

UNDERSTANDING THE SNAKE RIVER BASIN ADJUDICATION

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appealed.¹¹⁵⁵

The Idaho Supreme Court held that the primary purpose of the reservation was to create sanctuaries for migratory birds to protect them from hunters and trappers so they would not become extinct and so they could continue to benefit husbandry.¹¹⁵⁶ However, the Court held that “simply reserving an area of land where certain species are attracted, without more, does not constitute a reservation of water.”¹¹⁵⁷ The Court went on to note that “there is no standard for the amount of water necessary to have an island” and an absence of any standard for quantification is indicative of the fact that quantification was not meant to be determined.¹¹⁵⁸ In addition, the Court noted that a reserved water right would frustrate the United States’ control and use of its own reclamation activities on the Snake River.¹¹⁵⁹ Therefore, the Court affirmed the SRBA Court’s decision denying the United States’ claim for a federal reserved water right.¹¹⁶⁰

This decision further narrowed the scope of instances where the Court was willing to imply a federal reserved water right. Not only must the purposes of the reservation be entirely defeated, but there must also be a viable means of quantifying the right. Without a standard for quantification the Court would assume that no quantification is possible and therefore Congress did not intend to create a water right.

2. Quantification of Implied Federal Reserved Water Rights

The Idaho Supreme Court cases discussed above were useful in defining the parameters of the implied federal reserved water rights doctrine. The Court’s analysis in each of the cases provided important guidance for when it would find an intent to imply a federal reserved water right in an act or executive order. Ultimately, the Court held that the United States was entitled to federal reserved water rights under the Wild and Scenic Rivers Act and the HCRNA Act. The Court established that the quantity reserved for these implied federal reserved water rights was the “minimum amount necessary to achieve the purposes of the reservation.”¹¹⁶¹ The Court noted, however, that quantification of the minimum amount necessary was a factual determination that should be determined by the district court.¹¹⁶² Thus, the United States and the objectors to the Wild and Scenic and HCRNA claims were left with two avenues to quantify the federal reserved rights. They could return to district court and litigate the quantification of the rights, or they could pursue a negotiated settlement.

a. Negotiations

After litigation the federal reserved water right entitlement issues, the United

1155. U.S. v. State, 23 P.3d 117, 120, 135 Idaho 655, 658 (2001).

1156. *Id.*

1157. *Id.*

1158. *Id.*

1159. *Id.* at 666, 23 P.3d at 128.

1160. *Id.* at 667, 23 P.3d at 129.

1161. *Potlatch II*, 12 P.3d at 1260, 134 Idaho at 916.

1162. *Id.* at 1270, 134 Idaho at 926 (“However, the question of the amount of water necessary to fulfill the purpose of the reservation involves a factual inquiry.”); *see also id.* at 916, 12 P.3d at 1260.

States and the objectors quantified the amount of the federal reserved water rights through negotiations. Negotiations allowed the parties more flexibility than they would have had within the structure of litigation. The State of Idaho entered the negotiation with a clear set of objectives. It wanted to ensure the federal reserved water rights would not injure existing water users and it wanted to preserve a certain amount of water for future development. The United States entered the negotiations with the objective of maximizing the quantity of water under its rights. In the end, each party compromised to achieve a result that was acceptable to all.

i. The Wild and Scenic Rivers Water Right Agreement

In the absence of a recognized methodology for quantifying Wild and Scenic reserved water rights, the United States, the State, and certain private parties entered into a stipulation¹¹⁶³ that quantified water rights for the Mainstem Salmon, Middle Fork Salmon River, Selway, Lochsa and Rapid Rivers (“Wild and Scenic Stipulation”). The Wild and Scenic Stipulation provided for entry of partial decrees for each of the Wild and Scenic water rights and set forth how the Wild and Scenic water right decrees would be administered by IDWR.¹¹⁶⁴ The partial decrees for the Wild and Scenic water rights are based on two principles, quantification of the United States’ instream flow amounts and subordination protection for certain state-based water rights.

First, the quantity of each water right was determined using exceedence flows.¹¹⁶⁵ For example, the Main Salmon partial decrees were quantified at an exceedence flow of approximately 40% for the months of August through April and 30% for the months of May through July.¹¹⁶⁶ The quantity for the Middle Fork Salmon, Rapid River, Lochsa, and Selway federal reserved water rights was set at an exceedence flow of approximately 20%.¹¹⁶⁷ In addition, the United States is also entitled to all flows above a specified high-flow amount.¹¹⁶⁸

Second, the federal reserved water rights were subordinated to five classes of state-based water rights: 1) all water right claims filed in SRBA as of the date of the

1163. Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees, *In re* SRBA Case No. 39576, Subcase No. 75-13316 (Aug. 20, 2004).

