THE SNAKE RIVER BASIN ADJUDICATION

THE FUTURE OF WATER IN THE WEST

THE SNAKE RIVER BASIN ADJUDICATION
THE FUTURE OF WATER IN THE WEST

by

Alvin M. Josephy III

A Thesis
Submitted in partial fulfillment
of the requirements for the degree
Master of Environmental Studies
The Evergreen State College
June 2006

This Thesis for the Master of Environmental Studies Degree

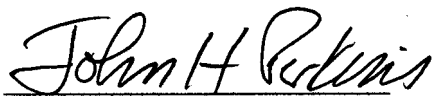
by

Alvin M. Josephy III

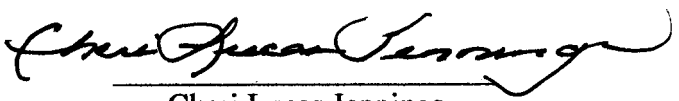
has been approved for

The Evergreen State College

by



John Perkins
Member of the Faculty



Cheri Lucas Jennings
Member of the Faculty

January, 2007

ACKNOWLEDGEMENTS

Many people contributed to this thesis. All of them deserve mention here. Only a few can be:

Adam Sowards, Assistant Professor of History introduced me to the writings of Mark Fiege and Richard White during a summer seminar, and showed me how to think of history in terms of environmental studies.

Char Simons gave me the confidence to write more than emails.

John Perkins re-introduced me in his patient way to the joys of scholarship.

Cheri Lucas Jennings infused my work with enthusiasm and cause.

John Peavey lent perspective.

Randy Stapilus was actually there, and without his collection of notes and anecdotes there would have been little in the way of actual accounting here.

Ellen Bishop took the magnificent cover picture, and lent it to me from her excellent book, In Search of Ancient Oregon. It is of course of Hells Canyon.

Gary Snyder, although he doesn't know it, for obvious reasons. (There's just a lot of reasons for defending water that don't fit into a legal brief.)

Rebecca Miles, who reminded me at the end of the part the Nez Perce tribe has played in this story for the past ten thousand years.

All the good folks in the MES office at the Evergreen State College who have put up with my meanderings for the past two years.

And my patient and nurturing wife, Melissa, and innumerable cups of midnight tea.

Finally, to the River itself. We now drink (water) to her health and prosperity.

Abstract

The Snake River Basin Adjudication (SRBA) was the largest legal proceeding ever to tackle the issue of water rights in U.S. history. Bound on one side by an aging legal code and on the other by increasing demand, the State of Idaho was forced into an immense "sorting out" of how water will be allocated in the Snake River Basin. This adjudication consumed the final years of the twentieth century and is not complete yet, in 2006.

The river cuts through over 750 miles of Idaho, from the southeast corner to the northwest before it escapes into the Columbia Basin in Washington State. Along the way the Snake watered the advance of American history as European immigrants spread over the valleys bordering the river. Bringing their customs with them, these new-comers molded the ideas and laws of property to meet their new, challenging environs. Imposing order on the chaotic and arid land, settlers sought surety of ownership of what they knew to be a rare element – water. Water was always the limiting factor in the development of the West. The goals were to impose a rigid structure that would guarantee private investment while at the same time disguising the fact that the water was finite.

Idaho isolated between the Cascades on the west and the Continental Divide on the east became as rigid a Prior Appropriation state as any in the Inter-Mountain west. Idaho experienced the mining booms that brought new settlers who had learned the law of the arid region in the California gold fields. Later agriculture gained predominance. Private interests developed water works and the farming communities that thrived around them. In fact, it was Idaho's unique experience that included a strong private development community, that laid the foundation for what came later. When it came time (in the twentieth century) to develop water and power seriously, Idaho went the private development route, while the states around them were largely developed by public entities including the Federal government.

The private power – private water relationship that worked so well for the state during much of the period between 1910 and 1980 finally collapsed as it became clear that private interests, armed with the iron rule of priority-of-use had simply over-allocated the precious asset of Snake River water. The ensuing court clash between these hundred-year partners lead to an agreement to measure the waters and try to understand who exactly had rights to use it.

In the course of this twenty-year adjudication many difficult issues have been exposed. A key issue explored in this Thesis is the idea that management of the rights to water is outside the purvey of the Federal Government, even though water freely crosses state lines. The arguments over the right to use water have increased as the agricultural community has been joined by other interested parties in making demands. The region remains in the grip of an aging legal paradigm. If Prior Appropriation is the law then don't Native Americans have the priority claim to water, not in fact local agriculture? The progress of the SRBA was marked by the entrance, for the first time, of many new claimants to this finite resource.

This Thesis proposes several ideas for the future of water use in the west. Perhaps water is not a property right per se, with absolute rights associated with its transfer and use. Perhaps water should be managed as a public good, and permitted by category of use. In this way we can recognize water for what it is, while developing plans for a future that considers ecological and social values, instead of merely political and legal rights.

THE SNAKE RIVER BASIN ADJUDICATION

THE FUTURE OF WATER IN THE WEST

TABLE OF CONTENTS

LIST OF FIGURES

Introduction

"A right to water is a pleasing thing; but it takes water in the laterals to raise the crops." Moses Lasky [1]

Adjudicate: "To hear and settle a case by judicial procedure. To study and settle a dispute. From the Latin, '*adiuricare'*, "to award to judicially."" [2]

In a developing world, where urbanization and population growth are accompanied by increasing industrialization, the competition for natural resources controls the growth curve. Limited access to minerals, timber, water and the like has restricted the commercial as well as intellectual and cultural development of parts of the world, while an abundance of these assets has hastened the progress of those portions of the human family fortunate enough to have access to them. Possibly no other resource fits this description as well as water.

Vital to our life form, water possesses many important qualities. It also has some challenging ones as well, and these, combined with it's absolutely imperative nature have made it a flash point in human relations over the millennia. Fresh water, available for human consumption, is not distributed evenly across the continents. A quick look at a

[1] Moses Lasky. "From Prior Appropriation to Economic Distribution of Water by the State via Irrigation Administration." Rocky Mountain Law Review 1 (April 1929): P. 174. As found in John D. Guice. The Rocky Mountain Bench. P. 129

[2] The American Heritage® Dictionary of the English Language, Fourth Edition Copyright © 2004, 2000 by Houghton Mifflin Company.

world map reminds us that water actually is most abundant where humans are not. Water is not static. Unlike copper or timber, left to its own devices it does not remain long in one place. It makes its own way, following the rules of hydrology, ignoring human political needs as it crosses and re-crosses man's "borders" and boundaries. Water follows a regime outside the control of man. Humans cannot control its abundance or scarcity. The hydrological cycle has its own laws which man ignores at his peril. Human political stratagems must revolve around the geological realities of water.

Water is impossible to "own". Humans have spent centuries developing ways to manage and allocate water, based on differing priorities. As civilization has changed, these priorities have changed as well. Water has meant individual power to kings and emperors, domination to growing nations, and political control to regional consortiums. Access to water has been and remains a touchstone to human development. It has more than simply life-giving qualities. It is a main lever throughout human history of political and economic power.

It is within this context that the unique system of water use and allocation grew up in the American West. This system, known by its legal term of "Prior Appropriation" is best known by its directive of "First in time, first in right". This system has been defined as "the legal principle that the first to put water to a "beneficial use" has the paramount right to the future use of that water". [3] This legal construct, which grew up in the last decades of the nineteenth and early years of the twentieth century, has been applied in its purest form only to the most arid states of the Rocky Mountain region; Nevada, Arizona, Utah,

[3] Pasani: Water, Land and Law in the West. P. 1

Colorado, Wyoming, Idaho and New Mexico. The states of the American West that have some more humid regions (California, Kansas, Montana, Nebraska, North and South Dakota, Oregon, Texas and Washington) have more blended regimes, combining aspects of traditional "riparian" usage patterns with some elements of the appropriative legal system. [4] Prior Appropriation took hold during a time when water use was being "industrialized" through large scale reclamation, requiring significant investments. As long as water use was local and small scale the existing use of riparian law with minimal adjustments functioned reasonably well. (*See Horowitz.*) It was only when private capital was needed to develop natural water sources, often located far from the place in which they were needed, that a scheme for controlling the resource apart from the land came into being. The legal protection afforded by Prior Appropriation made possible the significant inputs of capital required to develop the water resources of the West between the 1870s and the mid twentieth century. (Over three quarters of this capital was private. Near the end of the twentieth century, only one quarter of the irrigated acres in the West was watered by the federal government.) [5]

In the West of the early twenty-first century, scarcity is the most talked-about characteristic of water. But is that really the problem? Is lack of water really the challenge facing water administrators in the West? Urbanization (the West is the most urbanized region of the U.S.), relentless population growth, and the introduction into the arena of additional players (environmental interest groups, public trust advocates, and Native Americans, to name a few) have attenuated and redefined the scope of the issue.

[4] Pasani: ibid, P. 10
[5] Ibid. P. 1

Yet the water story today is less about quantity than it is about access, in spite of the rhetoric.

With the realization of the impacts of growth, new players and declining resource availability, the western states, who under the American federal system have legal responsibility for most fresh water supplies within their jurisdictions, have been actively seeking to quantify and formalize their relationship to their waters, over the past thirty years. The last decades of the twentieth century have seen repeated attempts to adjudicate and quantify water use and permit systems across the Mountain west. These have mostly been done through the (state) courts, in lengthy and expensive procedures. (Only Wyoming and Nebraska permit the adjudication of water rights by administrative commissions rather than by the state courts.[6]) Since the 1980s there have been adjudications of several of the river basins in the Northwest. The most recent and largest of these legal quantifications and adjustments of water rights has been in the Snake River Basin in Idaho.

This study, which is an examination of the world of western water rights, finds its focus in a view of multi-partied litigation in the state of Idaho by looking at the Snake River Basin Adjudication. Over a century of water rights allocations based on a doctrine of "first in time, first in right" have run head on into an existing bulwark of federal treaty making (with Native Americans) and emerging power bases built on federal legislation of the past 30 years. Over time these conflicting laws and promises have had the effect of buttressing a system – that we will track more fully in this paper - that placed greater

[6] Dunbar: Forging New Rights in Western Waters. P 113. Pasani, ibid. P. 20.

weight on ownership and priority of use rather than on stewardship of the resource. A mixed system of riparian rights where water goes with the land combined with the ability to separate water from the land remains in much of the West to this day. The result is that water resources are over-subscribed and poorly protected, either for economic or environmental values. Water has been roughly treated. William Hammond Hall, the first State Engineer of California, wrote in 1889 that to appropriate water "pre-supposes that water is like a wild beast – to be shot down and dragged out by the first brute that came in sight of it." Retaining this doctrine in our times, an idea that had its utility during the first 'pioneer phase' of development has created a world in which rational management of perhaps all national resources is more about ownership and private property than it is about the long term sustainability of the resource.

A further effect of water policy on the West that is only partly discussed in the historical literature bears further study. So much of the literature on the West is about individualism, democracy and independence. Since early in the nation's history the Congress has used the public lands to provide economic opportunity to Americans through lease, sale or outright grants. But Prior Appropriation favored one entity, usually a corporation or institution over the needs of a larger constituency. Water law is always driven by economic considerations. But is it always "reasonable"? This is the question we must face head on.

It wasn't until the dawning of the twentieth century and the advent of federal reclamation and financing that the region found its footing in the "tyranny of prior appropriation" as

Donald Pasani has called it. Throughout the twentieth century prior appropriation came to dominate the cultural and social development in Idaho as well as the rest of the West in that territory beyond the 100th meridian that we fantasize as free, open landscapes. The vision of the independent family farmer, an idea that was never actually true, continued well into the twentieth century, long after the frontier was closed and corporate interests had moved into the business of resource development in the West. Prior Appropriation came to be the tool whereby water became locked in an economic embrace, not freed for social development.

Freedom and democracy are recurrent themes in American History, as well as policy development. Donald Worster notes that the motivation behind the drive to rationalize the disorder of nature on the prairies and deserts of the West, led instead to a more authoritarian system of ownership of resources. The promise of the settling of the Snake River basin was the real-life manifestation of American westward expansion, the Garden Myth combined with the dream of industrial agriculture. That story involves the taming of wild nature by the heroic alliance of man and science. Hand in hand, abetted by water, they would quell the arid landscape. These rights proliferated haphazardly along the streams entering the Snake as western society moved from “reasonable use” and a democratic sharing of a fluctuating resource, to the level of property rights that led eventually to the over-allocation of every watercourse entering the Snake.

In 1982, the Idaho Supreme Court ruled unanimously that that there were no boundaries defining the limits of water use in the State. The immediate result of this ruling

(described in Chapter 4) was that the state water plan, passed in 1978, was invalid. The river immediately went into an over-allocated status. The whole world of Prior Appropriation in Idaho was suddenly at risk. The legal structure that had grown up in the Snake River Basin over 100 years was suddenly expressed inadequate as a resource management tool

The heart of the doctrine of Prior Appropriation is that water is a renewable resource meant to be used for commerce. Prior Appropriation protects the rights of the first to develop the resource from those users that came later. (It's important to remember here that these "junior rights" holders today are often the growing cities of the Basin.) The constitutional right to 'appropriate' water became identified with the right to 'appropriate' other public goods, like land, minerals and timber. Like these latter resources, water is a part of the commons. The real issue for rational management of water is allocation, not scarcity. At the same time, the 21st century challenge is to use our management skills in the scientific and policy arenas to restore democratic values to resource issues.

.

The Snake River Basin Adjudication was triggered by a catastrophic event, a small piece of data more or less left under the rug for thirty years that only came to light in the context of changing times. That event involved conflicting usage, which was defined in the absolute language of property rights. When water is allocated as a resource under a system that promotes efficiency, all will conserve it to meet the needs of the entire community. Once water became a property right as it has in Idaho, users view it as

having a value in itself, rather than having correlative values related to what it can do. Water becomes controlled by the legal community, rather than by public service administrators as it should be.

The adjudication process for the Snake, begun in November, 1987 has continued until now, in early 2006. During year seven of the case, in 1994, a controversy arose between the Chief Justice of the Idaho Supreme Court, and a State Senator concerned with the extreme unlikelihood of ever resolving all the claims. The legislature was attempting to protect a changing view of the law, while the courts demanded the ability to rule independent of political pressure. Partial forfeiture was not yet "a legal doctrine" in Idaho law. At this point, seeing the widespread impact on the adjudication of litigation stretching into the next century, and the problems that would arise if the State was unable to reduce water rights short of abrogating them, the controlling (State) agency switched tactics and moved to reduce water rights based solely on "beneficial use." This moment is important for the thesis in this study, as it said the largest water basin adjudication yet undertaken in the United States would be decided based on the narrow issue of property rights, and not on the wider issue of the Public Trust Doctrine and all that implies for the future.

For thousands of years before statehood Idaho has also had a large, important Native American community. Throughout the twentieth century, the Shoshone-Bannock of the Fort Hall Reservation in southwest Idaho, and the Nez Perce tribe of the Lewiston-Lapwai area in the north of the state have been at best peripheral entities in Idaho

political life. But history is inexorable. The Nez Perce, along with many tribes of the Northwest signed a treaty in 1855 (and again in 1863) that resulted in the exchange of large tracts of land in return for certain guarantees. These guarantees included the rights to water, large amounts of it. The treaties were executed in a hurry and by peoples with very different cultures, languages and understanding. But they were clear about the assignation of water adequate to water these new "reservations". And in a world of resource management that rewarded first in time, there was little argument that Native American rights pre-dated almost all white settlement. In 1993, the Nez Perce tribe entered the adjudication case as a major water rights claimant, changing the scope of the entire process.

The Nez Perce claim had significant implications. The Tribe stressed in-stream rather than consumptive uses. Tribal in-stream claims in the main stem of the Snake River essentially asked for all the water in the river as of the year 1855. If granted, these claims could eliminate much of southern Idaho civilization. In addition, the Nez Perce claimed instream flows to about 1100 creeks and streams throughout "aboriginal" territory based on the tribe's federally reserved right to "take fish at all usual and accustomed places" The entry of Native American claims into this legal process posed a dramatic challenge to water management both in Idaho and in the West in general. If water rights are based on an appropriative regime, and on the idea of beneficial as opposed to reasonable use, then claims such as the Tribe made in 1993 means no one, including those bucolic, yeoman, democratic farm families of the Snake River Basin have any right to water, and therefore, even if they have been farming the same land for 100 years, no right to be there at all. It

all depends on how much water is available. Water security suddenly seems not so very secure.

Water is money, and if it is a property right, then net worth accrues to the right. If a user cuts their appropriation at one time and applies it to another "beneficial" use, can they reclaim it for a different use at a later date? If they can then how can this doctrine lead us to water conservation over time? The State and the IDWR had once prevailed on the principle that although the public had an interest in the use of the river and the water, they did not have an "ownership" of a right. Adjudication was clearly, in the mind of the legislature, about water rights and property, not about the public interest. But the tribes had apparently vast, apparently ignored and likely to be restored water rights. How would the issue, ultimately be decided?

These legal exercises, most of which take up to a quarter of a century to complete, have been concluded in the context of a water law regime that was constructed at a time when the West was a smaller and less complicated place. The goal then was development and economic security through the medium of (scarce) private capital. Today the needs are different. Quantity and quality are at the top of the water agenda today as are quality of life issues in an urbanizing west that has less of a commitment to agriculture and extractive industries for their livelihood. The list of interested parties has changed and grown. In a previous century this group included industrial players and agriculture, virtually unchallenged. Today, mining and agriculture are declining, and being replaced in large part by service industries, which depend in part on quality of life to attract

employees and investors. The negotiating table over water issues today includes growing urban areas, Native populations, and government agencies, both state and federal. "Community" issues, issues that depend on a range of environmental values have changed the debate about water from one of "use it all", to one of conservation-in-place. In-stream uses matter in the 21st century. For these reasons as well as others, it is likely that we have reached a point where our existing legal structures no longer serve us as well as they once did. It is time to take another look at how we might address our need for water while understanding that the American dream of individual opportunity is now being constricted and not enhanced by the laws as they exist in the West.

The legal constraints of Prior Appropriation, viewed by many in the West as the bulwark of their constitutionally assurance of property rights, has become in our times an impediment to the continued growth and prosperity of the region. We can see this by considering as a case study what may be the last great adjudication of a major river basin in the west, that of the Snake River Basin Adjudication (SRBA) in the State of Idaho. The purpose of this thesis is to attempt to critically consider the institutions of water law in the western U.S., what their origins and antecedents are, and to consider whether the changes in our world and our environment don't warrant a change in the ways we relate administratively to this resource.

The uniqueness of the Snake River in terms of size and ecological regions crossed, the large number of individual as well as group constituencies involved, as well as the

positioning of the State of Idaho at this crossroads of western American history, make the Snake an excellent case study for considering the changing world of water rights.

FIGURE 1: IDAHO WITH MAJOR RIVERS

Chapter One: The Snake River

"It is clear that the West can no longer be considered an undeveloped area."

Tim Palmer. The Snake River. [7]

High in the Rocky Mountains, at the top of North America just to the Pacific side of the Continental Divide near the south edge of Yellowstone National Park the Snake River bubbles out of the ground and into the American West. The place where it rises bears a name that is so descriptive of the entire American experience as to be almost a joke. In the meadows below Two Oceans Pass, the Snake gathers itself from springs and rivulets coursing and burbling across the grasses, forms into a stream, and heads to the Pacific Ocean, 1500 miles away.

The area in which the creek that would be a river rises is a complicated landscape of peaks and cul-de-sacs, cut by spring-fed rivulets and mossy meadows. The starting point for the river is actually Two Ocean Plateau, a geological fault line so malleable that not very long ago, before the Yellowstone area was sculpted by one of the largest outburst of volcanism visible today on the planet, the Snake actually flowed to the Atlantic Ocean. (ref?) Uplifting of the nearby ridges redirected the Snake westward to its present majestic course and its Pacific destiny. Today, it is the Yellowstone River, which rises just to the other side of the divide at this location, which flows to the east and to another world.

[7] Palmer. The Snake River P. 66

From this place, deep in the North American continent, this river of the West runs through a valley carved over millennia by the passage, first of the continent itself as it passed over a massive volcanic "hot spot" and later by huge floods let loose by Lake Bonneville as the last of the great glaciers melted away not 12,000 years ago. The river runs 1056 miles, 779 of them in Idaho, through farmlands, sage desert, seven canyons and two time zones before it meets the Columbia River on the Columbia plateau. Along the way the river irrigates 3.8 million acres, supports most of Idaho's agriculture, provides habitat for countless species of wildlife and along the way defines Idaho's way of life as it has for millennia.[8] Eighty seven percent of the state of Idaho lies within the Snake River Basin.

