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Will Old Right Be Lost in New Adjudications - The Idaho Supreme Court Rules on the Boundaries of the Snake River Basin Adjudication

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NOTE

WILL OLD RIGHTS BE LOST IN NEW ADJUDICATIONS? THE IDAHO SUPREME COURT RULES ON THE BOUNDARIES OF THE SNAKE RIVER BASIN ADJUDICATION

[T]he Snake River and its use has exercised and will continue in the future to exercise an enormous influence over a very substantial portion of Idaho and its people.¹

STATEMENT OF THE CASE

The Snake River rises in Wyoming's Grand Tetons, flows west through southern Idaho, and then turns north to form Idaho's western border, before emptying into the Columbia River. The river drains approximately eighty-seven percent (87%) of the State of Idaho.² Four major tributaries of the Snake River—the Boise, Weiser, Payette, and Lemhi rivers—were adjudicated in the early twentieth century; however, the United States and the State of Idaho were not joined as parties to these state court adjudications. *In Re Snake River Basin Water System*³ required the Idaho Supreme Court to decide whether the McCarran Amendment⁴ mandated the State to include these historically adjudicated tributaries in the Snake River Basin Adjudication (SRBA).

In Re Snake River arose out of Idaho's legislative effort to avoid defining the jurisdictional scope of the McCarran Amendment, yet provide for joinder of the United States in the SRBA. After the Idaho Supreme Court construed the state legislation⁵ as a mere invocation of the McCarran Amendment, the court held that the McCarran Amendment required the inclusion of all tributaries on the Snake River in order to invoke jurisdiction over the United States.⁶

In the author's view, the court correctly decided the issue concerning inclusion of the historically adjudicated tributaries. Additionally, the dis-

1. Idaho Power Company v. State, 104 Idaho 575, 578, 661 P.2d 741, 744 (1983).

2. Appellants' Brief at 1, *In Re Snake River Water System*, 115 Idaho 1, 764 P.2d 78 (1988) (No. 17267), cert. denied, 109 S.Ct 1639 (1989).

3. 115 Idaho 1, 764 P.2d 78 (1988), cert. denied, 109 S.Ct 1639 .Ct 1639 (1989) (*In Re Snake River*).

4. 43 U.S.C. § 666 (1988). The McCarran Amendment states in part: "Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of the rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit." *Id.*

5. Act of March 1, 1985, ch. 18, § 1, 1985 Idaho Sess. Laws 27, codified at Idaho Code § 42-1406A (1990).

6. *In Re Snake River*, 115 Idaho at 8, 764 P.2d at 85.

sent's attack of the holding on *res judicata*⁷ grounds was misplaced because *res judicata* is not an available affirmative defense against all interested parties, particularly the State of Idaho and the United States government, who were not joined in the earlier adjudications. The Idaho Supreme Court affirmed the lower court's decision to require joinder of all persons claiming water rights in the Snake River basin. Thus, the court's holding assures that the SRBA will establish priorities and quantities for the rights of all water users on the Snake River and its tributaries as against the world.

BACKGROUND

A. General State Water Law

Congress's passage of the 1877 Desert Lands Act⁸ launched the federal government's well-established policy deferring to the individual states regulatory authority over the Nation's waters. The arid western states deviated from the eastern riparian water use system, adopting instead a water allocation system based on prior appropriation. To establish a water right pursuant to the prior appropriation doctrine, the water user must divert water to a beneficial use and must continue to use the water to maintain her right. In times of shortage, appropriators prior in time prevail over more recent appropriators.⁹

Western states have established various methods of allocating rights to the use of both surface waters and groundwater. The earliest recognized method to secure a water right was to claim the water simply by diverting it to a beneficial use. More recently, however, states have administered water appropriations through state-created permit/license systems. As long as water is available and an individual is going to put the water to beneficial use, the state may grant the individual a permit to appropriate the water. Once the water is put to beneficial use, the appropriator is issued a water license. Additionally, to reduce conflict and clarify property interests, state courts always have been available to "adjudicate" the rights of two or more water appropriators on a stream system.

