REPORT

FOR THE

WESTERN STATES WATER COUNCIL

FEDERAL NON-INDIAN CLAIMS TO WATER

By
D. Craig Bell, Executive Director
and
James P. Alder, Legal Counsel

February 22, 1999

REPORT

FOR THE

WESTERN STATES WATER COUNCIL

FEDERAL NON-INDIAN CLAIMS TO WATER

By
D. Craig Bell, Executive Director
and
James P. Alder, Legal Counsel

February 22, 1999

Table of Contents

Part One 1

Introduction 1

History of the Reserved Rights Doctrine 2

Congressional Recognition of State Water Laws 5

Judicial Recognition of Federal Water Rights 8

Federal "Non-Reserved" Rights 14

Federal "Regulatory Water Rights" 16

The Scope and Burden of Federal Claims 29

Conclusion 34

Part Two 37

Alaska Survey Response AK-1

Arizona Survey Response AZ-1

Colorado Survey Response CO-1

Idaho Survey Response ID-1

Montana Survey Response MT-1

Nevada Survey Response NV-1

North Dakota Survey Response ND-1

Oregon Survey Response OR-1

South Dakota Survey Response SD-1

Texas Survey Response TX-1

Utah Survey Respons UT-1

Washington Survey Response WA-1

Wyoming Survey Response WY-1

Federal Non-Indian Water Claims

Part I

I. Introduction

The subject of this report has been of concern to the Council for some time and has become increasingly important as federal agencies look for means to fulfill what they often see as federal objectives associated with enhancing instream flows. As state stream adjudications progress, federal agencies appear to have substantial claims for non-Indian reservation purposes, but are often reluctant to quantify those claims within state proceedings. Further, when states seek to have them quantified, doing so generally proves very costly and time consuming. Moreover, federal agencies are refusing in some cases to pay court costs levied in state adjudications, even though their claims may comprise the bulk of claims to be processed.

In addition to claims based on the reserved rights doctrine, federal agencies appear to be claiming new prerogatives pursuant to federal law to affect a reallocation of water. Claiming "regulatory," or "administrative" authority, these reallocation attempts may or may not represent a claim to an actual water right or ownership of water. Well known examples have been labeled "bypass flows" required of applicants who were seeking to have rights-of-way for diversion structures in National Forests re-permitted. Another stems from a federal agency's claim under its operating authority to be able to allocate water in its facilities for other purposes, without regard to limitations on its state-based water rights. In other cases, a federal agency appears to be asserting claims to ownership of surface waters and groundwater based on new federal proprietary theories.

In order to deal with the establishment and quantification of federal claims, states are being forced to dedicate substantial resources in the pursuit of "certainty" in order to continue to administer and develop their water resources for the benefit of their citizens, as well as wildlife and natural resources. More importantly, as it appears that federal agencies are looking, and will continue to look, for whatever means they deem appropriate to acquire water to fulfill federal purposes, fundamental questions are raised regarding federal/state roles in the allocation of western water resources.

With this in mind, the Legal Committee of the Western States Water Council adopted as one of its work plan items the preparation of a report describing these federal claims and how the western states are responding to them. This contents of this report represent many of the views and concerns of western states that will be part of a discussion to be held with appropriate federal representatives in conjunction with a regular Council meeting.

Part I of this report will describe the bases of federal authority to claim ownership or control of water. It will first summarize the legal history and development of the reserved rights doctrine from its beginning in *Winters v. United States,* through the succession of cases that have both extended and limited the doctrine to its present application. It will also examine the more recent developments related to assertions of federal authority over the use of water, outside the

confines of state law and the reservation doctrine.

1. This report will then examine the scope and nature of federal claims to water in the western states by drawing on individual state responses to a survey (hereinafter survey) prepared by WSWC staff. Copies of these responses make up part II of this report.

This survey was aimed at examining the broad range of claims being pursued by federal agencies as well as ascertaining the individual state strategies for dealing with these claims.

2. Part I of the report will conclude with a discussion of evolving trends and identification of the range of responses to these claims among the western states.

II. History of the Reserved Rights Doctrine

A. Development of the Appropriation Doctrine

In the arid and semi-arid states west of the 100th meridian, the climate differs greatly from that of the humid eastern states. Because of the water-scarce climatic, topographic and geographic conditions found in the West, different legal doctrines and administrative machinery were developed to govern settlers' rights to water. In the water-rich eastern states, the common law riparian theory of water rights had been the general rule governing the use of water. Under this theory, every owner of land on a stream has the right to make reasonable use of the water, as long as he does not unreasonably interfere with the rights of downstream owners to the continued flow of the stream. Riparian rights continue to exist regardless of whether the property owner ever takes steps to use water from the stream and may be exercised at any time.

Because water was generally abundant and water problems usually revolved around flooding, drainage, pollution or navigation, riparianism had served adequately as the method of allocating water in the eastern United States. As miners, ranchers, farmers and others began to move West, however, the shortage of water caused the riparian doctrine to be scrapped in these new territories in favor of the doctrine of "prior appropriation." This new doctrine was developed to serve the practical demands of the West's settlers.

The doctrine of riparian rights was particularly ill-suited for early miners, who arrived in the West at a time when most of the western lands were not legally open for settlement. Mining, especially placer mining, demanded large quantities of water. Western lands were still owned mostly by the federal government and, therefore, there was no private ownership of land to which riparian rights could attach.[1] Furthermore, to restrict the use of water to land adjacent a stream and preclude the diversion of waters from their normal channels would have entirely frustrated

[1] Federal "Non-Reserved" Water Rights, 6 Op. O.L.C. 328, 335 n.7 (June 16, 1982).

development of the West.[2] Irrigation water was necessary to grow crops in an arid land to support a growing population. In addition, a majority of the homesteads and many of the best parcels of land were located far from a stream.

Based largely on the customs miners adopted to settle disputes in the California mining camps, prior appropriation does not depend on the ownership of land appurtenant to a stream. Disputes over claims to water, as well as mining claims, were resolved by simple priority rules. This became known as the "law of the first taker," or the "appropriative" system.[3] It accorded the first person who captured or "appropriated" water and put it to a beneficial use the superior right. A superior right continues as long as the beneficial use continues, to the exclusion of subsequent users.

A valid appropriation consists of three distinct elements: 1) Intent to apply water to a beneficial use; 2) An actual diversion of water from a natural source; and, 3) Application of the water to a beneficial use within a reasonable time. "This principle that firm water rights could be acquired by capture for use where needed provided the legal support for the permanent settlement and intensive development of the West."[4]

B. Role of the Federal Government

As the initial owner of the most of the vast lands comprising the western United States, the federal government played a significant role in the development of water law in the West. As noted, the early miners and settlers, lured by dreams of religious freedom or economic independence, were trespassers on the public domain. The United States disposed of these lands through a variety of public land laws. Although it did not contain a reference to water rights or the appropriation of water by homesteaders, the Homestead Act of May 20, 1862[5] paved the way for initial settlement of the west. Federal lands were officially opened to development by miners through the adoption of the Mining Act of 1866.[6] Though Congress' primary purpose was to officially open federal lands to mining, it included a passage that expressly confirmed the rights of miners and appropriators of water.

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized

---

[2]See, e.g., California Oregon Power Co. v. Beaver Portland Cement. Co., 295 U.S. 142, 157 (1935).

[3] supra, n. 1, at 335.

[4]TARLOCK A. DAN, LAW OF WATER RIGHTS & RESOURCES § 5.02[1] (1988).

[5]12 Stat. 392, codified at 43 U.S.C. § 161.

[6]Act of July, 26, 1866, 14 Stat. 253, codified at 50 U.S.C. §§ 51, 52 and 43 U.S.C. § 661.

> and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; . . . and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed; . . . [7]

In 1870[8], Congress, while amending the Mining Act of 1866 to include "placer" mines, reaffirmed the previous legislation by stating:

> All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the [Mining Act of 1866].[9]

Finally, in 1877, Congress passed the Desert Lands Act.[10] Although it only applies to Arizona, California, Colorado (by later amendment), Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington and Wyoming, this Act provides that persons could claim irrigable lands by "conducting water upon the same . . .", subject to existing rights.[11] The amount of water available for appropriation under the statute was limited to the amount "actually appropriated" and "necessarily used" for irrigating crops and reclaiming the land.[12]

It wasn't until 1935 that the U.S. Supreme Court definitively construed these three acts. Until that time, western states had been divided on whether the Desert Land Act applied only to desert lands. In *California Oregon Power Co. v. Portland Beaver Cement Co.*, the Court ruled that the Act's acceptance of prior appropriation applied to all lands of the public domain in the applicable states and territories. The Court also held that the Desert Land Act affected "a severance of all waters upon the public domain, not theretofore appropriated, from the land itself. . ."[13] All unappropriated waters from non-navigable sources were to remain open for

---

[7]43 U.S.C. § 661.

[8]Act of July 9, 1870, 16 Stat. 218, codified at 30 U.S.C. §§ 51, 51 and 43 U.S.C. § 661.

[9]43 U.S.C. § 661.

[10]Act of March 3, 1877, 19 Stat. 377, codified at 43 U.S.C. § 321 et. seq.

[11]43 U.S.C. § 321.

[12]43 U.S.C. § 321.

[13]California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 162 (1935).

appropriation by the public according to the laws of the state in which it was found.[14] The Court also ruled that common law riparian rights were not conferred upon a holder of a patent granted under the Homestead Act, because Congress, through the Desert Lands Act, had acquiesced to the western states the authority to change from riparianism to appropriative water allocation systems.[15]

III. Congressional Recognition of State Water Laws

Through the adoption of the Mining Acts of 1866 and 1870 as well as the Desert Lands Act, Congress demonstrated a definite pattern of deference to the states to develop water codes and administrative systems, at least with respect to private appropriators.[16] Congressional intent to subject federal uses of water to state water laws is not so clear, notwithstanding the broad language found in the public lands acts and in *California Oregon Power Co v. Beaver Portland Cement Co.*[17]

The Supremacy Clause[18] of the U.S. Constitution requires that once Congress exercises an enumerated power, state law must yield to the exercise of that power.[19] Federal authority under the Commerce, Property, General Welfare, War Power, and Treaty Clauses of the Constitution[20] has also always been sufficient to supersede state laws where a federal interest demands such action.[21] These powers are only limited by the constitutional requirement that just compensation be paid for taking private property for public uses.[22]

Although it is well established that Congress has the authority to supersede state law,[23]

---

[14]Id., at 162.

[15]Id., at 158.

[16]supra, n. 1, at 344.

[17]Id.

[18]U.S. Const. art. VI, cl.2.

[19]supra, n. 4 at § 9.05[1].

[20]U.S. Const. art. I § 8, cl. 3 (commerce); art. IV, § 3, cl. 2 (property); art. I, § 8, cl. 1 (general welfare); art. I, § 8, (war power) ; art. II, § 2, (treaty).

[21]WATERS AND WATER RIGHTS, § 37.01(c), (Robert E. Beck et al. eds., 3rd ed. 1996).

[22]U.S. Const. amends. 5 and 14.

[23]supra, n. 1, at 346.

the federal government has rarely exercised this power to allocate and regulate waters. Rather, Congress has acted conversely, consistently choosing to require the federal government to comply with state law in the acquisition and exercise of water rights for federal projects and in the operation of federal projects. The Supreme Court analogized the history of Congressional action to "the consistent thread of purposeful and continued deference to state water law by Congress."[24]

The period during which the public land laws were passed was an era of surrender of these federal rights. Congress had emphasized and encouraged the settlement and development of the western lands by individuals, and had deferred to the states the authority to administer water allocation systems. But, it became apparent, near the end of the nineteenth century, that public land was being decimated and that reclamation by private development under the Desert Lands Act was not successful.[25] This led the federal government to create programs aimed at conservation and reclamation on its own. In each of the statutes discussed below, Congress reaffirmed the fact that states have a legitimate interest in, and responsibility for, allocation of water resources within their borders.

The Reclamation Act of 1902 authorized joint efforts by the federal government and state governments to undertake reclamation projects on federal lands. Such projects were to be subject to the jurisdiction and administration by the newly created Bureau of Reclamation, under the Secretary of the Interior. The Reclamation Act may be characterized as one of the earlier acts passed in a shift in federal policies aimed at conserving and regulating the growth of the western lands. Therein, Congress specifically designated state water law as the vehicle by which projects would acquire, use and distribute water. Section 8 of the Reclamation Act provides expressly for the application of state water law.

> [N]othing in [this title] shall be construed as affecting or intending to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of [the Act], shall proceed in conformity with such laws, and nothing [herein] shall in any way affect any rights of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.[26]

In 1920, the Federal Power Commission was created and authorized to license private power projects by the Federal Water Power Act.[27] A comprehensive licensing scheme was

---

[24] California v. United States, 438 U.S. 645 (1978).

[25] 26 MONT. L. REV. 199, at 204 (1965).

[26] 43 U.S.C. § 383.

[27] 41 Stat. 1075, as amended 16 U.S.C. §§ 791-823.

established for water power projects constructed by private or public entities on navigable streams or federally owned lands. Two provisions are contained in the Act that make specific reference to the applicability of state laws. Section 9(b) requires an applicant to present:

> satisfactory evidence that [he] has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purpose of a license under this chapter.[28]

Property rights in the use of water are the subject of a savings clause found in § 27 of the Act, which saves certain state laws from supersedure by the Act.

> Nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.[29]

Once again, Congress had explicitly avoided the opportunity to exercise constitutional powers to create a federal allocation system and reaffirmed the position that control of water allocation should remain in the states' hands.

Although not a substantive statute, the McCarran Amendment[30] should also be addressed as the intent of Congress in adopting the amendment demonstrates the continued federal deference to state water law. The McCarran Amendment is a limited waiver of sovereign immunity permitting the United States to be joined as a party in state general stream adjudications.[31] Although it does not affect the substantive rights of the federal government to water on federal lands, the position that it evidences Congressional recognition of the primacy of state water laws is supported by statements found in the Senate Report on the Amendment.

> In the arid Western States, for more than 80 years, the law has been that water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof. Since it is clear that the States have the control of water within their boundaries, <u>it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State</u>, if there is to be a proper

---

[28]16 U.S.C. § 802(b).

[29]16 U.S.C. § 821.

[30]43 U.S.C. § 666.

[31]<u>supra</u>, n. 1, at 345.

administration of the water law as it has developed over the years.[32]

U.S. Assistant Attorney General Theodore B. Olson, in his memorandum to Assistant Attorney General Carol Dinkins, summed up this notion of congressional deference to state water law found relevant by the Supreme Court to:

> both specific instances in which Congress directed federal agencies to abide by state water law, such as § 8 of the 1902 Reclamation Act and -- perhaps more importantly -- Congress' acquiescence in the development by the states of comprehensive procedural and substantive codes to recognize and enforce private rights to water, including water on federal lands. The significance of statutes such as the Mining Acts of 1866 and 1870, the Desert Land Act of 1877, the Reclamation Act of 1902, and the McCarran Amendment is thus not that they directly regulate federal uses of water, but that they demonstrate Congress' recognition that the allocation of water within the western states is primarily a matter of concern to the states, rather than a subject for uniform comprehensive federal regulation.[33]

IV. Judicial Recognition of Federal Water Rights

A. Judicial Recognition

Although Congress had consistently recognized the primacy of state water allocation laws, it had never directly addressed the issue of federal water rights on federal lands in the western states. However, the federal government's rights to use or dispose of water in the context of specific federal statutes including the Reclamation Act and the Federal Power Act and statutes authorizing the reservation of land from the public domain for a particular federal purpose has brought several cases to the Supreme Court's attention.

The first Supreme Court case to limit the authority of the states to control waters within their boundaries was *United States v. Rio Grande Dam & Irrigation Co.*[34] Although the Court determined that Congress had acquiesced to the substitution of appropriative schemes for common law riparian rights, it held that the federal government's superior authority under the Commerce Clause to preserve the navigability of navigable water had not been waived.

> First, that, in the absence of specific authority from Congress, a state cannot, by its legislation, destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters, so far, at least, as may be necessary for the beneficial uses of the government property; second, that it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable

---

[32]S. Rep. No. 755, 82d Cong., 1st Sess. 3, 6 (1951) (emphasis added).

[33]supra, n. 1, at 377.

[34]United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899).

streams within the limits of the United States.[35]

"Reserved" water rights for Indian tribes were first given life in the case of *Winters v. United States.*[36] In 1888, the Assiniboine and Gros Ventre tribes of Montana ceded large amounts of ancestral lands reserved to them in an earlier treaty to the U.S. in return for the creation of the smaller Fort Belknap Reservation. Soon after, homesteaders entered the ceded lands and began diverting water from the Milk River for irrigation, perfecting their water rights under Montana law. A short time later, the Indians also began diverting large quantities of water for irrigation. In 1905, drought and upstream diversion deprived the Indian project of water. The United States then brought suit against the settlers on behalf of the tribes.

After the facts established that the settlers owned the senior rights, the trial judge held that the Indians had superior rights based on the treaty that initially created the reservation. Relying on the *Rio Grande* holding of nine years earlier--that the state cannot destroy the federal government's rights to the continued flow of a stream "at least as may be necessary for beneficial uses of government property"--the Court concluded that it was inconceivable that the tribes would agree to reduce the area of their occupation and change from a nomadic to a pastoral people without reserving sufficient water to accomplish this purpose.[37] The Court found that the treaty and reservation, while not expressly providing for water, impliedly set aside sufficient water for the present and future needs of the tribes, reasoning that Congress' intent to allow the Indians to become a civilized people would be frustrated without sufficient water to irrigate the reservation land.[38] Congress' oversight, i.e. the failure to address or consider the issue of water rights for the reservation, could not serve to destroy the intention to provide for the tribes.

The doctrine established by this case became known as the reserved rights doctrine, or *Winters* rights, and was generally thought to be a special rule of Indian law until 1955.[39] In that year, the Supreme Court first suggested that the reserved rights doctrine might provide the basis for federal water rights for other types of federal reservations. In what is commonly referred to as the *Pelton Dam* decision, or *Federal Power Commission v. Oregon*,[40] the question before the Supreme Court was whether a state agency could deny permission to a federal licensee under the Federal Power Act to construct a hydroelectric dam on lands that had been specifically reserved

---

[35]Rio Grande, 174 U.S. at 703.

