

**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 03-10080
)	(Shoshone-Bannock Tribes)
)	
Case No. 39576)	ORDER DENYING MOTION TO DISMISS
<hr/>)	FOR FAILURE TO PAY FILING FEES

**I.
PROCEDURAL BACKGROUND**

At issue are 1083 off-reservation in-stream flow claims filed by the Shoshone-Bannock Tribes (hereinafter “Claimant” or “Tribes”) for fish habitat on stream reaches above Hells Canyon. The claims are for treaty-reserved rights based on the Treaty of Fort Bridger of July 3, 1868, 15 Stat. 673, 674-75.¹ The Tribes filed the claims on their own behalf as opposed to the claims being brought by the United States on behalf of the Tribes pursuant to the fiduciary trust responsibility the United States has with Indian Tribes.²

¹ Article IV of the Treaty reserved to the Tribes the right outside the reservation “to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.” See *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1478 (1995).

² The Tribes filed the claims on their own behalf because the United States declined to file the claims on behalf of the Tribes. *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1478 (1995). The issue regarding whether Indian Tribes are required to pay filing fees has been previously raised in the SRBA but has yet to be ruled on by this Court. See Consolidated Subcase 03-10022 (Nez Perce in-stream flow claims currently on appeal on other grounds); Consolidated Subcase 67-13701 (Nez Perce springs and fountain claims currently before Special Master Dolan). In these cases both the Nez Perce Tribe and the United States on behalf of the Tribes filed identical claims.

On May 4, 2001, a group of 127 objectors (hereinafter “Objectors”) filed a *Motion to Dismiss* in the above-captioned consolidated subcase, together with a memorandum in support thereof. Attached to the *Motion* was “Attachment A” listing the Objectors and their respective attorneys, a copy of which is also attached to this *Order*. The basis of the *Motion* is that the Tribes failed to pay filing fees as required by Idaho Code § 42-1414.

On May 16, 2001, the Court ordered, pursuant to I.R.C.P. 7(b)(3), that the *Motion* be decided on briefs and no oral argument will be heard. Thereafter, the Court issued an *Order Staying Matter for 90-Days and Setting Briefing Schedule*. On September 17, 2001, the Nez Perce Tribe filed a Response brief. On September 19, 2001, the Tribes filed a Response brief. On October 5, 2001, the Objectors filed a Reply brief.

II. MATTER FULLY SUBMITTED FOR DECISION

According to the *Briefing Schedule*, any reply briefing by the Objectors was due on October 5, 2001. With no oral argument being heard in this matter, and with neither the Court or any party seeking additional briefing, this matter is deemed fully submitted for decision the next business day, or October 9, 2001.

III. ANALYSIS AND DISCUSSION

A) THE TRIBES’ FAILURE TO PAY FILING FEES DOES NOT DEPRIVE THE SRBA COURT OF SUBJECT MATTER JURISDICTION TO ADJUDICATE THE MERITS OF THE TRIBES’ CLAIMS.

Preliminary to addressing the merits of whether the Tribes are exempt from paying filing fees is the issue of whether the SRBA Court lacks subject matter jurisdiction over the Tribes’ claims because filing fees were not submitted with the claims. For the reasons set forth below, the Court concludes that the payment of filing fees is not prerequisite to invoking subject matter jurisdiction over the Tribes’ claims.³ In this Court’s view, the failure to pay filing fees involves

³ The Court views the issue of subject matter jurisdiction as pivotal in the determination of whether to certify this decision as final pursuant to I.R.C.P. 54(b) or allow the matter to proceed on the merits to partial decree or order of disallowance. If the Court had doubts regarding subject matter jurisdiction, from a case management perspective it would make more sense to certify this decision as final for purposes of appeal. However, to avoid a piecemeal

an issue of imposing an appropriate remedy or sanction, not an issue of depriving the Court of subject matter jurisdiction. *See e.g., Knight v. Dept. of Ins.*, 124 Idaho 645, 862 P.2d 337 (Ct. App. 1993)(“although violation of a mandatory requirement may constitute error, not all errors are jurisdictional”); *State v. McCarthy*, 133 Idaho 119, 982 P.2d 954 (Ct. App. 1999)(failure to comply with all steps in appellate process is not jurisdictional but may be grounds for sanction or other appropriate action).

