

NOV 06 2009

DEPARTMENT OF
WATER RESOURCES

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IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA

Case No. 39576

)
) Subcase Nos. 00-92002GP, 02-200,
) 02-201, 02-223 and 02-224

)
) **AFFIDAVIT OF SHELLEY M.**
) **DAVIS IN SUPPORT OF CANAL**
) **COMPANIES' MEMORANDUM**
) **IN OPPOSITION TO STATE OF**
) **IDAHO'S MOTION FOR**
) **PARTIAL SUMMARY**
) **JUDGMENT RE: MILNER**
) **ZERO MINIMUM FLOW**

STATE OF IDAHO)
) ss.
County of Ada)

SHELLEY M. DAVIS, being first duly sworn upon oath, deposes and says:

1. I am an attorney in the firm Barker Rosholt & Simpson LLP providing legal representation to the Participants North Side and Twin Falls Canal Companies (hereinafter "Canal Companies") in the above captioned matter. I am over the age of 18 and have knowledge

AFFIDAVIT OF SHELLEY M. DAVIS IN SUPPORT OF CANAL COMPANIES'
MEMORANDUM IN OPPOSITION TO STATE OF IDAHO'S MOTION FOR
PARTIAL SUMMARY JUDGMENT RE: MILNER ZERO MINIMUM FLOW

of the documents and legal proceedings pertinent to this matter, and I make this affidavit based upon personal knowledge.

2. Attached hereto as Exhibit 1 is a true and correct copy of an excerpt of the Idaho State Water Plan adopted in the year 1992.

3. Attached hereto as Exhibit 2 is a true and correct copy of an excerpt of the Idaho State Water Plan adopted in the year 1986.

4. Attached hereto as Exhibit 3 is a true and correct copy of an excerpt of the Idaho State Water Plan adopted in the year 1996.

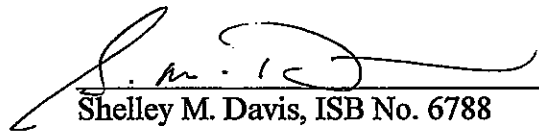
5. Attached hereto as Exhibit 4 is a true and correct copy of an excerpt of the Water District 01 2009 Draft Resolutions.

6. Attached hereto as Exhibit 5 is a true and correct copy of an excerpt of a report to the 1994 Interim Legislative Committee on The Snake River Basin Adjudication.

Further your affiant sayeth naught.

Dated this 5th day of November, 2009

BARKER ROSHOLT & SIMPSON LLP



Shelley M. Davis, ISB No. 6788
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Attorneys for North Side Canal Company and Twin Falls Canal Company

SUBSCRIBED AND SWORN to before me this 5th day of November, 2009.



Suzanne Estes

Notary Public for Idaho

Residing at: Bowse

Commission Expires: 6/1/2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of November, 2009, I served a true and correct copy of the foregoing document, **AFFIDAVIT OF SHELLEY M. DAVIS IN SUPPORT OF CANAL COMPANIES' MEMORANDUM IN OPPOSITION TO STATE OF IDAHO'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE: MILNER ZERO MINIMUM FLOW**, upon the following persons via the method indication below:

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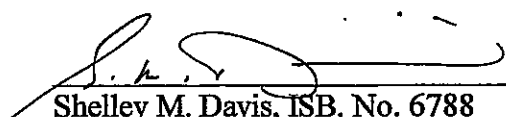
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Shelley M. Davis, ISB. No. 6788

DAVIS AFFIDAVIT

EXHIBIT 1

IDAHO STATE WATER PLAN



ADOPTED BY THE
IDAHO WATER RESOURCE BOARD

JANUARY 1992

THE WATER PLANNING PROGRAM

The Idaho State Water Plan was adopted by the Water Resource Board to guide the development, management, and use of the state's water and related lands. The plan recognizes past actions, addresses present conflicts and opportunities, and seeks to ensure that future water resource uses will complement and supplement state goals directed toward achieving a "quality of life" for the citizens of Idaho. The plan is a dynamic document, subject to change to reflect citizens' desires and to be responsive to new opportunities and needs. According to statute, a formal review of this plan must take place at least every five years.

