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FEDERAL WATER RIGHTS
IN THE SNAKE RIVER BASIN ADJUDICATION

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FEDERAL WATER RIGHTS IN THE SNAKE RIVER BASIN ADJUDICATION
by Michael A. Gheleta *

I. GENERAL OVERVIEW OF WATER RIGHTS IN THE SNAKE RIVER BASIN
ADJUDICATION (SRBA)
A. The SRBA is widely considered to be the largest water rights lawsuit in the nation,
involving more than 150,000 individual claims and over 30,000 objections, and costing
more than $30 million to date; about 38,000 partial decrees have been issued so far.
B. More than 62 percent of Idaho’s land is controlled by four federal agencies: the Forest
Service (21 million acres), Bureau of Land Management (11 million acres), National Park
Service (95,000 acres) and Fish and Wildlife Service (83,000 acres).
C. The United States is a participant in the SRBA, a state court proceeding, by virtue of
having been joined in the case by the State of Idaho under the waiver of sovereign

1. The McCarran Amendment waive federal sovereign immunity in comprehensive
general adjudications of water rights by states. Colorado River Water
Conservation District v. United States, 424 U.S. 800 (1976); United States v.
District Court for Eagle County, 401 U.S. 520, 525, 91 S.Ct. 998, 1002-03
(1971).

2. In the case of In Re the General Adjudication of Rights to the Use of Water from
the Snake River Basin Water System, 115 Idaho 1, 764 P.2d 78 (1988), the Idaho
Supreme Court held that the McCarran Amendment requires that, in order for the
United States to be subject to the jurisdiction of the trial court in the SRBA, the
rights of all claimants on the Snake River and all of its tributaries within the State
of Idaho must be included in the adjudication.

* The materials discussed below include the personal views of the speaker and do not necessarily represent the
official position of the U.S. Department of Justice or any other federal agency.
3. In United States v. Idaho, 508 U.S. 1, 113 S.Ct. 1893, 1897-98 (1993), the U.S. Supreme Court held that the McCarran Amendment, which provides that “no judgment for costs” shall be entered against the United States, did not waive the United States' sovereign immunity with respect to payment of filing fees required by Idaho legislation, with the result that Idaho could not require the United States to pay filing fees with its SRBA claims.

D. Federal agencies have filed more than 60,000 consumptive and non-consumptive claims in the SRBA, including the following approximate numbers of claims:

1. Forest Service - 10,339 consumptive and 58 non-consumptive claims
2. Bureau of Land Management - 16,663 consumptive claims
3. Bureau of Reclamation - 180 consumptive claims
4. Fish and Wildlife Service - 88 consumptive and 41 non-consumptive claims
5. National Park Service - 22 consumptive and 16 non-consumptive claims
6. Tribal Claims
   a. Nez Perce - 2349 consumptive (463 on reservation, 1,886 off reservation) and 1,113 non-consumptive claims
   b. Shoshone-Paiute (Duck Valley Reservation) - 622 consumptive claims
   c. Shoshone-Bannock (Fort Hall Reservation) - 22 consumptive claims

E. Many federal claims in the SRBA have been filed pursuant to the federal reserved water rights doctrine, which arose in the context of Indian reservations in Winters v. United States, 207 U.S. 564 (1908), and was extended to other types of federal public land reservations in Arizona v. California, 373 U.S. 546 (1963) (wildlife refuges, national forests, national recreation areas).

2. Reserved water rights may be express or implied. New Mexico, 438 U.S. 696.
   a. An express reservation of water is created by the explicit language in the act creating the reservation. Id.
   b. An implied reservation of water is based on inferred congressional intent.
      1. “Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.” Cappaert, 426 U.S. at 139.
      2. This inferred intent applies to the “very purposes of the reservation” (primary purposes), New Mexico, 438 U.S. at 714.
      3. If “water is only valuable for a secondary use of the reservation . . . there arises a contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.” New Mexico, 438 U.S. at 701; United States v. Idaho, 1998 Opinion No. 41 (PWR 107 reserved rights), at 3-4.
      3. “[T]he courts must consider the relevant acts, enabling legislation and history surrounding the particular reservation under review to determine if a federal reserved water right exists.” United States v. Idaho, 1998 Opinion No. 41 (PWR 107 reserved rights), at 4.

F. Federal agencies have also filed claims in the SRBA under Idaho state law for both consumptive and non-consumptive (e.g., instream flow) appropriative water rights.

G. Litigation has moved forward rapidly in the past two years on many significant federal claims in the SRBA, with trial court rulings, and appeals to the Idaho Supreme Court, on key legal issues including entitlement to reserved rights under various statutes.

H. The following significant litigated federal water rights in the SRBA will be discussed below, including the nature of the claims, legal arguments and judicial rulings to date:
   1. Bureau of Land Management (BLM) Reserved Rights Under Public Water Reserve 107
2. Forest Service Reserved Rights
   a. Wild and Scenic Rivers Act
   b. Wilderness Act
   c. Organic Act
   d. Hells Canyon National Recreation Area and Sawtooth National Recreation Area
   e. Multiple-Use Sustained-Yield Act (with alternative state law basis)
3. Fish and Wildlife Service (FWS) Reserved Rights and State Law Appropriate Rights
   a. State Law Rights For Minedoka National Wildlife Refuge (Smith Springs)
   b. Reserved Rights For Deer Flat National Wildlife Refuge

I. The following federal claims, which have been resolved by settlement, will also be addressed below.
   1. National Park Service (NPS) Rights for Craters of the Moon National Monument and Yellowstone National Park
   2. Department of Energy Rights for Idaho National Environmental and Engineering Laboratory (INEEL)

