

Henry's Fork Water Conference
Idaho Water Management Post Adjudication
Tuesday, Dec. 9, 2014

At an August 25, 2014 ceremony in Boise, Judge Eric Wildman signed the “final unified decree” of the Snake River Basin Adjudication (SRBA), ending a 27-year process in which 160,000 water-rights claims were reviewed and adjudicated. A few outstanding claims remain to be settled, but we now effectively have a firm legal basis for managing Idaho’s supply of Snake River water into the future. The SRBA was initiated in the wake of the Swan Falls settlement of 1984, in which Idaho Power Company and the State of Idaho reached an agreement over the minimum amount of water that is guaranteed to reach Idaho Power’s Swan Falls facility and which upstream water rights can be curtailed to meet this minimum flow. The SRBA is the largest water-rights adjudication ever completed and puts Idaho well ahead of other states in exerting its authority to manage its own water resources and avoid excessive and costly litigation in the future. Among the key accomplishments of the adjudication were water-rights settlements with Native American tribes and the U.S. government. Equally importantly, the completed SRBA, Swan Falls settlement, revised State Water Plan, and updates to Idaho code provide a legal and policy framework for conjunctive administration of surface and ground water.

This year’s Henry’s Fork Watershed Conference commemorates the conclusion of the SRBA and explores some of its implications for water management. After some general observations of post-adjudication water management from varied perspectives, we will discuss the concept of an Idaho Water Court and some important aspects of conjunctive administration, eventually coming full circle by revisiting the Swan Falls settlement.

Opening Community Building

Participants began registering at 8 a.m. at the Marriott SpringHill in Rexburg.

Brandon Hoffner, executive director of the Henry’s Fork Foundation, welcomed everyone at 9 a.m., and introductions were held with the 60 people present. Brandon explained the community-building circle is an arrangement going back 20 years to the beginning of the Henry’s Fork Watershed Council. It’s so we can look at each other and respect each other’s opinions. He noted the Council celebrated its 20th anniversary in 2013 and the Foundation celebrated its 30th in 2014. The Swan Falls agreement, on which the day’s agenda was based, was signed 30 years ago. The annual water conference was dedicated in 2012 to aquifer recharge and in 2011 to Yellowstone cutthroat trout status. Last year it focused on the accomplishments of the council in its 20 years.

Brandon asked the participants to contact the Watershed Council if they have an issue that could be addressed by the council at future meetings. After observing two minutes of silence, he opened the community-building session for comment.

Tom Bassista of Fish and Game introduced Jon Flinders, the new biologist with Fish and Game in Idaho Falls. Jon has worked for Fish and Game for six years, the last five in Salmon.

Dale Swensen, director of the Fremont-Madison Irrigation District, said he had been handed the nametag for Dave Rydalch. “I guess we will be retiring it,” he said. Rydalch, a founding member of the Watershed Council and well-known Idaho water expert and Fremont County resident, died Dec. 3 at his winter home in California. Swensen pointed out Rydalch served as chairman of the Idaho Water Resource Board and knew everything there was to know about Henry’s Lake. Dave had a great memory and was amazing that way.

Bryce Contor, Rocky Mountain Environmental, said he once farmed in Howe. A fight was scheduled, tempers flared, and a water meeting broke out. That was his introduction to water rights in Idaho. He also learned from Dave Rydalch.

Rob Van Kirk, Henry’s Fork Foundation senior scientist, said he started learning about water from Dave Rydalch back in 1981 when he (Rob) worked for Dave’s brother-in-law, Mike Lawson, at the fly shop in Island Park. Dave came into the shop regularly, on his way to Henry’s Lake Dam, and was Rob’s first mentor in Idaho water management.

Cathy Koon, Henry’s Fork Foundation office manager, said she first got acquainted with Dave when he married into the Koon family and she was a very young reporter in the upper valley. She said she learned a lot from Dave and would miss having him around so she could call and ask him what the heck that meant.

Ron Carlson, former District 1 watermaster and now a water consultant in the private sector, said it is unfortunate how information gets lost over time, and Dave carried a wealth of information around in his head. Dave was one of the last sub-irrigators on the Egin Bench, and when the first pumps went in there, Dave predicted we were going to have to do recharge when the sub goes away. He wasn’t wrong.

Editor’s Note: In order to make this document as useful as possible as a resource for information on the Swan Falls Agreement, the SRBA, and other issues discussed at the conference, I have attempted to fully capture the content of each speaker’s presentation in the written summaries. The summaries are based on my notes from the meeting, complemented by information in each speaker’s Powerpoint slides, if slides were used. Although I have attempted to accurately summarize the presentations, I accept full responsibility for any errors. All editorial comments appear in italic font; the remainder of the text is intended to accurately reflect each speaker’s presentation. For reference, the original Powerpoint file from each speaker who used slides is posted on the web. I have identified and provided a link to these files following each narrative summary. In a few cases, I have provided additional links relevant to the speaker’s presentation.
–Rob Van Kirk

Keynote Address: Water Management Post Adjudication

Gary Spackman: Director, Idaho Department of Water Resources (IDWR)

Director Spackman began his address by observing that water is very important to the people of Idaho. Over his lifetime, the expectation of conservation of water resources has increased, as has the value of fisheries and other water-dependent resources. As Director of IDWR, his current

priority is to oversee implementation of the state's water sustainability initiative, which was developed at the request of the governor. Most of the policy development related to the initiative is the responsibility of the Idaho Water Resource Board (IWRB), with support from IDWR staff. The three major components of the initiative are:

1. Sustainability of aquifers statewide (Eastern Snake Plain, Raft River, Mountain Home, Palouse/Moscow, Lewiston Plateau),
2. Ensuring that existing water rights are met, and
3. Finding water for future growth, including water in free-flowing streams.