1164. *Id.*

1165. “Exceedence” is a way to describe the percentage of time for which an observed stream-flow is greater than or equal to a defined stream flow. IWRB, Exceedence Flows *available at*: https://www.idwr.idaho.gov/waterboard/WaterPlanning/nezperce/exceedence_flows.htm Exceedence flows can be useful when stream-flow data show that high flow events cause the average flow to be greater than the median flow. *Id.* Low flows have high exceedence percentages, e.g. an 80% exceedence is a low flow because the flow in the river exceeds that amount 80% of the time. *Id.* High flows have low exceedence percentages, e.g. a 10% exceedence is a high flow because the flow in the river exceeds that amount only 10% of the time. *Id.*

1166. *See* Partial Decree for Federal Reserved Water Rights 75-13316 and 77-11941 Salmon Wild and Scenic River, *In re* SRBA Case No. 39576 at Section 3 (Nov. 16, 2004).

1167. *See* Partial Decree for Federal Reserved Water Right 77-13884 Middle Fork Salmon Wild and Scenic, *In re* SRBA Case No. 39576 (Nov. 16, 2004); Partial Decree for Federal Reserved Water Right 78-11961, *In re* SRBA Case No. 39576 (Nov. 16, 2004); Partial Decree for Federal Reserved Water Right 81-10472, *In re* SRBA Case No. 39576 (Nov. 16, 2004); Partial Decree for Federal Reserved Water Right 81-10513, *In re* SRBA Case No. 39576 (Nov. 16, 2004); Partial Decree for Federal Reserved Water Right 81-10625, *In re* SRBA Case No. 39576 (Nov. 16, 2004).

1168. *See e.g.*, Partial Decree for Federal Reserved Water Rights 75-13316 and 77-11941 Salmon Wild and Scenic River, *supra* note 1164, at Section 3.b (providing the United States will all flows between 13,600 cfs and 28,400 cfs.)

Wild and Scenic Stipulation,¹¹⁶⁹ 2) all applications for permit, permits, and licenses with proof of beneficial use due after the start of the SRBA that were on file with IDWR as of the date of the Wild and Scenic Stipulation,¹¹⁷⁰ 3) new *de minimis* domestic water rights,¹¹⁷¹ 4) new *de minimis* stockwater rights,¹¹⁷² and 5) a finite amount of water for other future uses authorized pursuant to state law.¹¹⁷³ Water

1169. See *e.g. id.* at Section 10.b.(1) (subordinating the right to “[a]ll water right claims filed in the Snake River Basin Adjudication (SRBA) as of the effective date of the Stipulation to the extent ultimately decreed in the SRBA.”)

1170. See *e.g. id.* at Section 10.b.(2) (subordinating the right to “[a]ll applications for permit and permits with proof of beneficial use due after November 19, 1987, on file with IDWR as of the effective date of the Stipulation, to the extent such applications for permit or permits are ultimately licensed; and all water right licenses with proof of beneficial use due after November 19, 1987, on file with IDWR, as of the effective date of the Stipulation.”) Collectively, Section 10.b(1) and (2) of the partial decrees subordinate the Wild and Scenic water rights to all junior state based water rights with a priority date prior to September 1, 2003, the effective date of the Stipulation.

1171. See *e.g. id.* at Section 10.b.(3). (incorporating the definition of *de minimis* domestic use from IDAHO CODE § 42-111. (“All domestic uses, which for purposes of this Partial Decree shall be defined as set forth at I.C. § 42-111(1)(a) & (b) to mean the use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half acre of land, if the total use is not in excess of thirteen-thousand (13,000) gallons per day or any other uses, if the total does not exceed a diversion rate of four one-hundreds (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day, provided that this domestic use subordination is limited and defined by I.C. 42-111(2), so that the subordination shall not and does not apply to multiple ownership subdivisions, mobile home parks, or commercial or business establishments, unless the use meets the diversion rate and volume limitations set forth in I.C. 42-111(1)(b) (0.04 cfs/2,500 gpd), and by I.C. 42-111(3), so that the subordination shall not and does not apply to multiple water rights for domestic uses which satisfy a single combined water use that would not itself come within the above definition of domestic use.”)).

1172. See *e.g., id.* at Section 10.b.4 (incorporating the definition of *de minimis* stockwater use from IDAHO CODE § 42-1401A(11). (“All *de minimis* stockwater uses, which for the purposes of this Partial Decree shall be defined as set forth at I.C. § 42-1401A(12) to mean the use of water solely for livestock or wildlife where the total diversion is not in excess of thirteen-thousand (13,000) gallons per day. This *de minimis* stockwater use subordination is limited and defined by I.C. § 42-111(3), so that the subordination shall not and does not apply to multiple water rights for stockwater uses which satisfy a single combined water use that would not itself come within the above definition of stockwater use.”)).