In recent years states have been forced to adopt more comprehensive systems of water administration. With the steady increase of competing domestic, agricultural, and utility demands, coupled with growing state and federal governmental needs for water, many western states have

7. *Res judicata* is a legal doctrine which recognizes that a final judgment by a court on the merits is conclusive as to the rights of the parties, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim. Black's Law Dictionary 1174 (5th ed. 1979).

8. 43 U.S.C. § 321 (1988).

9. For a general overview of the prior appropriation doctrine, see F. Trelease, Cases and Materials on Water Law (4th ed. 1986).

rights in their river systems. In a general stream adjudication, each user in the water system is joined as a party. The result of such a comprehensive adjudication is a judicial "decree" which details priorities and quantifies the rights of the water users. The rights are perfected because all interested parties participate in the adjudication. Although historically sovereign immunity shielded federal water users from participating in general stream adjudications, in 1952 Congress passed the McCarran Amendment which waived the United States' sovereign immunity with regard to adjudication of federal water rights in state courts.¹⁰

B. Idaho Water Adjudication Law

In anticipation of the SRBA, the 1986 Idaho legislature rewrote parts of the State's water code to foster more efficient adjudications.¹¹ Prior to 1986, various state court decrees established the rights to Snake River basin water. In particular, numerous decrees, dating back to 1906, existed in the Boise and Weiser river basins. However, these decrees did not provide all of the information requested by the new adjudication laws.¹² Nor did they reflect any (1) transfers of water rights made prior to 1969,¹³ (2) beneficial use water claims established before the mandatory application/permit/license system began in 1971¹⁴ (except for a few supplementary decrees), or (3) federal water rights. The Idaho Department of Water Resources' greatest concern has been that an estimated eighty-six percent (86%) of the beneficial use water claims established prior to 1971 are not on record.¹⁵

C. The McCarran Amendment

The framers of the McCarran Amendment recognized that proper and efficient administration of water rights was appropriately vested within the authority of the several states.¹⁶ The federal lawmakers further realized

10. Before Congress passed the McCarran Amendment, the federal government was immune from any type of water rights adjudication in state or federal court. Although the McCarran Amendment subjected the federal government to suit in either forum, its significance lies in allowing state court jurisdiction over federal entities, since federal courts as a rule do not perform general stream adjudications. See 43 U.S.C. § 666 (1988).

11. H.B. No. 642, 49th Leg., 1986 Idaho Sess. Laws 558 (1986), amended by H.B. No. 691 (1986 Idaho Sess. Laws) and S.B. No. 1472 (1986 Idaho Sess. Laws), codified at scattered sections of Idaho Code tit. 42, ch. 14 (1990).

12. See Idaho Code § 42-1409 (1990) for the contents of a post 1986 water rights' claim and § 42-1413 (1990) for the contents of a post 1986 final decree.

13. Ch. 303, 2, 1969 Idaho Sess. Laws 905, codified at Idaho Code § 42-222 (1990).

14. Ch. 177, 2, 1971 Idaho Sess. Laws 843, codified at Idaho Code § 42-201 (1990).

15. Respondent's Brief at 47, *In Re Snake River Water System*, 115 Idaho 1, 764 P.2d 78 (1988) (No. 17267), cert. denied, 109 S.Ct 1639 (1989).

16. S.Rep. No. 755, 82nd Cong. 1st Sess. 2, at 4-6 (1951).

the evils which would arise if the United States was permitted to claim immunity from state originated water adjudication suits. Specifically, waters appropriated pursuant to any United States claim would interfere materially "with the lawful and equitable use of water for beneficial use by [State] water users" if the United States was not bound by a state court's judgment or decree.¹⁷ If the United States could use water without having its right(s) sanctioned and/or quantified by the state, such use would thwart the administration of any comprehensive state water plan. For example, a state could not effectively appropriate the lower half of a river if the river originated or first flowed through a national forest. Since the state would not know how much water the forest was claiming and/or actually appropriating, the state could not determine the amount of water available to meet its own demands.

