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Department of Water Resources

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

IN RE: SRBA	)	
	)	Subcase Nos. See attached list
	)	
CASE NO. 39576	)	
	)	Memorandum in Support Of
	)	United States Motion For
_____	)	Summary Judgment

34-11247

Table of Contents

Descriptive Summary.....	1
Introduction.....	2
Statement Of Facts.....	2
Standard Of Review.....	6
Argument.....	7
Summary Of Argument.....	7
I. United States Cannot Be Barred By The Doctrine Of <i>Res Judicata</i> Because It Was Not A Party To The Adjudication.....	7
A. The United States Was Not Served And Did Not Participate In The Adjudication.....	8
B. The United States Did Not Waive Its Sovereign Immunity and Therefore Could Not Have Been Joined In The Adjudication.....	9
II. United States Cannot Be Barred By The Doctrine Of <i>Res Judicata</i> Because The Doctrine Does Not Apply Where There Are Different Parties.....	13
III. United States Cannot Be Barred By The Doctrine Of <i>Res Judicata</i> Because It Does Not Apply Where Different Claims Are At Issue.....	13
Conclusion.....	14

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TABLE OF AUTHORITIES

Department of Water Resources

CASES

<i>Anderson v. Dewey</i> , 82 Idaho 173, 350 P.2d 734 (1960).....	13
<i>Anderson v. Liberty Lobby Inc.</i> , 477 U.S. 242 (1986).....	7
<i>Block v. North Dakota</i> , 461 U.S. 273 (1983).....	10
<i>Cappaert v. U.S.</i> , 426 U.S. 128 (1976).....	12
<i>G & M. Farms v. Funk Irrigation Co.</i> , 119 Idaho 514, 808 P.2d 851 (1991)	6, 7
<i>Gibbons v. United States</i> , 75 U.S. (8 Wall.) 69 (1869).....	9
<i>Gubler v. Brydon</i> , 125 Idaho 107, 867 P.2d 981, 984 (1994).....	8
<i>In Re Snake River Basin Water</i> , 115 Idaho 1, 764 P.2d 78(1988).....	14
<i>Kawai Farms Inc. v. Longstreet</i> , 121 Idaho 610, 826 P.2d 1322 (1992).....	7, 14
<i>Kiefer & Kiefer v. Reconstruction Fin. Corp.</i> , 306 U.S. 381, 59 S. Ct. 516(1939).....	9
<i>Lambrix v. Frazier</i> , 31 Idaho 382, 171 P. 1134 (1918).....	13
<i>Larson v. Domerstic and Foreign Commerce Corp.</i> , 337 U.S. 682 (1949).....	9
<i>Loeffler v. Frank</i> , 486 U.S. 549, 108 S. Ct. 1965 (1988).....	10
<i>Mays v. District Court</i> , 34 Idaho 200, 200 P. 115 (1921).....	13
<i>Morrison v. Work</i> , 266 U.S. 481, 45 S. Ct. 149 (1925).....	10
<i>Petricevich v. Salmon River Canal Co.</i> , 92 Idaho 865, 452 P.2d 362 (1969).....	6
<i>Special Master's Recommendations Re: Basin Wide Issue No. 5A,</i> Case No.39576 (April 11, 1996).....	7, 13, 14
<i>U.S. v. Cappaert</i> , 508 F.2d 313., 321 (9 th Cir. 1974), affirmed, 426 U.S. 128 (1975)...	11
<i>United States v. Sherwood</i> , 312 U.S. 584, 61 S. Ct. 767 (1994).....	9
<i>United States v. Idaho</i> , _____ U.S. _____, 113 S.Ct. 1893 (1993).....	9, 10

<i>Utah Construction v. Abbott</i> , Equity No. 222 (D.E.1923).....	2, 3, 5, 6, 14
---	----------------

STATUTES

28 U.S.C. 517.....	10, 12
--------------------	--------

RULES

Equity Rule No. 13 of the Supreme Court of the United States.....	8
Idaho Rule of Civil Procedure.....	6

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	)	United States Motion For
	)	Summary Judgment

DESCRIPTIVE SUMMARY

This is a Memorandum In Support of the United States' Motion for Summary Judgment concerning the *res judicata* effect of the *Utah Construction* decree on the United States.