1173. The amount of water available for such uses is specified in each partial decree. See *e.g. id.* at Section 10.b.(6). Section 10.b.6 subordinates the rights to future water rights with a total combined diversion of 150 cfs when the mean daily discharge at the Shoup gage is less than 1,280 cfs, and an additional diversion of 225 cfs when the mean daily discharge at the Shoup gage is equal to or greater than 1,280 cfs. The partial decrees limit the amount of future use for irrigation to no more than 5,000 acres of irrigation when the mean daily discharge at the Shoup gage is less than 1,280 cfs, and no more than 10,000 acres of irrigation when the mean daily discharge at the Shoup gage is equal to or greater than 1,280 cfs. Section 10.b.5 of the partial decree 77-13844 for the Middle Fork Salmon subordinates the right to future water rights with a 1) a total combined diversion of 60 cfs, but limits the subordination to 2,000 acres of irrigation, and 2) to a total combined diversion of 5 cfs within a portion of Monumental and Marble Creek basins for any commercial or industrial uses. *Id.* at Section 10.b.(5). Partial decree 81-10472 for the Selway River and partial decree 81-10513 for the Lochsa River are each subordinated to a total combined diversion amount of 40 cfs for future uses, including not more than 500 acres of irrigation in each basin. Partial Decree for Federal Reserved Water Right 81-10472, *In re* SRBA Case No. 39576 at Section 10.b.(5).(b).(A) (Nov. 16, 2004); Partial Decree for Federal Reserved Water Right 81-10513, *In re* SRBA Case No. 39576 at Section 10.b.(5).(b).(A) (Nov. 16, 2004). The partial decree 81-10625 for the Middle Fork Clearwater is subordinated to future water rights with a total combined diversion of 40 cfs, but limits future irrigation use to no more than 500 acres. Partial Decree for Federal Reserved Water Right 81-10625, *In re* SRBA Case No. 39576 at Section 10.b.(5).(b).(A) (Nov. 16, 2004). The 40 cfs of future use subordination under partial decree 81-10625 is in addition to the amount of future use subordination provided for in partial decrees 81-10513 and 81-10472. Partial decree 78-11961 for the Rapid River is subordinated to future uses with a total combined diversion of 10 cfs, but limits future irrigation use to no more than 300 acres. Partial Decree for Federal Reserved Water Right 81-10625, *In re* SRBA Case No. 39576 at Section 10.b.(5).(b).(A) (Nov. 16, 2004). The subordination for irrigation specifies

rights of the United States, instream flow water rights, nonconsumptive water rights,¹¹⁷⁴ and replacement water rights¹¹⁷⁵ do not count against the finite future amount of water available for development.¹¹⁷⁶ In addition, the federal reserved water rights for the Main Salmon River are also subordinated to municipal uses provided “that any municipal hookup that has a manufacturer’s rated maximum flow capacity of equal to or greater than 2 cfs of water on an instantaneous basis, other than capacity for fire protection, . . . counts against the finite future subordination limit of the partial decree.”¹¹⁷⁷

The Wild and Scenic Stipulation called for the creation of water districts so that the partial decrees could be administered.¹¹⁷⁸ IDWR is tasked with maintaining a database that tracks those water rights enjoying the benefit of subordination under paragraph 10.b.(6) of the Main Salmon River partial decrees and paragraph 10.b.(5) of the other Wild and Scenic partial decrees.¹¹⁷⁹ IDWR was also tasked with maintaining an accounting database that identifies 1) all accepted applications for permit and claims with points of diversion upstream from the ending points of the Wild and Scenic partial decrees, 2) those applications and claims that enjoy the benefit of subordination, 3) the applicable subordination provision, and 4) for those “water rights decrees, permits and licenses that come within the future use subordination [of paragraph 10.b.(6) for the Main Salmon and 10.5(5) of the other

a maximum diversion rate of .02 cfs/acre. *Id.* In addition, the subordination for storage is limited to incidental storage, which is “defined as storage of not more than a 24 hour water supply for any beneficial use.” *Id.*

1174. Partial Decree for Federal Reserved Water Rights 75-13316 and 77-11941 Salmon Wild and Scenic River, *supra* note 1164, at Section 10.b.4

Nonconsumptive water rights mean all beneficial uses of water having these characteristics:

i) the use involves no diversion from the designated reach of the Wild and Scenic River as identified in this Partial Decree; ii) all return flows from the use accrue to the Wild and Scenic reach; and iii) the use does not cause a depletion or a change in timing of the flow (other than incidental evaporation or seepage) as determined at the point(s) of return, whether or not the depletion or change in timing can be measured within the designated reach. Examples of such uses include: i) run-of-the-river hydroelectric facilities; ii) fish propagation uses; and iii) other similar uses.