Three significant Supreme Court decisions have helped clarify the McCarran Amendment. In *Dugan v. Rank*,¹⁸ the United States Supreme Court held that the McCarran Amendment did not allow United States joinder to suits between private water users. Eight years after *Dugan*, the Court construed the McCarran Amendment to apply when the United States is joined in actions for adjudications of federal reserved water rights.¹⁹ In *County of Eagle*, a lower Colorado court initiated a supplemental water adjudication for the Eagle River pursuant to state law, and served notice on the United States who claimed reserved rights in a national forest within the Eagle River water basin. The United States moved to dismiss itself as a party, contending that the McCarran Amendment did not grant state court jurisdiction to adjudicate federal reserved water rights.²⁰ The Supreme Court, however, agreed with Colorado's reasoning that the McCarran Amendment waived United States' immunity for state court general stream adjudications involving federal reserved

17. *Id.*

18. 372 U.S. 609 (1963). In *Dugan*, holders of state water rights in California sued the United States Bureau of Reclamation for injunctive relief, asserting that a Bureau of Reclamation dam on the San Joaquin River severely diminished petitioners' downstream water rights. Petitioners claimed that the McCarran Amendment subjected the Bureau of Reclamation to suit. However, the Supreme Court did not agree. The Court held that the McCarran Amendment did not subject the Bureau of Reclamation to suit because petitioners' action was a private suit brought to determine water rights solely between state citizens and a federal entity, rather than a general adjudication of all of the rights of various owners on a given stream. In *Dugan*, the United States' sovereign immunity was not waived under the McCarran Amendment because all claimants to water rights along the San Joaquin River were not parties to the suit. The Court also determined that petitioners' claim involved a taking; thus, petitioners were denied their equitable relief and instead informed that their proper remedy was just compensation under the Fifth Amendment. *Id.*

19. *United States v. District Court in and for the County of Eagle*, 401 U.S. 520 (1971). Reserved water rights are water rights impliedly reserved by the United States upon creation of a federal reservation, reserved to fulfill the purpose(s) of the reservation. Black's Law Dictionary 680 (5th ed. 1979).

20. 401 U.S. at 524.

water rights. The Court held that the McCarran Amendment applied to reserved water rights because the Amendment is an all-inclusive waiver, notwithstanding that the rights may be reserved for future uses.²¹

County of Eagle is significant because it determined not only that reserved rights were subject to quantification in state courts, but also that all users did not have to participate in a supplementary adjudication if their rights had been perfected in a prior general stream adjudication.²² Water users whose rights were previously perfected against everyone except the federal government did not have to join in a subsequent adjudication of federal water rights merely because the federal water claims might conflict with non-federal water rights. Rather, the Court held that it had oversight authority to resolve such disputes if and when any should arise.²³

County of Eagle was decided the same day as *United States v. District Court in and for Water Division No. 5*.²⁴ In *Water Division No. 5*, the Supreme Court upheld Colorado's system of districting the state into water divisions which performed ongoing monthly adjudications. The Court held that the United States could not claim non-application of the McCarran Amendment, and hence immunity to Colorado's system of water adjudications. The system reached all claims, notwithstanding that all claims on a given river system were not adjudicated at the same time.²⁵ The question presented in this note is whether *Water District No. 5* and *Eagle River* allowed the Idaho district court to exempt the Boise and Weiser rivers from the SRBA.

PROCEDURAL HISTORY

The SRBA emerged in the late 1970s when Idaho Power Company ratepayers filed a complaint with the Idaho Public Utilities Commission. The consumers charged Idaho Power Company with overstating its rate base by allowing water consumption upriver from its Swan Falls hydroelectric facility, thereby creating artificially high electricity prices.²⁶ In order to explain its rate base, Idaho Power subsequently brought suit against the State of Idaho and some upstream water users to determine the status of its water rights.²⁷

When the Idaho Supreme Court remanded this case²⁸ for a determination

21. *Id.*

22. *Id.* at 525-6.

23. *Id.*

24. 401 U.S. 527 (1971).