The Snake provided the livelihood of the native peoples that populated the region for thousands of years, from its grassy plains dense with game to its mountain streams, alive with Salmon and Kokanee. Later, these same rushing creeks yielded furs and mineral wealth to several generations of entrepreneurs, while the basin lowlands opened themselves to the thousands non-native peoples that have come to the region to farm since the 1860s. For millennia the river set the pace of life for all in those pre-industrial times. Today the river is in turn dominated by man and his engineered world. Twenty-three dams block the river, creating 508 miles in reservoirs. (5 of these dams are outside Idaho). This represents a total of over 12 million acre feet of storage. [9] In fact, the placement of the structures that make up the Snake's "plumbing" have more to do with

[8] Palmer. P. 6
[9] Stapilus. P. 8; Palmer. P. 53.

dividing the river and its tributaries that make up the “basin” than does its natural hydrology.

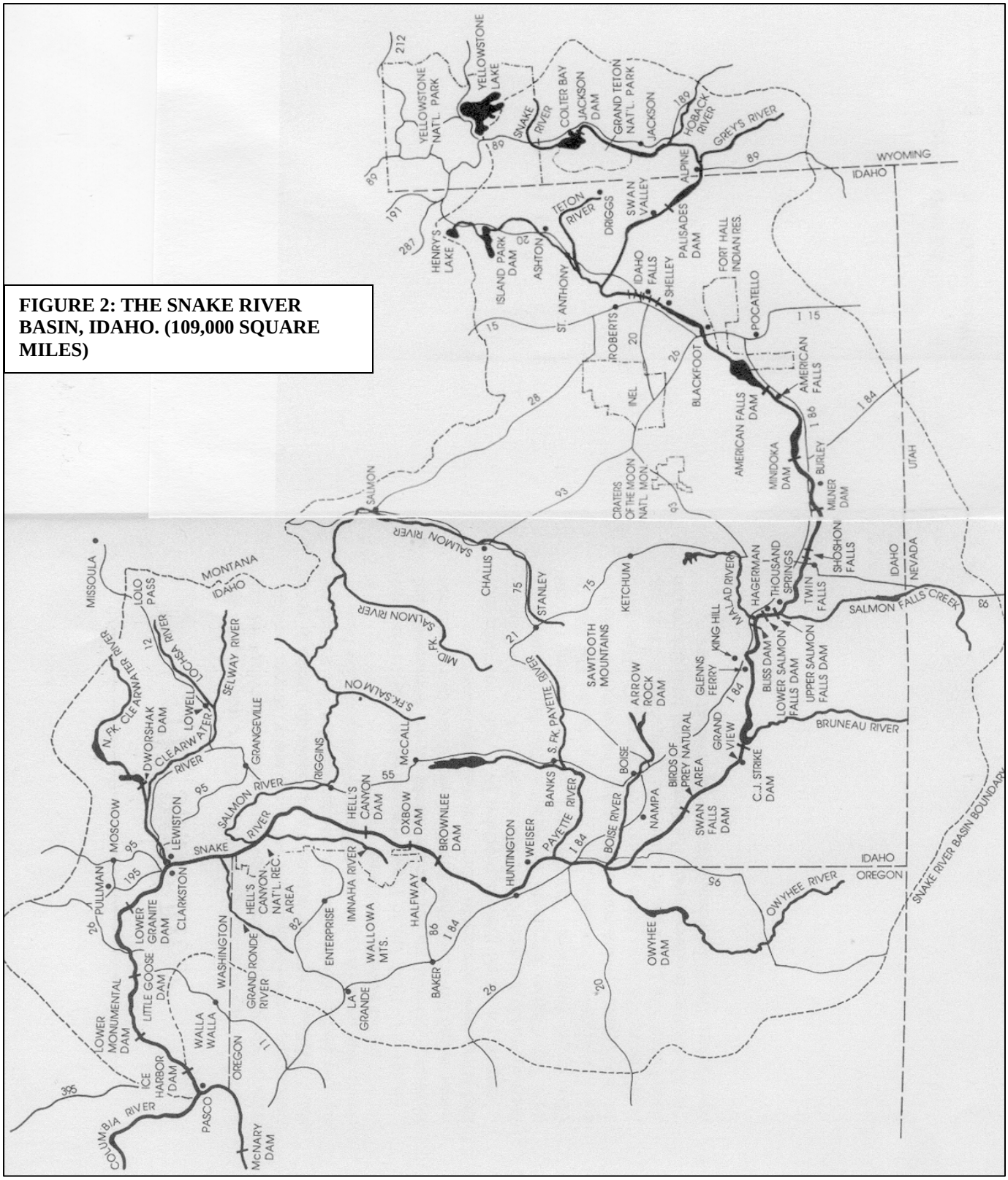


FIGURE 2: THE SNAKE RIVER BASIN, IDAHO. (109,000 SQUARE MILES)

As a result of all this plumbing The Snake River today is really three rivers in one. The "upper" river stretches from its source, near Yellowstone National Park at Two Oceans, and falls towards the west, passing through Grand Teton National Park and then several dams before the main stem (or South Fork as it was once called) joins the North or Henry's Fork west of Rigby. From here the river passes through several Bureau of Reclamation dams on its way to the massive diversion at Milner, near Twin Falls. At this point, in many years, the river is nearly emptied of water which is diverted through canals to water the rich southern plains around Jerome and Buhl.

The river lives again west of here, due to the extreme porosity of the lava flows that blanket southern Idaho, and the many, even "Thousand" springs that feed the river as it flows through the canyons near Hagerman west of Twin Falls. This "middle" river sweeps across desert and through canyons passing to the southwest of Boise and swings out into Oregon for a short ways until turning north to form the border between Idaho and Oregon. It enters Hells Canyon north of Weiser at Farewell Bend, and enters its last leg, as it heads towards its rendezvous with the Columbia near Pasco, Washington and its final trip to the Ocean. Finally, the "lower" river grinds past three dams in Hells Canyon, emerging at Lewiston, and turns west into Washington State, passing through four immense hydroelectric dams before reaching Wallula Junction and the Columbia River.

The administration of the river and its impoundment maze is divided politically as well as hydrologically. The upper river above Milner Dam is managed by the Bureau of Reclamation. The middle river from Milner to Hells Canyon is under the auspices of the

Idaho Power Company. (Governor John Evans once remarked that the state had been named after the power company rather than the other way around. The company owns eleven dams directly on the Snake and five more on tributaries. Hydro generates a third of Idaho's electricity in any given year. [10]) The lower river, from Hells Canyon to the state line and the two hundred odd miles past this point to where the Snake meets the Columbia is managed by the Army Corps of Engineers.

There is little doubt about who uses the water of the Snake River. The upper river basin is managed by the Bureau for irrigation, and for the agricultural interests that dominate the region. Agriculture has long been the lifeblood of Idaho and the Snake River has been the lifeblood of agriculture. This has been true since the first diversions were made from the basin when the Boise River was first dammed and used for irrigation by the Hudson's Bay Company at Fort Boise in 1843. [11] The federal government encouraged settlement throughout the nineteenth century, by providing land and allowing the use of water where and how the first settlers found it. In 1906 the federal government began an active role in development of water in the basin with the Minidoka Dam near Burley. (Today the Minidoka Project includes numerous structures along a 300 mile stretch of the upper river basin, between Ashton and Bliss. It is described as the "largest project of the bureau (of Reclamation) nationwide in acreage of land served." [12]

[10] Palmer. P. 190
[11] Idaho State Historical Society Reference Series No. 171. The reference for this information was John C. Fremont, who, traveling in the area in 1843 noted that more irrigation should be undertaken here, implying some was already taking place.
[12] Palmer. P. 56

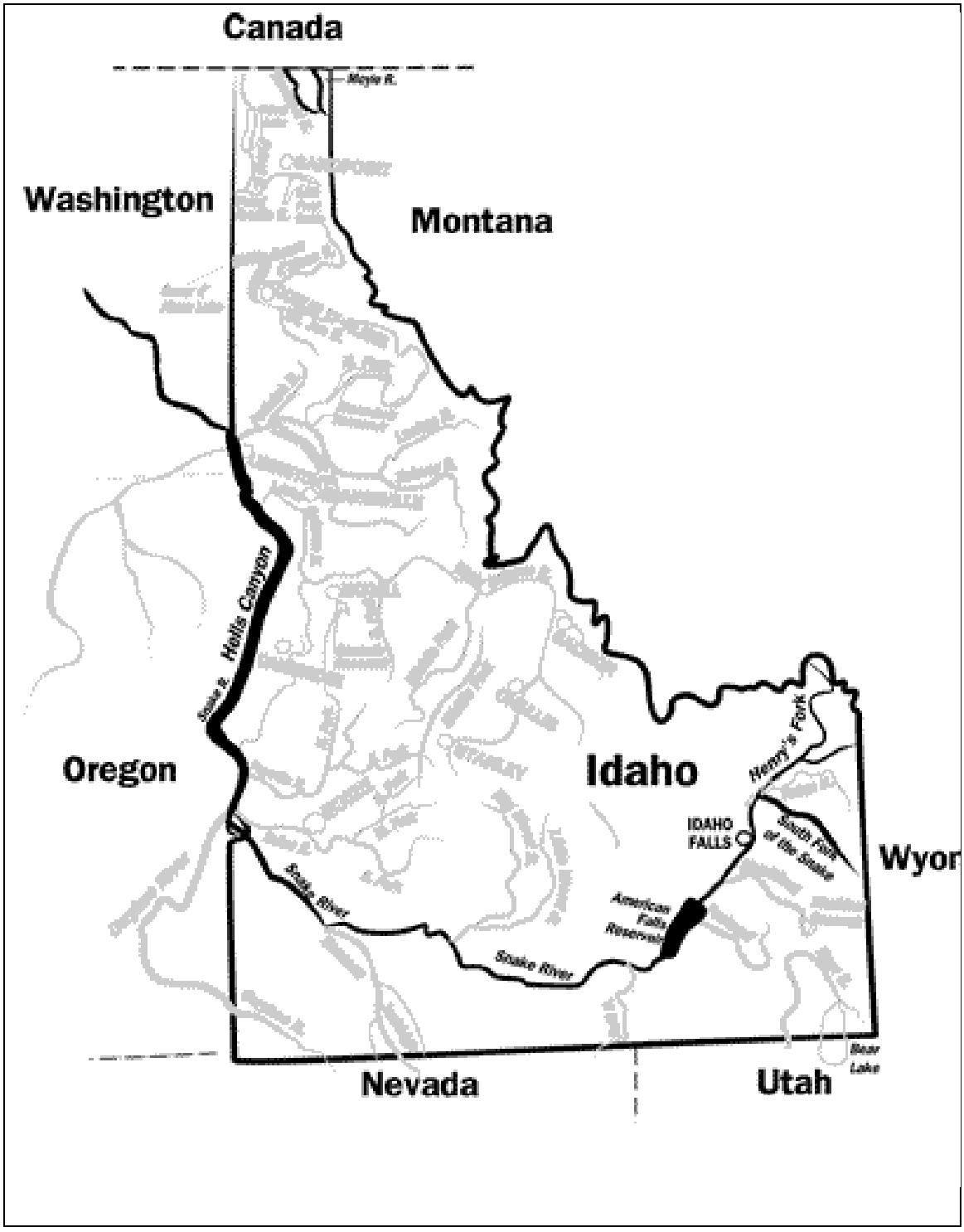


FIGURE 2.
THE SNAKE RIVER IN IDAHO

The river is operated through the dams like a huge plumbing system. Water is stored in impoundments all the way from behind Jackson Dam in Jackson Hole, Wyoming, in Grand Teton National Park in steps down the basin, and released through the season as irrigators require. Although it doesn't actually work this way, the guiding principle in river management is to keep the water as high up in the system as long as possible. This way it is available for irrigation as late into the growing season as possible. Since many of Idaho's money crops (sugar beets, potatoes, beans) require late irrigation, this requirement is basic to irrigator's lives. The reservoirs, and therefore the Snake River, are managed for irrigation first. Agriculture takes priority. The State Water Masters decide how water is released, and they do so based on filling water rights first. "The first thing is to fill water rights under state law." [13] Only once that is achieved, do the next priorities, flood control and then hydropower, get considered. Somewhere down the road, and until very recently, completely off the map, are environmental values.

There is nothing unusual or different about Idaho in the Mountain west. The seventeen states west of the 100th meridian all employ some form of the same water rights regime that Idaho does, and almost all of them have codified the priority of agriculture to use water first. Idaho is a bit vague, for while Title 42 of the Idaho Code gives priority to domestic, agricultural, mining and industrial use in that order, the State Constitution says "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, **except that the state may regulate and limit the**

[13] Palmer. P. 57.

use thereof for power purposes." [14] In any case, and in spite of the fact that Idaho specifically acknowledges control of water a public trust, the waters of the Snake River basin are the particular domain of the irrigation and agricultural community in the State and have been for over a century. 97% of the waters impounded behind the dams along its upper reaches are allocated to this use.

For over a century this has been the law in Idaho, and all other values dependent on this resource have taken a back seat. But as populations grow and society changes, pressure on the resource is growing. Changing needs require new perspectives. In order that society acknowledge these changes and deal with them successfully, the whole legal structure around water must change. The change does not have to be immediate but it does need to come eventually.

Over the last years of the twentieth century and into the new millennium Idaho has faced this challenge around their single most valuable resource. After a century of less than perfect quantification of water use, Idaho has undertaken a massive attempt, under current law, to adjudicate the waters of the Snake River. After 18 years this case is coming to a conclusion. The question is, has this historical court case done justice to the

[14] Idaho State Constitution. Article XV, Section 3. This seeming contradiction is made more complicated by the fact that agricultural interests have had such a huge political power in Idaho since the early years of the 20th century. Agriculture uses a huge percentage of the Snake River's water, and has always dominated any other uses of the river's water. But this too is not unique to Idaho. The world of Prior Appropriation has to do with separating water from land and creating a property right out of it. In Idaho, along the Snake and its tributaries, this ultimately meant electricity to pump water away from the river. So from early in the 20th century a battle line was drawn between power production and agriculture. The farmers needed power to pump water out of the river to their fields. The power company needed water in the river to make power. Here is where the real problems developed that would lead to the SRBA.

river, the people of Idaho, the changing society of the northern Rockies, and all the interested parties to this settlement? Time will tell.

Change will come to Idaho and to the rest of the west. Change is good but it's never easy. Hopefully the Snake River Basin Adjudication will allow a change to come that will acknowledge the values and needs of the entire Rocky Mountain community, not just those of the narrow group of first claimants. Can this happen? Before we can speculate on that we should lay some ground work by considering the context of water law in the western U.S.

Chapter Two: Prior Appropriations

"The Problem of the West is nothing less than the problem of American Development." Frederick Jackson Turner, "The Problem of the West". (1896)

"It (the appropriation of water) assumes that the establishment of titles to the snows on the mountains and the rains falling on the public land and the water collected in the lakes and the rivers, on the use of which the development of the state in a great measure depends, is a private matter. It ignores public interests in a resource upon which the enduring prosperity of the community must rest." Elwood Mead, first State Engineer of Wyoming.

This paper is a discussion about the rights to the use of a resource, and the context in which those rights are expressed in the early 21st century. It's impossible to understand the complexities of this debate without a historical context. The debate today is actually about the intertwining of the rights to use a resource with the rights to own property. Over the past several hundred years the right to use water has become inextricably joined with the right to property. We maintain that this concept, the idea of the use of natural resources as a property right, lies at the heart not only of the debate about water but at the center of the entire conflagration over the place of natural resource policy in the Environmental movement in the world today.

Early Precepts

Legal doctrine at the beginning of the nineteenth century in the United States was the product of an agrarian society with a relatively low level of commercial and industrial activity. The rights to property in 1800 were considered to be "absolute" in the sense that a guarantee to enjoyments of one's property allowed the ability to enjoin another if their use or enjoyment of their property inflicted damage on yours. This led to decidedly anti-development legal decisions, designed to protect the simpler world of the day. The maxim invoked by courts of law most often during the eighteenth century was "sic utere tuo, ut alientum non laedus." ("Use your own property so as not to harm another's.") This doctrine in law was known as Natural Use. [15]

The protection of existing agrarian rights was basically conservative, and meant to complement the tenor of the low-population, low economic activity times in pre-industrial America. However, another thread appeared in some legal decisions in early 18th century America which was bound to cause later difficulties. This "second theory of property rights", as Morton Horowitz has termed it, involved the concept of priority rights. It was meant to allow a preceding use of land or an associated resource to be considered preeminent, and to allow one to perfect a prescriptive property right from some long-standing use. At the time there was no conflict in fact between these two concepts. In fact this right of priority in the context of the times merely helped reinforce the conservative and preservationist nature of the "absolute" right to property enjoyed by land owners. [16]

[15] Horowitz, P. 32.
[16] Horowitz. P. 42-43.

Common law doctrine enforced this paradigm right up until the spirit of development began to seize the country early in the nineteenth century. In its natural state, the non-developed status of, say, a river is its "prior" use. In this case, and as long as this was the rule, there was no conflict between these precepts. But once development began to expand in the early nineteenth century along the rivers of New England and the eastern seaboard, the concept of "priority" began to take on a life of its own. As it already was tied to the principle of a property right, priority was used as a way to promote "the utilitarian world of economic efficiency". [17] The attachment of priority to unassailable property rights came to be a recognized legal principle long before it migrated to the California gold fields in the 1850s. [18]

The triumph of priority rights (as a function of a property right) over those of Natural Use was followed by the replacement of the primacy of "reasonable use" with that of "beneficial use". As the energy of the new economic spirit of the nineteenth century took hold the antiquated idea of shared conservative values gave way to the pressures of the new industrial age. Reasonable Use forbid the imposition of new technology that might harm another user, as in the creation of new dams on eastern rivers for grinding and milling operations. (America's mill capacity increased six-fold between 1820 and 1830). Beneficial Use, a concept that emerged with the spread of priority uses, announced that

[17] ibid.33

[18] Many historians attribute the early adoption of Prior Appropriation as it applied to water use to the California Gold Fields. However the principle had a lively history in front of the U.S. Supreme Court twenty years before the discoveries at Sutter's Mill at the end of the 1840s. The industrialization of eastern rivers made the issue of when you first used water important in legal squabbles over how you used the water.

any use was appropriate that made the best use of the resource. It was only later, in the twentieth century that the difficulty in accurately defining "beneficial" became apparent. In the youthful days of the American industrial miracle, any use that kept the water from running down to the sea (and thereby being wasted) was beneficial.

It is important to pause and remind ourselves that what we see here is the further development of property rights. The right to pursue property is what the development of the United States has always been about. In the case of water, what began long ago as a usufruct right became, in the course of investment and growth, an actual property right. (Usufruct means: "The right to use and enjoy the profits and advantages of something belonging to another as long as the property is not damaged or altered in any way".[19]). This did not occur through creation of statute, or national policy, but a continuing process of common law, which responded over time to the changing economic conditions in the country. The idea of priority in the matter of water use did not spring newly born from the soil of the arid west.

For instance, one of the first historians to explore this subject, Walter Prescott Webb, made the case that the aridity of the west led to the imposition of a doctrine of water law that would allow creativity and development in the otherwise unlivable arid region. It was Webb's theory that the abrogation of common law and the Riparian Doctrine in the West was inevitable and rational. For Webb, this was a natural outgrowth of an economic and,

[19] The American Heritage® Dictionary of the English Language, Fourth Edition Copyright © 2004, 2000 by Houghton Mifflin Company

in essence, a cultural sea-change that swept America in the years when Andrew Jackson was president and the frontier was at Lake Erie. [20]

In fact, the triumph of Prior Appropriation in the West was not inevitable. Nor was it the result simply of aridity and consequent scarcity. (As Donald Pasani has noted, aridity did not lead to Prior Appropriation taking root in the Mexican communities of New Mexico.) The doctrine of appropriation became dominant because of culture and because of economics. It suited the times, and it suited the folks on the ground. As example it only became predominant in its supposed original home ground of the California gold fields after the initial wave of small claims had been absorbed into large industrial mining operations, and the need for off-site hydraulic works developed. [21] So we see the early transformation of the use of water from a right to share a resource passing by the upper gate on its way to the sea into a hard property right to which access becomes eventually defined by the time in which it was first accessed. Being first came to mean you had the prevailing right to it. And your neighbors had to stand in line. Until then, for the first year or two of the gold diggings, riparian laws worked just fine for the miners.

