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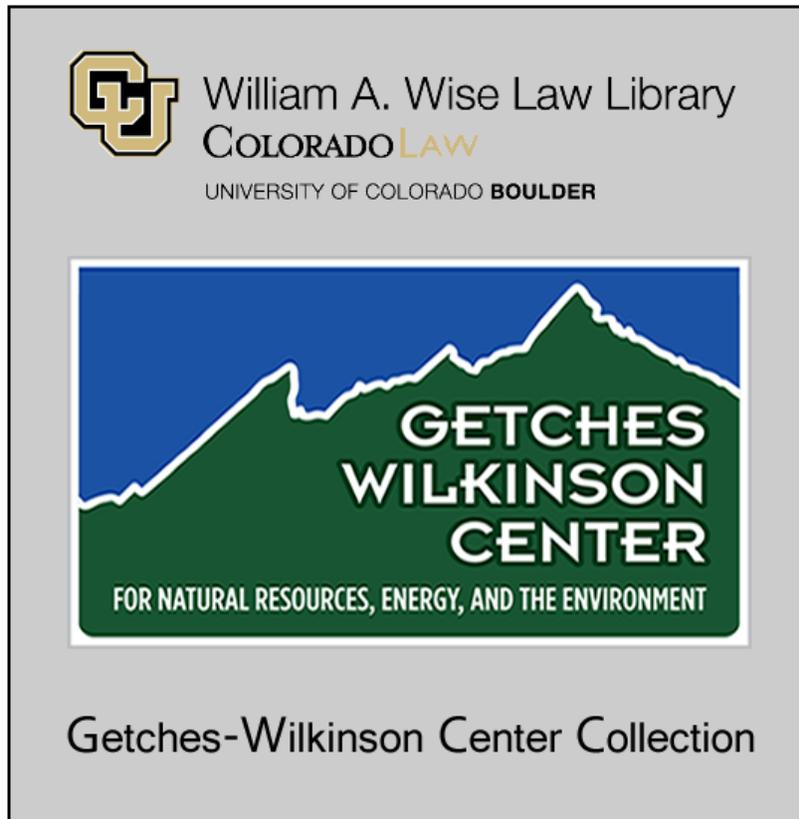


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**BASIN-WIDE ADJUDICATIONS IN THE WEST:
WHAT WORKS, WHAT DOESN'T?**

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Strategies in Western Water Law and Policy:

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NATURAL RESOURCES LAW CENTER

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Basin-Wide Adjudications in the West: What Works, What Doesn't

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I. Original Reasons for Initiating Modern Western Stream Adjudications

Resolving water disputes is not new or unique to the western United States – think of the Middle East where water is a key component in negotiations between neighboring political bodies. The following quote sounds familiar:

“Water for us is life itself. It is food for the people - and not food alone. Without large scale irrigation projects we shall not achieve high productivity, balancing the economy or economic independence. For without irrigation we shall not produce a wealthy agriculture ... we shall not be a people rooted in the land, secure in its existence and stable in its character.”

Speech to the Knesset of Prime Minister Moshe Sharett, 1952 quoted in Feitelson and Haddad 1994, p. 73.

A. Early resolution of water disputes in the West

1. *Native American* water systems – Hohokam, Anasazi - may have employed communal dispute resolution techniques.
2. *Hispanic* systems relied on Spanish law, forming ditch associations with a *mayordomo* as a decision maker, and the *composicion*, which was similar to today's declaratory judgment proceeding.

¹ The author is grateful to John Thorson, Dar Crammond and Andrea Gerlak for their contributions to this presentation. All and any conclusions and errors are the author's alone.

3. Early *Mormon* settlements devised a system where the ward bishop also provided equitable division of water.
4. *Statutory* Adjudications begun in late 1800s and early 1900
 - a. Based in part on the increased influence of scientific management (i.e., think about the State *Engineer*)
 - b. Desire of states to take advantage of the new reclamation programs under the Reclamation Act
 - c. Elimination of overt riparianism

B. Modern Stream Adjudications

1. Many states commenced general stream adjudications in the 1960s-1970s.
2. Proceedings evolved from Court interpretations of the McCarran Amendment, adopted in 1952.
3. The seminal *Arizona v. California* decision in 1963 put federal reserved rights in the forefront of state concerns.
4. Reasons for Modern general stream adjudications - unresolved social/policy issues
 - a. Management of water which travels across different state border (interstate apportionment concerns)
 - b. Concerns about impact of senior federal reserved rights
 - c. Struggle between riparian and prior appropriation doctrines in certain states (includes tensions between groundwater and surface water; instream flow v. consumptive use)
 - d. Ownership of public lands
 - e. Other?