25. *Id.* at 530.

26. Respondent's Brief at 5.

27. Idaho Power Company v. State of Idaho (Ada County Civil Case No. 62237) (1983).

28. Idaho Power Company v. State, 104 Idaho 575, 661 P.2d 741 (1983).

of upstream water rights established by such means as adverse possession, forfeiture, and abandonment, Idaho Power Company filed another action, this time against 7,500 persons claiming water rights on the Snake River upstream from the utility's Swan Falls facility.²⁹ However, instead of litigating such a massive claim, Idaho Power Company alternatively agreed to support legislation for the commencement of a general stream adjudication of the Snake River.³⁰

Pursuant to the settlement agreement between the Idaho Department of Water Resources and Idaho Power Company, the State legislature enacted legislation to guide the Department of Water Resources in adjudicating the Snake River.³¹ In order to effectuate a comprehensive basinwide adjudication, the Idaho legislature recognized the need to join all water users, including the United States, as parties. However, it did not know how to confine the adjudication, yet meet the terms of the McCarran Amendment's "river system."³² Thus, the legislature was concerned with the boundaries of the adjudication. The lawmakers did not know (1) whether to adjudicate the entire upper Snake River, or only the portion above the mainstem (the mainstem acts as the Idaho-Oregon border); (2) whether to adjudicate the lower river basin (the river below its confluence with the Salmon River); or (3) whether to include historically adjudicated tributaries in the adjudication—particularly the Boise and Weiser rivers, which flow into the mainstem of the upper Snake River.³³

Idaho Power Company, Idaho Department of Water Resources, the State Attorney General, upper and lower river irrigation districts, and the United States Department of Justice all had differing positions regarding the scope of the adjudication. Irrigation districts on the Boise and Weiser rivers, who ended up commencing this action, strongly objected to the inclusion of the mainstem in the adjudication. However, both the State Attorney General and upriver irrigation interests sought the mainstem's inclusion in order to allow a complete adjudication of Idaho Power Company's water rights.³⁴ Finally, the Idaho Department of Water Resources feared that joinder of the federal government under the McCarran Amendment might require not only the river's adjudication from its terminus at

29. *Idaho Power Company v. Idaho Department of Water Resources* (Ada County Civil Case No. 81375) (1983).

30. *In Re Snake River Water System*, 115 Idaho 1, 3, 764 P.2d 78, 80 (1988) (No. 17267), *cert. denied*, 109 S.Ct. 1639 (1989).

31. The SRBA is to result in an effective management of the Snake River by enforcing its minimum streamflow rights, quantifying federal and Indian reserved water rights and enabling the establishment of an efficient water market system. Respondent's Brief at 7 (quoting the minutes of the Idaho House Resources and Conservation Committee from January 17, 1985).

32. See 43 U.S.C. § 666 (1988).

33. Respondent's Brief at 7.

34. Respondent's Brief at 8.

the Washington border, but also the adjudication of all *uses* in the river basin, including groundwater uses.³⁵ The Department's perception of possible McCarran Amendment requirements conflicted with Idaho law, which does not necessarily require the inclusion of either groundwater or domestic water uses in general stream adjudications.³⁶

Idaho Code Section 42-1406A³⁷ was a legislative compromise between competing water users enacted to establish the SRBA boundaries. Idaho Code Section 42-1406A gave discretion to the Director of Water Resources to include the mainstem of the upper river basin in the adjudication.³⁸ The statute further provided that if the mainstem was included

[t]he director shall not include . . . any adjudicated tributary unless the United States . . . refuses to consent to the jurisdiction of the [State] district court to adjudicate all federal or Indian water rights claims pursuant to the McCarran Amendment.³⁹

The State Director of Water Resources chose to include the mainstem in the adjudication, but to exclude the lower river basin.⁴⁰ Moreover, adhering to Idaho Code Section 42-1406A(3), he also did not include the Boise, Weiser, Payette, or Lemhi rivers in his adjudication petition in the Idaho district court.⁴¹ Rather, the Director of Water Resources requested the State district court to determine whether the United States would join the adjudication without the inclusion of the four tributaries.⁴²

Petitioners—irrigation districts on the Weiser and Boise rivers—believed the adjudication would meet McCarran Amendment terms without including the tributaries.⁴³ Moreover, petitioners contended that the Idaho statute did not require the United States to consent specially to the exclusion of the adjudicated tributaries.⁴⁴ They felt that the statute merely invoked the McCarran Amendment in order to establish United States joinder.