The Riparian Doctrine: Water and Property Rights

In those regions of the country where rainfall is abundant irrigation is not a requirement for successful agriculture. Most of the United States east of the 100th meridian longitude enjoys this situation. In this area, which includes the areas first settled by Europeans in

[20] Walter Prescott Webb. The Great Plains. P. 431-452.
[21] Pasani. P. 3

the seventeenth and eighteenth centuries, surface water, augmented by what fell from the sky was considered to be sufficient for the populations present. As rainfall was sufficient for agriculture, the use of the surface water in watercourses was primarily used for transportation and industry, which through the nineteenth century involved river powered millworks. [22] In the East access to and use of the resource was (and still is) governed by the Riparian Doctrine. This doctrine, which has roots in both civil and common law in England and France, is still a primarily American creation. [23] In the years following the American Revolution and as industry grew up along the rivers of New England, a body of common law accumulated regarding the use of the many streams and watercourses in the region. At the heart of later eighteenth century common law was the idea of "natural flow" which disallowed any diversion that would impact the "absolute" property right of individuals with land adjoining the river.

This began to change just after the end of the eighteenth century in America. Starting in 1805 with the decision in *Palmer v. Mulligan* in New York State, the (state) courts first articulated the new idea of Reasonable Use. Interference with the natural flow of the river, while allowable, "must be restrained within reasonable bounds so as not to deprive a man of the enjoyment of his property." [24] At a stroke, Judge Brockholst Livingston articulated a novel way in which commerce and the growing economy could proceed while incorporating the existing common law of the region. Reasonable Use put boundaries around the common law Riparian Doctrine that were new.

---

[22] Twenty inches of rain per year is considered "sufficient". Actually, there are plenty of places in the West that get twenty inches of rain a year. It just doesn't fall when agriculture requires it. Robert Dunbar. Forging New Rights In Western Waters. P. 60.
[23] David Getches. Water Law. P. 16
[24] Horowitz. P. 37

Palmer v. Mulligan represents the beginning of the courts acceptance of the idea that development for commercial purposes is a property right, and a right so strong as to trump the "absolute" property rights that denied development in an earlier time. Common law built steadily on this small foundation, until in *Tyler v. Wilkinson* (1827) (a Supreme Court decision) the concept of "natural flow" was rendered "obsolete" by affirming the rights of property owners above an existing facility to alter the flow for commercial reasons. This "diversion" was found to constitute a "reasonable use", and held that all riparian users on the stream had a right to a similar reasonable use of the resource.

By tying use, or what came to be referred to as "diversion", to a property right, these early decisions signaled an evolution and "transformation" (to use Horowitz's phrase) in the concept of private property in nineteenth century common law. It is critical to note that this transformation was taking place within the context of water law, which upon reflection is of no wonder. In a pre-industrial revolution America, water power was the key to economic development, much as it would be throughout the century and into the next as the new nation moved west.

Prior Appropriation: Custom and Law

Scholars have pointed out that so much of the law in the United States, especially as pertains to property law, is derived from the development of long traditions of English common law. Many have shown that during the nineteenth century, common law judges,

operating far from a national stage, functioned in as important a role as legislatures in sculpting social change. Legislatures, both at the state as well as the federal level were often reluctant to legislate. This is equally true for the role the courts played in furthering and facilitating economic development in those areas where states had not yet been formed. Here land titles were not yet perfected and settlers were literally squatters.

The changes that took place in the social conceptions of property through the medium of water law were no exception. Throughout the nineteenth century territorial magistrates were surely as “activist” as judges as in any period in American history. This, as we shall subsequently see, was largely due to the neglect paid to economic development in the West by the federal government. Local judges merely filled the void. This situation did not change until the twentieth century, when the federal government embarked on an orgy of administrative regulation. Common law derives from an edifice of case law built over time. For this reason common law is as much a cultural phenomenon as anything.

Its strength is that it ultimately derives from the society and the social customs it represents. Prior Appropriation, which grew out of a changing economic paradigm that required the application of scarce capital and risk, was the product of a changing society rather than a response to the climate of the admittedly arid west. It was derived from the progress of the common law (back East) as applied to a new country “out west”.

California

"Whiskey is for drinkin'. Water is for fightin'." Attributed to Mark Twain.

The institutionalization of the Doctrine of Prior Appropriation took place in the gold fields of California in response to the unusual circumstances that existed there following the discovery of gold in 1848. It is important to stress again that this was a cultural development, not invented in this time and place, but adapted from previous circumstances to an existing need.

As discussed earlier, the idea of priority as a part of a property right had been developing in America for some time. It was latent in many early decisions regarding use of resources, but up until the mid-nineteenth century lacked the added weight that a right to appropriation would give it. The particular circumstances of the California goldfields added that force of circumstance that gave Prior Appropriation its ultimate legal authority in the west. In many ways California was the right place for it to develop. A month following James Marshall's discovery of gold, Mexico passed California and much of the intermountain west to the United States in the Treaty of Guadeloupe Hidalgo. Mexico had provided all of the early water rights and land grants in this territory in accordance with a modified form of Spanish Civil Law, rather than through English common law, the practice and foundation of water law in the eastern part of the young United States.

Irrigation was not practiced as a matter of course in England, or for that matter in New England. As we have noted, evolutionary changes in water law in the first areas of the U.S. to be settled were industrial in nature, not agricultural. But irrigation was common in both Spain and Mexico, and had been for centuries. Mexico bequeathed, through their three hundred year ownership of California, fairly well developed water traditions and civil laws. These included several principles:

- The Mexican government owned the rivers and the streams but not the water. They held that no one owned the actual water.
- The government could confer a right to use water on anyone, riparian or not.
- The Mexican government in granting the right to water could stipulate the use. The right could be lost, unlike in the English common law. But there was no appropriative right to water. This "exclusivity" was to become a uniquely American feature.

As the mining first was pursued by individuals with small claims along the immediate river banks, the Riparian Doctrine served perfectly well, and was widely used. As the placer claims began to peter out, larger scale industrial mining took hold. These larger enterprises demanded prodigious amounts of water, often well away from the stream channel. Here the idea of "reasonable" use collapsed. The dual needs of miners now were to divert the flow from the stream so as to first get at the immediate river bottom, and then to move the water long distances away from the channel to be used for hydraulic operations in another drainage. These works took large amounts of capital, and required some guarantee that large investments wouldn't simply be pushed aside by some later

appropriator. The logical protection for these investments, especially in a period before there was much formal law in the area, was to guarantee a right of priority. Appropriating the water, based on "first in time, first in right" even to the extreme of using the channels total output became the working law.

Many historians have written of the inevitability of Prior Appropriation as if it were dictated by nature. Robert Dunbar has written, "Climate has been the determining factor in the development of western water law." [25] But although aridity had a hand in the eventual success in the principle of "first in time, first in right" it was not the reason the concept was first tried. When Prior Appropriation first emerged as a full fledged legal doctrine in the 1850s, there was very little agriculture and almost no irrigation in the west. The future of the West was seen at the time to lie in mining and in stock grazing. It was not until later, in the 1870s and 80s that agriculture even entered the arena. State and territorial legislatures and boosters originally saw the growth of the area in these "industrial" uses, and ignored agriculture. Farming was done "back east" where it rained in the summer.

A larger challenge lay in the whole unclear assignment regarding the ownership of private property. In essence, Prior Appropriation filled a gap left by unclear assignment of property rights prior to Statehood. Early development in the west, in California, was taking place in the public domain on federal lands. Where there was no land ownership by individuals there could obviously be no riparian rights. Property rights were, in a word, not absolute. In fact, they hardly existed. In 1850 it would be fifteen years before

[25] Dunbar. The Adaptability of Water Law to the Arid West. P. 57.

the federal government got around to defining the rights of "squatters' on the public lands, in the Homestead Act of 1862, the Mining Act of 1866 and the Desert Land Act in 1877. There was only one way to allocate anything in the mining areas, and that was by appropriation. "The earliest possession took priority, in both water and minerals." [26] Ultimately, it was the disposition of the public lands that drove the evolution of common law which was addressing the circumstances of ownership that prevailed on the non-perfected public lands.

"A Law of Manifest Equity"

Clesson S. Kinney, a legal scholar of the early 20th century, made significant and stern arguments for the viability and even inevitability of Prior Appropriation that became the intellectual firmament upon which a generation of scholars built the edifice of western water law scholarship. This is important as most of the history of twentieth-century natural resource law and water law and policy in particular rests on this intellectual framework. It was Kinney who noted somberly about the west:

> "The rain does not fall on all alike. In some places it falls in the season when it is not needed. It is collected in the river channels and makes it way to the sea. It is neither right nor reasonable that that those few who dwell by the river should have the exclusive use of the water which has been collected by drainage from all the catchment basin. The rain should be allowed to shed its blessing on all alike. This it cannot do under the common law, even as developed and expanded. This it can do under the arid-region doctrine of appropriation for beneficial use." [27]

Kinney deeply affected at least two generations of western scholars. In an age before environmental concerns his remarks about water making its way to the sea had great

[26] Pasani. P. 10
[27] Clesson Kinney, Law of Irrigation and Water Rights. Volume I, Section 588. As found in Webb, P. 440.

traction. But in truth the ideas of prior appropriation made great sense in the years when the west was developing. It was clear from the mid-nineteenth century that irrigation was going to be critical in allowing the predominately agrarian populations of America to settle west of the Mississippi River. Climate, as Robert Dunbar has written, was in fact the determining factor in the development of western water law, at least at this stage.

As the nation moved westward at the middle of the 19th century there was almost no experience with irrigation or with an environment where water was a scarce commodity. The country had land laws that functioned well, but like England there was little in the way of water law. The federal government owned the land, and made laws to dispose of it. Water was viewed as incidental to land, and there was little law directly involved with the use of water. When the nation crossed into the arid west, the relationship between land and water changed dramatically. In the east, the main value was in the land. In the west it was in the water. The land was essentially worthless without water. But the federal government never saw this. Instead of reserving all the water for general use by all, they allowed the water to be appropriated to the first and obvious need. The federal government failed to address water for decades, and, when they did, they quickly abrogated their rights in favor of the States. (The Mining Act of 1866, and Desert Land Act of 1877 accomplished this). [28]

The advantages of the appropriative right in an era of economic uncertainty and unperfected property rights were many. Not only was investment protected but so was the equity. The agriculturalists investment was secured by the knowledge that as long as he

[28] Webb. P. 449-452.

put the water to a "beneficial" use, the water would be there to use without diminishment by another appropriator. Of course this was always subject to a priority date, which inevitably was undemocratic and elitist, neither of which were exactly the goals of the American enterprise. But undeniably the means satisfied the times. Prior Appropriation succeeded in creating a "property right in water" with all the appurtenances and rights that accrue to property. Not only that, "the appropriation right provided the security that is desirable in a property right." [29] This is this institutions first and foremost advantage. This feature adheres to the principles of private property, so vital to the modern capitalist enterprise.

But there is another strong advantage in appropriation, one that potentially provides great flexibility in the operation of the law. At one time water was tightly tied to the land. This is no longer the case. State legislatures have, over time, allowed the sale and transfer of water rights away from the land. This allows Prior Appropriation schemes to address changing economic uses and development strategies. This feature, unavailable in the riparian world, allows great flexibility in how water is allocated to changing uses. This feature in fact may help prior appropriation to weather the legal and social storm now enveloping it across the changing west. For instance, in Idaho.

The Victory of Prior Appropriation

The institution of Prior Appropriation brought with it another more subtle change to the riparian doctrine that preceded it. The concept of "Reasonable Use" implied the intent to do no harm to others, and to share the resource in times of need. A reasonable use further

[29] Dunbar. Forging New Rights in Western Water. P. 209.

implied that the scale of this use could change through the years, growing and diminishing as needed. This right could not be eliminated or lost through non-use. The right to water was determined by one's proximity to it, and by the amount available for use. Prior Appropriation, on the other hand, was based on the concept of beneficial use, and the date of that use commencing. This has continued to be one of the most troubling aspect of this doctrine of water law. How much use is beneficial? What exactly is beneficial? What happens when the use changes? None of this is answered in appropriative schemes.

Originally, the ability to appropriate water depended on three things: the intent to apply water to a "beneficial" use, an actual "diversion", in the form of a dam, headgate or other semi-permanent structure, and application of water to some beneficial use. States, who manage this legal regime, have tried over many years to define "beneficial" with little success. Definitions have changed with the times and been redefined many times. One thing seems to have remained constant. Once in place, an appropriated right does not go away unless it is not used. (In Idaho this period is five years.) While the right can be lost (unlike riparian rights, which can not be lost as they depend only on proximity to the source) if not used, they rarely are. [30]

Without ever taking a lead in mandating water law on the public lands for which it had constitutional authority, the federal government acquiesced in and in fact "sanctioned" the priority system and the doctrine of prior appropriation in their land legislation of 1862, 1866 and 1877. (See above). Over time these laws had the effect of buttressing a

[30] Getches. P. 74-75.

system that placed great weight on order of ownership rather than stewardship of the resource. Until Congress abolished common law on federal land in the Desert Land Act of 1877, a dual system of riparian rights combined with an ability to separate water from the land prevailed in much of the west. It still does in some fashion in ten states in the region including California, for whom the doctrine is named. (The California Doctrine).[31] But the preeminence of Prior Appropriation remains to this day, and represents the way in which water rights are allocated.

But not everyone acquiesced in this system, or agreed with it. While it has become the rule for water in the West in the twentieth century, prior to 1900 many states fought prior appropriation. In Montana's territorial court, the jurist C.J. Wade noted in 1872, that if prior appropriation took hold in Montana, "long before one-tenth part of the tillable land in the Territory is subjected to cultivation the entire available water of the country will have been monopolized and owned by a few individuals…thereby repelling immigration thither." [32] Prior Appropriation was branded by California's first State Engineer, William Hammond Hall, as bad law. "To 'appropriate'", he wrote in 1889, "pre-supposes that the thing taken is without ownership, like a wild beast of the forest or plain; and it has been the curse of irrigation from time immemorial, that water has been treated like it was a beast – to be shot down and dragged out by the first brute that came in sight of it." Elwood Mead, the brilliant State Engineer of Wyoming during the last decades of the nineteenth century noted prior appropriation "ignores public interests in a resource upon which the enduring prosperity of the community must rest." But perhaps the most telling

[31] Gordon Bakken. Making Constitutional Law in the West. Pasani. To Reclaim a Divided West. P. 35
[32] Guice. P. 127. Pasani. ibid. P. 35.

analysis of the times came from Frederick J. Newell, the first director of the Reclamation Service. (The service was renamed the Bureau of Reclamation in 1923). He observed that the doctrine was only valuable during the first stages of development, during the "pioneer phase." Once settlement had taken place, "there does not seem to be any good reason why a certain individual, who perhaps may be the poorest (worst) farmer of the community, should always have ample water simply because the man from whom he purchased or inherited his farm happened to take out and apply water a few days or months before his neighbors did." This last remains one of the strongest arguments against a legal doctrine that has actually impeded rational development of water for over one hundred years. [33]

There were other objections to the developing juggernaut of Prior Appropriation as it gathered force. Some of these were philosophical. The legal scholar John Norton Pomeroy felt appropriation, which allowed water to cross other lands away from the source was an abridgment of property rights in land. Further, he wrote that "No legislation can be just or practicable, or can tend to the peace and prosperity of society, which attempts to violate and override natural laws and natural rights – the immutable truths which exist in the regular order of nature." [34]

The Civil War veteran and western explorer John Wesley Powell, who became the first Director of the Geological Survey in March, 1881, had a vision of the West that contradicted the growing ideas of unimpeded development of irrigated agriculture. As

[33] Pasani. To Reclaim a Divided West. P. 35-36
[34] John Norton Pomeroy. A Treatise on the Law of Water Rights. P. 329.

local and regional boosters demanded federal financial intervention to develop the rivers and drainages of the region, Powell insisted that water should adhere to the land. Further, he proposed a scheme of development that would be structured around hydrological realities, by watersheds, rather than political state boundaries. He understood implicitly that the West would be forever impeded by the lack of water, and should plan to accommodate to the natural order of the region. His vision, one driven by an understanding of the land itself, contradicted the industrial vision other, more powerful interests others had for the future of the West. [35] It was Powell who, in 1893 in Los Angeles at an irrigation conference, warned that the finite water of the West could barely support the irrigation then in existence, let alone a whole new list of projects, many of which came to fruition in the next century. For his heretical views, much of which had their roots in the ideas of a riparian use of water, he was firmly excommunicated from the reclamation movement. He resigned his post at the Survey in the following year.

Prior Appropriation had a further effect on the West that is only partly discussed in the historical literature and bears further study. Much of the West has always been public lands, managed by the federal government via the constitutional authority vested in the Property Clause. Since early in the nation's history the Congress has used the public lands to provide economic opportunity to Americans through lease, sale or outright grants. This has included mineral claims, rights of way, as well as homesteading grants.

The purpose of this activity was to promote prosperity and "freedom", in the building of self sufficiency. This has been, since Jefferson, a primary goal of the federal government.

[35] Webb. P. 421.

So much of the literature on the West is about individualism, democracy and independence. But Prior Appropriation favored one entity, usually a corporation or institution over the needs of a larger private constituency. When compared with the doctrine of riparian rights, Prior Appropriation is anti-democratic and antithetical to the supposed values of the American nation. Riparian law guaranteed equality of access for those along the watercourse and a shared allocation in good times and dry times. Use was "reasonable" in the context of the society in general, not "beneficial", a definition that has never been precise. Beneficial use, in fact, was the capitalist markets answer to the way to use water. Capitalism has always sought to commoditize nature. Any wealth-creating scheme is by definition in a community that prizes economic gain above all else as "beneficial." (We have already discussed the fact that water law was always driven by economic considerations first and foremost.) But is it always "reasonable"? This is the question we must consider in our times in light of our changing priorities.

Prior Appropriation played its valuable part in the settling of the West in the last half of the nineteenth century, by providing scarce and nervous capital a guarantee of at least priority, if not ultimate success. (That came later, in the 20th century, with massive federal subsidies.) But in the end it failed to achieve the goals its boosters saw for it. Economic disaster in the form of drought and blizzards in the late 1880s and in catastrophic Depression in the 1890s brought the privately funded era of prosperity that visited the West after the Civil War to an abrupt end. It wasn't until the dawning of the twentieth century and the advent of federal reclamation and financing that the region found its footing again. In the meantime, the "tyranny of prior appropriation" as Donald

Pasani has called it settled over the most important resource in the region, and came to affect the cultural and social development of the region for the next hundred years.

Chapter Three: Idaho

"Touch water (in the West) and you touch everything".

John Gunther, Inside U.S.A. (1947)

"Here we have Idaho" (From the State Song)

When we imagine the western part of the United States, that expansive territory beyond the 100th meridian, we think of free, open landscapes populated by yeoman farmers and business people making their way as rugged individuals. The West has always represented the promise that America embodied, that of the individual's opportunity to own a part of the world for themselves. The West has symbolized independence and freedom for its people since the early days of the nineteenth century.

Boosters of the West did their part in fabricating this vision over many years. This continued well into the twentieth century, long after the frontier was closed. Promotional brochures and land developers advertisements included images of tranquil and bucolic scenes depicting abundant farms carved from the "howling desert" through the application of irrigation. The message was unwaveringly the same, wherever in the West it was used. Water, brought to the land through irrigation schemes and projects, liberated the land and promoted independence and freedom for an American population trapped in the teeming cities of the East. Here in the West, thanks to the gift of Irrigation, was the garden in which democracy would grow and thrive.

But how true was this? Donald Worster has analyzed this in his work, Rivers of Empire. He notes the motivation behind the drive to rationalize the disorder of nature found on the prairies and deserts of the West and, through management and the application of water, to bring order and prosperity. But this imposition of control on the native landscape led not to the freeing of man and to the extension of democracy. It led instead to a more authoritarian system of managed resources controlled by a small group and run for the benefit of a few, usually the land developers. The promise of democratization and the vision of the independent life in a rural life in the West has largely been a myth. The industrial world that emerged in the twentieth century in the West, one that owes much of its foundation to the regimes surrounding the use of water, was urban and corporate. Donald Worster has noted picturesquely: "This American West can best be described as a modern hydraulic society".[36]

The settling of the Snake River basin was the real-life manifestation of the recurring tale of American westward expansion, the Garden Myth made real. In the American West, this Garden Myth combined with the dream of industrial agriculture to create a managed environment where the dream of freedom and national redemption could happen. The story involved the taming of wild nature by the heroic alliance of man and science. Together they would quell the arid landscape and realize the earliest and most persistent myths of the American civilization. In a sense this vision of the free working man and his family bringing life to the desert through irrigation was subverted by the privatization and commoditization of the single most important input to this world, water. In this way, the

[36] Worster. P. 7

Garden Myth was overtaken by the mechanistic, undemocratic hydraulic society Worster has described. [37]

Idaho is at the heart of both the history of water use in the West as well as the controversies about the future of water. Southern Idaho was, just over one hundred years ago, a largely empty desert split by the Snake River and dotted with black basalt outcroppings and sagebrush. The development of the region followed the pattern set by many of the arid states of the Rocky Mountain area. Mining came to the mountainous areas of the territory in the early 1860's following the discoveries of gold and silver, first near what is now Pierce, near Orofino Creek, a tributary of the Clearwater River, and shortly afterwards in the Boise Basin. (Idaho's first permanent white settlement dates to 1860.) Commerce followed quickly with businesses arriving to supply the mining areas. Farming and commercial agriculture didn't begin to make much headway until the last two decades of the nineteenth century.

