IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	**)**	**Consolidated Subcase No. 03-10022**
	)	**Nez Perce Tribe Off-Reservation**
Case No. 39576	**)**	**Instream Flow Claims**
_____	**)**	

RESPONSE TO UNITED STATES' MOTION FOR STATUS CONFERENCE AND ORDER ON NEZ PERCE TRIBE'S MOTION TO SET ASIDE ALL DECISIONS, JUDGMENTS AND ORDERS ON INSTREAM FLOW CLAIMS ENTERED IN CONSOLIDATED SUBCASE 03-10022 BY JUDGE R. BARRY WOOD, AND MOTION TO DISQUALIFY JUDGE WOOD

I.
APPEARANCES

Mr. Albert Barker, Esq., Hawley Troxell Ennis & Hawley, Boise, Idaho, for the Boise-Kuna Irrigation District, Federal Claims Coalition, *et al.*

Mr. Steven Strack, Esq., Boise, Idaho, Deputy Attorney General, for the State of Idaho.

Mr. Michael Mirande, Esq., Miller Bateman LLP, Seattle, Washington, for the Idaho Power Company.

Mr. Scott L. Campbell, Esq., Ms. Angela D. Schaer, Esq., Mr. Chris E. Yorgason, Esq., Elam & Burke, Boise, Idaho, for Pioneer Irrigation Dist., *et al.*

Mr. Roger D. Ling, Esq., Ling Nielsen & Robinson, Rupert, Idaho, for Federal Claims Coalition, *et al*.

Mr. Peter Monson, Esq., Denver, Colorado, for the United States Department of Justice, Bureau of Indian Affairs.

Mr. Steven Moore, Esq., Native American Rights Fund, Boulder, Colorado, for the Nez Perce Tribe.

Ms. K. Heidi Gudgell, Esq., Lapwai, Idaho, for the Nez Perce Tribe.

II.
BRIEF PROCEDURAL BACKGROUND AND FACTS

1. In March of 1993, the United States filed 1,133 instream flow water right claims in the Snake River Basin Adjudication ("SRBA") on behalf of the Nez Perce Tribe ("Tribe"). Near that same time, the Tribe filed 1,134 claims on its own behalf.

2. On April 26, 1996, Judge Daniel C. Hurlbutt Jr., issued an Order consolidating all instream flow claims filed by the Tribe and the United States and designated the lead subcase to be no. 03-10022.

3. On December 31, 1998, Judge Hurlbutt retired from the SRBA.

4. On December 22, 1998, Chief Justice Trout issued an Order appointing Barry Wood as interim Presiding Judge of the SRBA, effective January 1, 1999.

5. On March 9, 1999, Chief Justice Trout issued an Amended Order appointing Barry Wood as the Presiding Judge of the SRBA.

6. On November 10, 1999, Judge Wood issued an Order and Judgment granting objector's[1] motions for partial summary judgment, holding that the Tribe, and the United States as trustee for the Tribe, had no off-reservation instream flow water rights in consolidated subcase no. 03-10022. The Judgment was certified under I.R.C.P. 54(b). *See Order on Motions for Summary Judgment of the State of Idaho, Idaho Power, Potlatch Corporation, Irrigation Districts et al.* (Nov. 10, 1999).

7. On November 17, 1999, the Tribe filed its *Notice of Appeal* in consolidated subcase no. 03-10022.

[1] The term "objectors" in subcase 03-10022 includes the State of Idaho, Idaho Power Company, Potlatch Corporation, several irrigation districts, and many municipalities within the State of Idaho.

8. On November 24, 1999, the United States filed a *Motion to Alter or Amend Judgment or Alternatively for an Evidentiary Hearing* relating to the Court's November 10, 1999, Order and Judgment.

9. On December 21, 1999, the United States filed its *Notice of Appeal* in consolidated subcase no. 03-10022.

10. On January 21, 2000, the Court issued an *Order on United States' Motion to Alter or Amend Judgment or Alternatively for an Evidentiary Hearing* denying the United States' Motion to Alter or Amend.

11. On February 4, 2000, the United States filed a *Motion for Status Conference and Request for Expedited Consideration*, together with an *Affidavit of Peter C. Monson*. This motion was filed in the SRBA main case no. 39576 (i.e., not filed solely in consolidated subcase no. 03-10022), and sought to "discuss" the matters set forth in the accompanying Affidavit.

12. On February 7, 2000, the Nez Perce Tribe filed a *Motion to Set Aside All Decisions, Judgments, and Orders on Instream Flow Claims Entered in Consolidated Subcase 03-10022 by Judge R. Barry Wood, and Motion to Disqualify Judge Wood*, and a *Memorandum in Support* thereof (hereinafter referred to as "*Motion to Set Aside*"). The Tribe contemporaneously filed an *Affidavit of K. Heidi Gudgell*, and a *Motion for Expedited Hearing*.

13. On February 8, 2000, the Court issued an Order setting a hearing to be held February 22, 2000, to hear the matters brought up in the Nez Perce Tribe's and the United States' respective motions and affidavits.

14. On February 11, 2000, Judge Wood issued a *Disclosure Pursuant to I.R.C.P. 40(d)(2)(A)* ("*Disclosure*"). This was followed by a *Supplemental Disclosure Pursuant to I.R.C.P. 40(d)(2)(A)* ("*Supplemental Disclosure*") issued on February 28, 2000. These

two disclosures and the exhibits thereto are incorporated herein by reference as though the same were set forth in full. (It should be noted that on February 29, 2000, it was discovered through the Idaho Department of Water Resources ("IDWR") that Flying Resort Ranch, Inc. also has a water right claim no. 77-04086, which is stated by IDWR to be a power, domestic, and irrigation right, scheduled to be reported by IDWR in the year 2005).

15. On February 16, 2000, the following documents were filed:

a) *Memorandum in Opposition to Nez Perce Tribe's Motion to Set Aside All Decisions, Judgments, and Orders on Instream Flow Claims Entered in Consolidated Subcase 03-10022 by Judge R. Barry Wood, and Motion to Disqualify Judge Wood*.

b) *Affidavit of Caralee A. Lambert in Support of Memorandum in Opposition to Nez Perce Tribe's Motion to Set Aside All Decisions, Judgments and Orders on Instream Flow Claims Entered in Consolidated Subcase 03-10022 by Judge R. Barry Wood and Motion to Disqualify Judge Wood*.

c) *State of Idaho's Memorandum Re: Motion to Disqualify Presiding Judge and Set Aside All Prior Judgments, Decisions, and Orders*.

d) *Affidavit of Steven W. Strack*.

e) *Objection to Affidavit of Peter C. Monson and Objection to Motion for Status Conference*.

f) *Response Brief of Objectors Re Disqualification*.

g) *Affidavit of Angela D. Schaer*.

h) *Affidavit of Scott L. Campbell*.

i) *Notice of Joinder*.

16. On February 18, 2000, the Tribe lodged a *Reply Brief of the Nez Perce*. Also on that date, the United States filed the *United States' Response to "Objection to Affidavit and Objection to Motion for Status Conference.*"

17. On February 22, 2000, the Tribe filed a *Supplement to Exhibit D* to the *Affidavit of Steven C. Moore.* Also on February 22, 2000, at the request of the Court, IDWR filed the *Affidavit of David R. Tuthill Jr., Re Number of Claims, Claimants and Irrigated Acres in the SRBA*. On that same date, the matters raised in the Tribe's and the United States' respective motions were heard in open court.

18. On March 2, 2000, the Tribe filed *Nez Perce Tribe's Response To Judge Wood's Supplemental Disclosure Pursuant To I.R.C.P. Rule 40(d)(2)(A)(2)* and the *Supplemental Affidavit Of Steven C. Moore*.

19. On March 8, 2000, the Federal Claims Coalition filed *Objectors' Reply to Nez Perce Tribe's Response to Judge Wood's Supplemental Disclosure Pursuant to I.R.C.P. Rule 40(d)(2)(A)(2).*

20. On March 10, 2000, counsel for Pioneer Irrigation District, *et al*. filed *Notice of Joinder in Objectors' Reply to Nez Perce Tribe's Response to Judge Wood's Supplemental Disclosure Pursuant to I.R.C.P. 40(d)(2)(A)(2).*

III.
MATTER DEEMED SUBMITTED

This Court having heard this matter on February 22, 2000, with no party seeking additional briefing and the Court having requested none, the matter was initially deemed fully submitted for decision on the next business day, or February 23, 2000. However, the Court issued a *Supplemental Disclosure* on February 28, 2000, and the Tribe responded thereto on March 2, 2000; the Federal Claims Coalition responded on

March 8, 2000; and the Pioneer Irrigation District, *et al*. filed a *Joinder* thereto on March 10, 2000. Therefore, this matter is deemed fully submitted on the next business day or March 13, 2000.

IV.
ISSUES RAISED

The following issues have been raised in conjunction with the Tribe's *Motion to Set Aside*:

ISSUE # 1) Does the District Court have jurisdiction under I.A.R. 13(b) to hear the Tribe's motion since the Tribe has already filed an appeal in the subcase?

ISSUE # 2) Does Judge Wood, as Presiding Judge of the SRBA, have a conflict of interest pursuant to I.R.C.P. 40(d)(2) and Canons 2 and 3 of the Idaho Code of Judicial Conduct where neither he nor members of his family are parties to consolidated subcase 03-10022, but have claims in the SRBA?

The resolution of this issue requires resolution of whether, for purposes of a conflict of interest analysis, this massive general stream adjudication is an evaluation of individual water right claims based upon the merits of each individual claim, whereby a decision on that particular claim has no bearing on the merits of another claim, and wherein water is thereafter administered according to priority; or, is the general stream adjudication one large combined case comprised of all claimants mixed together and claiming the resource from "one common pot," whereby each claim is *per se* in direct conflict with every other claim in the adjudication?

ISSUE # 3) If the Court determines that Judge Wood's claims and/or the claims of his family present disqualifying conflicts of interest, is setting aside the judgment and all prior rulings made by Judge Wood an appropriate remedy?

V.
ISSUE # 1: JURISDICTION

The objectors to the Tribe's motion have initially raised the issue of this Court's jurisdiction to hear the pending motions because this subcase is presently on appeal to the Idaho Supreme Court. The Court is cognizant of the jurisdictional complexities that arise between the operation of I.A.R. 13(b), I.R.C.P. 40(d)(2) and (5), and I.R.C.P. 60(b). I.R.C.P. 40(d)(2) requires that the presiding judge, as opposed to a different judge, rule on the motion for disqualification. I.R.C.P. 40(d)(5) prevents the presiding judge from taking further action in the case until the motion to disqualify has been granted or denied. As a consequence, this Court could not rule on the Tribe's Rule 60(b) *Motion to Set Aside* until the Court has ruled on the motion to disqualify.

Because an appeal has already been filed in the consolidated subcase, and as argued by the Tribe in a prior motion to dismiss the Tribe's claim for failure to pay filing fees, this Court does not have jurisdiction to rule on any matters not expressly enumerated in I.A.R. 13(b).[2] A motion to disqualify pursuant to I.R.C.P. 40(d)(2) is not one of the exceptions enumerated in I.A.R. 13(b). Additionally, cases such as *Christensen v. Ransom*, 123 Idaho 99, 844 P.2d 1349 (Ct. App. 1992), stand for the proposition that a district court does not have the authority to rule on a motion to disqualify a judge after an appeal has been filed.

However, because of the uniqueness of the SRBA, the foregoing procedural and jurisdictional rules cannot reasonably be interpreted to apply with the same exactitude as in typical litigation. Although Judge Wood's interests were disclosed to the Chief Justice prior to being appointed as the Presiding Judge of the SRBA, these interests, albeit both remote and a matter of public record, were not disclosed to all the parties within the SRBA. Therefore, prior to Judge Wood's *Disclosure*, and in giving the parties to the

[2] On August 31, 1999, the objectors filed a motion to dismiss the Tribe's claims for failure to pay the filing fees in the SRBA. The matter was set for hearing on November 18, 1999. The hearing was continued because the Tribe filed a *Notice of Appeal* on November 17, 1999. On December 14, 1999, the Federal Claims Coalition filed a motion for a scheduling order. On December 14, 1999, the Tribe filed a motion to vacate the motion to dismiss and the motion for the scheduling order asserting that this Court lost jurisdiction over those matters once the appeal had been filed. On January 21, 2000, this Court issued a ruling which granted the Tribe's motion to vacate. *See Order on Motion to Stay Proceedings Pending Appeal* (January 21, 2000).

