping can result in a drawdown of the river, which effects hydropower generation capability. Idaho Deputy Attorney General Clive Strong refers to this intertwinedness as a "symbiotic relationship."⁴⁶ Much of the upper Snake River above Milner Dam runs along the surface and is easily accessible for irrigation. Below Milner Dam, however, the flow of the river has cut canyons far below the desert surface, and moving water out of the river and on to the desert requires pumping and, in turn, electricity in loads. This is chiefly the conflict that has spurred the development of Idaho water law. The seeds of ruin for this harmonious relationship were planted in 1901 with the construction of the Swan Falls Dam.

C. Idaho Water Law: Swan Falls to SRBA

Swan Falls Dam was constructed solely for hydropower. The dam is on the Snake River about 40 miles south of Boise near Murphy, Idaho. The dam supplied its power

⁴⁶ RANDY STAPILUS, THROUGH THE WATERS 15 (2014).

primarily to the Silver City mines owned by Col. William Dewey's Trade Dollar Mining Company. It is the oldest hydroelectric generating site on the Snake River today. Because of the early date Swan Falls Dam was constructed, there are serious implications for the priority of subsequently appropriated upstream right holders. "The Swan Falls water rights have priority dates between 1901 and 1917. These priority dates predate a lot of the agricultural development. The water rights were licensed at a flow rate of a little over 9,000 cfs, which if exercised would have precluded upstream development."⁴⁷

Col. Dewey did not grant irrigators first dibs on the water. This act ignited the flame that instigated a simmer for about 75 years until the conflict eventually came to a rolling boil. Upstream irrigators continued to drain the river without thought of the needs of Swan Falls Dam. Swan Falls never told the farmers to stop taking their water. In 1916, the Swan Falls facility was included in a general consolidation of companies that formed Idaho Power Company (IPC).

The symbiotic relationship referred to earlier existed through the 1950's, working relatively smoothly so long as water was flowing through the river. In the 1950's, however, the margins began to narrow because vast tracts of land were being put into irrigation through groundwater pumping, thereby depleting the aquifer feeding the Snake. Population growth also demanded increased electricity production, which IPC was happy to supply and sell until its capacity to do so became too diminished by the reduced river flows. IPC began to raise its rates as well as to buy power from other sources, including the Jim Bridger coal-fired power plant in Wyoming. However, this power came at a much higher cost than hydropower, and customers were not happy about paying for it.

⁴⁷ *Id.* at 15-16.

IPC soon sought the support of the state and a FERC license to begin construction of additional hydropower projects along the river. The Governor gave IPC the license it sought on the condition that the company would subordinate its hydropower water rights at Swan Falls to agricultural development. Despite this arrangement, however, that condition was unfortunately not recorded in subsequent state water right licenses, including upstream water rights. “So the seed of the Swan Falls controversy was the failure to document the understanding regarding the subordination of hydropower water rights.”⁴⁸

Legal actions over the use of the water stemming from this subordination agreement arose in 1976. Curtailment of upstream users would have been necessary if IPC were allowed to assert its full rights, which would have been catastrophic to the agriculture industry. Because the stakes were so high, the Governor, Attorney General, and IPC entered into negotiations in an attempt to settle the litigation. A complaint was later filed with the Idaho public utilities commission in 1977 by IPC ratepayers essentially stating that IPC had not asserted its rights at the dam in regard to water in the Snake required to maintain flows for adequate power generation. As a result, coal-fired power plants had to be built, which placed an unfair burden on the rate payers, and gave irrigators an unfair advantage. IPC had no choice but to sue the irrigators for water rights downstream. The Idaho Supreme Court said the water was for electricity.⁴⁹ That decision left thousands of unhappy water users upstream.

When a marriage made in heaven goes to hell, it shakes things up a bit. An era ended, old alliances fell apart, and new ones formed. This course of events ultimately

⁴⁸ *Id.* at 17.

⁴⁹ *Idaho Power Co. v. State*, 104 Idaho 575, 661 P.2d 741 (1983).

necessitated the SRBA which set minimum stream flow obligations below Swan Falls Dam and required listing and review of every water right on the Snake. The precedents set during this adjudication will set the course for Idaho across at least the next century.

Scott Reaves, an Idaho water lawyer, emphasized in 1978 that in this state you have to understand the uses of water, past and present:

We are in the middle of change and there is going to be a recreation use that is going to conflict with existing diversionary uses, and how that is all going to work out is not entirely clear, but is probably going to be resolved in the context of a court battle perhaps. We as a people are ready socially for that. Whether we are ready for that legally is something that remains to be seen.⁵⁰

Mr. Reaves was speaking in reference to the burgeoning conflicts on the Snake between IPC, Idaho fisheries, and agricultural interests all vying for their share of the pie. To make matters even worse, in 1978 the Idaho Supreme Court designated another beneficial use to the list—namely, having enough water left in the river for it to qualify as a river.⁵¹ The river was over appropriated on the books. The Idaho Legislature made attempts in the 1983 and 1984 sessions to resolve the conflict that existed between upstream development interests and IPC’s instream flow interests. They could not fix it legislatively, and it cast a legal cloud over the status of many Idaho water rights. New development could not proceed because there was no unappropriated water available if IPC’s rights were to be satisfied.

In 1984, a negotiated water settlement was reached.⁵² The settlement is called the Swan Falls Agreement. One provision of the settlement required an adjudication, a

⁵⁰ IDAHO PUBLIC TELEVISION, *supra* note 3.

⁵¹ Dep’t of Parks v. Idaho Dep’t of Water Admin., 96 Idaho 440, 530 P.2d 924 (1974).

⁵² The following is an excerpt from the Swan Falls Agreement: “Litigation is not the most efficient method to resolve complex public policy questions. Moreover, adversary proceedings may not necessarily yield solutions which reflect the broad public interest as well as the interests of the proceeding’s participants. In order to resolve the controversy and settle the pending litigation, we have identified a series of judicial, legislative and administrative actions which we agree should be taken in the public interest, and

comprehensive identification of all existing uses of water in the SRB.⁵³ In 1985, the state legislature ratified the agreement. On April 3, 1986, the state legislature established procedures to commence a general adjudication.⁵⁴ On November 19, 1987, the adjudication commencement order was issued by the legislature.⁵⁵ The Swan Falls Agreement resolved the controversy about how to balance the water used for agriculture and hydropower. The SRBA was a statutorily-created lawsuit to inventory all surface and groundwater rights in the SRB.

Today, rights are established through registration of claims with IDWR. The Idaho Legislature determined that groundwater was subject to appropriation in 1951. Since that time IDWR has been the lead agency overseeing water rights.⁵⁶ IDWR actively guides, manages, and plans for the use and conservation of Idaho's water resources.⁵⁷ IDWR has been given authority to review proposals to change water rights, to record

which would resolve the outstanding legal issues to our mutual satisfaction.” RANDY FIORINI, MANAGING CONFLICT: LESSONS LEARNED FROM IDAHO'S SNAKE RIVER BASIN ADJUDICATION 2 (2014), http://deltacouncil.ca.gov/sites/default/files/documents/files/Item_3_Chairs_Report_14-0923%20Managing%20conflict%20-%20Lessons%20from%20Idaho%20v2_0.pdf.

⁵³ IDAHO OFFICE OF THE GOVERNOR, FRAMEWORK FOR FINAL RESOLUTION OF SNAKE RIVER WATER RIGHTS CONTROVERSY 6 (Oct. 1, 1984) unpublished paper. “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 the 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.” *Id.* “While this framework set for 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.’ VONDE ET AL., UNDERSTANDING THE SNAKE RIVER BASIN ADJUDICATION, 52 Idaho L. Rev. 53, 58 (2016).

⁵⁴ IDAHO CODE ANN. §§ 42-1401 to -1428 (2015).

⁵⁵ 1985 Idaho Sess. Laws ch. 18; 1994 Idaho Sess. Laws ch. 454 (codified at Idaho Code § 42-1406A(3)) (later amended and uncodified).

⁵⁶ IDWR's duties include issuing permits for new water rights, approving changes to existing rights' place of use or type of use, and resolving disputes between water users. They also conduct enforcement actions where necessary and are in charge of resource management and planning. They are responsible to ensure Idaho's compliance with federal laws and regulations, as well as interstate compacts and obligations.

⁵⁷ IDWR, PERFORMANCE MEASUREMENT REPORT 1 (2015), <https://www.idwr.idaho.gov/files/general/IDWR-Performance-Measurement-Report.pdf>.

adjudicated water rights, and to oversee the delivery of water in times of shortage.⁵⁸ The agency also promotes development of water resources for the economic benefit of the State of Idaho. To promote the development of water resources, the agency gathers information and data about the water supplies of the state. IDWR is also responsible for dam safety, ground water protection (well construction), stream channel alteration regulation, and administration of the National Flood Insurance Program.⁵⁹

IV. SRBA ADJUDICATION

The SRBA was undertaken to minimize conflict and to create a legal framework that would facilitate Idaho's future water needs. The SRBA court was established to administer the adjudication, which it successfully completed in 2014. The SRBA was a massive undertaking legally and logistically. Because this almost thirty year span has been such a pivotal development period for Idaho water law, it is essential to consider the ramifications in order to understand Idaho's future water administration needs. Idaho accomplished a great deal while completing this general stream adjudication. However, it is not all over yet, even though there has been a final decree issued. There are a few ongoing wrinkles in the SRBA that will probably require the attention of an expert water judge well into the future.

A. Highlights & Logistics

The stated purpose of the adjudication according to the procedures of the SRBA court was to “allow for the fair and expeditious resolution of all claims or issues in the SRBA.”⁶⁰ The SRBA cataloged and confirmed all water rights and the property to which

⁵⁸ IDAHO CODE ANN. *supra* note 54.

⁵⁹ IDWR, STRATEGIC AND ORGANIZATIONAL PLAN FY2016-FY2019 3 (2015), <https://www.idwr.idaho.gov/files/general/FY16-Strategic-Plan.pdf>.

⁶⁰ SRBA ADMINISTRATIVE ORDER 1 Sec. 1(b).

those water rights belong, binding all property owners and parties to the court decree. This is exactly what the parties to the Swan Falls Agreement set out to do.

The state decided the adjudication would be funded through the payment of filing fees by claimants requesting their rights to be adjudicated. Fees would vary based on the kind of right involved. Additionally, there was funding from the state legislature. The legislature committed more than \$3 million each year, and ended up spending more than \$97 million overall.⁶¹ The state tried to require the federal government to pay fees to help compensate for the adjudication process, but the U.S. Supreme Court unanimously quashed those attempts.⁶² The state ended up paying the marginal cost not covered by federal filing fees.

A special court system was created to manage this large and complex case: the SRBA court. The court used Special Masters to conduct hearings and make recommendations on contested rights. Partial and final decrees were entered by the Presiding Judge. The cases were governed by the Idaho Rules of Civil Procedure and the Idaho Rules of Evidence. Under authority granted by the Idaho Supreme Court to modify portions of these rules, the SRBA court adopted Administrative Order 1. The Idaho Supreme Court held that the commencement of the SRBA in 1987 precluded all private actions for adjudication of water rights within the Snake River Basin.⁶³ If a party wanted to adjudicate water rights existent within the basin after the SRBA began, they had to go to the SRBA court. The relevant language of the opinion making this determination

⁶¹ RANDY FIORINI, *MANAGING CONFLICT: LESSONS LEARNED FROM IDAHO'S SNAKE RIVER BASIN ADJUDICATION 3* (2014), http://deltacouncil.ca.gov/sites/default/files/documents/files/Item_3_Chairs_Report_14-0923%20Managing%20conflict%20-%20Lessons%20from%20Idaho%20v2_0.pdf.

⁶² *United States v. Idaho*, 508 U.S. 1, 113 S.Ct. 1893 (1993).

⁶³ *Walker v. Big Lost River Irrigation Dist.*, 124 Idaho 78, 81, 856 P.2d 868, 871 (1993).

states: “jurisdiction to resolve all of the water rights claims within the scope of the general adjudication is in the SRBA district court only. Jurisdiction remains with the SRBA court until it issues a final order concerning the particular water right at issue.”⁶⁴ That exclusive jurisdiction also extends to actions for the supplemental adjudication of water rights originally heard in the SRBA.⁶⁵

The SRBA court began its work by sending out approximately 442,000 notices between 1988 and 1990. It began taking claims in 1988. In 1992, the SRBA court established three test basins to start implementing the Directors’ Reports of recommendations. These basins were selected because there was a presumption they would give rise to a wide variety of issues that should be resolved early in the process and that would be representative of the issues the court anticipated it would encounter, across the entire basin throughout the adjudication. That presumption proved to be correct. Legal challenges began to develop in the early 1990’s that had to be dealt with in district courts as well as in the Idaho Supreme Court. This process resulted in the evolution of Idaho water law.

The SRBA proceeded under Idaho’s adjudication statute: Idaho Code §§ 42-1401 to 1428. The SRBA court adopted special rules covering a variety of matters in the cases it heard, including pleading requirements, forms for various motions, rules for reconsidering special masters’ rulings, and the like.⁶⁶ Once a claimant would file their claim, the special masters and IDWR would investigate the claim and submit a Director’s

⁶⁴ *Id.*

⁶⁵ IDAHO CODE ANN. § 42-1424.

⁶⁶ SRBA COURT ADMINISTRATIVE ORDER NO. 1 (Amended October 10, 1997).

Report to the court.⁶⁷ The purpose of the investigation would be to determine current and historical uses.