1175. *Id.*

Replacement water rights means all irrigation appropriations issued for the same purpose of use and place of use covered by an existing water right with no increase in period of use, diversion rate, and, if applicable, volume of water. To be considered a replacement water right: i) no element of the new appropriation may exceed that of the original water right; ii) only the original or the replacement water right or part of each water right may be used at the same time; and iii) the replacement water right cannot be used when water would not be legally and physically available under the original water right.

1176. *See supra* note 1161.

1177. *Supra* note 1161.

1178. Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees, *supra* note 1158, at Section 2.b.2. Section 2 of the Stipulation called for the creation of a water district in the Salmon River Basin. *Id.* at Section 2. When IDWR issued an order creating the district, Thompson Creek Mining Company challenged the order alleging denial of due process, takings, and violation of the Administrative Procedure Act. Both the SRBA Court and the Idaho Supreme Court affirmed the Director’s Order creating the water district. Amended Order Approving Stipulation and Entry of Partial Decrees, *In re* SRBA Case No. 39576, Subcase No. 75-13316 at 2 (Nov. 17, 2004); Thompson Creek Mining Co. v. Idaho Dep’t of Water Resources, 220 P.3d 318, 148 Idaho 200 (2009). The SRBA Court found that the provisions of Section 2 of the Stipulation “are covenants among the signatory parties only and shall not be binding on this Court or non-signatory parties with regard to administration of water rights by IDWR.” *Id.* at 208, 220 P.3d at 327.

1179. Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees, *supra* note 1161, at Section 3.d.

Partial Decrees] the diversion rate, and for irrigation rights, the number of irrigated acres, decreed, permitted or licensed, including any reductions in permitted amounts as licensed, to be credited to the applicable future use subordination.”¹¹⁸⁰ In addition the subordination database identifies adjustments made to the future subordination amounts as a result of the forfeiture, abandonment, or lapse of water rights or that IDWR determines are water rights of the United States.¹¹⁸¹ Finally, the database lists a running total of the amounts of future use subordination that remains available for appropriation under paragraph 10.b.(6) of the Main Salmon River partial decrees and 10.b.(5) of the other partial decrees.

The Stipulation also set forth a dispute resolution process to be used in case any disputes arises regarding implementation of the Wild and Scenic Stipulation.¹¹⁸² The first step in the process requires the parties to engage in a good faith effort to resolve any dispute.¹¹⁸³ If the parties are unable to resolve a dispute, any party may seek judicial review “within six months of the challenged action, or within six months of the notification of the challenged action (if notice is required under the terms of the Stipulation), whichever is later.”¹¹⁸⁴ Review of any challenged action is de novo and any disputed factual issues will be decided based upon a preponderance of the evidence.¹¹⁸⁵ The SRBA Court retained continuing jurisdiction for purposes of enforcement of the subordination provisions.¹¹⁸⁶

ii. Hells Canyon Negotiated Agreement

As discussed above, the Idaho Supreme Court held in *Potlatch II*,¹¹⁸⁷ that the HCNRA Act expressly reserved the minimum amount of water in the tributary streams of the Snake River within the HCNRA necessary to achieve the purposes of the HCNRA.¹¹⁸⁸ The Court remanded the case to the SRBA Court for a factual determination of the amount of water necessary to achieve the purposes of the HCNRA.¹¹⁸⁹ On remand, the parties negotiated a stipulated agreement quantifying the federal reserved water rights for the HCNRA that was subsequently approved by the SRBA Court with the exception of paragraph 2, which like the Wild and Scenic River Stipulation, addressed administration of water rights.¹¹⁹⁰

1180. *Id.* at Section 3.e.

1181. *Id.*

1182. *Id.* at Section 4.

1183. *Id.*

1184. *Id.*

1185. Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees, *supra* note 1161, at Section 4.

1186. Amended Order Approving Stipulation and Entry of Partial Decrees, *supra* note 1176, at 2

1187. *Potlatch II*, 12 P.3d 1260, 134 Idaho 916.

1188. *Id.* at 1269, 134 Idaho 925 (“In reserving waters within the boundaries of the HCNRA, Congress exempted from the reservation the mainstem of the Snake River and all tributaries upstream and downstream from the boundaries of the HCNRA”).

1189. *Id.* at 1270, 134 Idaho at 926.

1190. Order Approving Stipulation and Entry of Basin 79 Partial Decrees, *In re* SRBA Case No. 39576, Subcase No. 79-13597 (Nov. 16, 2004); Order Approving Entry of Basin 78 Partial Decrees, *In re* SRBA Case No. 39576, Subcase No. 79-13597 (May 2, 2005). The Order Approving Stipulation and Entry of Basin 79 Partial Decrees provides “that the provisions of paragraph 2 of the Stipulation (“paragraph 2”) that address administration of water rights are covenants among the signatory parties only and shall not be binding on this Court or non-signatory parties with regard to administration of water rights by IDWR.” Order Approving Stipulation and Entry of Basin 79 Partial Decrees, at 2.