SRBA every benefit of the doubt, the parties would not have had an opportunity to learn of, or respond to, all of the Judge's or his family members' interests.[3] Thus, to preclude the Tribe from having its motion heard as in *Christensen v. Ransom, supra*, raises due process concerns which override a strict reading of the procedural rule.

Next, the intent and spirit of I.R.C.P. 40(d)(2) is that the presiding judge make a record and then rule on a motion to disqualify for cause. This is made clear by the standard of review employed in reviewing a judge's determination in disqualification-for-cause matters. The determination is not reviewed *de novo*. *See State v. Wood*, 132 Idaho 88, 94, 967 P.2d 702, 708 (1998)(abuse of discretion standard). Consequently, this Court is required to make a record and a ruling even if it determines it has no jurisdiction.

Lastly, although the Tribe filed its motion only in subcase 03-10022, as opposed to the entire SRBA case, the issues raised by the Tribe's motions are not unique to consolidated subcase no. 03-10022. The issues raised on disqualification also apply to the entire SRBA. Namely, that the Presiding Judge has water right claims as well as certain family members with water right claims in the SRBA. In other words, the relationship between the Tribe's claims and Judge Wood's claims may be the same as the relationship between Judge Wood's claims and other claimants in the SRBA whose claim is senior to Judge Wood's. As a consequence, other subcases in the SRBA have been delayed until a ruling has been made on this matter. Therefore, the Court's reasoning on this issue also extends beyond the scope of this consolidated subcase. Because of the magnitude of the SRBA, the entire proceeding cannot be put on hold while the unique jurisdictional quandaries which present themselves in this subcase are resolved.

For the foregoing reasons, this Court declines to dismiss the Tribe's motions on the basis that it lacks jurisdiction. Ultimately, if an appellate court determines that this Court lacks jurisdiction to rule on the matter, the record is already complete and this

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[3] On this issue, however, the Tribe is really getting the benefit of the doubt. The Tribe's assertion that it was "surprised" to learn of Judge Wood's interests is somewhat questionable. As set forth in this decision, the reasoning underlying the Tribe's motion applies equally to all water users within the Snake River Basin. The Idaho Code clearly sets forth the venue requirements for the SRBA. Thus, any judge presiding over the SRBA would consume water either through a domestic well or a municipal water right. Lastly, as will be discussed later in this decision, the Tribe made it clear in its letter to Bob Hamlin, Executive Director of the Idaho Judicial Council, that it was scrutinizing the selection of a replacement judge to preside over the SRBA. All interests disclosed by Judge Wood are a matter of public record.

Court's ruling will provide some guidance. In addition, this ruling will set forth the Court's reasoning and position on the issue as it pertains to the entire SRBA, i.e., approximately 150,000 subcases.

VI.
ISSUE # 2: ANALYSIS OF MOTION TO DISQUALIFY FOR CAUSE

A.
THE BASES FOR THE TRIBE'S MOTION

The Tribe has filed a motion for disqualification pursuant to I.R.C.P. 40(d)(2), which provides as follows:

> **Rule 40(d)(2). Disqualification for cause.**
>
> (A) Grounds. Any party to an action may disqualify a judge or magistrate for cause from presiding in any action upon any of the following grounds:
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> 1. That the judge or magistrate is a party, or is interested, in the action or proceeding.
> 2. That the judge or magistrate is related to either party by consanguinity or affinity within the third degree, computed according to the rules of law.
> 3. That the judge or magistrate has been attorney or counsel for any party in the action or proceeding.
> 4. That the judge or magistrate is biased or prejudiced for or against any party or the case in the action.
>
> (B) Motion for Disqualification. Any such disqualification for cause shall be made by a motion to disqualify accompanied by an affidavit of the party or the party's attorney stating distinctly the grounds upon which disqualification is based and the facts relied upon in support of the motion. Such motion for disqualification for cause may be made at any time. The presiding judge or magistrate sought to be disqualified shall grant or deny the motion for disqualification upon notice and hearing in the manner prescribed by these rules for motions.

Pursuant to the foregoing rule, a judge must either be a party to the action, have an interest in the action, or have family members within the third degree of consanguinity or affinity who are parties to the action. The Tribe asserted grounds 1 and 2 of the Rule

in support of its motions. Specifically, that Judge Wood has an interest affected by the SRBA and is a party to the SRBA, and that certain members of his family are also parties to the SRBA. The Tribe further asserted that the interests of Judge Wood and his family members are in direct conflict with the Tribe's off-reservation instream flow claims.

Related issues have also been raised under Canons 2 and 3 of the Code of Judicial Conduct, which for all practical purposes involved here, mirror the issues presented by Rule 40(d)(2).[4]

B.
THE UNIQUE CHARACTERISTICS OF THE SRBA

Judge Wood and certain of his family members are parties to the SRBA. However, the issues raised by the Tribe must first be evaluated in the unique context of the SRBA. The scope of the SRBA is enormous. It is one of the largest general stream adjudications ever filed in the history of the United States. The SRBA involves approximately 150,000 claims for water rights and includes approximately 100,000 claimants (parties).[5] These claimants include the State of Idaho, the United States,

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[4] Canon 3 C of the Idaho Code of Judicial Conduct states in part:

1. Judges should disqualify themselves in proceedings in which impartiality might reasonably be questioned or where personal knowledge of disputed evidentiary facts might reasonably affect their impartiality in the proceeding. Judges shall disqualify themselves in instances where:

a. they have a personal bias or prejudice concerning a party, or the party's attorney;

b. they served as a lawyer in the matter of controversy, or a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter; or the judge or such lawyer has been a material witness concerning it;

c. they know that they, individually or as a fiduciary, or their spouse or minor children residing in their household, has a financial interest in the subject matter in controversy, in a party to the proceeding, or any other interest, that could be substantially affected by the outcome of the proceeding;

d. the judge and the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judges knowledge likely to be a material witness in the proceeding.

2. Judges should inform themselves about their personal and fiduciary financial interests, and make a reasonable effort to inform themselves about the personal financial interests of their spouse and minor children residing in their household.

[5] *See Affidavit of David R. Tuthill Jr. Re Number of Claims, Claimants and Irrigated Acres in SRBA* (February 22, 2000).

various Indian Tribes, Idaho Power Company, and numerous other municipalities, corporate entities, mining interests, irrigation districts, and individuals. The geographic area of the SRBA encompasses approximately 87% of the State of Idaho, which includes between three to three and a half million acres of irrigated land.

The magnitude of the SRBA case is unique as far as general stream adjudications are concerned. The existence of federal and tribal claims to water rights required that the United States be joined as a party and on behalf of the tribal interests. Pursuant to the McCarran Amendment, 43 U.S.C. § 666, in order to subject the United States to the jurisdiction of the State of Idaho for purposes of the general stream adjudication, the entire Snake River system, including its tributaries and connected groundwater sources, were required to also be included in the SRBA. This precluded a "piecemeal" approach to the stream adjudication. *See State v. United States*, 115 Idaho 1, 6, 764 P.2d 78, 83 (1988)(McCarran Amendment requires entire stream system to be adjudicated in order to join federal and tribal interests).

The size of the case in general is unique in Idaho jurisprudence. The Idaho Supreme Court has recognized that this uniqueness often requires a departure from established rules of procedure. In *In Re SRBA Case No. 39576*, 128 Idaho 246, 254, 912 P.2d 614, 622 (1995), the Idaho Supreme Court stated:

> 'It must be remembered that a suit to determine the priority and amount of water that each user from a stream is entitled to is somewhat different from the ordinary action, and the general rules of pleading have never been technically observed or strictly enforced in this class of cases, for if they were, in many cases where there are a hundred or more parties to the action the pleadings would be very voluminous.'

Id. (quoting *Joyce v. Rubin*, 23 Idaho 296, 303, 130 P. 793, 795 (1913)). The Nez Perce Tribe also recognized the uniqueness of the SRBA in its letter sent to Bob Hamlin, Executive Director of the Judicial Council, attached as "Exhibit A" to the *Affidavit of K. Heidi Gudgell*. Specifically, the letter stated: "The Nez Perce Tribe recognizes that the Judicial Council faces a somewhat unique situation in filling this position in that almost every Idaho attorney with water law experience has had some involvement with, or connection to, the SRBA."

Statutorily defined venue and jurisdictional requirements also place limitations on where the SRBA can be heard as well as who can preside as a judge over the SRBA. Idaho's general adjudication statutes require that the SRBA be brought in the district court. I.C. § 42-1407(1). In the forty-four counties of which Idaho is comprised there are a total of thirty-nine district court judges. The qualifications for becoming a district court judge include that the candidate be at least thirty years of age, a citizen of the United States, and have resided in the State of Idaho at least two years preceding his or her election. IDAHO CONST. Art. 5 § 23; I.C. § 34-616. Section 42-1407(1) of the Idaho Code also requires that the general adjudication be brought "in any district court in which any part of the water system within the state of Idaho is located." Only five Idaho counties are entirely outside the geographic area covered by the SRBA. These requirements limit the pool of district judges who are qualified to preside over the SRBA.

If the reasoning put forth by the Tribe and the United States is also imposed as an additional limitation, namely that any judge (or family member of a judge within the third degree of consanguinity or affinity) with a water right claim in the SRBA, or an interest which may be affected by the SRBA, gives rise to an automatic conflict of interest, the judicial machinery necessary to hear the case becomes virtually, if not absolutely, nonexistent. Because of the magnitude of the SRBA, it becomes readily apparent that every citizen who owns property within the geographic area covered by the SRBA (ground or surface) and consumes water in connection with that property, either through a private water right, a municipal water right, or otherwise, has some pecuniary interest in the outcome of the SRBA. Those citizens who use electrical power supplied in whole or in part by Idaho Power Company, which generates hydropower on the Snake River and is also a party to the SRBA as well as the consolidated subcase, also have an interest in the outcome of the SRBA. The Bonneville Power Administration ("BPA"), which is an agency of the U.S. Department of Energy, also sells hydroelectric power generated at federally owned dams on the Snake River and its tributaries, to public and private utility companies in the Northwest.[6] Although Judge Wood did not have involvement with the

[6] The BPA sells the hydroelectric power generated at the following federally owned Snake River Basin dams: Palisades, Minidoka, Anderson Ranch, Boise Diversion, Black Canyon, and Dworshak. *See* Bonneville Power Administration Website (visited March 15, 2000) <http://www.bpa.gov/power/pgf/hydrPNW.shtml>.

SRBA prior to becoming the Presiding Judge on January 1, 1999, the reasoning underlying the Tribe's argument as to Judge Wood's interests in the SRBA, and those of his family members, essentially places the Judge and his family on an "equal footing" with the rest of the citizens residing in the 87% of the State of Idaho covered by the SRBA.

C.
HOW WATER RIGHT CLAIMS ARE PROCESSED IN THE SRBA

In analyzing the issues of conflict of interest presently before this Court, it is important to understand how water right claims are processed in the SRBA. Claims may be made based on Idaho State law, such as prior appropriation, or based on federal law such as federal reserve claims. *See* I.C. §§ 42-1401–1428 (1996 & Supp. 1999); ***SRBA Administrative Order 1***, ***Rules of Procedure*** (***AO1***) (Oct. 16, 1997). The pleadings in an adjudication include documents such as the notices of claim, objections, and responses. *Fort Hall Water Users Ass'n v. U.S.*, 129 Idaho 39, 41, 921 P.2d 739, 741 (1995).

1. STATE BASED WATER RIGHTS

The principal steps in a state based water right claim are:

1. A claim of a water right is filed. I.C. § 42-1409 (Supp. 1999).
2. IDWR makes an examination of the relevant water system and the claim.
3. As a result of the IDWR examination, a Director's Report for the claim is filed. I.C. § 42-1411 (Supp. 1999).
4. Objections and/or responses to the Director's Report may be filed by the claimant or any other party to the SRBA. I.C. § 42-1412 (Supp. 1999); I.C. § 41-1411(5).

A. If objections to the claim are filed, the claim becomes a contested subcase.

B. Uncontested claims do not become subcases, and are partially decreed.

5. Contested subcases proceed toward resolution. The District Court may refer these subcases to a special master. I.C. § 42-1412(4)-(5).

A. Settlement conference.

B. Scheduling conference.

C. Trial before a special master.

D. Alternatively, the parties to a subcase can stipulate to the contested elements of a water right by the use of a Standard Form 5. IDWR may concur therewith. ***AO1*** **§** (4)(d)(3). If IDWR does not concur, the Court shall conduct any hearing necessary to determine whether a partial decree should be issued. ***AO1*** **§** (4)(d)(3)(c).