In 1994, there was a legislative review of the court's progress and a revision of a key part of the adjudicative process—namely, the legislature designated IDWR as a technical advisor to the SRBA court and no longer required the agency to be a party to the claims litigation. The legislature designated IDWR as an “independent expert and technical assistant” in the SRBA; charged it with the duty to “assure that claims to water rights...are accurately reported,” and retained its authority to hold its own fact-finding hearings to produce “a full and adequate disclosure of the facts” supporting each water right.⁶⁸ Randy Stapilus, a well-known author and commentator on the SRBA said of the 1994 change:

When the adjudication launched, the state Department of Water Resources was a party to the case just like each of the water users, which meant it was adversary to the people for whom it was filing records and conducting field investigations. It also was limited in how it could communicate with the court. In the mid-90s the department was removed (by the Legislature) as a party, which meant it could work with the court in exchanging critical information and work with the water claimants on a friendly basis. Most people in the middle of the SRBA today say that change was a turning point.⁶⁹

In 1996, the court bifurcated claims to expedite processing applications. De minimis claims were distinguished from irrigation, agricultural, industrial, and other uses so that they could be given partial decrees much more quickly.

⁶⁷ Additional information about the Director's Reports can be found in IDAHO CODE ANN. § 42-1411. This statute lists the information that should be included in a Director's Report as well as how that report should be dealt with.

⁶⁸ Litigation arose as to whether it was constitutional for the legislature to make changes in the SRBA after it had begun. The Idaho Supreme Court concluded that it was. *State of Idaho ex rel. Higginson v. United States* 912 P.2d 614 (Idaho 1995), (Basin-Wide Issue Nos. 2 and 3).

⁶⁹ RANDY STAPILUS, LESSONS FROM THE SRBA (2014), <http://www.ridenbaugh.com/index.php/2014/08/30/lessons-from-the-srba/>.

The adjudication included 5,970 federal claims,⁷⁰ several Native-American tribal and reservation claims,⁷¹ and many thousands of state claims in thirty-one counties. At a ceremony on August 25, 2014, in Boise, Judge Eric Wildman signed the final unified decree of the SRBA, ending a twenty-seven year process in which 175,000 water-rights claims were reviewed and adjudicated. A few outstanding claims remain to be settled, but there is now effectively a firm legal basis for managing Idaho's supply of Snake River water in the future. A major achievement of the SRBA was stated at a water conference after the adjudication: "The SRBA is the largest water-rights adjudication ever completed and puts Idaho well ahead of other states in exerting its authority to manage its own water resources and avoid excessive and costly litigation in the future."⁷² There are many innovative and significant accomplishments to come out of the SRBA. Some of the most notable ones include: (1) water-rights settlements with Native American tribes and the U.S. government, (2) the Swan Falls Agreement, (3) a revised State Water Plan, and (4) an updated Idaho code to provide a legal and policy framework for conjunctive administration of surface and ground water.

Considering some of the accomplishments of the adjudication, Idaho water attorney Jeffery Fereday wrote:

The adjudication is the largest general stream adjudication in the history of the West. It involves claims to some 175,000 water rights in the 53 separate sub-basins comprising Idaho's portion of the Snake River Basin, including

⁷⁰ The U.S. Forest Service made 3,748 of those claims, while the rest came from the Fish and Wildlife Service and tribal claims. Only seven federal claims were recognized in the final decree. Federal lands adjudicated covered nine national forests, four wilderness areas, many acres of BLM land, Yellowstone National Park, Craters of the Moon National Monument, two national recreation areas, Mountain Home Air Force Base, Idaho National Lab, The City of Rocks Reserve, The Snake River Birds of Prey Conservation Area, and three national wildlife refuges.

⁷¹ These rights included the Shoshone-Bannock and Fort Hall Indian Reservations, the Nez Perce Reservation, the Shoshone-Paiute Tribe, and the Duck Valley Reservation.

⁷² HENRY'S FORK WATER CONFERENCE, IDAHO'S WATER MANAGEMENT POST ADJUDICATION 1 (2014), http://henrysfork.org/files/Watershed%20Council/meeting%20notes%209dec2014_Final.pdf.

over a thousand instream flow claims filed by Indian tribes and federal agencies on the basis of the federal reserved rights doctrine. The SRBA involves over 80 percent of all of Idaho’s water sources. All ground water rights within the basin also are included.⁷³

Although this proceeding was very expensive and time consuming, Idaho arguably has accomplished something that no other western state has been able to yet—namely, complete an adjudication of this scale as efficiently in terms of time and cost as Idaho did. Speaking on this point, Idaho water law practitioner Jerry Rigby stated that “moneywise, the only comparisons we have are other states and no one has had this large of an adjudication and got this far. Looking at those, we did it right, and it was worth it. Those that nickel and dime it without concluding it, have wasted their money.”⁷⁴ Idaho House Speaker Scott Bedke stated, “[t]he Snake River Basin Adjudication is a feather in Idaho’s hat. We’re the only state that has finished a major adjudication. Property rights between one water right and another have been clearly delineated.”⁷⁵

B. Ongoing SRBA Wrinkles

Despite the fact that a final decree has been issued in the SRBA, there are a couple of ongoing wrinkles that are being ironed out. One could infer that a “final decree” is just what it sounds like, so how could there be anything remaining? Well, the answer to that question is that savings language is incorporated into the decree that allows for the resolution of these other wrinkles. There are three categories of claims still being reviewed that fall within the umbrella of the SRBA’s final decree.

⁷³ JEFFREY C. FEREDAY ET AL., WATER LAW HANDBOOK 360 (2015), http://www.givenspursley.com/uploads/pdf/handbook-waterlaw_1-5-16.pdf.

⁷⁴ Telephone Interview with Jerry Rigby, Senior Partner, Rigby, Andrus, Rigby (Feb. 19, 2015).

⁷⁵ MYCHEL MATTHEWS, UPDATE: WATER USERS REACH MONUMENTAL AGREEMENT TO AVERT CURTAILMENT (2015), http://magicvalley.com/business/agriculture/update-water-users-reach-monumental-agreement-to-avert-curtilment/article_2eab3f1b-b68c-5205-96a8-9f30d86a6036.html.

First, shortly after the initiation of the SRBA court, there was a provision that allowed for the deferment of small domestic and stock (D&S) water claims.⁷⁶ This means those users who qualify as D&S claimants did not have to file to have their right adjudicated during the SRBA in order to have it recognized later, unlike a large industrial or agricultural user who was required to have their right adjudicated prior to the final decree. If one of those latter types of users did not file their claims and have their rights adjudicated during the adjudication, they may potentially have their right forfeited, or at least held in a position of lesser priority in a dispute or call of some kind in the future. Essentially, what this means is that there were many small D&S claimants who did not come forward to have their rights adjudicated at the time of the SRBA and are continuing to trickle in now. These D&S claims will probably continue to come in slowly for years to come. There is a process whereby these claims can be dealt with in the counties where they are located at regular district courts, but Idaho has not yet used that process because as long as the SRBA court is still around it will continue to determine the D&S claims.

Second, there are continuing issues dealing with federal reserved rights arising under the Wild and Scenic Rivers Act. “The final decree was issued subject to pending case matters that had yet to be resolved, and the court is still grappling with those.”⁷⁷

Lastly, there is an ongoing dispute about reservoir management within the Snake River Basin. The reservoirs along the mainstem of the river have been settled, but there are issues on some of the tributary reservoirs, particularly the Boise River. The contention has to do with whether there is a right to fill a reservoir that has been vacated

⁷⁶ “Domestic use” is defined in IDAHO CODE ANN. § 42-111 and “Stock watering use” is defined in IDAHO CODE ANN. § 42-1401A(11). Both are restricted to a use not in excess of 13,000 gallons per day.

⁷⁷Telephone Interview Judge Eric Wildman, SRBA court judge, in Twin Falls, ID. (Jan. 15, 2016).

for flood control, and, if so, when are the appropriate times associated with those fillings and vacations, as well as the priority determinations.⁷⁸ This last issue originates out of what was designated in the SRBA as basin-wide issue #17. Essentially what the legal issue boils down to is whether water in the river should be used to satisfy a junior appropriator's reservoir entitlement for a first fill before a senior appropriator can get a refill. Senior appropriators argue that if they do not get their reservoir filled, they will not be able to use the water for its intended purpose of irrigation. The SRBA court was supposed to decide this type of issue, but avoided doing so by designating it as a basin-wide issue. It has since ended up being a back and forth between the SRBA court, IDWR, and the Idaho Supreme Court. Idaho water attorney Kent Fletcher said "if storage water is diverted for another purpose, such as flood control, and is not used for irrigation, the senior right has not been filled. All of southern Idaho is concerned about this issue."⁷⁹

Speaking of this dilemma, Director of IDWR, Gary Spackman said:

As a result of designating it a basin-wide issue, IDWR is now in the unpleasant position of having to make determinations about rights between juniors and seniors and different competing uses. The department is required to make a determination that applies current law mandating there be no injury to a senior water right holder. That means that no matter what the department decides, someone is going to be upset. IDWR issued a decision on this matter in October 2015 based on its obligation to do so in accordance with what the Idaho Supreme Court had ruled. Needless to say, there were some people aggrieved by the department's determination.⁸⁰

⁷⁸ A&B Irrigation District v. State (In re SRBA), 157 Idaho 385, 336 P.3d 792 (2014). This is the Idaho Supreme Court case dealing with the right to refill reservoir space that had been vacated for flood control. This issue was designated by Judge Wildman as basin-wide issue #17. It went up on appeal to the Idaho Supreme Court which said that Judge Wildman abused his discretion by even designating the issue, and that the real issue is when a reservoir water right really satisfied. The court said that the authority to make that determination is vested in the director of IDWR.

⁷⁹ LAURIE WELCH, COURTS: NO ANSWER TO IDAHO WATER RIGHTS REFILL QUESTION (2014), http://magicvalley.com/news/local/courts-no-answer-to-idaho-water-rights-refill-question/article_513cc3fc-1d22-11e4-badc-0019bb2963f4.html.

⁸⁰ Telephone Interview with Gary Spackman, Director at IDWR in Boise, ID., (Jan. 20, 2016).

Currently, the Idaho Legislature is discussing how best to deal with these contested cases. Because this is such a politically charged issue, it has many people troubled, who in turn have gotten their representatives riled up. Idaho is reviewing IDWR's role in contested hearings under the state Administrative Procedures Act (APA). Depending on how that review goes, we may soon see legislation assigning contested water cases to the judiciary (the SRBA court). Some legislators feel so strongly about this issue that they would like to see IDWR stripped of its decision-making authority. They are displeased about the time and quantity determinations that have been made by IDWR. Under Idaho's APA, when a contested case goes to the SRBA court for a de novo hearing, if there is a basis in fact to support the department's recommendation, then the court is required to give deference to the agency. Conversely, if there has been an abuse of discretion or misinterpretation, then the agency can be reversed.

Gary Spackman is being raked over the coals by the legislative committee that is doing a performance review of IDWR because of this conflict.⁸¹ Spackman says that what the whole issue is really about is dissatisfaction with the harshness of prior appropriation.⁸² Legislators and water users are upset about how prior appropriation is playing out on the ground when push comes to shove and there is not enough water to go around. This may just be the beginning of some difficult realities, which is why Spackman suggests that “[p]rior appropriation may not be the vehicle that really provides solutions in the long term.”⁸³ It is unlikely that the legislature will explore any

⁸¹ Later, in Part VII, it will be discussed that many people are skeptical of agencies and regard them as being susceptible to outside pressure and influence. This legislative action seems to reveal some of those sentiments, as they are questioning the legitimacy of the agency's actions.

⁸² SPACKMAN, *supra* note 80.

⁸³ *Id.*

modifications of the prior appropriation doctrine at this time, though. But it is certainly an indication that the time may be quickly approaching for Idaho to start considering what its future water administration is going to look like once the adjudications are complete and there is technically no longer a need for the SRBA court.

V. OTHER WESTERN STATE EXAMPLES

The way Idaho water law has developed and evolved prior appropriation to suit its needs, is certainly not the only way to do it. There are somewhat unique approaches taken in each of the western states that follow the prior appropriation doctrine. This Part will consider what two other western states are doing with regard to water administration, and highlight a few of the benefits of those approaches. This information should be useful for Idaho as it considers what characteristics it will incorporate into its future administrative approach. Montana has taken a very similar approach to water administration as Idaho, including the establishment of a state water court to administer general stream adjudications. However, unlike Idaho, Montana has begun considering the fate of that court and the needs of the state going forward. In contrast, Colorado is the “black sheep” of the West when it comes to water law. It is the only western state that administers water resources judicially through a permanent state water court system.⁸⁴ The experiences of each of these states will be used to illustrate some of the beneficial aspects of their approaches that Idaho should consider implementing. Additionally, some of the criticisms of those approaches will be mentioned.

⁸⁴ COLO. REV. STAT. § 37-92-203 (2015).