The HCNRA Stipulation¹¹⁹¹ provided for entry of thirty-two partial decrees for streams and lakes within the HCNRA.¹¹⁹² Each partial decree has a priority date of December 31, 1975; however, the partial decrees provide that the water rights are subordinated to junior water right claims filed in the SRBA prior to September 1, 2003 to “the extent ultimately decreed in the SRBA,” and “all applications for permit and permits with proof of beneficial use due after November 19, 1987, on file with IDWR as of [September 1, 2003] to the extent such applications for permit or permits are ultimately licensed; and all water right licenses with proof of beneficial use due after November 19, 1987, on file with IDWR as of [September 1, 2003].”¹¹⁹³ Additionally, each partial decree is subordinated to all *de minimis* domestic uses as defined in Idaho Code § 42-111 and all *de minimis* stockwater uses as defined by Idaho Code § 42-1401A(11).¹¹⁹⁴ The partial decrees for Corral¹¹⁹⁵ and Kirkwood¹¹⁹⁶ Creeks are also subordinated to specified amount of water for other future uses. The Corral Creek right is subordinated to future water uses with “a total combined diversion of 0.10 cfs for any purposes.”¹¹⁹⁷ The Kirkwood Creek right is also subordinated to future water uses with “a total combined diversion of 0.10 cfs for any purposes.”¹¹⁹⁸

Paragraph 2 of the HCNRA Stipulation describes the process for administration of water rights upstream from the ending point of the partial decrees.¹¹⁹⁹ Because of the remoteness of the HCNRA and the limited number of water rights above the ending point or point of the federal reserved water rights, the parties agreed creation of water districts for purposes of distribution of the HCNRA water rights was not necessary.¹²⁰⁰ Instead, the HCNRA Stipulation provides that IDWR will: “A) collect and record diversion data; B) enforce the water rights in priority; and C) curtail unauthorized or excessive diversion based on the authorities of Chapter 6, Title 42, Idaho Code.”¹²⁰¹

Paragraph 3 of the HCNRA Stipulation describes the process for administration of the subordination provisions.¹²⁰² IDWR is tasked with maintaining an accounting database for the purpose of tracking the amount of water allocated under the future

1191. Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees, *supra* note 1158. The Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees has an effective date of September 1, 2003.

1192. *Id.* at Section 1 (Aug. 17, 2004).

1193. *See e.g.* Partial Decree for Federal Reserved Water Right 78-12200, *In re* SRBA Case No. 39576 at Section 10.b.(1), (2) (May 2, 2005).

1194. *See e.g. id.* at Section 10.b.(3), (4).

1195. Partial Decree for Federal Reserved Water Right 79-14056, *In re* SRBA Case No. 39576 (Nov. 16, 2004).

1196. *Id.* at Section 10.b.(5).

1197. Partial Decree for Federal Reserved Water Right 79-14061, *In re* SRBA Case No. 39576 (Nov. 16, 2004).

1198. Partial Decree for Federal Reserved Water Right 79-14056, *supra* note 1189, at Section 10.b(5)(b); Partial Decree for Federal Reserved Water Right 79-14061, *supra* note 1191, at Section 10.b(5)(b) (providing that water rights established by the United States, nonconsumptive water rights and replacement water rights shall not be deducted from the subordination amount in paragraph 10.b(5)(A).).

1199. Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees, *supra* note 1158, at Section 2.

1200. *Id.* at Section 2.b.

1201. *Id.* Section 2.d. also provides that IDWR will pursue civil enforcement actions as appropriate under Idaho Code §§ 42-351 and 42-1701B.

1202. *Id.* at Section 3.

use subordination provisions for the Corral and Kirkwood Creek water rights.¹²⁰³ This accounting database is similar to the one IDWR set up to track the subordination amounts under the Wild and Scenic water rights. The SRBA Court retained jurisdiction “for the purpose of resolving disputes among the signatory parties regarding the implementation and enforcement of the Stipulation.”¹²⁰⁴

As with the Wild and Scenic Stipulation, negotiation allowed the parties to determine the quantity for the HCNRA water rights without having to resort to the expense of litigation. By the time the HCNRA Stipulation was entered, a pattern for settling federal reserved water rights had developed. The HCNRA Stipulation and the Wild and Scenic Stipulation provided a template for future federal reserved water rights negotiations, most notably in the Owyhee Wild and Scenic Agreement discussed below.