6. In referred subcases, a **Special Master's Report or Recommendation** is filed with the Court. ***AO1*** **§** (13).

7. **Motions to Alter or Amend a Special Master's Report or Recommendation** are filed, heard and ruled upon by a special master. ***AO1*** **§** (13).

8. Objections ("Challenges" in the SRBA) to the final **Special Master's Report or Recommendation** are filed with the SRBA District Court. I.R.C.P. 53(e)(2); ***AO1*** **§** (13).

9. A decision is made by the District Court on the **Challenge** and a Partial Decree is entered.

10. An appeal to the Idaho Supreme Court may be taken in the particular subcase.

Claims which are uncontested may be decreed as reported. Idaho Code § 42-1411(4) purports to mandate that the uncontested portions of the Director's Report (meaning the claims which are not objected to) be decreed as reported. Normally, this is exactly what happens and is a ministerial task only. Despite the language of this statute, the SRBA district court retains discretion to apply the law to the facts and render its own conclusions regarding unobjected to water rights. *State v. Higginson*, 128 Idaho 246, 258, 912 P.2d 614, 626 (1995)(citing I.R.C.P. 55).

Idaho Code § 42-1412(7) also allows the district court to delay entry of partial decrees for those portions of the Director's Report for which no objection has been filed if

the district court determines that the uncontested claim may be affected by the outcome of a contested matter. However, despite this "discretion," unless an objection is filed to a particular water right claim, the claim does not become a subcase. The fact finding function of the special master is bypassed and the claim is recommended for partial decree as reported. This process is akin to a judge entering a default judgment where no responsive pleading has been filed. Even though the judge retains discretion to review uncontested claims, there is no record from which the judge can apply facts or draw legal conclusions. The judge typically issues partial decrees identical to the elements contained in the Director's Report.

2. FEDERAL BASED WATER RIGHTS

Water right claims made pursuant to federal law are governed by Idaho Code § 42-1411A.[7] As with state based claims, the first step in the process is the filing of a claim. In contrast to state based claims, however, IDWR does not investigate and report claims made under federal law. Idaho Code § 42-1411A(12) states that "[s]ince no independent review of the notice of claim has occurred as provided for water rights acquired under state law in a director's report, a claimant of a water right established under federal law has the burden of going forward with the evidence to establish a prima facie case for the water right established under federal law." Other parties to the SRBA are provided notice of the filing of federal based claims via a federal reserve claims attachment to the Director's Report for each reporting area. *See Order Establishing Notice of Claim Form; Filing Procedures; and Notice Procedures for Claims to Water Rights Established Pursuant to Federal Law* (Aug. 24, 1998). Following notice, Idaho Code § 42-1411A(7) provides for various objection periods depending on the number of claims filed. Any claimant in the SRBA may object by filing an objection within the specified period.

[7] I.C. § 42-1411A was added to the Idaho Code in 1994. Prior to that time, federal law based water right claims were governed by I.C. § 42-1411(3), which required the Director to create an abstract of the elements contained in the notices of claim. This abstracting process did not involve an investigation or review of the claims.

For uncontested federal based claims, the claimant is required to appear at a hearing and present a *prima facie* case supporting each of the elements of a claimed water right. I.C. § 42-1411A(14). Contested water right claims proceed toward resolution in much the same manner as state based claims. If a contested federal based water right claim has been referred to a special master, a special master's report and recommendation is created, to which motions to alter or amend and challenges may be filed. *See* ***AO1*** § (13).

3. EACH SUBCASE IS TREATED AS A DISTINCT PIECE OF LITIGATION

It is clear that at least until the point in time when the motions were filed in this consolidated subcase, that this massive general adjudication has been treated by every participant as the evaluation of individual water right claims, or in some instances a consolidated set of subcases with common issues. Ultimately, the decision on one claim has nothing to do with another claimant unless the two are linked together by way of objections or responses. Each claim has a date of priority. Once the water right is partially decreed, the water is administered by IDWR, not the Court, in conjunction with other water rights based upon relative priority. For purposes of evaluating the merits of individual claims, the adjudication is not, and has never been treated as one combined case with all claimants being "mixed together" and claiming the resource from "one common pot" creating a direct conflict.[8] The quantity of water available to all Idaho water users is not constant. The supply of water is highly variable. It is not uncommon at different points in time for the resource to be over allocated to one degree or another, and based upon the variations in the supply of water at any given time, this degree of over allocation varies greatly.

The converse is also true. At a given time the resource may be under allocated, i.e., a surplus may exist. The conflict between any two rights is based upon variances in the supply of the resource. Delivery of water in times of shortage by priority must also

[8] By way of analogy, if ten people were severely injured in an accident and there was a fixed, limited dollar fund to pay all injuries in an amount less than necessary to fully compensate each injured party, then clearly each party is in direct conflict with every other party over this inadequate resource. The supply of water, however, can be highly variable.

recognize the futile call doctrine. *See infra*, fn 22. The purpose of the SRBA is to ascertain the validity of individual water right claims. The adjudication is not a predetermination of delivery during times of shortage. Therefore it is inaccurate to assert that every claim in the SRBA is in automatic conflict with every other claim in the SRBA. Furthermore, no conflict between rights can be stated to exist without consideration of whether the sources are connected and the significance of that connection as in conjunctive management and the futile call rule.

D.
THE INTERESTS OF JUDGE WOOD AND HIS FAMILY MEMBERS

1) THE WATER RIGHT CLAIMS OF JUDGE WOOD

The water right claims held by Judge Wood consist of a domestic and stock claim for .04 cfs of groundwater which supplies water to Judge Wood's residence via a well.[9] Since Judge Wood's residence is situated outside the boundaries of a municipality, he must rely on a well as opposed to a municipal water source for his household water.[10] The "objection period" during which any party to the SRBA could file an objection to the claim expired on September 10, 1999. During that period, no objections were filed by any party to the SRBA, including the Tribe. Since no objections were filed, the claim is awaiting entry of a partial decree. *See Disclosure*, p. 4, ¶ 15.

Also at issue is a groundwater right claim for irrigation in the amount of .21 cfs. This water is also diverted via a well. The water right is for purposes of irrigating a portion of the approximately 13 acre parcel on which Judge Wood's residence is situated.

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[9] Cfs (cubic feet per second) is a unit of flow. One cfs is equivalent to water passing at the rate of one cubic foot (7.48 gallons) every second. To place the matter into perspective, a typical garden hose flowing at about 13 1/2 gallons per minute equals approximately .03 cfs. The average annual flow of the Snake River from the lower Granite Dam is approximately 52,285.0 cfs. *See* Bonneville Power Administration Website (visited March 13, 2000) <http://www.bpa.gov/power/pgf/hydrPNW.shtml>.

[10] Judge Wood did not file the claim for domestic and stock water in the SRBA. Rather, the claim was filed by Judge Wood's predecessor in title and was pending when Judge Wood purchased the property.

This claim is based on a license issued by the State of Idaho.[11] The water right is considered a "split right" because the 13 acre parcel was divided from a much larger parcel of farm ground. Judge Wood's water right consists of a small portion of the original water right. The water, other than a small amount which is used to water the Judge's garden and trees, is used by the Judge's neighbor who owns the adjacent larger parcel, and also farms the farmable portion of the Judge's parcel.[12] Judge Wood receives no payment from the crops grown on his property or for the use of his property. This particular claim has not been reported by IDWR and therefore the objection period has not yet commenced. IDWR does not anticipate reporting the claim until some time in the year 2003. *See Disclosure*, p. 4, ¶ 15. After the claim is reported, parties to the SRBA will then have the opportunity to file objections. Until the claim is reported, however, the matter remains at the investigation level at IDWR, making it not yet ripe for objections or a justiciable controversy in the SRBA.

Contrary to the Tribe's assertion, Judge Wood does not own any water shares in a canal company or any other surface water rights.[13]

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[11] The fact that this claim is based on previously licensed claim is also significant because the scope of what can be litigated in the SRBA relative to the licensed water rights is substantially limited. Licensed water rights are perfected administratively as opposed to judicially or in the SRBA. *See* I.C. § 42-201 *et seq*. In fact, judicial review of the administrative agency action relative to licensed water rights does not even fall under the jurisdiction of the SRBA. *Twin Falls Canal Co. v. IDWR*, 127 Idaho 688, 688-89, 905 P.2d 89, 89-90 (1995). Additionally, the elements of previously licensed water rights are not subject to collateral attack in the SRBA proceedings. *See e.g*., *Bone v. City of Lewiston*, 107 Idaho 844, 847- 848, 693 P.2d 1046, 1049-50 (1984)(holding Administrative Procedures Act defines exclusive scope of appeal of agency decisions). As such, the only factual issues that can be addressed in the SRBA relative to the existence of a licensed water right concern legal causes of action which may have arisen subsequent to the issuance of the license, such as abandonment or forfeiture of the right.

[12] The claim for this water right was also filed by Judge Wood's predecessor in title and was pending when Judge Wood purchased the property.

[13] Judge Wood's water right claims are pumped from groundwater sources. Virtually all the groundwater within the Snake River Basin is deemed part of, or hydrologically connected to, the Snake River Basin Aquifer. The Snake River Basin Aquifer holds approximately between 200 and 300 million acre feet of water within its upper 200 to 500 feet. *See* Fereday, Jeffery C., and Creamer, Michael C., *Swan Falls in 3-D: A New Look at the Historical, Legal and Practical Dimensions of Idaho's Biggest Water Rights Controversy*, 28 Idaho L. Rev. 573, 576 (citing *U.S. Dept. Of Energy, Geohydrologic Story of the Eastern Snake River Plain and the Idaho National Engineering Laboratory 2* (D.C. 1982)). The Snake River Basin Aquifer as a matter of law is deemed hydrologically connected to the surface waters which are the subject of the SRBA. *See A & B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 421, 958 P.2d 568, 578 (1998). However, according to IDWR, the significance of these connections has yet to be established. In other words, the relationship between Judge Wood's groundwater rights and the instream flow surface claims of the Nez Perce is unknown.

2) THE INTERESTS OF JUDGE WOOD'S FAMILY MEMBERS

The Tribe has also raised the issue that certain family members of Judge Wood are parties to the SRBA or otherwise have interests that would be adversely affected by the Tribe's claims. The Judge's brother, Dr. Fredrick L. Wood III, has a claim in the SRBA for a domestic and stock water right for .06 cfs, which supplies water to his residence via a well. Dr. Wood's residence is located outside of a municipality and he must rely on a well for his domestic water supply. The claim filed for this water right was uncontested and a partial decree was issued by Judge Hurlbutt on July 27, 1998. *See Disclosure*, p. 6, ¶ 27(A). This is important because a partial decree in the SRBA is akin to the entry of a judgment. Hence, although the Judge's brother is technically still a party to the SRBA until the final unified decree is entered for the entire SRBA, this water right has already been adjudicated.

Dr. Wood also owns the ten acre parcel on which his residence is situated. The property is irrigated by water provided by the Burley Irrigation District. Dr. Wood pays assessments to the irrigation district for the use of that water. *See Disclosure*, p. 6, ¶ 27(A). The Burley Irrigation District, not Dr. Wood, is the claimant (party) to the SRBA with respect to this irrigation water right.[14] This is an important distinction because I.R.C.P. 40(d)(2) applies to families within the third degree of consanguinity who are "parties" to the action. A family member simply having an affected interest is not grounds for disqualification. *See* I.R.C.P. 40(d)(2).

Of additional importance is the quantity of water which the Burley Irrigation District is claiming in the SRBA in its own name, in contrast to the total amount of water used by the Burley Irrigation District that is claimed by both the Burley Irrigation District and the United States. At the hearing on the motion for disqualification, counsel for the Burley Irrigation District represented to the Court that the Burley Irrigation District consists of approximately 48,000 acres but that the Irrigation District has a claim in the SRBA for

[14] This situation is similar to a situation where a person owns a residence within the boundaries of a municipality and receives water via the municipal water right. In such case, the municipality is a claimant to the SRBA, not the individual water user. Thus, a resident of the municipality has an interest in the outcome of the water right.

only 163 cfs. The majority of the water used by the Burley Irrigation District is shared with the Minidoka Irrigation District and consists of two water right claims. One claim is for 1,726 cfs and the other is for 1,000 cfs. Both of these rights have been filed and are claimed by the United States. *See Tr.*, Vol. I, pp. 49-50, *Motion to Disqualify Judge* (February 22, 2000). Accordingly, the United States is the party in the SRBA claiming the right to the irrigation water used by Judge Wood's brother. Interestingly, the United States is claiming this water right, which according to the Tribe, is in direct conflict with the Tribe's claims. As pointed out earlier in this decision, Mr. Monson is counsel for the United States and is also assisting in prosecuting the Tribe's water right claims in the SRBA.[15] In any event, the United States or the Burley Irrigation District is the party to the SRBA, not the Judge's brother. [16] Furthermore, none of these claims have been reported by IDWR and therefore the objection period has not yet commenced.