A. Montana

Montana waters, in all their varied forms and locations, belong to the state. This ownership, however, exists on behalf of all state citizens.⁸⁵ Montana, like Idaho, also adopted prior appropriation doctrine early on. “Montana achieved statehood in 1889. Though prior appropriation was increasingly the norm, riparian doctrine still lingered in the statutes. Settlement advanced and water uses overlapped, creating disputes that inevitably surfaced in the courts. As courts began ruling on water rights issues, judicial support for prior appropriation prevailed.”⁸⁶

Historically, if disputes arose, users would go straight to a trial court to seek an order known as a decree that would resolve the issue. Once parties had gone through this judicial process they would leave with a “decreed right.” Montana district courts also appointed water commissioners to enforce decrees. Eventually, similar to Idaho’s experience, it proved very difficult to monitor and reconcile the numerous rights that had been decreed on a given water body, especially since many of those decrees were coming from different courts across the state and records were scant. Rivers and streams often span across multiple counties and districts, which can create confusion for water administration of this kind. Another issue that resulted from this approach—also similar to Idaho—is that many rivers and streams were soon over appropriated. These issues started to create pressure on Montana from all sides and within. There were interstate compact obligations as well as federal and Indian rights that had to be satisfied. Montana

⁸⁵ MT. CONST. art. IX, § 3. Since Montana waters belong to the state, water rights holders do not own the water itself. Instead, they possess a right to use the water, within state guidelines. Accordingly, Montana law notes that “[a] ‘water right’ means the right to use water.” MONT. CODE ANN. § 85-2-422.

⁸⁶ GERALD L. WESTESEN AND MICHELLE BRYAN, *WADING INTO MONTANA WATER RIGHTS* 10 (1997), <https://archive.org/details/wadingintomontan00westrich>.

came to the realization that it would have to make a change in order to meet all these demands and future ones.⁸⁷

Several significant developments took place in Montana in the early 1970's. First, Montana produced what was technically speaking its fourth state constitution in 1972.⁸⁸ This document was an updated and modernized version of the previous constitution that had been in place since 1889. The 1972 version includes a provision regarding Montana state waters that recognized all existing water rights at that time, and subsequently called for an improved record keeping system that would be more centralized and capable of accounting for all existing and future water rights. Second, in 1973, the state legislature passed the Water Use Act.⁸⁹ This law changed the way water rights were administered in Montana in several ways. The two most significant changes were that (1) all rights prior to July 1, 1973, would be finalized through a statewide adjudication process in state courts, and (2) a centralized records system would be created. An existing water right for purposes of the law means a "right to the use of water that would be protected under the law as it existed prior to July 1, 1973."⁹⁰ Just like most other western statewide adjudications, this proved to be an ambitious feat. The Montana adjudication continues today and has an estimated completion date of 2028.

⁸⁷ It is intriguing that most western states that adopted prior appropriation have had to make their way through this discovery and evaluative process once they reach certain growth. There comes a point that bare bones prior appropriation is simply not suited to handle the needs of the users. With the exception of Colorado (which will be discussed below), all other western states have come to some similar conclusions while undergoing prior appropriation evolution. Is this indicative of more changes to come as western states continue to grow and change? If bare bones prior appropriation had to be changed to accommodate developing needs, perhaps the modern day adapted version of prior appropriation will also need to make some more accommodations?

⁸⁸ MT. CONST.

⁸⁹ MONT. CODE ANN. § 85.

⁹⁰ MONT. CODE ANN. § 85-2-102.

Montana created a Water Court in 1979 to administer the statewide adjudication. “The Water Court is a special district court with exclusive jurisdiction to determine the characteristics of existing water rights. The court also determines whether existing rights have been abandoned due to nonuse. The Water Court’s mission is to expedite and facilitate the statewide adjudication of over 218,000 existing water rights claims.”⁹¹ The Water Court’s primary functions include decreeing water rights basin-wide across the state, answering certified questions from district courts, and providing information to district courts about how to resolve disputes.⁹²

When asked about the possibility of a future permanent water court in Idaho and Montana, Judge Ritter at the Montana Water Court responded that that is an interesting question for Idaho but not so much for Montana.⁹³ He suggested that Montana already knows that they will not be keeping the court on permanently once its adjudicative functions are completed. Granted, that may be another thirty years, and who can really say with certainty what may change and actually happen at that time. However, the Montana Legislature is exploring the future of water administration in that state. The Montana Supreme Court commissioned the Land Use & Natural Resources Clinic at the University of Montana in 2014 to prepare a report about the future water administration needs of the state.⁹⁴ That report identified several issues, and the state legislature has begun the process of addressing them through a legislative interim committee. One of the concerns identified in the report is that water users can occasionally become caught in the

⁹¹ UNIVERSITY OF MONTANA SCHOOL OF LAW LAND USE & NATURAL RESOURCES CLINIC, WATER RIGHTS IN MONTANA 6 (2014), https://courts.mt.gov/portals/113/water/UM_WaterRightsStudy.pdf.

⁹² *Id.* at 7.

⁹³ Interview with Doug Ritter, Associate Water Judge at the Montana Water Court in Bozeman, MT. (July 10, 2015).

⁹⁴ UNIVERSITY OF MONTANA SCHOOL OF LAW, *supra* note 91.

“jurisdictional seam” between a district court and the Water Court. When questions are certified to the Water Court, users may be required to appear in two separate forums to resolve their water rights matter.⁹⁵ On a related note, district court judges with heavy caseloads may lack the resources, expertise, or interest to wade into complex water cases. Another concern raised in the report deals with the way appeals are handled. Currently, appeals from the Montana Department of Natural Resources and Conservation (DNRC) go to local district courts. However, the report indicates that there should be an avenue whereby users can appeal directly to the Water Court, as that would possibly be less redundant and more efficient since they often end up there anyway, similar to what is done in Idaho.⁹⁶ Montana is in the process of considering these and other issues to determine what will happen next with the Water Court and law there.

B. Colorado

Colorado, as one of the most populated western states and headwaters state of seven major rivers, has some of the most complex and highly developed water law in the United States. Colorado also follows the doctrine of prior appropriation, which was enshrined in the state constitution.⁹⁷ Colorado water law really started to begin developing in 1861. In a landmark case from 1882, the Colorado Supreme Court ruled that the doctrine of prior appropriation has always existed in Colorado.⁹⁸ Colorado early on developed a judicial system of adjudicating water rights. The role of water courts is to

⁹⁵ *Id.* at 16.

⁹⁶ *Id.* at 29-30.

⁹⁷ CO. CONST. art. XVI, § 5, later reaffirmed in CO. CONST. art. XVI, § 6.

⁹⁸ *Coffin v. Left Hand Ditch Co.* 6 Colo. 443 (1882). This case involved a riparian landowner along the St. Vrain Creek who challenged a prior appropriator’s right to divert water from the creek. In ruling against the riparian landowner, the Court held that “the first appropriator of water from a natural stream for a beneficial purpose has, with the qualifications contained in the constitution, a prior right thereto, to the extent of such appropriations.” *Id.* at 447.

determine the date of appropriation and the priority of a water right with respect to other water rights. Users are required to have their own right adjudicated before they will be eligible to assert it against another user. Colorado is the only western state that has not delegated the adjudication of water rights to an administrative agency. Professor Larry MacDonnell⁹⁹ at the University of Colorado Law School stated that “in the 1870’s water in Colorado was essentially a free for all. They needed a good record and a way to resolve conflicts between users.”¹⁰⁰ There was a particularly dry period around that time that caused a lot of conflicts up and down the streams. Many downstream people were upset enough that they banded together and took their issue to court to have their rights determined.

At that time, Colorado had a state engineer whose role was to resolve conflicts between users, but who was limited to resolving issues only for users who had had their rights previously determined by the court. Additionally, the state needed a way to accommodate changes of diversion points and other details. Based largely on traditions and peoples’ familiarity with the judicial system, it was chosen as the means for administering Colorado water. MacDonnell states that people were skeptical of agencies’ abilities to be fair, neutral, and detached magistrates when it came to the politically charged issues associated with water. “In the 1870’s the idea of putting responsibility with agencies was a foreign one. People recognized courts as the way to legitimately

⁹⁹ “Lawrence J. MacDonnell is an attorney and consultant in Boulder who recently retired as a professor of law at the University of Wyoming College of Law where he taught water law, public land law, and natural resources law. He was the first director of the Natural Resources Law Center at the University of Colorado School of Law, a position he held between 1983 and 1994. Between 1995 and 2009 he worked as an attorney and consultant in Boulder, Colorado. His work focused primarily on water resources and on ways to make natural resource development more environmentally compatible.” UNIVERSITY OF COLORADO BOULDER BIO, <https://lawweb.colorado.edu/profiles/profile.jsp?id=250>.

¹⁰⁰ Telephone Interview with Lawrence MacDonnell, Law Professor at University of Colorado Law School (January 15, 2016).

resolve disputes as they had done in other areas of the law.”¹⁰¹ There was uncertainty to say the least about whether executive agency processes would provide sufficient due process. There was worry about the abuse of authority. There was trepidation over the fact that the agency approach had not been adequately tested and proven. “Another factor that played a role in the establishment of the Colorado system was the fact that there was a lively, political, and powerful entity with influence in the state: the Colorado water bar.”¹⁰² There were many attorneys and others whose very livelihood depended on the proliferation and promulgation of the judicial way of administering water. The system continued to gain momentum for the next hundred years and beyond.

Prior to 1969, the state was divided into eighty water districts. To have a right recognized, an appropriator would take their claim to the district court in the county where their water district was located. Each district court would issue a decree that included the rights of all users in the respective water districts where those courts were seated. Water districts did not follow watershed boundaries, and water rights holders were not always notified or aware of general adjudication proceedings in the same or another district that might affect their water rights. Decrees could be subsequently challenged in those circumstances. This caused a lot of redundancy in the system and often required decrees to be reopened.

The state legislature responded to that problem in 1969.¹⁰³ The 1969 changes called for the creation of seven water divisions that followed the state’s seven major water basins and the tabulation of priorities within each division. Each division has a

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ The Colorado Legislature enacted the Water Right Determination and Administration Act of 1969. COLO. REV. STAT. §§ 37-92-101 to 37-92-602 (2016).

water judge at a designated district court who has exclusive jurisdiction over the division. There is also a water referee in each division who investigates claims and makes rulings. In 1969, the court system was established more formally, and since then state water law has become very organized and sophisticated. The system's value is no longer questioned by most. One positive part of the judicial approach is that Colorado water law is very well developed. There is an abundance of case law and statutes to sort out most common issues. Involving the courts has forced clarity in the law. On the other hand, however, the law has turned out to be extremely narrow in its application. Very specific rules must be followed, which inevitably constrain the possible outcomes and resolutions that may be reached. Sometimes the law is not perfectly applicable to the unique facts of a dispute before the court.

One of the concerns about the Colorado model is the large investments of time and money associated with having a water dispute resolved in a formal court setting. Both sides are required to hire specialist water attorneys and technical experts. It can take a long time to get a case through the whole process, and resources are being diverted throughout. Litigation is often very expensive and protracted. It can take several years to get a ruling depending on the issue. Former University of Colorado Law School Dean David Getches opined that these large investments can often create formidable barriers to water right holders in Colorado, preventing them from protecting their rights.¹⁰⁴ Oftentimes because of the complexity of the laws and regulations governing Colorado water, it is necessary to hire an attorney to adequately represent a party's issues to the

¹⁰⁴ DAVID H. GETCHES, TRADITION, INNOVATION AND CONFLICT: PERSPECTIVES ON COLORADO WATER LAW 20-21 (Lawrence J. MacDonnell 1986).

court. Naturally, this is a good system if you are a Colorado water attorney, but maybe not so ideal for farmer Joe who has a bone to pick with neighbor Pete.

Prior to the 1969 changes, Colorado water administration was limited to the general enforcement of decrees. Now the court takes a much more active role. One of the complaints Getches expresses about the Colorado judicial approach is that it prevents full beneficial use of the water. He suggests that the future of Colorado water needs an institutional change:

The single greatest obstacle to making full beneficial uses of Colorado's water, consistent with contemporary values and desires, is the existence of institutions that resist or otherwise do not promote socially-beneficial decisions and coordinated planning. Specific problems include the burdensome and costly system of water courts to allocate and administer water rights...The most formidable obstacle to smooth market operation in water rights is the water court system...transfers and exchanges of water rights are often made so expensive that they are thwarted. The water court system gives virtually anyone in the watershed the ability to object to changes and transfers, setting in motion an expensive and cumbersome adversary process, with all parties represented by lawyers and engineers.¹⁰⁵

One example Getches used to illustrate this inefficiency was that “[w]ater users can maintain unused ‘conditional’ rights almost indefinitely through token investments in ‘due diligence’ work.”¹⁰⁶ This pattern, he said, “causes water users on some streams to be plagued by uncertainty.”¹⁰⁷ One of Getches’s principal complaints then is that the Colorado system interferes with market forces that would do a better job of putting water to the right use at the right price. The courts interfere with investment decisions and often facilitate the misuse or waste of precious water.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 22. Getches provides the following case to illustrate the point: Colorado River Conservation Dist. v. Twin Lakes Reservoir and Canal Co., 181 Colo. 53, 506 P.2d 1226 (1973).

¹⁰⁷ *Id.*

VI. IDAHO'S FUTURE WATER ADMINISTRATION NEEDS

While it is interesting to consider potential future uses of Idaho water, it is difficult to predict with certainty where exactly water is going to be needed, when it will be needed, and in what amounts. However, there are several future needs in Idaho that we can say with certainty will have to be addressed. Some of these needs will be addressed by the current structure that Idaho has been using for the past thirty years. The SRBA court has become exceedingly proficient at general stream adjudications. It makes sense then, and there is a general consensus that for adjudication purposes, we should keep the SRBA court around for at least a little while longer. In fact, the Idaho Legislature has already taken the initiative to do exactly that. Another need that we can anticipate with at least a moderate degree of certainty is the volume of administrative appeals from IDWR. However, there are a few variables of which we are aware that could affect this prognosis, and potentially still more variables of which we are not aware. Two final future needs that need to be briefly considered are dealing with post-adjudication issues that may arise and future conjunctive management concerns. The conjunctive management need is closely related to the volume of appeals we may anticipate from IDWR for a couple of reasons discussed below. Having listed these needs, let us consider each in turn.