In contrast, the United States and Idaho Power Company both argued that the historically adjudicated tributaries needed to be included in order to confer McCarran Amendment jurisdiction over the United States.⁴⁵

35. Respondent's Brief at 7.

36. Idaho Code § 42-1420 (1990). The legislature required groundwater adjudication in the SRBA.

37. See Act of March 1, 1985, ch. 18, § 1, 1985 Idaho Sess. Laws 27, codified at Idaho Code § 42-1406A (1990).

38. Idaho Code § 42-1406A(3)(b) (1990).

39. *Id.*

40. Department of Water Resources Petition to the District Court, filed June 17, 1987, *In Re Snake River Water System*, 115 Idaho 1, 764 P.2d 78 (1988) (No. 17267), *cert. denied*, 109 S.Ct. 1639 (1989).

41. *Id.*

42. *Id.*

43. Appellant's Brief at 5.

44. *In Re Snake River*, 115 Idaho at 4, 764 P.2d at 82.

45. *Id.*

Additionally, the State of Idaho took the position that the United States had the authority to decide whether to submit to the State court's jurisdiction pursuant to Idaho Code Section 42-1406A, independent of any requirements imposed by the McCarran Amendment.⁴⁶

Finally, the United States and the State of Idaho agreed that inclusion of the lower Snake River basin was not necessary to confer McCarran Amendment jurisdiction over the United States.⁴⁷ However, Idaho Power Company and irrigation districts above the mainstem contended that the entire River had to be included in the adjudication in order to confer McCarran Amendment jurisdiction upon the United States.⁴⁸

After a hearing, the State district court held that Idaho Code Section 42-1406A(3) required the four historically adjudicated tributaries to be included in the adjudication for two reasons: (1) the United States had objected to the court's jurisdiction without inclusion of the tributaries, and (2) in order to invoke McCarran Amendment jurisdiction.⁴⁹ Additionally, the district court included the lower Snake River basin in the adjudication because it determined that the inclusion of the lower river basin was necessary in order to establish McCarran Amendment jurisdiction over the United States.⁵⁰ Irrigation districts on the Boise and Weiser rivers appealed the district court's ruling on the inclusion of these tributaries in the adjudication. However, neither the inclusion of the Payette or Lemhi rivers, nor the inclusion of the lower Snake River basin, was appealed.⁵¹

ANALYSIS

A. Constitutional Issues

The Idaho Supreme Court held that interpreting Idaho Code Section 42-1406A(3) to require special consent by the United States would render the statute unconstitutional as an unlawful delegation of legislative authority because the state legislature cannot delegate the determination of the adjudication's boundaries to another sovereign.⁵² The court held to a

46. *Id.*

47. *Id.*

48. *Id.*

49. District Court Commencement Order, November 19, 1987, *adopting* findings of fact and conclusions of law contained in its Memorandum Opinion, filed October 14, 1987, *In Re Snake River Water System*, 115 Idaho 1, 764 P.2d 78 (1988) (No. 17267), *cert. denied*, 109 S.Ct 1639 (1989).

50. *Id.*

51. The United States Justice Department (Indian Resource Section) and the State of Idaho felt inclusion of the lower river basin was not necessary to obtain McCarran Amendment jurisdiction over the United States. Idaho Power Company and Twin Falls Canal Company felt it was.

52. *In Re Snake River*, 115 Idaho at 6, 764 P.2d at 83.

fundamental principle of constitutional law that a statute should be construed constitutionally before it is deemed unconstitutional.⁵³ Therefore, the court interpreted the clause as a mere invocation of the McCarran Amendment, and upheld the statute's constitutionality.