II. SPECIFIC FEDERAL WATER RIGHTS IN THE SRBA: BACKGROUND AND NATURE OF CLAIMS, AND RECENT JUDICIAL RULINGS
A. BLM RESERVED RIGHTS UNDER PUBLIC WATER RESERVE NO. 107

Background of Claims
   1. The United States filed over 11,000 claims in the SRBA on behalf of the Bureau of Land Management (BLM) seeking federal reserved water rights for stockwatering purposes on public domain lands it manages based on Public Water Reserve No. 107 (PWR 107), a 1926 executive order issued by President Coolidge.
   2. PWR 107 provides: “[E]very smallest legal subdivision of the public land surveys which is vacant unappropriated unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole,
located on unsurveyed public land, be and the same is hereby, withdrawn from
settlement, location, sale or entry, and reserved for public use in accordance with
the provisions of Sec. 10 of the Act of December 29, 1916 [the Stock Raising

3. The purpose of PWR 107 was to prevent the monopolization by private individuals
of springs and waterholes on public lands needing for stockwatering, including
large ranchers who sought to gain control of vast areas of public lands by gaining
control of areas containing water sources.

4. The United States’ reserved rights claims under PWR 107 are opposed by the
State of Idaho, J.R. Simplot Co., and a number of individuals with grazing
interests who have appeared pro se.

5. In United States v. Denver, 656 P.2d 1, 31 (Colo. 1982), the Colorado Supreme
Court recognized federal reserved water rights under PWR 107, holding, “[w]e
agree that the federal government has reserved rights to provide a watering supply
for animal and human consumption.”

Judicial Rulings

1. The SRBA trial court entered an order on March 8, 1996 designating as Basin
Wide Issue No. 9 the question: “Whether Public Water Reserve 107 is a valid basis
for a federal reserved water right.”

2. The SRBA trial court entered an order and decision on December 9, 1996
concluding that PWR 107 was not a valid basis for a federal reserved water right in
the SRBA.

3. On April 6, 1998, in a unanimous decision, the Idaho Supreme Court reversed the
SRBA trial court, and held that PWR 107 is a valid basis for a federal reserved
water right for stockwatering purposes, with a priority as of the 1926 withdrawal
made pursuant to PWR 107.

4. The Idaho Supreme Court concluded that upon considering the plain and ordinary
words of the enabling statutes and executive order underlying PWR 107, PWR 107
evidences an express intention by Congress that reserves a water right in the United States.

a. The Pickett Act of 1910, 43 U.S.C. § 141, provided the President with broad discretion to temporarily withdraw lands and reserve them for public purposes.

b. The Stock Raising Homestead Act of 1916, 43 U.S.C. § 300, subsequently authorized the President to reserve lands containing waterholes or other bodies of water needed or used by the public for watering purposes.

5. The Idaho Supreme Court also concluded that the United States has the right to administer these water rights on the public lands managed under the Taylor Grazing Act.

a. The United States argued that the purpose of PWR 107 is to reserve water for public use and appropriation as a source for permittees under the Taylor Grazing Act.

b. The Idaho Supreme Court agreed with the United States’ position that such a reservation of stock water is needed in order to ensure the perpetual use of the water for stockwatering purposes by whichever member of the public happens at any time to have the grazing permit for the lands containing the relevant springs and waterholes.

c. The Idaho Supreme Court stated, “[t]hese springs and waterholes, which are located on public lands, should be regulated, supervised and administered by the Department of the Interior. To hold otherwise would be in contravention of the policy of this state ‘to secure the maximum use and benefit, and least wasteful use, of its water resources.’ Poole v. Olaveson, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960).”

6. Finally, the Idaho Supreme Court held that the passage of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701 et seq., in 1976 does not affect the PWR 107 withdrawals.
a. FLPMA itself included a savings clause stipulating that withdrawals and reservations existing at the time of its enactment shall remain in effect.

b. PWR 107, which reserved water rights in withdrawn land fifty years prior to the enactment of FLPMA, remains in full force and effect.

7. On March 8, 1999, the United States Supreme Court, with Justice O’Connor dissenting, denied a petition for certiorari on the Idaho Supreme Court’s PWR 107 decision.

B. FOREST SERVICE RESERVED RIGHTS UNDER THE WILD AND SCENIC RIVERS ACT

Background of Claims

1. Idaho played a pivotal role in the creation of the National Wild and Scenic Rivers System: Idaho’s congressional delegation led the effort to enact the 1968 Wild and Scenic Rivers Act, the people of Idaho generally supported the river preservation effort, and several Idaho streams were among the rivers at the core of the bill.

2. Senator Frank Church, sponsor of the Senate bill which was the precursor to the Wild and Scenic Rivers Act, described how Idaho’s rivers were archetypes of the system: “Nowhere in America are there left such jewels, among our remaining wild rivers, as the Salmon and Clearwater systems. . . . Naturally, these should be the lead-off rivers in the bill. Anyone who has come to know the pristine mystique of the Selway, or the rampaging white waters of the Salmon, must appreciate how supremely these rivers quality as the core for any wild rivers bill.” 112 Cong. Rec. 523 at 535 (1966).

3. The United States filed claims in the SRBA on behalf of the Forest Service for federal reserved water rights on seven Wild and Scenic Rivers in Idaho.

a. Four of the streams -- the Middle Fork of the Clearwater and its two tributaries, the Selway and the Lochsa (the “Clearwater system”), as well as the Middle Fork of the Salmon -- were “instant” rivers designated under the 1968 Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271 et seq.
b. The Mainstem of the Salmon River was later added to the Wild and Scenic Rivers System as part of the 1980 Central Idaho Wilderness Act (Pub. L. No. 96-312, 94 Stat. 948).

c. The Rapid River was designated as a Wild and Scenic River by the 1975 legislation creating Hells Canyon National Recreation Area (Pub. L. No. 94-199, 89 Stat. 1117).