Constitutional Authority

The authority for the preparation of a State Water Plan is Article XV, Section 7 of the Idaho Constitution. This constitutional amendment was adopted in November 1964 following a state-wide referendum and provides that:

There shall be constituted a Water Resource Agency, composed as the Legislature may now or hereafter prescribe, which shall have power to formulate and implement a state water plan for optimum development of water resources in the public interest; to construct and operate water projects; to issue bonds, without state obligation, to be repaid from revenues of projects; to generate and wholesale hydroelectric power at the site of production; to appropriate public waters as trustee for Agency projects; to acquire, transfer and encumber title to real property for water projects and to have control and administrative authority over state land required for water projects; all under such laws as may be prescribed by the Legislature.

Section 7 provides the basic guidance and authority to formulate a State Water Plan. Before the adoption of Section 7, Section 3 of the Idaho constitution provided for the appropriation and allocation of water during low water conditions. Although no legal confrontations have occurred, Section 7 probably tempers Section 3 in that future decisions must be in conformance with the State Water Plan. Section 3 provides that:

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.

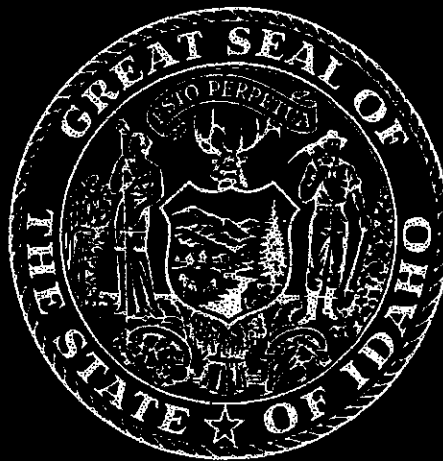
Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining have preference over those using the same for manufacturing or agriculture purposes.

But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution.

DAVIS AFFIDAVIT

EXHIBIT 2

IDAHO STATE WATER PLAN



ADOPTED BY THE
IDAHO WATER RESOURCE BOARD

DECEMBER 12, 1986



Formulation of the State Water Plan

Formulation of the State Water Plan

Formulation of a State Water Plan is a dynamic process. Adoption of The State Water Plan - Part One, The Objectives, in 1974, and The State Water Plan - Part Two in 1976, provided an initial water policy. Implementing the policies in Part Two required the combined efforts of government agencies, the legislature, private concerns and the public. Consequently, the report delineated those areas where legislative action was required, identified the programs to be pursued by the Board and described the areas where cooperation of public and private interests was necessary. The State Water Plan has evolved into a continuing planning process directed toward the development, adoption and implementation of various policies, projects, and programs which develop, utilize, conserve, and protect the state's water supplies. The State Water Plan has been updated and readopted in 1982 and 1986. Changes were made in 1985 in order to reconcile any differences created by the agreement entered into by the state and the Idaho Power Company concerning water rights at Swan Falls dam. The 1986 update involved both a reorganization of policies and a change in objectives.

The basic steps followed in this planning process are:

1. A comprehensive public involvement program to determine public views and desires regarding resources problems, needs, and potentials;
2. An ongoing evaluation of the water and land resource base and an estimation of probable future conditions;
3. An evaluation of the effects of environmental quality and economic development programs and projects;
4. The preparation of alternative policies and proposed plans, including identification of beneficial and adverse effects;
5. Final adjustment of the policies based on public response and action taken by the Water Resource Board;
6. The adoption of the State Water Plan by the Idaho Water Resource Board as required by Article 15, Section 7 of the Idaho Constitution;
7. Review by the Idaho Legislature as provided by law.



This state water planning process includes an extensive public involvement program and the information received is used in formulating the State Water Plan. Information meetings and

public hearings are held to answer questions the public might have concerning the planning process, various policies, and to solicit input and comments.



DAVIS AFFIDAVIT

EXHIBIT 3

IDAHO STATE WATER PLAN



ADOPTED BY

**THE
IDAHO
WATER RESOURCE
BOARD**

DECEMBER 1996

State of Idaho

THE STATE WATER PLAN

Philip E. Bart, Governor

Idaho Water Resource Board

Clarence Parr
Chairman

F. Dave Rydall
Vice Chairman

J. David Erickson
Secretary

Robert Graham
Joseph L. Jordan
Erval Ramey
Jerry R. Rigby
Terry T. Uhling

Adopted December 1996

Ratified by the Idaho Legislature March 1997

Statehouse

Boise, Idaho 83720

ment and optimum use of all unappropriated water resources and waterways of this state in the public interest.