The author believes that the court's constitutional construction of the statute was correct because it comported with the legislative intent to defer the boundary question to the district court and proceed with the adjudication. By construing the statute as a mere invocation of the McCarran Amendment, the Idaho Supreme Court then was able to reach the merits of the district court's boundary determination.

B. The McCarran Amendment Question

The Idaho Supreme Court held that the Boise and Weiser rivers had to be included in the SRBA in order for the State to join the United States pursuant to the McCarran Amendment. Justice Johnson found that "[t]he McCarran Amendment requires the adjudication of the rights of all those who use the water of a river system within a state, including those who use the water of tributaries."⁵⁴ Because *In Re Snake River's* facts were significantly different from those in *Water Division No. 5* and *Eagle River*, in the author's opinion *In Re Snake River* was correctly decided.

In *Water Division No. 5* the Colorado Supreme Court determined that the Gunnison River, located in District 5, did not have to be readjudicated with the river it fed into located in District 4, the Eagle River, because the Gunnison River already had been comprehensively adjudicated in a District 5 adjudication.⁵⁵ The Idaho Supreme Court recognized the *Water Division No. 5* holding that the adjudication of the Eagle River, without the inclusion of the Gunnison tributary, was a general stream adjudication because, although the Colorado adjudications were not basinwide, they nevertheless "reach[ed] all claims, perhaps month by month but inclusively in the totality."⁵⁶

In Re Snake River petitioners argued that the Snake River was a "river system" exclusive of its tributaries because the United States Supreme Court, in *Water Division No. 5*, recognized the Eagle River as a "river system" exclusive of its tributary, the Gunnison River.⁵⁷ However, the *In Re Snake River* court limited the *Water Division No. 5* holding to Colorado because of that state's unique adjudication system, and instead correctly cited *Water Division No. 5* for the rule that all tributaries must be included in a state's adjudication system in order to join the United

53. *Id.*

54. *Id.* at 85.

55. See 401 U.S. 527 (1971).

56. *In Re Snake River*, 115 Idaho at 9, 764 P.2d at 86 (quoting *Water Division No. 5* at 530).

57. Appellant's Brief at 58.

States under the McCarran Amendment.⁵⁸ Because the Boise and Weiser rivers were not being adjudicated in any other general stream adjudication, the state unequivocally was able to demand their inclusion in the SRBA.

C. The Court's Dicta

An important yet unanswered question is whether the McCarran Amendment required the inclusion of the lower Snake River basin in the adjudication. The district court determined that inclusion of the lower Snake River was necessary to confer McCarran Amendment jurisdiction over the United States,⁵⁹ notwithstanding the United States Justice Department's and the Idaho Attorney General Office's position to the contrary.⁶⁰ In the State of Idaho's petition for Writ of Certiorari to the United States Supreme Court, the Idaho Attorney General correctly noted:

[t]he issue of whether an entire basin within one state must be included in one general adjudication was not before the court. Any statements by the Idaho Supreme Court to that effect are dicta.⁶¹

Thus, the question still remains whether a state's boundary is the only appropriate terminus point in a general stream adjudication which includes the rights of all upstream users.

Adjudication of an upper river has been held comprehensive⁶² for the same reason that adjudication of a river which is tributary to another river within the same state also is comprehensive.⁶³ From a hydrologic standpoint, adjudication of an upper river is no different from adjudication of a tributary to that river. In both, downstream water rights are not adjudicated. Therefore, notwithstanding the inclusion of the entire Snake River in the SRBA, *In Re Snake River* does not hold that water users on an entire river within a state be joined in order to obtain McCarran Amendment jurisdiction over the United States.

Nevertheless, *In Re Snake River* already has been cited erroneously by the United States, in a motion to dismiss the adjudication of a portion of the Rio Grande in New Mexico, as standing for the proposition that the McCarran Amendment requires the inclusion of an entire river within a

58. *In Re Snake River*, 115 Idaho at 9, 764 P.2d at 86.