4. The United States’ reserved rights claims for the Idaho Wild and Scenic Rivers are opposed by the State of Idaho, Thompson Creek Mining Company, Potlatch Corporation, and various irrigation districts.

5. The United States filed a motion for partial summary judgment seeking a ruling that it is entitled to reserved rights for the Idaho Wild and Scenic Rivers.
   a. Quantification of the reserved rights for the four “instant” rivers would occur in subsequent evidentiary proceedings.
   b. All of the unappropriated flows were sought for the Mainstem Salmon River and the Rapid River.

   Judicial Rulings

1. In a July 24, 1998 ruling, the SRBA trial court held that the United States is entitled to an express federal reserved water right, as a matter of law, under the Wild and Scenic Rivers Act (WSRA).

2. The court found that Section 13(c) of the WSRA unambiguously expresses the intent of Congress to reserve water.
   a. Section 13(c) states: “Designation of any stream or portion thereof as a national wild, scenic or recreational river shall not be construed as a reservation of the waters of such streams for purposes other than those specified in this Act, or in quantities greater than necessary to accomplish these purposes.” 16 U.S.C. § 1284(c).
   b. According to the court, “[t]hough stated in the negative, this section expresses an affirmative reservation of water in quantities necessary to accomplish the purposes of the Act.”
c. The court further found that even if the language of Section 13(c) is seen as ambiguous, the legislative history overwhelmingly supports the conclusion that Congress intended to reserve water.

d. For example, the Conference Committee Report on the bill states: “Enactment of the Bill would reserve to the United States sufficient unappropriated water flowing through Federal lands involved to accomplish the purpose of the legislation. Specifically, only that amount of water reasonably necessary for the preservation and protection of those features for which a particular river is designated in accordance with the bill.” 114 Cong. Rec. 28310 (1968).

3. The court held that the United States is entitled to the minimum quantity necessary for the express reservation under the WSRA, and that proving the quantity of water reserved under the WSRA is a two-step process:
   a. First, the United States must establish the specific legal purposes for which a river is designated;
   b. Second, the United States must prove the minimum quantity of water necessary to fulfill those purposes.

4. While it may be possible to determine which purposes attach to designated rivers as a matter of law, according to the court, summary judgment was inappropriate here since such a determination is so closely related to the factual characteristics of each river.

5. The court also found that the United States was not entitled, as a matter of law, to all unappropriated flows for the Mainstem Salmon River and the Rapid River to fulfill wilderness purposes, since Congress intended to designate these rivers under the WSRA, to the exclusion of the Central Idaho Wilderness Act and the Hells Canyon National Recreation Area Act.
   a. The United States had argued that wilderness preservation was included in the “other similar values” provision of the WSRA (16 U.S.C. § 1271).
b. The court found instead that “[t]he quantity, if any to which the United States is entitled is a matter of proof which could theoretically equal all unappropriated flows.”

6. Ultimately, the court held that the United States is entitled to the minimum quantity necessary to fulfill what it found to be the two purposes of the WSRA:
   a. First, to serve as a complement to the policy of dam construction by preserving designated rivers in their free flowing condition;
   b. Second, to protect and preserve the characteristics for which a river is designated.

   1. The WSRA provides that selected rivers possess “outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values.” 16 U.S.C. § 1271.
   2. The court observed that a specific river may be designated to preserve any or all of the values contained in section 1271.

7. The United States, therefore, must prove the minimum quantity necessary to fulfill these general purposes and such specific values as were attached by each designation, according to the court.

8. The Opposers have appealed the SRBA trial court’s ruling recognizing the United States’ express reserved water right for the Idaho Wild and Scenic Rivers to the Idaho Supreme Court, and appellate briefing is now proceeding.

C. FOREST SERVICE RESERVED RIGHTS UNDER THE WILDERNESS ACT

Background of Claims

1. Since 1964, nearly four million acres within Idaho have been designated as components of the National Wilderness Preservation System.

2. The United States filed seven federal reserved water right claims in the SRBA on behalf of the Forest Service for Idaho wilderness areas, seeking all unappropriated water as of the date of designation within three wilderness areas: the Frank Church-River of No Return (1980), Gospel-Hump (1978), and Selway-Bitterroot (1964) Wilderness Areas.
3. While the Selway-Bitterroot can be considered a headwaters wilderness area, the other two are not; over one-half of the Salmon River Basin lies above the Frank Church-River of No Return, including the Cities of Challis, Salmon and Stanley.

4. The United States’ wilderness claims are opposed by the State of Idaho, the Cities of Salmon and Challis, Potlatch Corporation, and various mining companies.

5. The only reported case concerning federal reserved water rights for wilderness areas held that federal water rights were impliedly reserved in previously unappropriated waters in designated wilderness areas under the Wilderness Act. *Sierra Club v. Block*, 622 F.Supp. 842 (D.Colo. 1985), *vacated for lack of ripeness*, *Sierra Club v. Yeutter*, 911 F.2d 1405 (10th Cir. 1990).

**Judicial Rulings**

1. In a December 18, 1997 ruling, the SRBA trial court held that the United States is entitled to a federal reserved water right, as a matter of law, for all unappropriated water within the three Idaho wilderness areas.