5. Underlying social issues remain unresolved

State governments continue to resent federal government oversight in natural resource areas. When states and water users confront groundwater and surface water interaction, it is reminiscent of the doctrinal battles between riparian rights and prior appropriation. For instance, in Arizona, groundwater is legally a separate resource from surface water, at least until someone decides differently, either the Court or the legislature. In Texas, the Court recently ruled that the rule of capture for groundwater still applies, and that the legislature is the appropriate place to confront the interaction of groundwater and surface water. Across the West, ownership of public lands and resources continues to vex policy makers. In addition, Native American claims to water resources for their reservations have not gone away.

II. Contemporary Significance of Western Stream Adjudications

“To-day we study the day before yesterday, in order that yesterday may not paralyze to-day, and to-day may not paralyze tomorrow.” - So said Frederic William Maitland. Do the reasons stated above still have contemporary significance? Are post-McCarran Amendment general stream adjudications a worthy enterprise?

A. Western growth is inevitable

The future water needs of the West are enormous, especially the growing municipal needs. Fortunately, water managers have developed innovations to better manage supply and demand; unfortunately, some of these innovations, like water marketing, may require greater security of title, which may justify adjudications and the resolution of senior federal and Tribal claims.

B. Demographic Predictions for Western States

As part of the Western Water Policy Review Commission, Pamela Case and Gregory Alward studied demographics in the West, focusing on growth in the last three decades and using that data to predict future growth trends and water use trends.

Case and Alward reviewed large population swings in the Western States during the last 25-30 years, concluding that the “population of the Western States has been growing more quickly than predicted from both natural increase and from movement of people into the West from other states and abroad. During the last 25 years, the population of the 17 Western States grew by about 32 percent as a whole, in comparison with a growth rate of 19 percent for the rest of the nation. During the last 15 years, the population of the West has grown by about 18 percent, in comparison to 11 percent for the rest of the Nation.”

More significantly, the rearrangement of people in the West is striking. The population pattern of concentration includes the influx of people and the concentration of newcomers and westerners themselves into a relatively small number of metropolitan areas. Looking at the map for 1970-1980, the interior west has really moved generally west. But, through the 1980s and 1990s, that movement concentrates in the cities, leaving large rural areas.

The cities which are the new cities of the west (Boise, Salt Lake City, Spokane, Denver, Las Vegas, Sacramento, Eugene, El Paso, Dallas, Houston, Albuquerque, Tucson, Phoenix, and Missoula) all occupy main interstates, though that doesn't completely explain the growth of these nodes. Similarly, water use and large scale water development does not explain the growth. Half of the cities are on stems of large water storage and delivery projects, the other half are not. Dr. Case concludes that the “reorganization of people on the Western landscape is largely due to economic forces.”

You all have heard it and the Western Water Policy Review Commission's work confirms it - the Western economy by 1977 was much more urban and industrial than was commonly supposed. Though mining remained important as an extractive industry, the West's growth in the last 20 years has been in services, industry and technology. Out of the 20 sectors studied, the service sector expanded most rapidly, with advanced technology growing almost as fast. The service sector is very diverse, including professional services (doctors, engineers, architects) and support services (real estate, advertising, document reproduction). It is also striking that the advanced technology sector was ranked 18th of 20 economic sectors in 1977 – the same economic sector is now ranked as the 8th largest.

Case and Alward explain that demographic change by following economic patterns and points out that water use doesn't reflect this same economic pattern. As you might intuit, the data bears out that economic uses of water show clear associations with the large-scale water supply and delivery systems such as the Columbia/Snake, the Missouri/Platte, Rio Grande, Arkansas, Colorado River, Oglalla aquifer and the Central Valley of California.