INTRODUCTION

The issue before the Court on this motion is whether the United States is precluded by the doctrine of *res judicata* from obtaining a decree for water rights with a beneficial use priority date earlier than March 15, 1923, the date of adjudication of the Big Lost River and its tributaries in *Utah Construction v. Abbott*, Equity No. 222 (D.E. 1923). The United States is not precluded by *res judicata* because the United States was not a party to the *Utah Construction* adjudication.¹ The undisputed facts demonstrate that the United States was not served, did not participate in the adjudication and did not waive its sovereign immunity to allow its joinder in the adjudication. Further, the United States cannot be barred by the doctrine of *res judicata* because the doctrine does not apply since there are different parties and different claims at issue in the Snake River Basin Adjudication.

STATEMENT OF FACTS

In 1919, the *Utah Construction* Company (“Company”) filed a complaint in federal district court seeking to determine the water rights to the use of surface water from the Big Lost River and its tributaries.² Plaintiff’s Appendix pp.2, 20-26.³ The Company based its claim on the right to store water in its Mackay reservoir and use stored water for irrigation of lands under the Carey Act. P. App. 2. Defendants were settlers above and below the Mackay reservoir who claimed water rights prior in time to the Company. P. App. 2. The United

¹ This Memorandum Of Support of the United States Motion For Summary Judgment is supported by the affidavits of Joan L. Brownell, Timothy J. Jones, and William E. Tydeman, which are attached hereto as pp. 1-154, 155-161, and 162-394 respectively.

² The complaint was filed in federal district court based on diversity jurisdiction since *Utah Construction* was a foreign corporation. The case was instituted as *Utah Construction v. Barger*, subsequently recaptioned as *Utah Construction v. Aiken* and finally *Utah Construction v. Abbott*. All of these cases proceeded in the United States District Court for Idaho under Equity case number 222.

³ References to documents contained in Plaintiff’s Appendix are hereinafter cited as “P.App.____”.

States was not named as defendant. P. App. 2. Thereafter, subpoenas were served on all defendants. P. App. 163. The United States was not on the service list and was not served with a subpoena. An amended complaint was filed on May 26, 1920. P. App. 3, 27-79. The United States was not named as defendant, was not on the service list and was not served with a subpoena. P. App. 163.

On March 1, 1920, a hearing on the claimed water rights was held in the District Court. P. App. 163. During the course of the hearing there was no mention of the United States or any water rights associated with the Federal government. P. App. 163. On March 15, 1923, a final decree was entered.⁴ P. App. 3. The decree allowed for storage and diversion of the Big Lost River when it did not interfere with any prior rights for irrigation and specified beneficial uses such as domestic and culinary purposes and watering of livestock. P. App. 3. The decree identified all parties who were bound by the decree including all persons upon whom subpoenas had been served.⁵ P. App. 3, 163, 393-394. The United States was not identified as a party served with process or bound by the decree. P. App. 3.

On August 26, 1924, the Lemhi Forest supervisor requested several state water commission "blanks" to make application for water at several ranger stations from the same water commissioner in Boise. P. App. 159. Approximately two years after entry of the final decree, on July 2, 1925, the Forest Supervisor for the Lemhi Forest made application for

⁴ A certified copy of the final decree dated March 15, 1923 in *Utah Construction v. Abbott*, Equity No. 222 (hereinafter "Final Decree"), was submitted to the Court in subcase number 34-10167. An uncertified but identical copy of the decree is attached hereto for reference at P. App. 167-221.

⁵ See Final Decree p. 9 at P. App. 178.

water rights for irrigation uses at two guard stations including the Wildhorse Guard Station.⁶

P. App. 160-161. There was no reference in this request to the *Utah Construction* decree.

Thereafter, the water commissioner for the Big Lost River suggested to the attorney for Utah Construction that several additional rights be added to the decree through motion to the Court. P. App. 147-148. On September 30, 1925, the attorney for the Utah Construction Company filed a motion requesting that several water rights including the two Forest Service water rights be included in the 1923 final decree. P. App. 3-4, 149. These rights were requested to be included under a provision of the final decree that allowed for corrections for clerical errors, inadvertence and omissions.⁷ P. App. 4, 149-154. On October 12, 1925, the Water Commissioner confirmed that these water rights were correct.⁸ On October 21, 1925, the district court entered an Order Correcting Errors and Omissions in the *Utah Construction*

⁶ That letter provides in relevant part:

In [sic] behalf of the U. S. Forest Service in the capacity of Supervisor of the Lemhi Forest, I desire to make application to you for the diversion of 160 inches of water at Wildhorse Ranger Station to be used for irrigation of meadow and pasture land by the local ranger in charge.