Idaho was not a pioneer in the development of western water law. Idaho was originally organized out of the Oregon Territory. After 1859 when Oregon became a state, it became part of the Washington Territory. In the early years, through the 1860s, Idaho water law took shape under the influence of placer mining. Because of that, and because of what Idaho's miners had learned from the California experience of the previous decade, Idaho's approach to water rights mirrored the Golden State. As in California, appropriation was neither the first choice of settlers nor was it the only manner used for allocating water and rights to the streams. But as in California, it eventually stuck.

[37] Mark Fiege. P. 171-173.

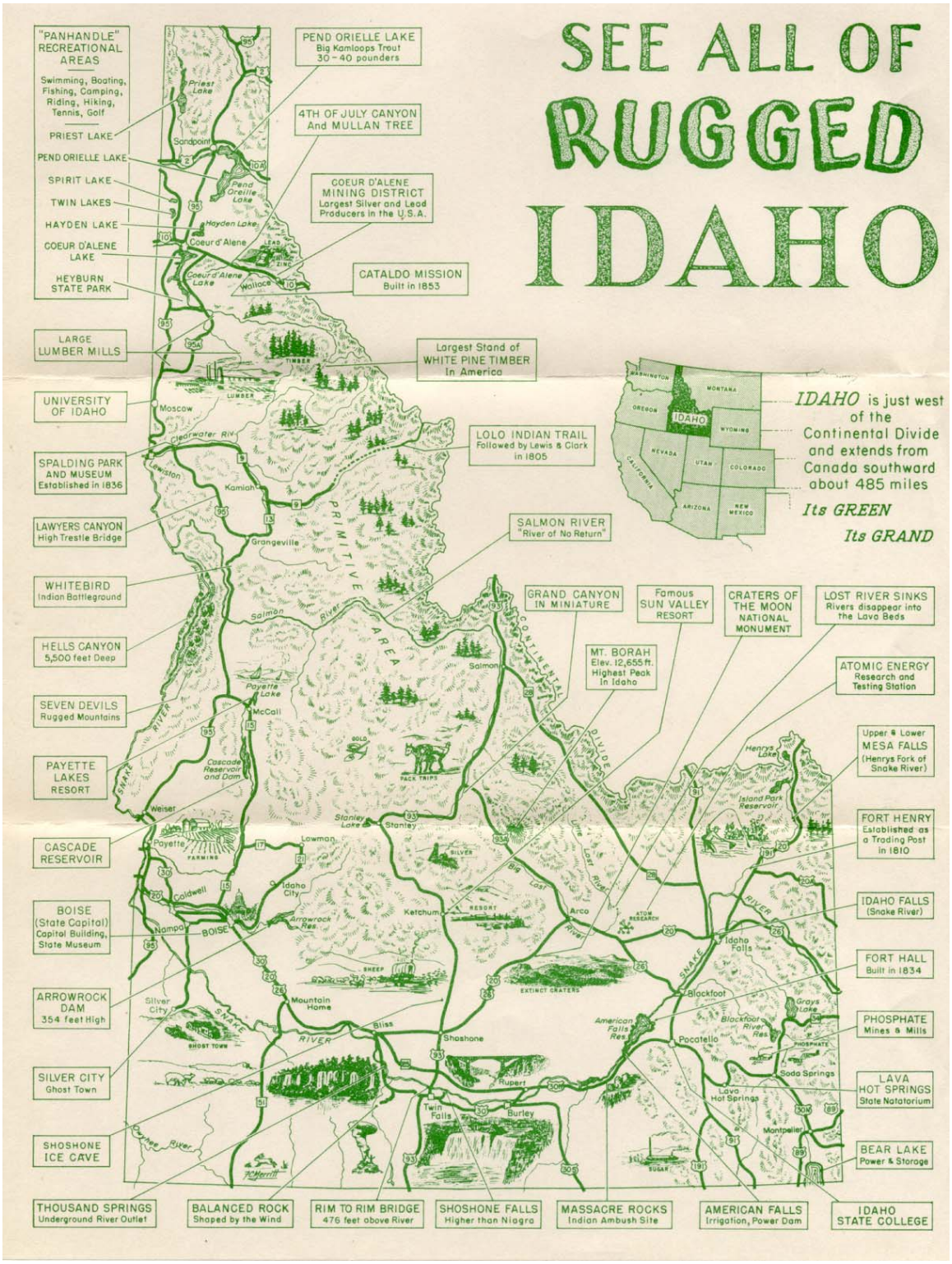


FIGURE 4: From a 1960's era promotional flyer advertising Idaho's grandeur and beauty. "Its green, it's grand!" The State's rivers appear prominently.

Land and water development began as permanent settlement took root below the mountain mines in the valleys of the Snake River basin. (The oldest recorded water right in the Upper Snake River Valley, the first area to be settled, was in 1874 by Orville Buck and George Heath. They claimed irrigation rights in Willow Creek near Idaho Falls. [38])

Idaho first restricted water use to land owners adjoining streams. This was clearly the Riparian Doctrine at work. Idaho adopted their first water law in 1881. At this point there were already several private water companies in the territory, notably in the western part of the territory in the Boise River basin near the city of Boise. The first of these, the Vallisco Water Company, was incorporated by the territorial legislature in 1864. [39]

When Idaho enacted its first water legislation in 1881, it provided for the election of watermasters and, although it did not specifically provide for the creation of water districts at this time, it did direct these watermasters to divide the available water according to "respective rights and necessities." When there was "not sufficient (water) to afford a full supply to those entitled or accustomed to use the same, according to the usage of the district, the water master (sic) and his deputies shall regulate the quantity to be used by each person, and the time at, and during which, each person may use the same." The law was clearly meant to share the water, by establishing some precedent in correlative, or riparian, rights. [40]

[38] Idaho Statesman. Article Published January 16, 2005.
[39] Idaho State Historical Society Reference Series #171
[40] Pasani To Reclaim a Divided West. P. 51

This approach to water law did not hold for long. In 1883 a decision at the Territorial Supreme Court upheld the rights of a prior appropriator [41] and in 1887 the territorial legislature included in the Revised Statutes the clause that "the right to the use of flowing water may be acquired by appropriation, and as between appropriations priority in time shall secure priority of right." [42] But the case for riparian rights, as in the arid states around it, was not quite dead in Idaho yet. In a dissent, Justice Charles H. Berry reiterated what had been on the mind of jurists in California, Wyoming and Montana as well as the other "dry" jurisdictions in the mountain west. He intoned that "a great majority of the cases relied on to establish this doctrine of absolute ownership and exclusive monopoly in streams do not relate to the use of water for agricultural purposes at all, but … relate to diversions or use for mining purposes only." For these reasons, and because it was impossible to forecast how much water an appropriator needed and might have surplus year to year, he asked "Is it reasonable to allow absolute and "unrestricted" ownership in water diverted… from a stream." This question was never adequately answered in any of the jurisdictions in the West where pure prior appropriation was adopted. In a paradigm of full allocation, this question is more pertinent today than ever before.

As people moved into the state and the population grew, and as the agricultural base expanded, a need to establish rights to use the waters of the many non-navigable streams in the basin became evident. The western experience up until this time, in the absence of formal patented land titles, was to hang up a sign and start digging. This mirrored the

[41] *Malad Valley Irrigating Co. v. Campbell.* 2 Idaho 411 (1883).
[42] Paul L. Murphy. "Early Irrigation in the Boise Valley"

earlier experience in the mining fields. It was simple to use this same method to "stake your claim" to water.

Water rights were perfected during this period by means of what is called "posted notice". With no formal permit process in place, a potential user of water merely "posted" notice at a head gate, fence line or gate indicating intent to divert water, and later recorded the notice at the county recorder's office. These water rights came to be known as Constitutional water rights, as they followed the norm established in the Idaho State Constitution, as opposed to later "permitted" rights (Administrative Rights) established by statute in 1971. All through this period of rapid development and population growth these rights proliferated, with farmers merely posting notice along a fence line and placing diversions haphazardly along the streams entering the Snake system. This was the change that took place in water use made during territorial days as western society moved from "reasonable use" and a democratic sharing of a fluctuating resource, step by step to the actuality of water as an "owned" commodity like land. Property rights were driving the community forward! This led in a short time to over-allocation of every watercourse entering the Snake River basin. By 1900, D.W. Ross, the State Engineer, noted that farmers along the Henry's Fork of the Snake (the North Fork) had appropriated under the current law 74,460 cubic feet per second of flow (cfs). This was thirty-five times the actual flow of the river! [43]

Posted notice encouraged antagonisms that flared from time to time into actual hostilities. An administrative alternative was called for. Idaho was still a territory at this time. (It did

[43] Fiege. P. 88

not become a state until 1890.) The water laws enacted in 1881 provided for a limited manner of recording of water rights in the territory. But even this simple method was virtually ignored. With a seeming abundance of available water, and little incentive to record either the claim itself or any accurate estimate of the quantity being used, water use escalated with no transaction records. This combined with several other factors (like drought) to bring about a water crisis in the upper basin early in the new century. (It was the upper basin, above Idaho Falls that was the area settled the earliest.) Changing crop patterns and increasing drought after 1899 brought about actual water shortages in 1901 and in 1902. Farmers in Idaho's eastern counties were switching from hay and grain to sugar beets which require water all summer rather than only in the early part of the season. In August, 1901 and again in 1902 the Snake actually went dry near Blackfoot, an unprecedented event.

This sequence of events showed the precarious situation prior appropriation placed the upper basin farming community in. As settlement had only begun after 1875 or 80 and hardly a generation had passed, everyone's priority date was practically identical. Furthermore, with no clear records, it was impossible to say who had the rights to the diminishing, or at least finite flow. Faced with water famine and a legal allocation system dependent on data that did not exist, local farmers sought the only solution, outside of range war, that they had available. In 1901 Rexburg Irrigation Company filed a lawsuit against the Teton Irrigation Company to formally sort out priority claims to the waters of the upper Snake Basin. (These ditches were in adjoining counties, upstream on the North

Fork from Rigby.) By the following year, dozens of smaller local irrigation companies had joined the lawsuit as well.

Rexburg v. Teton took ten years to get through the Idaho courts. The process was intended to sort out the actual workings of the priority process. "A judge collected testimony and other evidence necessary to establish an accurate chronological list of appropriations. With the information at hand, he determined as precisely as possible the date, amount, and quantity of each appropriation. He then issued the decree, and a watermaster physically distributed the stream among the claimants." [44]

The decree, passed down by Judge James M. Stevens in August, 1911 represented the first formal listing of priorities to water in the basin's history. It was not to be the last. In 1913 the Frost Decree extended the earlier decree (which adjudicated claims above Blackfoot) to the stretch of river between Blackfoot and Milner Dam, near Twin Falls. This was to be the last major adjudication prior to the Snake River Basin Adjudication that is the subject of this paper.

[44] Fiege. P. 91. But how much water was enough? As we have seen, subjective, "seat of the pants" claims are usually far beyond the actual needs of users, and are often radically beyond the capacity of the stream to carry them. Over years the USGS and other agencies have developed a general rule of thumb for the arid states of the Rocky Mountains of one cubic foot per second to irrigate 70 acres. Length of time to keep the water flowing is determined by the crop. (One cubic foot equals 7.48 gallons.) So in allocating water, a watermaster will likely allow an allocation of, say, .75 cubic feet per second (cfs) to irrigate 40 acres. Idaho Department of Water Resources (http://www.idwr.gov). Another more common index used in the world of irrigation measures actual flow. This involves miner's inches, rather than actual inches. A miner's inch equals 1.5 cubic feet of water per minute. A ditch 2 feet across and I foot deep carries 50 miners' inches (in one day) which equals approximately 650,000 gallons of water, or 2 acre feet. Of course this highly subjective measurement is subject to flow rates, head pressure, as well as other statistics. In Idaho, a miner's inch equals .020 cfs, or 1/50th of a cubic foot per second. Other states and provinces in Canada measure it differently. The subject and its history would fill a book in itself! http://stream.fs.fed.us/news/streamnt/jan97/jan97a2.htm.

At the same time as the courts were deliberating, much was accomplished in water allocation through cooperative associations directly among the irrigators themselves. In 1910, farmers along the South Fork of the Snake had formed the Farmers Protective Irrigation Association. (FPIA.) Intended originally by the South Fork irrigators to protect their own water, the FPIA evolved by stages into a more upper basin-wide organization, which had the power to develop agreements directly between irrigators. (This would later include the North Fork irrigators as well.) The outcome was an extra-legal cooperative venture that for years allowed disagreements over water to be worked out outside the legal system. Between 1919 and 1923, this concept of extending the borders of water agreements from small watersheds to basin-wide, led to the formation of the Committee of Nine. The group of nine men included three men from the North, or Henry's Fork, three from the South, or Main Fork (which flowed from Jackson) and three from the Minidoka, or Twin Falls region projects well downriver. This cooperative group remains powerful in Idaho water politics to this day. [45]

This evolution of cooperative water solutions outside of the judicial framework has a happily American ring to it. The idea of neighbors avoiding the deadly combination of shootings at the headgate and protracted and expensive legal battles gives us confidence in our institutions. What actually was created was a cozy community of water users that used these relationships to dominate Idaho law and politics for the next 80 years. Little

[45] Fiege. P. 96–104. The Committee of Nine has an interesting history. When the Jackson Lake Dam was completed in 1911 the stored water in it became the property of the irrigators near Twin Falls and Rupert, well downstream of the Idaho Falls region. In 1919 there was a severe drought. During this summer irrigators in the vicinity of Idaho Falls saw their water curtailed, their headgates shut even as there appeared to be plenty of water in the river. The State Engineer, following several field assessments decided it was impossible to accurately separate the "natural flow" from the stored water. To address this, the Committee of Nine was formed in 1919. Richard A. Slaughter. "Institutional History of the Snake River 1850-2004." P11.

happened during this period to establish a rational means for conservation and for recognizing values outside of the narrow interests of one constituency, the agricultural community. Other parties with their own interest in water use, whether industrial, municipal, tribal, recreational or environmental in the state had to wait on the sidelines for most of the twentieth century.

The Dams

The need for major watershed adjudications in the west over the past generation has revolved around the issues of over-allocation and over-use. One by one, the major rivers of the west have fallen into a condition where low flows and over use has degraded and diminished the rivers themselves, leaving various constituencies "high and dry". Over the past thirty years the environmental movement has attempted to address these issues in various ways, including judicially. In order to understand why this adjudication of the Snake River occurred when it did and in the way it did, it is important to survey the history and impact of increasing appropriations on the river over a short one hundred years. In a riparian system the adjudication process is mute. Water is shared among riparian users in a way that doesn't diminish the flow. The limit is understood, and the fact that there is a limit is also understood. Once water is allocated without limit to undefined "beneficial" uses, on a priority of use basis, there is no way short of a confrontation to parse it out. Prior Appropriation has led us, in our over-allocated world, to the courts.

While water rights law has followed a generally familiar western pattern in Idaho, the development of water sources has not. In much of the west, the national financial collapse of the 1890's so annihilated capital that it took the coming of federal reclamation after 1902 to put the region back on its feet. The result has been that in most of the big river basins of the West, mega-sized federal projects have led the way to development. In the course of that economic development, federal courts have had great (although not sole) influence in the process of the development of water rights.

Not so in Idaho. Locals have often complained that Idaho is often a "follower", but it is easy to see several times in the past century when this turned out to be fortunate for the Gem State. While the economic disaster of 1893 certainly curtailed growth in Idaho (the collapse of silver and lead prices caused the Coeur d'Alene mines to shut down) private capital and land development in the Snake River basin continued apace, as population boomed, doubling over the decade. The state was not as exposed to national trends and so missed the worst of the economic fallout of the times. When the federal government entered the era of big dams and water projects in the rest of the west after 1902, Idaho saw little of the activity. The advent of the federal reclamation era was characterized in Idaho by a hot competition between private and public capital in developing the state's resource.

The first major water projects built in Idaho were private ventures. Swan Falls, completed in 1901, was built by the Trade Dollar Consolidated Mining Company to supply power to the mines in Silver City. As it happened, the mine shut down before the dam was

completed. The Milner Dam near Twin Falls was built by the Twin Falls Land and Cattle Company and completed in 1905. Over the next four years over 400,000 acres were added to its irrigation scheme. (Both dams eventually became part of the Idaho Power system.) This was followed by a series of federal reclamation projects overseen by the Bureau of Reclamation: Minidoka Dam in 1908, Arrowrock Dam near Boise in 1915, Black Canyon in 1924, American Falls in 1927, Deadwood Dam in 1931, Cascade Dam in 1948, Anderson Ranch in 1950 and, at the far eastern end of the basin near Jackson, Palisade Dam in 1956. Idaho Power Company, consolidated from five smaller companies in 1915, continued to compete with the federal system by building their own system of 9 dams on the Snake and significant feeders which augmented the original dam at Swan Falls.

Following the economic depression of the 1930s and the war years that followed, the period after 1950 saw increasing competition between public and private water development. At the time the issue was simply private versus public hydroelectric power. No one yet saw water as a finite resource. Electric power, needed to fuel the rapid growth in northwest industry, was the issue. The president of Idaho Power at the time was a Midwesterner named C.J. Strike who had witnessed the rise of public power in South Dakota, and was determined to beat the “feds” in Idaho. With this in mind, and with the lure of profits from electric power generation in mind, the stage was set for the battle royal.

Hells Canyon

The scene of this war was the deepest canyon on North America, one of the deepest in the world. Hells Canyon, more than a mile deep at its deepest point was heaven-sent for large, high dams. The configuration of the canyon would allow the highest water to be accumulated, and the largest reservoirs. This was a period of strong private economic development. In 1950 Idaho Power made application to build the Oxbow Dam at the upper end (south end) of Hells Canyon, and to build four more dams at a later time in the canyon. This touched off a firestorm of local and national debate, in Boise and in Washington, D.C.

The controversy in Idaho had an odd twist that dated back to the 1920's. As we have noted earlier, the development of water resources in Idaho had always taken a somewhat different trajectory than in other states in the west. While federal reclamation had dominated in other watersheds, it was private capital that developed much of the Snake River's dams and reservoirs. The same was true for the irrigators. They were represented by private investment to a large degree, and had developed cooperative organizations to protect their rights against other development.

Irrigation has always been the primary consumptive use in the Snake River Basin. During the early 1920s, upper Snake basin irrigators had worried that downstream "non-consumptive" (or instream) water rights might someday limit economic (read irrigation) development in the eastern part of the state, in the upper basin. (A "non-consumptive water right" is one where the water remains in the river and is not removed for

consumptive uses, like agriculture. In Idaho non-consumptive uses include recreation, wildlife habitat and electric power generation. The Idaho Constitution had been amended in 1928 to read as follows: “Article XV, Section 3: The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes”. This created the very real sense of a competition for water between irrigators and the power company). This worry (involving competition between consumptive and non-consumptive uses of water) still existed, except by now the federal government had the same concerns. For this reason, and others (competition with the Federal agency, the Bureau of Reclamation, namely) the Idaho Power Company (known by its acronym, IPCO) application ran into trouble from the beginning. In order to secure the federal permit required for the construction, IPCO agreed to subordinate their water rights at Hells Canyon to upstream development. This meant that in low water years, Idaho Power would not press their water right at the expense of junior rights holders who might be pursuing consumptive uses of the water in the basin. A few years later, IPCO also agreed to subordinate their water rights at the new C.J. Strike Dam near Bruneau, between Mountain Home and Grandview. During these proceedings it was widely understood that in doing this, the company had subordinated their rights at Swan Falls as well as the company’s other nine dams upstream.

By 1967 Idaho Power had built three dams in Hells Canyon, along the Idaho-Oregon border; Brownlee in 1958, Oxbow in 1961 and Hells canyon in 1967. (Today they

account for over 47% of Idaho Powers electrical output, over 6,800,000 megawatt hours per year.)

Throughout the 1960s and 70s Idaho continued to grow and Idaho Power grew with it. In 1950 there were 588,000 people in Idaho, in 1960 there were 667,000, and by 1970 there were 713,000 residents. Irrigated acreage in the Snake River plain increased from 2,500,000 acres in 1948 to 3,700,000 acres in 1978. Yet even with the proliferation of active water rights there still was neither serious accounting of existing water rights nor any formal way of creating new rights or permits and accurately documenting them. (There had been no general adjudication of water rights since the Frost Decree in 1913.)