Judge Wood's sister, Martha K. Wood Sweeney, purchased a 1.837 acre parcel from the Judge's parents. The parcel has an appurtenant domestic and stock groundwater claim for .06 cfs. Following the recommendation of this claim by IDWR, no objections were filed to this water right claim, and a partial decree was issued by Judge Hurlbutt on November 15, 1996. No contested issue has existed with respect to this claim since that date. *See Disclosure*, p. 8, ¶ 27(F).

Judge Wood has another sister, Sharon L. Backus, who with her husband owns real property near Challis, Idaho. According to the Director's Report, the real property consists of 62.8 irrigated acres. It is believed the total land owned is 128 acres. The Backus' have four claims in the SRBA for surface stock water and irrigation. The claims have a total combined diversion rate not to exceed 3.74 cfs. *See Disclosure*, pp. 7-8, ¶ 27(E). The Tribe has asserted that these water right claims are diverted from the same creek in which the Tribe has instream flow claims. However, neither the Tribe nor any

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[15] This situation is noted for purposes of illustrating that as a result of the magnitude of the SRBA and the diversity of interests affected by the SRBA, the perception of some degree of conflict is to a large extent inescapable.

[16] Counsel for the United States admitted that the claims were presently held in the name of the United States but that they would soon be transferred to the Burley Irrigation District. However, at the time the motion was filed and at the time the hearing was conducted, the claims were in the name of the United States.

other party to the SRBA filed objections to these claims. The objection period expired on June 2, 1999. The claims are now awaiting entry of partial decrees. The Tribe's failure to object to these claims demonstrates that the Tribe does not contest or otherwise take issue with the water right claims being decreed as reported.[17]

The Backuses also have an interest in a limited partnership (1/20th share) which has filed two claims in the SRBA for irrigation and domestic purposes. These claims have not yet been reported by IDWR and therefore the objection period has not commenced. The limited partnership, not the Backuses, is the party to the SRBA for purposes of these claims.

Sharon Backuses' husband, Lynn, owns 1 of 150 outstanding shares of corporate stock in Flying Resort Ranches, Inc. The corporation has filed for a domestic water right. The objection period for this claim has also expired and the claim is awaiting partial decree. *See Supplemental Disclosure*. The corporation has apparently also filed for power, domestic, and irrigation claims which will not be reported by IDWR until 2005 (claim no. 77-04086) and therefore the claim is not ripe for objections in the SRBA. *See supra,* pp. 3-4, ¶ 14, of this ***Order***. The corporate entity is the party for purposes of these claims.

E.
THE TRIBE'S INSTREAM FLOW CLAIMS

As previously noted in paragraph 1 on page 2 of this ***Order***, the United States has filed 1,133 instream flow claims in the SRBA on behalf of the Tribe, and the Tribe on its own behalf has filed 1,134 claims. The claims filed by the United States on behalf of the Tribe and the claims filed by the Tribe on its own behalf overlap as opposed to being distinctly different claims. The claims are for instream flows on discrete reaches of the Snake, Salmon, Clearwater, Weiser, and Payette Rivers, and certain stream reaches

[17] Much was made at the oral argument about Sharon Backus' claims coming from the same creek as some of the Nez Perce claims. However, if the Tribe was concerned about these claims, the Tribe would have objected to the claims. Although the Backuses are still technically parties to the SRBA by virtue of these claims, the objection period has closed and the claims have been recommended for partial decrees. As such, no contested issue exists relative to these claims. A search of IDWR records also indicates the existence of another claim filed by a different claimant on this same creek for irrigation and stock purposes. The Tribe also did not object to these claims.

tributary to these rivers. Instream flow claims are claims for water that is not diverted from its natural channel. Instream flow claims are to maintain flow levels within the channel at the quantity claimed. The purpose of the Tribe's claims is for anadromous fish habitat and migration. The Tribe asserts that these water rights were reserved from its aboriginal grounds in conjunction with the 1855 Treaty, which established the Nez Perce Reservation. These instream flows are claimed as Indian reserved water rights and not as federal reserved water rights. The Tribe's claimed priority date is "time immemorial," i.e., the most senior right on the system. Although each water right claim was made for a particular quantity, the quantity element for each claim has been beyond the scope of the proceedings to date.

Until the Tribe filed its *Motion to Disqualify and Set Aside the Judgment*, the scope of the proceedings had focused solely on "entitlement" as opposed to any quantification of the water rights. This distinction is significant because without a determination of quantity, the potential for conflict between the Tribal claims and all other water right claims in SRBA, including those claims of Judge Wood and his family members, is speculative. In fact, the United States on behalf of the Tribe took this very position in urging this Court to disregard any quantity issues for purposes of ruling on the motion for summary judgment.[18] The United States and the Tribe strongly urged the Court to simply rule on whether, pursuant to the subject Treaties, some quantity of water was reserved for fish habitat. Then, in future proceedings any reserved rights would be quantified. In urging the Court to follow this approach, both the United States and the

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[18] This position was asserted in response to the contention that the Tribe's claims exceeded the annual average flow of the Snake, Clearwater and Salmon Rivers combined. Specifically**,** the State of Idaho, in its *Memorandum in Support of Motion for Summary Judgment*, lodged July 20, 1998, at page 9, stated:

> [T]he instream flow water rights claimed by the United States and the Tribe are intended to recreate the hydrological conditions extant in 1855, the time of the first Nez Perce treaty, and to support the fish species then in existence, at least two of which are functionally extinct (coho and sockeye salmon). The scope of the claims is enormous. For example, the lowermost claim, on the Snake River as it leaves Idaho, is for 38.7 million acre feet annually. Aff. at 28. According to the United States' own figures (from its original claims, Aff. at 15), the average annual flow at that point is 36. 9 million acre feet. **In other words, the United States claims 105% of the average annual flow of the Snake, Clearwater, and Salmon Rivers combined**. In essence, the plaintiffs seek to impose a wilderness servitude throughout the Snake River Basin, in many years preventing entirely the storage and diversion of water by all other water users. (Emphasis added).

Tribe took the position that the Tribe was not claiming all the water in the Snake River Basin, and that the Tribe's claims would have "very little impact upon irrigators and other water users." Now in support of the instant motion, the United States and the Tribe have abandoned their previous in-court representations and have adopted an entirely inconsistent position. Now the Tribe asserts that the quantity of water claimed is so large that it substantially conflicts with the *de minimis* interests of Judge Wood and virtually every water right in the SRBA. The Tribe's change in position is so dramatic that it now asserts that its instream flow claims even have the potential to impact *de minimis* domestic and stock water claims not diverted from the Snake River, but pumped from the Snake River Basin Aquifer.

The inconsistency of the Tribe's current position is exemplified by examining both its current and prior in-court representations. In the *Reply Brief of the Nez Perce Tribe*, lodged in the instant motion the Tribe now argues that its claims conflict with those of all irrigators.

> **The very essence of the issues** presented in Subcase No. 03-10022 **is the conflict between the water needs of irrigators and the water needs of fish**. **At their core, the claims of the United States and the Tribe**, as filed and not yet quantified, **require that virtually the entire natural flow of the Snake River in Idaho be left in the river** to meet the needs of anadromous fish **at the very time that irrigators need that same water for their crops**. (emphasis added).

Contrary to its current position, the Tribe previously admitted that it did not claim all the water in the system and insisted that its claims would have minimal impact on irrigators. Mr. Monson, on behalf of both the United States and the Tribe, represented to this Court during oral argument on summary judgment on October 13, 1999, the following:

> **Before I turn to the issues which are before the court, it is important to emphasize what is not before the court today. The issues before this court are not about sensational speculation over what might or might not occur should the water rights be adjudicated as claimed in this case**. That is for a later day. It's a quantification question. And I'll explain that in a moment.
>
> . . .

First, let me address the potential impact of the claims, and why that's not really before the court, and it's not relevant here. We are – at issue before this court is whether some quantity of water is necessary to fulfill the Nez Perce tribe's treaty reserved fishing rights.

This case is not about the United States claiming all the water. In fact there is no place in any pleading that we have made such an assertion, nor has the Nez Perce tribe in any pleading made any assertion that it's claiming all of the water rights.

By contrast, what we are claiming is a very specific, precise description of the amount of water that our biologists tell us is necessary to fulfill the tribe's treaty rights by providing the necessary and absolutely essential element of water. **We are not claiming all the water. We never have.** And if there was any doubt in the court's mind, when we amended our claims a year and a half ago we specifically amended them downward in almost every instance so that the existing uses would not be as greatly impacted as the objectors now claim or argue.

. . .

The United States and Nez Perce tribe did not file the Snake River Basin Adjudication. The State of Idaho filed the Snake River Basin Adjudication. **We, like every other water right claimant in the adjudication, have to pursue our claims. We have an obligation to assert claims or else they will forever be barred. And that's the nature of this proceeding**.

So it is not fair for objectors and others to claim somehow that we are asserting some grandiose scheme of water rights management upon the state. We were simply defending the rights to water that we believe we are entitled.

The State of Idaho presented a slide show earlier today. And unfortunately, Your Honor, we don't have quite the same high tech capabilities that the State has. But one of the slides in the counsel for the state's presentation compared the water right claims in acre-feet with some measure of average annual flows or something also in acre-feet.

Your Honor, there's no foundation laid for that presentation. And in fact if you go back and examine the claims, the claims are not stated in acre-feet. They are stated in cubic feet *per se*cond. So it is important for the court to be aware that the figures stated there are merely guesstimates and have no basis in the record.

Not only that, but we believe that the average annual flow as presented there represents the average annual flow today, including all the diversions that are currently occurring. There is no evidence to say that that is what the average natural flow would have been absent the diversions.

So if you compare those numbers, there actually is very little impact upon the irrigators and other water users from the assertion of

claims at the lower extent of the Snake River as it leaves the state, which is the claim that they pointed out. So I just wanted, before I went too much further I wanted to make that point – that the State's slide on that particular issue was both erroneous and actually supports our position that there usually isn't as much of an impact as the objectors would have you believe.

. . .

The assertions of some dire result arising from the adjudication or recognition of our claims here are simply not borne out by the record, nor are they borne out by the facts in this or any other case. **There is simply no basis for the speculative assertions that somehow water in southern Idaho will all have to be left in the river**.

Water development and fisheries have existed for many years in this state. And they can continue to exist even with the guarantee of a decreed water right in the name of the tribe. There's not going to be a complete cessation of water diversion in the State of Idaho, and the objectors don't even make that point.

The actual truth is going to lie somewhere in the middle. There's going to be at the end of the day – if our claims are adjudicated and the court recognizes the entitlement to our claims, there will be a need to address the quantification issue. And in that proceeding, the remedy phase, if you will, there will be an effort by all parties presumably to try and develop an accommodation of both the diversion rights and the instream flow rights that are left in the river.

That this will in fact be the case is clearly evident from what's happened in other basins where instream flows for fishery purposes have been adjudicated to fulfill treaty fishing rights. For example, in the Yakima Basin there is still considerable irrigation going on notwithstanding the fact that the Yakima tribe was adjudicated an instream flow right to fulfill its fishing purposes both on and off the reservation in the Aquavella General Stream Adjudication.

Similarly farmers still irrigate their crops in the Klamath Basin notwithstanding the court's decision in the ADAIR case recognizing, again, that instream flow rights for fishery purposes are necessary to fulfill those fishery needs and those treaty rights.

The same is true in the Flathead Valley where, in light of the FLATHEAD BOARD OF CONTROL cases which are cited in our brief, the Bureau of Reclamation and the Bureau of Indian Affairs manage the project there with an eye towards the impacts of irrigation diversions upon fish, and expressly preserve fish flows in those streams. That has not caused a cessation of irrigation in that valley, and it still continues to this day.