[36]Winters v. United States, 207 U.S. 565 (1908).

[37]supra, n. 4, at § 9.07[1][a].

[38]Winters, 207 U.S. at 576.

[39]supra, n. 1 at 347.

[40]Federal Power Commission v. Oregon, 349 U.S. 435 (1955).

from the public domain for that purpose by the United States. Although the decision in *Pelton Dam* did not directly involve the federal government's right to use water because the licensee was a private party, "the Court's holding implies that the licensee was exercising some right of the United States to use water that had been reserved from state control at the time the United States reserved the dam site."[41]

In *Arizona v. California*, the Supreme Court upheld a Special Master's award of reserved rights in several wildlife refuges and the Gila National Forest to the United States.[42] The Court also held that reserved rights extended to protecting future reservation uses and are not limited to the population needs of Indians.

> The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the Master that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest.[43]

Arizona also held that the federal government could reserve water after statehood was granted, and that it could do so by executive order as well as by treaty or statute.[44]

The scope of a federal reserved water right was the next question to be tackled by the Supreme Court. Under the Antiquities Act, the Devil's Hole National Monument had been created to preserve the habitat of the Devil's Hole pupfish, which the presidential proclamation establishing the monument indicated was of scientific interest.[45] The Court enjoined nearby groundwater pumping that endangered the pupfish by threatening to lower the water level below a rock shelf that served as the fish's spawning bed. The Court stated in *Cappaert v. United States* that:

> [t]his Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing, the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. . . The doctrine applies to Indian reservations and other

---

[41]supra, n. 1, at 348.

[42]Arizona v. California, 373 U.S. 546 (1963).

[43]Id., at 601.

[44]Id., at 598.

[45]supra, n. 21 at § 37.03(a)(2).

federal enclaves, encompassing water rights in navigable and nonnavigable streams.[46] The Supreme Court also specified that the federal government impliedly reserved "only that amount of water necessary to fulfill the purpose of the reservation, no more."[47]

The next step in determining the scope of reserved rights was taken in *United States v. New Mexico*.[48] The U.S. Forest Service had asserted reserved rights to instream flows within the Gila National Forest for aesthetic enhancement, fish and wildlife protection, and recreation and stock-watering purposes.[49] The Gila National Forest had been created pursuant to the Forest Service's Organic Administration Act. The Organic Act made no reference to fish and wildlife or stock watering, only timber production and watershed protection were listed as National Forest purposes under the Act. The Forest Service's claims were initially granted by the Special Master, but later denied by the New Mexico District and Supreme Courts.[50] Justice Rehnquist, in contrasting the Organic Act with legislation that specifically expressed concern for wildlife:

> established three formidable barriers to the implication of any future federal reserved water rights in agreeing with the result and analysis of the New Mexico Supreme Court. First, the right must relate to the original purpose of the withdrawal of the reservation. Second, the implication must be necessary to prevent the frustration of the original purpose of the reservation. Third, the Court introduced into the law of reserved rights the distinction between the primary and secondary purposes of reservations, stating that the Court will find a reserved right to effect the former but will draw the contrary inference when the latter is found.[51]

Justice Rehnquist concluded that such a detailed examination was necessary "because the reservation is implied, rather than explicit and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water."[52] After accepting the primary/secondary use distinction first rendered by the New Mexico Supreme Court, the U.S. Supreme Court also concluded that the Multiple Use Sustained-Yield Act of 1960 (MUSYA)[53] did not raise "secondary" purposes to the level of those "primary" purposes for which National

---

[46]Cappaert v. United States, 426 U.S. 128, 138 (1976).

[47]Id., at 141.

[48]United States v. New Mexico, 438 U.S. 696 (1978).

[49]supra, n. 4, at § 9.08[2].

[50]supra, n. 1, at 349.

[51]supra, n. 4, at § 9.08[2].

[52]New Mexico, 438 U.S. at 701, 702.

[53]16 U.S.C. § 528.

Forests had been established prior to the effective date of MUSYA.[54]

The precedence set in *Cappaert* and *New Mexico* leads to the conclusion that a federal agency may acquire a federal reserved right to unappropriated water on federal lands notwithstanding the laws of the state regulating water rights when the federal land has been reserved by congressional authorization for a specific federal purpose that requires the use of water.[55] There are two important limitations that restrict this water right based on congressional intent. The right will only be implied if it is necessary to fulfill the primary purposes for which Congress authorized the reservation of land. Secondary, or incidental purposes that may be permitted by congressional authorization or federal agency practice are not sufficient to require the imposition of a federal reserved water right. The particular federal statute authorizing the creation of the reservation and its legislative history must be carefully scrutinized to distinguish between the primary and secondary purposes. Finally, the quantity of water reserved to the federal enclave will be limited to the minimal amount necessary to accomplish the primary purposes.[56] In the language of the Supreme Court that amount is the quantity "without [which] the purposes of the reservation would be entirely defeated."[57]

B. Conflicts with Congressional Directives

The Supreme Court has also repeatedly expressed a common theme that declares that a state may not prohibit or impede the construction of a federally authorized water project through the use of its allocation authority, or impose conditions on the acquisition, use or distribution of project water, when such conditions or prohibitions are contrary to the specific congressional directives authorizing the project.

> [W]hen the federal government, in the exercise of its constitutional powers, for example under the Commerce or Property Clauses, authorizes a project requiring the diversion or use of water, state laws that would effectively prevent the project from being built or operated under the conditions and terms and for the purposes prescribed by Congress must fall under the Supremacy Clause.[58]

The Federal Power Act has two provisions that appear to protect state law from federal encroachment. Section 9(b) requires license applicants to submit satisfactory evidence of compliance with state laws concerning hydropower development and § 27 is a savings clause that

---

[54]New Mexico, 438 U.S. at 715.

[55]supra, n. 1, at 350.

[56]supra, n. 1, at 351.

[57]New Mexico, 438 U.S. at 700.

[58]supra, n. 1, at 351.

seems to preserve state water law applicability, but judicial interpretation has limited their effectiveness. However, in *First Iowa Hydro-Electric Coop. v. Federal Power Commission,*[59] the Court held that where compliance with both the state and federal permit requirements are impossible, the state law must fall, as subjecting the project to state law would frustrate the Federal Power Act's purpose of comprehensive nationwide planning.[60]

Similar conclusions have been reached in cases involving interpretations of Reclamation laws, although the Reclamation Act includes sections that direct the Secretary of the Interior to proceed in conformity with applicable state laws.[61] Repeatedly, the Court has held that where state laws or permit requirements are inconsistent with more specific congressionally authorized directives, they will be preempted. In *Ivanhoe Irrigation District v. McCracken,*[62] the Court held that § 5 of the Reclamation Act limiting the size of parcels receiving water from Reclamation projects applied to the Central Valley Project in spite of a state law doctrine imposing a public trust in favor of project water beneficiaries and requiring that adequate water be furnished to each regardless of the acreage the beneficiary owned. The Supreme Court held that the general savings clause provisions of § 8 could not override the mandatory, specific provisions of § 5 and § 9 of the Reclamation Act.[63] In *City of Fresno v. California,*[64] the city had attempted to enforce state law preferences for domestic uses and uses in the watershed of origin. The Court responded that § 8 does not require the federal agency to observe state law when it conflicted with § 9(c) of the Reclamation Act, which gives preference to irrigation uses. In *Arizona v. California,*[65] the Court determined that provisions of the Boulder Canyon Project Act delegating discretion to the Secretary of the Interior to allocate project waters were sufficient to supersede state water apportionment laws.

> However, in *California v. United States,*[66] . . .the Court made clear that its decisions in *Ivanhoe, Fresno* and *Arizona* could only be read to hold that state laws governing the appropriation, use, control or distribution of water do not control federal uses if they are inconsistent with specific congressional directives, for example § 5 of the Reclamation

---

[59]First Iowa Hydro-Electric Coop. v. Federal Power Comm'n., 328 U.S. 152 (1946).

[60]Id., at 176.

[61]See p. 6, supra.

[62]Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958).

[63]Id., at 292.

[64]City of Fresno v. California, 372 U.S. 627 (1963).

[65]Arizona v. California, 373 U.S. 546 (1963).

[66]California v. United States, 438 U.S. 645, 671 (1978).

Act or § 9 of the Reclamation Project Act of 1939.[67]

The Supreme Court, recognizing that prior holdings relating to § 8 of the Reclamation Act could be interpreted to support the United States argument that state law does not control even where not inconsistent with . . . expressions of congressional content,"[68] made clear that each of the decisions in *Ivanhoe, Fresno* and *Arizona* involved direct conflict between state laws and a specific provision of the Reclamation Act. To that end, the Court disavowed the language of these decisions insofar as it "would prevent petitioners from imposing conditions on the permit granted to the United States which are not inconsistent with congressional provisions authorizing the project in question."[69]

V. Federal "Non-Reserved" Rights

The purpose of this section is to examine the role of the federal government in the regulation and allocation of water and to explore the statutory basis for assertion of federal authority to control water outside of the reserved rights theory.

The federal government, as discussed previously, has the authority under the Supremacy Clause of the U.S. Constitution to supersede state water laws if necessary to fulfill the purposes of federal programs. The issue surrounding federal "non-reserved" rights is whether Congress delegated sufficient authority to federal agencies to appropriate water inconsistent with state law. Such non-reserved rights would have as a priority date the date of use. Compliance with state law is not necessary. A source of substantial controversy, the development of the doctrine of federal non-reserved rights can be attributed to the Supreme Court's decision in *United States v. New Mexico* where reserved rights were limited to the "primary" purposes of federal reservations and federal agencies were left to find other ways to secure water to fulfill "secondary" purposes and land management functions.[70]

The doctrine was first articulated by Interior Solicitor Leo Krulitz in 1979, where he concluded that under the Supremacy Clause, the federal government could "appropriate water on its own property for congressionally authorized uses, whether or not such uses are part of any 'reservation' of land."[71] The Krulitz opinion found that where Congress has not clearly granted authority to the states over waters appurtenant to federal lands comprising the public domain and

---

[67]supra, n. 1 at 353.

[68]California, 438 U.S. at 671.

[69]Id., at 674.

[70]supra, n. 21 at § 37.06(c).

[71]86 I.D. 533, 574 (1974).

federal reservations, the federal government maintains its sovereign rights in such waters and may put them to use irrespective of state law.[72] Solicitor Krulitz also argued that federal control over its needed water rights is unhampered by compliance with procedural and substantive state law and that this is supported by the Supremacy Clause and the doctrine that federal activities are immune from state regulation unless there is specific congressional action providing for state control.[73]

Subsequent Solicitors' opinions served to limit the theory as the Krulitz opinion elicited sharp criticism from the western states. The "Martz" opinion initially limited the Krulitz theory by concluding that while Congress could create federal non-reserved water rights, it did not intend to do so through the enactment of the Federal Land Policy and Management Act or the Taylor Grazing Act.[74] A third Solicitor's opinion, issued by William H. Coldiron, later denied the very existence of federal non-reserved rights altogether.[75] Solicitor Coldiron even went so far as to conclude that "consistent with the express language in the *New Mexico* decision, federal entities must acquire water as would any other private claimant within the various states.[76]

One year later, the question arose in litigation in a Wyoming state court as to whether an appropriate legal basis existed for the Forest Service to assert amended claims to water in the Big Horn and Shoshone National Forests for water based on the non-reserved water rights theory.[77] Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, in his memorandum to Carol E. Dinkins, Assistant Attorney General, Land and Natural Resources Division, concluded that non-reserved rights are not created "merely by the assignment of land management functions to a federal agency or authorization of a federal project. . .[78] Mr. Olson found that "the rationale of *California* and *New Mexico* must be applied to any assertion of federal water rights in western states,"[79] and that these two cases "make it clear that the federal constitutional authority to preempt state water law must be clearly and specifically exercised, either expressly or by

---

[72]Id., at 563.

[73]Id.

[74]88 I.D. 253 (1981).

[75]88 I.D. 1055 (1981).

[76]Id., at 1065.

[77]supra, n. 1 at 329.

[78]Id., at 383.

[79]Id.

necessary implication."[80] Otherwise, a presumption of western state control over allocation of unappropriated water had been created against the assertion of any non-reserved rights by traditional congressional deference.[81]

VI. Federal "Regulatory Water Rights"

So-called federal regulatory rights are likely to be asserted by federal agencies carrying out federal regulatory commands such as those of the Clean Water Act,[82] the Endangered Species Act (ESA),[83] the Federal Power Act,[84] and the National Environmental Policy Act (NEPA).[85] Although no court has declared the existence of such a right, the concept has been the subject of commentary and analysis. The basic question appears to be to what extent the federal government may exercise its regulatory powers over water use without regard to state laws and rights granted pursuant to those laws by virtue of the Supremacy Clause of the Constitution.

The general perception of federal agencies appears to be that state allocation systems do not provide adequate stream flow protection for fish and wildlife. States, apparently, in trying to balance the demands of population growth along with environmental concerns, are failing to do enough for the environment, focusing instead on development of water resources.[86] Therefore, federal agencies reason that they are constrained by federal environmental statutes to assert claims to water in order to meet federal purposes and to compensate for what they perceive is either not being done or is incapable of being done by western states.

The Klamath Project of Oregon

A good example of the "regulatory" tension and competition for water resources that exists between western states and federal agencies is to be found in the state of Oregon. The

---

[80]Id.

[81]Id.

[82]33 U.S.C. §§ 1251 to 1387.

[83]16 U.S.C. §§ 1531 to 1544.

[84]supra, n. 27.

[85]42 U.S.C. §§ 4321 to 4370.

[86]*See generally* Draft letter from Stephen P. Glasser, Water Rights Program Manager, U.S. Forest Service, to the Acting Chief of the U.S. Forest Service (November 2, 1993) (Included in Idaho Federal Water Claims Survey Response as Attachment 10; copy on file at Western States Water Council offices).

Klamath Project (Project) stores water in Upper Klamath Lake by diverting live flow from the Klamath River. Water rights for the Project were based upon the Reclamation Act of 1902 and a 1905 Oregon statute designed to assist the federal government in developing irrigation projects. Under this statute, the federal government could tie up all unappropriated water in a river system for future irrigation projects by filing a notice with the state that served to identify its intention to develop a particular project.[87] Both the provisions of the Reclamation Act and the notice filed with the state of Oregon by the federal government indicate that irrigation is the purpose for which the Project could, and would, be built. Under the Reclamation Act, the Secretary of the Interior was authorized to "locate and construct . . . irrigation works for the storage, diversion, and development of waters."[88] The notice filed by the United States expresses Reclamation's intent:

> to use the above described waters [of the Klamath River Basin] in the operation of works for the utilization of water in the State of Oregon under the provisions of the act of Congress approved June 17, 1902 (32 Stat. 388) known as the Reclamation Act. (Notice signed by T. H. Humpherys, Engineer of the U.S. Reclamation Service, dated May 17, 1905.)[89]

States adhere to the belief that the water impounded under the water rights secured by the Bureau of Reclamation for the Project must be used for the purpose dictated by the Reclamation Act and the notice, that is irrigation. A change in the place of use or in the actual use itself by any other appropriator of water would presumably necessitate that the appropriator comply with requirements of state water law, yet the federal government asserts the ability to use the water stored in the Project facilities in the manner it sees fit, pending the outcome of a general stream adjudication,[90] although such action appears to fly in the face of the legislation and notice which authorized the Project's construction. The federal government asserts in an inter-agency memorandum by David Nawi, U.S. Department of Interior Regional Solicitor, Pacific Southwest Region, that this does not amount to a reallocation of water or an attempt to regulate water uses in the Klamath basin. "Rather, it reflects Reclamation's effort to exercise its authority to manage the project consistent with all of its obligations; including senior Indian water rights, contractual

---

[87]1905 Or. Laws, ch. 228.

[88]32 Stat. 388 § 2 (1902).

[89]cited in Letter from Steve Sanders, Oregon Assistant Attorney General, to Martha Pagel, Director, Oregon Water Resources Department, (March 18, 1996) [hereinafter Sanders Letter] (copy on file at the Western States Water Council office).

[90]Memorandum from David Nawi, U.S. Dep't. of the Interior Regional Solicitor, Pacific Southwest Region, et. al., to Regional Director, Region 1, U.S. Fish and Wildlife Service, et. al. (Jan. 9, 1997) [hereinafter Nawi memo] (copy on file at the Western States Water Council office).

obligations and ESA requirements."[91]

The Nawi memo attempts to dismiss the holding of the United States Supreme Court in *Nevada v. United States*[92] by simply claiming that the application of that case is limited to water rights that have been adjudicated. This distinction is not to be found within the language of the Court's decision. "Rather, the Court rejected inherent United States authority to ignore the limitations of the water rights it held, stressing the disruption that would otherwise result."[93] A careful reading of *Nevada* demonstrates that the Court rejected the United States' contention that it had the authority to unilaterally reallocate state-law based water rights acquired under the Reclamation Act, regardless of the adjudicated or unadjudicated nature of the rights in question.

As stated in the Sanders letter, Interior has never identified any federal law that would authorize the new uses of water stored in Klamath Lake.[94] Instead, the Nawi memo points to

---

[91]Id., at 7.

[92]Nevada v. United States, 463 U.S. 110 (1983).