Idaho Code 42-1734A(1)

To assist the Idaho Water Resource Board, the Legislature provided for the director of the Department of Water Resources:

To perform administrative duties and such other functions as the Board may from time to time assign to the Director to enable the Board to carry out its powers and duties.

Idaho Code 42-1805(6)

Article XV, Section 7 was amended by the electorate during the general election of November 6, 1984. This modification provides that:

The Legislature of the State of Idaho shall have the authority to amend or reject the state water plan in a manner provided by law. Thereafter any change in the state water plan shall be submitted to the Legislature of the State of Idaho upon the first day of a regular session following the change and the change shall become effective unless amended or rejected by law within sixty days of its submission to the Legislature.

Legislation in 1988 provided for the development of a "comprehensive state water plan" and authorized designation of highly-valued waterways as state-protected rivers. Each comprehensive basin or water body plan becomes a component of Idaho's State Water Plan.

The board may develop a comprehensive state water plan in stages based upon waterways, river basins, drainage areas, river reaches, ground-water aquifers, or other geographic considerations.

Idaho Code 42-1734A(2)

As part of the comprehensive state water plan, the board may designate selected waterways as protected rivers as provided in this chapter.

Idaho Code 42-1734A(1)

The authority to designate "protected rivers" derives from the state's power to regulate activities within a stream bed including stream channel alter-

ations, water diversions, the extraction of minerals or other commodities, and the construction of impoundments.

State Water Plan Formulation

Formulation of a State Water Plan is a dynamic process. Adoption of The State Water Plan - Part One, *The Objectives*, in 1974, and *The State Water Plan - Part Two* in 1976, provided an initial State water policy. Implementing the policies in Part Two required the combined efforts of government agencies, the legislature, private concerns and the public. Consequently, the report delineated those areas where legislative action was required, identified the programs to be pursued by the Board, and described the areas where cooperation of public and private interests was necessary.

The State Water Plan was updated and re-adopted in 1982, 1986, and 1992. The Plan continues to evolve as an instrument in the adoption and implementation of policies, projects, and programs that develop, utilize, conserve, and protect the state's water supplies. Changes were made in 1985 to reconcile any differences created by the Swan Falls agreement entered into by the State and the Idaho Power Company. The 1986 and 1992 updates involved changes in objectives and policy reorganization.

Legislation in 1988 directed preparation of comprehensive plans for specific geographic areas as components of the State Water Plan [Idaho Code 42-1734A(2)]. These plans are prepared within the framework of the policies established by the overarching State Water Plan.

PLANNING PROCESS

The planning process encompasses five steps:

1. A comprehensive public involvement program to determine public views and desires regarding resource problems, needs, and potentials;
2. An ongoing evaluation of the water and related resource base and an estimate of probable future conditions;

DAVIS AFFIDAVIT

EXHIBIT 4

WATER DISTRICT 1

2009 DRAFT RESOLUTIONS

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46.	Water Monitoring Expenses
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48.	IDWR Funding
49.	IWRB Comprehensive Aquifer Management Plan (CAMP)
50.	Ririe Reservoir Flood Control Rule Curves

BE IT FURTHER RESOLVED that the water district treasurer shall maintain said amounts in a separate account and that payment there from shall ONLY be made when authorized by the upper valley Committee of Nine members.

| 1820. RENTAL POOL PROCEDURES OF COMMITTEE OF NINE

BE IT RESOLVED that the following Rental Pool Procedures be approved by the Idaho Water Resource Board as follows:

See the Rental Pool Section.

| 2021. WATER DISTRICT 1 POLICY POSITION

WHEREAS, there are currently many issues that potentially can change water distribution patterns and water supplies in Idaho; and

WHEREAS, water users are now being asked to fund experts and attorneys in preparation for negotiations and/or litigation; and

WHEREAS, the water users of Water District 1 and their representatives, the Committee of Nine, wish to have a clear representation of the position of Snake River irrigators, and establish the following as the guiding principles in any and all negotiations and litigation:

- A. Administration of water rights that have been or will be adjudicated in the SRBA must recognize traditional distribution and water management.
- B. The zero minimum flow at Milner, as established in the state water plan be recognized as the Water District 1's position, and that there can be no call for deliveries below Milner by downstream interests.
- C. Releases past Milner must be consistent with state law and limited to annual arrangements approved by the Committee of Nine and IWRB.
- D. Any changes in upstream water rights that would allow water to be transferred below Milner shall be by Committee of Nine agreement only or will be vigorously opposed.