In working to meet the goals of the initiative, IDWR is faced with several important issues/questions:

1. How much of the spring freshet, especially during wet years, is required to be left in streams to maintain fisheries, and how much can be withdrawn for other uses?
2. Are there options for new water storage that are acceptable to everyone?
3. When and where should aquifer recharge be done?
4. How much water can be conserved through more efficient irrigation methods?
5. In general, farmers are growing more water-intensive crops (e.g., feed corn), thereby increasing consumptive use. Do we need to consider reducing consumption?

Regardless of the answers to these larger questions, the Director is ultimately responsible for administering water rights. He identified several specific water-rights administration issues that IDWR is working to improve.

1. **Rule 50:** This is the definition of area of common groundwater supply on the Eastern Snake Plain Aquifer (ESPA). The original area was defined based on hydrogeologic surveys performed in the 1950s and 1960s. Currently, in administrative processes, IDWR determines interactions between groundwater and surface water on a case-by-case basis.
2. **Rangen Call:** IDWR had proposed a line of demarcation (the "trim-line"), beyond which the effects of groundwater pumping on surface flow at Rangen's points of diversion would be negligible. This line would separate groundwater users subject to curtailment under Rangen's Call from those who would not be curtailed. However, Judge Wildman, who presides over the SRBA court, ruled that there is no basis for such a demarcation and that "everyone is in." From a hydrologic perspective, however, resolving the call requires identifying areas in which groundwater pumping has the greatest impact on surface discharge from the aquifer. In addition, IDWR needs to increase its measurement and enforcement of surface-water diversions that are currently unregulated. Director Spackman stated that he "could not in good conscience, just regulate groundwater pumpers without also regulating these junior surface users."
3. **Surface Water Coalition Call:** The goal in resolving this call is to reduce uncertainty at the beginning of the irrigation season. Prediction of pre-season water availability, within a given margin of error, would allow quantification of the amount of groundwater mitigation that would need to be done during the upcoming irrigation season. Judge Wildman ruled that a mid-season estimate of availability was necessary, and if this estimate showed a shortage in surface-water availability, IDWR could curtail groundwater users at that time.
4. **Big Wood River:** IDWR, with cooperation from the U.S. Geological Survey, is developing a groundwater model for the Wood River aquifer system. That model will be

used in resolving calls on groundwater pumpers in the Wood River valley.

5. **Reservoir fill and refill:** Reservoir storage accounting and the status of reservoir refill rights are still being considered by the SRBA court, both in the upper Snake and the Boise basins. Settling these contested cases will provide certainty in administration of storage rights.
6. **Expansion of administration:** To meet its obligation to regulate water use and enforce water rights throughout the state, IDWR has created new water districts and expanded Water District 01 (WD01). Additional/expansion of water districts needs to continue in order to fully regulate water use in all basins.

Director Spackman concluded his remarks by praising collaborative efforts in the upper Salmon Basin to address water needs of anadromous fish. He gave a “hat’s off” to farmers and ranchers there for their cooperation with fisheries agencies and interests.

Additional resources:

IDWR web site <http://www.idwr.idaho.gov/>

Post-adjudication Management from a Planning Perspective

Jeff Raybould: Idaho Water Resource Board

The IWRB is comprised of eight appointed members, no more than four of whom can be from the same political party. Currently, there are four Republicans, two Democrats, and two Independents on the IWRB. The Board was created in 1965 by an act of the Idaho legislature, in response to a proposal that would have diverted water from the Snake River and delivered it to southern California. The purpose of creating the IWRB, and of vesting it with the authority and responsibility of developing the State Water Plan, was to demonstrate to the federal government and to other states that Idaho had a plan for managing and using its own water resources.

Mr. Raybould described the board as “hard-working” and emphasized that its most important role is planning, primarily through revision and maintenance of the State Water Plan. The essential goal of the Plan itself is sustainability of Idaho’s water resources. Important components of the current version of the Plan, which was adopted by the IWRB in 2012 and passed by the Idaho legislature in 2013, are:

1. Conjunctive management of groundwater and surface water,
2. Comprehensive Aquifer Management Plan (CAMP) processes,
3. Water-supply enhancement,
4. Water-resources planning program to ensure sufficient water supplies to satisfy current and future needs,
5. “Two-rivers concept,” which separates water-rights administration in the Snake River upstream of Milner Dam (upper Snake) from that downstream, resulting in the “zero-flow at Milner” objective,
6. Specific conjunctive management activities and goals for the ESPA, and
7. Maintenance and enhancement of agriculture in the Snake River basin.

Primary challenges in achieving sustainability are balancing competing needs and protecting

private property rights. The Henry's Fork Watershed Council provides a good example of how collaboration can be used to approach the challenge of meeting competing demands. There is not enough water to meet every demand every year, but by increasing supply and better managing the supply we have, most uses can be met in most years. Mr. Raybould distinguished between actions that increase supply and those that manage the existing supply more effectively. Water conservation does not increase supply; it just moves water from one use to another. However, cloud-seeding can actually increase water supply, by increasing precipitation. The goal is to keep more of the annual supply within the state in any given year, and this can be accomplished through additional surface storage capacity and increased aquifer recharge. Mr. Raybould emphasized the need to constantly be planning for the future in order to guarantee that water will be available to meet existing uses as well as to develop new uses.