The issue raised by the Objectors relies on the operative language of I.C. § 42-1414(1) which provides:

Fees for filing notice of claims with the director.-(1) In order to provide an adequate and equitable cost-sharing formula for financing the costs of adjudicating the water rights the department of water resources *shall accept no notice of claim* required under the provisions of section 42-1409, Idaho Code, unless such notice of claim is submitted with a filing fee based upon the fee schedule set forth below. Failure to pay the variable water use fee in accordance with the timetable provided shall be cause for the department to reject and return the notice of claim to the claimant.

I.C. § 42-1414(1)(emphasis added). The Objectors assert that the failure of the Tribes to pay filing fees deprives the SRBA Court of subject matter jurisdiction over the claims. This Court disagrees.

- 1) Once the SRBA was commenced the SRBA Court gained subject matter jurisdiction over the Tribes’ cause of action for its water rights by operation of the McCarran Amendment irrespective of whether the Tribes actually filed claims.**

As explained below, this Court’s subject matter jurisdiction over the Tribes’ cause of action for its treaty reserved water right claims is derived by operation of the McCarran Amendment, 43 U.S.C. § 666, and in this Court’s opinion is not contingent on the payment of the statutory filing fees or even on the actual filing of claims in the SRBA. Subject matter jurisdiction is defined as:

[T]he right of the court to exercise judicial power over that class of cases; not the particular case before it, but rather the abstract power to try a case of the kind and character of the one pending; and not whether the particular case is one that

approach to resolving the Tribes’ claims, because the Court believes subject matter jurisdiction to be proper, it makes more sense to adjudicate the merits of the claims prior to certifying the decision as final.

presents a cause of action, or under the particular facts is triable before the court in which it is pending, because of some inherent facts which exist and may be developed during the trial.

Matter of Hanson, 121 Idaho 507, 509, 826 P.2d 468, 470 (1992)(quoting *Wayne v. Alspach*, 20 Idaho 144, 149-150, 116 P. 1033, 1035 (1911)).

The McCarran Amendment operates to subject the United States to the jurisdiction of a state for the limited purpose of joining the United States as a party in any comprehensive water right adjudication.⁴ The SRBA is a general adjudication and complies with the terms of the McCarran Amendment and as such, the state of Idaho has jurisdiction over the United States for the purpose of adjudicating all of the water right claims tributary to the Snake River. *In Re Snake River Basin Water System*, 115 Idaho 1, 6, 764 P.2d 78, 83 (1988)(SRBA includes all tributaries of Snake River in order to obtain jurisdiction over the United States). In *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) (“*Colorado River*”), the United States Supreme Court held that the McCarran Amendment also applies to Indian water rights. *Id.* at 808. Although the *Colorado River* decision involved water rights asserted by the United States on behalf of an Indian tribe, in *Arizona v. San Carlos Apache Tribe of Arizona*, 436 U.S. 545 (1983) (“*San Carlos Apache*”), the same interpretation of the McCarran Amendment was extended to apply to Indian water right claims asserted by a tribe on its own behalf. *Id.* at 564-66; *see also Jicarilla Apache Tribe v. United States*, 601 F.2d 1116 (1979). Accordingly, as is the case with the United States, in a McCarran Amendment adjudication an Indian tribe asserting the right to use water or even not asserting the right to use water within the scope of the adjudication is bound by the final decree ultimately entered. The purpose of a general adjudication is to adjudicate all existing claims to water rights within the boundaries of the adjudication. Parties electing not to pursue their claims in a general adjudication run the risk of having the claims extinguished. As such, if an Indian tribe (or any other water user) fails to file its claims, or if its claims are not filed on its behalf, once the final decree is entered, any claims not pursued in the general adjudication would essentially be extinguished under principles of *res judicata*. *San Carlos Apache* at 567 (a judgment by either state or federal court would be *res*