2. The court began by stating the legal standards that it believed must be met in order to find a federal reserved water right:

   a. A reserved water right must be based on a reservation of land, and reserved water rights may be express or implied.

   b. An implied reserved water right may be granted if three criteria are satisfied (citing *United States v. New Mexico*, 438 U.S. 696 (1978)):

      1. Water must be necessary to fulfill the primary, not the secondary, purpose for which the reservation of land was created;

      2. The water claimed must be the minimum amount necessary to achieve the purposes of the reservation;

      3. Without the minimum amount of water claimed, the purposes of the reservation must be entirely defeated.

3. The court held that that the wilderness areas are reservations of land, since they satisfied two criteria necessary for a land reservation (citing *United States v. City*
and County of Denver, 656 P.2d 1, 5 (Colo. 1982); United States v. Midwest Oil Co., 236 U.S. 459 (1915):

a. The land was withdrawn from the public domain;
   1. The national forests were all withdrawn from the public domain.
   2. Wilderness designation continued the withdrawal from the public domain.

b. The withdrawn land was assigned a specific federal purpose;
   1. Federal land may be reserved and reserved again (“re-reserved”) (citing Denver, 656 P.2d at 30-31, and Arizona v. California, 373 U.S. at 601 (1963).
   2. The “one time only reservation” rule lacks legal support, since Congress must have the ability to change the purposes for which land was originally reserved under the Property Clause.

4. The court also held that the three wilderness areas were established for the primary purpose of wilderness preservation.
   a. Under the Wilderness Act, Congress intended to create a new category of land in which wilderness purposes would be primary and elevated above all other purposes previously allowed in national forests. 16 U.S.C. §§ 1131(a), (c), 4(b).
   b. Any purpose previously authorized in the national forests under the Organic Act or the MUSYA continues to exist in wilderness areas, but those purposes must serve and further wilderness preservation.
   c. Provisions in the wilderness legislation allowing non-wilderness uses such as pre-1983 mining claims and pre-1964 grazing did not relegate wilderness preservation to a secondary purpose, but were simply grandfather clauses designed to avoid takings.

5. The court found that the Wilderness Act includes an implied reservation of water.
   a. Section 4(d)(6) is not intended to either establish or disallow any express or implied water right under the Wilderness Act.
1. Section 4(d)(6) states: “Nothing in this Act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from the State water laws.” 16 U.S.C. § 1133(d)(6).

2. Section 4(d)(6) is ambiguous on its face because it does not declare whether or not state water law governs water rights in wilderness areas.

3. The legislative history establishes that Congress adopted section 4(d)(6) to maintain the legal status quo; Congress did not want to alter the balance in the legal relationship between the state and federal governments regarding water located in federal reservations.

b. The purpose of wilderness preservation would be entirely defeated without a federal reserved water right.

   1. Wilderness areas were established under the premise that development is inconsistent with maintenance of the land’s natural conditions.

   2. The prior appropriation doctrine is entirely inconsistent with Congress’ intent to preserve wilderness character within wilderness areas, since appropriation of wilderness water would entirely defeat congressional intent to preserve wilderness character.

6. On the issue of quantity, the court held that the minimum amount of water necessary to fulfill the purposes of wilderness reservations is all unappropriated natural flow in each wilderness area, a result which it found to be consistent with Idaho law.

a. The United States may reserve all unappropriated natural flows without specific quantification of the reserved right, according to the court.

b. In Avondale Irrigation Dist. v. North Idaho Properties, Inc., 99 Idaho 30, 577 P.2d 9 (1978), the Idaho Supreme Court concluded that a claim by the United States for the “entire natural stream flow” was permissible even
though the right could not be quantified in cubic feet per second or acre feet per year.

(c) Although Idaho statutes require the court to decree the quantity of a water right, the *Avondale* court held that “an Idaho statute may not be applied to a federal reserved water right if such application changes the nature and scope of that federal right.” 99 Idaho at 41 n.15.

7. An appeal to the Idaho Supreme Court of the SRBA trial court’s ruling recognizing the United States’ reserved right to all unappropriated natural flows in the Idaho wilderness areas is currently pending, and was argued on March 3, 1999.

D. **FOREST SERVICE RESERVED RIGHTS UNDER THE ORGANIC ACT**

**Background of Claims**

1. The United States filed federal reserved water right claims on behalf of the Forest Service for instream flows in twelve streams located within five national forests in Idaho under the Organic Administration Act of 1897 (“Organic Act”), 16 U.S.C. §§ 475 et seq.

2. The United States’ Organic Act instream flow claims are based upon the purpose “of securing favorable conditions of water flows” as provided by the Organic Act, and seek water for stream channel maintenance.

(a) The United States argues that “securing favorable conditions of water flows” requires maintaining properly functioning watersheds, including the stream channels within them, that in the long-term retain the ability to pass flows and convey water under favorable conditions to downstream users for irrigation, navigation, municipal, domestic and industrial uses.

(b) Without the claimed flows, the United States maintains, one of the primary purposes for which the forests were created would be defeated — stream channels will be reduced in size, flows impeded, flooding exacerbated, and efficient conservation and distribution of water to downstream users precluded.
3. The United States’ Organic Act instream flow claims are opposed by the State of Idaho, Hecla Mining Company, and various irrigation districts.

Judicial Rulings

1. On December 21, 1998, the SRBA trial court, ruling on cross-motions for summary judgment by the United States and the State of Idaho, granted the United States the opportunity to prove the factual necessity of a federal reserved water right for channel maintenance under the Organic Act.

2. The court held at the outset that the United States cannot be denied the opportunity to assert Organic Act claims under the doctrine of collateral estoppel.
   a. The State of Idaho had argued that the doctrine of collateral estoppel precluded the United States from re-litigating whether channel maintenance is a primary purpose of the Organic Act, claiming that the issue had been decided against the United States in *In re Amended Application of United States for Reserved Water Rights in the Platte River*, No. W-8439-76 (Dist. Ct. Colo., Water Div. No. 1, Feb. 12, 1993 (Water Division 1).
   b. The court found that non-mutual collateral estoppel, or “issue preclusion,” does not apply against the United States government to preclude litigation of issues of public importance under *United States v. Mendoza*, 464 U.S. 154, 158 (1984).
   c. Furthermore, the court held, the issues presented in *Water Division 1* and in the SRBA could not be identical because the decision in *Water Division 1* was factually based following a trial on the merits.
   d. Indeed, the trial court found that *Water Division 1* and *United States v. Jesse*, 744 P.2d 491, 503 (Colo. 1987), hold that the United States is entitled to prove that channel maintenance is required to fulfill the purposes of the Organic Act.