[93]supra, n. 89, at 9. The Court's treatment of the issue of federal "ownership" of water and Interior's attempts to secure more water for fisheries and tribal interests is entirely separate from its discussion of the *res judicata* issue that defendant irrigators argued before the Court. Part I of *Nevada* relates the history of the Pyramid Reservation, the Newlands Project and the Orr Ditch decree, which were the subjects of the litigation. Part II begins by summarizing two of the cases which had interpreted aspects of Reclamation law, water rights, and contracts. In the first of these two cases, *Ickes v. Fox*, the rights to water provided by the Reclamation projects in question had not yet been adjudicated at the time of the Supreme Court decision. In *Nebraska v. Wyoming,* only a portion of the rights to water associated with the projects at issue had been adjudicated when this case was argued before the Court. It is immediately after its summary of *Ickes* and *Nebraska* that the Supreme Court in *Nevada*, without any discussion of the res judicata issue treated later in the decision, and without any language limiting the application of their reasoning to situations where a general adjudication has already been completed, holds:

> *[i]n the light of these cases*, we conclude that the Government is completely mistaken if it believes that the water rights confirmed to it by the Orr Ditch decree in 1944 for use in irrigating lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit. Nevada, 463 U.S. at 126.

If the Supreme Court concludes that the reasoning of two cases involving unadjudicated rights to water supplied by Reclamation projects should dictate its holding in a case were the rights had been previously adjudicated, it follows that the adjudicated nature of the *Nevada* rights is irrelevant and the reasoning of the Nawi memo that *Nevada* does not apply to the Klamath Project is without merit.

[94]supra, n. 89, at 10.

case law for support, citing *Carson-Truckee Water Conservancy District v. Clark*,[95] where the facility in question was authorized to be operated specifically for the purpose of conserving two endangered species of fish. Because the Ninth Circuit specifically held that the Washoe Project Act allowed the project to be operated for ESA conservation purposes, the Court declined to consider the extent of the Secretary of the Interior's affirmative obligations under ESA had he decided to not protect the fish.[96] The solicitors also cite *O'Neill v. United States*,[97] where congressional legislation specifically required Reclamation to change the operation of the Central Valley Project to satisfy fishery needs. Absent any other specific congressional authorization, Reclamation may not unilaterally reallocate water for fishery purposes, as the Endangered Species Act "does not confer authority on the Bureau to protect fish; rather, it requires the Bureau (and every federal agency) to exercise the authority it already possesses in a certain way."[98] This includes compliance with consultation requirements to prevent the "taking" of an endangered or threatened species[99] and development and implementation of recovery plans for listed species.[100]

Oregon feels that the proper mechanism for determining the rights of water users and the needs of fisheries in the Klamath system would be the ongoing Klamath basin adjudication and its accompanying alternative dispute resolution process. But, the federal government, while filing hundreds of claims[101] in the Klamath Basin Adjudication, is apparently attempting to bypass the state mechanism deferred to by Congress to determine and regulate water allocation in the West, at least until the time that the adjudication has been completed. This gives the appearance of a federal attempt to impose its policy-based judgment on the state as to how Project water should be allocated. Meanwhile, states feel that the "regulatory" activities Reclamation will implement to pursue these endangered species and tribal objectives have not been congressionally authorized.

---

[95]Carson-Truckee Water Conservancy District v. Clark, 741 F.2d 257 (9th Cir. 1984), cert. denied, 470 U.S. 1083 (1985).

[96]Id., at 262, n. 5.

[97]O'Neill v. United States, 50 F.3d 677 (9th Cir.), cert. denied, 516 U.S. 1028 (1995).

[98]supra, n. 89, at 8.

[99]supra, n. 83, at § 1536.

[100]Id., at § 1533(d).

[101]Oregon Federal Non-Indian Water Claims Survey Response from Reed Marbut, Oregon Water Resources Dep't., (June 29, 1998) (copy on file at the Western States Water Council offices).

Bypass Flows for the U.S. Forest Service in Colorado

Regarded by states as another regulatory attempt to control the use of water, the Colorado bypass flow experience illustrates the nature of federal/state relations. Frustrated by the fact that federal reserved rights must be exercised in priority, the U.S. Forest Service turned to its permitting authority in an attempt to control the use of water on Forest Service lands in Colorado. The decision to pursue this type of regulation was motivated by the perceived need to "enlarge overall management and control of National Forests, and by the desire to side-step previous allocations of water to non-federal purposes and entities."[102]

The bypass flow controversy began in the early 1990s when the administrators of the Arapaho-Roosevelt National Forest informed the owners of certain existing water facilities that federal land use permits for those facilities would have to be renewed. The facility owners were informed that they would be required to allow a certain minimum amount of water to bypass their facilities in order to renew their permits. The Forest Service asserted that these conditions were necessary to achieve the numerical standards for aquatic habitat as stated in the 1994 Arapaho and Roosevelt Forest Plan. The legal authority that the Forest Service claimed in support of the imposition of bypass flows stemmed from the Property Clause of the U.S. Constitution, which was "delegated to it by Congress in the 1897 Organic Administration Act, Multiple Use and Sustained Yield Act, Federal Land Policy and Management Act and the National Forest Management Act. In particular, the Forest Service asserted that § 505(a) of FLPMA and 16 U.S.C. § 1604(i) (NFMA) provided authority for the imposition of bypass flows."[103]

The Forest Service has steadfastly maintained that a bypass flow requirement does not interfere with the exercise of a water right. This assertion is justified, according to the Forest Service, because

> 1) title to the water right remained in non-federal ownership, [thus] there was no interference with the water right, 2) there was no interference with water rights because the Forest Service was not 'seeking' or 'claiming' a water right, 3) water users could simply take the water at a different time and place, and 4) any impact on water rights was *de minimis* or inconsequential.[104]

The Forest Service's argument that title to the water right remains with the owner thereof, and that it is not "seeking" or "claiming" a water right was described to be drawing "a distinction

---

[102]REPORT OF THE FEDERAL WATER RIGHTS TASK FORCE, Federal Water Rights Task Force create pursuant to Section 389(d)(3) of P.L. 104-127 at IX-3 (1997), p. II-3.

[103]Id., at III-1.

[104]Id., at III-2.

without a difference."[105] Possession of the title to a water right means nothing without the ability to exercise the right in accordance with its terms. And because the purpose of a bypass flow is to take water from the owner of a water right and use it to attain National Forest purposes, the fact that the Forest Service is not "seeking" or "claiming" a water right appears inconsequential. Opponents also argued that the Forest Service ignored the basic tenets of geography as well as western water law when it claimed that bypass flows do not interfere with the exercise of a water right. When forced to leave water in the stream, the water right owner is often without recourse, as that water is often lost to junior appropriators and no longer available to the owner. Even if it were, states argue that it is often impossible or impractical to make the water flow back uphill to its diversion point and "place it to its decreed, historical beneficial use."[106]

In response to this emerging problem, Congress passed a conference report on the 1996 Farm Bill that established an 18-month moratorium on the imposition of bypass flows during which time a federal task force would review the problem and make recommendations for protecting the forest environment, instream flows, and state water rights. President Clinton signed the bill into law in early April 1996 and the Federal Water Rights Task Force was convened to investigate the issues of Forest Service authority and bypass flows. The majority opinion of the task force, which was released in August of 1997, concluded that the Forest Service does not have the authority necessary to condition the granting or renewal of land use permits on the relinquishment of a portion of a water users water supply. Nevertheless, the Forest Service has demonstrated an intent to continue this practice.[107] Furthermore, the Forest Service contends that it is prohibited from entering into any agreement which would preclude it from requiring even more water as a condition to the renewal of permits in the future.[108] Even though the state of Colorado has offered to allow the Forest Service to hold instream rights in its own name[109]--by law, state law-based instream rights in Colorado can only be held by the Colorado Water Conservation Board[110]--for a quantity greater than could be obtained through the best possible outcome of reserved rights litigation,[111] in return for the Forest Service's

---

[105]Id., at III-3.

[106]Id.

[107]*see* Memorandum from Kenneth D. Paur, Attorney/Advisor, Office of the General Counsel, U.S. Dep't. of Agriculture, to Skip Underwood, Director of Physical Resources, Rocky Mountain Region, U.S. Forest Service (March 16, 1998) (copy on file at the Western States Water Council office).

[108]Id.

[109]Telephone conversation between Carol Angel, Natural Resources Section, Colorado Attorney General's Office, and James Alder (September 18, 1998).

[110]Colo. Rev. Stat 37-92-102(3) (1997).

commitment to forego further bypass flow requirements, the Forest Service asserts it "does not have authority to enter into factual stipulations stating that the water rights granted meet the requirements for specific water-dependant resources or meet specific obligations arising under various laws and regulations."[112] This would appear to be plainly contrary to the purposes of the McCarran Amendment, as its purpose is to make the federal government and its agencies parties to a process that will result "in a binding allocation of the rights to the use of water for federal and non-federal purposes, including the use of water to attain the primary and secondary purposes of the National Forests."[113]

One commentator has speculated that conditioning permit renewals on bypass flow requirements are the last line of defense when Forest Service efforts to secure voluntary mitigation fail to achieve national forest resource goals. Apparently, the Forest Service

> now expects the owners of authorized facilities facing special use renewals to offer a mitigation package similar the Poudre River [Joint Operations Plan] during the agency's consideration of the renewal request. Some of the Forest Supervisor's recent decisions also show a willingness to accept off-site/off-channel mitigation in certain circumstances. However, the Forest Service may use the bypass flow threat to exact more 'voluntary' mitigation than facility owners originally propose.[114]

Western states feel that these recent activities indicate a desire on the part of the Forest Service to circumvent the processes and policies deferred to by Congress as the appropriate mechanism for assertion and determination of water claims. State agencies claim that the Forest Service routinely disregards the official federal water rights policies dictated by its own operations manual that would require the agency to use state appropriation systems as the vehicle by which it establishes and quantifies its uses of water .[115]

---

[111]Letter from Carol D. Angel, Colorado Senior Assistant Attorney General, et al., to James J. DuBois, Attorney, U.S. Department of Justice (September 16, 1998). (Copy on file at the Western States Water Council offices.)

[112]supra, n. 107, at 11.

[113]supra, n. 102, at Executive Summary.

[114]James S. Witwer, *The Renewal of Authorizations to Divert Water on National Forests*, 24 COLO. LAW. 2363, 2364 (1995).

[115]Colorado Federal Non-Indian Water Claims Survey Response from Wendy C. Weiss, Natural Resources Section, Colorado Attorney General's Office, (June 30, 1998); Nevada Federal Non-Indian Water Claims Survey Response from R. Michael Turnipseed, Nevada State Engineer, (June 9, 1998) (copies of both responses on file at the Western States Water Council offices). The Forest Service Manual would require it to

> rely on reserved water rights, obtain water rights under state law, or purchase water rights

The imposition of bypass flow requirements may also prove ineffective in providing additional water for stream reaches they are meant to protect. Bypass flows are not a protectable water right and "are not capable of being administered in priority by state water rights administration systems" as they carry know priority.[116] Water released from an upstream facility under a bypass flow requirement automatically becomes available for downstream junior appropriators.[117]

In light of the bypass flows' potential ineffectiveness, their injurious nature, the agency's lack of authority as determined by the Federal Water Rights Task Force, and specific congressional legislation as well as agency policy to the contrary, western states perceive the Forest Service to be pursuing its own agenda, claiming "authority" from various environmental statutes and policies as its means of transportation towards its goal, while refusing to follow the congressionally proscribed roadmap to that destination.

Expanding Federal Claims to Water

Responses to the survey of western states regarding federal claims to water conducted in preparation for this report indicate a general belief among state agency personnel that federal claims are increasing and that federal agencies will continue to expand bases and strategies to control or claim water. Survey responses note "aggressive" and "adversarial" behavior, "unbending attitudes," and federal "strategies" that entail the "swamping" of state court general adjudications as indicative of recent federal activities.

Certain reserved rights claims appear to have been made based upon agency agenda and not a specific, sustainable legal theory.[118] Although the United States Supreme Court had previously suggested that no federal reserved water rights were created by the Multiple-Use

---

before using permits to protect instream flows (FSM §§ 2541.03, 2541.04b, 2541.31, and 2541.42); inventory foreseeable national forest water requirements (FSM § 2541.11); determine the amount of water needed for instream and standing water purposes (FSM § 2541.12); and, in states that require that instream flow rights be held in the name of the state agency, work with the appropriate agency to obtain and protect needed flows (FSM § 2541.31). . .

[116]supra, n. 102, at III-5.

[117]Letter from Daries C. Lile, Director, Colorado Water Conservation Board, to the Federal Water Rights Task Force (August 15, 1997); quoted in supra, n. 102.

[118]Idaho Federal Non-Indian Water Claims Survey Response from Clive J. Strong, Deputy Attorney General, Idaho Attorney General's Office (August 1, 1998) (copy on file at the Western States Water Council office).

Sustained-Yield Act,[119] Forest Service personnel continued to pursue the 1993 filing of instream flow claims in Idaho's Snake River Basin Adjudication (SRBA) under the federal reserved water rights doctrine.[120]

The way in which these claims were presented explains associated state frustrations. The Forest Service initially filed for 3,764 claims. It subsequently moved to withdraw all but 71 of these claims on September 29, 1995, just 17 days before the parties to the SRBA were required to file objections to these instream flow claims.[121] The Forest Service had apparently been contemplating this "massive withdrawal of claims" for approximately 18 months before the action was taken.[122] Although the agency elected to focus its efforts on a relatively small number of claims, it failed to notify the state of Idaho or any other objecting party of this intention, and allowed the objectors to expend "well in excess of a half million dollars preparing objections to claims the Forest Service knew were going to be withdrawn."[123] A further eleven claims were later withdrawn during the summer of 1997, with the state of Idaho alone expending over $100,000 in investigating these claims.[124]

Internal agency memoranda point to a Forest Service strategy of filing claims with no clear legal theory,[125] dual filing (under the reserved rights doctrine as well as state law) and abstaining from disclosing its intent to withdraw the vast majority of its claims for a year-and-a - half, in an attempt "to impose costs on the state and private water users so that they would acquiesce to the claims."[126]

---

[119]United States v. New Mexico, 438 U.S. 696, 715 (1978).

[120]supra, n.118, at 8.

[121]Id.

[122]Id., at 9.

[123]Id.

[124]Id.

[125]Id., at 8.

[126]Id. Speaking of the MUSYA instream flow claims, one memorandum sets out the basis for the Forest Service claims.

> We have opted to use this authority for the following reasons: 1. instream flows are not available under state law; 2. inholdings and upstream non-NF lands limit our use of special permits; 3. these claims put the state and future appropriators on notice of what our water needs are; 4. *the form the basis for negotiations with the state;* 5. this is our one and only chance to assert such claims." Attachment 11 (emphasis added). Message

The dual filing approach in particular serves to demonstrate to Congress and the public that the federal agency has made a showing of compliance with state law. And because some states have no legal provision for issuing instream water rights to federal entities, the agency goal then becomes the preemption of state law with the federal reserved rights doctrine. According to an internal memo, the tactic of dual filing, which was proposed to the Department of Justice and the Forest Service by Interior's Office of General Counsel, "was employed in several small adjudications in Utah and New Mexico with the result that both states terminated their adjudications rather that deal with the situation."[127]

The explanation given by the Justice Department as to why approximately 3,600 claims were suddenly withdrawn from the SRBA, the Justice Attorney stated:

> The election to withdraw the claims voluntarily *was purely a strategic decision* intended to allow the United States to focus its limited resources on a discrete number of claims that provide the maximum benefit to the National Forests and the Nation. . . .[T]he Forest Service claims were not withdrawn because they were invalid, but because of a *strategic decision* on maximizing the United States' chances of success given very limited resources.[128]

Such "strategic decisions" as this appear to be the standard that western states must contend with in the future.

The continued expansion of bases pursuant to which the United States, through its

---

from Gary Bole, U.S. Forest Service Field Representative, to Stephen P. Glasser, Water Rights Program Manager, U.S. Forest Service.

Another internal memo demonstrates the Forest Service's reasoning behind a decision to file claims under both state law and the federal reserved rights doctrine.

> [I]t may allow them to avoid having to recognize federal reserved rights and could result in the allocation of some water to us for instream purposes. *It would also change the balance in the upcoming negotiations between the state and the United States over federal water claims that are to precede any litigation.* Attachment 10. (emphasis added). Draft letter from Stephen P. Glasser, Water Rights Program Manager, U.S. Forest Service, to the Acting Chief of the U.S. Forest Service (November 2, 1993).

Another document produced on discovery indicates that the purpose of 1994 amended claim for "all unappropriated water" in the Snake River Islands Sector of the Deer Flat National Wildlife Refuge was "to allow bargaining if all avail [sic] priority date water can't be supported." Attachment 1.

[127]Id.

[128]Id. (emphasis added). The quotation is an excerpt from the *United States Response To State Of Idaho's Motion For Appointment Of Special Master To Determine If Sanctions Should Be Assessed Against The United States*, pp. 2, 7.

> agencies, continues to assert new reasons that its claims should support reserved water rights has little basis in law and has a tremendous impact on this State's resources with apparently no concern or consideration for those impacts. The United States, through its agencies apparently has an agenda and does not appear to have any concern for how that agenda is accomplished or the effect it has on the states.[129]

Also indicative of this federal agenda is the effort led by federal land management agencies and water rights attorneys in the Justice Department to persuade Attorney General Janet Reno to withdraw the 1988 Attorney General Meese letter, in which he had declared "there are no federal reserved water rights for wilderness in the absence of any Congressional declaration."[130] Attorney General Reno did, indeed, withdraw the Meese letter. No formal guidance has since been issued by the Justice Department to fill the void left by its withdrawal.[131]

A number of states responding to the survey also indicated a belief that recent strategic decisions by federal agencies are driven by attitudes within the Justice Department. The state of Washington explains that "[t]he Bureau [of Reclamation] has become more aggressive and adversarial over time in claiming water in the Yakima adjudication. The state suspects this attitude may be driven more by the Department of Justice than by the Bureau."[132] The state of Nevada relates that "[t]he problem the state faces are partly exacerbated by the arrogance and unbending attitude of the Justice Department. Justice has never liked the McCarran Amendment and does everything it can to frustrate the adjudication process. They ignore case law when it does not favor their agenda."[133] Idaho's survey response has also detailed the strategies of federal agencies in attempting to frustrate and overwhelm the SRBA, as well as shedding some light on behind-the-scenes workings of federal personnel in pursuit of an agenda that appears to

---

[129] supra, n. 115, (Nevada response).