Additional resources:

Mr. Raybould's slides <http://henrysfork.org/watershed-council>

IWRB web site <http://www.idwr.idaho.gov/waterboard/>

Post-adjudication Management from Idaho Power's Perspective

Jon Bowling: Idaho Power

Editor's Note: A substantial amount of background on the Swan Falls Agreement was presented at the end of the day by Lynn Tominaga of Idaho Ground Water Appropriators. Some but not all of this information repeated information presented by Jon Bowling earlier in the day. To avoid duplication in the written notes, and to place all of the Swan Falls background information in the same place, near the beginning of the document, some of the information in Mr. Tominaga's presentation is included here. –RVK

The first dam on the Snake River was built at Swan Falls, in 1902, to generate electricity. Idaho Power was formed in 1916 and currently operates 17 hydroelectric power plants. Two of these plants, at American Falls and Cascade, are on federal dams. Idaho Power's other hydroelectric plants were built on its own, private dams. The Hells Canyon complex, consisting of Hells Canyon, Oxbow, and Brownlee dams, is the workhorse of Idaho Power's hydroelectric system.

In the early 1970s, Idaho Power proposed building a fossil-fuel-fired thermal power plant to meet increasing demand for electricity. A group of its ratepayers sued the company, claiming that a thermal plant—and its associated costs—would be unnecessary had Idaho Power defended its water rights more carefully and hence maintained higher production at its hydroelectric plants. The heart of the legal question was whether Idaho Power had subordinated its water rights during the Hells Canyon Complex licensing process. The court ruled that the company had subordinated its rights at the Hells Canyon Complex but not at its Swan Falls facility. This forced the company to issue a water call against about 7,500 junior water users upstream of Swan Falls, the vast majority of whom were agricultural users in the upper Snake basin. Curtailing that many irrigation users in the upper basin would have had disastrous economic effects, and legislation was introduced to subordinate all hydropower rights to upstream irrigation rights.

Subsequently, the State of Idaho entered into negotiations with Idaho Power, and the result was

the Swan Falls Settlement of 1984. Idaho Power agreed to subordinate its water rights at Swan Falls and ten other facilities to all upstream water uses in existence at the time of the agreement, including some for which substantial investment pursuant to a valid application had been made even if the water right had not yet been granted. The State agreed to increase the minimum streamflow right at the Murphy gage (just downstream of Swan Falls Dam) to 3,900 cfs from March to November and 5,600 cfs for the remainder of the year. The agreement also resulted in State authority to administer the so-called “Swan Falls trust water”, which is flow of the Snake River that is greater than the minimum flow at Murphy but less than the decreed water rights at Idaho Power’s facilities. This aspect of the agreement allowed the State to issue water rights claimed after the 1984 agreement date on this trust water. In essence, the agreement allowed uses that, prior to 1984, would have been subordinated to Idaho Power’s hydropower rights and hence would not have been allowed. The trust water area is the area of land over which surface and groundwater is deemed tributary to the Snake River between Milner Dam and Swan Falls Dam. As a result, most groundwater use on the ESPA occurs within the trust area, whereas all surface water use upstream of Milner occurs outside of the trust area. This definition allows the State to manage surface water according to the “two rivers” principle, under which flow at Milner Dam is reduced to zero most of the time, in order to allow full development and use of surface water upstream.

The Swan Falls agreement was reaffirmed in 2009, at which time a collaborative process was established for addressing issues related implementation of the agreement. Representatives of Idaho Power, IDWR, the Idaho Attorney General, and water-rights holders serve on a policy group and a technical workgroup. These groups have developed a well-defined procedure for calculating flow at the Murphy gage in a way that accounts for short-term effects of Idaho Power’s hydroelectric operations, so that there is no question among the parties about whether the Swan Falls minimum flows are being met. The groups have also developed a procedure for action in case the minimum flows are not met. The short-term remedy for a violation of the minimum flows is to release additional flow past Milner; in almost all scenarios, this would be storage water. If additional water is not available for release past Milner, then trust water-rights could be curtailed, a measure that would have undesirable economic consequences. In the long-term, the best solution is to manage the ESPA so that discharge from the aquifer between Milner and Swan Falls maintains the minimum streamflows at the Murphy gage. Management objectives for the ESPA have been formalized through the ESPA CAMP.

Maintaining minimum streamflows at Swan Falls provide for multiple resources, including hydropower, recreation, Endangered Species Act obligations, and water quality. Meeting the Swan Falls minimum through management of the ESPA will also increase water availability for other uses. Idaho Power remains committed to collaborating with the State and water-resource stakeholders to manage water resources of the Snake River to benefit all users and to the persistence necessary to accomplish this goal in the long run. Mr. Bowling concluded his remarks by stating “we’re all in this together.”

Additional resources:

Mr. Bowling’s slides <http://henrysfork.org/watershed-council>

Swan Falls Agreement

http://www.idwr.idaho.gov/News/Issues/SwanFalls/swan_falls_agreement.htm

Post-adjudication Management from a Conservation Organization Perspective

Peter Anderson: Trout Unlimited

The “rich life” desired by Idahoans depends on water for agriculture, municipalities, fisheries, and water-related recreation. Although water management usually focuses on the Snake River and its large tributaries, there are many important resources supported by smaller streams, such as tributaries to the South Fork Snake and streams in the Wood River Valley. The SRBA applies to these streams as well as to the main Snake River. Managing Idaho’s water resources amounts to answering two general questions: 1) Is there “unused water” available for new uses, and if so, when and where is this water available? 2) What do we do when there is insufficient supply to meet existing uses?

The SRBA decree lies at the heart of answers to these questions, but we need to make the decree work for us now and into the future. There are five important ways that the legal and administrative system, water users themselves, and other water-resource stakeholders can make the SRBA a living, accurate, well-enforced document.