NOW, THEREFORE, BE IT RESOLVED by the water users of Water District 1, that the Committee of Nine is authorized to allocate sufficient funds to protect and defend these principles in negotiations with the federal government and Indian tribes and in challenging and defending claims in the Snake River Basin Adjudication or other necessary litigation.

| 2422. ADMINISTRATION

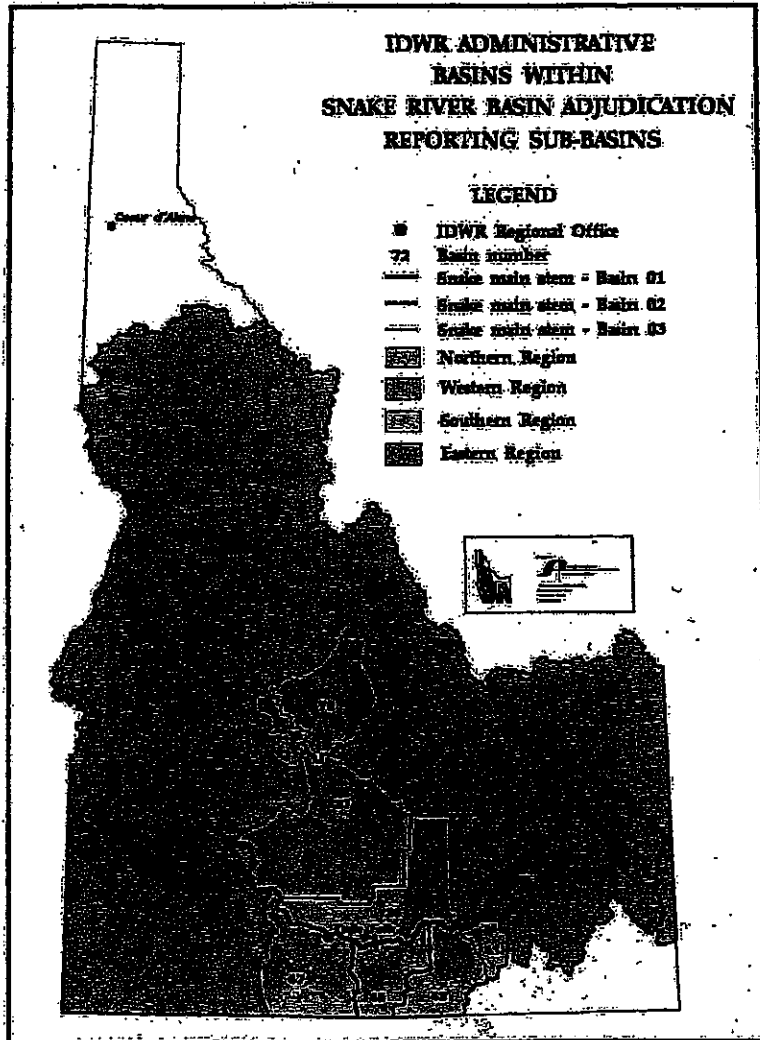
DAVIS AFFIDAVIT

EXHIBIT 5

1994 INTERIM LEGISLATIVE COMMITTEE

ON

THE SNAKE RIVER BASIN ADJUDICATION



SENATE MEMBERS

Senator Laird Noh, Cochairman
Senator John Hansen
Senator Stan Hawkins
Senator Cecil Ingram
Senator Marguerite McLaughlin
Senator Clair Wetherell

HOUSE MEMBERS

Representative Golden Linford, Cochairman
Representative Jack Barraclough
Representative Maxine Bell
Representative Jim Christiansen
Representative Al Johnson
Representative Bruce Newcomb

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1994 LEGISLATIVE COUNCIL COMMITTEE REPORT
ON
THE SNAKE RIVER BASIN ADJUDICATION

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I. CHARGE TO 1994 LEGISLATIVE COUNCIL COMMITTEE ON THE SNAKE RIVER BASIN ADJUDICATION

House Concurrent Resolution No. 70 directed the Legislative Council Committee on the Snake River Basin Adjudication to study and report back to the 1995 Idaho Legislature on the following matters:

1. Methods of funding the Snake River Basin Adjudication;
2. Measures that can be taken to facilitate the participation of small claimants in the Snake River Basin Adjudication;
3. Means for spreading the cost of the resolution of basin-wide issues; and
4. Actions the Legislature should take to facilitate the development of a long-term management plan for the administration of surface and ground water supplies in Idaho.