A. Adjudications

As discussed above in Part IV, the SRBA has been almost entirely concluded at this point. Technically, there are a few issues still being resolved, but those should be wrapped up before the court is done with the new adjudications it has been given. Focusing now on the current and pending adjudications, the Idaho Water Board described, “[w]e now are adjudicating northern Idaho water rights in order to justify and defend them from downstream users. This process is similar to the adjudication

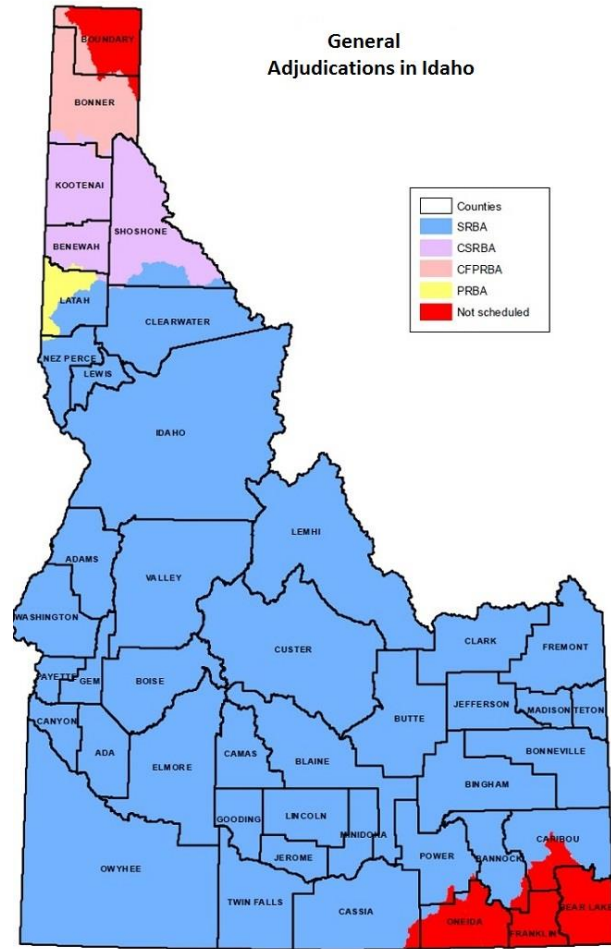


Figure 4: Idaho Adjudications Map

that Idaho recently completed in the Snake River Basin – an effort that has received positive national recognition.”¹⁰⁸ The SRBA court has already begun the Coeur d’Alene-Spokane River Basin Adjudication (CSRBA). The commencement order for the CSRBA issued in March 2015.¹⁰⁹ The authorizing statute states that the director of IDWR is authorized to petition the district court to commence adjudications of water rights (both surface and ground) in northern Idaho, which includes the CSRBA, Palouse River (PRBA),

¹⁰⁸ ROGER CHASE, IDAHO WATER BOARD WORKS TO CONSERVE IDAHO’S PRECIOUS WATER SUPPLIES (2016), http://www.clearwatertribune.com/news/online_only_news/idaho-water-board-works-to-conserve-idaho-s-precious-water/article_8c5dfc30-c140-11e5-a422-db0936661055.html.

¹⁰⁹ AMENDED CSRBA ADMINISTRATIVE ORDER 1 (2015).

and Clark Fork-Pend Oreille River (CFPRBA).¹¹⁰ Each separate basin requires a petition and commencement order.

Thus far, only the CSRBA has had a commencement order issued. The CSRBA includes the federal water rights of the Coeur d'Alene Indian Reservation, and the United States Forest Service (USFS). It also deals with the rights of the Avista Power Company, formerly known as the Washington Water Power Company. All of these are controversial and complex rights. Approximately 11,370 active claims existed in the database for the CSRBA basins at the end of 2014, including a total of 447 claims based on federal law.¹¹¹

A petition has been filed for the PRBA and it is anticipated a commencement order will be forthcoming this spring. There has not been a time frame given for commencement of the CFPRBA.

The last basin remaining to be adjudicated in Idaho is the Bear River Basin (BRBA) in southeast Idaho. Despite this basin being about the same size as the CSRBA, there are many more claims at stake. Judge Wildman referred to this basin as a “wildcard” because there are so many disputes involved.¹¹² It is anticipated that there would be approximately 14,000 to 20,000 claims filed.¹¹³ The interstate implications with Utah would also have to be considered, which is an additional complicating factor for the BRBA. Speaking of the BRBA, Judge Wildman described that “much of it is really contingent on when the legislature issues the commencement order, and that is based on resources. They have already made a significant appropriation for these two adjudications

¹¹⁰ IDAHO CODE ANN. § 42-1406B (2016).

¹¹¹ IDWR, DIRECTOR'S ANNUAL REPORT 12 (2014), <https://www.idwr.idaho.gov/files/general/Director-Annual-Report.pdf>.

¹¹² WILDMAN, *supra* note 77.

¹¹³ JOHN O'CONNELL, BEAR RIVER ADJUDICATION PROPOSED (Nov. 5, 2014), <http://www.capitalpress.com/Idaho/20141105/bear-river-adjudication-proposed>.

and they may want to stagger the others now.”¹¹⁴ Judge Wildman further explained that “if the court doesn’t have to deal with the Bear, then I’d say we would be able to wrap up the rest of the adjudications in ten years or less.”¹¹⁵ Presumably, an additional order, statute, amendment, or some equivalent will have to be produced in order to proceed with an adjudication being planned for the Bear River, as it is not included in the language of § 1406B. Doubtless the Bear River Basin cannot be lumped neatly with the northern Idaho adjudications since it is located in the southeast corner of the state.

Idaho Code § 1406B(2) states that the adjudication commencement order

...shall be brought in any district court in which any part of the water source is located or before the court of special jurisdiction for water right adjudications. Unless otherwise ordered by the Supreme Court, special jurisdiction for the water rights general adjudications authorized by this section shall reside in the Snake River Basin Adjudication district court. The clerk of the district court in which the petition is filed shall send to the Supreme Court a true and certified copy of the petition. The Supreme Court, by order, shall assign the judge to preside over the general adjudication.¹¹⁶

This statute clearly recognizes the usefulness of the SRBA court. However, like the commencement order that preceded it authorizing the SRBA, the statute fails to establish the fate of the court once the northern Idaho adjudications are completed. Estimates for time required to conclude the current and future adjudications assigned to the court are in the neighborhood of ten to fifteen years.

B. Administrative Appeals

During the adjudication period for these other basins, the SRBA court will continue to hear administrative appeals from IDWR decisions. Currently, the SRBA court

¹¹⁴ WILDMAN, *supra* note 77.

¹¹⁵ *Id.*

¹¹⁶ IDAHO CODE ANN. *supra* note 110.

hears all administrative appeals from IDWR. This judicial review is accomplished by a series of Idaho Supreme Court administrative orders that direct all these appeals to the water court.¹¹⁷ Both the director of IDWR and the SRBA court judge said that there are relatively few appeals.¹¹⁸ In an average year, there may only be five to ten contested cases. In a busy year, it may be as high as twenty. In fact, relatively so few cases are involved that there is not even an established way to keep track of them. A special report would have to be generated in order to see that data. However, Director Spackman says that while there may not be enough need in Idaho's post-adjudication world to constitute a full-time job requiring the whole staff there is today, there is at least enough to necessitate a part-time job.¹¹⁹

University of Idaho's water law professor, Barb Cosens, stated:

We are completely developed in our water rights here and climate change is up on us. How do you apply law that has been developed in the context of surface water to a ground water call which behaves differently? The water court has developed expertise in both water law and water science. You're not going to have that in any other court. That combined with growing population is going to mean increased litigation.¹²⁰

Appeals to the SRBA court are possible in part because of Rule 84 of Idaho's Rules of Civil Procedure.¹²¹ Rule 84 makes it possible to have judicial review of state agency and local government actions. This means that actions taken and decisions made

¹¹⁷ ORDER APPOINTING THE SRBA TO HEAR ALL PETITIONS FOR JUDICIAL REVIEW FROM THE DEPARTMENT OF WATER RESOURCES INVOLVING ADMINISTRATION OF WATER RIGHTS (Dec. 9, 2009), <http://www.5thjudicialdistrict.com/wp-content/uploads/admin-orders/Supreme-Court-Order-re-Water-cases-to-SRBA.pdf>; PROCEDURAL ORDER GOVERNING JUDICIAL REVIEW OF FINAL ORDER OF DIRECTOR OF IDAHO DEPARTMENT OF WATER RESOURCES (Apr. 14, 2015), https://www.idwr.idaho.gov/files/legal/CV-2015-237/CV-2015-237_20150205_Procedural_Order_Governing_Judicial_Review.pdf.

¹¹⁸ SPACKMAN, *supra* note 80; WILDMAN, *supra* note 77.

¹¹⁹ SPACKMAN, *supra* note 80.

¹²⁰ Telephone Interview with Barbara Cosens, Water Law Professor at University of Idaho College of Law in Moscow, Idaho, (Sep. 21, 2015).

¹²¹ I.R.C.P. 84(e)(1).

by IDWR are subject to review by the SRBA court as the court of special jurisdiction for water matters in the state. There is also Rule 40(e), which allows for change of venue. This provision provides for the place of trial to be moved to another county in a civil action as provided by statute upon motion of either party.¹²² There are a few additional criteria that allow this rule to be used, but the requirements are minimal.

C. Post-Adjudication Issues

It is not anticipated that there will be future issues requiring reopening of any final decrees. Naturally, judges and administrators both hope that when a final decree is issued it will be just what the name implies: “final.” It is then hoped that administration of the decree going into the future will be relatively straightforward. However, there are some issues that will still need to be addressed in the post-final decree period. The main issues that fall into this category were discussed above in Part IV. They include D&S claims, ongoing federal reserved rights that are being settled, and reservoir management issues.

Professor MacDonnell suggests that once general stream adjudications are complete there is little, if any, utility to be had from a water court. He supports the idea of agencies undertaking all water management issues, including adjudications where possible.¹²³ Adjudications dealing with federal reserved rights are required by federal law to be administered by a court.¹²⁴ MacDonnell has experienced both models first hand, and he believes that the administrative approach is more efficient. As a seasoned Colorado water law practitioner, and then later a water law professor in Wyoming who worked

¹²² I.R.C.P. 40(e).

¹²³ LAWRENCE J. MACDONNELL, RETHINKING THE USE OF GENERAL STREAM ADJUDICATIONS, 15 WYO. L. REV. 347, 378 (2015). General stream adjudications involving federal water rights are required to be administered in a court in order to get McCarren jurisdiction.

¹²⁴ The McCarran Amendment, 43 U.S.C. § 666 (2015).

closely with the administrative model, his experience with these two systems informs his advocacy for the agency approach.

D. Conjunctive Management

“Where a hydraulic connection exists between ground and surface waters, they should be conjunctively managed to maintain a sustainable water supply.”¹²⁵ Judge Wildman expressed that most of the administrative appeals coming up to the SRBA court are dealing with conjunctive management issues.¹²⁶ He stated that the 1994 rules adopted during the SRBA have generated a host of issues that the court is still trying to iron out.¹²⁷

One of the biggest problems is that there may be multiple orders coming from one claim because one call order that the director issues may impact a lot of parties and any one of those parties (or all of them) could potentially bring an appeal. If all those appeals were not being directed to this court, it would quickly get very confusing because otherwise they will be brought in the county court where the issue arises, and potentially one delivery call could impact water rights across many counties and there would be different judges hearing all these appeals that stem from essentially the same dispute. It is better in that case to have all those issues being directed into one place and having all the disputes resolved by the same judge. That was made possible by the Idaho Supreme Court’s administrative order.¹²⁸

Judge Wildman further described that many of the conjunctive management issues coming up are either very complex, or issues of first impression. As indicated above, Idaho water administrators have expressed a concern regarding future conjunctive management issues developing in the state. The rippling effects so to speak that accompany ground water use have the potential to cause increases in the frequency of administrative curtailments, conflicts among water users, and even litigation.

¹²⁵ IDAHO WATER RESOURCE BOARD, *supra* note 1, at 11.

¹²⁶ WILDMAN, *supra* note 77.

¹²⁷ *Id.*

¹²⁸ *Id.*

One of the difficulties with conjunctive management stems from the fact that as the Idaho laws are written, ground water and surface water are regulated as two distinct systems. For example, ground water law protects senior ground water appropriators by maintaining reasonable pumping levels in order to obtain full economic development of the state's aquifers.¹²⁹ The director of IDWR is authorized to make determinations about what is "reasonable" when it becomes necessary to protect senior appropriators. The director may curtail withdrawals to whatever extent necessary to ensure that resources are not depleted beyond "the reasonably anticipated average rate of future natural recharge."¹³⁰ The difficulty with this system arises from the fact that the reasonably anticipated rate of future natural recharge does not account for the rate of surface water depletion. In a state where many areas are fully appropriated, and where some areas even have moratoria in place, it seems unlikely that conflicts between ground and surface water users will be going away, especially if serious efforts are made to restore aquifer levels across the state.