⁴ The state’s jurisdiction is not exclusive but is concurrent with federal jurisdiction. However, once a McCarran Amendment adjudication is commenced by a state, as a matter of course federal courts follow abstention principles. Although once a final decree is entered in the state action the United States is bound by principles of *res judicata*.

judicata in the other); *Arizona v. California*, 460 U.S. 603, 615-629 (discussing *res judicata* as applied to Indian reserved water rights). Consequently, once the SRBA was commenced this Court acquired subject matter jurisdiction over the Tribes' cause of action for its water right claims irrespective of whether or not the Tribes actually file claims in the proceeding.

Put differently, the commencement of the SRBA defined the Court's subject matter jurisdiction, not the actual filing of the individual claims within the SRBA. The Court's subject matter jurisdiction is comprehensive of all preexisting water rights within the scope of the SRBA. The Objectors' reasoning presupposes that it is the filing of the claim for a preexisting water right that invokes the Court's subject matter jurisdiction. Hence, if a claim is not filed or is rejected for failure to pay the requisite filing fee, the Court lacks subject matter jurisdiction over that preexisting water right. This Court disagrees. Assuming that the Tribes had proper notice of the SRBA but elected not to file its claims in the SRBA the Court would still have subject matter jurisdiction over the preexisting water rights. The result would be that any unasserted claims would potentially be extinguished. That is the purpose of a general adjudication. Preexisting water right owners cannot de facto "opt out" of the SRBA and have their claims adjudicated at a later date or in a different forum. Once the final unified decree is entered the water user will be bound by the result. *See* I.C. § 42-1420 (binding effect of final unified decree and exceptions).

For the sake of argument, if the SRBA Court were deprived of subject matter jurisdiction over a particular water right claim as a result of a procedural infirmity or for some other reason, presumably the final unified decree would have no binding affect in either confirming or extinguishing the water right over which the Court lacked subject matter jurisdiction. *See e.g., Sagewillow, Inc., v. Idaho Department of Water Resources*, __ Idaho __, 13 P.3d 855, 856 (2000)(vacating district court's decision where court lacked subject matter jurisdiction). This result would undermine the very objective of a general adjudication as well as of the SRBA. The Court cannot possess subject matter jurisdiction over the Tribes' water rights (whether or not the claims are actually filed) for the limited purpose of binding the Tribes' to a final unified decree and implicating *res judicata*, but at the same time lack subject matter jurisdiction for the purpose of adjudicating the claims. Simply put, the SRBA Court either has subject matter jurisdiction over the Tribe's water right claims in total or not at all.

For the foregoing reasons, this Court holds that its subject matter jurisdiction over the Tribes' cause of action for its claims is derived from the commencement of the SRBA and the

operation of the McCarran Amendment irrespective of the actual filing of a water right claim. Therefore, even if IDWR rejected or returned the Tribes' claims for failure to pay filing fees, the SRBA Court would not be deprived of subject matter jurisdiction. Once the final unified decree is entered the Tribes will be bound by the same.

2) In addition, Idaho's statute on filing fees also does not support the proposition that the payment of filing fees is jurisdictional.