The Committee met five times to consider these matters. Testimony was received from the claimants, the private attorneys, the Idaho Department of Water Resources (IDWR) and the judiciary. The following report summarizes the Committee's findings and recommendations.

II. REASONS FOR THE ADJUDICATION

Although the Snake River Basin Adjudication (SRBA) was authorized as part of the legislation enacted in 1985 to settle the Swan Falls water rights dispute between the Idaho Power Company and the State of Idaho, the genesis of the adjudication came from a report of the Snake River Technical Advisory Committee. This Committee consisted of fifteen members representing state and federal water resource agencies, the Idaho Public Utilities Commission, consulting hydrologists, Idaho Power Company, the Idaho Water and Energy Resources Research Institute and the Swan Falls Water Rights subcommittee of the Legislative Council. The purpose of the Committee was to "determine the scope and priority of needed hydrologic studies required to assist in planning, management, water rights administration, regulation and litigation of the Snake River system in Idaho above Swan Falls." *Needed Water Resources Programs in the Snake River Basin* at 1 (1983). The Technical Committee recommended initiation of a general stream adjudication for the following reasons:

If water resources in the Snake River Basin are to be managed for maximum beneficial use within the constraints of the Constitution, laws of the State and new directives of the legislature, the priority of those rights must be established. There are presently a number of decrees affecting surface and ground water tributary to the Snake River Plain. These decrees were created and operate in a vacuum. They do not acknowledge the existence of other tributaries they may affect or rights listed in the decrees are or may be subordinate to other rights not listed. These decrees are not effective vehicles for management of the entire system.

The procedure to quantify all rights to use waters of the Snake River system within Idaho is a general adjudication pursuant to I.C. Section 42-1406, et seq. This statute permits the State to require the federal government to quantify its reserved rights, in addition to permitting the quantification of statutory claims. Delay could cause piecemeal adjudication of federal claims in federal court.

Id. at 35 (1983).

The federal reserved water rights need to be adjudicated because they are a cloud over all other water rights and threaten to undo any water planning done by the state. The federal reserved water rights doctrine arises from *Winters v. United States*, 207 U.S. 564 (1908). In *Winters*, the United States Supreme Court held that when Congress establishes an Indian reservation, it also impliedly reserves sufficient water to achieve the purposes for which the reservation was created. This judicial doctrine was extended to other federal reservations of lands in *Arizona v. California*, 373 U.S. 546 (1963). Because these rights have never been quantified and are not subject to state beneficial use requirements, they constitute a threat to all state water rights junior in priority to the reserved water rights. Moreover, any state water planning is suspect for the same reason.

III. HISTORY OF THE SNAKE RIVER BASIN ADJUDICATION

A. *Description of the Hydrology of the Snake River*

The Snake River is one of the great rivers of the western United States. It rises along the continental divide near Yellowstone and Grand Teton National Parks in Wyoming, and travels across southern Idaho in a broad crescent. Along the way it joins with such rivers as the Henry's Fork, the Blackfoot River, the Big Wood River, the Bruneau River, the Boise River and the Payette River. At the western boundary of Idaho, the Snake River completely leaves the State of Idaho and flows into the State of Oregon for a short distance and then turns north. The Snake River forms the boundary between Idaho and the states of Oregon and Washington while passing through the nation's deepest gorge, Hells Canyon. Along the way the Salmon River, the fabled "River of No Return" of the Lewis and Clark expedition, drains into the Snake River from the huge wilderness of central Idaho. Further north, the Clearwater River flows into the Snake River near Lewiston where the Snake River leaves the state. The total land area upstream from this point encompasses approximately 87% of the total land area of the state.

The Snake River Plain is a broad crescent-shaped plain extending from Ashton, Idaho, in the east to Weiser, Idaho, in the west. The plain is from 30 to 75 miles wide and is bordered or intersected by the main stem of the Snake River. The plain is divided geographically into an upper and lower plain with the dividing line roughly located at King Hill, Idaho.

The Upper Snake River Plain is underlain by a large aquifer which is hydraulically connected with the Snake River at various points from Heise to Thousand Springs. At some points, the Snake River supplies the Snake River Plain Aquifer with water, and at other points the

court without a comprehensive review of all claims. Thus, the Committee recommends continuation of the SRBA.