Speaking of the conjunctive management issues in Idaho, IDWR Director Gary Spackman said that really these issues stem from complications with the prior appropriation doctrine.¹³¹ "There are a number of laws and rules that the Idaho Supreme Court has ruled to be facially constitutional." Despite many challenges to those rules and statutes, the court has upheld them.

The courts have told us that we can't determine the rights and obligations of the parties but the prior appropriation doctrine still requires an expeditious and timely determination by the director. So that conflict really confines the department into a time period in order to not result in a substantial injury to the senior appropriator. What results is that as soon as

¹²⁹ IDAHO CODE ANN. § 42-226 (2015).

¹³⁰ IDAHO WATER RESOURCE BOARD, *supra* note 1, at 12; IDAHO CODE ANN. § 42-237a (2015).

¹³¹ SPACKMAN, *supra* note 80.

the department gets a delivery call, the litigious nature of everybody is galvanized and unless the senior is willing to stipulate to some delay the department has to hurry and push the parties through this process of discovery, disclosure, depositions, exchange of exhibits etc. So this forces the litigation. Many of the disputes have been matters of first impression. These conjunctive management rules were developed in a vacuum and when you try to apply the rules to facts, with no precedent, that requires the agency to try and fit square pegs into round holes. Of course there will be some cases going up to court after that. Over time we are developing a body of law; ground water vs. surface water, or ground vs. ground.¹³²

So Idaho is in the midst of ongoing developments in this area of the law. It is uncertain how long it will take for the corpus to be sufficiently established so that the agency's role in administration will be more straightforward. As long as the SRBA court is still on assignment, Idaho water users have the benefit of the court's opinions on these issues where applicable. But what about when the adjudicative work is done?

E. Unknowns

As stated above, there will always be some uncertainty associated with trying to predict the future. To repeat an oft lampooned quote from Donald Rumsfeld, "[t]here are known knowns. There are things we know that we know. There are known unknowns. That is to say, there are things that we now know we don't know. But there are also unknown unknowns. There are things we do not know we don't know."¹³³ This section will consider some of the known unknowns as they pertain to Idaho's future water administration needs.

¹³² *Id.*

¹³³ DONALD RUMSFELD (February 2002). Then U.S. Secretary of State for Defense, statement made at a Defense Department Briefing.

Idaho's population has grown by 4.3 percent since 2010 to 1.65 million in 2014.¹³⁴ In 2013, the U.S. Census Bureau named Meridian, Idaho the tenth fastest growing city in the United States.¹³⁵ It was growth and increased water demand that necessitated the SRBA initially. As the population continues to grow and technology continues to evolve, there will be more changes in the place of use and type of use of water that has been appropriated. Speaking of the demands on Idaho water, Judge Wildman said:

[k]eep in mind that many of the areas in Idaho are already fully or over appropriated and that there are moratoria in place. That means that anyone who is a new water user and wants to get water in one of those areas has to get it from an existing user/use. That requires that the user(s) go through all of the usual change/transfer application processes which are statutorily handled through IDWR. That alone means that there is always going to be litigation. One of the main benefits of having the water court is that it gives litigants some predictability of the law. The water court will already have a pretty good idea how this case is going to unfold if it goes up on appeal. Users can decide if they want to go through the time and expense of taking it further on.¹³⁶

Another complicating factor according to Judge Wildman is that rights are not getting decreed in many cases until many years after they have been filed. In the case of the SRBA, some rights have taken as long as twenty years to receive decrees. In the meantime, those rights may have changed hands many times, which has complicated the process greatly. Numerous transfers of rights complicates adjudication of those rights because the court may not be able to get a hold of some of the parties who held the rights in the interim to evaluate what has happened historically.

¹³⁴ U.S. CENSUS BUREAU, TABLE 1. ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR THE UNITED STATES, REGIONS, STATES, AND PUERTO RICO: APRIL 1, 2010 TO JULY 1, 2015 (2015), <http://www.census.gov/popest/data/state/totals/2015/tables/NST-EST2015-01.csv>.

¹³⁵ U.S. CENSUS BUREAU, POPULATION DIVISION, VINTAGE 2013 POPULATION ESTIMATES, THE 15 FASTEST-GROWING LARGE CITIES WITH POPULATIONS OF 50,000 OR MORE FROM JULY 1, 2012 TO JULY 1, 2013 (2014), https://www.census.gov/newsroom/releases/pdf/cb14-89_pop_table1.pdf.

¹³⁶ WILDMAN, *supra* note 77.

An additional uncertainty is that if it ever became necessary to reopen a decree, or to commence another adjudication for some reason that involved federal rights, such actions would require the same court in the case of a reopening, or some other court in the case of a new adjudication, as opposed to an agency. The McCarran Amendment is the reason for these requirements.¹³⁷

The last unknown is dealing with the effects of climate change. In an article published by the *Journal of the American Water Resources Association*, authors Hamlet and Lettenmaier suggest that the effects of climate change on the Columbia River Basin (of which almost all of Idaho is a part) will be significant for water resources.¹³⁸ An incremental basin annual average increase in temperature of 1.8 to 4.5° C. approximately every twenty-five years is projected between now and 2095.¹³⁹ This will result in altered stream flows and reservoir levels, as well as seasonal changes in precipitation levels. Summer precipitation is expected to decrease, while winter precipitation is expected to increase. However, warmer winter temperatures will result in significant increases in winter runoff, resulting in reduced snowpack, earlier spring peak flows, and higher evapotranspiration rates.¹⁴⁰ Combined, those results mean there will be increased

¹³⁷ The McCarran Amendment was enacted in 1952, codified at 43 U.S.C. § 666. “Prior to enactment of this legislation, federal water rights could only be adjudicated in actions filed (or not opposed) by the United States because there was otherwise no waiver of sovereign immunity providing for the involuntary joinder of the United States to water rights adjudications...[T]he McCarran Amendment only provides a limited waiver of sovereign immunity for purposes of joinder to comprehensive, general stream adjudications in which the rights of all competing claimants are adjudicated. The waiver does not subject the United States to private suits to decide priorities between the United States and a particular claimant.” THE UNITED STATES DEPARTMENT OF JUSTICE (2015). <https://www.justice.gov/enrd/mccarran-amendment>.

¹³⁸ A.F. HAMLET AND D.P. LETTENMAIER, EFFECTS OF CLIMATE CHANGE ON HYDROLOGY AND WATER RESOURCES IN THE COLUMBIA RIVER BASIN, 35 J. AM. WATER RESOURCES ASS’N. 1597-1623 (1999).

¹³⁹ *Id.* at 1602.

¹⁴⁰ *Id.* at 1609.

variability in stream flows, creating increased competition for water during the spring, summer, and fall. Additionally, flood control effectiveness is projected to be reduced.¹⁴¹

When considered together, these unknowns suggest that the current constraints on water will increase in the future. Population growth, uncertainties associated with adjudications, and climate change are just a few unknowns. Addressing these constraints will require judicial expertise be maintained in Idaho's future. There are several approaches to maintain that expertise. One of the most obvious and effective options is to have a specialized court.

VII. UTILITY OF SPECIALIZED COURTS

In order to assess the utility of specialized courts, we need to consider some of the chief criteria that are used to evaluate the usefulness of any government institution. Because these institutions are publicly funded through taxes, a major concern for government officials should be the judicious and prudent use of public funds. The last thing the public wants to see is a public institution being underutilized. This is recognized by most as waste. As a foundation to this Part, the first section below will mention some of the philosophical reasons for specialized courts. After that, some specific qualities of specialized courts will be considered. The first quality considered here is efficiency. The second is judicial competence or expertise. Third, a critical reason that is often used to justify any specialized court is uniformity in the law. Lastly, public perception of courts compared to agencies is considered. Together, these three characteristics are referred to as the "utility" of specialized courts.

¹⁴¹ *Id.* at 1618.

A. Philosophical Underpinnings

Traditionally, it is understood that when disputes are brought to judges in a court of law, there are fewer remedies available than if the disputes could be resolved through some type of collaborative process. This is one of the reasons why our legal system is so encouraging of alternative dispute resolution approaches where possible. In this sense, IDWR's administrative hearing process potentially offers more room for collaboration and resolution than a judicial setting. For example, IDWR's administrative hearing process applies to a very large number of proceedings that involve statutory matters but are also highly technical. IDWR's current hearing process is more streamlined, inexpensive, and flexible than court proceedings. IDWR's technical expertise can more easily be applied in an administrative hearing than in court. However, there are times when an IDWR decision will be appealed to a court. When that happens, it is crucial that the reviewing judge is sufficiently familiar with Idaho water law to be able to understand IDWR's decision, and to determine whether anything should be changed.

The theory of division of labor and specialization is not a new one. Adam Smith was one of the earliest proponents of this philosophy.¹⁴² He suggested that specialization would lead to greater efficiency. Despite our country's adept application of this economic principle in industry and many other aspects of life, for some unknown reason there has been a stubborn reluctance to adopt it fully in the judicial realm. Even lawyers have figured this out, as evidenced by the wide variety of boutique firms and specialized areas of practice attorneys have found to carve out their niche. But for some reason, once

¹⁴² See generally ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Edwin Cannan, ed. 1904).

lawyers attain judicial eminence, tradition trumps common sense in this regard. Why do we adhere to the notion that judges should be generalists?

At one time most people lived in small colonial groups, and we only had English common law to govern disputes. In these circumstances, a generalist judge may have been a logical solution. But now, given the evolution of the American legal system, and the increasing complexity of many areas of law, it hardly seems sensible outside the small town setting. It may not be reasonable to have an expert judge for every legal area, but there are certainly some areas where it is merited.

Judge Richard Posner, suggested in 1985 that the judiciary has come into a crisis.¹⁴³ Caseloads are rising at an exponential rate, and the law has been increasing in complexity.¹⁴⁴ In an article published in *Yale Law Journal*, Judge Friendly said:

[w]hereas it was not unreasonable to expect a judge to be truly learned in a body of law that Blackstone compressed into 2400 pages, it is altogether absurd to expect any single judge to vie with an assemblage of law professors in the gamut of subjects, ranging from accounting, administrative law and admiralty to water rights, wills, and world law, that may come before his court.¹⁴⁵

The fact that judicial resources are scarce, and cannot be expanded infinitely, presents a familiar problem: how to make the best use of a limited commodity. Economic theory provides a typical answer: division of labor through specialization of the court system. Considering this issue, Sarang Damle in his *Virginia Law Review* article suggests that current judicial trends “risk serious harm to the quality of justice,” and the division of

¹⁴³ RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 59-77 (1985).

¹⁴⁴ *Id.*

¹⁴⁵ HENRY FRIENDLY, *REACTIONS OF A LAWYER-NEWLY BECOME JUDGE*, 71 *YALE L.J.* 218, 220 (1961).

labor may be the only way to extricate the courts from this predicament.¹⁴⁶ Professor Revesz has noted that “there is rich diversity in the types of specialized courts.”¹⁴⁷ There are many excellent examples of specialized courts in the United States and all across the world.¹⁴⁸ Suffice it to say that most prominent areas of law have a specialized court at some level in the United States, and many obscure areas of law do as well.

With that philosophical foundation, the more important qualities of specialized courts that are applicable to Idaho are reflected in the characteristics listed below. These characteristics illustrate some of the specific benefits that are available through judicial specialization.

B. Efficiency

“Efficiency” as it is being used here subsumes two main forms: economic and temporal. Efficiency is simply obtaining the desired result at the lowest cost in both respects. Obviously, the cost will be largely driven by what exactly a party wants the result to be, keeping in mind that the lowest-cost result is not always the best result. It has been suggested that specialized courts are more economically efficient than courts of general jurisdiction because expert judges (and their staff) are able to process claims more quickly and accurately than judges without expertise.¹⁴⁹

¹⁴⁶ SARANG VIJAY DAMLE, NOTE: SPECIALIZE THE JUDGE, NOT THE COURT: A LESSON FROM THE GERMAN CONSTITUTIONAL COURT, 91 VA. L. REV. 1267, 1268 (2005).

¹⁴⁷ RICHARD L. REVESZ, SPECIALIZED COURTS AND THE ADMINISTRATIVE LAWMAKING SYSTEM, 138 U. PA. L. REV. 1111, 1121 (1990).

¹⁴⁸ I would refer readers to John Thorson’s article for specific consideration of water tribunals around the world: JOHN E. THORSON, A PERMANENT WATER COURT PROPOSAL FOR A POST-GENERAL STREAM ADJUDICATION WORLD, 52 IDAHO L. REV. 17 (2016).

¹⁴⁹ *Id.* at 29.

Economic efficiency is simply the condition where every resource is optimally allocated to serve each person in the best way while minimizing waste.¹⁵⁰ Efficiency in terms of the courts incorporates many things, including case management and procedural proficiency. Thorson's article points out an important preliminary observation on the topic of efficiency:

[T]he benefits of generalist versus specialist courts are being broadly debated. In a 2011 book, Lawrence Baum examined three potential results of court specialization: efficiencies, improved quality in decision making (in terms of consistency and accuracy), and whether specialization leads to an institutional advantage for one side or the other. He concludes there is little evidence on the question of efficiency, although a reviewer of the book points to examples of specialized appeals yielding prompt results (unemployment compensation appeals). As for quality decision making, Baum concludes "we have little meaningful evidence of differences in the quality of decision making between generalist and specialized courts . . . [because of the] difficulty of measuring the quality of judges' work." The book reviewer responds that litigants may perceive the judgments of a specialized court to be more legitimate—albeit a subjective measure of quality. Finally, while Baum is concerned specialized courts may result in long-term policy advantages to certain litigants, the evidence is mixed.¹⁵¹

Proponents of the administrative model suggest that courts are simply too slow and expensive. That is because the cost and time associated with having water rights adjudicated creates outright barriers for some parties and arguably superfluous costs for all. Professor MacDonnell suggests that the Colorado approach is simply too slow, expensive, and constrained.¹⁵²

Proponents of the judicial model suggest that perhaps because so many water disputes end up in court anyway, it might be more efficient if they were heard entirely

¹⁵⁰ As we understand economics, it is impossible to achieve a state of perfect economic efficiency so long as there is market manipulation because any change in resource allocation automatically result in an imbalance causing advantage to one (or some) at the expense of another (or others).