Letter dated July 2, 1925 from O. W. Mink, Forest Supervisor to Lynn Crandall, Water Commissioner, P.1 P. App. 160-161. After a review of all available records, the Forest Service was unable to locate a similar letter for the Antelope Creek Guard Station. Affidavit of Timothy Jones at P. App.156.

⁷ The March 1923 *Utah Construction* Decree included a clause (Part III No. 7) that the Court retain jurisdiction of this cause (a) to make corrections for clerical errors, inadvertence and omissions in the rights decreed, the reservation of jurisdiction for this purpose to extend to January 1, 1926. P. App. 220.

⁸ The omission of rights of the United States Forest Service and others to waters of the Big Lost River were observed by Lynn Crandall, who was appointed Water Commissioner of the Big Lost River to administer the 1923 Decree. P. App. 3,147-148. Crandall presented the information to the attorney for the plaintiff "...with the suggestion that steps be taken to obtain the correction of said decree in those respects". . Affidavit of Lynn Crandall dated October 12, 1925 at .P. App. 147-148. Edwin Snow, attorney for the *Utah Construction* Company, was agreeable to the suggestions and presented a Motion on September 30, 1925, to move the Court "that certain clerical errors and inadvertences with respect to rights hereinafter numbered and described be corrected, and that with respect to such rights the decree heretofore entered herein be amended..." P. App.149-154.

Decree. P. App. 4, 124-146. Based upon available evidence, there did not appear to be any objections to inclusions of these rights and no hearing on the merits was held.

United States Claims And Objections

In March of 1993, the United States on behalf of the United States Department of Agriculture, Forest Service (hereinafter "United States") filed claims in each of the above referenced subcases. Each of these claims are state law based consumptive use claims for stockwater use in de minimus amounts. The priority dates recommended in the Director's Reports for all of the referenced claims were all prior to 1923.

Objections to these claims were filed by Young Harvey Walker⁹, Vernon Roche¹⁰ and Gordon Fulton.¹¹ Standard Form 5's were submitted to the Court on July 18, 1995, which resolved the objections to the above referenced cases including all objections to priority dates. The priority dates recommended in the SF5's are 1876¹², and 1898¹³ and 1906¹⁴. In each of these subcases IDWR was the only entity objecting to these settlements.

In each subcase, IDWR filed a report explaining the basis for its objections:

rights to the use of surface water from the Big Lost River and tributaries were adjudicated in *Utah Construction Co., v. Abbott*, Equity No. 222 (D.E. Id. 1923). The source of water for this right is tributary to the Big Lost River, and the United

⁹ Subcase nos. 34-11645, 34-11659, 34-11661, 34-11662, 34-11946, 34-11947, 34-11948, 34-11949, 34-11950 and 34-11951.

¹⁰ Subcase nos. 34-11447 and 34-11509.

¹¹ Subcase nos. 34-11576 and 34-11580.

¹² Subcase nos. 34-11645, 34-11659, 34, 11661, 34-11662, 34-11946, 34-11947, 34-11948, 34-11949, 34-11950, 34-11951, 34, 11576 and 34-11580.

¹³ Subcase no. 34-11509.

¹⁴ Subcase no 34-11447.

States was a party to that a case. The United States is therefore precluded by the doctrine of *res judicata* from asserting a beneficial use priority date the same as or earlier than the date of the decree, March 15, 1923.¹⁵

On May 9, 1996 this Court ordered the United States to file a summary judgment motion addressing the issue of whether the US is precluded by the doctrine of *res judicata* from obtaining a decree for water rights with a beneficial use priority date earlier than March 15, 1923, the date of adjudication of the Big Lost River and its tributaries in *Utah Construction v. Abbott*, Equity No. 222 (D.E. Id.1923).

STANDARD OF REVIEW

I.R.C.P. 56(c) provides for summary judgment where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Courts look to “the pleadings, depositions, and admissions on file, together with the affidavits, if any . . .” to determine whether the moving party is entitled to judgment. *I.R.C.P. 56(c); G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 808 P.2d 851 (1991). The burden of proving the absence of genuine issues of material fact rests on the moving party. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 362 (1969). If the moving party properly supports the motion for summary judgment, the nonmoving party must then present opposing evidence. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 808 P.2d 851 (1991)

The opposing party’s case must consist of more than speculation because a mere scintilla of evidence is not enough to create a genuine issue of fact. *G & M Farms v. Funk Irrigation*, 119 Idaho at 517. The burden of proving the absence of material facts rests upon