[130] supra, n. 118, Attachment 10.

[131] Telephone conversation between Clive J. Strong, Idaho Deputy Attorney General and James Alder (September 22, 1998).

[132] Washington Federal Non-Indian Water Claims Survey Response from Ken Slattery, Senior Policy Analyst, Washington Dep't. of Ecology (July 9, 1998) (copy on file at Western States Water Council offices).

[133] supra, n. 115; *see also,* Sanders Letter, supra, n. 89. The Sanders Letter details the Bureau of Reclamation's Klamath Operations Plan, under which the Bureau seeks to avoid a century of Congressional legislation and case law by attempting to convert a general government obligation to specific Bureau authority to affect a reallocation of water from congressionally designated irrigation uses to fisheries protection and tribal trust responsibilities.

lack legal basis and Congressional authorization.[134]

The U.S. Environmental Protection Agency (EPA) has also taken steps toward implementing regulations aimed at giving EPA authority to influence the amount of water that can be withdrawn from any particular waterbody in order to meet "wildlife habitat," "biological," "hydrologic balance," "clean sediment" or "flow" criteria established by water quality standards regulation. In an Advanced Notice of Proposed Rulemaking for Water Quality Standards Regulation published in the Federal Register on July 7, 1998, EPA indicates an intent or desire to adopt "physical criteria," which is defined as "a concept that takes into account the physical attributes of the aquatic environment, such as quality of habitat and hydrologic balance."[135] EPA specifically states its belief that "physical habitat parameters, *including flow*, are important and often overlooked parameters that influence and at some sites control whether or not an aquatic life use is or will be attained."[136] EPA states an interest in creating a set of "hydrologic balance criteria guidance" which would possibly include "regional stream flow criteria on a seasonal or average monthly basis," as well as a "groundwater-recharge criterion meant to maintain adequate stream base flow. . ."[137] Each of these flow criteria would appear to have at least an indirect affect on the allocation of water resources, even though such allocation was specifically left to the control of the states and disclaimed by the CWA.[138]

Additionally, "biological criteria," "wildlife criteria" and "clean sediment criteria" also under consideration have a direct relationship to any "hydrologic modification criteria" which might be adopted. Removal or storage of water will naturally affect the biological integrity of a stream system, wildlife habitat, and sediment transport and deposition. Therefore, flow criteria may be imposed due to measurements taken as a consequence of the application of any of these

---

[134]supra, n. 118.

[135]Water Quality Standards Regulation; Proposed Rule, 63 Fed. Reg. 36741, at 36773 (1998) (to be codified at 40 C.F.R. § 131).

[136]Id., (emphasis added).

[137]Id.

[138]33 U.S.C. § 1251(g) (CWA Section 101(g)). This section of the Clean Water Act explicitly states that:

> [i]t is the policy of Congress that the authority of each state to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any state. Federal agencies shall cooperate with state and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

other criteria. The ANPRM does not adequately explore how these complex issues would interrelate and the agency may be inappropriately extending its authority to matters over which Congress gave it little or no control.

The ANPRM also contemplates the addition of "a groundwater recharge criterion."[139] Allocation of tributary groundwater is most often regulated by Western states by their prior appropriation schemes. Regulation of groundwater has traditionally been outside the reach of EPA authority under the Clean Water Act and subject to state control. The ANPRM may thus be an attempt to place a federal overlay on top of existing state and local systems without Congressional authorization.

EPA also believes that flow criteria would also require a wastewater facility to maintain a discharge where the stream segment would otherwise be intermittent or ephemeral in order to protect the aquatic community.[140] EPA believes that the removal of a designated use from a waterbody under criterion 2,[141] where low flow conditions would preclude the use, should no longer be allowed where the discharge supports an aquatic life use. Prohibiting a state from removing a designated use under criterion 2 could work to prevent a municipality from reusing treated wastewater, a valuable resource in western states. Reuse schemes are becoming a pivotal portion of many municipal water supply plans. Some Western states also allow for "reuse to extinction" of waters imported into a basin. Since these flows were never "native" to the river system, no one else has a right to claim them. Such flow criteria could thereby undermine such water supply plans and state allocation systems even though the EPA lacks the authority to upset any water supply decision of any state.[142] Indeed, the EPA is specifically required by the CWA to "*cooperate* with state and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution *in concert with programs for managing water resources*."[143]

---

[139]63 F.R., at 36774.

[140]Id., at 36755.

[141]40 C.F.R. 131.10(g)(2). Criterion 2 permits a state to remove a designated use classification established under 40 C.F.R. 131.10(a) from a stream segment or waterbody where

> [n]atural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the use, unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges without violating State water conservation requirements to enable uses to be met; . . .

[142]supra, n. 138.

[143]Id., (emphasis added).

VII. The Scope and Burden of Federal Claims

Survey responses from participating states indicate a variety of claims that being asserted across the West today. This report has already identified a number of these, including federal reserved rights claims[144] (which includes continued filing of reserved rights claims for purposes deemed as secondary by the Supreme Court under New Mexico[145]), claims to control water under regulatory authority[146] including bypass flow requirements imposed under land use management authority.[147] Also identified by state survey responses are the Bureau of Reclamation's claim that the Yakima Basin of Washington is a '"federalized basin" which entails federal ownership of surface and groundwaters,[148] Bureau assertion of ownership of all waters of the Rio Grande from Elephant Butte Reservoir in New Mexico to Fort Quitman, Texas,[149] the U.S. Army Corps of Engineers (Corps) attempt to withdraw state-based claims conditioned on Montana Water Court recognition of a "superior federal proprietary right" in the Montana adjudication of Hungry Horse and Fort Peck Reservoirs,[150] the Corps' assertion that state water law is preempted by legislation authorizing Dworshak Dam in Idaho,[151] and the Corps' claim of federal supremacy over state water law based on the doctrine of the navigation servitude for Columbia and Snake River dams in western Washington.[152]

Although the Forest Service, for decades, participated in and had no objection to the

---

[144]supra, p. 8.

[145]supra, n. 118; Arizona Federal Non-Indian Water Claims Survey Response from Tom Wilmouth, Deputy Counsel, Arizona Dep't. of Water Resources (August 10, 1998) (copy on file at Western States Water Counsel offices).

[146]supra, p. 16.

[147]supra, p. 20.

[148]supra, n. 132, at 5-6.

[149]Texas Federal Non-Indian Water Claims Survey Response from James Kowis, Senior Technical Specialist, Texas Natural Resources Conservation Commission, (July 2, 1998) (copy on file at Western State Water Council offices).

[150]Montana Federal Non-Indian Water Claims Survey Response from Harley R. Harris, Montana Assistant General (Prepared by the Montana Reserved Water Rights Compact Commission) (August 11, 1998) (copy on file at Western States Water Council offices).

[151]supra, n. 118, at 9.

[152]supra, n. 132, at 1.

recognition of Nevada's issuance of stock water rights to private citizens on public lands, it now asserts that agency is the only entity that can own such rights on national forests. The Forest Service "argues that neither the Mining Act of 1866 or the Desert Land Act of 1877 authorized private acquisition of stock water rights on federal range land on the grounds that stock watering was not within the definition of agriculture."[153] Another argument advanced by the Forest Service to support this contention is that the water right should not be appurtenant to the cattle, but rather to the federal land.[154]

Some states responding to the survey also expressed their growing concerns that federal agencies will continue to expand their claims to the control or use of water in the future based on the Endangered Species Act and the Clean Water Act.[155] Wyoming's survey response illustrates this concern. Federal involvement in defining the "purpose and need" of proposed water projects is heightened by Clean Water Act § 404(b)(2) regulations, and under present Corps of Engineers scrutiny "the State's desire to develop water for future use is considered unnecessary and the project[s are] undoable under the Section 404 permitting process."[156] Furthermore, veto authority possessed by the Environmental Protection Agency under CWA § 404(c) "has been used to halt water supply projects which the Corps of Engineers had found to be in the public interest."[157]

At this time, the Bureau of Reclamation is involved in the appeal of the Nevada State Engineer's decision to grant Newlands Project transfer applications on the basis that it would be detrimental to the public interest based on endangered species arguments. Nevada argues that this is "an attempt to re-adjudicate waters already adjudicated."[158] In Arizona, the Federal Energy Regulatory Commission has proposed that, as a condition of relicensing any non-federal dam within the state, the facility owner must maintain minimum flow releases, based on the mandates of the Federal Power Act, the Endangered Species Act and the National Environmental Policy Act.

> The federal land manager has proposed that the owner permanently relinquish a portion of its water rights to sustain minimum stream flows and support the critical habitat in the area. The relinquished rights would then be transferred to the federal government which

---

[153] supra, n. 115 (Nevada response), at 5.

[154] Id.

[155] supra, n. 149, at 2.

[156] Wyoming Federal Non-Indian Water Claims Survey Response from the Wyoming State Engineer's Office, (October 6, 1998) (copy on file at the Western States Water Council offices).

[157] Id., at 7.

[158] supra, n. 115, at 8.

would hold the right and maintain the flows in perpetuity.[159]

Colorado and Wyoming survey responses also illustrate western state concerns with federal agency use of the Endangered Species Act to control the use of water, stating that "the federal government has asserted that federal agencies have the authority to deny permits if water depletions associated with the facility to be permitted would jeopardize an endangered species or adversely modify its critical habitat."[160]

In establishing spring and summer flow targets for the Columbia River pursuant to its biological opinions, the National Marine Fisheries Service (NMFS) has acquired augmentation flows from Idaho irrigators, and then protected that water from downstream diversion. In so doing, NMFS has created a significant alteration of storage operations in the Columbia and Snake River basins.[161]

The financial burden placed on states dealing with the thousands of federal claims to water may be very a substantial one. Although not representative of all western states, Nevada State Engineer Michael Turnipseed, in speaking of the burden created by federal claims in Nevada, stated, "I cannot stress enough that these claims overwhelmingly impact the Adjudication Section of the Division of Water Resources, that enormous amounts of time and money are spent in dealing with these claims. . . ."[162] Federal claims may constitute the largest

---

[159]supra, n. 145 (Arizona response), at 5.

[160]supra, n. 115 (Colorado response). Since the U.S. Fish and Wildlife Service has also taken the position "that water diverted anywhere upstream of endangered species habitat is equivalent to water diversions in areas where endangered species reside, water projects upstream in Wyoming face the same constraints relative to a project's depletive effects as those downstream." supra, n. 156, at 7.

[161]supra, n. 132, at 10. "Though NMFS does not use water rights terminology regarding its actions, it is in effect creating regulatory water rights under the authority of the Endangered Species Act. . . . No action has been taken against any existing perfected water rights, but it is NMFS' belief that such action would be within its authority under the ESA if it could show that the illegal taking of a listed species was caused by such diversion. . . . As NMFS turns its attention to tributaries and to western Washington, a collision with state water rights holders is more likely. Id.

[162]supra, n. 115 (Nevada response), at 1. The Nevada response demonstrates the frustration with adjudication fees experienced by a number of western states.

> The U.S. has refused to pay the fees for the filing of these thousands of claims, and has refused to comply with Nevada law which requires the participants to an adjudication to reimburse the State for the costs of the hearing which includes court reporters fees. While it is the U.S., its agencies, or Indian tribes, and their actions that have been the

percentage of claims filed in a general adjudication.[163] Furthermore, federal agencies are not constrained in the number of claims that they file by the necessary payment of filing fees and court costs. Because the Supreme Court held that the McCarran Amendment's waiver of sovereign immunity does not allow a state court to collect required fees from the United States,[164] federal agencies enjoy a "creative license" to make almost any claim for which a plausible argument can be made, all at the states' expense,[165] unlike any other appropriator of water. In light of the Idaho experience with Forest Service claims and the internal Forest Service memoranda[166] referred to earlier, exploitation of this advantage appears to be a tactic employed by at least one federal agency.

Three State Approaches to handling Federal Claims

State responses identify a number of settlement methods outside of traditional litigation that are employed by states responding to the many differing types of federal claims. The state of Oregon has initiated an Alternative Dispute Resolution (ADR) process to address all claims of the Klamath Basin Adjudication.[167] A parallel project of the adjudication, this ADR process allows the parties to negotiate how water will be managed within the basin. It is hoped that this will encourage the parties to be creative in addressing quantification issues, as well as extending discussion to other water-related issues.

Montana's Reserved Water Rights Compact Commission (Commission) was created in 1979 to negotiate with federal agencies and Indian tribes that claim reserved water rights on

---

> factors in requiring these time consuming and costly adjudications, the U.S. takes no responsibility for the impact this has on the State. Nevada feels it is imperative that the U.S. accept responsibility for the costs its claims are imposing on the State of Nevada. While the Division of Water Resources has not passed on those costs directly to the other participants in the adjudication, those costs are paid directly by the taxpayers of this state. Id.

[163]*See* remarks by Martha Pagel, Director, Oregon Water Resources Dep't., Meeting of the Western States Water Council (March 5, 1998)(included as part of the meeting minutes on file at the Western States Water Council offices). Federal claims account for over one-half of the more than 700 claims filed as part of the Klamath Basin Adjudication in Oregon; Arizona survey response, supra, n. 145, at 6.

[164]United States v. Idaho, 508 U.S. 1(1993).

[165]supra, n. 115 (Nevada response), at 1.

[166]supra, n. 118 (Attachment 10).

[167]supra, n. 89, at 2.

behalf of the Governor. The Commission negotiates with the various agencies individually and each of the agencies has been willing to assign teams and participate in the negotiations.[168] The agencies have demonstrated a willingness to address a much broader range of issues in negotiation than would be required in formal litigation.[169] One very interesting approach implemented by the Commission to settle National Park Service claims is referred to as the "reverse approach." The "reverse approach" quantifies existing and future state water use and provides for basin closure at a future date after a specified amount of water is developed.[170] Montana notes that this method is a very useful one for addressing instream flows by recognizing a reserved water right to the entire flow of a stream but subordinating it to all existing uses and some level of future use under state law as this "eliminates the need for actual quantification of the instream flow itself and prevents any future enforcement controversies."[171]

The Commission also plans to work with the Forest Service to obtain land use agreements such as long-term easements for individual water rights holders within National Forests who desire them. The use of long term easements is aimed at reducing the number of periodic reviews that the land use would otherwise be subject to, which would consequently reduce the opportunities for the Forest Service to attach conditions to special use permits.[172]

In some cases where the federal government has been reluctant to work within the state system, the Arizona Department of Water Resources has agreed to recognize "certain attributes" of a federal reserved right in a state law based water right for federal agencies.[173] The state law based right may have a priority date as of the date of the reservation, and may not be subject to forfeiture or abandonment. In return, the federal agencies have agreed to quantify the rights and remove the label of "federal reserved water rights." Quantification serves to eliminate much of the uncertainty surrounding the size of federal water rights. While this tactic is "currently being pursued between the [National Park Service] and various private claimants in the Little Colorado River Watershed" it has yet to be implemented anywhere in the state.[174]

However, while negotiated settlements to water rights issues can often provide win/win

---

[168] supra, n. 149, at 2.

[169] Id.

[170] Id., at 3.

[171] Id.

[172] Id.

[173] supra, n. 145 (Arizona response), at 5.

[174] Id.

situations, a federal agency's recent insistence that it cannot and will not agree to forego any future implementation of bypass flow requirements in return for the recognition of its current instream flow claims illustrates the fear of western states that even this potential avenue of obtaining certainty for their water use planning decisions may be limited.

> Federal agencies . . . often wish to avoid litigation and are willing to at least try to negotiate a compromise that is consistent with state law. However, these compromises never fully resolve the issues; rather, they result in a continuing tug-of-war between state and federal interests. Any state entering into an agreement . . . should be prepared for long-term institutionalized conflict.[175]

VIII. Conclusion

In an era of increasing government and public awareness of western environmental concerns, cooperation between federal agencies and state governments is becoming increasingly important as agencies on both levels of government tackle public demands and environmental needs under the restraints placed upon them by legislative bodies. Federal environmental statutes call for environmental protection as Congress sets national mandates designed to protect the public, its lands and its resources. State governments are called upon to address many of these same issues as well, but must also balance these concerns with the need to adequately plan for the basic requirements and demands of a growing population.

This competing use dynamic leads to the inevitable question of "Who decides?" But instead of conflict over this question, exacerbated by the federal government seeking to exercise greater control over the use of water, intergovernmental cooperation should be the vehicle that federal agencies use to reach their respective objectives. It is the process of consultation, cooperation and coordination that will result in optimal decisions regarding water resources, avoiding the need for lengthy legal protraction of the issues.

As illustrated by examples discussed earlier, a general federal concern that state law inadequately provides for federal interests in the form of instream flows has led to the increased competition for control of water resources, as federal agencies depart from the constraints of their authorizing legislation and traditional methods, and employ other strategies to reach new objectives. It is important that federal proponents recognize that state appropriation laws have evolved to be able to accommodate many federal uses.[176] "Federal officials need not resort to the specter of federal preemption to accomplish federal statutory objectives."[177] Rather federal

---

[175] supra, n. 115 (Colorado response) at 6.

[176] *See* D. Craig Bell & Norman K. Johnson, *State Water Laws and Federal Water Uses: The History of Conflict, The Prospects for Accommodation,* 21 ENVTL. L. 1 (1991).

[177] Id.

entities should rely on existing state authorities and systems as foreseen by Congress to secure water necessary for the purposes of federal enclaves. States, with their role in planning and economic development, are in the best position to balance all of the competing interests while determining how water should be properly allocated. Congress has historically deferred to this system, requiring federal agencies to submit to these state forums. Federal agencies should refrain from attempting to upset the balance that states seek to achieve by asserting "supremacy" under various legislative acts, and assume the role in state processes that Congress and the courts have assigned to them. The continued federal pursuit of expansive claims and the control of water independent of state allocation priorities will only lead to more expense, more confusion, greater mistrust and protracted legal battles. Circumvention of the designated state processes by entities seeking to fulfill a narrow agenda cannot produce carefully balanced decisions necessary to address all pertinent concerns. Therefore, "federal mandates must be fulfilled within the framework of state law and interstate compacts and decrees"[178] if the necessary balance is to be struck.