3. The court further held that *United States v. New Mexico*, 438 U.S. 696 (1978), does not preclude an instream federal reserved water right under the Organic Act for the purpose of securing favorable flows.
a. In New Mexico, the U.S. Supreme Court held that the primary purposes of the Organic Act were “to conserve the water flows, and to furnish a continuous supply of timber for the people,” id. at 707, implicitly recognizing that an instream federal reserved claim could be made to effectuate these two primary purposes.

b. The Court interpreted New Mexico as defining “favorable conditions” to mean “enhancing the quantity of water that would be available to the settlers of the arid West,” id. at 713, and not simply protecting the forest canopy as argued by the State of Idaho.

c. Therefore, the court held, “the United States is entitled to the opportunity to prove, as a factual matter, that an instream flow claim for channel maintenance in the National Forests is necessary to assure favorable conditions of water flows, thereby enhancing the quantity of water available for water users, and then to prove the minimum quantity of water which must be reserved for its fulfillment.”

4. Finally, the court found that Idaho Supreme Court and Ninth Circuit case law hold that the United States is entitled to prove the factual necessity of a federal reserved water right to fulfill the purpose of securing favorable water flows.

a. In Avondale Irr. Dist. v. North Idaho Properties, Inc. 99 Idaho 30, 41, 577 P.2d 9, 20 (1978) (Avondale II), the Idaho Supreme Court ruled that the United States should be afforded the opportunity to prove that an instream reserved right is necessary to accomplish the purpose of watershed protection thus securing favorable conditions of water flows, and also noted that “erosion control is an integral part of watershed protection.” Id. at 39.

b. In United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 859 (9th Cir. 1983), Justice Kennedy, then a circuit judge, upheld the finding of the trial court that the United States be afforded the opportunity to prove the
necessity of an instream reserved right under the Organic Act to protect the “banks of the Carson’s tributaries within the forest from erosion.”

5. The State of Idaho has appealed the SRBA trial court’s Organic Act decision to the Idaho Supreme Court, with a notice of appeal filed on April 23, 1999, and briefing to occur later this summer.

E. FOREST SERVICE RESERVED RIGHTS FOR HELLS CANYON NATIONAL RECREATION AREA

Background of Claim

1. The United States filed one federal reserved water right with a 1975 priority date for all unappropriated flows originating in the Hells Canyon National Recreation Area (HCNRA) under the HCNRA Act, 16 U.S.C. § 460gg.

2. The HCNRA Act provides: “The Hells Canyon National Recreation Area . . . shall comprise the lands and waters” specified on a map on file with the Chief of the Forest Service.

3. Congress provided in the HCNRA Act that no flow requirements may be imposed on the waters of the Snake River and all tributaries both upstream and downstream of the designated land.

4. The United States’ HCNRA claim is opposed by the State of Idaho, Idaho Power Company, and Evergreen Land and Timber.

Judicial Rulings

1. On December 18, 1997, the SRBA trial court granted the United States’ motion for summary judgment, ruling that the United States is entitled to an express federal reserved water right for all unappropriated flows of water originating in tributaries located within the HCNRA with a 1975 priority.

2. The trial court’s HCNRA ruling is on appeal in the Idaho Supreme Court, and was argued on March 3, 1999.
F. FOREST SERVICE RESERVED RIGHTS FOR SAWTOOTH NATIONAL RECREATION AREA

Background of Claims

1. The United States filed five claims for federal reserved water rights in the SRBA on behalf of the Forest Service for the Sawtooth National Recreation Area (SNRA) under the 1973 SNRA Act, 16 U.S.C. § 460aa-14.

2. The SNRA Act sets forth its purposes in Section 1(a) as follows: “In order to assure the preservation and protection of the natural, scenic, historic, pastoral, and fish and wildlife values and to provide for the enhancement of the recreational values associated herewith, the Sawtooth National Recreation Area is hereby established.” 16 U.S.C. § 460aa.

3. The United States’ SNRA claims are opposed by the State of Idaho, Hecla Mining Company, and various irrigation districts and canal companies.

Judicial Rulings

1. In a September 15, 1998 ruling, the SRBA trial court held that the SNRA Act entitles the United States to an implied federal reserved water right for the Sawtooth National Recreation Area.

   a. Within the “wilderness” portion of the SNRA (the Sawtooth Wilderness Area), the United States is entitled to a reserved right for all unappropriated water.

   b. For the remaining “recreation area” portion of the SNRA, the United States is entitled to a reserved right, with the minimum amount necessary to fulfill the purposes of the SNRA Act to be proven at trial.

2. The State of Idaho and others have appealed the SRBA trial court’s ruling on Sawtooth National Recreation Area to the Idaho Supreme Court, and briefing is now being completed.
G. FOREST SERVICE RESERVED RIGHTS UNDER THE MULTIPLE-USE SUSTAINED-YIELD ACT (MUSYA) AND IDAHO STATE LAW

Background of Claims

1. The United States has filed in the SRBA on behalf of the Forest Service 28 claims for fish, wildlife and outdoor recreation on various streams, lakes and hot springs in six Idaho national forests.

2. Each claim has two alternative legal bases: a federal reserved water right under the Multiple-Use Sustained-Yield Act of 1960 (MUSYA), 16 U.S.C. §§ 528-531; and a state law-based appropriative water right.