¹⁵ IDWR has filed similar statements regarding all United States’ claims in the SRBA in the geographic area adjudicated in the *Utah Construction Decree*, including numerous claims filed on behalf of the BLM. A determination of the issue of the application of *res judicata* in this case should establish the law of the case and apply to all affected United States claims in basin 34.

the moving party. *Id.* If the record contains conflicting inferences upon which reasonable minds might reach different conclusions, summary judgment must be denied. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho at 517. Credibility determinations, weighing of evidence and drawing of legitimate inferences from the facts are functions to be performed at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

ARGUMENT

Summary Of Argument

The United States is not precluded by *res judicata* because the United States was not a party to the *Utah Construction* adjudication. The undisputed facts demonstrate that the United States was not served, did not participate in the adjudication and did not waive its sovereign immunity to allow its joinder in the adjudication. Further, the United States cannot be barred by the doctrine of *res judicata* because the doctrine does not apply since there are different parties and different claims at issue in the Snake River Basin Adjudication.

I. United States Cannot Be Barred By The Doctrine Of *Res Judicata* Because It Was Not A Party To The Adjudication

“[I]n an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim but also as to every matter which might and should have been litigated in the first suit.” *Special Master’s Recommendations Re: Basin Wide Issue No. 5A*, Case No. 39576 (April 11, 1996), citing *Kawai Farms, Inc. v. Longstreet*, 121 Idaho 610, 614, 826 P.2d 1322, 1326 (1992). “*Res judicata* prevents the litigation of causes of action which were finally decided in a previous suit.” *Gubler v. Brydon*, 125 Idaho 107, 110, 867

P.2d 981, 984 (1994). IDWR contends that *res judicata* bars the United States. The United States is not barred from assertion of a pre-1923 priority date under *res judicata* principles for a number of reasons.

A. The United States Was Not Served And Did Not Participate In The Adjudication

Res judicata does not apply because the United States was not a party to the adjudication since the United States was not served or in any way consented to being a party in the adjudication that resulted in the final decree.

The United States was not served in the adjudication when it was commenced in 1919. P. App. 163. There is no reference to service on the United States in the subpoenas and proofs of service filed in the District Court. P. App. 163. Nor was the United States subpoenaed in accordance with the requirements of the District Court at any time during the course of the adjudication. P. App. 163. The final decree specifically identifies all parties who were subpoenaed in the adjudication and bound by the decree. P. App. 163. The United States is not identified. P. App. 163. In addition, there is no evidence that the United States was served under Equity Rule No. 13 of the Supreme Court Of The United States which provided the process for service on the United States. In sum, the record is devoid of any attempt to serve the United States.

The evidence clearly supports the contention of the United States that the United States did not participate in any fashion in the adjudication of water rights resulting in the 1923 *Utah Construction* decree. The United States did not file any claims in the adjudication prior to entry of the final decree in 1923. P. App. 163. Nor is there any evidence to suggest that the United States was joined or consented to joinder at any time prior to entry of the final

decree.¹⁶ The United States made no special appearances and did not appear before the Court at any time.¹⁷ The United States did not appear at any hearings during the adjudication and was not granted or denied any water rights in the final decree. In sum, the evidence clearly shows that the United States was not joined and did not participate in litigation resulting in the 1923 final decree.

B. The United States Did Not Waive Its Sovereign Immunity and Therefore Could Not Have Been Joined In The Adjudication

The doctrine of *res judicata* also does not apply because the United States could not be not a party to the *Utah Construction* adjudication since it did not waive its sovereign immunity to allow its joinder. It is a fundamental principle of jurisprudence that the United States is immune from suit unless it consents to be sued. *United States v. Idaho*, ___ U.S. ___, 113 S.Ct. 1893, 1896 (1993)(and authorities cited therein); *Kiefer & Kiefer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 59 S. Ct. 516 (1939). The doctrine of sovereign immunity is no mere monarchical anachronism inherited from the Stuarts of England; instead, it ensures that essential government activities such as those involving federal property as well as expenditures from the public fisc can proceed unhampered by court challenges. See *Larson v. Domestic and Foreign Commerce Corp.* 337 U.S. 682, 703-704 (1949). The doctrine rests on the time honored theory that, “where it is proper for the nation to furnish a remedy, Congress has wisely reserved the matter for its own determination.” *Gibbons v. United States*, 75 U.S. (8 Wall.) 69, 275-276 (1869). Only the United States Congress can grant such consent to be sued. *Id.*; *United States v. Sherwood*, 312 U. S. 584, 61 S. Ct. 767 (194); *Morrison v. Work*, 266 U.S. 481, 45 S. Ct. 149 (1925). Absent a waiver

¹⁶ Such consent to suit can only be made by Congress. See section I.B, *infra*.

of sovereign immunity by Congress, the United States cannot be sued. *Loeffler v. Frank*, 486 U.S. 549, 108 S. Ct. 1965 (1988). Consent to suit cannot be implied, but must be unequivocally expressed in the text of the statute. *United States v. Idaho*, *supra*, 113 S.Ct. at 1896 (1993); *Block v. North Dakota*, 461 U.S. 273, 280 (1983).