The same is true in the other cases that we've cited – in the WALTON case on the Colville reservation, and the ANDERSON case involving the Spokane tribe. In all of these instances accommodations

> have been made and a means has been able to be worked out during the remedy phase which allows the needs of the fish to be met while still allowing for diversions of water for agriculture and other beneficial uses under state law.
>
> The State of Idaho has asserted that there's some sort of inconsistency between the claims that the United States has asserted and the state notions of sovereignty over water rights. Well, the same claim was made in the recent decision in the MILLE LACS case, MINNESOTA v. MILLE LACS TRIBE which we submitted on supplemental authority around September 1st.
>
> In that case the Supreme Court rejected the notion that there's some sort of irreconcilable conflict between state sovereignty over natural resources such as, in that case fishing rights and fish and wildlife, in this case water, and noted that, "Indian treaty rights are not irreconcilable with the state sovereignty over natural resources. Rather, Indian treaty rights can coexist with state management of natural resources."
>
> That will be the case here, we submit. But all this discussion is really premature because what we're talking about is what is the remedy. We haven't gotten to the point of declaring the right yet. And it is incumbent upon this court to focus on the nature of the right, and then we'll get to the remedy phase.
>
> Similarly Judge Hurlbutt, in prior proceedings on motions to strike affidavits in this case, recognized that the assertions by objectors regarding subsequent development of the Columbia River Basin was irrelevant to the case. And on that basis, he struck the affidavit of Doctor Lisa Mighetto and her report which discusses in considerable detail the development of the Columbia River system and the efforts by the Corps of Engineers to attempt to harmonize the needs of the fish with the development of the hydropower resources in the Columbia Basin.
>
> We dispute their history. We dispute the history that was quoted today. But at bottom it's irrelevant to what's before the court. What is before the court is what was the intent and understanding of the parties to the 1855 treaty regarding the permanency of the Indian fishing right and the need for water to fulfill that treaty right.

(emphasis added).

Tr. p. 65, l. 23 – p. 74, l. 7.

As is readily discernable from the two wholly inconsistent positions illustrated above, irrigation claims in general (including the *de minimis* claims of Judge Wood and his family members) were not perceived or alleged by the Tribe or the United States to be in conflict with the instream flow claims involved in this case until after this Court issued its ruling on summary judgment and the

Motion to Alter or Amend. To the contrary, this Court was assured there was little chance of a conflict and that the two categories of claims had in the past and would in the future exist in harmony. What the Tribe and the United States now claim to be a direct, substantial and disqualifying conflict of interest in this consolidated subcase was described by Mr. Monson on October 13, 1999, as "sensational speculation." *Tr.* p. 66, l. 6.

Through this motion, the Tribe now asserts that its claims may potentially include all of the water which is the subject of the SRBA, including both surface and hydrologically connected groundwater, a position which both the Tribe and the United States denied when the issue of entitlement was before the Court. Of related concern is the fact that the United States shares this position. It now appears that the position asserted by the United States and the Tribe at summary judgment was an effort to distract the Court from taking into account all federal legislation enacted subsequent to creation of the Nez Perce Reservation specifically aimed at settling the arid desert regions of the Snake River Basin through development of the waters of the Snake River, which amplifies the issue of intent. For example, under the Carey Act of 1894, 43 U.S.C. § 641, over 414,000 acres in the Twin Falls area alone were developed for irrigation.[19] Accordingly, it would not make sense for the United States, with multiple legislative acts over many years, to encourage development of the desert lands of southern Idaho if both the United States and the Tribe believed that the Tribe reserved ownership of all the waters in the Snake River Basin for fish habitat.

F.
THERE IS NO DIRECT CONFLICT IN THE SRBA BETWEEN JUDGE WOOD'S CLAIMS OR THE CLAIMS OF HIS FAMILY MEMBERS, AND THE INSTREAM FLOW CLAIMS FILED BY THE NEZ PERCE TRIBE.

As previously set forth in Section VI.D(1) of this ***Order***, no objections were filed by any party to the SRBA to Judge Wood's domestic and stock water claim. Entry of the

[19] *See infra* footnote 25.

partial decree at this stage of the proceeding for the claim is essentially ministerial. Thus, for all intents and purposes, the status of this claim is the same as if a partial decree had already been issued for the water right.

Partial decrees were entered by Judge Hurlbutt for the domestic and stock claim made by Judge Wood's brother, and for the domestic and stock claim filed by Judge Wood's sister, Martha K. Wood-Sweeney. Both of these partial decrees were entered prior to Judge Wood presiding over the SRBA. Likewise, the objection periods have passed for the water right claims made by Judge Wood's sister, Sharon L. Backus. No contested issue exists for these claims. Entry of the partial decrees for these claims is also essentially ministerial.

Since the foregoing claims have either been partially decreed or entry of a partial decree is uncontested, there is no direct conflict between the foregoing claims and the instream flow claims filed by the Nez Perce Tribe. Simply put, the Tribe is precluded from now contesting the claims. As a corollary, the time has elapsed for objecting to the Tribe's instream flow claims represented by this consolidated subcase no. 03-10022, and neither Judge Wood nor his family members filed objections. There is no conflict between the claims.

To rule otherwise would exclude any presiding judge and his/her family from owning real property in the boundaries of the SRBA. If the *de minimus* claims give rise to an automatic conflict of interest, then no judge presiding over the SRBA could own real property, nor could any of his or her family members within the third degree of consanguinity or affinity own real property, with an appurtenant water right situated within the 87% of the State of Idaho encompassed by the SRBA. Again, this further complicates finding a presiding judge because as a matter of law the adjudication must be conducted in a district court where part of the water system is located. Statutorily, the SRBA cannot be conducted in a district court located in the remaining 13% of the state not encompassed by the SRBA.

The purpose of Judge Wood's domestic water right claim is to supply domestic water to a residence, together with a *de minimis* amount of water for stock.[20] The water

[20] Idaho Code § 42-111 states in relevant part: "[T]he phrase 'domestic purposes' or 'domestic uses' means:

right is essentially akin to the water supply which services a residence via a municipal water source. Since Judge Wood's property is located outside the limits of a municipality, a domestic well provides the only source of water. Municipal water sources within the boundaries of the SRBA are also subject to the jurisdiction of the SRBA. A domestic well user is essentially on "equal footing" with the person whose residence is supplied with domestic water from a municipal source. The only difference is in whose name the water right is claimed.

More importantly, simply being a party to the SRBA does not place a party's water right claim in direct conflict with the claims of another. Although the SRBA is technically one comprehensive case, the action is comprised of tens of thousands of individual subcases in which parties to the SRBA litigate their individual claims. ***Administrative Order 1*** distinguishes between a "party to the adjudication" and a "party to a subcase." Specifically, ***AO1*** § 2(q) defines "party to the adjudication" as "any claimant as defined in I.C. §§ 42-1401A(1) and (6)." Idaho Code § 42-1401A(1) defines "claimant" as "any person asserting ownership of rights to the use of water within the state of Idaho or on whose behalf ownership of the rights to be used is asserted." Idaho Code § 42-1401A(6) defines party as "any person who is a claimant or any person who is served or joined." ***AO1*** § 2(p) provides a somewhat narrower definition for "party to a subcase." It states as follows:

> The claimant, any objector or respondent to a water right recommendation, any party to a subcase which has been consolidated with another subcase, any party to the adjudication granted leave to participate in a subcase by the Presiding Judge or a Special Master, and any party to the adjudication filing a *Motion to Alter or Amend* the ***Special Master's Recommendation***.

(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." Idaho Code 42-1401A(11) defines stock water use as "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." The United States previously stipulated with the State of Idaho in the main SRBA case regarding a procedure for adjudicating *de minimis* claims. Implicit in the stipulation is the recognition that both domestic and stock water rights are considered to be *de minimis* in nature. *See Stipulation for Establishment of Procedure for the Adjudication of Domestic and Stock Water Claims*, Case No. 39576 (Dec. 20, 1998); *Findings of Fact Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses, Case No. 39576* (Jan. 17, 1989). Thus, for the United States to now argue that these types of claims are "substantial" is inconsistent with the stipulation entered into with the State of Idaho.

AO1 § 10(k) states as follows (emphasis added):

> Any **party to the adjudication** who is not a **party to a subcase** may seek leave to participate in a subcase by filing a timely *Motion to Participate*. A *Motion to Participate* shall be treated like a motion to intervene under I.R.C.P. 24 and shall be decided by the Presiding Judge or the assigned Special Master. **A party to the adjudication who does not file an objection, a response or a timely *Motion to Participate* waives the right to be a party to the subcase and to receive notice of further proceedings before the Special Master, except for *Motions to Alter or Amend.***

AO1 § 13(a) provides in relevant part (emphasis original):

> Any party to the adjudication not already a party to the subcase may respond to a *Motion to Alter or Amend* by filing a *Notice of Participation*. . . . **Failure of any party in the adjudication to pursue or participate in a *Motion to Alter or Amend* the *Special Master's Recommendation* shall constitute a waiver of the right to challenge it before the Presiding Judge.**

Based on the foregoing provisions of the Idaho Code and ***AO1***, it is apparent that merely because a claimant is a party to the overall SRBA, that claimant does not have a direct conflict with another claimant unless both parties are participating in the same subcase. Parties to one subcase are not recognized as parties to other subcases absent the filing of an objection, response, or a motion to participate. Subcases are not even designated for uncontested claims. Again, the Tribe did not object, respond, or participate in the claims of Judge Wood or his family members, nor did Judge Wood or his family members object, respond, or participate in the instant consolidated subcase. Since neither the Tribe nor the United States objected to Judge Wood's claims or the claims of his family, for all intents and purposes the Tribe and the United States are in concurrence with the claims. If the Tribe and the United States do not object to the claims, it does not follow logically that Judge Wood's claims or the claims of his family present a direct conflict. Obviously, Judge Wood would not be able to preside over a particular contested subcase in which he or a family member were participants. If such an instance were to arise, the Chief Justice would be asked to assign a judge to hear that particular subcase.

The Idaho State Bar has also adopted a similar position with respect to handling the ethical dilemmas unique to the SRBA. Specifically, Idaho State Bar Counsel was

requested to render an opinion regarding whether a former law clerk for the SRBA could ethically participate as a lawyer in the SRBA. Bar Counsel reasoned that:

> If the entire Snake River adjudication is viewed as one inseparable 'matter,' then your law clerks would, for all practical purposes, be foreclosed from ever participating in the adjudication. It would be impossible for them to obtain the necessary consent from the thousands of parties to the case.
>
> In quoting ABA Formal Opinion 342 (1975), the opinion further states:
>
> The troubling language in the above passage is: 'The same lawsuit or litigation is the same matter.' It is doubtful that the drafters of that opinion contemplated a 'litigation' the size of the Snake River adjudication. **It seems more practical to view the individual contested claims as distinct pieces of litigation.** (emphasis added).

See March 12, 1991, letter to Hon. Daniel Hurlbutt, Exhibit F to *Affidavit of Scott L. Campbell.*

The opinion goes on to recommend that former law clerks not participate in matters involving the same specific facts, or represent or oppose parties who had contested claims heard by the judge while the clerk was employed. In essence, the opinion of Bar Counsel rejects the notion that an ethical conflict automatically exists by mere involvement in the overall SRBA. For purposes of determining an ethical conflict, the individual claims within the SRBA need to be evaluated as distinct pieces of litigation. For ethical purposes, if the SRBA is treated as a single lawsuit, then virtually every claimant within the SRBA would have an interest in conflict with every other claimant in the SRBA. Accordingly, each attorney within the water bar would only be able to represent one claimant within the SRBA to avoid an ethical conflict. Instead, the practice has been to take a practical approach and look at representation in individual subcases for purposes of determining conflicts.

The Tribe and the United States have apparently adopted this approach in the sense that neither has sought to disqualify Judge Wood from presiding over all Tribal claims within the SRBA. Rather, the motion is limited to the instant consolidated subcase. Yet, if a conflict were to exist merely by Judge Wood having claims in the SRBA, as contended by the Tribe and the United States, it would follow that both would

seek to have Judge Wood disqualified from every subcase in which either the United States or the Tribe is involved. While it is true that every party to the SRBA is bound by decisions rendered in a particular subcase, that does not mean that every party to the SRBA is in conflict with every other party to the SRBA. The SRBA is in effect an *in rem* proceeding. As such, not only is every party to the SRBA bound by a ruling in a particular subcase but so is the rest of the world.