iii. Owyhee Wild and Scenic Stipulation

During the pendency of the SRBA, Congress enacted the Omnibus Public Land Management Act of 2009 (“Owyhee Act”) that, among other things, designated 517,000 acres of federal land in southwestern Idaho for inclusion in the federal Wilderness system and 384 miles of rivers in the federal Wild and Scenic river system.¹²⁰⁵ The Owyhee Act sought to resolve many of the contentious natural resources issues in Owyhee County. One of these issues was whether designation of lands and rivers under the Wilderness Act and the Wild and Scenic Rivers Act would create federal reserved water rights. Consistent with the Idaho Supreme Court’s decision in *Potlatch II*,¹²⁰⁶ Section 1503 of the Owyhee Act expressly disclaimed any intent to reserve unappropriated water under the Wilderness Act.¹²⁰⁷ The Owyhee Act, however, expressly recognized Congressional intent to reserve water to fulfill the purposes for designation of river reaches under the Wild and Scenic River Act.¹²⁰⁸

In recognition of the past conflict over quantification of federal reserved water rights for Wild and Scenic rivers, the Owyhee Working Group¹²⁰⁹ crafted the Owyhee Initiative Wild and Scenic Rivers Water Right Agreement (“OI

1203. *Id.*

1204. *Id.* at Section 5.

1205. Pub. L. 111-11, 123 Stat. 991, 1037–39 (2009).

1206. In *Potlatch Corp. v. United States (Potlatch II)*, 12 P.3d 1256, 1268, 134 Idaho 912, 924 (2000), the Idaho Supreme Court held the Wilderness Act did not contain a clear intent to create an implied federal reserved water right for lands designated for inclusion in the wilderness system. In the companion *Potlatch Corp.* case, the Idaho Supreme Court held that section 13(c) of the Wild and Scenic Rivers Act expressly reserved water to fulfill the purposes of the Act. 12 P.3d at 1258, 134 Idaho at 914.

1207. “The designation of areas as wilderness by subsection (a) shall not create an express or implied reservation by the United States of any water or water rights for wilderness purposes with respect to such areas.” 123 Stat. 991, *supra* note 1199, at Section 1503(b)(12)(A). This provision was included in the legislation at the insistence of the State of Idaho, which sought to avoid future litigation over whether designation of the federal lands for inclusion in the federal wilderness system created federal reserved water rights.

1208. *Id.* at Section 1503(b)(12)(B).

1209. The Owyhee Working Group is a “coalition of representatives of landowners, ranchers, environmental organizations, county government, and recreation groups appointed in Owyhee County, Idaho by the Board of Commissioners,” that developed the Owyhee Initiative Agreement. Owyhee Initiative Agreement (Sept. 17, 2010) (on file with authors) [hereinafter OI Agreement]. The Owyhee Initiative Agreement was the foundational document that provided the foundation for enactment of the 2009 Omnibus Act. 123 Stat. 991, *supra* note 1199.

Agreement”).¹²¹⁰ In Appendix B to the OI Agreement (“OI Appendix B”),¹²¹¹ the Owyhee Working Group expressed a desire that “the Interior Department or other appropriate federal agencies . . . file federal reserved water right claims in the Snake River Basin Adjudication and take such other actions necessary to assure that the reserved water rights are quantified and administered consistent with the understanding of the parties as set forth [in the Agreement].”¹²¹² Consistent with the Salmon and Clearwater Wild and Scenic River Agreement, OI Appendix B provides that the federal reserved water rights are “subordinate to future uses of water for new water rights for domestic and *de minimis* stockwater purposes”¹²¹³ and to a specified amount of “unappropriated water in each of the watersheds containing the Designated Rivers for future in-basin irrigation, commercial, municipal, industrial and other state-recognized beneficial uses.”¹²¹⁴

The United States filed reserved water right claims for the newly established Owyhee Wild and Scenic Rivers in the SRBA and the State objected, based largely on the issue of quantification. Rather than litigating the claims, the United States and the State entered into negotiations to quantify the claims. Guided by the OI Appendix B, and using the Salmon and Clearwater Wild and Scenic Agreement as a template, the United States and the State negotiated a stipulation that proposes to quantify sixteen Wild and Scenic federal reserved water rights for river reaches designated under the 2009 Omnibus Act (“Owyhee Stipulation”). At the time of this article, the stipulation has been agreed to in principle but has not yet been signed by the parties.

The Owyhee Stipulation and water rights generally follow much the same pattern as was used in the Salmon and Clearwater Wild and Scenic Agreement and in the HCRNA Agreement. Each Owyhee Wild and Scenic federal reserved water right is subordinated to all *de minimis* domestic¹²¹⁵ and *de minimis* stockwater

1210. Owyhee Initiative Agreement, Owyhee Initiative Wild and Scenic Rivers Water Rights Agreement at Appendix B (May 10, 2006) [hereinafter OI Appendix B].