3. The priority date claimed is June 12, 1960, the date MUSYA was enacted.

4. The United States’ MUSYA/state law claims for the Forest Service are opposed by the State of Idaho, the Cities of Challis, Salmon and Pocatello, and various irrigation districts and canal companies.

Judicial Rulings

1. On December 18, 1997, the SRBA trial court, in an opinion of only three pages ruling on cross-motions for summary judgment, held that the United States is not entitled to a federal reserved water right for the national forests based on MUSYA.

2. The trial court found no reserved right entitlement based upon its conclusion that MUSYA does not constitute a reservation of land.

3. In its opinion, the court initially set forth a test for the existence of a reservation, and specified the purposes of MUSYA.

   a. “[A] land reservation is established where land is withdrawn from the public domain and the withdrawn land is reserved and assigned a specific federal purpose.” United States v. Denver, 656 P.2d 1, 5 (Colo. 1982).

   b. Regarding purposes, MUSYA provides: “It is the policy of Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528 to 531 of this title [MUSYA] are declared to be supplemental to, but not in derogation of, the purposes for which the
national forests were established as set forth in section 475 of this title [Organic Act].”

4. The court did not apply its test for a reservation to MUSYA’s statement of purposes, but instead said that the issue of whether MUSYA constituted a reservation with purposes supporting implied reservations of water was addressed by the U.S. Supreme Court in United States v. New Mexico, 438 U.S. 696 (1978).

a. The court observed that in New Mexico “the United States claimed reserved water rights dating back to enactment of the Organic Act of 1897, based on the MUSYA purposes,” and that “the Supreme Court held that the MUSYA purposes did not support the United States’ claimed water rights.”

b. The court also acknowledged the United States’ arguments that: (1) that the Supreme Court in New Mexico left open the question of whether MUSYA could support reserved rights with a priority date of 1960; (2) that the New Mexico Court did not have the full benefit of MUSYA’s legislative history since it was not presented in support of the United States’ Organic Act claims; and (3) that a full review of that legislative history reveals Congress’ intent to re-reserve the then-existing national forests with MUSYA’s passage in 1960.

1. For example, regarding MUSYA’s purposes or resources of outdoor recreation, range, timber, watershed, and wildlife and fish, the Senate Report on MUSYA stated that “none of these resources is given a statutory priority over the others,” while the House Report stated that each resource is “by statute to be given equal consideration” with the others.

2. In addition, MUSYA’s legislative history establishes that the “supplemental to, but not in derogation of” language was intended to limit the creation of new national forests -- by requiring that one of the two Organic Act purposes of timber or watershed be present
-- but not to relegate other purposes to an inferior status once a new forest is created.

c. The SRBA court found that in New Mexico, the Supreme Court determined: (1) that the MUSYA purposes were administrative purposes; (2) that as administrative provisions the MUSYA purposes were secondary to the original Organic Act purposes; and (3) that because the purposes were secondary, they did not support a reservation of water.

d. The court concluded that absent a reservation or re-reservation of land for specific MUSYA purposes, the MUSYA purposes are secondary to the Organic Act purposes, and thus cannot support an implied reservation of water.

5. At the end of its brief opinion on MUSYA reserved rights, the trial court quoted the following language from New Mexico: “Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.” 438 U.S. at 702.

a. The United States has filed claims “in the same manner as any other public or private appropriator” by asserting claims on behalf of the Forest Service under Idaho state law for MUSYA purposes of recreation, fish and wildlife.

b. These state law filings provide the opportunity in the SRBA to test the Supreme Court’s apparent assumption in New Mexico that the United States can acquire water for MUSYA’s purposes under state law.

c. However, even though no party requested certification for appeal of the trial court’s MUSYA ruling, the trial court certified it sua sponte, thus severing the federal reserved right basis of these claims from the alternative state law basis, and frustrating any attempt to test in the SRBA the Supreme Court’s assumption regarding availability of state law rights.
6. An appeal to the Idaho Supreme Court of the SRBA trial court’s ruling denying the United States’ MUSYA federal reserved water right claims is currently pending, and was argued on March 3, 1999.

H. FISH AND WILDLIFE SERVICE STATE LAW RIGHTS FOR MINEDOKA NATIONAL WILDLIFE REFUGE (SMITH SPRINGS)

Background of Claims

1. The United States filed in the SRBA, on behalf of the Fish and Wildlife Service (FWS), an in situ water right claim of 1.16 cfs with a 1915 priority for wildlife purposes, based on the constitutional appropriation of water under Idaho state law, from Smith Springs, located within the boundaries of the Minidoka National Wildlife Refuge.
   a. The Refuge was created by executive order in 1909 as a preserve and breeding ground for native birds, but the land on which Smith Springs arises and is primarily used was acquired from the State of Idaho and added to the Refuge in 1915.
   b. Prior to 1971 legislation making the statutory method of appropriation mandatory, there were two methods of creating a water right in Idaho:
      1. The “constitutional method,” in which one could appropriate unappropriated water and apply it to beneficial use, without applying to the state engineer;
      2. The “statutory method,” which required application to a state agency for a permit.

2. The moving water from Smith Springs, which flows onto the banks of the Snake River and into Lake Walcott, a reservoir created by the Minedoka Reclamation Project, provides wildlife habitat by keeping areas of a bay in Lake Walcott from freezing over during the winter, maintaining habitat areas used by birds during other times of the year when the reservoir is drawn down, and providing year-round high quality fishery habitat.
3. A diversion is not required for the water to be put to beneficial use, but the United States has made some expenditures and improvements within the Refuge, at least partially in reliance on the continued flow from Smith Springs for wildlife use.