1. **Measurement.** Without accurate measurement of water supply and use, water rights cannot be accurately enforced. We need good measurement of streamflow, diversions, and wells.
2. **Compliance.** We need to ensure that changes in water rights (e.g., transfers of place of use, point of diversion, and/or beneficial use) comply with decrees.
3. **Enforcement.** Establishment of new water districts and expansion of existing water districts are necessary to enforce, on the ground, the decrees as they exist on paper.
4. **Improvement of real estate transactions.** The real estate system must evolve with water rights and administration. When agricultural land is sold for subdivision and development, the water rights associated with that land must be transferred in accordance with water law. In many cases, real estate agents and developers do not understand water law, and water rights aspects of land transfers can be handled poorly or ignored altogether, often resulting in loss of water rights associated with a parcel of land.
5. **Evolution of forfeiture laws.** Generally understood as the “use it or lose it” provision of the prior appropriation doctrine, forfeiture of water rights can occur, in principle, for nonuse of a right. However, there are numerous ways to avoid forfeiture in Idaho, limiting its occurrence to those who are ignorant of the law, cannot afford the services of a water lawyer or engineer, or are too indolent to even pay attention to water rights (e.g., parties in a real estate transaction). However, some of the mechanisms through which forfeiture can be avoided allow “unused” water rights to be used by another user without risk of forfeiture of the original right. For example, water can be placed in a water supply bank, where it is available for use by others.

At some point in space or time, there is not surplus water available for new uses or even for existing uses. Water markets are the wave of the future in dealing with shortage and in finding water for new uses. Markets, including mechanisms such as the water supply bank, allow water associated with an existing right to be used at a different time and/or place for a different use, where it presumably has a higher economic value. Lynn Tominaga of Idaho Ground Water

Appropriators is a leader in using markets to solve water-shortage problems. Trout Unlimited uses water marketing to keep water flowing through stream reaches that are important for fisheries and recreational use. If kept alive and relevant, the SRBA allows for water marketing and other mechanisms that will sustain the rich life we all desire in Idaho.

Additional resources:

Mr. Anderson's paper on forfeiture, Idaho Law Review (2012), Vol. 48, pp. 419-446
<http://www.uidaho.edu/law/law-review/articles/volume-48>

The Future of the SRBA Court and IDWR Administrative Hearings

Background: On June 17, 1987, then-IDWR director A. Kenneth Dunn filed a petition in the 5th Judicial District Court in Twin Falls requesting a general adjudication of all water rights in the Snake River basin. On November 19, 1987, said court issued a commencement order, which initiated the SRBA and what is now known as the SRBA Court. Although the SRBA is winding down, the number of administrative hearings being brought before IDWR is increasing, due primarily to the increased number of water calls and related actions involving conjunctive administration of water rights on the ESPA. Completion of the SRBA and increase in the number of administrative hearings has prompted many in the water community to consider ways to retain the water-law expertise that has accumulated in the SRBA court over the past 27 years while also streamlining IDWR's administrative hearing process and reducing the administrative burden on IDWR. During the 2014 legislative session, a bill was introduced that would allow water-rights holders the option to bring most water-related grievances and petitions to either the Director of IDWR via an administrative hearing or to the SRBA Court. Although the bill did not pass in 2014, another version will be reintroduced in 2015. –RVK

Perspective of T.J. Budge: Racine, Olson, Nye, Budge and Bailey

Mr. Budge started his presentation by stating that as a water attorney, he loses sleep over the fact that when disputes are brought to judges in a court of law, there are fewer remedies available than if the disputes could be resolved through a collaborative process. In this sense, IDWR's administrative hearing process potentially offers more room for collaboration and resolution than a judge's ruling.

As he views the situation, there are two issues to be addressed: 1) Should the SRBA Court be retained as a permanent "water court," and if so, what sorts of cases should it hear? 2) How can IDWR's hearing process be streamlined, including the question of whether some of IDWR's authority can or should be transferred to the SRBA Court?

At the outset of the SRBA, there was some concern that the SRBA Court might become permanent, but its appointment was temporary and only an act of the legislature could make it permanent. The advantages of permanently establishing the SRBA Court as Idaho's water court include retaining the institutional knowledge and experience gained through the SRBA process, maximizing consistency in decisions involving water rights across the entire state, and increasing the efficiency of hearing and ruling on water-rights cases. One disadvantage is the Court's

location in Twin Falls, but this can be remediated through use of teleconferencing and other electronic media, which the Court is already doing. Given new and future adjudications in north Idaho and in the Bear River basin, there is an ongoing need for the services of a dedicated water court. Such a court could handle all water-related cases such as forfeiture and enforcement. More efficient and expeditious hearings would benefit all water users.

However, offering a choice between an administrative hearing before IDWR or a hearing before a judge raises the question of whether IDWR's current statutory authority can or should be transferred to a court of law. IDWR's administrative hearing process applies to a very large number of proceedings that are matters of statute but are also highly technical, including lease of water rights, issuance of new water rights, cancellation of Swan Falls trust water rights, and designation of critical groundwater areas. If a petitioner were given a choice of whether to bring these matters to a court and chose to do so, then IDWR's existing authority to make decisions in these types of cases would have to be transferred to the court. There is currently no precedent for such a transfer of authority, and if it did occur, it would allow petitioners to "shop" for the forum they think would be most favorable to their case. In addition, IDWR's current hearing process is more streamlined, inexpensive and flexible than court proceedings. IDWR's technical expertise can more easily be applied in an administrative hearing, which can be considered an advantage or disadvantage, depending on perspective. In a court of law, only evidence presented to the judge can be used in making a decision, whereas in an administrative hearing, internal information and knowledge influences decision-making but that information and knowledge often remains unknown to the parties involved. Numerous court decisions have upheld the authority of the Director of IDWR to make decisions pursuant to the distribution of water resources under state law, and Mr. Budge believes that this authority should remain in IDWR.