Finally, in 1971 the State began the practice of permitting use of surface water through an application and permit process, thus ending the practice of Constitutional water rights.. [46]

The Hells Canyon dams represented the last good sites on the Snake River for hydroelectric generation. Additional generation from the river depended on Idaho Power's ability to take advantage of more and more of the river's flow by exercising their water rights, which were, on the one hand, supported by Article XV of the Constitution but on the other hand subordinated to upstream agricultural interests. Pressure from population growth and commercial growth was on. Across the region utilities were looking at all kinds of alternatives for more generation. Electricity use was forecast to increase "forever" at 7% per year across the Northwest. These were the days of WPPSS (Washington Public Power Supply System and the extended plan to address forecast

[46] "Idaho Water Rights: A Primer." Idaho Department of Water Rights. (IDWR) 2001.

growth with nuclear power), and dreams of coal fired plants reaching across the west. Wall Street was drooling over the prospect of investment profits in the exploding northwest energy business.

Over the next decade this vision of rampant economic growth in Idaho ran head-on into the triple whammy of poor forecasting, new political alignments that included the environmental movement and the inflexibility of the existing hundred year old water rights regime. The way was open to create new political relationships and a new way of relating to resources as the country headed towards the twenty-first century.

But first, Idaho had some work to do.

Chapter Four: The Inevitable Dilemma: Over-allocation

"The Problem of the West is nothing less than the problem of American Development."

Frederick Jackson Turner, "The Problem of the West". (1896)

"It assumes that the establishment of titles to the snows on the mountains and the rains falling on the public land and the water collected in the lakes and the rivers, on the use of which the development of the state in a great measure depends, is a private matter. It ignores public interests in a resource upon which the enduring prosperity of the community must rest."

Elwood Mead, first State Engineer of Wyoming, speaking of the doctrine of Prior Appropriation.

In 1974 121,000 new irrigated acres were added to Idaho Power's electric system.[47] The growing dilemna for IPCO was that as the agricultural community continued to draw more water from the river, and demand more power to pump it farther and farther away from the river to new farm development, the power company needed to keep more water in the river to generate power. The continued pressure on the utility's rate base was driving the company towards alternative sources for power besides hydroelectric. With so much of the river already allocated and with demand for power rising, the company began to look for alternatives for generation. Early in the 70s, in anticipation of increasing electrical demand, the company purchased one third of a coal fired plant in Wyoming, the Jim Bridger Power Plant. This plant, while meeting the short term needs of the State, carried a very high cost to the rate payers. Electricity generated at Jim Bridger cost three times the overall hydro cost at IPCO.

[47] Pat Ford. "High Country News", Vol. 20, No. 17. September 12, 1988. P. 20.

In November, 1974, Idaho Power formally filed for a license to build a 1,000 MW coal fired plant near Boise, 26 miles away between the Union Pacific railway and the Snake River. The site was to be in the desert, near a spot called Orchard, where the railroad could be used to haul coal, and the river would supply water needed for generation. The plant, the first coal fired generation plant in Idaho, was to be called Pioneer.

The application ran into problems from the beginning. A nascent environmental movement, concerned about massive air pollution from the coal plant downwind of Boise, mobilized quickly and effectively. Oddly for a small western city, Boise has long been known for air pollution caused by mountain inversions that trap local air in the Treasure Valley with warm air aloft over the mountains north of the City. This is especially true in winter.

But as difficult as it sounds, environmental concerns were only the tip of the iceberg in this controversy. At the heart of the challenge of the coal plant and Idaho Power's vision of Idaho's commercial future was a bleaker reality. In this go-go era (the 1970s) of ever-expanding economic horizons (no one yet anticipated the bust of the1980s) few groups, rate payers or developers alike attempted to understand the math of economic development. In Idaho, still a "follower", agriculture and water were as predominant as they had been for a hundred years. In "ag", good times come with bad. In this world it took a farmer to see the fallacy in Idaho Power's calculations.

John Peavey of Carey was a State Senator in 1974, a “maverick” Republican with ideas of his own that did not always mesh with the established leadership. His family was one of the most important ranching families in the State. Peavey was a third generation sheep man from Blaine County, in the center of the State. Utilizing recent Sunshine legislation, Peavey began to look over Idaho Powers rate base data. It soon became clear to him that the end of the age of cheap hydro, and the coming of higher coal-induced electricity rates would be the death of the Idaho agricultural community. Cheap hydro power, and priority protected water were the touchstones of farming in Idaho. Almost all of the growth in Idaho’s agricultural base over the period since World War II had been totally dependent on cheap electricity to make it viable. Far from the streams and dependent on electric power to pump water uphill to the new farm units, any change to that equation would mean bankruptcy for many of Idaho’s newer farms. Idaho Power was asking for a license to build a massive new generating facility out on the desert to supply electricity to the growing industries, including Idaho agriculture, which would be strangled by the cost of that very growth.

Peavey saw that at the same time, more irrigation would mean less water in the river to make electricity at the Hells Canyon dams. This would lead to even more high priced electricity from coal. These rates would drive farmers, already operating marginally, out of business. Peavey’s calculations, based on the rural agricultural community of southern Idaho, confirmed what communities of a different makeup suffered in the 1980s across the northwest. As rates spiraled up, economic activity spiraled down, leaving fewer and fewer rate payers paying for unneeded plants. Since Idaho Power’s case for Pioneer

depended heavily on their demand forecast of 7% per year, the conflicting economic reality of built-in bankruptcy became an impossible sell for the company. The environmental degradation implied by the location of the plant just sealed the deal. When the popular governor, Cecil Andrus came out against the license application in March, 1975, the case was settled. The community (the three counties near Boise that would be directly affected by the bad air created by the plant) participated in an "advisory" vote in May, 1976, and 56% of them rejected the plant. In September the PUC formally rejected the plant in a decision based on environmental concerns and on the plants huge estimated cost and the project was dead. [48]

The Pioneer saga, as loud and angry as it had been, had a sequel that was far more significant to the future of Idaho and much of the west. Projections concerning the continuing escalation of power needs turned out to be highly exaggerated. In 1975 Idaho rejected a massive hit on the rate payers, but other states did not and they and numerous investors paid a steep price. But what was missed at the time in Idaho were the long range issues surrounding water. Even if conservation and efficiency might render the need for more and more power unnecessary, the demands on water would continue to escalate. Idaho chose in 1976 a course on power (conservation and rate base management) that was wise and conservative, and exercised not only precaution but took what has become at the end of the twentieth century a progressive road into the future. The same cannot be said for their approach to water use. The continued weakness of the appropriation paradigm, with no incentives for conservation, remained in place in the water management world in Idaho.

[48] Pat Ford. ibid. P. 19-22.

Peavey and his supporters had another contribution to make to Idaho, and maybe to western history. All along what had bothered the Senator most of all was the danger that increased development in the basin implied for the existing agricultural community. In order to more fully understand the issue of where the water in the river was being used he began to research Idaho water law and water rights. In the course of this he made an enormous discovery.

As we discussed previously, much of the development of water resources in the Snake River basin had been undertaken by private companies. The chief among these since 1915 was the Idaho Power Company. Their sole business was hydroelectric generation, for which the company utilized Idaho's constitutionally guaranteed water rights. This they had done since their founding under the terms of appropriative rights to water. During the 1920s, however, resident farmers in the upper basin began to fear the growth of hydro, and worried that downstream non-consumptive water rights could prevent the expansion of farming in their area at some future date. In 1928 these groups passed an amendment to the Idaho State Constitution that limited the ability of in-stream water rights to impact farming, specifically power uses. This amendment stated: "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes". [49] Following this logic, several water licenses granted by the state to the company for hydroelectric development used "subordination" language in them to formalize the fact that Idaho Power would never press their water rights at the expense of

[49] Article XV of the Idaho State Constitution, amended in 1928.

an upstream irrigator, even if it negatively impacted Idaho Power's ability to generate power. [50]

Contrary to what everyone in the State believed, Idaho Power had never actually subordinated their water right at Swan Falls, the oldest of their dams. (It was built before there was an Idaho Power company, as we have noted previously.) The company had agreed, in securing the agreement that allowed them to build the Hells Canyon dams in the 1950s and 60s, to guarantee that the needs of power generation would never trump upstream irrigators. This is what was referred to by subordination. But the power company had never actually subordinated the Swan Falls right, which dated to 1901. The water right was a huge one, for 8400 cubic feet per second (cfs). Idaho Power actually still had the senior, unencumbered (unsubordinated) right to this water. Over 70 years, subsequent irrigation diversions had lowered the flow at Swan Falls to 6000 cfs, which meant that 2400 cfs were being illegally used out on the river somewhere. In the world according to prior appropriation, Idaho Power had a big problem. The rights to this water belonged to their rate payers, not to junior rights farmers above Swan Falls.

A citizen's group filed a petition with the Idaho Public Utility Commission in August 1976, noting that as Idaho Power had failed for years to defend their priority water right, they should have the systems lost potential removed from their rate base and refunded to customers. This caused an uproar at Idaho Power and in the legislature. It so happened that this was one of the driest years on record in Idaho, and the river dropped during this summer to a point where the plant at Swan Falls was generating at two-thirds capacity.

[50] Costello, Patrick D. Kole, Patrick J. "Commentary on Swan Falls Resolution". P. 12.

The 32 member lawsuit claimed that failing to defend their water right over the years meant that IPCO had to buy expensive coal generated power from out of state costing ratepayers more money. If Idaho Power had protected its water right rates would have been lower. IPCO executives realized that in the event of a large settlement, their stockholders would hold them liable.

Idaho Power took immediate drastic action. First they got the Public Utility Commission to freeze all new electric hookups in southern Idaho. That stopped all new farm expansion. Second, the company sued the state to determine whether in fact they had actually subordinated their water right or not. There was enough uncertainty involved in the issue to warrant a probing lawsuit to test the theory. IPCO executives realized that the financial exposure to ratepayers and stockholders alike was so significant that it might bankrupt the company.

The IPCO suit against the State, which was the pivotal action in determining the actual water right that the company controlled, was filed at the same time that the legislature was acting on the States first water plan. The plan was meant to establish minimum flows at various points along the river to maintain water quality and the hydrological integrity of the basin. The plan set minimum stream flows at Murphy, near Swan Falls at 3300 cfs, which was considerably less than IPCO's potential water right of 8400 cfs. But there was little fear at the time of a collision, as the "conventional wisdom" in Idaho, with farmers and legislators alike, was that Idaho Power had subordinated all their water rights in the 1950s. In essence, the legal river still could function as a real river. Folks involved were

not surprised, then, when Judge Jesse Walters ruled in *Idaho Power v. Idaho* (104 Idaho 575, 661) that since Idaho Power had subordinated their water right at the end of their system at Hells Canyon Dam, they had subordinated the entire system. In effect, the company couldn't complain about the State Water Plan since the plan did not take away the company's assets, which the company had already signed away.

This of course was not the last word. It took awhile in coming, but it was worth the wait. The company appealed the district court ruling under Judge Walters and in 1982 the Supreme Court (Idaho) ruled unanimously that in fact that the license at Hells Canyon was only for that dam, and referred to the dam as "one complete project". Idaho Power did still control rights to 8400 cubic feet per second at Swan Falls. The state water plan, passed in 1978, was technically invalid. [51]

Once this happened the river immediately went into an over-allocated status. Suddenly hundreds of water rights issued since 1919 were at risk, rights currently watering over 200,000 acres, over 5% of all the irrigated farmland in the Snake River Basin. As the law for creating new water rights has changed to a permit process in 1971, a moratorium on new permits was extended to the entire basin east of Swan Falls, all of the upper river east of Boise. (This moratorium was in effect from November, 1982 until November, 1988, during which time permit applications were received but not acted on. The device of a moratorium has been used under the State Water Plan (which itself has been amended from time to time since 1978) several times, during periods of drought (1992-

[51] Randy Stapilus. The Snake River Basin Adjudication Reference. P. 49-52.

1993) and for administrative reasons (1996 to the present, for new consumptive uses between Lewiston and Milner Dam, which includes the region of Hells Canyon.) [52]

There was nothing left under the statutes, the state constitution, the rules of priority (not to mention angry ratepayers and stockholders breathing down their corporate neck) and the court's decision but for Idaho Power to sue the very customers that were making them a profitable concern. The river, by Idaho State law could not remain in its now over-allocated state, and as IPCO controlled the bulk of the water, as it had since 1915, it fell to the company to take action. [53]

The company did in fact file suit against 7500 individual water rights holders, primarily in the Magic Valley in and around Twin Falls. (this suit was in defense of the water rights identified at Swan Falls.) These water rights had a priority date mostly after 1915 and were the most junior in the basin. (The Snake River basin was developed first in the east, around Idaho Falls, then in the west near Boise, and only later, after 1905, in the middle basin between Burley and Hagerman/ King Hill.) The hero of most of the agricultural community for decades for their low hydro-electric rate structures, which included a declining rate structure based on heavier usage, Idaho Power now found themselves the enemy of the farming community across the upper basin. The danger to the agricultural sector in the state was huge.

---

[52] Karl J. Dreher. "Status of Water Allocation from Idaho's Snake River Water Basin". IDWR. 1997

[53] As a yardstick, and purely as that, consider the fact that on December 30, 2005, at midnight, in an excellent water year, the Snake was running at 9969 cfs below Swan Falls Dam. Although no one irrigates in December the comparison is useful. Subtract IPCO's theoretical 8400 cfs from the total and you have enough water left to irrigate about 150,000 acres at one time, or less than 5% of the basin. (See http://www.weather.gov/view for pertinent real time state flow data.)

And they owed it all to the inflexibility of a water rights paradigm created a hundred years before to rationalize a completely different economic challenge. The constitutionally mandated scheme of Prior Appropriation, with the further twist of constitutionally requiring the legislature to maintain flows for hydropower generation essentially guaranteed a day of reckoning. Now it had come, and the state and its citizens had hard choices to make. They could go forward to a new world that was uncertain and uncharted, at least in their minds, or they could depend on the courts to re-figure the system. In time they chose the latter, safer way. Soon it will become clear that this has only guaranteed that there will be another reckoning at a later date in the future.

Chapter Five: The Swan Falls Settlement

"To 'appropriate' pre-supposes that the thing taken is without ownership, like a wild beast of the forest or of the plain; and it has been the curse of irrigation from time immemorial, that water has been treated like it was a beast – to be shot down and dragged out by the first brute that came in sight of it." William Hammond Hall, the first State Engineer of California, 1889.

"There does not seem to be any good reason why a certain individual, who may perhaps be the poorest (worst) farmer of the community, should always have ample water simply because the man from whom he purchased or inherited his farm happened to take out and apply water a few days or months before his neighbors did." Frederick Haynes Newell, first Director of the Bureau of Reclamation. [54]

"The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied, except that the state may regulate and limit the use thereof for power purposes." Idaho State Constitution, Article XV, Section 3 as amended, 1928.

If Idaho's various constituencies weren't quite ready to convene a Constitutional Convention to reassess the whole construct of water rights law in their state, they were ready to do battle over what user group would dominate the water in the basin. In the early 1980s the agricultural community, which since the demise of the mining business in the years following World War II had been far and away the most powerful lobby in the state found themselves under extreme pressure from a host of challenges. World markets were putting downward pressure on the price of all farm commodities. Competition from rapidly expanding agricultural producers in developing countries was driving the prices farmers could get for their products lower and lower. Distribution costs driven by escalating fuel prices were eating into farmers profits at the other end. Now the life blood of their venture in Idaho, cheap hydro, was under pressure from none other than their supposed ally, Idaho Power Company. The combination of these pressures threatened to

[54] Pasani. P.36

undermine agriculture's traditional predominant political position in this historically rural and agricultural state.

The problem facing the State at this point was that industry, as represented by Idaho Power, was now in conflict with the traditional farming lobby over the resource they both needed to survive. Idaho Power needed the river to generate power for the agricultural community to use to pump water away from the river (a model abetted and driven by prior appropriation that implicitly encouraged out-of-river diversions). The farm community required irrigation to make the desert bloom! It already had been settled that IPCO was not going to be able to use some other means to create electric power, if for no other reason than pure economics. The marginal nature of Idaho farming meant that the growing of high value crops such as sugar beets required cheap inputs (read cheap power) if Idaho farmers were going to survive, especially in a rapidly globalizing marketplace. At this historical juncture (for Idaho) industry had now diverged from agriculture as they found themselves in competition for the same resource, water. Irrigators needed it delivered cheaply, and power producers needed it to make the power to deliver more water. The quandary presented by an over-allocated river could only be resolved by finding "new" water on the system.

But where was the water? Because there had never been a true accounting of the entire basin (and no partial accounting since 1913 the time of the Frost Decree, which adjudicated the natural flow between Blackfoot and Milner and completed the work begun in *Rexburg v. Teton* in 1911) there was no record of all the water rights extant in

the basin. More importantly, there was no record of how much water was appropriated, and actually being used. [55] There was clearly evidence of good flows in the river itself. Even at its historically lowest ebb, which came in the summer months of 1977, the river did not go completely dry at any location. (The Snake River, as discussed earlier, is actually three rivers. The upper river, which rises in the Jackson Hole area, ends for all intents at Milner Dam between Burley and Twin Falls. Two large canals remove much of the water from the river at this point, the Twin Falls and Northside canals. In very low water years the river can actually go dry below the dam.) But the legal implications of theoretical over-allocation froze users and regulators alike into their combative positions.

In order to determine whether in fact the water right at Swan Falls controlled by Idaho Power was subordinated or not, the company sued the State. The state Supreme Court decided in early 1983 that in fact as the dam had been built before 1928 and the agreement to build it had no express subordination language in it, the company's right still existed at its full level. Immediately the State water resources went to an over-appropriated status on the Snake River.

This was followed by a twenty-month siege of the legislature as one bill after another sought a way out of the logjam. Water developers and irrigators sought to pass legislation to subordinate all of Idaho Power's water rights where those rights had not been explicitly identified before. They felt they needed this assurance to protect future agricultural development. But this meant less water for hydro generation, and supporters

[55] "Key dates in the 169-year history of Idaho water development". Article in the Idaho Statesman. January 16, 2005.

of the power company fought back. Odd alliances abounded. Environmentalists and rate payers, fresh from the 70s battles over coal, found themselves allied with the power company in support of minimum stream flows and rate issues.

For decades previous to this controversy, irrigators and the power company had been allies in the strategy to dominate the use of the Snake River. Idaho Power used the water to generate cheap power and the agricultural community used cheap power to pump water up out of the river to their new fields. Other users, especially in-stream users including domestic, commercial, municipal and industrial were on the outside looking in. Suddenly, the battle line that formed when the reality of over-allocation was realized involved very different alliances. Now the controversy was over a limited and finite resource. Over the months in which the legislature agonized over a settlement, new lines became drawn between in-stream users (the power company, electrical consumers, and fish and wildlife proponents, including Native American groups) and consumptive users of water, especially irrigated agriculture. A new constituency was emerging.

The debate became more and more convoluted as the parties tried to find a way around existing Idaho statutes. At one point the Legislature passed a bill that was intended to create a contract between the State and Idaho Power that would protect the rights of 5,000 water users while skirting the subordination issue. Idaho Power pressed the deal as they did not want an agreement that affirmed subordination which would limit their ability to generate power from the river in future years, especially as irrigation grew into the next century. In the end, Governor John Evans vetoed this legislation, still hoping to achieve a

legislated settlement that would provide for subordination of the utility's right. Like all parties involved, he refused to accept the idea that a litigated settlement would be the best one for Idaho.

Near the end of the legislative session in 1984 it became clear that no agreement would be forthcoming. The Idaho House passed one version of a bill which was then rejected by the Senate. At this point the Governor offered to negotiate directly with Idaho Power to find a solution. The ground rules he requested revolved around the idea of minimum stream flow. If the power company would agree to maintain a minimum level in the river the State would undertake to manage it. The starting point for the negotiations would be the recently established minimum flows set by the March, 1976 State Water Plan. These flows were Milner Dam, 0 c.f.s., Murphy Gage (4 miles below Swan Falls), 3300 c.f.s., and Weiser (below the mouth of the Payette), 4500 c.f.s. [56]

The central issue for the power company was their concern that the State lacked the administrative structure to manage any agreement that might come out of a negotiated settlement. So the first task in the negotiations was to address the "institutional inadequacies" in the way the state managed water resources. There was no real understanding of who used water in the state, how much and under what authority. What was the range of existing water rights? So the first requirement was for a general adjudication of the entire Snake River basin to identify all the water rights on the river. Once this has been achieved the state could appoint a water master to manage all these rights.

[56] Costello and Kole. P. 14

A second task addressed the lack of adequate hydrological data to accurately predict the effects of further development on the river and the Snake River aquifer. Thirdly, the state had no clear plan for empowering the Department of Water Resources to implement any policy through a strong permitting policy. Correcting this became a major key to the settlement.