4. The United States' claims for Smith Springs are opposed by A & B Irrigation District, Burley Irrigation District, Twin Falls Canal Company, North Side Canal Company, and the State of Idaho (which joined in after the Special Master granted summary judgment for the United States).

Judicial Rulings

1. The Director of the Idaho Department of Water Resources (IDWR) recommended that this claim be disallowed for failure to show a lawful appropriation based on the United States’ failure to establish a diversion at Smith Springs.

2. The Special Master ruled in favor of the United States, holding that a diversion was not required for a constitutional appropriation, and that the United States had perfected a state law-based non-consumptive water right for wildlife use under the facts of the case.

3. On October 10, 1997, the SRBA trial court issued an order accepting in part, and denying in part, the Special Master’s report and recommendation.

4. The court held that diversion is not required to perfect a constitutional beneficial use water right under Idaho law.

   a. The court found that a constitutional beneficial use water right could be perfected in the absence of a statute allowing appropriation without a diversion, citing Nahas v. Hulet, 106 Idaho 37, 674 P.2d 1036 (Ct. App. 1983), in which the court held that a rancher was entitled to a constitutional instream water right for livestock watering with no diversion required for a constitutional appropriation.

   b. The court then held that no constitutional provision requires diversion to perfect a beneficial use water right.

1. Article 15, Section 3 of the Idaho Constitution, the only constitutional provision which mentions diversion, provides: “[T]he
right to divert and appropriate the unappropriated waters of any natural stream to beneficial use, shall never be denied.”

2. Interpreting this provision, the Idaho Supreme Court held in State, Dept. of Parks v. Idaho Dept. of Water Admin., 96 Idaho 440, 530 P.2d 924 (1974) that “our Constitution does not require actual diversion” to perfect a water right under the prior appropriation doctrine.

3. The court found that the word “divert” under Article 15, Section 3 was used in order to establish the prior appropriation doctrine, contrasted to the riparian doctrine, as the applicable constitutional water doctrine under the Idaho Constitution.

c. The court recognized that for many in situ uses, diversion would be inconsistent with the beneficial use of a water right, supporting the position that diversion is not a requirement for a constitutional appropriation.

d. The court held that the constitutional method of appropriation is satisfied when: (1) a user intends to apply the water to beneficial use; and (2) water is, in fact, applied to a beneficial use.

1. Although diversion is not a requirement to perfect a beneficial use claim, diversion serves as perhaps the best evidence of an appropriator’s intent to apply water to a beneficial use.

2. Consequently, intent becomes a more critical inquiry where there is no diversion

5. Ultimately, however, the trial court held that the record contained insufficient evidence on the quantity and priority elements to support the Special Master’s finding that the United States perfected an in situ wildlife claim

a. An affidavit from a FWS official regarding the quantity of water flowing from Smith Springs, the amount of beneficially used, and the date on which it was first put to beneficial use was inadequate with respect to quantity.
b. There was no evidence on what “expenditures or improvements” exist evidencing an intent to appropriate.

c. Evidence that the land was reserved for a federal purpose is insufficient alone to establish intent to perfect a state law-based beneficial use water right.

6. The trial court remanded the matter to the Special Master for further findings on intent to appropriate, quantity, and priority date.

7. The State of Idaho and others have appealed the SRBA trial court’s Smith Springs ruling to the Idaho Supreme Court, and the matter was argued on March 3, 1999, together with the trial court’s rulings on reserved rights under the Wilderness Act and MUSYA.

I. FISH AND WILDLIFE SERVICE CLAIMS FOR DEER FLAT NATIONAL WILDLIFE REFUGE

Background of Claims

1. The United States filed federal reserved water right claims in the SRBA on behalf of the Fish and Wildlife Service for the Deer Flat National Wildlife Refuge, which includes 94 islands distributed along 110 miles of the Snake River between Swan Falls Dam and Farewell Bend, Oregon.

2. The Refuge was created in 1937 and expanded in 1963, in both cases through the reservation of “islands” in the Snake River.


b. In 1963, additional islands in the lower reach of the Refuge were withdrawn from the public domain and reserved as an addition to the Refuge.

3. The Refuge is located downstream from substantial groundwater development in the Snake River Plain which occurred following the Refuge’s creation in 1937.
4. The United States’ claims for Deer Flat National Wildlife Refuge are opposed by the State of Idaho, J.R. Simplot Co., and numerous irrigation districts.

Judicial Rulings

1. In a December 31, 1998 ruling, the SRBA trial court held that the United States was not entitled to a federal reserved water right for the islands of the Deer Flat National Wildlife Refuge, and dismissed the United States’ claims.

2. The United States has appealed the trial court’s ruling to the Idaho Supreme Court, and briefing should occur later this summer.

III. THE SRBA: A WINDOW ON THE FUTURE OF WESTERN WATER LAW?

A. Size and Scope of Adjudication

1. The size and scope of the SRBA, which includes the entire watershed of the Snake River within the State of Idaho and encompasses over 85% of the State, is unprecedented.

2. It may be unlikely that we will ever see a basinwide adjudication which is so large and complex in the future.

3. If the SRBA can succeed, then other adjudications can move forward to resolution also, benefitting all by reducing uncertainty associated with unadjudicated state and federal rights.

B. Extent and Nature of Federal Claims

1. Like most other western states, Idaho includes extensive federal public lands and Indian lands.

2. Perhaps no other single adjudication has attempted to determine such a broad variety of federal reserved water rights.

3. The natural resources at stake in the SRBA are of tremendous importance in their own right.

C. Creation of Judicial Precedent

1. The SRBA has already started, and will likely continue, to be a springboard for resolving a number of issues concerning federal reserved water rights, many of which are questions of first impression.
2. Idaho state courts have been presented with the opportunity to protect federal public land resources under state law or federal law.