Regarding steps that could be taken to improve IDWR's existing process, Mr. Budge noted that currently, administrative decisions can be appealed to the Director and can be reviewed by a judge. The issues involved in improving the existing process are fairness, objectivity, and capacity. Some possibilities for addressing these issues are to establish an independent corps of hearing officers that would not be specific to IDWR but would serve all state agencies, use SRBA Court masters as hearing officers in IDWR proceedings, and issuing rules that clarify the involvement of IDWR staff in the hearing process, in particular the relationship between technical staff and the Director or designated hearing officer. There are numerous technical questions to consider in pursuing any of these options.

Additional resources:

Mr. Budge's slides <http://henryfork.org/watershed-council>

Perspective of Tom Arkoosh: Arkoosh Law Offices

Mr. Arkoosh agreed with many of Mr. Budge's points, including the ongoing need for a water court to handle adjudications in north Idaho and the Bear River and the need for expeditious hearings. But, he provided examples illustrating his claim that IDWR's administrative process is no more expeditious than court hearings. Elapsed time between the water call and the hearing in Rangen, Clear Springs and Surface Water Coalition cases was over 32 months. This counters the claim that a court process would be slower than the existing administrative hearing process.

In general, by the time issues get to either a court or an administrative hearing, the parties are already at odds. Courts are in the business of managing conflict, and allowing a dedicated water court to handle cases currently brought to IDWR's hearing processes could greatly reduce IDWR's workload. As Mr. Budge noted, the technical expertise housed in the administrative body such as IDWR is both a curse and a blessing. On the one hand, because IDWR staff have technical knowledge of the issue, an order issued by IDWR is more likely to be based on this knowledge. On the other hand, knowledge is usually accompanied by opinions, which reduces objectivity. Courts offer a more objective process, although an independent corps of hearing officers would serve to increase the objectivity of the existing administrative hearing process. Mr. Arkoosh acknowledged that giving petitioners a choice of whether to bring a case to a hearing officer or to a court would constitute "forum shopping," but he views that as a positive outcome. In fact, providing the opportunity for a petitioner to "shop" for the appropriate forum was one of the intents of the legislation that was introduced in 2014. Another criticism of allowing a court to hear administrative cases instead of IDWR is that a court ruling could have unintended consequences for Idaho's water law, to which Mr. Arkoosh counters that the law is constantly changing and evolving in response to both legal decisions and technical information.

He summarized the three options for handling the increased number of water calls and other administrative proceedings: 1) continuing under the present system, 2) establishing a permanent water court to hear all legal and administrative actions, or 3) retaining the administrative hearing process, but establish an independent corps of hearing officers. He concluded by presenting the text of proposed legislation that would allow parties the choice between an administrative hearing before IDWR or before the SRBA Court.

Additional resources:

Mr. Arkoosh's slides <http://henrysfork.org/watershed-council>

Update on Reservoir Refill Rights and Ongoing Contested Case

Rob Van Kirk: Henry's Fork Foundation

Although the final SRBA decree was ceremonially signed in August, a few water-rights claims are still being contested through the adjudication process. Among those are 18 claims referred to as "reservoir refill rights"; these rights are claimed on Jackson, Palisades, American Falls, Walcott, and Island Park reservoirs in WD01 and on reservoirs in the Boise, Payette and Little Wood rivers in other water districts. The need for rights to refill reservoirs arises from two common scenarios: 1) water stored during winter is released for flood control in the spring, but space is refilled later in the spring after flood threat passes; and 2) storage water is released for use early in irrigation season, but reservoir storage content increases later in the season during the snowmelt freshet or periods of rain. Some of the refill rights were claimed by U.S. Bureau of Reclamation on behalf of contract holders, and some were claimed by irrigation districts or canal companies. All of the refill rights claimed in WD01 have priority dates in 1952, 1953, or 1965. Most of these rights reference the original, "first-fill" right(s) and specify that use of the storage water under the combination of the original right(s) and the refill right(s) cannot exceed the amount authorized under the original storage right(s) associated with a particular reservoir. However, one of the refill rights for American Falls Reservoir explicitly states that refill that

occurs during irrigation season, after some storage water has already been used, adds to the amount that can be used during a given irrigation season. The diversion rate claimed in the refill rights is roughly the annual basin yield upstream of a given reservoir in an above-average water year, which is much larger than what is authorized by the original right(s) and much larger than the physical reservoir capacity. This essentially allows any water that might flow through a particular reservoir during the water year to be stored in that reservoir when possible.

As a concrete example, Island Park Reservoir was originally authorized to store 135,000 acre-feet of water for irrigation; 90,000 acre-feet carries the original priority date of 3/14/1935 (right 21-2156), and 45,000 acre-feet carries a priority date of 45,000 acre-feet (right 21-10560) as a result of court decrees in 1968 and 1969 related to Palisades contracts and power generation at Minidoka. The refill right (21-13161), claimed by U.S. Bureau of Reclamation, carries a priority date of 9/30/1952 and specifies a total diversion rate of 557,921 acre-feet. For comparison, the mean annual natural flow of the Henry's Fork at Island Park Dam over water years 1979-2014 was 475,225 acre-feet; natural flow at Island Dam during water 1984, a moderately wet year, was 549,257 acre-feet. However, the refill right limits the total amount of storage water that can be used for irrigation to the original 135,000 acre-feet per year.