There is simply no statutory authority waiving the United States' sovereign immunity which would have allowed it to be joined as a party in the *Utah Construction* proceeding. Absent a showing of such intent, the United States cannot be sued and cannot be bound as party. Therefore, since the United States could not have been a party to that litigation, it could not be bound under *res judicata* principles.

The only conceivable basis for IDWR's allegation that the United States was a party to the *Utah Construction* adjudication was the fact that the Forest Service was decreed two water rights in 1925, over two years after entry of the final decree. The evidence suggests that a Forest Service official applied for these irrigation rights consistent with state water law independent of the adjudication process. P. App. 156, 160-161. In his July 2, 1925 letter, O. W. Mink, Forest Supervisor for the Lemhi National Forest, applied for a water right to irrigate pasture at Wildhorse Guard station but made no reference to the *Utah Construction* Decree:

In [sic] behalf of the U. S. Forest Service in the capacity of Supervisor of the Lemhi Forest, I desire to make application to you for the diversion of 160 inches of water at Wildhorse Ranger Station to be used for irrigation of meadow and pasture land by the local ranger in charge.

P. App. 160-161.

¹⁷ Any such appearance, of course, could only be made by the Attorney General or duly authorized representative. 28 U.S.C. 517.

Contrary to IDWR's opinion that the United States actively participated in the *Utah Construction* litigation by having two water rights added to the decree, the available evidence suggests that the decision to include those two rights into a supplement to the *Utah Construction* final decree, was made by the water commissioner, Lynn Crandall, in conjunction with Edwin Snow, the attorney for the *Utah Construction* Company. See footnote 8, *supra* at p. 4 and correspondence cited therein. Upon Mr. Crandall's suggestion, Mr. Snow, not Forest Service attorneys, presented a motion to add these additional rights. P. App. 149-154.

Assuming *arguendo* that the Forest Supervisor intended to be bound by the *Utah Construction* decree, the United States would not be bound by his action in any event because he was not authorized to waive sovereign immunity and bind the United States.

It is well settled that an agency official of the United States does not have the authority to adjudicate the water rights of the United States where the United States did not waive its sovereign immunity. *Cf. U.S. v. Cappaert*, 508 F.2d 313, 321 (9th Cir. 1974), *affirmed*, 426 U.S. 128 (1975) (United States was neither a defendant nor served with process in the proceedings before the State Engineer). In *Cappaert*, the government sought to enjoin the defendants from the unrestricted use of their wells located more than one mile from Devil's Hole. *Id.* The State of Nevada intervened and argued that the decision of a State Engineer who granted the defendants permits to use groundwater was *res judicata* and barred the government's action. *Id.* The United States was not a party to the proceedings or served with process. *Id.* at 321. Nevertheless, employees of the National Park Service learned of the applications through a public notice. *Id.* A field solicitor for the National Park Service protested the applications because extracting groundwater would lower the water level in the

Devil's Hole Pool and might endanger the pupfish. *Id.* The solicitor did not raise the jurisdictional issue or any of the legal issues which the United States had the right to assert. *Id.* In denying application of *res judicata*, the Court expressly noted that the State Engineer did not have the authority to adjudicate the water rights of the United States because the United States did not waive its sovereign immunity. *Id.* In affirming the Court's opinion, the Supreme Court likewise noted that the United States was not made a party to the state proceeding, nor was it in privity with any of the litigants. *Cappaert v. U.S.*, 426 U.S. 128, 146 (1976). Furthermore, when the United States appeared to protest in the state proceeding it did not assert any federal water-rights claims. *Id.* It follows that mere acquiescence to a state court proceeding cannot be given preclusive effect when the United States was not a party and as a prerequisite the sovereign immunity of the United States was not and could not have been waived by a Forest Service Official.