3. It is quite probable that at least some federal reserved water rights issues in the SRBA will reach the U.S. Supreme Court.

4. While the U.S. Supreme Court has shown some willingness to address *procedural* issues raised in the SRBA which implicate other adjudications (e.g., no filing fees for U.S.), so far it has refused to take on *substantive* issues concerning federal reserved water rights which also must be resolved in other adjudications (e.g., denial of certiorari on PWR 107 reserved rights).

D. Courts, Coercion and Collaboration

1. Just because parties to the SRBA initially have been forced into *court*, no party is being *coerced* to litigate, and a *collaborative* result is possible regarding federal claims and other interests affected by them.

2. There have been some limited past successes in settlement of federal claims in the SRBA:
   a. NPS claims for Craters of the Moon National Monument
   b. NPS claims for Yellowstone National Park
   c. Department of Energy claims for Idaho National Environmental and Engineering Laboratory (INEEL)
   d. Forest Service MUSYA claims (some parties)

3. However, settlement of significant federal claims has not been pursued by all major parties, pending the outcome of threshold legal issues such as entitlement to various federal reserved water rights.

4. While full reconciliation of various interests may be difficult with respect to some federal claims in Idaho, other states have shown that resources can be successfully directed toward settlement rather than litigation.
   a. The Montana Reserved Water Rights Compact Commission successfully negotiated compacts in 1995 and 1995 settling a number of significant
federal water rights, including water rights in Glacier National Park, Yellowstone National Park, and others federal reservations.

b. In the Virgin River Adjudication, the State of Utah, the United States, and the Washington County Water Conservancy District reached a settlement in 1996, recognizing federal reserved water rights for Zion National Park while allowing limited future development of water for future growth needs — without the need for any litigation.

c. In the Klamath Basin Adjudication, the Oregon Water Resources Department has initiated an Alternative Dispute Resolution (ADR) process — prior to the filing of any objections to federal or other claims.

5. Can collaborative efforts succeed where parties have chosen to devote resources to litigation rather than settlement?

a. Can litigation and negotiation be sequential, or must they be simultaneous?

b. Does waiting for judicial rulings on key aspects of a case promote or confound settlement?

c. Once the court rules, what incentive remains to negotiate?
Forest Service
Wild & Scenic Rivers
and
Wilderness Act
Claims
in the SRBA
Federal and Indian Lands in the Snake River Basin Adjudication
ISSUES AND ARGUMENTS IN SRBA BRIEFING ON FEDERAL WATER RIGHTS

Wilderness Water Rights - Issues and Arguments

1. Do withdrawals under the Wilderness Act constitute reservations?
   a. The United States maintains that reserved lands are those withdrawn from
      the public domain and dedicated to a specific federal purpose, and that
      wilderness areas are dedicated to a specific federal purpose: the
      preservation of wilderness.
   b. The Opposers contend that the Wilderness Act does not constitute a new
      reservation, but rather codifies wilderness land management criteria for
      existing federal reservations being managed for wilderness values.

2. Is wilderness preservation the primary purpose of Wilderness Act reservations?
   a. The United States maintains that the Wilderness Act on its face makes
      wilderness preservation the primary purpose of designated wilderness
      areas, creating an entirely new land system (the National Wilderness
      Preservation System) having the paramount purpose of wilderness
      preservation, with pre-existing national forest purposes remaining to
      the extent they are consistent with the area’s wilderness character.
   b. The Opposers contend that the Wilderness Act makes wilderness purposes
      secondary to the existing purposes of national forests, by declaring its
      purposes to be within and supplemental to the purposes for which national
      forests are established and administered.

3. Would the very purpose (primary purpose) for reserving wilderness areas be
   entirely defeated if water were not reserved?
a. The United States maintains that since water is essential to attainment of the Wilderness Act’s mandates to preserve wilderness areas “unimpaired” and in their “natural conditions,” water is necessary to attain the very purposes for which the three Idaho wilderness areas were established.

b. The Opposers do not address the question of whether some water is necessary to avoid defeating wilderness purposes, but contend that all the unappropriated flow is not necessary.

4. Does Section 4(d)(6) of the Wilderness Act disclaim federal reserved water rights?

   a. Section 4(d)(6) of the Wilderness Act provides that “[n]othing in this Act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from the State water laws.”

   b. The United States maintains that Section 4(d)(6), by including the words “claim or denial,” preserves the status quo as to applicable principles of water rights, and that any question of federal reserved water rights under the Wilderness Act must be resolved in accordance with existing principles of water law, including the federal reserved water rights doctrine.

   c. The Opposers argue that under the plain and unambiguous meaning of Section 4(d)(6), Congress intended that the Wilderness Act would not claim any new federal exemption from state water laws, while any existing exemption was not denied (i.e., waives any reservation of water under the Wilderness Act itself, but not any pre-existing reserved water rights of the designated land)

   d. The Opposers argue in the alternative that even if Congress purposefully decided not to address the issue of reserved water rights in Section 4(d)(6), because it addressed the subject at all such affirmative congressional inaction precludes the very application of the implied reserved water rights doctrine, which is a canon of construction, or rule of thumb summarizing such canons, rather than a substantive rule of federal water law.
5. Is the United States entitled to all the unappropriated natural flow in wilderness areas as a matter of law?

a. The United States maintains that in order for these wilderness areas to be preserved in their natural, unimpaired condition, all natural flows must be preserved, with the United States’ water rights subordinated to future appropriations for uses statutorily-recognized by Congress in the Wilderness Act.

b. The Opposers contend that a federal reserved right to all unappropriated flows is inconsistent with and precluded by Congress’ allowance of certain non-conforming uses within wilderness areas, such as its designation of a special mining management zone in one wilderness area.