Combining the pattern of Western economic activity with the known agricultural water use pattern, the conclusion is fairly self-evident. "While total economic activity is strongly concentrated in metropolitan nodes the economic uses of water are far more dispersed. As we know, agricultural continues to use the bulk of the West's water supply." Further, the Commission's study indicates that high irrigation water use areas, such as the Snake River, produce agricultural products of lower economic value.

So, looking into the crystal ball, the population for the future West continues this cycle of growth. "Between 1995 and 2000, the 17 Western States are expected to add 5.427 million people to their current population. Between 2000 and 2025, the West will add about 28 million more people, for a total change of 27.4 percent (33, 470,000 people)." This is a much larger than the rate of change than expected for the rest of the Nation. Eight western states lead the top ten states in growth predictions from 1995-2000: Nevada, Idaho, Arizona, Utah, Colorado, New

Mexico, Wyoming and Montana. From 2000 to 2025, the top ten fastest growing states are expected to include California, Texas, Arizona, Washington, Idaho, Utah, New Mexico, and Wyoming. For example, from 2000 to 2025, California is expected to increase in population by the same number of total people in Montana each year. Texas will be importing people in numbers equal to Wyoming's population each year.

Implications for Western water use and management will be necessarily driven by these demographic changes. As the metropolitan nodes grow, so will demand for water.

C. A Tale of Two Cities

Two contemporary growing Western cities -- Las Vegas, Nevada, and El Paso, Texas, -- may be used to exemplify the question of whether general stream adjudications are the most effective way to meet the West's water challenges. Here is a tale of two cities.

From 1995-2000, it was predicted that eight of the nation's ten fastest growing states were in the West. In 1992-1993, Nevada led the growth rate with a 3.9 percent increase; compared with the national increase of 1.1 percent. Looking to the future, Nevada is expected to be one of the fastest growing states in the nation, with projected growth of 24.7% from 1990-2000.

Consider the growth of Las Vegas, Nevada during the last two decades. Las Vegas nearly doubled its population in classic sunbelt style during the 1980s. The recession of the early 1990s was barely a ripple on the surface of continuous growth in the western "city that never sleeps." In a search to secure supplies for the future of this glittering city, the Southern Nevada Water Authority, which services 900,000 people -- 65% of Nevada's population -- attempted a water grab reminiscent of California's Owens Valley. First Las Vegas filed claims to appropriate nearly all unappropriated groundwater in southern and central Nevada. Next, it attempted to appropriate 70,000 acre feet on the Virgin River, a large tributary to the Colorado River. Then,

news of a secret deal with Chevron surfaced which included use of Colorado's apportionment of Colorado River water.

East of Las Vegas, similar growth pressures the Rio Grande system. Just south of the New Mexico border lies the burgeoning city of El Paso, Texas. El Paso's next door neighbor, across the Rio Grande, is Mexico's Ciudad Juarez. Las Cruces is the neighboring New Mexico city to the north. It is estimated that the combined population of Las Cruces, El Paso and Ciudad Juarez will exceed 3.5 million by the year 2010, which represents a 2.7% annual growth rate. For its metropolitan water, El Paso has historically relied on groundwater supplies from the Hueco Bolson, which is estimated to be depleted by 2030. El Paso is out to increase available surface water supply as part of a strategy to adequately deal with continuous growth.

D. Recognition that some level of adjudication is necessary to support market activity or the shift from agricultural use to municipal use

In El Paso's search for more surface water, adjudication of water rights in both Texas and in New Mexico has become a concern. Water rights adjudications in New Mexico and Texas do not reassure a thirsty El Paso. First, El Paso is concerned with adjudications and the lack of progress in New Mexico. Because the River within the Rio Grande Project has not been adjudicated, there is "almost no priority administration of water use or basis for evaluating the priority of a particular water right." Citing New Mexico's failure to adjudicate Rio Grande waters and the lack of adjudicated rights, El Paso asserts that (1) water market development is precluded, (2) El Paso's ability to make a long-term financial plan is decreased, and (3) the regions ability to draft a drought management plan is hampered. El Paso views New Mexico's attempt at adjudication "abysmal" yet offers no real resolution to the problem. These tensions are being played out on the lower Rio Grande river in two proceedings involving the Elephant Butte Dam and Reservoir – one is the quiet title action in federal court, and the other is an adjudication proceeding in New Mexico court.