Once the state had agreed to implement this three-prong strategy (which required significant on-going expenditures for the state, including an estimated $28 million for the adjudication as well as perhaps $500,000 a year to gather and maintain hydrological data and management) the negotiations moved to a consideration of the quantification of Idaho Power's appropriated right. As agreed previously this was involved with a discussion of minimum stream flows.

This is an important point for the thesis of this study. Part of the premise behind Prior Appropriation is that water is a renewable resource meant to be used for commerce. The doctrine developed in the west around a paradigm of undocumented property rights and the need to move water from its originating basin. As agriculture spread after 1860 the ability to 'appropriate' water became identified with the right to 'appropriate' other public goods, like land, minerals and timber. The key is that water should be used. In Idaho, at the time of the first State Water Plan in 1976, there was considerable resistance to the idea of maintaining a "minimum flow" in the river. The Snake "would always be a 'working river', available for development even to the extent of totally drying it up

before it left the state." [57] The fact that the parties to a settlement over a very significant water rights case, precipitated by Prior Appropriation, could take on the language of riparianism in even a limited context, is significant.

The mathematics of the agreement were complicated enough for the parties to bring in several hydrology experts to work them out. The State Water Plan, as we've noted, set a minimum flow of 3300 c.f.s. at Murphy Gage, in the summer. The power company, whose goal was to keep their water right unsubordinated if possible, would look for a higher minimum if they went to court. What data did exist at this gaging station showed that the lowest level the river ever reached in actuality had been 4500 c.f.s. This would be the best the company could hope to prevail on in court. As the established minimum was 3300 c.f.s. (in the State Water Plan) the State offered to split the difference of 1200 c.f.s. with IPCO. Idaho Power would get an agreement that the State would use it's authority to protect the company's water right at Swan falls at 3900 c.f.s. and the remaining 600 c.f.s. would go into a "reserve" for "future development." The agreement was further complicated by Idaho Power's business model. IPCO is a "summer peaking" utility. Their biggest load is from irrigators pumping water in mid-summer. Utilities usually subsidize their peak load with low load activity in other times of the year. For Idaho Power, this means selling power to utilities out of the state for winter heating. To make sure Idaho Power would continue to benefit from this arrangement, the agreement included a minimum flow of 5600 c.f.s. in the winter months. [58]

[57] ibid. P.14
[58] Thomas Fullerton, Jr. and Richard L. Gardner. "Statistical Input to Water Policy Decisions: An Idaho Case Study"

Once the amount of water involved in the agreement was resolved, the parties turned to the matters that may have much more far-reaching implications for further considerations of water use in Idaho on the Snake River. The agreement acknowledged the finite nature of the water resource and sought to initiate planning processes for how it could be best utilized. It further acknowledged that these uses went beyond agricultural uses, largely to the growing municipal needs of Idaho. A block of water from the agreement was et aside to address these future needs. Finally the agreement took on the state constitutional provision that established the doctrine of Prior Appropriation in the state. The agreement absolutely recognized the validity of the power company's water right, which meant that at that point the waters of the Snake were "fully appropriated". Since the state constitution "guarantees only the right to the "unappropriated" waters of the state" it is likely that any further appropriations of water in Idaho will be challenged as unconstitutional.

Does this mean that Prior Appropriation is dead in Idaho? Does this mean that as we reach a place where all the water in watersheds is spoken for, "appropriated" as it were, development will cease? We are clearly entering a new world, full of uncertainty.

This negotiated agreement allowed the irrigating community to breathe a brief sigh of relief as the controversy, which over the intervening eight years had become far too complicated for a layman to understand, receded from the newspapers for awhile. The agreement between the parties was signed on October 25, 1984. It took awhile to get the wheels of the general stream adjudication rolling, and so it wasn't until June 17, 1987

that the Director of the Department of Water Resources filed a petition in the District Court of the Fifth Judicial District in Twin Falls to begin the Snake River Basin Adjudication. The petition proposed to adjudicate the Snake River Basin upstream from and including the Salmon River Basin. When the court issued its commencement order on November 19, 1987, it determined the Boise, Weiser, Payette and Lemhi Basins should also be included in the adjudication. In the end, the order mandated that the entire river downstream from the Salmon to Lewiston including the Clearwater River be included in the adjudication. This last order was to have far-reaching ramifications on the political life of Idaho.

Chapter Six: The Snake River Basin Adjudication

"I tell you gentlemen, you are piling up a heritage of conflict and litigation over water rights, as there is not sufficient water to supply these lands."

John Wesley Powell, Address to the International Irrigation Conference, 1893.[59]

The Swan Falls Agreement between The State of Idaho and Idaho Power Company was made because of the inability of the Idaho Legislature to craft a political solution agreeable to all the traditional parties. This inability was due to the lack of credibility that the entire system of water management in Idaho, which had evolved haphazardly over one hundred years, engendered in the growing community of water users in the State. The agreement left the entire water user community of the Snake River Basin in the middle. Unlike water adjudications in many states involving large, complex river basin agreements crafted over time, the Snake River Basin Adjudication was triggered by a catastrophic event, a small piece of data more or less left under the rug for thirty years that only came to light in the context of changing times and economic needs in the early 1980s. Once the fact of over-allocation became known, any agreement amongst the parties had to include a general re-quantifying of where the water was, how much there was, and who had the actual "rights" to use it.

It's important to say again that this huge, expensive, contentious problem only existed because of the legal paradigm in which water is "used", not only in Idaho but across the West. When water is allocated as a resource under a system that promotes efficiency, all will conserve it to meet the needs of the entire community. Once it becomes a property

[59] Pasani. To Reclaim a Divided West. P. 328

right, users view it as having a value in itself, rather than having correlative values related to what it can do. Water becomes another property right. A property right is measured in dollars, and takes on a mercantile existence that is not necessarily related to its intrinsic value. Water is controlled by the legal community, rather than by public service administrators employed by the public at large. This is entirely a function of its status as property. The danger in this approach is that once water reaches the point where it is over-allocated, the temptation is to correct that problem by allowing it to become a market good. At this point we have no idea how valuable water may be as a commodity.

Vast parts of the mountain west have been federal lands since the United States gained sovereignty over them. States' jurisdictions on federal lands have always been spotty at best, and repeated Supreme Court decisions over nearly two hundred years have supported the national government's rights not only to maintain this ownership but manage resources on federal lands as they see fit. Most recently, during the late 1970s and the 1980s the Sagebrush Rebellion failed to change much of this federal administrative control. However, as if in acknowledgment of its uniqueness as a resource and what should be its different legal status, water has been treated by the federal government as a State matter since the mid-nineteenth century. Since the Mining Act of 1866, Congress has repeatedly recognized and protected the primary role of western States in the allocation and administration of the use of water. [60]

[60] The Mining Act of 1866 had its origins in the plan of the Lincoln administration to pay off the Civil War debt to foreign bankers by nationalizing the western mineral deposits. This was the beginning of the legal basis for the development of water rights in the West (under Prior Appropriation, a State regime) as separate from the surface lands. While surface rights could be held by various owners, including the federal government, the minerals were, according to treaties whereby the federal government took title to these lands, separate. This was the basis for the Lincoln Administrations proposed plan in 1864. The Mining Act of 1866 was meant to clarify the manner in which the federal government would dispose of mineral rights.

The States have administered water rights since the Federal government indicated their preference for state responsibility over water in several legislative acts of the latter nineteenth century (such as the Desert Land Act of 1877). However, the courts have maintained that the federal government has various "reserved" rights to water on lands expressly set aside for various purposes by the federal government. This has always included Indian reservations. The government has maintained for over a hundred years that this right was a "reasonable" use and could not be abrogated by non-use. But states have continued to allocate water based on the doctrine of Prior Appropriation and the ideas of beneficial use all during the twentieth century. This dichotomy has maintained a level of legal tension in the west, where much of the land remains public.

In 1952 the Congress, after nearly 40 years under the court ruling in the Winters Decree[61] of 1908 (which formalized the concept of reserved rights for federally reserved water) passed the McCarran Amendment, included as part of a general Congressional appropriation. This legislation directed that henceforth federal agencies were required to submit to general stream and basin adjudications as a claimant to water rights under the

---

The Act specifically designated that the disposal of water, which would be used in mining, would be handled according to custom in the local jurisdictions. Custom was developed over the next twenty years through territorial case law, which proceeded to abrogate the long existing tradition of riparian common law.

[61] *Winters v. United States*, 207 U.S. 564 (1908), an Indian reservation water rights case at Fort Belknap along the Milk River in Montana. This was the first formal statement of federally reserved water rights as separate from Prior Appropriations. Since that time, court cases have extended the Winters Doctrine to other types of federal land withdrawals such as national parks, forests, and wildlife refuges. As federal law, the McCarran Amendment (43 U.S.C. 666), allows judicial adjudication of federal reserved water rights in state court. However, the adjudication must include all water rights in a basin, including all claimed federal reserved water rights and all state administered water rights, which are adjudicated simultaneously under existing state law.

local customs and laws then prevailing in the States. [62] The purpose of the amendment was specific. Without directly challenging *Winters* this legislation directed federal agencies to submit as parties to general river adjudications that might be ordered by states in their river basins. Subsequent Supreme Court and state court rulings in the years since have directed State courts to referee water rights allocations, thus seeming to affirm Congressional intent to uphold State jurisdiction over water. And in the west, the states have in some form or another all adopted the doctrine of appropriation and beneficial use in their Constitutions. But at the heart of the issue, the tension between appropriative and riparian values has not disappeared entirely.

The adjudication required as part of the Swan Falls Settlement began work as promised in Twin Falls on September 8, 1987 with a petition by the director of the Department of Water Resources, Keith Higgenson. On November 19, in its commencement order, the court made the adjudication truly historical and basin-wide by including the largest Snake tributaries in the case; the Boise, Weiser, Payette and Lemhi basins were to be adjudicated. At the same time the case was widened downstream to the Idaho border past Lewiston, including the Clearwater River Basin which has its source at the Continental Divide on the Montana Border between Idaho and Montana.

[62] Nathan Brooks. "Indian Reserved Water Rights: An Overview." January 12, 2004. CRS Report for Congress. "The McCarran Amendment and the Administration of Tribal Reserved Water Rights.".

Organization of the Snake River Basin Adjudication

For purposes of administration, Idaho is divided into water basins of varying size. There are 53 basins in the state. Forty one of these administrative "basins" are located within the Snake River Basin. (8 are in the Spokane River Basin in the north, and 4 are located in the south in the Bear River Basin that flows to Bear Lake near the Utah border.) Water rights were to be categorized by the court according the designated water basin. In order to field test the adjudication process, the court early on designated three test basins, which were adjudicated and reported out first. These were basin 34 (The Lost River basin between Mackay and Arco, including associated local streams); basin 36 (From Lake Walcott to Hagerman on the north side of the Snake River. This included Milner Dam, most of the North Side Canal and Thousand Springs, approximately 70 miles along the Snake River); and basin 57 (including Reynolds Creek, southwest of Murphy, just to the west of Swan Falls.) [63]

(Refer to Figure 4, a map of Idaho administrative water basins, which follows.)

[63] Stapilus. P. 7. See also Basin Reports at http://www.idwr.idaho.gov/water/srba/

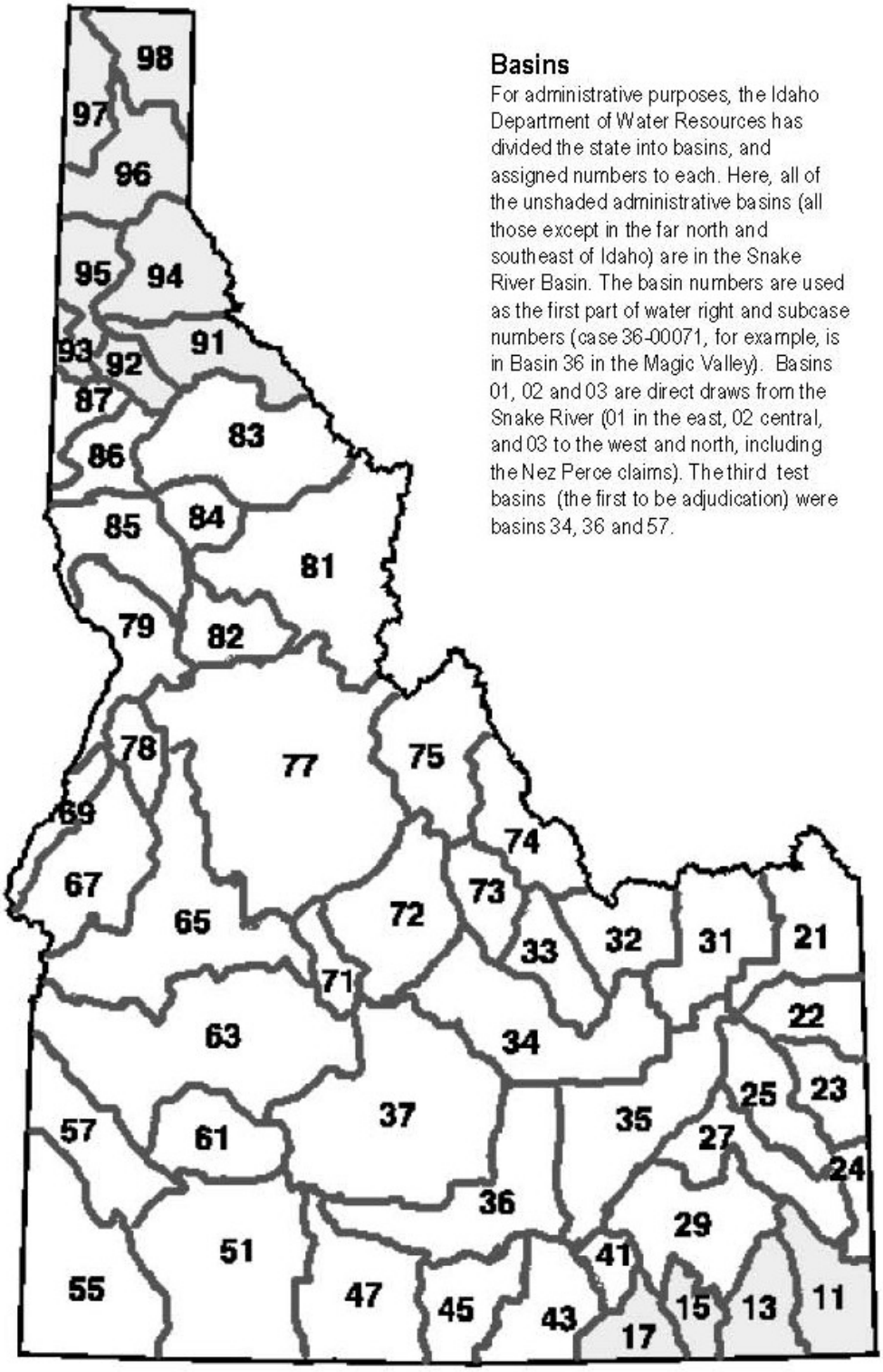


FIGURE 4: Idaho Administrative Water Basins. (Basin 11, 13, 15 and 17 are in the Bear River Watershed. 91 through 98 are in the Spokane River Watershed. (Reference, Randy Stapilus.)

The court process, which began in November, 1987 has continued until now, in early 2006. During the process there have been controversies arise at times between the Idaho Legislature and The Court. Federal directives through statute have clearly directed State courts to manage water adjudications and for a case of this magnitude and duration a special court was warranted. This did not keep legislators from feeling concern lest independently minded court officers, doing what they saw as their historical duty, upset the apple cart amongst their constituents. During year seven of the case, in 1994, a controversy arose between the Chief Justice of the Idaho Supreme Court, Charles McDevitt and State Senator Stan Hawkins, R-Idaho Falls, "a persistent SRBA critic."

Hawkins was concerned with the extreme complexity of the case and the unlikelihood of ever resolving all the claims involved. He also was a continuing critic of the accumulating costs of the adjudication. McDevitt used the occasion to remind the Legislature in general of the separation of powers doctrine and the need to allow the courts to work independently of the solons in state government. The principle was what really mattered here, with the legislature attempting to protect their often changing view of the law (which they of course make), and the courts demanding independence to rule in the context of existing law independent of political pressure. While accepting that "the legislature retain an overview and inquire into the progress of the SRBA," McDevitt explained to the Senator that if the legislature felt they had a role to play in direct court action, "then you and I part company." [64] McDevitt reminded the legislature that subjects such as the general components of a water right were legislative topics, but court

[64] Stapilus. P. 62.

procedures “are the province of the court.” By law, both federal and state, the basin adjudication was considered nothing more than a judicial “procedure”.

This was a main point in the proceedings. The SRBA court was not (perhaps regrettably from this writer’s point of view) attempting to make new law. It was merely sorting around documents to try to make the “paper” (or legal) river match the actual meandering stream making its way across over almost 800 miles in the State of Idaho.

What is a Water Right?

The principle was what really mattered here, with the legislature attempting to protect their often changing view of the law (which they of course make), while the courts demanded independence to rule in the context of existing law independent of political pressure. The principle was what really mattered here, with the legislature attempting to protect their often changing view of the law (which they of course make), while the courts demanded independence to rule in the context of existing law independent of political pressure.

The argument between the legislature and the court involved the idea of partial forfeiture, or losing part of a water right if the beneficial use changes. It grew out of an earlier case in Idaho, in Owyhee County which was covered in a 1932 decree, *New International Mortgage Bank v. Idaho Power Co.* In this decision the scope of a water right was detailed without specifically explaining how amounts, type of use and specific

consumptive issues should be described. In making proposals for water rights in this basin (basin 36) in 1996, specifically for a group of 24 irrigators and aquaculture farmers (fish hatcheries) near Hagerman, the Director of the Idaho Department of Water Resources (IDWR) proposed reducing their right (the amount of the right) based on the fact that the users were not using what they had used historically. This, to the IDWR represented "partial forfeiture" under the statute. The claimants appealed this proposal by the IDWR to that effect and the Court ruled, on April 26, 1996 that in fact 42-222 never "contemplated" this use and in fact partial forfeiture was not yet "a legal doctrine" in Idaho law. At this point, seeing the widespread impact on the adjudication of litigation stretching into the next century, and the problems that would arise if the department was unable to reduce water rights short of abrogating them, the IDWR switched tactics and moved to reduce water rights based solely on beneficial use.

At this point the Special Master decreed in the claimants favor, by noting the " 'issues concerned whether elements of a previously decreed water right may be reduced based on beneficial use where there is no evidence of forfeiture, abandonment, adverse possession or estoppel.' Special Master Fritz Haemmerle said the rights could not be reduced for any of those reasons. He noted that 'the state and claimants disagree as to whether a change in beneficial use or better evidence of beneficial use, by itself, is a basis to reduce an established or vested water right. The most widely accepted rule is that once a water right is vested, the user may use or all some of the water within the appropriation.'" [65] In other

[65] Stapilus. P. 21. The decision went on to say, "The claimants filed motions for summary judgment in all twenty-four subcases, arguing, inter alia, that the *New International* decree determined the "extent of beneficial use as to the original appropriation" and that res judicata and collateral estoppel prevented

words, the Beneficial Use Doctrine had real limits to its enforceability. Once you had a water right, you always had it. How you used the water had nothing to do with it.

This had to be a real blow to any party seeking a fresh look at the whole world of water rights in Idaho from this case. In truth the adjudication was never meant to be anything else than a paper shuffle, and a way to build a newer and more accurate database. Judge McDevitt made that clear in his discussions with the legislature. But this exchange over forfeiture must have made it plain that "under Idaho law" prior appropriation was inviolate. If the state had any intention of reviewing how Idaho would proceed in the next century it would need to approach the issue in the legislature under another banner.

Conservation Groups and Environmental Issues

Rejection of the Public Trust Doctrine in the SRBA.

One of the risks of the SRBA case imposed on the water users community in Idaho had always been that, once joined, many completely unanticipated situations may arise. That is, once the genie was out of the bottle it might no longer be possible to put him back in. 70 years of water rights litigation, legislation and more litigation at both the federal as well as state level had brought many new players to the edge of the circle. Here we are speaking primarily of environmental/ conservation groups as well as Native American tribes, but during this time there had also been a growing movement within the property rights community in Idaho. Sportsmen also wanted a place in the case. All of these

---

finding any lesser amount of water than was contained in the decree." In other words, this court can say no more on the subject.

players clamoring to find a place at the table saw the joining of the Snake River adjudication as their opportunity.