1211. *Id.*

1212. *Id.* at 31.

1213. *Id.*

1214. *Id.* at 32. The OI Appendix B recommended that the subordination of the federal reserved water rights to “unappropriated water in each of the watersheds containing the Designated Rivers for future in-basin irrigation, commercial, municipal, industrial and other state-recognized beneficial uses,” be subject to a number of conditions. OI Appendix B, *supra* note 1204, at 32. The OI Appendix B recommended an unconditional subordination to all *de minimis* domestic and stockwater rights. *Id.* at 31–32.

1215. All “*de minimis* domestic water rights,” for purposes of the Partial Decrees, mean[s] (a) the use of water for homes, organization camps, public campgrounds, livestock, and for any other purpose in connection therewith, including irrigation of up to one-half (1/2) acre of land, if the total use is not in excess of thirteen-thousand (13,000) gallons per day, or (b) any other uses, if the total does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day. Th[e] subordination to *de minimis* domestic water rights does not apply to domestic purposes or domestic uses for subdivisions mobile home parks, or commercial or business establishments, unless the use meets the diversion rate and volume limitations set forth in (b) above. This subordination to *de minimis* domestic purposes or domestic uses does not apply to multiple water rights for domestic uses or domestic purposes that satisfy a single combined water use or purpose that would not itself come within the definitions above. [For purposes of the subordination] ‘subdivision’ is defined as set forth in Owyhee County Code Section 10-2-2.

See e.g. Partial Decree for Federal Reserved Water Right 51-13089, *In re* SRBA Case No. 39576 at Section 10.b.(1) (on file with authors) (as of the date of publication these partial decrees have not yet been entered by the SRBA Court).

rights.¹²¹⁶ In addition each reserved water right is subordinated to a specified amount of water for future in-basin irrigation, commercial, municipal, industrial, and other state-recognized water rights during March, April, May and June, “or the amount available above the base flow amount for each of those semi-monthly periods” as specified in the right, whichever is less.¹²¹⁷ There is no subordination for these uses in other months. Water rights of the United States, instream flow water rights, nonconsumptive water rights, and replacement water rights do not count against the subordination amounts provided for in each right. In a departure from the Salmon and Clearwater Wild and Scenic and HCNRA templates, the Owyhee Wild and Scenic water rights also provide for a base flow amount. Because of the small amount of water available in these desert rivers, the United States insisted on including protections to prevent dewatering of the streams. Therefore, the Owyhee Wild and Scenic rights provide for an 80% exceedance flow that acts as a base flow and prevents junior water users from dewatering the streams.

The Owyhee Stipulation sets forth an agreed upon process for administering the subordination provisions. IDWR will maintain a database for purposes of tracking the applications that it determines should enjoy the benefit of subordination. IDWR will provide notice of new applications that will include the water right number, source, priority date, quantity, purpose of use, ownership, and the Wild and Scenic reach in which the appropriation is sought. IDWR will also maintain a current GIS data set of new well logs on its website. For each water right other than *de minimis* domestic and *de minimis* stockwater right, IDWR will include on the permit or license the amount of “subordination for each semi-monthly period March–June.”

In the event of a dispute over IDWR’s implementation of the Owyhee Stipulation, any party may seek judicial review before the SRBA Court or any successor court. Upon a satisfactory showing of IDWR’s failure to properly implement, enforce, or administer the Stipulation or Partial Decrees, such party is entitled to an order compelling IDWR to properly administer the Stipulation and/or Partial Decrees. “Review shall be de novo and any disputed factual issues shall be decided based upon a preponderance of the evidence.”¹²¹⁸

The Owyhee Stipulation was built on the foundation laid by the Idaho Supreme Court’s decisions regarding intent to reserve and on the Wild and Scenic and the HCRNA Stipulations. When the OI Agreement was signed, the parties had the benefit of the Court’s decisions in the *Potlatch* line of cases. Therefore, the State specifically required the United States disclaim a water right under the Wilderness Act. And, because the Owyhee Act expressly reserved water under the Wild and Scenic Rivers Act, it eliminated the need for additional litigation on the issue of intent to reserve water. Moreover, when it came time to quantify the Owyhee Wild and Scenic rights, the parties had the benefit of OI Appendix B, which set forth general principles for the quantification of the rights. These factors allowed the Owyhee Wild

1216. All “*de minimis* stock water rights” for the purposes of the Partial Decrees is “defined to mean the use of water solely for livestock or wildlife where the total diversion is not in excess of thirteen-thousand (13,000) gallons per day. Th[e] *de minimis* stock water use subordination is further limited and defined so that the subordination shall not and does not apply to multiple water rights for stock water uses which satisfy a single combined water use that would not itself come within the above definition of *de minimis* stock water use.” See *e.g. id.* at Section 10.b.(2).