Idaho Code § 42-1414 sets forth required filing fees for claims in the SRBA. That statutory provision, however, does not suggest that the payment of filing fees is a jurisdictional prerequisite. The Objectors argue that failure to pay filing fees divests this Court of subject matter jurisdiction over a claim. The argument relies on the language of the statute that provides: "[T]he department of water resources shall accept no notice of claim . . . unless such claim is submitted with a filing fee based upon the fee schedule . . ." I.C. § 42-1414(1). The statute provides further: "Failure to pay the variable water use fee in accordance with the timetable provided shall be cause for the department to reject and return the notice of claim to the claimant." *Id.*

The statute is silent on whether or not the payment of filing fees was intended to be jurisdictional. The Court first notes that the statutory language specifically applies only to the Idaho Department of Water Resources (IDWR), which is an administrative agency within the executive branch of state government, and does not make any reference to the role or jurisdiction of the SRBA District Court in the event filing fees are not collected. More importantly, however, the statutory framework provides a remedy for the enforcement of filing fees once the director's report has been filed. I.C. § 42-1415 provides:

Enforcement of filing fees.-After filing of the director's report in a general adjudication, the director may prohibit in accordance with chapter 3, title 42, Idaho Code, the diversion and use of water in satisfaction of a right claimed or decreed in the adjudication upon the failure of the claimant to comply with the schedule for payment of variable fees as set forth in subsection (1) of section 42-1414, Idaho Code.

The fact that the statute contemplates a remedy for the enforcement of filing fees is probative that the payment of filing fees was not intended as a jurisdictional prerequisite.⁵ The Court acknowledges that the remedy is directed at the failure to pay the variable filing fees, which can be paid in installments according to the time schedule set forth in the statute. For purposes of subject matter jurisdiction, however, the Court fails to see the distinction between failing to pay at all and only partially paying. In either event, the claimant failed to comply with the fee payment schedule as required by the statute.⁶ Furthermore, under the statutory framework, once the director's report has been filed, the statute does not appear to authorize IDWR to withdraw or return the claim for failure to comply with the fee schedule. Rather, following the entry of partial decree, the statute provides a remedy where IDWR may decline to administer the right until the fees are ultimately satisfied. If the failure to pay fees were intended to be jurisdictional, then presumably IDWR would be authorized to return the claim at any time as soon as the claimant failed to comply with payment schedule whether or not a director's report was filed.

Furthermore, although the statute states that IDWR "shall" accept no notice of claim unless accompanied by a filing fee, as a general proposition the failure to comply with procedural prerequisites does not *ipso facto* result in depriving a court of subject matter jurisdiction. Rather such failure is more appropriately an issue of remedy such as sanctions, including dismissal, as deemed appropriate by the Court.⁷ This general proposition is noted in

⁵ Again, as previously discussed had the legislature intended the payment of filing fees to be jurisdictional the result would compromise the purpose of the general adjudication.

⁶ Although a claim in the SRBA is tantamount to a Complaint, the Director's Report is what actually puts the claim at issue before the Court. Nonetheless if a claimant fails to satisfy the paying of the variable fees the statutory scheme does not authorize IDWR to withhold the filing of the Director's Report. Rather, I.C. 42-1415 allows IDWR to decline to administer the water right. I.C. § 42-1414 allows the claimant to spread out the payment of variable fees over a period of 5 years from the time the claim is filed. In many cases the time between the deadline for filing timely claims and the time the claim is reported in the Director's Report exceeds the 5-year period. In this situation a claimant electing to spread out the payment of filing fees should have any outstanding balance paid prior to the issuance of the Director's Report. Yet under the statutory scheme, if a claimant fails to satisfy the payment schedule IDWR is not authorized to withhold the filing of the Director's Report which actually puts the claim before the SRBA Court. Presumably, if the legislature had intended that the jurisdiction of the Court was contingent on the payment of filing fees, the statutory scheme would require full satisfaction prior to the filing of the Director's Report.