Both Las Vegas and El Paso demonstrate what is becoming a common theme in the west. The growth of the western metropolis demands more water and craves certainty of supply. Often surface water is available through river systems which cross many states and serve traditional agricultural uses. The end product of adjudication of water supply could well serve cities like El Paso and Las Vegas, if a tabulation of existing supplies and users resulted. The very same background reasons for general stream adjudications – concerns about interstate allocations, riparian v. prior appropriation doctrine, federal reserved rights, and ownership of public land -- crop up in the review of Las Vegas and El Paso.

E. Federal reserved water rights are here to stay. Adjudications are necessary to drive settlement discussions.

Huge growth in Las Vegas and the surrounding desert demands some accounting of the actual supplies currently available to the city. Other claimants may take priority over the gleaming city. For example, the Las Vegas Paiute Tribe's groundwater pumping recently prompted adjudication in Nevada. The Las Vegas Paiute Tribe's reservation was created in 1986 - not a senior reservation of a water right. The Tribes began to drill wells for golf course development and the state engineer tried to shut down their wells. The Tribe claimed water rights for 40,000 acre-feet, which is more than all the recharge in the basin to the groundwater system. Based on this dispute, Nevada began an adjudication through its administrative agency. The adjudication prompted settlement talks and a stipulated agreement created a "homeland right" for 2,000 acre feet for the Tribe. Additionally, a "national emergency right" was created for the neighboring Air Force base. Both settlements avoided the federal reserved right concept.

Similarly, because the Rio Grande passes through several New Mexico Indian Pueblos, both the United States and those Native American peoples have asserted their water claims as aboriginal

and as *Winters* rights in both New Mexico and federal courts. With the pressures of adjudication, Indian tribes hope to force recognition or possibly, settlement of their *Winters* water rights.

Often, solutions seem only possible if the water-dependent entities sit down and negotiate compacts for use and allocations. Surely, a compendium of the water available and its current ownership would assist those efforts, whether they are local within a state, or regional.

Adjudications might fulfill this need -- if an adjudication could be completed. But, you can't get a mortgage without clear title.

III. A Model General Stream Adjudication

If the above reasons for continuing to adjudicate water rights are valid, have the last twenty years of general stream adjudications provided some lessons or wisdom? Below are some observations on what works and what doesn't work in western stream adjudications.

A. Federal and tribal rights should go first - there is authority to do this

1. Recognize that the federal court probably will not interfere (*Colorado Trilogy/Eagle County* cases; *U.S. v. Oregon*).
2. In the Little Colorado River Adjudication in Arizona, all litigation has been stayed to work on settling tribal rights.
3. The Big Horn River adjudication in Wyoming is now handled in three phases, by stipulation of the parties, which results in litigating federal reserved rights first.
4. Compact Commission in Montana handles federal reserved rights separately from the water court process.

B. The “KISS” principle (keep it simple stupid)

Everyone craves certainty. All parties push to have the court decide overarching issues. Attorneys and water managers identify all possible unknowns. Often, this leads to a new fight, not previously foreseen. A cost/benefit analysis to pursue the issue is recommended. In addition, the imperative to be comprehensive under the McCarran Amendment can violate this KISS principle, leading to disputes about issues which may be unnecessary to determine from a water management perspective. Examples include exemption of small uses, as is done in Colorado with exempt wells, or in Montana, which exempted stock watering and domestic uses in its adjudication statute.

Further, adjudication for every state water right in every basin may not be necessary. For example, in Wyoming, the only basin to suffer adjudication is the basin where the Tribes’ federal reserved rights are at stake. Another idea is to limit the initial service of process to the actual stake holders or entities which serve water uses. For example, in Washington, service of process was limited to major water-providing entities in the Yakima basin, avoiding service on 40,000+ entities or individual users whose presence would have vastly complicated the adjudication.

C. Use local dispute resolution mechanisms (acequias, watershed councils)

Capitalize on the current focus on consensus models, led by those with the greatest stake in outcome.