Some storage-rights holders claim that if their storage water is released for flood control, which is a public benefit, the amount of water released should be allowed to refill "under priority", that is, without regard to junior storage rights that may not have filled prior to the flood-control operation. In practice, in years when flood control is required, there generally is enough water to refill any storage that might have been lost during the flood-control operation, but in rare instances, such as occurred in 2012, the lost storage can fail to refill. The SRBA Court heard a case brought by some of the storage-rights holders, entitled "Does Idaho Water Law require a remark authorizing storage rights to be refilled under priority, space that was vacated by flood control?" The SRBA Court ruled in the negative, stating that refill can only occur after junior storage rights are filled once. The SRBA Court also declined to consider a request to determine when a storage right is filled. The SRBA Court's ruling was appealed to the Idaho Supreme Court, and this case was referred to as "Basin-Wide Issue 17." In August 2014, the Supreme Court ruled that no change to existing law was needed and that the Director of IDWR has the authority to determine when storage rights are considered filled.

The contested case regarding reservoir storage accounting and the refill rights was stayed while the Supreme Court heard Basin-Wide Issue 17, and that stay was lifted after the Court issued its ruling. The order lifting the stay requested that WD01 staff prepare a report documenting current storage accounting procedures, and that document was issued on November 2, 2014. The accounting document and other documents related to the reservoir-fill contested case are available on IDWR's website. The hearing of the contested case is scheduled for early 2015. A similar process is occurring in the Boise River basin.

Additional resources:

Supreme Court decision on Basin-Wide Issue 17 <http://www.isc.idaho.gov/opinions/A&Bfix.pdf>
WD01 contested case <http://www.idwr.idaho.gov/news/issues/WD01/>
WD63 contested case <http://www.idwr.idaho.gov/news/issues/WD63/>

Perspectives on Conjunctive Management and Administration

Mat Weaver: Deputy Director, IDWR

Under the prior appropriation doctrine, which governs water law in Idaho, water is a public resource that can be appropriated by private parties. The two fundamental aspects of prior appropriation are seniority (“first in time is first in right”) and beneficial use (water must be diverted and put to beneficial use). The primary elements of a water right are source, priority date, diversion rate, beneficial use, season of use, point of diversion, and place of use. Priority dates determine which water users get to use water in times of shortage. Administration of surface water by priority date is relatively simple: the available supply in a stream system at any given time is allocated to users in order of priority, and when demand exceeds supply, the users with the most junior priorities cannot divert water. If a junior user continues to divert after supply is insufficient to meet his right, a senior user can file a “delivery call,” and the junior user is curtailed. The question of when a junior user should be curtailed is usually easy to answer from real-time measurement of streamflow and diversion rates. However, this question is much more difficult to answer in the case of groundwater, because the physical response of a stream to groundwater pumping is lagged in time and is dependent on the distance of the groundwater use away from the stream.

The basic question in conjunctive administration is usually “Does groundwater pumping cause injury to water users who divert water from a stream?” The conjunctive management rules, adopted by IDWR in 1994 and approved by the Idaho Legislature in 1995, specify a procedure for answering this question. The rules define conjunctive management as administration of surface water and groundwater rights together, from a common water source. Under these rules, a surface-water user who claims injury due to groundwater withdrawal by a junior user can file a delivery call with IDWR, which then determines whether the senior user has been materially injured by the junior use. Factors in this determination include but are not limited to the amount of water available to the senior, whether the junior’s use affects quantity and timing of this availability, whether the senior’s needs can be met with the existing supply, and the existence of water measurement devices. However, IDWR cannot consider economics in determining injury or in its response to the call. A junior groundwater user can avoid curtailment by participation in an approved and effectively operating mitigation plan, even if material injury to the senior user is determined. Mitigation plans can be phased in over a period of up to five years. Numerical groundwater models and water-measurement data are usually used in determining and quantifying injury. The technical details of IDWR’s response to a call depend on whether the groundwater use occurs in an organized water district, in a groundwater management area, or in an unregulated area, although the general elements of the response are similar: determination of injury, order of curtailment, and development/approval of a mitigation plan to avoid curtailment. For delivery calls within a water district, the time between the delivery call and a hearing can take up to a year or more, depending on complexity of the case and availability of a groundwater model or other analytical tools. The procedure for developing and approving mitigation plans includes advertisement of the plan, hearing(s) on the plan, and issuance of an order by the Director.

Groundwater districts offer groundwater users the opportunity to be collectively represented in

delivery calls and formulation of mitigation plans. They are similar to irrigation districts in that they are overseen by boards of directors and can levy assessments on members. Participation is voluntary, and users can join a groundwater district as a full member or only for mitigation purposes. There are currently eight groundwater districts on the Eastern Snake Plain, but there are large portions of the Plain that do not lie within a groundwater district.

Tensions in the conjunctive administration process arise because of lag times between groundwater use and surface water response, physical distance between the junior and senior users, and the futile call doctrine. Futile call is an aspect of prior appropriation that allows a junior user to avoid curtailment if it can be demonstrated that curtailment of the junior will not increase supply available to the senior. However, the conjunctive management rules state: “Although a call may be denied under the futile call doctrine, these rules may require mitigation or staged or phased curtailment of a junior-priority use if diversion and use of water by the holder of a junior-priority water right causes material injury, even though not immediately measurable, to the holder of a senior-priority surface or ground water right in instances where the hydrologic connection may be remote, the resource is large, and no direct immediate relief would be achieved if the junior-priority water use was discontinued.”

Mr. Weaver’s slide presentation concluded with the classic photo of two farmers battling each other with shovels over an irrigation ditch. Although conflicts occur between water users in the conjunctive administration process, the conjunctive management rules provide IDWR and the water users a framework for resolving these conflicts.