⁷ Unlike administrative tribunals, the jurisdiction of the SRBA Court is not entirely derived by statute. The distinction is important in this case. Rather, the origination of the jurisdiction for the SRBA Court is the same as that for the district court and is then modified by statute. In *Walker v. Big Lost Irr. Dist.*, 124 Idaho 78, 80 (1993), the Idaho Supreme Court analogized the relationship between the SRBA District Court and the district court to the

Massey v. Stillman, 128 Idaho 736, 918 P.2d 605 (Ct. App. 1996). *Massey* addressed the issue of whether the district court erred in considering the defendant's pleadings due to the failure to pay the required filing fee. Despite the statutory language requiring the prepayment of filing fees, the Court of Appeals concluded: "The alleged failure of certain parties to prepay the appropriate filing fee does not however, void the action taken by the county official, interfere with the jurisdiction of the district court or this Court, or invalidate the summary judgment." *Id.* at 738, 918 P. 2d 607. In *Knight v. Dept. of Ins.*, 124 Idaho 645, 862 P.2d 337 (Ct. App. 1993), the Idaho Court of Appeals acknowledged that "although violation of a mandatory requirement may constitute error, not all errors are jurisdictional. An error is jurisdictional only if it deprives the tribunal of personal jurisdiction over the parties or of subject matter jurisdiction over the proceeding." *Id.* at 649, 862 P.2d at 341 (citing *Matter of Von Krosigk*, 116 Idaho 520, 522, 777 P.2d 742, 744 (Ct. App. 1989)). The *Knight* Court also acknowledged that subject matter jurisdiction consists of "the right and abstract power of the tribunal to exercise power over cases of the kind and character of the one pending." *Id.* (citing *Lockhart v. Department of Fish and Game*, 121 Idaho 894, 895-96, 828 P.2d 1299, 1300-01 (1992)). In the instant case, the SRBA clearly has jurisdiction (possesses the right and abstract power) to adjudicate the Tribes' claims. See e.g., *Sagewillow Inc. v. Idaho Department of Water Resources*, __ Idaho __, 13 P.3d 855 (2000) ("resolution of all claims arising within the scope of the SRBA are within the exclusive jurisdiction of the SRBA district court.").

For the foregoing reasons this Court holds that the failure to pay the filing fees as required by Idaho Code § 42-1414 does not deprive the SRBA court of subject matter jurisdiction over the Tribes' claims.

B) THE TRIBES ARE EXEMPT FROM THE PAYMENT OF FILING FEES UNDER PRINCIPLES OF SOVEREIGN IMMUNITY AS ESTABLISHED BY THE UNITED STATE'S SUPREME COURT.

statutorily derived division between the magistrate court and district court. The jurisdiction for a district court is derived from Article V § 20 of the Idaho Constitution and I.C. § 1-705. In contrast, an administrative authority is a tribunal of limited jurisdiction and is entirely dependent on the statutes reposing power in them for jurisdiction. *Knight v. Dept. of Insurance*, 124 Idaho 645 (Ct. App. 1993). As such, the failure of administrative tribunals to comply with such statutes is jurisdictional. *Id.* at 649. The same is not true for a district court.

In turning to the underlying merits of the issue, the Court finds that the Tribes cannot be compelled to pay filing fees for its claims as required by Idaho Code § 42-1414.

1) The Tribes' waiver of sovereignty in a general adjudication is comperable to that of the United States under the McCarran Amendment.

The United States waived sovereign immunity through the McCarran Amendment for the limited purpose of being joined as a party in a comprehensive water adjudication where the United States is a necessary party. In *United States v. Ex. Rel. Dir. Idaho Department of Water Resources*, 508 U.S. 1 (1993), the United States Supreme Court held that the McCarran Amendment is a waiver of sovereign immunity by the United States for purposes of being joined as a party, but held that sovereign immunity was not waived as to the payment of filing fees.⁸ The Supreme Court reasoned that waivers of sovereign immunity as to monetary exactions must be specific and that the McCarran Amendment was not sufficiently specific to satisfy the requirement. *Id.* at 8-9. As a result, the state of Idaho could not require the United States to pay the filing fees required by I.C. § 42-1414. The Objectors argue that the McCarran Amendment applies only to the United States and does not provide the same exemption for an Indian tribe. This Court disagrees. The Objectors are correct in the assertion that the McCarran Amendment only expressly applies to the United States; however, subsequent interpretations of the McCarran Amendment by the United States Supreme Court have extended its application to Indian reserved water rights.

