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# THE WATER ISSUE

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This past summer, hundreds of people gathered in Idaho's state capital to celebrate the successful conclusion of the Snake River Basin Adjudication (SRBA), a lengthy water rights confirmation process that covered nearly 90% of the state. Supreme Court Justice Antonin Scalia joined the party as well, marking the occasion's significance to national law and policy. The adjudication process began in the early 1980s, after the courts ruled in favor of rate payers and against the Idaho Power Corporation for not adequately protecting the water rights that allowed for power generation at the Swan Falls Dam and subjecting customers to higher electric rates. Following the surprise decision, Idaho Power filed a lawsuit against 7,500 upstream water users holding junior water rights. The State of Idaho rightly predicted a disastrous showdown that would have had dire consequences for Idaho's agriculturally based economy had the lawsuit proceeded. The state instead pushed for the parties to negotiate a settlement that became known as the Swan Falls Agreement.

It is important to recognize that Idaho did not require permits for surface water use until 1971. But since non-Native American pioneers had settled the area in the mid-19<sup>th</sup> century, thousands of water rights existed that had been claimed merely by putting a notice of water right on a stake in the ground next to the diversion. For the most part, paperwork was not filed nor measurements made to quantify people's water rights or use. Thus, part of the Swan Falls Agreement required that the state enter into an adjudication process for the entire Snake River Basin in order to determine exactly what water rights were held by whom.

The 30-year process was arduous, but participants credit Idaho for making some key decisions along the way. First, a special court was created in the middle of the basin at Twin Falls, where some of the highest intensity water use occurred. Second, Idaho's Department of Water Resources was made an expert in the claims instead of a party. This step allowed for a great deal of communication between the parties who would ultimately have to administer the adjudicated rights, permitting the Department to conduct research and offer data and facts that the Court could view in an unbiased manner.

Historians worked on many of the claims during the process. I personally had several opportunities to work on the SRBA. One of those projects included researching the history of the Deer Flat National Wildlife Refuge and related sites for which the federal government was seeking in-stream flow rights. Another involved researching the history and co-evolution of surface water and groundwater rights in eastern Idaho.

In spring 2015, the Idaho State Archives will receive the entire SRBA court collection, estimated to be more than 1,500 boxes of documents. There is no doubt that the collection will be a rich one for historians and other researchers interested in the history of water rights in the West. There will be significant documentation on two important Native American water rights settlements – the Nez Perce and the Fort Hall agreements – as well as detailed information on individual farmers' claims and federal in-stream flow claims. Researchers anxious to learn about any of these topics will have an incredible opportunity when the collection becomes available. In the meantime, Idaho is moving toward its next adjudication in the northern part of the state, where it no doubt hopes to have as much if not more success.

*Jennifer Stevens*



*Clean Water Act*

Litigation associated with the Clean Water Act (CWA) often requires reconstructing decades of land, law, and business history to reveal events that occurred before the law passed, unravel more than a century of development, and identify culpable parties. Interpreting the history of American business, water development, and landscape change requires a historian's expertise, methodology, and access to and familiarity with myriad archival sources. SHRA has 18 years of experience providing expert research and analysis in all types of CWA cases, from those involving small farmers to those involving international corporations, from western irrigation districts to eastern urban rivers, and from the early days of statehood to current pollution litigation. The court's historically broad interpretation of the CWA makes SHRA's extensive experience in water law, land use history, and pollution clean-up critical to any CWA case.

*Navigability*

Questions on historic navigability can arise during title disputes over a river's beds and banks. Such cases arise across the U.S. In a recent case, *Montana v. Montana PPL*, the state sued the utility for decades of back rent it claimed was due because the utility had built facilities on land that Montana claimed it owned based on an assessment of the river as navigable. In a 2012 ruling on the case, the U.S. Supreme Court asserted that navigability assessments should be done in logical river segments rather than on an entire river at once; it relied heavily on the historian's evidence and report in this ruling. SHRA associates have worked on a variety of similar disputes across the West. We have supplied historic documents, photographs, and expert reports which have successfully illuminated the historic scope and uses of rivers. SHRA's research methods, knowledge of legal strategy and precedent, and relevant experience make our services invaluable on any such title case.



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*History in the Making*

SHRA is conducting historical research on:

Four Superfund/CERCLA projects, including legacy zinc and lead smelters, mineral processing plants, and polluted waterways involving multiple PRPs; History of state endowment land management; Reclamation project history in support of new TMDLs; Historic navigability studies; Interstate water rights dispute; and Idaho Power's 2016 Centennial celebration.

SHRA is currently combing the records of:

The U.S. Geological Survey, the National Park Service, county road records in Washington, the Bureau of Reclamation, the National Resources Committee, various state engineers, and many more!

SHRA is currently working in:  
Indiana, New Mexico,  
Colorado, Washington, Texas,  
Oklahoma, and Idaho