Next, although a party to a subcase is entitled to judicial review of a claim, unless objections are filed to a recommended claim, the claim is essentially processed as a ministerial task. *See* I.C. § 42-1411. The claims made by Judge Wood and his family members, with the exception of the irrigation claims which to date have not been reported by IDWR, have either been partially decreed or recommended for partial decree and all objection periods have elapsed. Even if the SRBA is viewed as a single lawsuit for purposes of applying ethical standards, no contested issue presently exists as to Judge Wood's claims or those claims of his family members. In fact, based on the merits of each of these claims, the Tribe made no objection <u>because they had no objection to the substance of any of these claims</u>. The Tribe's only concern now is that there is a family nexus to Judge Wood, not that any of the subject claims are or were objectionable. In the Court's view, the objectionable nature of these claims (and thus the conflict) must be something intrinsic to the claims, not simply the result of some nexus to Judge Wood, which was discovered after the time to object has expired. Consequently, there can be no conflict within the SRBA between Judge Wood's domestic claim, the claims of his family members and the Tribe's claims. Furthermore, conflicts of interest are typically not implicated in the performance of duties that are ministerial in nature. *See e.g., Dimon v. Ehrlich*, 234 A.2d 419 (N.J. Super. Ct. App. Div.1967).

In regards to Judge Wood's split-irrigation claim, this claim will not be reported until sometime in the year 2003. Judge Wood owns a fraction of a much larger claim. *See Disclosure*. This claim is based upon a license issued by the State of Idaho with a priority date of 1973. As such, the likelihood of any good faith objection to the claim appears to be remote and speculative. If Judge Wood's split-irrigation claim is ultimately contested, the only factual issues which can be brought before the Court will have to be those concerning events occurring subsequent to the issuance of the license

such as abandonment or forfeiture. The license *per se*, and the right it created, is not subject to collateral attack within the SRBA proceedings. Unlike a federal reserved right, a constitutionally based claim under state law, or perhaps a claim based upon a private decree, the Tribe cannot attack the elements of an underlying licensed right in the SRBA at this late date. There will be no fact finding concerning the elements determined during licensing. An objection to a licensed right cannot be a late substitute for an appeal of IDWR's administrative decision concerning the merits of the right created by the license. If a license is not appealed when issued, any attempt to appeal the license in a subsequent judicial proceeding, *e.g.*, the SRBA, would constitute an impermissible collateral attack on the license. *See, e.g., Mosman v. Mathison*, 90 Idaho 76, 408 P.2d 450 (1965); *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984).

Since there is no actual direct conflict in the SRBA between Judge Wood's claims (and the claims of his family members) and the Tribe's claims, the essence of the Tribe's argument supporting a conflict of interest is really the more general concern that Judge Wood's water rights and those of his family members may be potentially affected by the Tribe being decreed senior water rights in sufficient quantity so as to allow a delivery call against Judge Wood's (or his family's) supply of water. As discussed in the following section, this argument does not support a disqualification.

G.

ANY ALLEGED CONFLICT IS INDIRECT, SPECULATIVE AND, AT BEST, DE MINIMIS

The underlying basis for the Tribe's motion is essentially predicated on a potential future conflict between the Tribe's claims if decreed as claimed, and the water rights of Judge Wood and those of his family members. Any perceived conflict therefore rests entirely on circumstances which may arise in the future. Namely, a water shortage in which the Tribe would be able to make a "delivery call" against the water rights of Judge Wood or the water rights of his family members. This reasoning, however, will not support a disqualification.

In order to support a disqualification of a judge based on an alleged conflict of interest, the pecuniary gain or loss to the judge must be an immediate result of the

judgment rendered and not remotely arise on a future date. In *Narro Warehouse, Inc. v. Kelly*, 530 S.W.2d 146 (1975), the Texas Supreme Court held:

> It is a rule of long standing that the interest required for disqualification of a judge is one of pecuniary nature at the tim [sic] of suit. A pecuniary interest sufficient to disqualify a judge from sitting on a case must be direct, real and certain interest in the subject matter of the case, which is capable of monetary valuation. **Moreover, the pecuniary gain or loss to the judge must be an immediate result of the judgment to be rendered in the pending case, and not result remotely, or at some future date, from the general operation of law upon the status fixed by the judgment**.

Id. at 149 (citations omitted)(emphasis added).

In *Hidalgo County Water Improvement Dist. No.2 v. Blalock*, 301 S.W. 2d 593 (Tex. 1957), the Texas Court has also applied this same reasoning in the context of a judge presiding over a stream adjudication which, like the SRBA, involved various interests including a water improvement district in which the judge owned property. One of the issues before the presiding judge was whether landowners within the district would be able to pump water from the river for irrigation purposes. The judge was not irrigating from the river at the time. The Texas Court held that the judge's interest of simply being a citizen and patron of a water district was in common with that of the general public and did not disqualify him from sitting in the action between water improvement districts. *Id*. at 596. The Court further held that the decision as to whether direct injury would result to the judge on account of being deprived of the right to set up an irrigation system in the future was "too highly remote and speculative to disqualify him to sit in the case." *Id*. at 596. Specifically, the Texas Court stated "if his interest in question is indirect, uncertain or remote, and the result of the suit will not necessarily subject him to a personal gain or loss, he is not disqualified to sit in the case." *Id*. at 596 (citations omitted). *See also Mitchell v. Sage Stores Co.*, 143 P.2d 652 (Kan. 1943)(holding that "to warrant disqualification, the interest must be a direct, certain, and immediate interest, and not one which is indirect, contingent, incidental, or remote.").

Idaho employs a similar standard in determining the existence of a disqualifying conflict. In *Desfosses v. Desfosses*, 120 Idaho 27, 813 P.2d 366 (Ct. App. 1991), the Idaho Court of Appeals held that "[s]uspicion, surmise, speculation, rationalization,

conjecture, innuendo, and statements of mere conclusions . . . may not be substituted for a statement of facts." *Id.* at 30, 813 P.2d at 369 (quoting *Walker v. People*, 126 Colo. 135, 248 P.2d 287, 295 (1952)). Although the Tribe argues the appropriate standard for warranting a disqualification is one of "reasonable speculation" that the Presiding Judge's interests or the interest of his family could be affected by the Nez Perce claims, clearly "reasonable speculation" is not the appropriate standard. *See Tr.*, p. 17.

In *State of Oregon v. United States*, 44 F.3d 758 (9th Cir. 1994), the Ninth Circuit used an "unacceptable probability" test to determine whether the Klamath Tribe's claims could be fairly adjudicated. In that case, the Klamath Tribe objected to the general adjudication of the Klamath River Basin in Oregon proceeding in a state administrative proceeding as opposed to a court. The Klamath Tribe argued that its due process rights would be violated because the state agencies responsible for adjudicating the Tribal claims had in the past shown "a persistent bias against Tribal treaty rights." Specifically, the Klamath Tribe argued that the Oregon Department of Justice would be advising the Oregon Water Resources Department which was responsible for initially quantifying the Tribe's claims. The Ninth Circuit Court of Appeals held that the Klamath Tribe's showing of alleged bias was "insufficient to demonstrate an unacceptable probability that the decision makers in the Klamath Basin adjudication will be biased against the Tribe's claim." *Id.* at 772.

In the instant case, the Nez Perce Tribe's allegations supporting a conflict of interest are contingent on the occurrence of various speculative future events. First, any alleged conflict between the Tribe's claims and the claims of Judge Wood and his family members would only arise in the event of a water shortage, in which case the Tribe contends that Judge Wood's water rights would be competing with the Tribe's instream flow rights. However, this would necessarily be true with respect to all water users in the Snake River Basin with priority dates later than "time immemorial." Since there has been no ruling as to the quantity of the Tribe's instream flow claims, it cannot now be determined whether the potential for a future conflict even exists. In other words, without a quantity determination and without also analyzing the interrelation of other claims on the Snake River system, it is unknown how the Tribal claims would affect

other water rights, including those claimed by Judge Wood and his family members.[21] On its face, the basis for the Tribe's motion requires the happening of a future unpredictable course of events. Consequently, any potential conflict cannot be considered direct.

Secondly, Judge Wood's water right claims are for groundwater. The Tribe's claims are for instream surface flows. As a matter of law, virtually all the waters within the SRBA are deemed to be hydrologically connected. *See A & B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 421, 958 P.2d 568, 578 (1998). However, in the administration of a delivery call by a senior surface water user against a junior groundwater right, it is the extent or significance of the hydrological connection that is important. To date, there has been no determination regarding the pending conjunctive management provisions for administration between ground and surface water on a basin-wide (Snake River Basin) scale. *See Remittitur* filed May 27, 1998, in *A & B Irrigation, supra*. Furthermore, the facts relating to the significance of any hydrological connection between the Tribe's claimed rights and Judge Wood's groundwater rights or the groundwater rights of his family are unknown and not before the Court. Thus, at present, it is not known whether administration of the Tribe's instream flow claims would ever interfere with the groundwater rights of Judge Wood or his family members. Additionally, IDWR, not the Court, is charged with the conjunctive administration of ground and surface rights and the allocation of water during times of shortages. To date, IDWR admits it does not possess the scientific data necessary to conjunctively manage ground and surface water on a basin-wide scale. See *Affidavit of Karl J. Dreher* filed in Basin-Wide Issue 5 (conjunctive management provisions), subcase no. 91-00005 (Dec. 30, 1999). Any impact that the Tribe's claims would have on Judge Wood's groundwater rights and those groundwater rights of his family members would be at best speculative.

[21] The interrelation of other water rights is also important. Assuming the Tribe could make a successful delivery call against junior water rights to maintain instream flows, those water rights junior to Judge Wood and his family members would first have to be shut down. Therefore, without knowing the quantity of intervening water rights along the spectrum of priorities, it would not be possible to say at what point, if ever, the Judge's rights or those of his family members would be affected.

Third, under current Idaho law if the Tribe made a delivery call against Judge Wood's water rights or the water rights of his family members the Tribe would have the burden of demonstrating that shutting down the rights would restore the Tribe's instream flows in usable quantities, otherwise any call on the water would be considered to be "futile."[22] *See* Grant, Douglas L., *The Complexities of Managing Hydrologically Connected Surface Water and Groundwater Under the Appropriation Doctrine*, 22 Land and Water L. Rev. 63, 92-93 (1987)(discussing the respective burdens of proof in making delivery calls). Also, the Tribe would first have to call water rights junior to both Judge Wood's or those of his family members and perhaps even senior rights with a greater degree of hydrological connectivity. Without knowing the quantity of water that might be decreed to the Tribe, or the quantity of water rights junior to those of Judge Wood or his family, to argue that there is even the potential for conflict in the future is at best speculative. A delivery call of the magnitude contemplated by the Tribe would be an unprecedented event in the State of Idaho, and it is sheer speculation as to how such a call would ultimately be administered.

Lastly, in the overall scope of the SRBA, Judge Wood's claims, and the claims of his family members, are inconsequential. As indicated previously, the SRBA encompasses more than three million acres of irrigated land. Judge Wood's irrigation right for ten acres represents a tiny fraction of the total irrigation claims. Surely this interest is *de minimis*.[23] In sum, the speculative nature and indirectness of any perceived conflict is not sufficient grounds for disqualification.

[22] IDAPA 37.03.11 defines "futile call" as "[a] delivery call made by a holder of a senior-priority surface or ground water right that, for physical and hydrologic reasons, cannot be satisfied within a reasonable time of the call by immediately curtailing diversions under junior-priority ground water rights or that would result in a waste of the water resource."

[23] To put Judge Wood's real estate holding in context to the SRBA, the following is helpful. Judge Wood owns slightly fewer than 13 acres. *See Disclosure*. The State of Idaho has a land area of approximately 83,754 square miles. As noted, the SRBA jurisdiction covers 87% of the State, or about 72,709 square miles. Each square mile is 640 acres. Therefore, there are approximately 46,544,000 acres within the SRBA. An interest of 13/46,534,000, or less than 0.0000002%, is without question *de minimis*.

H.
THE "RULE OF NECESSITY" REQUIRES THAT SOME IDAHO DISTRICT JUDGE PRESIDE OVER THE SRBA DESPITE ANY PERCEIVED CONFLICT

As indicated previously, the reasoning supporting the Tribe's motion could be applied to virtually every citizen residing within the geographic area covered by the SRBA. Essentially every water user residing within the 87% of the State of Idaho covered by the SRBA has some interest in the outcome of the SRBA. This is true whether the source of the water is directly from a private water right or vicariously through water rights which comprise a municipal water source. Accordingly, Judge Wood and his family members are essentially on an "equal footing" with every other citizen who uses water which is hydrologically connected to the water within the Snake River Basin. Therefore, to follow the logic supporting the Tribe's motion, no judge who resides within the geographic area encompassed by the SRBA and uses a domestic water supply could preside over the SRBA, because indirectly their interest, too, could potentially be affected by the Tribe's claim. Any property would be adversely affected if its water supply were cut off, whether the source is from a municipal supply or a domestic well.[24] In order to rectify this perceived conflict, a presiding judge would have to reside in the remaining 13% of the State not covered by the SRBA. Under the Tribe's reasoning, this would also necessitate relocating the SRBA proceedings. However, Idaho Code § 42-1407 requires that the "general adjudication be brought in any district court in which any part of the water system within the State of Idaho is located." I.C. § 42-1407.