---

[178] Id.

Part II

Part II of this report consists of individual state responses to the Federal Non-Indian Water Claims Survey prepared by staff of the Western States Water Council. The Survey was prepared with the intent to gauge the extent of federal claims to water resources other than those claimed for tribal reservation purposes. By means of the survey, the Council also hoped to ascertain the impact in terms of quantities of water, man-hours, and funding that deal with these federal claims created for western states.

Finally, states belonging to the Council hoped to use the results of the survey to experience what means their sister states were employing to adjudicate, negotiate and settle federal claims to water in order to improve their individual efforts.

Survey responses varied in their lengths and in the details provided. Some responses included a number of attachments and exhibits. Council staff has attempted to provide a consistent format for the state responses that follow this introduction. A brief description of any supplemental material not included in the report follows the response of the state providing it. Copies of these supplemental materials supplied by states as part of their survey responses are available from the Western States Water Council offices.

ALASKA RESPONSE TO WSWC SURVEY REGARDING FEDERAL RESERVED WATER RIGHTS

Prepared by Christopher Estes
Statewide Instream Flow Coordinator

In 1973, the National Water Commission recommended legislation be enacted to require the federal government to assert and quantify its water rights through state procedures and state governments. In 1978, President Carter directed federal agencies to resolve reserved rights claims in a fair and timely manner by identifying Federal Reserved Water Rights (FRWR) claims, quantifying the rights and using a reasonable standard for assertion.

Of the 367.7 million acres in Alaska, approximately 49 percent, or 178.8 million acres are reserved lands which may have FRWR. Katie John may expand this further (see comments below). The Alaska's Water Use Act (AS 46.15) was amended in 1980 to allow instream flows as a use of water. One of the purposes for adding instream flow provisions to the Water Use Act was to provide a mechanism for adjudicating instream flows for FRWR through the state administrative system. Unfortunately, the 1980 amendment did not go far enough to satisfy all of the requirements of the McCarran Amendment, because it was based on the state's existing administrative adjudication process. It did not provide a supplemental state judicial mechanism for adjudicating water rights on a basin-wide basis in the state court system. Accordingly, Senate Bill (SB) 150 was submitted in the 1985 Alaska legislative session to eliminate deficiencies in the existing Water Use Act, and was enacted in 1986.

With the SB 150 amendments, AS 46.15.165 allows the Commissioner of DNR to initiate an administrative adjudication to quantify and determine the priority of all water rights and claims in a particular hydrologic basin. AS 46.15.166 provides that when a FRWR may be involved, and the claimant refuses to consent to an administrative adjudication, the DNR Commissioner could initiate the adjudication in a state superior court (consistent with the McCarran Amendment). The basin wide adjudication processes established in the Alaska Water Use Act were also designed to administer non-federal reserved rights, should they occur.

The Alaska Water Use Act is unique among state water laws of western states because Alaska is one of the few states that treats the federal government as being equal to other citizens and state agencies re: the ability to acquire consumptive and non-consumptive water rights for beneficial uses under AS § 46.15 (without necessitating a basin-wide federal adjudication). Alaska's state law was crafted to encourage the federal government to establish its claims under the state system and obviate the need to assert FRWR claims.

History of FRWR Adjudication Activity in Alaska

In March of 1981, the instream flow subcommittee of the Alaska Land Mangers Cooperative Task Force recommended a 5-year schedule for quantifying instream flow needs and 10-years for

other water allocations for federal and non-federal reservations of land. Funding was never realized to collect and then analyze the hydrologic and other data needed. A FRWR (state/federal) work group was formed in 1985 to encourage settlement of the water needs for federal reservations of land and Annette Island. The group has since disbanded.

Only one attempt has been initiated in Alaska to adjudicate FRWR under Alaska's Water Use Act, to date. The candidate basin was the Indian River watershed in Sitka. This system has several water rights claims by federal, state, and private entities, including some of which are grandfathered under state law (AS 46.15) with priority dates predating statehood. The National Park Service claim is located at the lower reach of this river. The FRWR adjudication process was attempted under state law for resolving FRWR and outstanding claims that exceeded the amount of water available for this system. However, parties were unable to reach a settlement agreement and the FRWR process attempted was never completed for this basin. There may be a light at the end of this particular tunnel for resolution of Indian River water rights claims under state law. An interagency meeting was held earlier in 1998 to begin discussions for resolution of this claim. Whether a parallel completion of the FRWR process will also result in unknown. For the time being, parties are sharing resources to collect stream gage data.

Another claim may occur in Metlakatla (the only recognized Indian Country in Alaska) related to water export plans. Other FRWR under consideration are Ship Creek in Anchorage, various tributaries in the Kenai National Forest and other Wildlife Refuges.

Future FRWR Claims

It is uncertain haw the Alaska National Interest Land Claims Act (ANILCA) and the Ninth Circuit Court's decision in the Katie John case will impact the adjudication of FRWR in Alaska in the long-run. However, it should be noted that in 1985, Bruce Landon, of the U.S. Dept. of Justice, (at an Alaska Water Resources Board meeting) stated that he felt the long list of written purposes for conservation units, that were included in ANILCA will eventually assist the federal government to define the basis for its water requirements as required to assert FRWR. At the same gathering, Tom Meacham, as a former member of the Alaska Water Resources Board, stated he had written the definition of terms included in ANILCA, and indicated they were intended to define both the quality and quantity of water as being reserved under ANILCA reservations.

It is important to emphasize the long-term ramifications of Katie John and other related litigation and legislative actions remain unknown. These all pertain to definitions of public lands that would transfer state management of navigable waters and fish and wildlife resources that use those waterways outside the boundaries of a federal reservation of land to federal management (including the impacts on the long-term management of fish and wildlife in Alaska).

Obstacles to FRWR and other Adjudications

Alaska has existing mechanisms enabling the state to initiate FRWR under its current statutes; but, doesn't presently exercise this authority to force an adjudication, largely based on questions associated with the burden of paying the cost for collecting and analyzing the needed data for adjudications.

Alaska has 20% of the nation's land mass and an estimated 40% of the nation's freshwater (much of which is located in navigable waterways) many of which are located within or flow through one or more federal reservations of land. With thousands of flowing waters and millions of lakes, ironically less than 500 stream gages have been established in Alaska since 1908. Of those, on the average, only 87 are currently operating in any one year. Consequently, Alaska has only one stream gage per approximately 8,300 square miles or less than 1% of all waterways gaged.

Thus, as noted above, a major hurdle to adjudications is the uncertainty as to who pays, and what share, for collecting and analyzing the data needed for an adjudication? This topic is also addressed with access to waterway issues in a recent state legislative audit report, "Audit Report-Department of Natural Resources, Department of Fish and Game, and Department of Law Waterway Management Issues-Audit Control Number 10-4540-97".

Other Factors of Concern

Perhaps most significant to Alaskans in the short-run is the pending late 1999 (postponed from December 1, 1998) implementation of the Katie John ruling. Notwithstanding legal and other challenges to resolve differences between Alaskan and federal laws associated with subsistence, it will require federal management of fish and wildlife on all public lands (identified by federal agencies under regulation) which, now can include navigable waterways (federal definition) outside of a federal reservation.

Concurrent with the public land definition is the claim that federal entities will be able to exercise extraterritorial powers in other federal and non federal locations when necessary to provide subsistence users their fish and wildlife for subsistence purposes. This raises the question as to who will have the responsibility for protecting Public Trust Doctrine uses which include fishery, navigation, commerce, recreation, etc.?

Other uncertainties exist in Alaska related to a mosaic of land ownership patterns and interagency authorities. Yet to be resolved are conflicting claims of supremacy between a federal agency's claim over water allocation under FRWR versus other federal laws granting powers to other agencies such as the Federal Energy Regulatory Commission.

Summary

In summary, Alaska's infancy as a state, combined with its vast water resources and federal lands, set the stage for significant adjudications of FRWR in the future. The resulting adjudications are likely to have a major role in establishing the scope and procedures for FRWR in both Alaska and the nation.

Supplemental Materials

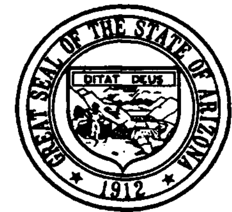
Copy of Alaska Statutes 46.15.165 - 169, excerpted from the Alaska Water Use Act.

Copy of Alaska Administrative Code Sections 11 AAC 093.0400 - 0440, existing Alaska Water Use Act related regulations addressing federal reserved water rights.

Copy of Alaska Administrative Code Section 11 AAC 005.0010, existing Alaska Water Use Act related regulations for water use and application fees.

ARIZONA DEPARTMENT OF WATER RESOURCES

500 North Third Street, Phoenix, Arizona 85004
Telephone (602) 417-2420
Fax (602) 417-2415



February 22, 1999

JANE DEE HULL
Governor

RITA P. PEARSON
Director

Mr. Jim Alder
Western States Water Council
Creekview Plaza, Suite A-201
942 East 7145 South
Midvale, Utah 84047

Dear Jim,

I am writing on behalf of the Arizona Department of Water Resources (ADWR) in response to the Western States Water Council (WSWC) survey dated May 1, 1998 regarding non-Indian federal reserved water right claims. The responses enclosed are based on the filings made by the United States in the San Pedro River Watershed (SPRW) in the Gila River General Stream Adjudication. This watershed was chosen because it is representative of the variety of claims filed by the United States in Arizona's two general stream adjudications. Please bear in mind that the answers included are with regard to the SPRW only unless otherwise stated. The Arizona Department of Water Resources appreciates the opportunity to participate in this survey.

Background of the San Pedro River Watershed

The SPRW is comprised of the San Pedro River and two major tributaries, the Babocomari River and Aravaipa Creek. The San Pedro River has a total drainage area of approximately 4,485 square miles and a total river length of 151 miles in the United States. The Babocomari River drains approximately 308 square miles and Aravaipa Creek about 560 square miles. The population of the principal communities in the watershed is expected to reach approximately 70,000 by the year 2000. Agriculture and mining are the predominate resource oriented activities in the area. The majority of lands are used for agriculture and livestock raising.

Precipitation in the watershed results from two major cycles; lesser winter precipitation events result from large cyclonic storms originating over the Pacific Ocean while the major precipitation comes from convective thunderstorms during the months of July, August and September. The SPRW has a wide valley floor containing older alluvial deposits with younger alluvium along the stream channels and is bounded beneath and on the sides by consolidated rock material. The watershed receives its water supply from direct precipitation, snowmelt

runoff and baseflow derived from groundwater discharges to the stream. A current condition water budget analysis of the SPRW shows a total supply of 158,610 acre feet per anum (afa), depletions (both natural and cultural) of 122,520 afa, and a groundwater and surface water outflow of 58,110 afa excluding the Aravaipa subwatershed. Most years, only prolonged high water flows and significant summer flood flows are able to pass through the entire system and ultimately reach the Gila River.

The SPRW is comprised of federal, state trust, Indian and private lands. Federal lands account for 637,987 acres (26.5 %) of the watershed. These lands are administered by the United States Department of Agriculture (USDA), the United States Department of the Interior (USDI) and the United States Department of Defense (USDOD). The United States Forest Service (USFS) administers the Coronado National Forest comprising 376,135 acres. The Bureau of Land Management (BLM) administers 170,115 including the 48,000 acre San Pedro River National Conservation Area (SPRNCA). The National Park Service (NPS) manages the Saguaro National Monument and the Coronado National Memorial together comprising 12,427 acres. The USDOD's major holding is Fort Huachuca, located in Sierra Vista.

Non-Indian Reserved Rights Claims Generally

Because both the Gila River General Stream Adjudication and the Little Colorado River General Stream Adjudication remain in pending status, no non-Indian federal reserved rights have been "established" in the sense that they have been recognized by a court of competent jurisdiction. Therefore, the answers herein are based on those rights which have been claimed by the United States in the SPRW. The NPS, the USFS, the Fort Huachuca Military Installation and the BLM have all made multiple claims in the SPRW under the traditional reserved rights doctrine. In addition, some claims have sought to appropriate amounts which are arguably in excess of that which would be recognized under the traditional doctrine.

National Park Service:

The NPS claims water rights for both the Coronado National Memorial and the Saguaro National Monument. The former was established in 1951 as part of the Huachuca Forest Reserve created by proclamation in 1906 to commemorate the explorations of Francisco Vasquez de Coronado. The annual visitation to the memorial was 57,738 in 1990. The NPS has submitted 5 claims for 3 springs and 9 wells within the Memorial boundaries. Of these, 2 springs and 4 wells claim a federal reserved water right. The claims include an annual use of 6 afa for park administration and facilities and claims for unquantified present and future uses for fire suppression, trail construction, and revegetation activities necessary to maintain or return watersheds to their natural conditions with priority dates as of the reservation date for the lands where the water is developed. The Rincon Unit of the Saguaro National Monument was established by proclamation of 1933 from lands reserved originally as part of the Catalina Forest Reserve for the preservation of lands with specific types of cacti. The NPS has claimed four springs totaling approximately 2 afa for use for indigenous flora and fauna and fire suppression with a priority as of the date of the original Catalina Forest Reserve Reservation in 1907.

United States Forest Service:

The Coronado National Forest has filed 2 claims for reserved rights for the Powers Garden Administrative Site. The right is premised on the reservation of land for the Coronado National Forest on September 26, 1910. The USFS claims current uses including fire suppression and periodic domestic and stock watering along with occasional irrigation. The total claims amount to 1.05 afa for these uses.

Fort Huachuca Military reservation:

Fort Huachuca is currently the Headquarters for the United States Army Intelligence Center and occupies 73,272 acres. The reservation has been increased from 41,760 acres when it was originally established in 1881. The population of the Post was estimated at 9,200 in 1990. The Fort has filed 2 claims for 25 wells, 39 springs and 74 ponds. The total annual use claimed is 10,522 afa for military installation purposes. The basis of the claims is a federal reserved water right with a priority of the date of original reservation, October 28, 1881.

Bureau of Land Management:

The BLM has claimed a number of water rights based on Solicitor's Opinion M-36914 1979 (Krulitz Opinion). Therein, the Solicitor discussed the nature and extent of federal reserved water rights on federal lands. The claims are based specifically on Public Water Reserve No. 107. Section 4 of the Krulitz Opinion discussed the executive order which generally dealt with the reservation of public lands containing water holes and other bodies of water needed for public purposes. The BLM also claims that Executive Order 11990 dated May 24, 1977, provides a basis for a federal reserved right to maintain natural systems and riparian habitat. The BLM has claimed a federal reserved right to 39 springs and 1 stockpond based on Public Water Reserve No. 107. The average claimed use per spring is 0.88 afa. The average claimed flow for each springs is 2.41 afa. The average annual flow into the stockpond is estimated at 0.32 afa. The claimed uses are stock, wildlife including fish, recreation and habitat maintenance.

The SPRNCA is also administered by the BLM. SPRNCA encompasses 47,668 acres along the San Pedro River. The BLM claims an instream use of 11,028 afa for two discreet segments of the river. The claimed uses are municipal, domestic, recreation, fish and wildlife and instream flow. The priority date claimed is 1988, the year SPRNCA was created. The filing was amended in 1991 to also claim administrative uses, maintenance of the natural hydrologic processes, watershed rehabilitation and fire suppression. The claim covers present and future use from all existing springs, cienegas, ponds, lakes, and wells.

The claims described are typical of the types of non-Indian federal reserved rights claims that have been made throughout the state in both the Gila River General Stream Adjudication and the Little Colorado River General Stream Adjudication. The Department of Water Resources's position with regard to these various claims is the subject of the next section.

Federal Reserved Rights v. The Federal "Proprietary" Right

ADWR recognizes the federal reserved rights doctrine as it has evolved from Winters v. United States 207 U.S. 564 (1908) through more recent interpretations including United States v. New Mexico, 438 U.S. 696 (1978), and California v. United States, 438 U.S. 645 (1978). While ADWR does not dispute the ability of Congress to reserve amounts of water necessary to fulfill the *primary* purposes of a particular reservation, ADWR agrees with the Supreme Court's holding in New Mexico that, "where water is only valuable for a *secondary* use on the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views that the United States would acquire water in the same manner as any other public or private appropriator"[emphasis added]. 438 U.S. 702.

Accordingly, ADWR would challenge the assertion that a federal proprietary right exists to appropriate waters beyond that amount necessary to fulfill the primary purposes of a reservation out of turn with the state's prior appropriation system. As noted, the BLM sites the Krulitz Opinion referenced above as the basis for many of its federal claims in the SPRW. The Krulitz Opinion, potentially at odds with New Mexico, was significantly modified by more recent interpretations by Solicitor Coldiron.

The Coldiron interpretations limited the purposes for which Public Water Reserve No. 107 operates to reserve water rights on the public domain to human and animal consumption and concluded that rights to all other uses must be obtained according to state law. M-36914 (Supp.II), Feb. 16, 1983. According to Coldiron:

> "Congress gave the states broad power to provide for the administration of water rights which would only be limited where necessary to accomplish the original purpose of a congressionally mandated reservation or to protect the navigation servitude. As a result of this implicit grant of power, the presumption is that state law will control all non-reserved claims unless Congress provides otherwise.... In construing land management statutes, deference to state law rises to a presumption that the United States and its agencies must acquire water rights in accordance with state substantive and procedural law unless necessary for the original purpose of a reservation." M-36914 (Supp. I) Sept. 11, 1981.

The current position of the Solicitor with respect to federal reserved water rights is not only more in keeping with the spirit of Public Law 107, but also with the leading Supreme Court cases interpreting the doctrine. *See e.g.* New Mexico and California.

Other Assertions of a Federal Water Right

Another potential conflict with state regulation of water rights is the assertion of a federal right deemed necessary to comply with federal environmental mandates. For example, the Federal Energy Regulatory Commission (FERC) is charged with licensing non-federal dams in the state. Section 10(j) of the Federal Power Act (FPA) now requires that certain conditions be placed on licenses in order to, "adequately and equitably protect, mitigate damages to and

enhance fish and wildlife (including spawning grounds and habitat)..." 16 U.S.C. § 803(j). There have been instances in the State of Arizona where such relicensing procedures have resulted in demands by FERC that specific minimum stream flows be included as a condition in the newly issued license. Th United States argues that these flows are necessary to preserve and protect an acceptable environmental baseline.