Moreover, the Forest Service official had no authority to conduct litigation affecting property rights of the United States. The power to conduct litigation in any federal court affecting the United States is reserved to the Department of Justice through the Attorney General of the United States. 28 U.S.C. 517. There is no evidence of any involvement by the Department of Justice in asserting these two Forest Service claims. As a result, the United States cannot be bound by Forest Service actions in a federal court proceeding where there was no attorney present who was authorized to represent the United States' property interests in litigation and no affirmative waiver of sovereign immunity.

Absent the express consent of Congress, neither a Forest Service official nor the state or federal court has authority to dispose of federal water rights not claimed. The Property Clause, Article IV, Sec. 3, U.S. Const., together with the Supremacy Clause, is the

fundamental constitutional basis for the doctrine of sovereign immunity. Therefore, if in the prior action, the United States was not properly joined pursuant to a valid, clear, waiver of sovereign immunity, that prior action is not binding on the U.S. A court, whether federal or state, has no authority to divest the U.S. of its property based on the action or inaction of a federal official, at least not in the absence of a valid waiver of sovereign immunity which is clearly and unambiguously stated.

II. United States Cannot Be Barred By The Doctrine Of *Res Judicata* Because The Doctrine Does Not Apply Where There Are Different Parties

Even if the United States had participated in some meaningful fashion in the *Utah Construction* proceeding (which it did not) *res judicata* would not apply since the parties to that adjudication and the Snake River Basin adjudication are not the same. *See e.g. Special Master's Recommendation on Basin-Wide Issue 5A, re SRBA Case No. 39576, pp. 12-13. (April 11, 1996).* Without identity of parties or privities, *res judicata* does not apply. *Id. Lambrix v. Frazier*, 31 Idaho 382, 386, 171 P. 1134 (1918); *Mays v. District Court*, 34 Idaho 200, 207, 200 P. 115 (1921); *Anderson v. Dewey*, 82 Idaho 173, 182, 350 P.2d 734 (1960). The parties in *Utah Construction* were users of water from the Big Lost River and its tributaries. The parties in the SRBA are all water users in the Snake River Basin. Therefore, since the parties are different *res judicata* principles are inapplicable.

III. United States Cannot Be Barred By The Doctrine Of *Res Judicata* Because It Does Not Apply Where Different Claims Are At Issue

The SRBA involves a different claim or demand than the *Utah Construction* Adjudication. The *Utah Construction* Court determined rights in a particular stream, *i.e.*, the Big Lost River and its tributaries. The jurisdiction of the SRBA Court is over all rights in the Snake River Basin and includes thousands of claimants. Because the claim and demand

are different, *res judicata* does not apply. See e.g. *Special Master's Recommendation on Basin-Wide Issue 5A, re SRBA Case No. 39576, pp. 12-13, (April 11, 1996)*, citing *Kawai Farms, Inc. v. Longstreet*. The Idaho Supreme Court in *In Re Snake River Basin Water*, 115 Idaho 1, 764 P.2d 78 (1988), implicitly recognized these principles by including the Boise and Weiser Rivers in the SRBA although those two rivers had undergone prior stream adjudication. *Id.*

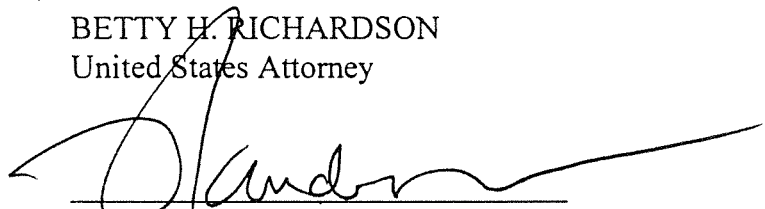
CONCLUSION

The United States respectfully requests that this Court enter an order stating that the United States is not precluded by the doctrine of *res judicata* from obtaining a decree for water rights with a beneficial use priority date earlier than March 15, 1923, the date of adjudication of the Big Lost River and its tributaries in *Utah Construction v. Abbott*, Equity No. 222 (D.E. 1923).

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "R. Bramer", is written over a horizontal line.

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DATED this 26 day of June, 1996.

CERTIFICATE OF MAILING

I certify that on the 26th day of June, 1996, I served a true and correct copy of this **Memorandum In Support Of United States Motion For Summary Judgment** by the following methods:

Original by Federal Express to:

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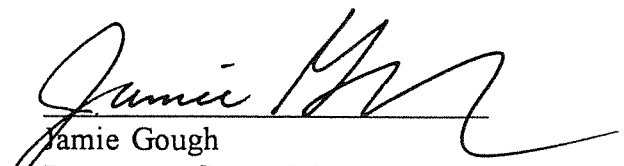
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