¹⁵¹ THORSON, *supra* note 148, at 37.

¹⁵² MACDONNELL, *supra* note 100.

before a court to begin with, rather than creating all the redundancies that result from the judicial review of administrative decisions. Thorson says it is true that “agencies play an important role in the process, but there is often redundancy and there should be a way to reduce the layers of decision making.”¹⁵³ He uses a nightmarish case from California to illustrate this point. In that case, a series of appeals over the same administrative decision required a court to review a 130,000 page administrative record.¹⁵⁴ Requiring all that work twice is inefficient to say the least.

Thorson goes on to describe that “efficient dispute resolution requires the least amount of time and resources necessary to produce sound results.”¹⁵⁵ He acknowledges that agencies are often considered to have a leg up on the courts in this area, because of the routine machine that agencies become from dealing with so much of the same type of work. They simply get good at what they do and can do it much quicker than others. As discussed earlier in this paper, courts often have much higher burdens for claimants to overcome before justice may be served.¹⁵⁶ However, in making this comparison, Thorson suggests that there is often a factor left out of the equation: “proceedings before administrative agencies also are often lengthy and costly and may ultimately end up in court for the additional rounds of litigation.”¹⁵⁷

¹⁵³ Phone Interview with John Thorson, Federal water master for the Lummi Decree, in Plains MT. (Jan. 14, 2016).

¹⁵⁴ “Eleven individual civil cases challenged Decision 1641 or D-1641, a 206-page administrative decision issued by the State Water Resources Control Board ruling on water right issues and water quality responsibilities for the Sacramento River Delta region. These cases were coordinated under California’s civil rules before a Sacramento superior court judge who presided over the cases for three years. The administrative record totaled 129,000 pages. Statement of Decision at 4–5, SWRCB Cases, No. JC 4118 (Sacramento Co. Super. Ct. May 5, 2003).” THORSON, *supra* note 148, at 39.

¹⁵⁵ THORSON, *supra* note 148, at 33.

¹⁵⁶ As discussed above in Part V, the expense and time associated with court proceedings can often create formidable barriers for people having their rights adjudicated.

¹⁵⁷ THORSON, *supra* note 148, at 34.

In the case of Idaho, IDWR's role is already clearly established by statute and tradition. Agency staff know what they are doing, and water users know what they can expect when dealing with the agency. People know how to bring claims and settle disputes through that forum as it exists. Without a complete rethinking and overhaul of Idaho water law, there is no way to avoid the agency process even if that were determined to be the right course of action. That would not be the correct course in Idaho's case. The question of a permanent water court here is not one of a court compared to, or instead of, an agency. Rather, it is a question concerning how the efficiencies and usefulness of both entities can be incorporated into Idaho's future water administration. There are certainly valid arguments to support each model. But Idaho is in a unique position to be able to choose how to implement the positive aspects of a court system to augment the administrative one.

C. Competence/Expertise

Another consideration that should be taken into account is judicial competence. There is great difficulty when comparing one judicial decision to another. Those judges who preside for some time over a water court in Idaho or another western state become intimately familiar with the law in their jurisdiction. In Idaho's case, a very technical and specific set of laws has developed, both procedural and substantive, that is not in the minds of most district judges. Because the SRBA court has been hard at it for about thirty years, it has been a long time since any district judge outside the SRBA court has had to grapple seriously with a complicated water law issue.

This is not to say that every other district judge in Idaho is incapable of becoming sufficiently familiar with Idaho water law to fairly adjudicate claims. Idaho judges are

undoubtedly intelligent and capable individuals who for the most part would be up to the challenge of learning the law and filling voids that may appear in a post-SRBA court era. “Competence” as the term is used here does not imply that every other district court judge is inept legally speaking. It simply means in the realm of existing knowledge and experience, the current SRBA judge and any subsequent ones have been and will be so thoroughly steeped in this area of law that they are or will become far more competent than any other district judge in the state when it comes to water law. Also, the time and dollars that would inevitably be associated with requiring every other district judge to become equally familiar with this area of the law foreseeably would be taxing.

This characteristic goes back to the earlier discussion of specialization. SRBA court judges have become experts in all the ways that count for a water law expert. Because of the significant part that water plays in the lives of Idahoans, it is absolutely critical that there is a judicial figure on whom citizens can rely to get these questions right, for them as litigants as well as for future generations who use and enjoy water in any way. The precedents that this judicial figure creates have the potential to affect many more people than just those parties bringing their claims to court. This judge is not only an expert in the law, but also the science of water. He or she needs to understand the ramifications of consumed and returned flows.

It is not reasonable to expect every other district judge across the state to develop the knowledge required to become an expert water judge. Additionally, it is unlikely that any one district judge would hear enough water-related disputes if they were distributed all over the state to really get the experience needed to develop expertise. Thorson states that “[r]egardless of the institutional structure chosen for water related dispute resolution,

much of the success of the forum depends on the quality and expertise of the adjudicators.”¹⁵⁸ To illustrate this requirement, Thorson says the following:

At the turn of the nineteenth century, a judge or a state engineer seeking to resolve a water dispute would need, in addition to an understanding of water law principles, some knowledge of property law, the common law and equity, civil engineering, surveying, and irrigation techniques. The evidence the adjudicator would consider would be oral, lay witness testimony and relatively few written documents. By comparison, an adjudicator of a water law dispute in the twenty-first century requires a facility in water law (quantity and quality), property law, equity, constitutional law with an emphasis on federalism, public land law, Indian law, Reclamation law, federal environmental law, the management of complex litigation, and the effective use of ADR and settlement methods. In terms of evidence, this twenty-first century adjudicator relies greatly on expert testimony. He or she is faced with exhibits or administrative records often running in excess of 100,000 pages. He or she needs the ability to understand and apply scientific and technical evidence in a wide range of fields: hydrology (both surface and groundwater), geomorphology, economics, engineering, ichthyology, other ecological sciences, modeling, history and anthropology, global circulation models, adaptive management and ecosystem restoration, and traditional ecological knowledge (TEK). And, according to some commentators, we will soon be adding resilience theory and panarchy to the decision maker’s educational curriculum.¹⁵⁹

Director Spackman too indicated that regardless of what the legislature decides to do going forward, there is no denying that there is a need for an expert judiciary when it comes to the future of Idaho water law.¹⁶⁰

D. Uniformity

The next characteristic is judicial consistency or uniformity, which includes predictability. Presumably, a specialized court will produce more uniform decisions that will be consistent with precedent no matter where the litigants are located within the state. In contrast, forty-two district judges throughout the state each ruling on water

¹⁵⁸ THORSON, *supra* note 148, at 38.

¹⁵⁹ THORSON, *supra* note 148, at 38-39.

¹⁶⁰ SPACKMAN, *supra* note 80.

issues, and each with varying degrees of understanding of water law, could potentially result in a wide variety of opinions. Arguably, any discrepancies would be resolved at the appellate level. Even so, however, there is still an increased cost in pursuing an appeal to resolve particular issues. Would it not be better to achieve that consistency initially at the first judicial step of the process?¹⁶¹ In addition, there is great difficulty in evaluating the correctness of one judge's ruling compared to another, unless of course one ruling is in some way patently irreconcilable with existing law and precedent. It may be the case that the bad precedent or irreconcilable opinion may not be caught until after it has a long line of progeny and has become thoroughly entrenched. If bad case law makes it that far, it becomes much harder to correct.

Director Spackman at IDWR says that the Idaho Supreme Court delegates authority and responsibility for hearing all water-related matters on appeal to one court for a reason.

There is value and worth in having a single tribunal hear these matters. The judge is aware of expertise and precedent and the court has developed a uniform body of law that is consistent. Prior to the Supreme Court order delegating authority to the SRBA court there were district courts deciding issues that everyone was aghast at. Then to make matters worse, the appeals period would run and then there was this bad decision out that had to be dealt with.¹⁶²

Unfortunately, the reality is that occasionally a judge may not get it right. When this happens and there is a subsequent appeal, it means that a higher court may have to overturn the decision. No judge likes to be overturned, and probably no higher court judge enjoys doing the overturning. But it is a problem that courts are designed to

¹⁶¹ Technically speaking, an administrative appeal to the SRBA court, or any other district court for that matter, is the first judicial step. Even though those instances are being referred to here as appeals or administrative appeals, it is the first time a judge reviews the case.

¹⁶² SPACKMAN, *supra* note 80.

navigate, and it is required from time to time. Nevertheless it requires additional time and resources while also being potentially detrimental to the credibility and legitimacy of the judiciary. So understandably judges try to avoid this contingency as much as possible.

While speaking on this concern of incorrect judicial decisions, both Spackman and Wildman mentioned an illustrative issue that was quickly developing during the initial stages of the SRBA. A delivery call would be issued by IDWR, and based on the location of the water right implicated by that call, it could potentially affect many parties, across several counties upstream and downstream, senior and junior. This situation resulted in appeals coming in across multiple districts all originating from the same delivery call, requiring each of the district judges involved to review the administrative record and to make a determination about the agency's action. It would be lucky to say the least if those multiple judges uniformly came to the same conclusions. Hopefully, it is apparent why this is an unworkable approach to some water disputes.

Although Thorson is a proponent of the judicial approach, he suggests that:

Regardless of whether most water-related dispute resolution occurs in an administrative agency or in a court, it is desirable that the jurisdiction's water policies and programs have a considerable degree of coordination. Although specific agencies have unique roles, and some friction among our branches of government is a necessary and often positive feature, we do not want agencies to consistently work at cross-purposes.¹⁶³

Thorson provides multiple examples where this type of coordination occurs in special land and environmental courts regarding water-related dispute resolution. But as mentioned above, because this paper is not considering or suggesting a revision to Idaho's current administrative approach, those examples will not be addressed.

¹⁶³ THORSON, *supra* note 148, at 34.

Having all these issues funneled into a single entity creates stability and consistency in the law. This is very important to the legitimacy and efficacy of the judicial branch of government. Precedent is perhaps one of the single most enduring concepts in the mind of any judge. It is referred to as *stare decisis* in the legal community.¹⁶⁴ Courts will often abide by this principle even if they are on less than solid ground when it comes to the legal issues they may be deciding.¹⁶⁵ That is why it is crucial that decisions are made by judicial authorities who really know what they are talking about. An erroneous opinion from a district judge in one part of the state may potentially have highly undesirable consequences when applied to similar (or dissimilar) facts in another part of the state. Having one entity not only preserves and improves uniformity, but it enhances the quality of decisions because water law is so complex.

E. Public Perception

The last characteristic is the way which agencies are perceived by the public. Thorson suggests that there is a perception that agencies are susceptible to outside political influences that may interfere with their detached examination of issues. Additionally, there may be a tendency for “agency science” to be promulgated if left

¹⁶⁴ BLACK'S LAW DICTIONARY (10TH ED. 2014), STARE DECISIS, (stahr-ee di-sI-sis or stair-ee) *n.* [Latin “to stand by things decided”] The doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation. “This doctrine is simply that, when a point or principle of law has been once officially decided or settled by the ruling of a competent court in a case in which it is directly and necessarily involved, it will no longer be considered as open to examination or to a new ruling by the same tribunal, or by those which are bound to follow its adjudications, unless it be for urgent reasons and in exceptional cases.” WILLIAM M. LILE ET AL., BRIEF MAKING AND THE USE OF LAW BOOKS 321 (Roger W. Cooley & Charles Lesley Ames eds., 3d ed. 1914).

¹⁶⁵ “According to the Supreme Court, *stare decisis* ‘promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.’ In practice, the Supreme Court will usually defer to its previous decisions even if the soundness of the decision is in doubt. A benefit of this rigidity is that a court need not continuously reevaluate the legal underpinnings of past decisions and accepted doctrines.” CORNELL UNIVERSITY OF LAW LEGAL INFORMATION INSTITUTE, STARE DECISIS, https://www.law.cornell.edu/wex/stare_decisis.

unchecked.¹⁶⁶ According to a Gallup poll, there is evidence that public sentiment is more favorable towards courts than agencies.¹⁶⁷ Courts are viewed as more legitimate entities, as they are clearly established with limited powers in the federal and state constitutions. Agencies on the other hand are viewed by some as the equivalent of tyranny.¹⁶⁸ Some people believe that agencies are the uncontrollable tentacles of an executive branch run amok and strangling individuals' liberties wherever they reach, and they reach everywhere.¹⁶⁹ Further, that agencies are the result of a progressive era that is now gone by the wayside. Idaho is a politically conservative state, and although the above sentiments may not be uniformly held or held to such a dramatic degree, there is at least a rich skepticism and even mild disdain of government that is prevalent. Many people believe judges are personally distanced from the dispute and can objectively evaluate issues and associated science in an adversarial process that is more likely to result in both parties being at least partially satisfied. Surveys support the idea, and there is typically more faith in the independence of the courts than agencies.¹⁷⁰ Water right holders often feel that agencies overreach and are big government. Also, there is research done that surveys litigant satisfaction, which depends on more than just the outcomes, but that people feel they actually had their claims heard and considered.¹⁷¹ Courts may provide a

¹⁶⁶ This is a term used by Thorson. Essentially, it refers to potentially erroneous or fallacious science being promulgated simply because that has been the accepted, preferred, or traditional way of doing things within an agency. THORSON, *supra* note 153.