The relationship between tribal self-government and the jurisdiction of a state is complex. The differentiation becomes even more complex as to treaty-reserved rights exercised outside the boundaries of an existing Indian Reservation. A general tenet of federal Indian law is that Indian tribes are “sovereigns” that possess all governmental powers except those that Congress has

⁸ The Idaho Supreme Court ruled that the McCarran Amendment did not exempt the United States from the payment of filing fees. The United States Supreme Court reversed. Prior to the United States Supreme Court's ruling, the Colorado Supreme Court also ruled that the United States was not exempt from the payment of filing fees in the Colorado adjudication. *U.S. v. City and County of Denver*, 656 P.2d 1 (Colo.1982).

The United States Supreme Court's interpretation of the McCarran Amendment creates a hardship for the citizens of a state in the same posture as Idaho. In order for the state to acquire jurisdiction over the United States the adjudication has to be comprehensive of the entire stream reach and tributaries. In order to finance an adjudication of that magnitude, the state of Idaho charges filing fees on the claims. However, in the SRBA the single largest claimant is the United States, which is exempt from the payment of the filing fees. Nonetheless the exemption is based on the United States Supreme Court's interpretation of the McCarran Amendment and Congress has not taken action in response thereto.

specifically abolished. *C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, __U.S.__, 121 S.Ct. 1589, 1594 (2001)(citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978))(to abrogate tribal immunity, Congress must “unequivocally” express that purpose); *County of Oneida, New York, v. Oneida Indian Nation of New York*, 470 U.S. 226, 247 (1985)(absent explicit statutory language this Court has refused to find Congress has abrogated Indian treaty rights); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412 (1968)(intention to abrogate or modify treaty right is not lightly imputed to Congress). In 1953, Congress enacted Public Law 280, which conferred jurisdiction to the states over various matters. However, Public Law 280 specifically excluded a grant of jurisdiction to the states over water rights belonging to an Indian tribe. This was confirmed in *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545 (1983), where the United States Supreme Court held:

Public Law 280 specifically withheld from state courts jurisdiction to adjudicate ownership or right to possession ‘of any real or personal property *including water rights*, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.’ . . . Thus, the presence or absence of jurisdiction must rise or fall without reference to whether the states have assumed jurisdiction under Public Law 280.

Id. at 560-61(emphasis in original).

A year prior, in 1952, Congress enacted the McCarran Amendment, which provided states concurrent jurisdiction to adjudicate federal water rights. The McCarran Amendment gave consent for the United States to be joined as a defendant in any suit:

(1)[F]or the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.

43 U.S.C. § 666(a). The McCarran Amendment did not expressly waive the sovereign immunity of Indian tribes. In 1976, the United States Supreme Court applied the McCarran Amendment to Indian water rights asserted on behalf of a tribe by the United States. *Colorado River*, 424 U.S. 800 (1976). The United States Supreme Court reasoned: “[B]earing in mind the ubiquitous nature of Indian water rights in the Southwest, it is clear that a construction of the Amendment excluding those rights from its coverage would enervate the Amendment’s objective.” *Colorado*

River at 811. In 1983, the United States Supreme Court extended the decision in *Colorado River* to suits brought by Indian tribes, as opposed to the United States, seeking adjudication of Indian water rights. *San Carlos Apache Tribe of Arizona* at 565-66. Thus it is through the McCarran Amendment that the states gained concurrent jurisdiction over Indian water rights.