59. See *supra* note 49.

60. Appellants' Brief at p.6.

61. On Petition For Writ of Certiorari To The Supreme Court Of The State Of Idaho, Brief for the State of Idaho in Opposition, No. 88-1170, *cert. denied*, 109 S.Ct 1639 (1989). The Idaho Supreme Court found that McCarran Amendment jurisdiction required that "the rights of all claimants on the Snake River . . . within the state of Idaho . . . be included in the adjudication." *In Re Snake River*, 115 Idaho at 8, 764 P.2d at 85.

62. The upper Green River adjudication in Utah is an example.

63. The current Jemez and Taos River adjudications in New Mexico are examples.

state in any adjudication of that river.⁶⁴ *In Re Snake River* stands for no such determination. Rather, the *In Re Snake River* holding tells us that a state retains the authority to determine and quantify the water rights within its borders. It should be cited for nothing less.

D. Res Judicata Concerns

The dissent's concern with the court's inclusion of the Boise and Weiser rivers was that the water users on those rivers will be forced to have their water rights readjudicated, contrary to the doctrine of *res judicata*.⁶⁵ The dissent, however, did not fully apply *res judicata* principles to the 1906 and 1921 Boise and Weiser river decrees. For example, the United States and the State of Idaho were not joined as parties in these early twentieth century adjudications; therefore, water rights established pursuant to these decrees do not have *res judicata* force against federal and state water rights with priority dates preceding the decrees. However, the doctrine of *res judicata* indeed applies among the parties who were joined in the early adjudications and supplementary proceedings.

A limited application of *res judicata* would be appropriate only in a setting presented in the *Eagle River* decision, where water users would be asked to readjudicate their water rights for the limited purpose of quantifying federal reserved water rights. The SRBA by far exceeds this purpose. In fact, the SRBA seeks to accomplish a comprehensive state water plan, a goal that petitioners clearly acknowledge as being within the State's power.⁶⁶

Most importantly, however, Snake River basin water users must remember that if any water users lose their rights in the current adjudication, it will be because of factors such as adverse possession, forfeiture, and abandonment. Absent such statutory criteria, those who went to court in 1906 and 1921 will not lose their water rights.

CONCLUSION

In Re Snake River exemplifies the complexities inherent in defining a large general stream adjudication. Indeed, "[t]he greatest problem anticipated with the Snake River Basin Adjudication [was] the enormity of the undertaking."⁶⁷ It by far exceeds the scope of any previous general

64. Memorandum in Support of Motion to Dismiss at 14, *Elephant Butte Irrigation District v. United States of America* (March 12, 1990) (Doña Ana County Civil Case No. 86-848). The motion was properly denied.

65. *In Re Snake River*, 115 Idaho at 11, 764 P.2d at 88.

66. The overriding theme in petitioners' briefs is that states have regulatory control over their waters.

67. Krogh-Hampe, *The 1986 Idaho Water Rights Adjudication Statutes*, 23 Idaho L. Rev. 1, 2 (1986-87).

stream adjudication in the United States. The Idaho legislature was in a very difficult position trying to structure the SRBA. And although Idaho lawmakers were unable to keep the boundary question out of court, their legislative efforts to facilitate the adjudication are laudable. In hindsight, had the legislature known that petitioners were going to challenge the Boise and Weiser rivers' inclusion on McCarran Amendment grounds, the State could have avoided this litigation by forcing petitioners into the adjudication pursuant to the sovereign authority it retains over its waters.

All holders of Snake River basin water rights now are paying filing fees in order to assert claims to their water rights. While some users find this an imposition,⁶⁸ others believe it is a small price to pay to have their rights perfected against the world. The pending adjudication will perfect existing water rights. If rights are lost, they will be lost because of non-compliance with State law, not by arbitrary judicial action.

CECILIA DENNIS

68. Fees for the irrigation rights of petitioners on the Boise River approximate \$167,000. Telephone interview with Don A. Olowinski, appellants counsel (Jan. 9, 1991) (Hawley, Troxell, Ennis & Hawley, Boise, Idaho).