¹⁶⁷ FRANK NEWPORT, AMERICANS TRUST JUDICIAL BRANCH MOST, LEGISLATIVE LEAST (2012), <http://www.gallup.com/poll/157685/americans-trust-judicial-branch-legislative-least.aspx>.

¹⁶⁸ *City of Arlington v. FCC*, 133 S. Ct. 1863, 1877 (2013) (Roberts, J., dissenting).

¹⁶⁹ *Id.*

¹⁷⁰ NEWPORT, *supra* note 167.

¹⁷¹ *See generally* JUDITH RESNIK, MEDIATING PREFERENCES: LITIGANT PREFERENCE FOR PROCESS AND JUDICIAL PREFERENCES FOR SETTLEMENT (2002), http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1767&context=fss_papers; *See also* E. ALLAN LIND ET AL, THE PERCEPTION OF JUSTICE; TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES (1989), <http://www.rand.org/content/dam/rand/pubs/reports/2006/R3708.pdf>.

better opportunity for people to feel that they have been considered. This information regarding agency characteristics and operation, whether rooted in perception or actuality, is further evidence to support the need to maintain some form of water expertise at the judicial level. It is more efficient for parties to be able to have their appeals reviewed by independent judicial experts outside an agency in order to counterbalance these real or perceived agency characteristics.

VIII. RECOMMENDATION FOR IDAHO'S FUTURE WATER ADMINISTRATION

This Part is a recommendation for Idaho lawmakers consideration based on the information encompassed within this paper. There is unquestionably a need for, and benefit to be gained by, Idaho maintaining judicial expertise in water law. This Part discusses a potential solution to address the primary needs of the state as well as to preserve the available benefits of various administration approaches. Additionally, this Part will mention a few of the complications that Idaho will have to consider in order to be able to implement this proposal or something similar.

Some of the information discussed above illustrates that there are pros and cons to both the chiefly administrative model, as well as the chiefly judicial approach. Idaho is in a unique position among western states to set some precedent so to speak as to how they decide to address future water administration. Inevitably, something is going to have to happen when the SRBA court completes all the adjudicative work. There are essentially three options: (1) The legislature can decide to let things return to the way they were prior to the SRBA court. Water work from all over the state would be brought in the respective district court where water rights are located. This would be the default, no-action option as the statutes creating the SRBA court do not make that court permanent. (2) The

legislature could establish a new, freestanding and independent Idaho State Water Court. This would be the most expensive option. (3) The legislature could create some alternative hybrid approach for addressing complex water law issues in the future, such as an expert water judge in one district court. All water matters would be directed to that court.

Given the utility of specialized courts as illustrated in Part VII, and the legal water challenges in Idaho, it would be a mistake for Idaho to return to its former approach of having each district court review these matters independently. Idaho should consider what administration approach would be best to preserve the benefits of the SRBA court while being mindful of the restraints.

A. Recommendation

There is an economies of scale issue in Idaho's case.¹⁷² There is enough foreseeable water specific legal work in Idaho's future to merit an expert judge, and there may one day be enough work to merit a full water court. But there is not enough water specific legal work to merit the expense, time, and effort to establish a permanent water court in Idaho now or in the foreseeable future. So what can be done to maintain the advantages of a specialized court without bearing the cost of it?

Exactly what the structure and details of the future administration approach would look like is quite flexible and dependent on needs identified by the Idaho Legislature. Thorson suggests that the model entity would have at least three judges appointed by a judicial nominating commission who each would be held accountable through periodic

¹⁷² In economics, economies of scale are the cost advantages that enterprises obtain due to size, output, or scale of operation, with cost per unit of output generally decreasing with increasing scale as fixed costs are spread out over more units of output.

retention elections.¹⁷³ This panel of judges would also be supported by a board of commissioners or special masters.¹⁷⁴ Respectfully, based on the future administration needs of Idaho outlined above, it seems tenuous at best to try and justify such an organization in Idaho's case. Although there is merit in Thorson's proposed model water court, it is not a good fit for Idaho to try and incorporate into the existing framework. Perhaps there is a possibility that this panel could be convened on a part-time basis as needed.

There are also what Thorson refers to as "other specialized measures" that have been utilized in order to address this issue. Thorson states that "courts have developed methods for addressing the need for specialized, expert knowledge for resolving certain cases."¹⁷⁵ For example, Thorson discusses two cases where a presiding judge was able to assign a particular case to a judge with the relevant expertise.¹⁷⁶ There are numerous state examples of specialized courts across the country that have been very successful in addressing the needs of special tribunals in their jurisdictions. Montana, for example, has a specific court designated for workers compensation issues. Oregon has a specific court for tax law.¹⁷⁷ The areas of law that could merit a specialized court are limited only by the needs of a given state to justify it. Many states use drug courts, which is understandable because of the prevalence of that issue in society. Thorson continues and says that "[s]tates and federal courts...have instituted approaches for developing the specialized capacity of judges without necessarily creating specialized courts. Rules of

¹⁷³ THORSON, *supra* note 148, at 35.

¹⁷⁴ *Id.* at 36.

¹⁷⁵ *Id.* at 28.

¹⁷⁶ *Id.* California's Bay Delta and the San Joaquin River.

¹⁷⁷ The court is "the sole, exclusive and final judicial authority for the hearing and determination of all questions of law and fact arising under the tax laws of the state." OR. REV. STAT. § 305.405-410(1) (2003).

civil procedure allow changes in venue for various reasons including the agreement of all parties,¹⁷⁸ or that ‘the ends of justice would be promoted by the change.’¹⁷⁹ Provisions like that allow cases to be reviewed by expert judges.

Admittedly, there are advantages to Thorson’s proposals where they fit with existing needs. However, all things considered, there are valid reasons why a permanent freestanding water court is not the best solution for Idaho’s future water administration needs. But the more feasible approach is to have something similar to what Idaho is currently doing with the SRBA court—namely, to have one district court appointed to have water matters directed to it. Because of the very useful and real advantages that may come from having an entity like the SRBA court around, Idaho should seriously consider how best to preserve those benefits where the future workload may not merit an additional independent court. Idaho would benefit from a judge who is intimately familiar with the law, regulations, policies, precedents, decrees, and science concerning Idaho water. Idaho would benefit from maintaining some entity that has developed a uniform body of law over time that provides predictability, consistency, and certainty to both water users and IDWR.

Based on a variety of considerations, including past experiences of the SRBA court and a view of Idaho’s future needs, the best course of action going forward would be to comply with the legislature’s acts and have the SRBA court continue to work on and wrap up the remaining adjudications. After that point, the physical court itself should

¹⁷⁸ See, e.g., MONT. CODE ANN. § 25-2-202 (2014). “Change of venue on agreement of parties. All the parties to an action, by stipulation or by consent in open court entered in the minutes, may agree that the place of trial may be changed to any county in the state. Thereupon the court must order the change agreed upon.” *Id.*

¹⁷⁹ *Id.* at § 25-2-201(3).

be closed, and the then-current water judge should return to a traditional district court where he or she will work on a traditional docket like the other forty-one district court judges in Idaho. This is similar to how Judge Wildman's docket currently operates. If at a given time there were an increased amount of water litigation due to water availability changes, or a new development project or whatever the case may be, it would be possible to adjust the water judge's docket so that he or she could focus more exclusively on water matters. The procedural avenues that have been established to send administrative appeals and other state water matters, such as issues of first impression or high complexity, to be reviewed by the water judge will remain in effect. Whomever is designated as the water judge will be able to review the relatively few cases that require it in a post-adjudication age. Where necessary the judge would be supplemented with special masters or other staff as appropriate given the complexity of the issues being reviewed. It is not necessary to establish a permanent entity in order to take advantage of the unique expertise the current organization has to offer.

There is one part of Thorson's proposal that is a good fit for Idaho. Thorson says that Alternative Dispute Resolution (ADR) can be and is part of many administrative processes, but it also can and should be part of more judicial processes. It is required by most federal courts, and at the appellate level in many state courts. It can be very informal like typical mediation. The proceedings and solutions do not have to be bound by the same formalities required in trials. Having an opportunity like that is truly valuable. One advantage of this option is that judicial officers can fairly and accurately predict what the outcomes of a case will be at trial after serving as a mediator for the parties. It can be helpful to the parties to determine if trial is the best option for them. It is

an early neutral evaluation approach.¹⁸⁰ Traditionally, it is understood that when disputes are brought to judges in a court of law, there are fewer remedies available than if the disputes could be resolved through some other type of collaborative process. This is one of the reasons why the U.S. legal system is so encouraging of ADR. In this sense, IDWR's administrative hearing process potentially offers more room for collaboration and resolution than a judge's ruling. Idaho should consider incorporating this approach into its future water administration system. It is usually less expensive than traditional litigation and also faster. Also, it is less formal and adaptive to parties' needs.

B. Complications To Establishing a Permanent Court

Despite the usefulness of specialized courts, there are unique circumstances in Idaho's case that create complications to the feasibility of such a court. This section will review five such complications that Idaho lawmakers would have to overcome in order to establish a permanent court. Some individuals suggest that there is benefit to keeping the SRBA court and establishing it as a permanent institution.¹⁸¹ However, in light of the following complications, the practical reasons for not keeping the court outweigh those in favor of keeping it.

The first complication is the implications that a permanent water court would have for IDWR. In a court of law, only evidence presented to the judge can be used in making a decision, whereas in an administrative hearing internal information and

¹⁸⁰ THORSON, *supra* note 153.

¹⁸¹ Idaho water attorney Mr. T.J. Budge, while speaking at a water conference said that “[a]t the outset of the SRBA, there was some concern that the SRBA court might become permanent, but its appointment was temporary and only an act of the legislature could make it permanent. The advantages of permanently establishing the SRBA court as Idaho’s water court include retaining the institutional knowledge and experience gained through the SRBA process, maximizing consistency in decisions involving water rights across the entire state, and increasing the efficiency of hearing and ruling on water-rights cases.” HENRY’S FORK WATER CONFERENCE 8 (2014), http://henrysfork.org/files/Watershed%20Council/meeting%20notes%209dec2014_Final.pdf.

knowledge influences decision-making, but that information and knowledge often remains unknown to the parties involved. Numerous court decisions have upheld the authority of the Director of IDWR to make decisions pertaining to the distribution of water resources under state law. Idaho practitioners such as Mr. Rigby and Mr. Budge believe that this authority should remain in IDWR. Mr. Rigby stated,

I am a real believer in the administrative process of water rights. The court should absolutely remain in an appellate capacity. This is a better process for clients because it is less formal, more flexible, often without litigation, parties working together, that process works well. If you don't like the decision of the director and his people through that process, you always have the right to appeal. The court did a very good job of using special masters to get parties together and work through the process. That is similar to what IDWR is doing anyway now that the adjudication is over. As much as I like the special masters and think they did a great job, I'm not sure we need them anymore because the role that they played in the adjudication can be done by IDWR, which is what it is supposed to be doing anyway: to be out there working with the individuals to try to come to a conclusion, including hearing and trying the case just like a trial. Definitely we should keep the special masters around for the other adjudications because that worked so well.¹⁸²

The abandonment of IDWR's role in applying its technical expertise would be a mistake. Establishing a permanent freestanding court would not only diminish IDWR's role, but also create several complicating factors. What relationship would exist between a permanent water court and IDWR? Would the court have its own staff of experts? Who would be required to support or defend an administrative decision in front of the court and what level of deference would be given to IDWR? After making a determination, would the department become an advocate of one of the parties on appeal? Would it be a friend of the court? What would the decision-making process look like? The parties and the department would be required to go through a second process *de novo* in front of the

¹⁸² RIGBY, *supra* note 74.

court. Simply put, by creating that a freestanding permanent court and introducing all those additional procedural complications, the legislature would be watering down the expertise of the department and duplicating effort. The legislature should be the entity that decides how Idaho water law will evolve. IDWR and the SRBA court can help to inform the legislature when it comes time to make those determinations.

A second complication to consider in regards to the legislature was raised by Professor Cosens: the agricultural interests in Idaho are very powerful. Idaho has a citizen's legislature that meets for ninety days in the winter. This trend was established in a time period when most citizens worked in agriculture and winter was the season they could meet. So today this scheduling self-selects those employed in this industry because others cannot really do the work with less-accommodating occupations. As described by Cosens, this results in the agriculture industry being grossly over represented in the number of legislators from that industry compared to the percentage of the economy it actually makes up.¹⁸³ According to a study produced by the University of Idaho, agribusiness only contributes twenty percent of Idaho's total economic output,¹⁸⁴ and ranks fourth behind manufacturing, medical, and tourism.¹⁸⁵ Yet the occupational demographics of the Idaho legislature reveal that the more than twenty percent of legislators are employed in the agriculture industry, while manufacturing, medical, and tourism are far less.¹⁸⁶ Based on those figures, it is likely that the legislature would only

¹⁸³ COSENS, *supra* note 120.