At least one owner of a hydroelectric facility in Arizona is now engaged in this process. The facility is currently up for relicensing. The facility owner holds all state based water rights claims to the baseflow of the stream. With the dam in place, there remains a continuous flow in the stream comprised primarily of underflow at the dam, precipitation derived from runoff and ongoing return flows to the stream from facility water conveyance equipment. Aquatic and riparian habitat exists in the area, and as a routine part of the licensing process endangered species studies are currently being conducted in the area. Based on the mandates of the FPA, the Endangered Species Act and the National Environmental Policy Act, FERC has proposed that, as a condition of the facility's new license, the owner maintain minimum flow releases. The federal land manager has proposed that the owner permanently relinquish a portion of its water rights to sustain minimum stream flows and support the critical habitat in the area. The relinquished rights would then be transferred to the federal government which would hold the right and maintain the flows in perpetuity. Thus far, there has been no discussion regarding compensation for these rights.

With so many hydroelectric facilities coming due for relicensing in the next decade, these types of demands are likely to become more common. The Arizona Department of Water Resources is concerned about the displacement of state based water rights potentially resulting from such relicensing decisions.

State and Federal Interaction Regarding "Reserved Water Rights"

Where possible, the State of Arizona has encourage the federal government to work within the prior appropriation system to effectuate its goals on its various holdings. In some instances, there has been much progress. For instance, ADWR has had success in working with the federal government in obtaining in situ use rights for its riparian maintenance and fish and wildlife needs. There have been 12 applications by the BLM and 1 by the USFS for instream flow use in the SPRW. Of these, two have been certificated (1 on the San Pedro River and 1 on Aravaipa Creek), three have been permitted (on smaller tributaries) and the remaining applications are still pending. While the technical requirements for obtaining an instream flow permit are exacting, ADWR continues to work in conjunction with the federal government toward perfection of some 78 instream flow applications throughout the state.

In some cases the federal government has been reluctant to work within the state system and has maintained the need for a federal reserved water right. In such instances ADWR, along with many private entities, have in the course of various negotiations agreed to recognize in federal rights certain attributes which are reminiscent of a federal reserved water right. For instance, the right may have a priority date as of the date of the reservation, and may not be subject to forfeiture or abandonment. In return, the federal government has agreed to quantify

these rights and remove the label of "federal reserved water right." The benefit of this bargain is that the quantification eliminates much of the uncertainty surrounding the size of the federal right. Of course, there remains the question of the level of protection to which the right is entitled. This tactic is currently being pursued in negotiations between the NPS and various private claimants in the Little Colorado River Watershed. This negotiated water right concept has yet to be implemented anywhere in the state.

Magnitude of Claims and Costs of Adjudication

There are approximately 900 federal claims in the SPRW. The total number of federal claims outstanding in the both the Gila River General Stream Adjudication and the Little Colorado River General Stream Adjudication is approximately 16,000. Unfortunately, the total volume of water associated with these claims could not be determined as we are currently in the middle of a database conversion and our query capacity is compromised.

The cost of the two adjudications to the State of Arizona have been and continue to be immeasurable. The Gila River Adjudication has been pending since 1974 and the Little Colorado since 1978. While much time will be spent on the determination of individual claims, it can be assumed that, given the size and complexity of federal reserved rights claims (both Indian and non-Indian) the quantification of these claims will comprise a large portion, if not the majority of the costs to the State of Arizona, the United States and the many individual claimants. Consequently, ADWR continues to support settlement of these claims in an effort to resolve the uncertainty created by their very nature.

Again, ADWR appreciates the opportunity to participate in this survey and hopes that its responses will aid WSWC in its goals.

Sincerely,

Thomas R. Wilmoth
Deputy Counsel

GALE A. NORTON
Attorney General

MARTHA PHILLIPS ALLBRIGHT
Chief Deputy Attorney General

RICHARD A. WESTFALL
Solicitor General

STATE OF COLORADO
DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STATE SERVICES BUILDING
1525 Sherman Street - 5th Floor
Denver, Colorado 80203
Phone (303) 866-4500
FAX (303) 866-5691

June 30, 1998

Jim Alder, Legal Counsel
Western States Water Council
Creekview Plaza, Suite A-201
942 East 7145 South
Midvale, Utah 84047

RE: Survey of Western State Experiences with Federal Non-Indian Water Claims

Dear Jim:

Before responding to your survey, I would like to make some general comments on your cover letter. I don't mean to be academic, but I don't want Western States Water Council to make statements that could later be used to the states' detriment. You state, "In order to determine ... federal claims to water, states must launch very expensive and time-consuming state court adjudications." While this may be true for other states, Colorado has ongoing adjudications conducted by designated water judges and referees in all seven of its drainage basins. Therefore, while litigating federal claims is expensive and time-consuming, it fits within Colorado's established institutions and procedures and does not involve initiating new adjudications. Given the western states' long battle to force the federal government to assert its claims in state adjudications pursuant to the McCarran Amendment and our desire to have the federal government claim water rights in those proceedings rather than using its permitting authority to exact bypass flows, I believe that we need to be careful in complaining about the expense and we need to be sure that we have fair and efficient adjudication procedures in place.

Second, in your discussion of federal reserved rights, you state, "If Congress authorizes creation of a park, wildlife refuge, national forest, military base, wilderness area, or other reservation of public land that demands water for its success, reserving the land implies an intention to reserve sufficient water to carry out the congressional purposes." This statement glosses over important questions about what constitutes a *reservation* and what the *primary* purposes of the reservation are. It is still an open question, and a hotly contested one, whether the designation of wilderness areas under the Wilderness Act of 1964 created reserved water rights. *See Sierra Club v. Yeutter,* 911 F.2d 1405

(10th Cir. 1990). I am aware of one Idaho lower court decision holding that the 1964 Wilderness Act did reserve water rights, In Re SRBA, Case No. 39576, District Court, Fifth Judicial District, State of Idaho (Dec. 18, 1997), but I believe Idaho intends to appeal the decision.

In discussing federal proprietary claims to water, I think it is important to distinguish between non-reserved water rights and appropriative rights. The former is, as far as I know, theory only. The theory originated in a 1979 solicitor's opinion, generally referred to as the Krulitz Opinion, which stated that a federal agency could claim appropriative rights necessary to serve *any* Congressionally authorized land management function, without regard to state substantive or procedural law. While the opinion was not limited to federal land reservations, it was tied to federal land ownership and concomitant land management responsibilities. The Krulitz Opinion was subsequently modified by the Martz Opinion and then repudiated by the Coldiron Opinion. There is also a Department of Justice memorandum (from Theodore B. Olson to Carol E. Dinkins) that contradicts the Krulitz Opinion. (I can get you copies or citations if you need them.) The point is that, as far as I know (although I'm not familiar with the Yakima basin claims you mention in 2.a.), the federal government has never claimed a water right based on the theory of non-reserved rights and that theory should not be confused with appropriative rights claims made pursuant to state law.

Finally, in discussing other federal claims based on federal law, you refer to "federal regulatory rights." While federal agencies have sought to use their permitting authority to require the holders of water rights to relinquish a portion of their yield, such requirements do not create water rights. I realize that the states and water users sometimes refer to these permit conditions as "regulatory rights" because federal agencies seek to use them as substitutes for water rights, but I think we need to keep in mind that they are not really rights. For instance, bypassed flows will not have a priority date and will not be protected from subsequent diversion by a downstream water user.

I hope those points are useful to you. Turning to the survey, your questions could take several weeks and several hundred pages to answer. I'll give the short version. Please feel free to call me if you need more detail in specific areas.

1.a. In the mid-1970s, the United States filed reserved rights claims in all seven Colorado water divisions, which correspond to the state's seven drainage basins. The claims included surface water rights for both instream flows and out-of-stream uses and ground water rights. The applications did *not* include any wilderness areas *(see Yeutter)* and, to date, the United States has not asserted any wilderness reserved rights. Subsequent Colorado wilderness legislation expressly disclaimed any reserved rights.

There has generally been little dispute over the non-instream flow claims, which are usually for small amounts, and those claims either have not been contested at trial or have been granted by stipulation. There has been some dispute over whether the United States needs to apply for well permits for its claimed groundwater rights, but we have resolved the question by compromising on

something that looks like a permit but isn't. I will try to list all the reservations for which reserved rights were claimed, but won't discuss the non-controversial surface water and groundwater claims. **National parks:** Rocky Mountain National Park; Mesa Verde National Park.

The United States was granted instream flow rights for the west slope of Rocky Mountain National Park with little or no opposition, but the amounts still have not been quantified. The United States was also awarded instream flow rights for all the water on the east slope of Rocky Mountain National Park, despite unsuccessful arguments that water rights were not needed at all given the park's headwaters location and that the federal government had not proven the minimum amount of water necessary. The United States, Colorado, and water users negotiated a decree for Mesa Verde National Park that gives the United States modest instream flows.

National monuments: Black Canyon of the Gunnison National Monument; Dinosaur National Monument; Colorado National Monument; Great Sand Dunes National Monument; Hovenweep National Monument; Yucca House (claims withdrawn).

The United States claimed instream flow rights for Black Canyon, Dinosaur, and Great Sand Dunes national monuments. The claims for Black Canyon were granted with little or no opposition, but the amounts have not yet been quantified. The claims for Great Sand Dunes were decreed by stipulation. The instream flow claims for Dinosaur National Monument were denied.

National forests: The United States claimed reserved rights, including instream flows, for national forests in all seven water divisions.

The instream flow claims in the Colorado, Gunnison, and Yampa river basins were denied because the federal government did not base its case on the primary purposes of the forests. The instream flow claims in the South Platte basin were litigated in a major trial which began in 1990. The water court denied the claims because the United States failed to prove either necessity or the minimum amount of water needed. The Forest Service still has instream flow claims pending in the Arkansas, Rio Grande, and San Juan basins. The state and water users are currently negotiating with the United States in these three cases to try to address all forest purposes in one decree that would foreclose future appropriative rights claims and permit demands for water.

Naval oil shale reserves: The United States obtained decrees for surface and ground water rights on the reservation, but was denied a reserved right from the mainstem of the Colorado River, which is not appurtenant to the reservation.

Public springs and water holes: The BLM claimed the entire yield of over 1,500 water holes and springs on lands withdrawn from the public domain under a 1926 executive order. The Colorado Supreme Court ruled that the BLM was not entitled to the entire yield, but only to that amount of water necessary to prevent monopolization. The rights were subsequently quantified by stipulation.

Mineral hot springs: The federal government's claims for reserved rights under the Pickett Act were granted, but its claims under the Geothermal Steam Act were denied.

Military bases: Fort Carson; Fort Lyon V.A. Hospital. Decreed.

Fish hatchery: Leadville Fish Hatchery. Decreed

Wild and scenic river: Cache la Poudre River. The Poudre was designated in 1986 and the legislation expressly provided for the adjudication of a reserved right, which was subsequently decreed by stipulation.

BLM oil and gas conversion well: One well was decreed over the objection of the leasing entity.

1.b. See above. Generally Colorado's position is that the doctrine of reserved rights should be strictly construed and the United States should be held to strict proof of all the elements of a reserved right. Where possible, the state has attempted to resolve the United States' claims through negotiation and stipulated decrees. The instream flow claims for the national forests have been the most problematic. Colorado's position has been that the Forest Service is not entitled to reserved instream flow rights, but we have been willing to try to negotiate reserved right decrees if- (1) they are subordinate to all existing uses; (2) they will allow reasonable future development; and (3) they will foreclose future appropriative rights claims and federal efforts to require bypass flows as a condition of land use permits. The state's goals are to protect existing uses and a reasonable amount of new development and to achieve maximum certainty for water users.

1.c. The Forest Service has been unwilling to accommodate future uses or to provide reasonable certainty for water users with facilities in the national forests that are subject to future land use authorizations. The state, water users, and the Department of Justice had agreed *in writing* to certain "certainty" principles in the Arkansas River basin case and the Forest Service repudiated the agreement.

1.d. The Forest Service instream flow claims evolved legally as a result of *United States v. New Mexico* and *United States v. Denver,* 656 P.2d I (Colo. 1982), which followed *New Mexico,* and factually as a result of its proof problems in the South Platte case.

1.e. Virtually all of the reserved right claims except the Forest Service instream flow claims have been decreed, are awaiting the entry of final decrees, or have been dismissed. The outcome of the Forest Service instream flow negotiations, particularly in the Arkansas River basin, is very uncertain. If negotiations break down altogether, the United States will have a short time to quantify its claims and the state will vigorously oppose them.

2.a. The federal government has asserted appropriative rights claims, but not non-reserved rights claims, in Colorado. Federal claims for appropriative rights in accordance with Colorado law have generally been granted without serious opposition. Again, the problem has been with instream. flow water rights. Under Colorado law, only the Colorado Water Conservation Board may be granted a decree for an instream flow right. Although there were several instances in the mid-1980s where the National Park Service and the Forest Service purchased existing agricultural rights and obtained decrees changing them to instream flow rights, to date, no federal agency has obtained a decree for a new instream flow appropriation. (The federal government has on occasion claimed to have been awarded instream flow rights for fire protection, wildlife and livestock watering, and recreation. However, the record shows that these rights are not instream flow rights; they are rights for out-of-stream uses that do not require a permanent, man-made diversion structure.) Federal agencies have twice applied for new appropriative instream flow rights. A 1987 Fish and Wildlife Service application for an instream flow right for a wildlife refuge was denied by the water court. In 1994, the Forest Service applied for an instream flow right on a small creek in the Rio Grande basin. That application is still pending.

2.b. Colorado has opposed federal claims for appropriative instream flow rights as contrary to state law. The state encourages federal agencies to request that the Colorado Water Conservation Board apply for rights to protect instream flows on federal lands. When the Forest Service filed its 1994 application for an instream flow right, the CWCB not only opposed the application, but filed its own application to demonstrate that it could and would protect the resource. The CWCB has successfully worked with federal agencies, including the Forest Service, to protect instream flows.

2.c. The response has been mixed. Sometimes federal agencies have been willing to work with the CWCB, but other times they argue that they have a separate mandate to fulfill and cannot rely on a state agency.

2.d. I don't think that there has been a pattern.

2.e. The 1994 Forest Service application is the only such claim pending. The parties agreed to stay that case and the CWCB application while they negotiated, and the cases are now included in the ongoing reserved rights negotiations.

3.a. I believe that most of the water rights for federally-operated reservoirs in Colorado have been adjudicated in state or federal court; some are actually decreed to non-federal entities. Federal agencies have not asserted water rights for Endangered Species Act or Clean Water Act purposes. However, the federal government has asserted that federal agencies have the authority to deny permits if water depletions associated with the facility to be permitted would jeopardize an endangered species or adversely modify its critical habitat. *See Riverside Irrigation Dist. v. Andrews,* 758 F.2d 508 (10th Cir. 1985). Obviously this could conflict with the exercise of state-created water rights and the full development of water allocated to the state by interstate compact or decree. The

Forest Service has also asserted the authority to require bypass flows as a condition of issuing or renewing land use permits. This issue is discussed in the bypass flow task force report (Report of the Federal Water Rights Task Force Created Pursuant to Section 389(d)(3) of P.L. 104-127) and the attached article by Jim Witwer.

3.b. Colorado does not concede that federal environmental statutes supersede interstate compacts and decrees or allow the federal government to preclude the exercise of vested rights without paying compensation. However, we try to work with federal agencies to accomplish their purposes within state law. For instance, we are parties to the Recovery Implementation Program for Endangered Fish Species in the Upper Colorado River Basin and the Cooperative Agreement for Platte River Research and Other Efforts Relating to Endangered Species Habitats Along the Central Platte River, Nebraska. Our bottom line, however, is that federal mandates must be fulfilled within the framework of state law and interstate compacts and decrees. Colorado also strongly opposes the federal government's use of permit conditions as a substitute for acquiring water or water rights pursuant to state law. Colorado has supported water user efforts to develop voluntary coordinated reservoir operation plans that benefit the environment without reducing the yield of decreed water rights.

3.c. Federal agencies take the position that their mandates supersede state law. However, they often wish to avoid litigation and are willing to at least try to negotiate a compromise that is consistent with state law. However, these compromises never fully resolve the issues; rather, they result in a continuing tug-of-war between state and federal interests. Any state entering into an agreement such as a recovery program should be prepared for long-term institutionalized conflict.

3.d. I don't think these positions have changed on either side. The *Riverside* case obviously has influenced negotiating positions.

3.e. The current status is as described above; there never seems to be a final "outcome"; negotiations just advance to another level.

4. 1) There have been thousands of federal claims asserted in Colorado adjudications. If each stream on which the Forest Service claims a right is counted separately, hundreds of disputed claims still remain.

2) Can't estimate. Moreover, the nature of the instream flow claims makes it impossible to quantify them.

3) I assume that this question refers to costs to the state. There are two aspects to the cost of adjudicating the federal claims: the costs associated with the state's role as adjudicator and the costs incurred in its role as a litigant. As to the former, as noted above, Colorado conducts ongoing adjudications, so the water courts, including judges and referees, are already in place and functioning. As to the latter, opposing and/or negotiating the federal claims has been very expensive.

I can't give you even a ballpark estimate of our costs over the past twenty plus years, but they have included the salaries and expenses of from two to four full time attorneys and a paralegal for about fifteen years plus support from Division of Water Resources and Colorado Water Conservation Board staff and outside experts.