Since the early 1970s Idaho had seen a continuously coalescing and strengthening environmental movement. With Idaho's mix of Rocky Mountain splendor and history of extractive and exploitive industry this came as no surprise. One of these groups was the Idaho Conservation League. Founded in 1973, the League has been one of several local conservation groups to take an active interest in the adjudication from the beginning. In fact, the adjudication was a direct outcome of the Swan Falls agreement in 1984, which itself was a byproduct of the fight in the 1970s over the Idaho Power Pioneer Coal Plant. Linking environmentalism to the SRBA was inevitable, and although legislature and courts alike seemed determined to ignore the dawning of a new day in Idaho, the growing concern for water and the rivers health was not going to be denied a place in the negotiations.

From the beginning of the SRBA, Environmental groups tried repeatedly to gain standing in the court, eventually to no avail. The court was strict throughout the proceedings in refusing to allow parties who did not have actual water rights claims to gain standing in the adjudication. The presiding judge (up until 1998), Daniel Hurlbutt, rejected a claim that several conservation groups be given intervener status as early as spring, 1993. At this time he rejected an attorney from Ketchum who claimed to represent three Idaho conservation groups as well as the salmon and the river itself. The attorney argued that intervention and standing were two distinct issues.

The argument over this issue eventually led to an attempt by the Environmental groups to bring consideration of the Public Trust Doctrine into the SRBA court. The State argued that the legislature was the more appropriate venue for argument over this doctrine, and the judge agreed at this point, early in1993, to defer a decision on intervener status for later in the process.

The subject of water conservation as a goal of future Idaho water policy, both as it related to the SRBA and to Idaho water laws, came up early. Environmental groups attempted to intervene in the case for the first time in November, 1992. [66] Farmers in the middle basin, especially in the Hagerman area where water use is at least partially industrial (fish farming) feared that conservation efforts could leave their use of water constricted at a later date. This has become, in the context of a Prior Appropriation regime, a big worry. [67]Water is money, and as it is a property right, net worth accrues to water rights. If a user cuts their appropriation at one time, can they reclaim it for a different use at a later date? In an environment governed by the Prior Appropriation Doctrine the answer is clearly no. Then how, one might ask, can this doctrine lead us to water conservation over time? Legislators have been in turmoil over that one for some time in the State, and as long as the doctrine of Prior Appropriation is used, they will remain so.

[66] Stapilus. P. 189.
[67] This is a reference to the ambiguities in the concept of forfeiture. Technically if water is not put to a beneficial use for five years (in Idaho) it reverts to the State and can be appropriated to another use. In fact this rarely happens. The threat always remains.

On May 3, 1993 Conservation groups in the State, taking a different legal tack, filed objections to four separate water rights claims in the Hagerman area. The objections, part of the regular SRBA process, were filed in the name of the Idaho Conservation League, Idaho Rivers United, the Idaho Wildlife Federation and the Northwest Resource Information Center. Conservation groups had decided to use the only strategy available to them, to challenge individual water rights on a case by case basis, in order that water uses other than agricultural, municipal and industrial get noticed and allowed for. Marti Bridges of Idaho Rivers United said "We want to make sure that Idaho's rivers and stream have enough water for fish, wildlife, water quality and recreation and not just for traditional uses of irrigation, stockwater and hydropower generation." [68] It was noted that Idaho water rights are allocated for beneficial uses, but that the Idaho Supreme Court has ruled that the Public Trust Doctrine takes precedence over existing water rights. (ref?)

This was the wedge environmental groups sought to drive into the SRBA that they never quite succeeded in setting. Water rights are for specific beneficial uses. Boating, fishing and wildlife are "reasonable" uses, and hard to define outside of the strict confines of the law in the West and in Idaho. That's why there is a Public Trust Doctrine to begin with, to protect those things that are important to the public. The courts recognize this, but Prior Appropriation does not.

In May of 1994, Conservation groups got their highest level hearing at the Idaho Supreme Court. The lawyers for the opposing side argued vehemently that the Public Trust Doctrine did not enter into a water rights case unless the plaintiffs could show a

[68] Stapilus. P. 187.

claim and injury. One of the defendant attorneys decried “this is the wrong case, brought to the wrong court by the wrong parties.” One of the Justices asked if this attorney could tell him what the “right case, the right court, and the right parties” might be. The answer was that by opening a door in the adjudication the court had no way of knowing what might occur. This was of course precisely the problem.

For reasons that seemed obvious at the time, attorneys for nearly all the interested parties argued strenuously against allowing the Public Trust Doctrine into the adjudication, and against allowing conservation groups intervener status or any other status. The mere mention of these issues exposed all water rights in the state to reduction in a wildly undefined way, as the court sought to decide how much water rafters and boaters needed and were entitled to. But the subject would surface again, in a more measurable manner; in how much water fish need, fish protected under the Endangered Species Act.

The Supreme Court of Idaho voted in a split decision, 3 to 2, to disallow intervention by these conservation groups in the adjudication. But the majority opinion went out of its way to separate the adjudication from the Public Trust Doctrine. “It (the Public Trust Doctrine) has never been applied in the context of water appropriation by case law or statute. The public trust doctrine does not create an element of a water right to be determined by adjudication.” [69]

This was, however, not the last time these groups would seek to intervene in the case. The fact that the decision was so close and that the two separate minority opinions both

[69] Stapilus. P. 191.

agreed that the Public Trust Doctrine had been applied in water cases in the past gave the Conservation groups heart. The groups asked for rehearing, and it was granted. The attorneys for the Land Trust asked whether the adjudication would be simply a "toting up" of water rights or whether it would examine "issues" in its consideration of water rights. Using the Public Trust Doctrine as a leg to stand on, the attorneys pressed the State to do more in the adjudication than merely count up water rights. Ultimately this argument, which took the court deep into 1995, revolved around who had an ownership right. The State and the IDWR prevailed on the principle that although the public had an interest in the use of the river and the water, they did not have an "ownership" of a right. And the adjudication was clearly, in the mind of the legislature, about water rights and property, not about the public interest.

By November of 1995 Idaho's main conservation groups had been barred from the adjudication. The "statutorily controlled adjudication" as attorneys from Elam & Burke put it preempted the Idaho public from using the Snake River Basin Adjudication to revisit the entire hundred year history of water rights and the doctrine of Prior Appropriation. [70]

[70] Stapilus. P. 194.

Chapter Seven: Native American Water Rights Claims and Subsequent Agreement

"But here they come; with the most audacious, blatant water grab that…I couldn't have even imagined that it would be this bad." Retired U.S. Congresswomen Helen Chenoweth- Hage.

Since long before statehood Idaho has had a large and important Native American community. Throughout the twentieth century, the Shoshone-Bannock of the Fort Hall Reservation in southwest Idaho, and the Nez Perce tribe of the Lewiston-Lapwai area in the north of the state have been mainstays in Idaho political life. However, their previous involvement in the subject of Idaho water rights has less to do with their Idaho heritage than their unique relationship with the nation as a whole and their involvement with the federal government. The Nez Perce, along with many tribes of the Northwest made treaty in 1855 at Walla Walla with the United States through the offices of then-governor of the Washington Territory, Issac Stevens. These treaties resulted in the tribes involved agreeing for the most part to settle on federally allocated reservations in the region. In return the federal government agreed to maintain certain rights, privileges and guarantees.

At the same time, the tribes affected exchanged large tracts of land for certain guarantees. In some cases these guarantees were more implicit than explicit, but they certainly included the right to water, often large amounts of it. The treaties were often slip-shod affairs, written in haste and executed between a government in a hurry and by peoples

with very different cultures, languages and understanding of the niceties of private property. As the years went by and the new century began it became apparent that these treaties failed to adequately describe reality on the ground. (Ground which was often arid.) In agreeing to trade vast tracts of land for smaller reserves in return for basic necessities and security, the two sides failed to mention the fact that if the new denizens of the reservations, the "Indians" were meant to leave their previous nomadic life and farm, they would also need water. Unfortunately when this began to become apparent, all the local water had already been turned into ditches by the settler community through the auspices of Prior Appropriation, which, as we have seen, by 1900 was dominant throughout the West.

Treaties with the tribes of the northwest were, it turned out, exactly that; treaties. In the early nineteenth century, when the nation was small and struggling, deals with Native peoples were agreements with powerful, sovereign peoples. In a series of early Supreme Court rulings on these treaties, and the rights of the signatories, the court established the nation's relationship with Native Americans. The precepts that came to govern the government's relationship to "Indians" were embodied in "John Marshal's Trilogy", opinions written in the 1830s. [71] What was accomplished in case law here and later, was the intertwining of sovereign status and "protection" of that status through the offices of federal treaty-making.[72] When Isaac Stevens made treaty with the indigenous peoples of

[71] (*Johnson v. McIntosh*, 21 U.S. ; *Cherokee Nation v. Georgia*, 30 U.S.; *Worcester v. Georgia*, 31 U.S Peter d'Errico, Legal Studies Department, University of Massachusetts/Amherst. "John Marshall: Indian Lover?" *Journal of the West*, Vol. 39 No. 3 (Summer 2000).

[72] Tribes were recognized in some of the earliest judicial findings in our country's history. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 1-2 (1831) noted: "The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war; of being responsible in their political character for any violation of their engagements, or for any aggression

the Northwest and the Columbia Basin twenty five years after Marshal's rulings, he was merely following in the old jurists footsteps. Fifty years after Stevens, along the Columbia River in the case of *United States v. Winans*, [73] or shortly afterwards in Montana along the Milk River in the landmark case *Winters v. U. S.* [74], the federal government affirmed this treaty-based relationship. In acknowledgement of the institutional weight of Prior Appropriation by the early 20th century, the U.S. attorney for the Gros Ventre and Assiniboine Indians at Fort Belknap, Montana, Carl Rasch, insisted on a fall back position that dated the Milk River water right to 1888, the date of the Fort Belknap treaty while at the same time establishing the principle of Reserved Water Rights at the middle of the Milk River. [75]

On March 25, 1993, when the SRBA was less than six years old and before any basin surveys had been nearly completed, the Department of Justice, under a restraining order of the District Court of Washington, D.C., filed instream flow claims for the Shoshone-Bannock and Nez Perce Tribes of Idaho. [76]

The Shoshone-Bannock claims in the upper basin of the river affected several water basins, including the Lost River in Basin 34, but had been largely resolved through a general water agreement in 1990 at Fort Hall and through the exclusion of their main

---

committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee Nation as a state; and the courts are bound by those acts." Gudgell, Moore, and Whiting. P.6

[73] John Shurts. P. 56-60. *United States v. Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905).

[74] Ibid. *Winters v. U. S*., 207 U.S. 564 (1908)

[75] John Shurts. P. 19-21.

[76] The legal team included the Department of Justice, Department of Interior, the Bureau of Indian Affairs, as well as extensive support by attorneys from the Department of Justice Solicitors office, the Nez Perce Tribe and the Native American Rights Fund. Gudgell, Moore, and Whiting. P. 10.

antagonist, the Fort Hall Water Users Association as a party to the adjudication. (This was another general issue throughout the entire state – gaining standing in the case required having a direct water right at stake. The enabling legislation for the SRBA written in 1985 had allowed "parties" to take part in the case, but subsequent rulings in the SRBA court denied this.) In 1998 the Users Association went to court, claiming standing in the adjudication. They based their participation on having purchased water rights in 1891. (The group was eventually denied standing based on the fact that they were represented through their water district.)[77]

The Nez Perce claim had far more significant implications. The Tribe filed over 1000 individual water rights claims, for waters in the Snake River as well as for creeks and springs in the lower basin below Hells Canyon, on the Oregon as well as Idaho side of the river. They also had significant claims on the Clearwater River. How significant they were and how the local political minds viewed them can be judged by this remark, made by Boise attorney Don Olowinski: "As to the significance of the claims by the United States and the Tribe, there can be no doubt. The Tribal in-stream flow claims in the main stem of the Snake River essentially ask for all the water in the river as of the year 1855. If granted, the Tribal claims could eliminate much of southern Idaho civilization." [78]

The scope of the Nez Perce claims made for a large water rights case in itself. Brought to court within the scope of the SRBA, they had the effect of steering the adjudication off into a whole new case, fraught with the specter of interminable litigation far into the

[77] Stapilus. P. 196-198.
[78] Stapilus. P. 216

future. The Nez Perce brought forward three general classes of claims in the adjudication. First, the tribe claimed instream flows to about 1100 creeks and streams throughout what they termed "aboriginal" territory, based on the tribe's treaty rights from the 1855 and 1863 agreements with the government to "take fish at all usual and accustomed places". (In 1905 *Winans* had upheld the validity of this language.) The treaty area encompassed most of the Salmon River basin in central Idaho (This area can be found on the Idaho Water Basin map, primarily portions of basins 81, 77 and 72.) [79]Second, the claims included about 1800 springs, on federal, state and private lands. These rights were referenced to the treaty of 1863, which gave the tribes' rights to access "springs and fountains" in the land they ceded in that treaty, approximately 7 million acres. This area included all of central Idaho and much of Easter Oregon, from the Spokane River in the north to Willow Creek south of the Weiser River in the south, and from the Continental Divide at what is now the Montana border in the east to the Grande Ronde and lower Palouse country in the west. Finally, the tribe claimed their "Winters" rights to consumptive water on the reservation. These included domestic, agricultural, commercial, municipal, industrial and cultural uses. The claims covered all surface sources on the 1863 reservation and ultimately included all groundwater sources as well.

These claims were so huge, so all-encompassing (the Tribe claimed treaty rights to nearly the entire flow of the Snake River as well as many tributaries, springs and "fountains")

[79] The aboriginal territory, on the other hand, is quite different. Although the tribe specifically relinquished rights to land sold to the U.S. from the aboriginal territory, they did not anywhere in the treaties relinquish their usufructuary rights to this territory. This area, approximately 14 million acres at one time, included northwest Idaho, northeast Oregon, and southeast Washington. It ran from the Blue Mountains in the west to the Bitterroots in the east, and encompassed most of the Lower Snake River Basin. Gudgell, Moore, and Whiting. P. 18-19.

that it was bound to draw opponents throughout the state. These included state government, irrigator groups, farm groups, and many property owners throughout the Snake River Basin, especially in the lower basin. The threat to the existing state regime of water rights and to individual property rights was enormous. There were thousands of objectors to the initial claims. [80] It was widely expected throughout the period of the Nez Perce claim negotiations which lasted in stages from the end of 1993 until the agreement was signed in 2004, that the case would be litigated with many parties involved. The intense uncertainty on both sides of the case eventually brought about a settlement.

Negotiations between the affected parties to these claims went on for almost four years, from late 1993 to spring, 1997. It was not possible to negotiate a settlement. By 1997 the parties began preparing for litigation that everyone knew, once joined could last for decades. Preparation for it was agreed would take at least three years, as it would take several years to gather fish run data in the affected streams to understand the effects of various flow levels on habitat and environmental issues, key to the instream flow portion of the claims issue. (Many of the Tribes claims were for instream flows).

[80] Officially, the adjudication process worked in this manner. You had to make claim to a water right by a certain date in order to be included in the SRBA. That date had been set at March 25, 1993. The tribes filed on the last possible date in the process. Notices had been mailed out to water rights holders of record for several years after commencement of the adjudication and it was understood that public notices, newspaper stories and the like would, between 1987 and 1993 bring forward claimants. Once the claims were set the IDWR was responsible for reviewing them on a basin by basin basis. If there were no objections they could be handled administratively, and often, especially later in the adjudication, in large groups. If there were objections, the court, presided over by Judge Daniel Hurlbutt until his retirement in 1998, made a determination on the evidence, usually in the form of a report from the IDWR. These could be contested, and appealed through the Idaho courts, right up to and including the state Supreme Court, which has happened occasionally.

As the case headed towards litigation, there were several attempts at mediation. Each in turn failed. But as the reality of litigation approached closer and closer in late 1997 and early 1998, the parties began to have serious doubts about their positions. The risks were huge and the prospects were uncertain. For the State of Idaho, the major upstream irrigators (upstream of the Nez Perce) and Idaho Power (who worried most about water for hydro-electricity) the danger in litigation was if they lost, the Tribe would become the water masters of Idaho. The Tribe would control virtually all the water in the Snake River. What this meant was unclear, but visions of charges paid to Lapwai every time someone in the state flushed their toilet were rife. Mediation and negotiation had greater and greater appeal, especially to the State government.

It did for the Tribe as well. Precedent seemed on the side of the Tribe but the courts did not. *Arizona v. California* (1963) had been the high water mark for *Winters* litigation. Since then the courts, including the federal courts, had been trending against *Winters*. More and more the federal courts either ruled against the Tribes in the west, or as in the case of water adjudications, required that the Tribes abide by state statute and join adjudications administered by State courts.[81] State courts had always been much less moved by claims of tribal sovereignty and by the reserved rights doctrine than federal courts. States in the West had always seen *Winters* as an abrogation of their constitutional rights.

[81] The McCarran Amendment, which was enacted by Congress in 1952, was meant only to keep water rights cases in State Courts. This amendment gave concurrent jurisdiction to State Courts over federally reserved rights for stream adjudications only. Other matters pertaining to federal law that pertain to water rights are still considered in the jurisdiction of federal courts.

In addition, the issue of diminishment had been in the courts frequently over the past decade, during the 1990s. Diminishment referred to the Dawes Act of 1894, called the General Allotment Act, which was passed after the reservations were created and after the Tribes had ceded their aboriginal lands in return for smaller tracts. The Dawes Act proposed that the Native American peoples would be better off if their tribal (reservation) lands were divided amongst the tribal members into small plots, and the remainder sold off to buyers to fund activities on the reservations. Indians should become farmers like whites and take on the ownerships and opportunities of private property. This Act in effect removed most of the last remaining vestiges of tribal hegemony but did not abrogate the treaties under which the reservations were created. The reservations were "diminished" to a fraction of their size but they remained as a legal vehicle.

As the tribes gained political and legal expertise throughout the last decades of the 20th century, they fought back against the Allotment Act. This concept was litigated unsuccessfully on several occasions by individual tribes in the 1990s, including in *South Dakota v. Yankton Sioux Tribe*. In this case Sandra Day O'Connor, writing for the majority said "we hold that Congress diminished the Yankton Sioux Reservation in the 1894 Act, that the unallotted tracts no longer constitute Indian country, and thus that the State (of South Dakota) has primary jurisdiction over the waste site and other lands ceded under the Act." [82] (This case continues to ripple uncomfortably through Indian country today.)

[82] *South Dakota v. Yankton Sioux Tribe* (522 U.S. 329 (1998). http://www.law.cornell.edu/supct/html/96-1581.ZO.html

Diminishment was addressed in the Idaho State courts in 1999 during the negotiation phase as the parties seemed to be headed towards litigation. In this case, Judge Barry Wood ruled against the Nez Perce claims to the waters of the Snake River, a claim (for this case) they based on their treaty rights to fish. The judgment, which was later appealed to the State Supreme Court, meant that perhaps the Nez Perce had less of a defendable water right, at least under state law, and may have trouble prevailing in a suit in state court [83] The ruling heartened opponents of the Nez Perce claims, signaling that perhaps litigation could succeed. (The Court ruled in this case that the current reservation was only 11% Indian owned in 1998.)

But the State considered the idea of risking the future of Idaho's water dangerous. Prior Appropriation does not provide a formula for sharing water. So negotiation seemed to be the only way, no matter how painful. In order to sooth the process, Judge Hurlbutt mandated mediation, in December, 1998. This didn't stop preparations for litigation, which continued on a "double track." [84] The threat of litigation remaining over everyone's head seemed to focus the mind. In the meantime, user groups across the State continued to line up on one side of the mediation process or another. In rough terms, those groups (irrigation districts, municipalities, individual rights holders, school districts) upstream, who were worried about water rights, were attracted to the idea of a

[83] A local paper made these comments at the conclusion of the District Court decision: …"a court has decided that the boundaries of an Indian reservation are reduced to the amount of land owned by the tribe and held in trust by the United States. Diminishment becomes an issue when, as is the case on the Nez Perce Reservation, not all the land within a reservation is owned by that tribe. That kind of land ownership is referred to as a "checkerboard" and it provides the basis for non-Indians to object to the sovereignty of tribes and their jurisdiction over activities on non-tribal land. When Judge Wood dismissed the Tribe's off-reservation instream flow claims, he also concluded that the Nez Perce Reservation had been diminished…" *Snake River Currents*, October, 2004, Volume 4, Issue 10.
[84] Stapilus. P. 223.

settlement that would avoid the dangers of litigation, and provide security, even if at a diminished level, to their water right going into the future. Those groups who saw a settlement as a give-away of property rights (many downstream users and those living in the area affected directly by the Nez Perce claims in the north of the State) were more in favor of litigating the case. They felt the principle of diminishment of the Tribes land titles (read property rights) and the supposed support of the State courts had already sealed the deal in their favor.