¹⁸⁴ PHILIP WATSON ET AL, ECONOMIC CONTRIBUTION OF IDAHO AGRIBUSINESS 4 (2014), <http://www.cals.uidaho.edu/edcomm/pdf/BUL/BUL892.pdf>.

¹⁸⁵ AMBER HARGRODER, TOP 5 INDUSTRIES IN IDAHO: WHICH PARTS OF THE ECONOMY ARE STRONGEST? (2015), <http://www.newsmax.com/FastFeatures/industries-idaho-economy/2015/04/04/id/636472/>.

¹⁸⁶ EMILIE RITTER SAUNDERS, HOW LAWMAKERS' DAY JOB AFFECT POLICY DECISION IN IDAHO, (2012), <https://stateimpact.npr.org/idaho/2012/12/10/how-lawmakers-day-jobs-affect-policy-decisions-in-idaho/>. According to the U.S. Census Bureau only 5.3 percent of Idahoans are employed in an agriculture-

entertain further appropriations for a water court in circumstances that benefited the agriculture industry in some way, or at least did not adversely affect it. Presently, as mentioned in Part II, agriculture does indeed represent by far the largest percentage of Idaho water users.¹⁸⁷ However, the volume of water is not the only consideration as Professor Cosens indicated. Other economic interests also require water. Given present trends, it is likely that other sectors of the economy will be assuming more prominence than what Idahoans may be used to or comfortable with at this time—particularly, the agriculture industry. Someone trying to anticipate these developments should consider the utility of an entity with expertise in water law as a tool for resolving conflicts. Considering that tourism already ranks ahead of agriculture economically in Idaho, we may see increasing water demand by the tourism and recreation industries in the future.

The third complication to a permanent court, just alluded to in the previous complication, is the financial commitment it would require. Director Spackman has concerns about a water court simply because of the perceived cost.¹⁸⁸ If economies of scale were not a concern, this recommendation would be much simpler. However, because we are discussing a publicly funded institution, it is not practical to require the public to pay for another government organization if it is not merited and sufficiently beneficial to taxpayers. It would be a very expensive proposition to establish a new court. The legislature would have to appropriate additional funds to the judicial branch, and designate the required amount to the water court. The current Idaho district courts'

related field, while 21 percent of Idaho legislators work in agriculture. Additional research done by the United States Department of Labor Bureau of Labor Statistics, as well as the National Conference of State Legislatures also support these figures.

¹⁸⁷ USGS, *supra* note 14.

¹⁸⁸ SPACKMAN, *supra* note 80.

combined budget was \$9.8 million in 2014.¹⁸⁹ Assuming for the sake of argument that those funds are divided equally among all forty-two district courts, it would cost a minimum of \$235,556 annually to establish an additional district court.¹⁹⁰ However, that would be funds from the state general fund only, and does not account for the full operating budget of each district court.¹⁹¹ The actual cost of the each district court far exceeds the appropriation from the state legislature.¹⁹²

The fourth consideration is that in 2014, appeals in all areas of law were up six percent in Idaho.¹⁹³ If all water law issues were heard by regular district judges in a post-SRBA court world, it is likely that appeals would continue to rise so as to impose an additional burden and expense on appellate judges. Assuming the characteristics of specialized courts identified in Part VII are true, having one expert district judge hear all water matters would presumably reduce the contribution water law matters make to appellate caseloads.

¹⁸⁹ LEGISLATIVE SERVICES OFFICE, 2014 IDAHO FISCAL SOURCE BOOK 91 (2014), <http://www.legislature.idaho.gov/budget/publications/FiscalSourcebook/current/FSBFrame.htm>. Fiscal Year 2014 budget was \$9,893,378. *Id.*

¹⁹⁰ In reality, the funds are not divided equally among all forty-two districts. Rather, funds are distributed based largely on the population of the counties they serve, as well as caseloads and other factors.

¹⁹¹ The funds distributed by the legislature from the general fund (\$9.8 million) only represent a relatively small portion of the total amount required to operate the court. Each court has their own budget revenues and expenditures based on filing fees and other assessments among the counties where they are located. It is less clear how these types of funds would be accounted for in hypothetical state water court that serves the whole state and not just a given district. Presumably, the state legislature would have to compensate for the difference from the general fund.

¹⁹² Currently, the SRBA court is funded just like any other district court in Idaho. That is because it is in fact just another district court. The judicial branch is appropriated a lump sum each fiscal year, part of which the judiciary allocates to the district courts. Idaho lawmakers approved a \$2.78 billion budget statewide for 2014. That was a 2.9 percent increase over the previous year. In 2015, the judicial branch was appropriated \$66.3 million. These appropriations come out of the general fund. The General Fund consists of, "moneys received into the treasury and not specially appropriated to any other fund" IDAHO CODE ANN. §67-1205 (2016). Approximately 47 percent of the General Fund is derived from individual income tax, 41 percent from sales tax, 7 percent from corporate income tax, and 5 percent from other sources.

¹⁹³ IDAHO SUPREME COURT, FY4014 ANNUAL REPORT OF THE IDAHO JUDICIARY 14 (2014).

Last by not least, is the complicating fact that there would need to be a sufficient caseload to justify the organization. This complication is the chief reasoning for deviating from Thorson's proposed model. Idaho simply does not now have nor is it foreseeable that it will have the workload to merit a full panel of judges, let alone a permanent freestanding court with one judge. Both Director Spackman and Judge Wildman indicated that Idaho does not currently have the appellate load to merit a permanent water court in a post adjudication Idaho.¹⁹⁴ Certainly there are advantages to having a multiple judge forum as Thorson suggests, and there may occasionally be instances in Idaho where convening such a panel will be the correct course of action. But it would be wasteful to do so on a permanent and full-time basis in light of current and foreseeable demand.

Idaho needs to ensure adequate expertise so that taxpayers are not needlessly burdened, and litigants are getting the best results. The legislature would need to gather written submissions, testimony, empirical research (where possible), and undertake public policy analysis. If Idaho were going to pursue a judicial course to address these future issues, they may be well situated to do so because most Idahoans have already had a relatively good experience with the SRBA court in the past. They have learned to look to that courts expertise and guidance and be able to rely on the results. The SRBA court has a lot of credibility that would be useful to build upon going forward.

C. Timing

So when should the Idaho Legislature begin considering whether and what future developments should be taken to administer Idaho water law? As suggested above, there are persuasive arguments that this process should not be delayed. Just as Montana has

¹⁹⁴ SPACKMAN, *supra* note 80; WILDMAN, *supra* note 77.

already initiated the required steps to make informed decisions, Idaho should now start to consider these issues. Of course, if we are going to stick with trends, then we can simply wait until the crisis is upon us before we act. Some may believe that it is simply too early to be addressing this issue. With adjudication and appeals work for the SRBA court likely to continue for an estimated ten to fifteen years, why should we address this question now? Perhaps by the time the issue is more pressing a solution will have presented itself. But if there is a sufficiently compelling argument in favor of designating one district court with an expert water judge, then why wait ten to fifteen years to consider doing so? Would it not be more efficient to begin the legislative discussions in committees, doing the research and exploring the options, now? If prudent, Idahoans could begin the process of drafting legislation and developing the requisite material to establish this court at present. Are circumstances going to be so changed in ten years down the road that a court may be justified now, but not at that time? If history and science tell us anything, it is that the opposite is true. If there is sufficient reason to establish a court now, the need will be even greater in coming years.

The crisis management mentality of governance cannot possibly produce the best results. Facing and tackling difficult problems well in advance of them becoming stressful allows policymakers to explore more thoroughly all scenarios and to choose the policy option that is best suited to Idahoans now and in the future. Admittedly, it is difficult to predict with certainty what the future needs for a water court might be. However, as has been shown above, there are at least a few needs that we know will be prominent in the future. It is safe to suggest, as undesirable as it may sound, that there will be an increase in litigation so long as we are grappling with uncertain impacts of

climate change, population growth, economic development, drought, variability in water availability, etc. Conflicts and litigation are inevitable whenever a finite resource exists for which there is more demand than supply. Idaho has a lot of water. But it is not always where we want it, when we want it to be there, and in the desired amounts.

There is also some uncertainty about the workability of the prior appropriation doctrine going forward. Idaho population is growing and there is economic development in other areas besides agriculture. Granted it may be a long time off based on that fact that eighty-one percent of Idaho water is still going to crops. But it is also clear that this is going to be a source of contention going forward, and the economy in recreation and other areas continues to grow just as it has in the past. Prior appropriation is a flash point for some Idaho water users. The current tension that is going on with the legislature reviewing IDWR's determinations about reservoir operations, and between the parties that are involved in pushing those interests, is evidence that the doctrine of prior appropriation is potentially uncertain. If in the future similar issues continue to arise, it would certainly be beneficial to have an expert judge to review the matters. Additionally, the systemic nature of the resource should be reflected in the way that it is administered. We now know that we cannot compartmentalize surface and ground water administration. As conjunctive management issues continue to develop, the usefulness of a water judge will too.

Montana is going to have to face this issue as well to an extent. Although the two states are not identical, there are some striking similarities. Montana, however, has already begun to explore this at the legislative committee level. There have been interim water policy committee meetings going on already this year. Additionally, the University

of Montana water study cited earlier was commissioned by the Montana Supreme Court to start looking at what needs to happen next for Montana's water administration. Like Idaho, Montana has developed a lot of expertise coming out of the Water Court in Bozeman. They too want to maintain that institution to the extent it would be possible and beneficial.

With the completion of the SRBA adjudication, the work of issuing permits is largely accomplished. There is still the time required to address the other basins that are currently being adjudicated as well as those pending. Once the adjudications are completed, however, hopefully all that is left to be done will be to deal with any reorganization of existing claims and uses to meet changing needs. The question for Idaho now is: what is the best system to facilitate that? Once the SRBA court has completed its current assignments, designating one district court with an expert water judge to hear these matters in a post adjudication future is one effective solution.

IX. CONCLUSION

In summary, Idaho should continue to use the SRBA court for its ongoing and future adjudications. After those adjudications are complete, the legislature or the Idaho Supreme Court should consider designating one of Idaho's district courts as the de facto state water court. There would be one judge, in one district, to perform all the work for the state.¹⁹⁵ For all practical purposes this expert judge would maintain the benefits of a permanent state water court without requiring the expense and effort of establishing a

¹⁹⁵ One consideration the legislature would have to take into account, is which district this judge would be a part of. The current SRBA court is in the Fifth District, specifically in Twin Falls, which is in southern Idaho. There is a good argument to be made that it should be located more centrally, perhaps closer to IDWR in the Boise area. That would place it in the Fourth District. This area would be more fairly accessible to a greater number of water right holders in Idaho. This location would also facilitate more effective coordination between the other branches and individuals involved in water administration in Idaho.

freestanding water court. This designation could be a rotating or elected appointment if that suited the needs of water users. Water matters should continue to be directed to this expert judge under the current rules of civil procedure and administrative orders. It would not be necessary, except possibly in exceptional cases, for this judge to have the full staff that the SRBA court has today. Establishing such an organization would be the most efficient use of Idaho's resources considering the amount of work that this expert judge would have to do. It would also provide a forum for future water law issues that might arise as a result of climate change, increased population, and evolving water use changes. This organization would be exceedingly knowledgeable and expert on water law issues. This means that because parties would have the opportunity of appealing their grievances to a court from IDWR, they would feel that they had their day in court so to speak, and they were heard regardless of whether the court ruled in their favor. That would result in fewer appeals to higher courts. Also, the opinions from this judge would be far more consistent than the alternative approach. The body of law would be more uniform, providing stability and predictability to Idaho water users.

There will continue to be water difficulties in the future that will require the knowledge and expertise that have been gained over the past thirty years of the SRBA court's history. These difficulties include: ongoing adjudications that will continue for at least the next ten years, administrative appeals, and disputes stemming from conjunctive management issues as noted above. However, a freestanding court is not merited. It does not satisfy the criteria needed to justify a specialized court. It is simply too expensive to maintain, and the workload is not there to support it. It is not in the best interest of Idaho water users. The formalities that come with a court can create formidable barriers to

users. Although a freestanding court is not merited after consideration of the relevant criteria, there is at the least a growing necessity for water law expertise at the judicial level. What form Idaho chooses to implement that expertise is an interesting question, as there are several viable options. But no one can doubt that it is essential to address this issue as we go forward.

Just like prior to the SRBA, as the river gradually became over-appropriated, public preferences began to change in the late twentieth century. Institutions have had to deal with changes in use and resource scarcity in the context of a growing population and changing economy. As preferences for water use have changed and developed over time, it has proven difficult to facilitate those changes legally. In the Snake River Basin, “[i]t has historically been difficult, for legal, political, and hydrologic reasons, to subsequently provide for changes in place or nature of the use of water once appropriated.”¹⁹⁶ The occurrence of climate change has increased, and will continue to increase, these difficulties. Water built Idaho. Its role will not be diminished, but changed. The closer we get to the mud, the higher the price will go. “Our water is among our greatest treasures; we must protect both its quality and quantity for future generations of Idahoans. We recognize that our water resources are finite. We have done many great things with our water, but we must do better. Let us keep it clean, use it wisely, and treasure it forever.”¹⁹⁷

¹⁹⁶ RICHARD A. SLAUGHTER, PH.D., INSTITUTIONAL HISTORY OF THE SNAKE RIVER 1850-2004 1 (2004), http://cses.washington.edu/db/pdf/Slaughter_InstitutionalHistorySnake241.pdf.

¹⁹⁷ CHASE, *supra* note 108.

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