5. See answers above. In addition, it apparently has been a Department of Justice policy (unwritten as far as we know) not to claim reserved rights for reservations created from acquired (i.e., non-federally owned) land rather than from the public domain. The Forest Service Manual also contains federal policies requiring it to rely on reserved water rights, obtain water rights under state law, or purchase water rights before using permits to protect instream flows (FSM §§2541.03, 2541.04b, 2541.31, and 2541.42), inventory foreseeable national forest water requirements (FSM §254 1.11); determine the amount of water needed for instream and standing water purposes (FSM §2541.12); and, in states that require that instream flow rights be held in the name of the state or a state agency, work with the appropriate agency to obtain and protect needed flows (FSM §2541.31), all of which the Forest Service routinely disregards.

6. None.

I hope these answers will be helpful to you. Please feel free to call me I you have questions or would like additional information.

Sincerely,

WENDY C. WEISS
First Assistant Attorney General
Natural Resources Section
(303) 866-5008

Enclosure
cc: Peter Evans (without enclosure)
Hal Simpson (without enclosure)
David Holm (without enclosure)

Supplemental Materials

Letter from Howard Holme, Carol D. Angel, Mary Mead Hammond, and Mark T. Pifher to James J. DuBois, Trial Attorney, U.S. Department of Justice (September 16, 1998). The authors of the letter are responding to what they describe as unacceptable Forest Service negotiating tactics, flawed Forest Service public policy, and inadequate legal analysis to support the Forest Service's abrupt reversal of position in regards to its ability to settle its claims to water.

Letter from James J. DuBois to Carol Angel, Colorado Senior Assistant Attorney General (July 31, 1995). The letter sets forth the terms of all purposes for instream flow needs on the National Forest lands in Water Division No. 2 which the Forest Service might have addressed.

Letter from M. M. Underwood, Jr., Rocky Mountain Region Director of Physical Resources for the U.S. Forest Service to Daries C. Lile, Colorado State Engineer (December 18, 1997). This letter sets forth principles for settlement of instream flow claims agreed to by the Forest Service.

Letter from Gale A. Norton, Colorado Attorney General, to Representative Scott McInnis, U.S. Congressman (September 18, 1998). Details the frustrations and difficulties Colorado is experiencing in dealing with Forest Service's about-face regarding settlement authority.

Memorandum from Kenneth D. Paur, Attorney/Advisor, U.S.D.A Office of the General Counsel, to Skip Underwood, Director of Physical Resources, U.S. Forest Service, Rocky Mountain Region (March 16, 1998). This memo provides the basis for the Forest Service's argument that it lacks the authority to settle its claims to water in Colorado.

The Renewal of Authorizations to Divert Water on National Forests, by James S. Witwer. This article appeared in the Colorado Lawyer, volume 24, No. 10, October 1995. The article discusses the origins of the Colorado bypass flow controversy.

IDAHO RESPONSE TO WSWC SURVEY REGARDING
FEDERAL RESERVED WATER RIGHTS

Prepared by Clive J. Strong

1. Description of non-Indian federal reserved water right claims.

   a. Deer Flat National Wildlife Refuge - 1 claim

      Description of Second Amended Notice of Claim for the Snake River Islands Unit.

Period of Year	Amount of Water	Purpose
Jan. 1 through Feb. 28/29 (Upper Reach hereinafter "UR")	5,600 c.f.s.	To maintain water around all islands
March 1 through June 30	12,000 c.f.s.	To prevent mammalian predation of nesting water fowl
July 1 through December 31 (UR)	5,600 c.f.s.	To maintain water around all islands
July 1 through September 30 (UR)	7,500 c.f.s. 7 days out of every 14 days	To prevent recruitment of vegetation that would cause island coalescence
Once every five years (UR)	27,900 c.f.s. average flow for five days	A geomorphic flow to maintain the islands as islands
Jan. 1 through Feb. 28/29 (Lower Reach hereinafter "LR")	7,180 c.f.s.	To maintain water around all islands
March 1 through June 30	17,000 c.f.s. Weiser gage minus Weiser River flow	To prevent mammalian predation of nesting water fowl
July 1 through December 31 (LR)	7,180 c.f.s.	To maintain water around all islands
July 1 through September 30 (LR)	8,620 c.f.s.	To prevent recruitment of vegetation that would cause island coalescence
Once every five years (UR)	55,800 c.f.s. Weiser River gage minus Weiser River	A geomorphic flow to maintain the islands as islands

History of the Claim for a Reserved Water Right for the Snake River Islands Sector of the Deer Flat National Wildlife Refuge.

March 25, 1993: The United States files one notice of claim with three priority dates for the Snake River Islands Sector. The monthly average flow claimed for **channel maintenance** varies from a low of 5,000 c.f.s. to 40,000 c.f.s..

February 25, 1994: The United States files an amended notice of claim with three priority dates for the Snake River Islands Sector. The quantity claimed is "all unappropriated water," and the purpose of use is described as **"wildlife."**

February 1996: United States informs objectors in a negotiation session that it intends to amend its claims at the Deer Flat Refuge.

May 1, 1996: Initial disclosure by the United States. This disclosure included about 17,400 pages of written material and several hundred aerial photos. A document produced on discovery indicates that the purpose of the 1994 amended claim for "all unappropriated water [was] to allow bargaining if all avail [sic] priority date water can't be supported." See Attachment 1.

September 1, 1996: Full discovery began.

December 1996: Objectors request about 3,600 pages of undisclosed documents.

January 15, 1997: United States deposits additional 14,000+ pages of undisclosed documents at its depository.

January 30, 1997: Deposition of Ron Thomasson. Mr. Thomasson describes the proposed amendments to its reserved water right claims as follows: (1) to maintain water around all islands, (2) to prevent mammalian predation of nesting waterfowl, (3) to prevent recruitment of vegetation that would cause island coalescence, and (4) to maintain the islands as islands by a geomorphic flow.

February 14, 1997: United States files a Motion to File: Amended Notice of Claim. The claimed flows in some cases are greater than were described at the deposition on January 30, 1997. The District Court later grants the motion to amend claim.

July 1, 1998: Counter motions for summary judgment filed with SRBA District Court. Oral argument on the motions is scheduled for September

18, 1998.
Positions of the Parties.

The United States contends that because the Executive Orders and Public Land Orders reserved islands and because islands are surrounded by water there is an implied federal reserved water right. The purposes are as described above.

The State of Idaho contends that the wildlife refuge is a secondary use ancillary to the upstream federal reclamation projects. In fact, the refuge was created based upon the knowledge and acceptance of the regulated flows released from the upstream reclamation projects.

Negotiations.

There were numerous efforts to resolve this claim through negotiations; however, those efforts failed when the United States insisted upon state recognition of a federal reserved water right for the refuge.

Miscellaneous.

The Deer Flat claim impacts a huge number of water rights in Idaho. Every water right with a priority date later than August 1937 from a surface or ground water source tributary to the Snake River upstream of Swan Falls Dam potentially could be shut-off as a result of these claims. Over a million acres of farmland in the upper Snake River basin are at risk of being shut-off. In addition, every water right with a priority date later than April 1963 from a surface or ground water source tributary to the Boise, Payette, and Weiser Rivers could potentially be shut-off. The economic impact of such consequences is incalculable.

b. Idaho National Engineering and Environmental Laboratory - I claim

These claims were settled through negotiations. See attachment 2.

c. Yellowstone National Park - I claim

These claims were settled through negotiations. See attachment 3.

d. Craters of the Moon National Monument - 8 claims

These claims were settled through negotiations. An additional claim will be added based on an addition to the Monument. See attachment 4.

e. Forest Service claims

1. Sawtooth National Recreation Area (SNRA) - 5 claims

Description of Claim.

The United States seeks all unappropriated flows within the SNRA as of the date of its creation in 1975. Although the United States admits Congress envisioned future development within the SNRA, it contends that Congress intended to allow appropriation of water under state law only if the Forest Service first finds that the use is compatible with the purposes of the SNRA. See attachment 5. These claims are being made while the Forest Service is requesting additional moneys for purchase of scenic easements to preclude development within the SNRA. If in fact, the Forest Service has a valid federal reserved water right for the SNRA, there is no need for scenic easements because no water exists for any development.

Positions of the Parties.

The State contends that the SNRA is only a land use management statute. Since Congress intended to allow future development within the SNRA, it could not have intended to appropriate all unappropriated flows. Rather, the Congress intended to achieve the purposes of the SNRA through the use of scenic easements.

Negotiations.

None.

Status.

Counter motions for summary judgment are under advisement by the SRBA district court. A decision is expected within the next few months.

2. Wild and Scenic Rivers - 8 claims

Description of Claims.

The SRBA district court held that the Wild and Scenic Rivers Act created an express federal reserved water right; however, the court denied the United States' motion for summary judgment seeking all unappropriated flows in the main Salmon and Middle Fork of the Salmon. See attachment 6.

Positions of the Parties.

While the State acknowledged that the Wild and Scenic Rivers Act appears by negative implication to provide a basis for a federal reserved water right, Congress intended that any reserved water right would be limited to the minimum amount necessary to achieve the stated purposes for the reservation.

Negotiations.

None.

Status.

The next phase of this litigation will be quantification of the amount of water the United States contends is necessary to achieve the stated purpose(s) for each river designated under the Wild and Scenic Rivers Act. The court may order mandatory mediation of the claims.

1897 Organic Act - 12 claims

Description of Claims.

This is a continuation of the channel maintenance type claims rejected by the Colorado Water Division 1 Water Court.

Positions of the Parties.

The United States contends that Congress intended to reserve flushing flows for maintenance of channel structure.

The State contends that flushing flows were never envisioned by Congress and are not within the purposes identified by the United States Supreme Court in *United States v. New Mexico.*

Negotiations.

The United States is bent upon proving these claims so no negotiations have been pursued. Trial of these claims is expected to occur in mid 1999.

4. Wilderness - 7 claims

Description of Claims.

The SRBA district court held that the United States is entitled to a federal

reserved water right for all unappropriated flows for the Frank Church Wilderness of No Return, the Selway-Bitterroot Wilderness and the Gospel-Hump Wilderness. See attachment 7. This decision is on appeal to the Idaho Supreme Court.

Positions of the Parties.

The United States contends that Congress intended the wilderness areas to be maintained in a pristine condition and that this purpose would be entirely defeated in the absence of a federal reserved water right for all unappropriated flows. This argument was made despite the United States' concession that Congress permitted certain future uses within and upstream of the wilderness areas. See attachment 8.

The State contends that because Congress expressly considered the issue of federal reserved water rights and took no affirmative action to create a reserved water right, it is improper for a court to use a rule of construction to imply a reserved water right. A court should not use a rule of construction to rewrite a statute. Moreover, the state contends that the Wilderness Act is simply a land management statute and all of its purposes can be achieved without a federal reserved water right.

Negotiations.

No negotiations have been attempted on these claims.

5. Multiple-Use Sustain-Yield Act (MUSYA) - 37 claims

Description of Claims.

The SRBA district court denied all of the federal reserved water right claims under MUSYA based upon the rationale of *United States v. New Mexico.* See attachment 6. This decision is on appeal to the Idaho Supreme Court.

Positions of the Parties.

The United States contends that *United States v. New Mexico* did not resolve whether MUSYA provided a basis for a federal reserved water right claim. The State takes the opposite position.

Negotiations.

Although some negotiation efforts were undertaken, they never matured.

6. Hells Canyon National Recreation Area - I claim

Description of the Claim.

The SRBA district court has held that the Hells Canyon National Recreation Area Act created a federal reserved water right to all unappropriated flows in streams tributary to the Snake River. See attachment 6. This decision is on appeal to the Idaho Supreme Court.

Positions of the Parties.

The United States contends that because Congress only expressly disclaimed a federal reserved water right in the main Snake River, it impliedly intended to reserve all flows in streams tributary to the Snake River within the HCNRA.

The State contends that since Congress expressly addressed the issue of reserved water rights, the court is without authority to use a rule of construction to imply a federal reserved water right. The State also contends that the HCNRA was a land management statute and all of its purposes can be achieved without a federal reserved water right.

Negotiations.

None.

Forest Service Instream Flow Claim History in SRBA.

In 1993, the Forest Service filed over 3,764 federal reserved water right instream flow claims in the SRBA.

1. Wilderness claims were made only after a concerted effort by Forest Service personnel to overturn a prior Solicitor Opinion concurred in by the Attorney General that no water rights exist for wilderness areas. An internal memorandum in reference to these claims stated: "Please prepare a paper describing the federal reserved water rights under the Wilderness Act issue. Where we are now, and where we need to be. Make the case that we need to make a move so Justice will have a reason to rescind the Meese letter." Attachment 9. A follow-up memorandum stated: "McCleese wants me to finalize it this week; now that we have a more sympathetic Chief, we want to move ahead quickly, surely & wisely Can (sic) you reply by COB tomorrow (Nov 3 rd)?????" Attachment 10.

2. Likewise, the Multiple-Use Sustained-Yield Act claims were made based upon an agenda not a legal theory. Although the Supreme Court previously suggested that MUSYA did not create federal reserved water rights, agency personnel nonetheless pushed for filing of these claims under the federal reserved water rights doctrine. The basis for this action is set out in an internal memorandum. "We have opted to use this authority for the following reasons: 1. instream flows are not available under state law; 2. inholdings and upstream non-NF lands limit our use of special use permits; 3. these claims put the state and future appropriators on notice of what our water needs are; 4. **they form the basis for negotiations with the state;** 5. this is our one and only chance to assert such claims." Emphasis added. The memorandum goes on to state "We are concerned that we have not received any written confirmation from the Chief that we can move ahead with MUSYA claims. ... Can you instigate a letter giving approval for us to assert reserved water rights under the authority of the Multiple-Use Act?? My gut feeling is that George Leonard would support us on this. But you are in a better position to judge that. **If you need any ammunition let me know."** Emphasis added. Attachment 11.

A careful review of other memoranda discloses that the agency was expending large sums of money on these instream flow claims and yet had no clear legal theory other than to impose costs on the state and private water users so that they would acquiesce to the claims. In regard to dual filing of claims the agency personnel stated: "Undoubtedly, the judge and the Idaho Department of Water Resources would be surprised and perhaps upset by a dual filing under state law; that's a real possibility in my judgment. On the other hand, it may allow them to avoid having to recognize federal reserved rights and could result in the allocation of some water to us for instream purposes. It would also change the balance in the upcoming negotiations between the state and the United States over federal water claims that are to precede any litigation." Attachment 10.

Since there was no cost to the Forest Service for filing the claims, it appears that the agency intentionally embarked upon a program of overwhelming the objectors for strategic reasons.

On September 29, 1995, the Forest Service moved to withdraw all but 71 of these instream flow claims. This withdrawal occurred just 17 days before parties to the SRBA were required to file objections to these claims. In explaining the withdrawal of the approximately 3,600 claims, the Justice Attorney stated:

> The election to withdraw the claims voluntarily was *purely a*

> *strategic decision* intended to allow the United States to focus its limited resources on a discrete number of claims that provide the maximum benefit to the National Forests and the Nation.
>
> * * * *
>
> [T]he Forest Service claims were not withdrawn because they were invalid, but because of a *strategic decision* on maximizing the United States' chances of success given very limited resources.

United States Response To State Of Idaho's Motion For Appointment Of Special Master To Determine If Sanctions Should Be Assessed Against The United States, pp. 2, 7.

While it appears that the Forest Service was contemplating this massive withdrawal of claims at least as early as March 7, 1994, more than a year before the actual withdrawal, no notice was given to the state or the objectors of this planned action. Consequently, the objectors expended well in excess of a half million dollars preparing objections to claims the Forest Service knew were going to be with drawn. Attachment 12.

In the summer of 1997, the Forest Service stated an intent to withdraw an additional eleven claims. The State has incurred in excess of $100,000 investigating these claims.

In summary, the Forest Service instream flow claims have shrunk from 3,764 to a mere 60 claims in the course of 4 years. The Forest Service has expended in excess of $8 million in pursuing the remaining claims. Attachment 13. The Forest Service has provided no accounting of the amount expended in preparing the approximately 3,600 claims that were dismissed.

f. Veteran's Administration - claims

The United States is seeking a reserved water right for geothermal water used to heat the Veteran's Hospital and a GSA building. These claims have not been reported or investigated at this time.

g. Corps of Engineers - I claim

The Corps of Engineers contends that it is not required to file water right claims for Dworshak Dam and, therefore, has submitted claims as a matter of comity. Moreover, the United States contends that state water law is preempted by the legislation authorizing the Dworshak Dam.

The State contends that claims must be submitted; the State has taken no position on the merits of the claim.

h. PWR 107 - Over 10,000 claims

<u>Description of Claims.</u>

The SRBA district court held that PWR 107 did not provide a basis for a federal reserved water right for livestock watering. See attachment 14. On appeal, the Idaho Supreme Court reversed and held that PWR 107 created an express reserved water right. See attachment 15. A petition for rehearing was denied July 29, 1998.

<u>Positions of the Parties.</u>

The United States contends that because the Executive Order references water holes, the President must have intended to reserve water for the surrounding public lands. It also relies on the City *and County of Denver* decision as a basis for its claim.

The State contends that PWR 107 merely reserved the land around the water holes so that no one could homestead the water hole and thereby control the surrounding public lands.

<u>Negotiations.</u>

None.

2. What non-reserved right proprietary claims to water have been made by the federal government?

As noted above, the United States contends it is not required to quantify water for Corps of Engineer projects in the SRBA.

Also, the Forest Service is pursuing water right claims under state law as well as federal for MUSYA purposes. The claims are based upon alleged beneficial use and the assertion that Idaho law does not require a diversion. A similar claim is being made by the Fish and Wildlife Service for the Minidoka Wildlife Refuge. The SRBA district court has held that diversion is not a required element of a water right under Idaho law. See attachment 16. This issue is on appeal to the Idaho Supreme Court. Oral argument is anticipated this fall.

Supplemental Materials

Copy of an untitled document produced on discovery in the Snake River Basin Adjudication. The document indicates that the purpose of an 1994 amended claim for "all unappropriated water [was] to allow bargaining if all avail [sic] priority date water won't be supported."

Water Rights Agreement between the State of Idaho and the United States for the U.S. Department of Energy.

Water Rights Agreement between the State of Idaho and the United States for Yellowstone National Park.

Water Rights Agreement between the State of Idaho and the United States for Craters of the Moon National Monument.