The question left to this Court is whether there is a distinction between the United States and the Tribes as to filing fees in the SRBA. Although the Supreme Court did not address the issue, it would be logically inconsistent to conclude that in extending the application of the McCarran Amendment to Indian tribes that the Supreme Court intended a broader waiver of sovereignty than that which the Court interpreted to apply to the United States. The Supreme Court's reasoning that the McCarran Amendment was not specific enough to subject the United States to filing fees is also consistent with the general tenet that Congress must expressly abolish the governmental powers of an Indian tribe. *C & L Enterprises, Inc.*, at 1594; *Menominee Tribe of Indians* at 412. If the language of the McCarran Amendment was not specific enough to subject the United States to a waiver as to filing fees, this Court cannot find that it is specific enough to establish a waiver of tribal sovereignty. The argument carries even more weight as applied to the Tribes given the fact that the McCarran Amendment did not expressly address Indian tribes specifically or generally.

2) Alternatively, the imposition of a filing fee is analogous to requiring Tribes to pay licensing fees to exercise treaty reserved hunting and fishing rights.

The issue of whether a state can require an Indian tribe to pay filing fees in a general water adjudication was previously addressed in the Klamath Basin Adjudication in Oregon in *United States v. State of Oregon Water Resources Dept.*, 774 F. Supp 1568 (D. Ore. 1991). In that case, the state of Oregon argued that it derived authority to charge a filing fee from the McCarran Amendment. The Federal District Court analogized the charging of filing fees to the facts presented in the case of *Tulee v. Washington*, 315 U.S. 681 (1942) and applied the same reasoning adopted by the United States Supreme Court. At issue in *Tulee* was whether a state could impose a licensing fee on an Indian for fishing pursuant to a treaty-reserved right. The United States Supreme Court held that the imposition of the licensing fee would in effect be charging the Indian for exercising treaty-reserved rights. The Oregon Federal District Court applied this same reasoning to the state of Oregon requiring a Tribe to pay filing fees in

conjunction with filing claims in the Klamath Basin Adjudication and held that the Tribe was exempt from the payment of filing fees. *Id.* at 1581.

This Court finds the reasoning of the Oregon District Court to be persuasive. Objectors argue that the reasoning in *Tulee* only applies to vested or established rights and that in this case the Shoshone-Bannock claims have not yet been adjudicated. This Court disagrees. The Oregon Federal District Court applied the reasoning of *Tulee* in the Klamath Basin Adjudication where the Tribe asserted treaty-reserved rights. This is the same procedural posture within which the Shoshone-Bannock Tribes are now asserting their treaty-reserved claims in the SRBA. Furthermore, one of the main objectives of the SRBA is to confirm valid, existing water rights, including the recognition, prioritization, and quantification of federal and Indian reserved water rights. Therefore, tribal claims, as with all claims, come before the SRBA with a presumption that they are asserted in good faith as a valid existing right even though the claim may ultimately be disallowed.

C) THE ISSUE OF STANDING.

The parties also raised the issue of whether the Objectors possess the requisite standing to assert the issue of the failure to pay filing fees. However, because the Court has decided the issue on other grounds it is not necessary to decide the issue of standing.

**IV.
CONCLUSION**

For the reasons set forth herein, the Objectors' *Motion to Dismiss* is DENIED. The Court acknowledges that the resolution of this issue is one of first impression for the SRBA and that in all likelihood the parties will seek review of this decision and order by a higher court. However, because the Court is convinced that it is not without subject matter jurisdiction to proceed with the Tribes' claims, the Court declines to certify this matter as final or grant a motion for permission to appeal until the underlying merits of the claims have been adjudicated. This determination is consistent with this Court's prior approach with respect to the issue regarding the United States' obligation to pay filing fees. *See Order Requiring Idaho Department of Water*

Resources to Accept Federal Claims Without Filing Fees (May 19, 1992). The Court intends to forthwith issue an order setting this matter for a scheduling conference to proceed with the merits of the claims.

IT IS SO ORDERED.

Dated: NOVEMBER 1, 2001.

ROGER BURDICK
Administrative District Judge and
Presiding Judge of the
Snake River Basin Adjudication