In reality, under the Tribe's reasoning, no judge who is a resident of Idaho could preside over the SRBA. Assuming *arguendo* that in a future time of shortage, Judge Wood's water rights could be shut down by the Tribe's instream flow claims, a significant amount of the infrastructure and economy of the state would also be impacted

[24] For some perspective, the following Idaho cities are parties to the SRBA: Aberdeen, Arco, Ashton, Atomic City, Bliss, Boise, Boville, Buhl, Burley, Butte City, Caldwell, Cascade, Challis, Chubbuck, Clayton, Cottonwood, Council, Culdesac, Deary, Declo, Donnelly, Eden, Elk River, Emmett, Fairfield, Fruitland, Garden City, Glenns Ferry, Grand View, Grangeville, Hagerman, Hailey, Hazelton, Heyburn, Hollister, Homedale, Idaho Falls, Inkom, Jerome, Juliaetta, Kamiah, Kendrick, Ketchum, Kooskia, Kuna, Lapwai, Leadore, Lewiston, Mackay, Marsing, McCall, Meridian, Middleton, Minidoka, Mountain Home, Mud Lake, Nampa, New Plymouth, Nez Perce, Oakley, Orofino, Parma, Paul, Payette, Peck, Pierce, Pocatello, Rigby, Ririe, Roberts, Rockland, Rupert, Salmon, St. Anthony, Stanley, Stites, Sugar City, Troy, Twin Falls, Ucon, Weiser, and Wendell.

since the Tribe's call would shut down domestic wells. This would impact virtually every citizen of the State of Idaho. It is clear that because of the magnitude of the SRBA, virtually every citizen of the State of Idaho stands to be affected one way or another by its outcome. It is rather easy to hypothesize various scenarios wherein everyone residing in the State of Idaho, including the Presiding Judge, has a vested interest in the outcome of the SRBA. This is possible given the definition of "party" in the SRBA. Idaho Power is a party to the SRBA and Idaho Power provides electricity to a significant part of the State. The State of Idaho is a party to the SRBA. Judicial salaries are paid by the State of Idaho and judges pay state taxes. The federal government, like the State of Idaho, is also a party to the SRBA and judges pay federal taxes. However, some Idaho State judge must preside over the SRBA. Further, the SRBA is not the usual two or three party case, as in those cases cited by the Tribe wherein the case can be readily assigned to a different judge in the event a perceived conflict arises. Again, literally every judge in the State of Idaho has some type of interest in the outcome of the SRBA.

In situations where all judges can be perceived to have a potential conflict of interest, the law recognizes an exception based on "necessity." The United States Supreme Court recognized this legal principle in *United States v. Wills*, 449 U.S. 200, 213 (1980). In *Wills*, at issue was the ethical propriety of a judge presiding over a case that challenged budget appropriations which provided pay raises for the federal judiciary. The United States Supreme Court recognized that any judge within the jurisdiction assigned to hear the case would have a financial interest in the outcome of the case. The Court held that under the unusual circumstance of the case, necessity precluded the disqualification of the presiding judge. *Id.* at 213-14.

This principle has also been recognized and applied in Idaho. In *Higer v. Hansen*, 67 Idaho 45, 170 P.2d 411 (1946), a case involving salary increases for the judiciary, the Idaho Supreme Court stated:

> Some criticism may arise from the fact that the justices of the court are individually interested in the question involved, and, accordingly, it may be urged that they are disqualified from hearing, considering or determining this proceeding. It would be fortunate, indeed, if the matter could be determined without this court having to participate, but since the machinery of the law furnishes no other means or tribunal to hear and determine the same, we must deal with the subject as best we can, and

> with the means at our disposal. The case of *McCoy v. Handlin*, 35 S.D. 487, 153 N.W. 361, 368, L.R.A. 1915E., 858, Ann.Cas.1917A, 1046, a parallel case, in which a vast array of authorities are cited, holds that disqualification of judges must yield to necessity, and wherein it is made clear, under both reason and authority, that the rule of necessity must be recognized in proper cases.

Id. at 50, 170 P.2d at 413. In another case, which involved the propriety of a highway district commissioner's ability to vote on the abandonment of a road which traversed his property, the Idaho Supreme Court held:

> Of necessity each time that any maintenance work or construction work is done by their order, each of the commissioners will be affected thereby by improvement in the highways or roads within the district and by the requirement of the payment of taxes. The obligations of the highway commissioners to administer the affairs within the area of their district brings into focus an exception to the rule that a member of such board becomes disqualified from acting by reason of interest in the result of the actions, and which exception is the so called rule of necessity. The courts generally recognize that when the members of the only tribunal with jurisdiction to act are disqualified by reason of bias, prejudice, or interest, still such tribunal is not prohibited from acting, where such disqualification would prevent a determination of the proceeding.

Mosman v. Mathison, 90 Idaho 76, 85, 408 P.2d 450, 455 (1965)(citations omitted). In another case, *Eismann v. Miller*, 101 Idaho 692, 619 P.2d 1145 (1980), the Idaho Supreme Court stated: "As recognized in *Higer v. Hansen*, 67 Idaho 45, 170 P.2d 411 (1946), where disqualification results in an absence of judicial machinery capable of dealing with a matter, disqualification must yield to necessity." *Id*. at 696, 619 P.2d at 1149 (citing *Higer*, 67 Idaho at 50-51, 170 P.2d at 413-14; *Girard v. Defenbach*, 61 Idaho 702, 706, 106 P.2d 1010 (1940)). Examples where the rule of necessity has been applied in other jurisdictions include cases involving challenging utility rate hikes or income tax hikes where the judge is a customer of the utility company or a taxpayer or where a judge's interest in public proceedings is in common with a mass of citizens. *See e.g.*, *Evans v. Gore*, 253 U.S. 245 (1920)(power to tax compensation of federal judges); 46 AM JUR 2d *Judges* § 100.

This Court holds that the relationship between Judge Wood's claims and the claims of his family members and the Tribe's claims are insufficient to create a disqualifying conflict of interest. However, even if those claims were sufficient to

support a conflict of interest, then any presiding judge would have that same conflict. The rule of necessity dictates that an Idaho judge preside over the SRBA.

I.
JUDGE WOOD'S PROPERTY BEING LOCATED WITHIN THE BOUNDARIES OF THE NORTH SNAKE GROUND WATER DISTRICT DOES NOT CREATE A CONFLICT OF INTEREST.

As a result of the Tribe's motion, it was also brought to the Court's attention that Judge Wood's property is situated within the boundaries of the North Snake Ground Water District ("NSGWD"). The NSGWD is a party to the SRBA and also contributes money to the Federal Claims Coalition which is an objecting party to the consolidated subcase. Although not raised in the Tribe's motion, this issue should also be addressed.

The location of Judge Wood's property does not result in a conflict. Idaho Code §§ 42-5201 *et seq*. governs the establishment of groundwater districts. Idaho Code § 42-5201(8) exempts domestic wells used solely for domestic or stock uses from the definition of "ground water use." Thus, Judge Wood is not a member of the NSGWD as a result of his domestic well. In regards to Judge Wood's split irrigation water right claim, this right is used by Judge Wood's neighbor who owns the majority of the water right claim. *See Disclosure*. Although this right is subject to the provisions of Idaho Code §§ 42-5201 *et seq*., Idaho Code § 42-5201(8) provides that the "user of a ground water right pursuant to lease or contract" is a "ground water user." Since Judge Wood's neighbor uses the irrigated portion of the Judge's property, the neighbor, not Judge Wood is the groundwater user of the water rights as well as the member of NSGWD for purposes of Idaho Code §§ 42-5201 *et seq*. Additionally, Idaho Code § 42-5210 provides that each water right has only one vote. Since Judge Wood's neighbor votes this right, Judge Wood is precluded from voting or even becoming a member of the NSGWD.

Lastly, the statutory provisions notwithstanding, the fact that Judge Wood's property is located within the boundaries of a groundwater district does not give rise to a conflict of interest. This issue was squarely addressed in *Hidalgo County Water Improvement District No. 2, supra*, where it was contended that the presiding judge had a conflict of interest because the adjudication over which he was presiding involved various competing irrigation districts and municipalities, and the judge owned real property

located within the boundaries of one of the municipalities. In finding no conflict, the Texas Court held: "It is a well-settled rule that as a citizen of [the municipality] and a patron of its water system [the judge's] interest is in common with that of the public, and is therefore not one that disqualifies him from sitting in the case." *Id*. at 596.

In another case involving two Texas Court of Appeals Justices who owned land within a drainage district and were liable for taxes within the district, the Texas court, in holding that there was no conflict, stated:

> Our extensive research and investigation does not show that either of the Justices named are disqualified in this case. Although two of them are taxpayers and property owners within the Drainage District, such 'interest' is so indirect, remote, and uncertain under the facts and circumstances of this case that such does not disqualify them.

Nueces County Drainage and Conservation Dist. No. 2. v. Bevly, 519 S.W.2d 938, 952 (1975).

For the foregoing reasons, the fact that Judge Wood's property is located within the boundaries of the NSGWD not a sufficient basis to support disqualification.

J.
OTHER QUESTIONS RAISED

The Tribe's timing in bringing the instant motion and its failure to object to Judge Wood's (or his family's) water right claims raises questions regarding the underlying impetus for bringing the motion. The objectors assert that it is forum shopping. In conjunction with the motion, the Tribe demonstrated that it had previously expressed concern to both the Judicial Council and the Governor over the selection of a presiding judge to replace Judge Hurlbutt. The interests of Judge Wood and those of his family members are all of public record. While the Tribe may have not been able to initially identify Judge Wood's family members who have interests, the Tribe however, learned of these interests prior to the Court issuing its ruling on the Tribe's *Motion to Alter or Amend* the judgment. Yet, the Tribe waited to file its motion until after the Court issued its order. Hence, it is peculiar, given the Tribe's overriding concern regarding a replacement judge, that the Tribe would wait until after the decision on both the summary judgment and the motion to alter or amend were entered to file the instant motion.

Further, given the broad scope of the grounds supporting the Tribe's motion, virtually every district judge who owns property in the geographic area covered by the SRBA has some potential for conflict.

The Tribe filed its motion only in the instant consolidated subcase, despite having other claims in the SRBA. At the hearing held on the motion, the Tribe indicated that "at this time" it did not intend to file similar motions with respect to its other claims. Apparently the Tribe does not contend a conflict exists merely by the Judge and certain of his family members having claims in the SRBA. Otherwise the Tribe would have moved for disqualification as to all of its claims in the SRBA. Although the Tribe seeks to distinguish the instant claims from its other claims based on the amount of water claimed, this argument is troubling. As previously discussed in conjunction with the motion for summary judgment, the Tribe urged the Court to disregard issues pertaining to the quantity of the claims. The Tribe also made it a point to state that it was not claiming the full amount of the waters of the lower Snake River together with its tributary streams and rivers. The Tribe urged the Court not to consider any quantity issues over concern that the quantities claimed may influence the Court's determination regarding entitlement. Therefore, the Court did not directly address the issue of quantity, nor was any evidence offered or considered regarding the quantity of the Tribe's claims. Since quantity was not addressed relative to the instream flow claims at this juncture, the instant claims are essentially indistinguishable from the Tribe's other claims as to matters of conflict. Yet, the Tribe has not sought to disqualify Judge Wood from its other claims.

Even more disturbing is the rationale that the Tribe is now asserting in support of establishing a potential conflict. Specifically, the Tribe stated that since the Tribe claims all of the instream flows of the lower Snake River and its tributaries, the Tribe's claims necessarily interfere with the claims of Judge Wood and his family members. Yet in arguing the motion for summary judgment, the Tribe asked that this Court interpret the 1855 Treaty as it would have been reasonably understood by the Tribe at the time the Treaty was negotiated. As this Court discussed in the November 10, 1999, *Order on the Motion for Summary Judgment*, and as acknowledged by all parties, the 1855 Treaty and the subsequent treaties were negotiated as a result of emerging conflicts between the Nez Perce people and the influx of settlers encroaching on their Tribal lands. The treaties

were negotiated in furtherance of the United States government's policy of developing the West. At the time the Tribe argued the motion for summary judgment, the Tribe stated on the record that it was not the intent of the Tribe to reserve all the waters of the Snake River, pursuant to the 1855 Treaty.