1. Watershed Councils. There is a growing culture in water and other natural resource arenas to find cooperative solutions. Watershed councils, such as the Henry’s Fork Watershed Council and the Yakima River Watershed Council, offer local communities the opportunity to address

water supply and water quality challenges on a local level. They hope to bring greater assurances of water to their citizens through improved coordination and communication between users in the watershed. Such mechanisms may be a vehicle to bring the concept of watershed management into the adjudications, and to address new issues of supply and quality long after the adjudication is complete. Seek out these entities in your watersheds and use them to form models in your adjudications. Or promote organization of such models, when they are not present.

2. Acequias. An older model of cooperation also can guide courts toward consensus solutions - the acequia associations found in New Mexico. Factors which influenced dispute resolutions in acequias include the following: proof of proper title, prior appropriation, need, injury to third persons, intent, legal right, equity and common good. Historic legal foundations supporting this kind of dispute resolution are persuasive. The localized nature of acequias has produced on the ground results. Does a local entity like this exist in every adjudication? Can it help resolve allocation issues? Is it perceived as a neutral ground for discussion?

D. Remove Ambiguity From the State Role

1. State agencies should always be a party to the litigation. The state should have a clear, factually based role in the adversarial world. The state should not spend time or money doing upfront reports. A water user's claim to historic use should form the basis for adjudicating.
2. In many adjudications, the state agency charged with water management maintains an ambiguous posture, making fruitful ground for litigation to refine what that role should be. To follow are some examples where ambiguity of State role causes problems:
 - a. Arizona (See recent Arizona Supreme Court's denial of petition to remove Gila River Adjudication Superior Court Judge)
 - b. Idaho (State Legislature changes IDWR from a party to a neutral entity)

3. In addition, some state water departments have gone to great lengths and costs to explore the claims made by water users. This has resulted in unfocused objections directed to the state reports, which often ties up time and money, without tackling the claim. These types of reports add unnecessary complexity.

E. Put most state-based rights in the background - use simple, on-going process, set modest short-term goals

1. Wyoming is progressing on adjudicating junior state water rights, largely without objection by the federal parties. A simple process can be designed where federal parties can review adjudication of junior state rights at the conclusion and log objections if necessary.
2. Grandfathering existing junior, state rights is another alternative, especially where a stream is not over-appropriated.
3. Can a system be cooperatively designed, so that state rights are moving toward adjudication simultaneously, as the larger, more contentious rights settle or are litigated?

F. Don't complicate the statutory set-up; simple is better

Both Arizona and Idaho have and are living through the ramifications of statutory change. How can this phenomena be either (a) avoided, or (b) improved?

One insight. In Wyoming, the 1977 adjudication statute is short and simple; it contemplates that the Board of Control (comprised of four water division superintendents and the state engineer) would adjudicate the water rights for the District Court. However, the United States and the

Shoshone and Arapaho Tribes objected. This objection prompted the State District Court Judge, Harold Joffe, to assign the adjudication tasks to a Special Master, former Congressman Teno Roncalio, an arm of the judiciary. What is important about this example? For twenty years, the Wyoming adjudication has proceeded in contradiction to the statutory design - based on judicial modification to the process.

Arizona's legislative attempts to change the adjudication statute in the 1990s resulted in a near total halt of any judicial activity while the changes progressed through judicial review. Recently, the Arizona Supreme Court struck several portions of the legislative change, making for a Byzantine set of rules for their adjudication.

Any serious consideration of legislative tinkering with general stream adjudication statutes should consider and quantify the time and costs of any challenge.

G. Carefully evaluate interlocutory appeal

In most Western states, it seems inevitable that partial decisions in stream adjudications are appealed for some kind of interlocutory review.

1. At one point, Wyoming's district court certified its own opinion for review, but the Supreme Court refused to review the few test *Walton* cases and provide a piecemeal review.
2. Opposite facts exist in Arizona, where multiple pretrial orders have stagnated and await separate and drawn out treatment by the Arizona Supreme Court. In September of 1998, the Arizona Supreme Court heard oral argument on interlocutory issues initially decided in 1988 by the Superior Court Judge in the Gila River Adjudication.

3. Idaho enjoys the luxury of a Supreme Court that is required to turn around cases in a very short time frame.

However, in each state, interlocutory review slows adjudication and adds complexity.