Additional resources:

Mr. Weaver’s slides <http://henrysfork.org/watershed-council>

Conjunctive management rules <http://adminrules.idaho.gov/rules/current/37/0311.pdf>

Robert Williams: Williams, Meservy, and Lothspeich

Mr. Williams represents a coalition of 14 cities in the Magic Valley, with a combined population of about 42,000 residents. Although cities hold less than 1% of all groundwater rights on the ESPA, cities can be curtailed, and the effects of curtailment on economic activity on municipalities are huge. In turn, if cities cannot function because of lack of water, other institutions such as schools, service to outlying farms, and food processing facilities cannot function. The cities in this coalition lie in the area susceptible to groundwater curtailment under the call by Rangen, Inc., holder of senior surface-water rights to springs that discharge from the ESPA. On January 29, 2014, the Director of IDWR found injury of 9.1 cfs to Rangen’s right and ordered curtailment of junior-priority groundwater diversions for irrigation of 157,000 acres. On the ESPA, 9.1 cfs is sufficient to irrigate about 500 acres for a growing season. The priority date for the curtailment under the Rangen call is 8/12/1973. For comparison, all of the water rights held by the City of Heyburn and the majority of the water rights held by the City of Richfield are junior to the curtailment date. In other cities, such as Paul, rights senior to the curtailment date are sufficient for winter supply but insufficient to supply water during the summer months.

The Coalition of Cities was formed to represent the cities’ interests in water calls, even though most of the cities are members of groundwater districts for the purposes of participating in mitigation plans and/or are members of Idaho Ground Water Appropriators (IGWA). The

Coalition started with a comprehensive review of water rights and water use in the member cities. Most of the water rights held by cities are municipal rights, which generally include domestic, commercial, industrial, and irrigation uses. The Coalition of Cities is proactively pursuing a number of actions to prevent curtailment, including participation in mitigation plans, promotion of regional aquifer recharge efforts, and use of exemptions to curtailment allowed under the conjunctive management rules. In general, non-consumptive uses are not subject to curtailment. Non-consumptive uses include indoor and culinary uses authorized under municipal water rights. Consumptive uses authorized under municipal water rights include outdoor uses and irrigation (e.g., watering of lawns, parks, etc.). Thus, a strategy for cities to avoid curtailment is to carefully quantify the non-consumptive and consumptive portions of its use, allocate the consumptive uses to senior water rights, and allocate the non-consumptive uses to more junior rights. In addition, the cities are pursuing a remedy for what Mr. Williams views as an inequity in Idaho code that exempts domestic water rights from curtailment. A domestic right authorizes diversion of up to 13,000 gallons/day for use by a single home, including irrigation of up to ½ acre. If each home within a city were granted a 13,000 gallon/day exemption from curtailment, then none of the cities in the coalition would be susceptible to curtailment. However, because the domestic uses within a city fall under the city's municipal right rather than under a single-household domestic right, only the documented non-consumptive uses under the municipal right are exempt from curtailment, rather than the full 13,000 gallon/day exemption for the single-household domestic right. This provision of Idaho code effectively exempts households outside of municipal water-supply districts from curtailment while subjecting households within municipal water-supply districts to curtailment. The Coalition of Cities is working resolve this apparent contradiction in the code.

Additional resources:

Mr. Williams' slides <http://henrysfork.org/watershed-council>

David Richards: City of Idaho Falls

The City of Idaho Falls was originally settled in 1865 as Eagle Rock, after construction of Taylor's Bridge over the Snake River. Eagle Rock became Idaho Falls in 1881. Initially, the city pursued surface water as a source of its municipal water because it was readily accessible at the time of settlement. The city established surface-water rights from Willow Creek in 1874. However, surface water carries a high cost of treatment, is less consistent in supply, and is more susceptible to freezing. Thus, Idaho Falls, like most municipalities in the region, has developed groundwater as the majority of its supply. In 1927, the city drilled its first well, which remains in use today. This right was licensed and thus carries a priority date of 1927. Between 1933 and 1960, the city drilled seven more wells, but none of these were licensed. In 1963, IDWR began requiring licenses for wells, so the two wells the city drilled in that year, along with all of the wells drilled between 1933 and 1960, were assigned 1963 priority dates. Subsequent wells developed by the city carried various priority dates between 1967 and 2006. Meanwhile, the city has acquired surface-water shares in canal companies as it annexed land. In 2006, the city purchased some storage water in Palisades Reservoir to diversify its water-supply portfolio.

Even though municipal use accounts for only a tiny fraction of water use in Idaho and on the ESPA, municipalities face a number of legal and administrative challenges in providing water to its residents. As Mr. Richards put it, "The playing field is not level, and the goal posts keep

moving.” Prior to adoption of the conjunctive management rules, the priority date of a groundwater right was comparable only to other groundwater rights. Now, however, groundwater rights must compete with surface-water rights, which are generally senior in priority. Thus, for example, the 1963 priority dates of most of the city’s groundwater rights would be fairly senior among groundwater rights on the ESPA, whereas they are very junior in the priority of surface rights. In addition, different requirements and legal procedures for water quantity (administered by IDWR) versus water quality (administered by Idaho Department of Environmental Quality) constrain cities in how they can manage and use their water supply. Solutions available to cities for ensuring continued and future water supplies include identifying ways to use their surface water (e.g., groundwater recharge, outdoor uses), increasing water-system efficiency, and promoting water conservation.

Additional resources:

Mr. Richards’ slides <http://henrysfork.org/watershed-council>

Bryce Contor: Rocky Mountain Environmental Associates

Mr. Contor’s presentation started and ended with a demonstration, in which cups of water were used to represent Island Park Reservoir, the snowpack, and the Eastern Snake Plain aquifer. In the first demonstration, the Island Park cup was full prior to melting of the snowpack, and the excess snowpack that did not fit into the cup was dumped into a bucket, representing water lost from the system (in this case, spill of water past Milner).