The settlement that finally emerged, in 2004, had three major components to it. There were a Nez Perce Tribal Component, a Salmon/ Clearwater River Basin Component, and an Upper Snake River Basin Component. [85] The terms of the settlement were contained in a detailed and lengthy "Mediators Term Sheet". The terms were generally as follows:

The Nez Perce Tribal Component:

- The Tribe's "Winters" water, its basic water right, was decreed in the amount of 50,000 acres feet annually with a priority date of June 11, 1855, to be supplied mostly from the Clearwater River.
- The agreement decreed that 587 springs on federal lands would be decreed to the Tribe, while 1,263 springs on non-federal land would be released. The Tribe would have access to up to half of the annual flow from these springs. The priority date for these springs and fountains is "time immemorial."

[85] This information is contained in the "Mediators Term Sheet", an appendix to the Settlement.

- Instream flows claimed under federal law would be released, but would continue to be administered by the Idaho Department of Water Resources.
- The Tribe would now co-manage the Dworshak National Fish Hatchery with the federal government, and take over complete management of the Kooskia Hatchery, both on the Clearwater River.
- The U.S. would enter into an MOU to "shape" the release of 200,000 acre feet of water annually from Dworshak reservoir to "achieve salmon habitat improvements and recreation."
- The U.S. government would create a $60 million dollar trust fund for use by the Tribe to acquire land and water rights, restore and improve fish habitat, fish protection, agricultural development, cultural preservation and water resource development.
- The U.S. would provide $23 million for sewer and water system development on the reservation.
- 11,000 acres of BLM land now within the boundary of the 1863 reservation were designated to be returned to the Tribe. (They had been lost during the allotment period, and had something to do with the fact that the current reservation is only 11% owned by Tribal members.)
- The settlement does not change any of the Tribe's treaty rights to fish, hunt, gather or pasture.

The Salmon/ Clearwater River Basin Component contained:

- The State of Idaho agreed to establish instream flows in 205 streams having significant importance to the Tribe.
- The State agreed to implement an ESA Section 6 Agreement between the State and the federal government regarding forestry and water practices on State and private land in certain areas affected by the settlement. (Under Section 6 of the ESA the federal government can enter into cooperative programs with States to implement programs for protected species. These programs are voluntary for private landowners. However, landowners who take part are covered under the Act for incidental take. Enrollment in the forestry provisions includes using road building techniques meant to protect habitat and riparian areas.)
- A Habitat Trust Fund was set up by the agreement, one third of which would be administered by the Tribe.
- The federal government agreed to fund this program to the level of $38 million dollars.

Finally there was a component for the Upper Snake River Basin.

- This component called for a 30 year Biological Opinion (BiOp) to be issued for this basin by NOAA fisheries covering all endangered species. This was issued March 31, 2005.
- The Bureau of Reclamation would be responsible for augmenting the Snake Rivers annual flow with up to 487,000 acre feet of water to maintain minimum flows for salmon in the main stem of the river. This water would come from upstream sources (probably above American Falls.)

- Minimum flows decreed by the Swan Falls Agreement would be decreed by the SRBA court and held by the IDWR.

On June 24, 2004 Senators Craig and Crapo introduced S. 2605, The Snake River Water Rights Act. It was passed was passed by Congress on November 20, 2004. President Bush signed it on December 8, 2004, and the biggest hurdle to completing the SRBA was successfully crossed. On March 24, 2005, Governor Dirk Kempthorne signed the enabling legislation required by the Nez Perce Tribal Settlement to allow the State to keep up their end of the deal. Finally, on March 29, 2005 the Nez Perce Tribal Executive Committee passed resolution 05-210 "contingent upon the completion of all other provisions of the Agreement necessary to it becoming final." [86] The Joint Motion for Approval of the Consent Decree was filed with the SRBA Court on June 29, 2005. The significance of this agreement was great for Idaho, possibly less great for the Tribe, but still important in many ways. It gave many users and river values standing for the first time. It acknowledged and made provision for the incorporation of mandates to improve the health of the River over time. It recognized that change was at hand, even if the agreement didn't actually change the manner in which these users and changes get noticed and incorporated into the process. Although it was an agreement in the context of Prior Appropriation, several new issues had been incorporated into the process. Eventually the river and water rights will be mapped and further quantified, leading to

[86] "The Snake River Basin Adjudication – Nez Perce Tribe Water Rights Settlement". Symposium on the Settlement of Indian Water Rights. September 14-16, 2005. Moscow, Idaho. Sponsored by Native American Rights Fund.

greater understanding of how the river works. But the most important change is the entry into the process of new players and constituencies. [87]

With the clearing of the greatest uncertainty in the process of delineating the outstanding water rights in the basin, the court was able to move towards a conclusion of the adjudication. Today, at the beginning of 2006, the Snake River Basin Adjudication is heading towards winding up, after nearly twenty years in business.

[87] Was it a good settlement for the tribe? Political Science Professor Dan McCool of the University of Utah noted that the settlement was characterized as "having innovative environmental measures, a huge pot of money, and an unprecedented amount of land "returned" to the tribe." Ray Ring, *"Small Tribe in Idaho Weighs Big Water Deal*. High Country News, March 7, 2005. http://www.hcn.org/servlets/hcn.Article?article_id=15327. Rebecca Miles, Chairwomen of the Nez Perce Tribe of Idaho noted in a conversation recently that "The idea of quantifying water and settling based on those numbers is very unsettling to Indian People. We identify with the River through the fish." In essence, most observers, both inside the tribe and outside, feel the deal was the best one the tribe could get given the circumstances.

Chapter Eight: Recommendations and Conclusion: Water's Next Phase

Our vision of the American West involves great expanses of sagebrush deserts, spectacular canyon vistas and endless mountain ranges. The W.H. Jackson photos of the Grand Tetons, Charlie Russell's paintings of the Great Plains massed with wildlife, and the countless photos of Delicate Arch against the snowy La Sals. These images all share a common sense of aridity, of great vistas in dry lands. The statistics reinforce the image: while the temperate eastern portion of the continent enjoys an average of 48 inches of rain a year, the part of the U.S. west of the 100th meridian receives an average of between 12 to 30 inches. Writers of all disciplines have made a great deal of the general dryness of the region and the ways in which aridity has influenced the development of the region.

But the aridity is not ubiquitous. It is a fact that the West includes areas of humidity along its coasts, and areas of seasonal or monsoonal precipitation in the southwest. There are significant rivers and a multitude of streams and seasonal snow packs that cover many of its majestic mountain ranges. While the West has features of an arid environment it has always had great hydrological potential. It many ways this potential still exists in the West. So aridity is only part of the story.

The real problem for water in the West has always been poorly conceived and haphazardly administered schemes for delivering the water that does exist to the places where it makes the most rational sense and could provide the greatest good. As Donald Pasani has noted in his work To Reclaim a Divided West, water management has always

been a *national problem.*[88] When it comes to development of the nation's water resources, regionalism has always been a specious argument. Successful water projects as well as unsuccessful ones dot the landscape "from sea to shining sea." There was no difference in importance in purpose between projects intended for flood control, irrigation, wetland reclamation or navigation. For a growing nation each had its importance to the total enterprise.

What did make the West different was its role as economic colony to the rest of the nation. This perception, true or not, caused a lack of attention by the federal government through much of the formative period in the nineteenth century. Thin populations and lack of adequate transportation left western localism with little teeth, and although the West depended on the federal government for support services like physical protection early on, it wasn't until the twentieth century that real adequate federal investment flowed to the West. This was true in spite of the fact that most of the West was public lands. It was this and other social challenges that contributed to the overall failure in the West to construct a unified regional approach to water allocation that would benefit all constituencies while promoting democracy and fairness. The regime of Prior Appropriation, first widely used in the California gold fields, mirrored the "early comer takes all" philosophy that grew up in the temporary world of wildcat development that was enacted by squatters on the public domain. Finally, as the states coalesced piecemeal in response to local boosterism in the last decades of the nineteenth century, they each took a slightly different angle on water, each embodying language in their codes to "protect" first claimants. In this way, the territory-to-state process froze development in a

[88] Pasani. P. xiv.

pattern that allowed for no experimentation later in the next century as society in the West changed.

The West has matured in the twentieth century. Yet the region still is in the embrace of a water rights paradigm from another, more hectic, more brutal era. This process is embedded in the individual states Constitutions through priority language that protects the rights of the first in time user, no matter if that use is compatible with current community values, protects and defends the resource or honors society's changing attitudes and goals. For instance, until the very recent past, the agricultural and industrial community in Idaho viewed the waters of the Snake River basin as a commodity in itself, something to be used even to the extent of emptying the river bed before it left the State. For years, when parties battled over the issue of instream flows, they weren't talking about water for fish. They were talking about commercial electric power, and about property values. Until the end of the twentieth century the river had no place of its own at the negotiating table.

"The water story illustrates the way institutions resist change and the ways people find to preserve their autonomy." [89] How true this is! Change comes so slowly to human institutions. Remember that prior appropriation had its roots in the humid East and only gained acceptance in the West because it was adaptable not so much to an arid environment as to a land almost wholly owned by the federal government. Riparian rights, "correlative" rights tied to land couldn't work where you couldn't own the land. Once the appropriation system was in place for the mining interests it was too easy to

[89] Pasani. To Reclaim a Divided West. P. 336.

extend it to farming and from territory to territory, where this lack of clear title helped destroy the age-old concept of tying water to land. The arid nature of the region helped boosters sell the myth of the inevitability of appropriation even as territorial courts and judges fought it off. [90]

Even as the idea of prior appropriation took hold in the West, there were several attempts to blunt its affects and replace it with a different regime. But as the nineteenth century passed into the twentieth and corporatism came to dominate business in the region, the values embodied in the riparian doctrine and in the flow of the river itself slowly disappeared from the law. They were replaced by a legal structure that rewarded first claimants with little attention to place, purpose or values that supposedly drew these claimants to the river in the first place.

These "riparian" ideas could have validity in our times again. As society's values change in a time of increased population and especially urbanization, people are looking for structures that enhance environmental values and the rights of communities, human and otherwise. There are several of these ideas, first outlined during the nineteenth century, which could resonate with twenty-first century populations.

The first idea, promoted in California in the 1870s, would be for the State to condemn all water rights, and take over the operation of all dams and canals and lease water to individuals. In an age of high tech remote measuring and metering technology this could be done and be made to be very effective. Water leases could fluctuate to meet current

[90] John D. W. Guice. The Rocky Mountain Bench.

needs as farmers changed crops and industrial users changed processes. Uses could be judged as “reasonable” rather than “beneficial”. This would also promote water conservation, especially if combined to an inverted sliding rate scheme, which would assign full costs to water users based on consumption. This would imply the creation of a large state bureaucracy, which at least would not be federal. In fact states already have much of the infrastructure and staffing in place today. Savings in dismantling huge existing federal bureaucracies probably would be able to fund creation of state ones to take their place.

A second idea was originally put forward by the soldier/ adventurer/ government bureaucrat John Wesley Powell in the 1880s. Following his survey of the Rocky Mountain States, and in his role as Director of the US Geographical and Geological Survey, he published his Report on the Lands of the Arid Region of The United States (1878). In it the old soldier planted several bombs including his ideas of autonomous local water districts organized by watersheds. Powell believed in a system that actually promoted the small freeholder, as much of the public land legislation that came out of Washington between the end of the Civil war and the later 1870s purported to support. It was his goal to save that freeholder from the growing juggernaut of the national government that threatened to send small farmers unarmed into the arid west. Powell saw a West living within the constraints of limited and unpredictable moisture but able to support itself on the resources available if agriculture conformed to the conditions that existed there. He saw cooperative irrigation and grazing districts made up of small farms of no more than 80 acres and dry-land pasturages of four full sections each. He proposed

abandoning the square survey system of townships and ranges to allow water rights to be fully tied to the land they served, and water districts organized by topography and drainages (watershed planning) rather than by political counties, which he saw as unnatural and arbitrary. This sort of planning often pitted physical neighbors against one another as they struggled over limited water using the monopolistic and anti-democratic means of prior appropriation to limit others access to water and thereby stifle their most important allies, the farmer next door. As the West wrestles with the next phase of development, one that demands conservation and cooperation, the long-ago abandoned visions of Major Powell will begin to look very attractive. [91] [92]

Prior Appropriation, while it promoted growth in an earlier, less stable time has outlived its usefulness in the West. We now live in a world of finite resources and diminishing options. As the ecologists tell us, we now are living in the "full world" or closed world. Before much longer, prior appropriation will have to be replaced by a new water allocation system that acknowledges the range of values including those of community and the environment. We must learn to live within our means and promote these values in order to pass on a sustainable world to future generations. Prior Appropriation does not promote the extension of values that include conservation and careful use. It has led, in the twentieth century to quite the opposite. Overuse of water for irrigation has led to

[91] Walter Prescott Webb. The Great Plains. P. 421. Webb is recognized by the academic community as the modern father of western water law history. He remarks in this section: "Incidentally in connection with the parceling of lands according to topographic basins and not by the rectangular system, Major Powell asserted that practically all values inhered in water in the arid region." This is at the heart of why today owners are so loath to even discuss alternatives to a system of water rights they understand to be failing the region for fear of losing the value of their land, which for many farmers is the sum of their net worth.
[92] Wallace Stegner. Introduction, Report on the Lands of the Arid Region of the United States. P. xi.

salinization, waterlogging, silt buildup in rivers which has damaged fish runs, poor land use planning, and increased groundwater pumping.

The “tyranny of Prior Appropriation”, as Donald Pasani has called it, includes the extension over several generations of the idea that equates rights to water as a property right. The mechanism in appropriation that allowed water to become separated in law from the land and then be assigned to yet another party is perhaps the most troubling part of the doctrine and the one that has had the gravest consequences for the West to date. This however is nothing compared to the upheavals this doctrine can cause in the next century. An immensely important fact about the West, one that has been true for nearly a hundred years, is that the region is the most urban area of the entire country, and is becoming more so with each year. As the urban conglomerations of the southwest and the northwest consolidate, and reach out for more and more water, they will buy up water rights in remote areas and ship the water through large pipelines to their demanding populations. The West may soon see a proliferation of Owens Valleys as private water, free from riparian constraints, becomes the new “gold”. This is already happening. Water starved municipalities in the growing southwest are frantically buying the water rights around them (often from defunct irrigators) and either using the water in their systems or even selling the water on. The water is treated as a direct property right, and the use is haphazardly defined as “beneficial” even in the absence of any best-practices means testing of that concept. Uncontrolled population growth may seem a beneficial use, but to many in the West it is surely not “reasonable”.

We cannot be intimidated by the challenges of the future. In so many ways the inclusion of environmental values and changing social structures in the West affords us as a nation the opportunity to forge a more long range and more sustainable relationship with our vital resources, like water. But change at this time of increasing pressure on our planet is an imperative. We must soon make the first steps. The changing West will lead the way.

Referenced Works

Bakken, Gordon Morrison. Rocky Mountain Constitution Making,1850-1912. Greenwood Press, Westport, Connecticut. 1987.

Blomquist, William. Heikkila, Tanya. Schlager,Edella. Common Waters, Diverging Streams. Linking Institutions and Water Management in Arizona, California and Colorado. RFF Press. Washington. D.C. 2004.

Burton, Lloyd. American Indian Water Rights and the Limits of Law. University of Kansas Press. Lawrence, Kansas. 1991.

Deloria, Vine. (Ed.) American Indian Policy in the Twentieth Century. 1985.

Dunbar, Robert G. Forging New Rights in Western Waters. University of Nebraska Press. Lincoln, Nebraska. 1983.

Fiege, Mark. Irrigated Eden. The Making of an Agricultural Landscape in the American West. University of Washington Press. Seattle, Washington. 1999.

Getches, David H. Water Law. West Publishing Company. St. Paul,Minnesota. 1997.

Guice, John D.W. The Rocky Mountain Bench. The Territorial Supreme Courts of Colorado, Montana and Wyoming, 1861-1890. Yale University Press. New Haven, Connecticut. 1972.

Hailey, John. The History of Idaho. Syms-York Company. Boise, Idaho. 1910.

Hays, Samuel. Conservation and the Gospel of Efficiency. The Progressive Conservation Movement. Harvard University Press. Cambridge, Massachusetts. 1959.

Horowitz, Morton J. The Transformation of American Law 1780-1860. Harvard University Press. Cambridge, Massachusetts. USA. 1977.

Hundley, Norris. Water and the West. The Politics of Water in the American West. University of California Press. Berkeley, California. 1975.

McCool, Daniel. Native Waters. Contemporary Indian Water Settlements. University of Arizona Press. Tucson, Arizona. 2002.

McGuire, Thomas R. Lord, William B. Wallace, Mary G. (Ed.) Indian Water in the New West. The Univeristy of Arizona Press. Tucson, Arizona. 1993.

Miklas, Christine L. Indian Water, 1985. American Indian Resources Institute. Oakland, California. 1986.

Palmer, Tim. The Snake River. Window to the West. Island Press. Washington, D.C. 1991.

Pisani, Donald J. To Reclaim a Divided West. Water, Law and Public Policy, 1848-1902. University of New Mexico Press. Albuquerque, New Mexico. 1992.

Pisani, Donald J. Water, Land and Law in the West. University Press of Kansas. Lawrence, Kansas. 1996.

Pomeroy, John Norton. A Treatise on the Law of Water Rights. West Publishing Co. St. Paul, Minnesota. 1893.

Powell, John Wesley. Report on the Lands of the Arid Region of the United States. The Belknap Press Harvard University Press. CambridgeMassachusetts. 1962.

Shupe, Steven J. Water and the West. The Politics of Water in the American West. University of California Press. Berkeley, California. 1975.

Shurtz, John. Indian Reserved Water Rights. The Winters Doctrine in its Social and Legal Context 1880s-1930s. University of Oklahoma Press. Norman, Oklahoma. 2000.

Sly, Peter W. Reserved Water Rights Settlement Manual. Island Press. Washington, D.C. 1988.

Stapilus, Randy. (Ed.) The SRBA Reference. Water for Idaho's Next Century. Ridenbaugh Press. Boise, Idaho. 1999.

Webb, Walter Prescott. The Great Plains. Blaisdell Publishing Company. Waltham, Massachusetts. USA.1931.

Wilkinson, Charles F. Blood Struggle. The Rise of Modern Indian Nations. W.W. Norton. New York, New York. 2005.

Wilkinson, Charles F. Crossing the Next Meridian. Island Press. Washington, D.C. 1992.

Worster, Donald. Rivers of Empire. Water, Aridity and the Growth of the American West. Pantheon Books, New York, New York. 1985.

Papers and Journal Articles

Dunbar, Robert G. *The Adaptability of Water law to the Aridity of the West.* Journal of the West 24. (January 1985): P. 57-65

Murphy, Paul L. *Early Irrigation in the Boise Valley.* Pacific Northwest Quarterly. Vol XLIV (October, 1935). P. 177-184.

Idaho State Historical Reference Series No. 171.

"Idaho Water Rights. A Primer." Idaho Department of Water Rights. 2001.

"Idaho water use has helped shape state." Idaho Council on Industry and the Environment. June 20, 2003. http://www.icie.org.

Nathan Brooks. Legislative Attorney. American Law Division. "Indian Reserved Water Rights: An Overview." Congressional Research Services. The Library of Congress. January 12, 2004.

Karl J. Dreher. "Status of Water Allocation from Idaho's Snake River Water Basin". IDWR. 1997.

Costello, Patrick D. Kole, Patrick J. "Commentary on Swan Falls Resolution". WNRL Digest. Summer, 1985. P. 11-18.

Fullerton, Thomas M Jr. Gardner, Richard L. Division of Financial Management. State of Idaho. "Statistical Input to Water Policy Decisions: An Idaho Case Study." *Proceedings of the American Statistical Association. 1985, Social Statistics Section.* P. 31-35.

Stein, Jay F. "The McCarran Amendment and the Administration of Tribal Reserved Water Rights."

Slaughter, Richard A. "Institutional History of the Snake River 1850-2004." Joint Institute for the Study of the Atmosphere and Ocean (JISAO)

"The Nez Perce Tribe's Perspective on the Settlement of its Water Rights Claims in the Snake River Basin Adjudication". K. Heidi Gudgell, Steven C. Moore, Geoffrey Whiting. 2006.

Newspaper Articles

Ford, Pat. "During the boom, Idaho succumbed to good sense." *High Country News.* September 12, 1988. Vol. 20, No. 17. P. 19-24.

"Key dates in the 169-year history of Idaho water development". *The Idaho Statesman.* January 16, 2005.

"Swan Falls agreement in 1985 was a turning point." *The Idaho Statesman.* January 16, 2005.

Snake River Currents, October, 2004, Volume 4, Issue 10.

Internet Sites

http://stream.fs.fed.us/news/streamnt/jan97/jan97a2.htm. Accessed January 21, 2006.