1217. OI Agreement, *supra* note 1207.

1218. OI Agreement, *supra* note 1207.

and Scenic rights to be settled in much less time than was required by other agreements.

iv. Craters of the Moon

The area known as Craters of the Moon is located in southern Idaho and contains unique volcanic features including craters and lava flows. The Craters of the Moon National Monument was created by Presidential Proclamation No. 1694, 43 Stat 1947 on May 2, 1924. The Monument was subsequently enlarged three times by Presidential Proclamation No. 1843, 45 Stat. 2959 (July 23, 1928); Presidential Proclamation No. 1916, 46 Stat. 3029 (July 9, 1930); and Presidential Proclamation No. 3506, 77 Stat. 960 (November 19, 1962). Presidential Proclamation No. 2499, 55 Stat. 1660 (July 9, 1930) excluded certain lands from the Monument. The purpose for the creation of the Monument was to preserve the “volcanic features” of the area.

The water rights agreement between the State of Idaho and the United States for the Craters of the Moon National Monument (“Craters of the Moon Agreement”) provided for recognition of nine federal reserved water rights for the Monument.¹²¹⁹ The Court subsequently entered partial decrees consistent with the Craters of the Moon Agreement.¹²²⁰ A consumptive use water right was decreed for each of the areas reserved under the four presidential proclamations that created the Monument.¹²²¹ The purpose of use for these water rights is commercial, domestic, and irrigation use within the Monument.¹²²² A combined use remark in each partial decree limits the total annual diversion under the four consumptive use water rights to not more than 54.5 acre feet, and a total consumptive use of 19.9 acre feet. The partial decrees also provide that “the United States is not entitled to maintain any specific water table elevation in the [Eastern Snake Plain Aquifer], beneath the Craters of the Moon National Monument.”¹²²³

1219. Water Rights Agreement between the State of Idaho and the United States for the Craters of the Moon National Monument at Section 5.2–5.9 (May 14, 1992) [hereinafter Craters of the Moon Agreement].

1220. Partial Decree Pursuant to I.R.C.P. 54(d) for Water Right 34-12383/36-15342, *In re* SRBA Case No. 39576 (Dec. 1, 1990); Partial Decree Pursuant to I.R.C.P. 54(d) for Water Right 34-12384/36-15343, *In re* SRBA Case No. 39576 (Dec. 1, 1990); Partial Decree Pursuant to I.R.C.P. 54(d) for Water Right 34-12385/36-15344, *In re* SRBA Case No. 39576 (Dec. 1, 1990); Partial Decree Pursuant to I.R.C.P. 54(d) for Water Right 34-12386, *In re* SRBA Case No. 39576 (Dec. 1, 1990); Partial Decree Pursuant to I.R.C.P. 54(d) for Water Right 34-12387, *In re* SRBA Case No. 39576 (Dec. 1, 1990); Partial Decree Pursuant to I.R.C.P. 54(d) for Water Right 34-12388, *In re* SRBA Case No. 39576 (Dec. 1, 1990); Partial Decree Pursuant to I.R.C.P. 54(d) for Water Right 34-12389, *In re* SRBA Case No. 39576 (Dec. 1, 1990); Partial Decree Pursuant to I.R.C.P. 54(d) for Water Right 36-15345, *In re* SRBA Case No. 39576 (Dec. 1, 1990); Partial Decree Pursuant to I.R.C.P. 54(d) for Water Right 36-15346, *In re* SRBA Case No. 39576 (Dec. 1, 1990).

1221. Water Right No. 34-12383/36-15342 was decreed for the area reserved under Proclamation No. 1694, 43 Stat. 1947 with a priority date of May 2, 1924. Water Right No. 34-12385/36-15344, was decreed for the area reserved under Proclamation No. 1843, 45 Stat. 2959 with a priority date of July 23, 1928. Water Right No. 34-12388 was decreed for the area reserved under Proclamation No. 1916, 46 Stat. 3029 with a priority date of July 9, 1930. Water Right No. 36-15345 was decreed for the area reserved under Proclamation No. 3506, 77 Stat. 960 with a priority date of November 19, 1962. Upon entry of the federal reserved water right partial decrees, the United States abandoned state water right licenses 34-2381 and 34-2254.

1222. Craters of the Moon Agreement, *supra* note 1211, at Article 5.10. Article 5.10 of the Craters of the Moon Agreement provides that the United States may also divert water for fire suppression. *Id.*

1223. As described in Article 5.13 of the Craters of the Moon Agreement, the parties stipulated that the source of water for the federal reserved water rights was surface water within the Monument boundaries and perched ground water underlying the Monument. *Id.* at Article 5.13. Accordingly, Article 5.14 provides