Because of long retention times and multiple discharge points along the river, managed aquifer recharge in the Henry’s Fork watershed and other upper-valley locations provides numerous benefits to both groundwater and surface-water resources. Even when private entities conduct recharge in these locations as mitigation for groundwater pumping on the ESPA, 10-30% of the benefit accrues to public resources. For example, water recharged on the Egin Bench returns to the river in numerous locations extending from the lower Henry’s Fork to American Falls Reservoir. This return flow maintains river baseflows, moderates water temperatures, and increases reach gains. Higher reach gains lead to lower demands on storage water and therefore to higher reservoir storage carryover. The longer water is retained in the groundwater-surface water system upstream of Milner, the more benefit is accrued.

The existing water-rights system allows canal companies and other private entities to use their water for managed recharge. However, the accounting system is cumbersome. An accounting procedure developed by Mr. Contor combines standard elements of financial accounting with the physical principles of movement of water through the aquifer. If adopted, this procedure would streamline the accounting process and encourage private entities to conduct managed recharge, to the benefit of everyone. These benefits were illustrated by Mr. Contor’s second demonstration, in which water from the Island Park cup was poured into the aquifer cup during the winter, recharging the aquifer while also providing streamflow for the fishery below Island Park Dam. The water from the snowpack cup then filled Island Park Reservoir during the spring, without any loss from the system.

Additional resources:

Mr. Contor’s slides (not shown at conference) <http://henrysfork.org/watershed-council>

Lynn Tominaga: Idaho Ground Water Appropriators

Mr. Tominaga's presentation began with background information on the Swan Falls Agreement (see summary of Jon Bowling's presentation above, and the editor's note preceding it). Mr. Tominaga emphasized that the Swan Falls trust water is enough to irrigate around 20,000 acres, but because of partial and stacked water rights, 88,000-102,000 acres are affected by administration of the trust water. The trust water includes over 100 commercial, industrial, and municipal rights. Thus, curtailing these rights to meet the Swan Falls minimum flows would have enormous economic impacts. Anticipating the possible need for storage water to meet Swan Falls minimum flows during calendar year 2014, the IWRB passed a resolution in June of 2014 that created a "debit system" for making its storage water in Palisades Reservoir available for this purpose. This system allows Idaho Power to call for delivery of IWRB storage in Palisades, if needed to maintain the Swan Falls minimum. In the short term, the cost of delivering this water would be borne by the IWRB. However, if successful in 2014, IWRB intends to extend this system into the future and develop a mechanism whereby future costs of delivery of Palisades storage water to meet the Swan Falls minimum are borne by the owners of Swan Falls trust water-rights.

To emphasize just how important irrigated agriculture, particularly in the Magic Valley, is to Idaho's economy (and therefore, just how devastating curtailment of the trust water-rights would be), Mr. Tominaga presented a number of facts and figures, many compiled by University of Idaho Agricultural Extension staff. In 2005, irrigation withdrawals in Idaho accounted for 13% of the national total, second only to California, which accounted for 19% of the national total. Idaho ranks 5th in the country in number of irrigated acres (behind Nebraska, California, Arkansas, and Texas), and Idaho's net farm income is second only to California among the 11 states in the West. Although the total amount of irrigation water applied to crops, and total irrigated acreage, in Idaho have remained fairly constant over the past 30 years, the amount of water applied by sprinklers has nearly doubled, while the amount supplied by gravity systems has decreased by over 50%, increasing irrigation efficiency but decreasing incidental recharge. In 2012, the top three crops in Idaho, by acreage, were hay (34% of all irrigated acreage), wheat (19%) and potatoes (13%). In 2013, both total farm cash receipts and net farm income reached all-time records; gross receipts have grown at an annual rate of 4.3% over the past 10 years. Over half of the \$7.8 billion in cash receipts in 2013 were related to livestock (dairy at 33% and beef/other livestock at 22%). Agribusiness is the single largest sector of the economy, worth \$24 billion (20% of state's economy) in 2011. Within this agribusiness sector, livestock farming accounted for 20% (\$4.8 billion), crop farming for 25% (\$6 billion), and food processing for 55% (\$13.2 billion). The trend toward increased livestock and dairy production is even more accentuated in the Magic Valley, where feed crops (alfalfa and corn) account for 47% of crop acreage. The Magic Valley generates over 50% of Idaho's farm cash receipts, accounts for more than 25% of Idaho's gross domestic product, contains over 70% of Idaho's dairy herd, and is home to Idaho's four top agricultural counties (Cassia, Gooding, Twin Falls, and Jerome).

Additional resources:

Mr. Tominaga's slides <http://henrysfork.org/watershed-council>

Closing Community Building

Brandon Hoffner

With just 23 people still present, Brandon opened the meeting to comments. He noted that no meetings have yet been scheduled for 2015 and that it will probably be February or March for the next session of the Watershed Council.

Dale Swensen said the talk about efficiency in irrigation reminded him that “we enjoy our inefficiency in irrigating in the upper valley” in that it helps with aquifer recharge. We need to dump more water out in the dunes, he said, to make up for the loss of recharge from subirrigation on the Egin Bench.

Lynn Tominaga said Ron Carlson talked about how our roles have changed. Lynn pointed out the Endangered Species Act also changed water management because of the water sent downstream for salmon recovery. “Looking back, what would that have done if we had kept it in the basin,” he said. “It makes me wonder, looking back at all the water that has gone downstream. It has been of benefit to the salmon but would it have done more good locally?”

Mike Beus said that without the Nez Perce agreement for 467,000 acre feet per year, we may have been looking at double that amount delivered for the salmon.

Dale said he is ready for snow.

Ron Carlson said he is counting on the 400,000 acre feet of water Jon (Bowling) promised us (from snow-making).