Obviously, if the intent was that the 1855 Treaty essentially reserved all the waters of the Snake River Basin which supplies water to approximately 87% of Idaho, that would make the Tribe's argument as to intent all the more questionable. The entire purpose of the 1855 Treaty would be undermined if the entire water supply intended for the developing territory was included as an appurtenance to the Nez Perce Reservation.

The importance of water to the habitability and productivity of land has long been recognized by both the Tribe and the federal government. It is this same reasoning that gives rise to the "Winters Doctrine." Specifically, because of the vital importance of water, the federal government could not have intended to withdraw land from the public domain without reserving sufficient water to carry out the primary purpose for which the land was withdrawn. This reasoning has long been used to establish water rights on federal as well as Tribal land. However, such reasoning also applies to land intended for settlement. It is inconceivable that either of the parties to the 1855 Treaty reasonably understood that the Treaty, created with the purpose of resolving conflict between the Tribe and the settlers, reserved all off-reservation water to the Tribe.[25] In recognizing the

[25] The conclusion that the Nez Perce Reservation also included the majority of the off-reservation water being adjudicated in the SRBA is also inconsistent with virtually all federal legislation enacted subsequent to the 1855 Treaty, which was aimed at encouraging private development of water. The Homestead Act, May 20, 1862, 12 stat. 392; the Mining Act of 1866, Act of July 26, 1866, 14 stat. 251, 253; the Desert Land Act of 1877, 19 stat. 377; the Carey Act of 1894, 43 U.S.C. §§ 641-648; the Taylor Grazing Act of 1934, 43 U.S.C. § 315 are examples of such federal legislation aimed at developing the west through the private development of water. For example, under the provisions of the Carey Act, the United States segregated federal lands in each of the desert land states to be held in trust while private companies erected diversion works under the supervision of the state. Upon proof of successful irrigation of the lands, the state issued a final certificate to the settler and requested the federal government to patent the land to the settler. Ultimately, 618,000 acres were patented under the Carey Act in Idaho. This is more than in any other western state. Over 414,000 acres of public land near Twin Falls, Idaho, were brought under irrigation under the Carey Act. Additionally, federal water storage projects were established on the main stem of the Snake River and its tributaries to provide irrigation, power, and flood control pursuant to the Federal Reclamation Act of 1902, including the Minidoka Dam east of Rupert, Idaho constructed in 1906. Additional Bureau of Reclamation projects were built to supplement water supplies on existing irrigated lands and to irrigate land on the Snake River plains. These projects included the American Falls Dam (1926), the 70 mile long Milner-Gooding Canal (1928), Island Park Dam and Reservoir (1939), Grassy Lake Dam and Reservoir (1940), Palisades Dam and Reservoir (1957) and Ririe Dam and Reservoir (1975). *See* Fereday, Jeffery C., and Creamer, Michael C., *Swan Falls in 3-D: A New Look at the*

fundamental importance of water, neither party would likely have intended this result. Otherwise, it would logically follow that the Reservation boundaries would be coextensive with the land and riparian to the water rights claimed. However, this is not the case. Instead, the boundaries of the Reservation were diminished with each subsequent Treaty.[26] It is important to note that this Court's ruling was expressly limited to off-reservation instream flows. This Court made no determination as to entitlement of on-reservation claims. The basis for the Tribe's motion now relies on the argument that virtually all the waters of the Snake River Basin are necessary to sustain its instream flow claims. This position is inconsistent with the position urged by the Tribe when this Court was interpreting the respective 1855 and 1863 Treaties, as well as the 1893 Agreement.

In taking into consideration that: 1) ethical conflicts within the SRBA historically have been evaluated from the perspective of the individual subcases; 2) the Tribe is not seeking disqualification as to all its claims, only the consolidated subcase; 3) the Tribe did not object to the claims of Judge Wood or those of his family members; 4) this Court did not address the quantity issue in its decision; 5) the *de minimis* size of Judge Wood's claims and those of his family in the overall scope of the SRBA; 6) the claims of Judge Wood and his family members have either been partially decreed, not yet reported by IDWR or all objection periods have expired; and 7) the overriding principle that this Court only decided a legal issue which is subject to free review on appeal, and which was filed prior to bringing the instant motion; the objector's are correct in asserting that it is questionable whether the Tribe and the United States are genuinely concerned about the judicial ethics of Judge Wood or wants a "second bite of the apple" in a different forum.[27]

Historical, Legal and Practical Dimensions of Idaho's Biggest Water Rights Controversy, 28 Idaho L. Rev. 573, 581-82 (citing *Idaho Department of Reclamation Special Report, The History of Development and Current Status of the Carey Act in Idaho 15* (Mar. 1970)). Clearly, the federal government is in large part responsible for the early development of southern Idaho through various reclamation projects directed at developing the waters of the Snake River.

[26] Although the effect of the 1893 Agreement on the Reservation boundaries is in dispute, all parties agree that the 1855 Treaty included only a portion of the Tribe's aboriginal lands, and that the 1863 Treaty diminished the boundaries established in the 1855 Treaty.

[27] At the hearing on February 22, 2000 and in its reply brief, the Tribe argued that because of the broad impact of the SRBA it may not be able to get a fair trial in state court. The Tribe cited to footnote 20 in *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 570 (1983) which states (emphasis added): "Moreover, the courts below should, if the need arises, allow whatever amendment of pleadings not

K.
CONCLUSION AND RULING ON MOTION TO DISQUALIFY FOR CAUSE

This Court recognizes that the determination of whether to grant or deny a motion to disqualify a presiding judge is discretionary with that presiding judge. In *State v. Wood*, 132 Idaho 88, 94, 967 P.2d 702, 708 (1998), the Idaho Supreme Court stated: "Whether a judge's involvement in a case reaches a point where disqualification from further participation in a defendant's case becomes necessary is left to the sound discretion of the judge himself." *Id*. (citing *Sivak v. State*, 112 Idaho 197, 206, 731 P.2d 192, 201 (1986)). As discussed above, there is no direct conflict between the Tribe's water right claims and the claims of Judge Wood or his family members. Any perceived conflict is indirect, speculative, and *de minimis* in the overall scope of the SRBA. Virtually every judge in the State of Idaho has some interest or affiliation in the SRBA based on the reasoning supporting the Tribe's motion. Therefore, in exercising its discretion, this Court **denies** the Tribe's motion to disqualify. As a consequence, the Tribe's requested remedy of setting aside all decisions rendered in this consolidated subcase is **denied**.

VII.
ISSUE #3: THE APPROPRIATE REMEDY IN THE EVENT OF A CONFLICT OF INTEREST

The Tribe argues that the "interest of justice, fairness and equity require that all decisions, judgments, and orders entered by Judge Wood in Consolidated Subcase No. 03-10022 be set aside . . . ." *Nez Perce Tribe's Motion* at 2. As explained in this *Order*,

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prejudicial to other parties may be necessary to preserve in federal court those issues as to which the state forum lacks jurisdiction **or is inadequate**."

The Tribe's reasoning is inconsistent with the McCarran Amendment. In order to join the United States and Indian tribes as parties to a stream adjudication, the McCarran Amendment requires that a stream adjudication include the entire stream system rather than "piece mealing" the adjudication. In prior attempts to avoid the McCarran Amendment in other stream ajudications, the United States has argued that the adjudications were not sufficiently comprehensive enough to subject the United States to the jurisdiction of the state. *See e.g., United States v. Oregon*, 44 F.3d 758 (1994). However, when an entire stream system within a state is adjudicated as in the SRBA, the adjudication, in all likelihood, will impact a significant portion, if not all, of the citizens of the state including state judges. Presumably Congress was aware of this problem when it imposed this condition in the legislation.

this Court has found that no disqualifying conflict exists. However, even if a disqualification were found, setting aside all decisions, judgments and orders is not an appropriate remedy. This Court was asked to render a legal interpretation on an issue of law. This Court did not decide or weigh any factual issues or judge the credibility of any witnesses. The Tribe filed its appeal prior to filing the motion to alter or amend and prior to filing the instant motions. Idaho Appellate Courts exercise plenary or *de novo* review over issues of law as well as rulings on summary judgement. *See e.g., Thomson v. Idaho Insurance Agency, Inc.*, 126 Idaho 527, 529, 887 P.2d 1034, 1036 (Ct. App. 1994)(citing *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994); *East Lizard Butte Water Corp. v. Howell*, 122 Idaho 679, 681, 837 P.2d 805, 807 (1992))(standard of review on summary judgment is same as standard used by district court); *Corder v. Idaho Farmway, Inc.*, 133 Idaho 353, 357, 986 P.2d 1019, 1023 (Ct. App. 1999)(free review is exercised over issues of law). In *In Re Continental Airlines Corp*., 901 F.2d 1259, 1263 (5th Cir. 1990), *cert denied*., 506 U.S. 828, 113 S.Ct. 87, the Court addressed the issue of whether a lower court's ruling on a motion for partial summary judgment should be vacated as a result of the presiding judge having a conflict of interest. The court noted that reversal of prior rulings as set forth in *Liljeberg v. Health Services Corp.*, 486 U.S. 847, 108 S.Ct. 2194 (1988), is not automatic. The court distinguished the situation where a lower court's ruling was subject to *de novo* review as opposed to a deferential standard of review as a factor in determining whether or not to vacate the prior ruling. The Court stated:

> The risk of injustice to the parties in allowing a summary judgment ruling to stand is usually slight. Such rulings are subject to de novo review, with the reviewing court utilizing criteria identical to that used by the court below. In cases where we would otherwise affirm such a ruling, little would be gained by vacating and remanding with instructions that it essentially be reinstated.

In Re Continental Airlines Corp., at 1263. *See also Rohrbach v. AT & T Nassau Metals Corp*., 915 F. Supp. 712, 716 (M.D. Pa. 1996)(distinguishing plenary from discretionary review); Idaho v. Freeman, 507 F.Supp. 706, 728 (D. Idaho 1981)(disqualification is less appropriate in cases which present only questions of law).

That being said, this Court set out a detailed legal analysis setting forth the reasoning behind its decision as opposed to merely making unsubstantiated conclusory remarks. Even though the Idaho Supreme Court will exercise free review over the legal issues, the basis for this Court's ruling is nonetheless set forth in detail. Accordingly, the Tribe was not denied due process.

VIII.
DENIAL OF OPPORTUNITY TO CONDUCT DISCOVERY

At the oral argument held on February 22, 2000, the Tribe also requested the opportunity to conduct discovery regarding information contained in the *Disclosure* in the event this Court denied its motion.[28] Idaho Rules of Civil Procedure 40(d)(2) and (5) do not provide for conducting discovery in conjunction with a motion to disqualify. Furthermore, the disclosures filed by Judge Wood's set forth the facts in sufficient detail for purposes of a determining the extent of a conflict of interest. Therefore, the Tribe's request is **denied**.

IX.
RESPONSE TO THE UNITED STATES' MOTION

At the February 22, 2000, status conference held at the request of the United States, counsel for the United States proposed a procedure for dealing prospectively with any future perceived conflicts resulting from the information contained in the *Disclosure* and requested the opportunity to submit the details of the proposal in writing.

Therefore, in accordance with the United States' proposal, the following is ordered: The United States was ordered to file with the Court the details of its written proposal within thirty (30) days following the oral argument, or no later than March 23, 2000. The United States filed its proposal with the Court on March 22, 2000. The proposal shall be served on all the parties to the SRBA via docket-sheet notice and the

[28] Specifically, Mr. Moore for the Tribe asked for a discovery schedule that would allow for written discovery and the depositions of the following individuals (among others): Chief Justice Trout; Judge Wood; Dr. Frederick Wood III; Sharon Backus; James Wolfe; members of the Idaho Judicial Council; Officers or employees of the Burley Irrigation District; officers or employees of the Big Wood Canal Company; officers or employees of the American Falls Reservoir District No. 2; and James Arkoosh.

expedited service mailing list. Following proper docket-sheet notice, all parties to the SRBA will be given thirty days from the time of service to file responses, objections, or counter-proposals.

IT IS SO ORDERED

DATED: March 23, 2000

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BARRY WOOD
Administrative District Judge and
Presiding Judge of the
Snake River Basin Adjudication