H. Minimize resource allocation

1. Today, in 1999, parties to adjudications may not have the same energy or resources for a fight over principles. Thus, resources historically devoted to these cases may not be justified.
2. Complicated adjudicative structures may inevitably become inflexible. An inflexible structure invites appeals, costing all parties time and money.

I. Don't fight over the forum

Jurisdictional battles in some states have consumed over a decade of litigation.

1. In Arizona, general stream adjudications were filed in 1974, but state court jurisdiction was not firm until 1985.
2. In Oregon, the federal government and the tribes resisted state jurisdiction from 1975 1994. Was it worth it?
3. Contrast New Mexico - adjudications proceed in both federal and state courts based on agreement between the State and the United States made in the 1950s. Though not all jurisdictional struggles in New Mexico were prevented, actual energy was free for

adjudication of claims. Yet, the *Aamodt* case in New Mexico is the reputedly the oldest federal case in the country.

4. Fears of bias unfounded. Witness the recent Arizona Supreme Court ruling that the legislated statutory changes were unconstitutional.

J. Always look for a way to craft a settlement of federal reserved rights

1. Is there a community resolution model?
2. Find ways that courts can help.
3. Are other resources available for money or water?
4. But, will the settlement process end? Can a settlement be implemented?
(What about Animas-La Plata?)

General References

The McCarran Amendment, 43 U.S.C. § 666 (1952).

Colorado Ute Water Rights Settlement Act, Pub. L. No. 100-585, 102 Stat. 2973 (1988).

Idaho Code 42-1401 to -1428 (Sup. 1994).

United States v. Oregon, 44 F.3d 758 (9th Cir. 1994).

The Montana Reserved Water Rights Compact Commission, authorized in Mont. Code Ann. § 85-2-217.

The Colorado Trilogy. Three Supreme Court cases specifically addressed Colorado's adjudication under the McCarran Amendment. *United States v. District Court in & for Eagle Country*, 401 U.S. 520, 91 S. Ct. 998, 28 L. Ed. 278 (1971) ("Eagle Country") held valid the McCarran Amendment. Its companion case, *United States v. District Court in and for Water Division No.5*, 401 U.S. 527 (1971) ("Water Division No.5") held the state court had jurisdiction to adjudicate the United States reserve water rights and that the Colorado system was within the scope of the McCarran Amendment. Finally, *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) ("Colorado River") held Indian federal reserve rights within the McCarran Amendment.

Charlotte Benson, *General Stream Adjudication: State Party Perspective*, American Bar Association's Section of Natural Resources, Energy, and Environmental Law, 15th Annual Water Law Conference, Feb 20-21, 1997.

Arizona v. California, 373 U.S. 546, 83 S.Ct. 1468, 10 L. Ed.2d 542 (1963).

Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 103 S.Ct. 3201, 77 L.Ed. 2d 837 (1983).

Sipriano, et al. v. Ozarka, Texas Supreme Court, Case No. 98-0247 (May 6, 1999).

Pamela Case and Gregory Alward, *Patterns of Demographic, Economic and Value Change in the Western United States: Implications for Water Use and Management*, Report to the Western Water Policy Review Advisory Commission, (Aug. 1997).

Arizona General Stream Adjudication Bulletin (1993-1999).

Idaho cases on federal agency water rights

United States v. State, 1998 Opinion No. 41 (Idaho Apr. 6, 1998).

Order Granting and Denying United States' Motions for Summary Judgment on Reserved Claims, Nos. 75-13605, 63-25293 and 79-13597, *In re SRBA Case No. 39576* (Dist. Ct Twin Falls Country Dec. 18, 1997).

Memorandum Decision Granting, in Part, the United States' Motion for Summary Judgment on Reserved Water Right Claims, *In re SRBA Case No. 39576, No. 75-13316* (Dist. Ct. Twin Falls County July 24, 1998).

Memorandum Decision Denying the State of Idaho's Motion for Summary Judgment, *In re SRBA Case No. 39576, No. 63-25243* (Dist. Ct. Twin Falls County Dec. 21, 1998).

Memorandum Decision Granting State of Idaho's Motion for Summary Judgment, *In re SBRA Case No. 39576, No. 02-10036* (Dist. Ct. Twin Falls County Dec. 31, 1998).