The Committee is troubled by the SRBA District Court's recent decisions. As University of Idaho Professor Colson testified, the decisions are long on conviction but short on analysis. The decisions improperly question the motives of the Legislature in enacting the 1994 adjudication amendments and fail to adhere to the most fundamental rule of constitutional interpretation that a statute is presumed constitutional. Moreover, the decisions reflect a fundamental misunderstanding of the separation of powers doctrine and interfere with the constitutional powers of the Idaho Legislature and those of the Attorney General. While the Committee appreciates the very difficult task that has been given to the SRBA District Court, the SRBA District Court must likewise respect the Legislature's ability to oversee and enact legislation to address problems arising in the adjudication. Thus, the Committee recommends that the Legislature intervene in the appeals of Basin Wide Issues #2 and # 3.

In addition to intervening in the appeals, the Committee has identified several additional measures that should be considered. These measures were developed after consideration of testimony by Chief Justice McDevitt, representing the judiciary, members of the executive branch and, in particular, the detailed comments made by the claimants. The recommendations are not intended as a criticism of the efforts of any agency or branch of government but, rather, are offered to defuse some of the conflict that has developed to date, to streamline the SRBA and to save taxpayer monies.

A. *Goals for the Snake River Basin Adjudication*

Those who testified before the Committee repeatedly suggested that the SRBA's goals are unfocused and need to be clarified. Many testified that they understood the adjudication would simply catalogue their water rights. Some suggested that the SRBA's role is more expansive. Others testified that the adjudication was improperly being expanded into a forum for the resolution of all water issues and thus frustrating the primary purposes of the adjudication. Given the confusion regarding the adjudication's goals, it is not surprising that the SRBA has gotten off course. Moreover, the absence of clearly articulated goals has made it difficult for the Committee to evaluate whether the SRBA is achieving the desired ends. Thus, the Committee recommends the adoption of the following statement of substantive goals for the SRBA:

1. All water rights within the Snake River Basin should be defined in accordance with Chapter 14, Title 42 so that all users can predict the risks of curtailment in times of shortage. It is vital to all water users that they have as high a degree of certainty as possible with respect to their water rights. Uncertainty discourages development, undermines the ability of agencies to protect stream systems and fosters further litigation.

2. All water rights acquired under federal law must be quantified, their relative priority determined, and their legal and hydrologic relationship to state-law based rights must be established.

3. The decree must contain sufficient information for state administration of all federal as well as state water rights. The McCarran Amendment provides a basis for state administration of federal water rights. The language of the McCarran Amendment, 43 U.S.C. § 666(a)(2), defers to the entire body of water law administration procedures of each state, regardless of the forms in which they may exist. *Federal Youth Center v. District Court of Jefferson County*, 575 P.2d 395, 400 (1978). In order for effective administration of water, the State must fully exercise this authority. While the quantification of water rights is important, it is of little use if the decree fails to provide an adequate basis for future administration. The State must know how each water right relates to another with sufficient legal and hydrologic certainty to ensure delivery in accordance with priority and in order to know what water supplies remain for future use. Thus, the final decree in the SRBA must contain those provisions necessary to allow the IDWR to administer the federal and state water rights as decreed.

In the end, the SRBA must effect some finality on each of these points. That finality, however, cannot be left to some indefinite time in the future. Because of the pressing demands on Idaho's water supply, the SRBA must not follow the route of most other general stream adjudications—where the adjudications seem to go on indefinitely. Thus, each branch of government should develop measurable criteria that demonstrate how these goals will be achieved and a time schedule for completion of its duties.

These projections should be evaluated on an annual basis by the Legislature and any deviations from the time schedule should be explained. While the Committee recognizes that it is not possible to predict with a high degree of certainty how long this process will take, nonetheless, some identifiable target for completion is necessary. In this regard, the Committee recommends that the IDWR and SRBA District Court be requested to jointly develop a date certain for the completion of the SRBA.

B. *Funding of the Snake River Basin Adjudication*

Based on the absence of any reliable means of predicting the total cost of the adjudication at this time, the Committee recommends the adoption of the interim funding plan developed by the subcommittee. This recommendation of \$20 million in general fund support is premised on the need for equitable sharing of the costs between the general public and the claimants. Since all citizens of Idaho will benefit from better water management, the State, as a whole, should provide funding equivalent to the amount of filing fees paid by the claimants. Moreover, the Committee believes that the claimants should not bear the additional expenses arising from the federal government's refusal to pay the adjudication filing fee.