United States Supplemental Brief in Response to Inquiries by the Court during Oral Argument regarding Future Water Rights in the Sawtooth National Recreation Area, Snake River Basin Adjudication, Case No. 39576, Idaho Fifth Judicial District, June 30, 1998.

Memorandum Decision granting in part and denying in part the United States' Motion for Summary Judgment on Reserved Water Rights Claims, Snake River Basin Adjudication, Case No. 39576, Idaho Fifth Judicial District, July 24, 1998.

Order granting and denying United States' Motions for Summary Judgment on Reserved Water Rights Claims, Snake River Basin Adjudication, Case No. 39576, Idaho Fifth Judicial District, December 18, 1997.

United States Supplemental Brief in Response to Inquiries by the Court during Oral Argument Regarding the United States' Claims to Federal Reserved Water Rights for Wilderness, Snake River Basin Adjudication, Case No. 39576, Idaho Fifth Judicial District, February 21, 1997.

Electronic mail message from William McCleese to Stephen Glasser, October 1, 1993, regarding "Wilderness Water Rights."

Electronic mail message from Stephen Glasser to R. Russell, G. Boyle, M. Old, and M. Lohrey, November 2, 1993, regarding the "Draft of a Letter to Chief on 2 SRBA Policy Matters."

Letter from Gary Boyle to Stephen Glasser (undated) regarding the use of Multiple Use/Sustained Yield Act-based reserved rights claims for instream flows.

Discussion Outline for a Quantification Point Retention Meeting of the Boise Adjudication Team

Conference Room, March 7, 1994.

Letter from Andrew Fois, U.S. Assistant Attorney General, to the Congressman Don Young, U.S. House of Representatives, December 17, 1997, responding to Congressman Young's request for information about the Department of Justice's expenditure associated with the Snake River Basin Adjudication.

Memorandum Decision and Order Re: Basin-Wide Issue 9, Snake River Basin Adjudication, Case No. 39576, Idaho Fifth Judicial District, December 9, 1996.

United States v. State of Idaho, et al., 959 P.2d 449 (Idaho, 1998). Decision in the matter of Basin-Wide Issue #9 (Public Water Right 107).

Order Accepting, in Part, and Denying, in Part, Special Master's Report and Recommendation, Snake River Basin Adjudication, Case No. 39576, Idaho Fifth Judicial District, October 10, 1997.

RESERVED WATER RIGHTS
COMPACT COMMISSION

MARC RACICOT, GOVERNOR | CHRIS D. TWEETEN, CHAIRMAN

STATE OF MONTANA

Tara DePuy
Rep. Antoinette R. Hagener
Rep. John "Sam" Rose
Sen. Chuck Swysgood

Bob Thoft, Vice-Chairman
Gene Etchart
Sen. Bea McCarthy
Jack Salmond

SURVEY OF WESTERN STATE EXPERIENCES WITH FEDERAL NON-INDIAN WATER CLAIMS

1. a. Please describe in general terms the non-Indian reserved rights claims to water that have been established, are part of a pending adjudication, or are anticipated in your State? This would include claims for National Parks, National Forests, National Monuments, wilderness areas, Wild and Scenic Rivers, etc.

Montana is in the process of completing a state-wide water adjudication. There are four federal agencies claiming non-Indian reserved water rights in Montana for various units. These are:

- National Park Service
  - Yellowstone National Park
  - Glacier National Park
  - Little Bighorn Battlefield National Monument
  - Big Hole National Battlefield
  - Bighorn Canyon National Recreation Area

- U.S. Fish and Wildlife Service
  - Black Coulee National Wildlife Refuge
  - Benton Lake National Wildlife Refuge
  - Red Rocks National Wildlife Refuge and Wilderness Area
  - Charles M. Russell and UL Bend National Wildlife Refuges and UL Bend Wilderness Area
  - Bowdoin National Wildlife Area
  - the National Bison Range

- Bureau of Land Management
  - Upper Missouri National Wild and Scenic River
  - Bear Trap Canyon Public Recreation Site
  - Public Water Reserves (PWR 107)

- Forest Service
  - National Forests (10)
  - Wilderness Areas
  - Range and Livestock and the Sheep Experiment Stations

1. b. How has your state responded to these claims in the course of negotiations, other processes, or adjudications? Please describe in general terms the state's positions that have been advanced regarding these claims.

The Montana Reserved Water Rights Compact Commission (Compact Commission) was created by statute in 1979 to negotiate with federal agencies (and Indian tribes) that claim reserved water rights in Montana as part of the ongoing state-wide water adjudication. The Compact Commission negotiates on behalf of the Governor, and its statutory mission is to conclude compacts "for the equitable division and apportionment of waters between the state and its people and the federal government." Mont. Code Ann. § 85-2-703. An outline of the Compact Commission's statutory settlement process and the procedures used during negotiations is attached.

The State of Montana initiated negotiations with the federal agencies to resolve all claims to federal reserved water rights within the state. While negotiations are proceeding, the federal agency is not required to file claims and is not subject to adjudication proceedings. (Should negotiations be terminated by either party, the agency would have six months to file its claims in Water Court.) The Compact Commission negotiates with each agency separately. Some agencies have made formal proposals to the Compact Commission which set out each "claim" to reserved water. Other agencies have outlined the purposes and goals that they claim need water, but do not identify a quantification number prior to active negotiations. The Compact Commission does a general review of the legal and factual basis for each claim and a detailed examination of the practical implications of recognizing a reserved water right in each circumstance.

c. How have federal agencies responded to state efforts regarding their claims? Please describe in general terms the federal positions that have been advanced regarding these claims.

Each agency has been willing to negotiate and assigned negotiating teams. Each agency has been willing to address a much broader range of issues and possible solutions in negotiations then would have been required in litigation.

d. Please describe, wherever possible, how the above-mentioned federal claims have evolved over time, if at all.

As described in 1 (b), the federal agencies were not required to file formal claims prior to negotiations.

e. What is the outcome or current status of such contact, negotiations, court pleadings, etc., regarding these claims?

National Park Service - A copy of the Compact with the National Park Service is attached. Mont. Code Ann. § 85-20-401. All claims are settled and the Compact has been filed with the Water Court for review and incorporation in decrees.

Some of the more interesting provisions of the Compact include establishing a controlled groundwater area, legislative basin closures, and subordination agreements. The northern boundary of Yellowstone Park lies within Montana. Concern had been expressed that groundwater withdrawals outside of Yellowstone would impact hydrothermal features within the Park. Although scientific evidence was unclear, Congressional action creating a buffer zone around the park had been considered. The National Park Service Compact created a controlled groundwater area outside the boundary of Yellowstone Park. The Compact does not recognize a reserved water right outside of the Park, but groundwater use is monitored and thermal groundwater use is restricted to prevent impact to the hydrothermal system within the Park. The controlled groundwater area is managed by the State and monitoring and testing is paid for by the National Park Service.

Agreements providing for water management, subordination to existing water rights, etc., require that the status quo at the time of agreement be maintained and compacts often include provisions for basin closure. Basin closure means that the drainages specified in the compact are closed to new water uses. Certain types of future water uses are excluded from most basin closures, such as domestic wells and stock water. Because all agreements reached with federal agencies must be ratified by the Montana Legislature, we have flexibility to include provisions that change state law.

The National Park Service Compact does not contain any immediate basin closures but provides for basin closure at a future date after a specified amount of water is developed. We call this the "reverse approach" because it quantifies existing and future state water use instead of the reserved water right. This is a very useful approach for instrearn flows. For several streams in the National Park Service Compact the agreement recognizes a reserved water right to the entire flow of the stream but subordinates that right to all existing and some level of future use under state law. After levels of future use identified in a compact are reached, the basin is closed to new appropriations. This eliminates the need for actual quantification of the instrearn flow itself and prevents any future enforcement controversies.

Since the North Fork and the Middle Fork of the Flathead River form a common boundary of Glacier National Park and the Flathead National Forest, the Forest Service

agreed that the instrearn flow recognized in the National Park Service Compact would also settle the instrearn flow for the wild and scenic claims by the Forest Service for these rivers.

U.S. Fish and Wildlife Service - A copy of the Compact with the U.S. Fish and Wildlife Service for Black Coulee National Wildlife Refuge and Benton Lake National Wildlife Refuge is attached. Mont. Code Ann. § 85-20-701. All claims for these two units are settled. The Compact subordinates the recognized reserved water right to existing water rights and closes these basins to new appropriations. Small wells and small stock ponds are exempted from the basin closure.

Negotiating parties are continuing work on the four remaining U.S. Fish and Wildlife Refuges for which federal reserved water rights are claimed, the priority being Red Rock Lakes National Wildlife Refuge followed by Bowdoin National Wildlife Refuge. A negotiating session was held on February 6, 1998 in Helena to discuss the Commission's preliminary response to the FWS proposal of September 1996 for Red Rocks. A portion of the proposal includes negotiation of cooperative agreements with water users upstream from the Refuge to allow satisfaction of the FWS request for minimum flows on these streams. In June, Commission staff visited personally with upstream water users to discuss cooperative agreements. The parties hope to be ready to submit a compact for Red Rock Lakes National Wildlife Refuge to the 1999 legislature.

Bureau of Land Management - A copy of the Compact with the Bureau of Land Management is attached. Mont. Code Ann. § 85-20-501. All claims for the Upper Missouri National Wild and Scenic River and the Bear Trap Canyon Public Recreation Site are settled and the Compact will soon be filed with the Water Court for review and incorporation in decrees.

The drainage basin above the Upper Missouri National Wild and Scenic River is very large (41,000 square miles). The Compact again used a "reverse approach" which quantified existing and future state water use instead of the reserved water right. Instead of quantifying the reserved water right as the entire flow of the river and subordinating the right to existing and future uses as was done in the National Park Service Compact, here the reserved water right is defined as all water remaining in the stream after certain levels of water is development under state law. After the levels of future use identified in a compact are reached, the basin is closed to new appropriations. This eliminates the need for actual quantification of the instrearn flow itself and prevents any future enforcement controversies.

Bear Trap Canyon Public Recreation Site is a straight quantification of a reserved water right. The amount of water recognized matches required minimum releases from Madison Dam directly above Bear Trap Canyon so no conflict exists.

United States Forest Service:

The Coronado National Forest has filed 2 claims for reserved rights for the Powers Garden Administrative Site. The right is premised on the reservation of land for the Coronado National Forest on September 26, 1910. The USFS claims current uses including fire suppression and periodic domestic and stock watering along with occasional irrigation. The total claims amount to 1.05 afa for these uses.

Fort Huachuca Military reservation:

Fort Huachuca is currently the Headquarters for the United States Army Intelligence Center and occupies 73,272 acres. The reservation has been increased from 41,760 acres when it was originally established in 1881. The population of the Post was estimated at 9,200 in 1990. The Fort has filed 2 claims for 25 wells, 39 springs and 74 ponds. The total annual use claimed is 10,522 afa for military installation purposes. The basis of the claims is a federal reserved water right with a priority of the date of original reservation, October 28, 1881.

Bureau of Land Management:

The BLM has claimed a number of water rights based on Solicitor's Opinion M-36914 1979 (Krulitz Opinion). Therein, the Solicitor discussed the nature and extent of federal reserved water rights on federal lands. The claims are based specifically on Public Water Reserve No. 107. Section 4 of the Krulitz Opinion discussed the executive order which generally dealt with the reservation of public lands containing water holes and other bodies of water needed for public purposes. The BLM also claims that Executive Order 11990 dated May 24, 1977, provides a basis for a federal reserved right to maintain natural systems and riparian habitat. The BLM has claimed a federal reserved right to 39 springs and 1 stockpond based on Public Water Reserve No. 107. The average claimed use per spring is 0.88 afa. The average claimed flow for each springs is 2.41 afa. The average annual flow into the stockpond is estimated at 0.32 afa. The claimed uses are stock, wildlife including fish, recreation and habitat maintenance.

The SPRNCA is also administered by the BLM. SPRNCA encompasses 47,668 acres along the San Pedro River. The BLM claims an instream use of 11,028 afa for two discreet segments of the river. The claimed uses are municipal, domestic, recreation, fish and wildlife and instream flow. The priority date claimed is 1988, the year SPRNCA was created. The filing was amended in 1991 to also claim administrative uses, maintenance of the natural hydrologic processes, watershed rehabilitation and fire suppression. The claim covers present and future use from all existing springs, cienegas, ponds, lakes, and wells.

The claims described are typical of the types of non-Indian federal reserved rights claims that have been made throughout the state in both the Gila River General Stream Adjudication and the Little Colorado River General Stream Adjudication. The Department of Water Resources's position with regard to these various claims is the subject of the next section.

Federal Reserved Rights v. The Federal "Proprietary" Right

ADWR recognizes the federal reserved rights doctrine as it has evolved from Winters v. United States 207 U.S. 564 (1908) through more recent interpretations including United States v. New Mexico, 438 U.S. 696 (1978), and California v. United States, 438 U.S. 645 (1978). While ADWR does not dispute the ability of Congress to reserve amounts of water necessary to fulfill the *primary* purposes of a particular reservation, ADWR agrees with the Supreme Court's holding in New Mexico that, "where water is only valuable for a *secondary* use on the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views that the United States would acquire water in the same manner as any other public or private appropriator"[emphasis added]. 438 U.S. 702.

Accordingly, ADWR would challenge the assertion that a federal proprietary right exists to appropriate waters beyond that amount necessary to fulfill the primary purposes of a reservation out of turn with the state's prior appropriation system. As noted, the BLM sites the Krulitz Opinion referenced above as the basis for many of its federal claims in the SPRW. The Krulitz Opinion, potentially at odds with New Mexico, was significantly modified by more recent interpretations by Solicitor Coldiron.

The Coldiron interpretations limited the purposes for which Public Water Reserve No. 107 operates to reserve water rights on the public domain to human and animal consumption and concluded that rights to all other uses must be obtained according to state law. M-36914 (Supp.II), Feb. 16, 1983. According to Coldiron:

> "Congress gave the states broad power to provide for the administration of water rights which would only be limited where necessary to accomplish the original purpose of a congressionally mandated reservation or to protect the navigation servitude. As a result of this implicit grant of power, the presumption is that state law will control all non-reserved claims unless Congress provides otherwise.... In construing land management statutes, deference to state law rises to a presumption that the United States and its agencies must acquire water rights in accordance with state substantive and procedural law unless necessary for the original purpose of a reservation." M-36914 (Supp. I) Sept. 11, 1981.

The current position of the Solicitor with respect to federal reserved water rights is not only more in keeping with the spirit of Public Law 107, but also with the leading Supreme Court cases interpreting the doctrine. *See e.g.* New Mexico and California.

Other Assertions of a Federal Water Right

Another potential conflict with state regulation of water rights is the assertion of a federal right deemed necessary to comply with federal environmental mandates. For example, the Federal Energy Regulatory Commission (FERC) is charged with licensing non-federal dams in the state. Section 10(j) of the Federal Power Act (FPA) now requires that certain conditions be placed on licenses in order to, "adequately and equitably protect, mitigate damages to and

enhance fish and wildlife (including spawning grounds and habitat)..." 16 U.S.C. § 803(j). There have been instances in the State of Arizona where such relicensing procedures have resulted in demands by FERC that specific minimum stream flows be included as a condition in the newly issued license. Th United States argues that these flows are necessary to preserve and protect an acceptable environmental baseline.

At least one owner of a hydroelectric facility in Arizona is now engaged in this process. The facility is currently up for relicensing. The facility owner holds all state based water rights claims to the baseflow of the stream. With the dam in place, there remains a continuous flow in the stream comprised primarily of underflow at the dam, precipitation derived from runoff and ongoing return flows to the stream from facility water conveyance equipment. Aquatic and riparian habitat exists in the area, and as a routine part of the licensing process endangered species studies are currently being conducted in the area. Based on the mandates of the FPA, the Endangered Species Act and the National Environmental Policy Act, FERC has proposed that, as a condition of the facility's new license, the owner maintain minimum flow releases. The federal land manager has proposed that the owner permanently relinquish a portion of its water rights to sustain minimum stream flows and support the critical habitat in the area. The relinquished rights would then be transferred to the federal government which would hold the right and maintain the flows in perpetuity. Thus far, there has been no discussion regarding compensation for these rights.

With so many hydroelectric facilities coming due for relicensing in the next decade, these types of demands are likely to become more common. The Arizona Department of Water Resources is concerned about the displacement of state based water rights potentially resulting from such relicensing decisions.

State and Federal Interaction Regarding "Reserved Water Rights"

Where possible, the State of Arizona has encourage the federal government to work within the prior appropriation system to effectuate its goals on its various holdings. In some instances, there has been much progress. For instance, ADWR has had success in working with the federal government in obtaining in situ use rights for its riparian maintenance and fish and wildlife needs. There have been 12 applications by the BLM and 1 by the USFS for instream flow use in the SPRW. Of these, two have been certificated (1 on the San Pedro River and 1 on Aravaipa Creek), three have been permitted (on smaller tributaries) and the remaining applications are still pending. While the technical requirements for obtaining an instream flow permit are exacting, ADWR continues to work in conjunction with the federal government toward perfection of some 78 instream flow applications throughout the state.

In some cases the federal government has been reluctant to work within the state system and has maintained the need for a federal reserved water right. In such instances ADWR, along with many private entities, have in the course of various negotiations agreed to recognize in federal rights certain attributes which are reminiscent of a federal reserved water right. For instance, the right may have a priority date as of the date of the reservation, and may not be subject to forfeiture or abandonment. In return, the federal government has agreed to quantify

these rights and remove the label of "federal reserved water right." The benefit of this bargain is that the quantification eliminates much of the uncertainty surrounding the size of the federal right. Of course, there remains the question of the level of protection to which the right is entitled. This tactic is currently being pursued in negotiations between the NPS and various private claimants in the Little Colorado River Watershed. This negotiated water right concept has yet to be implemented anywhere in the state.

Magnitude of Claims and Costs of Adjudication

There are approximately 900 federal claims in the SPRW. The total number of federal claims outstanding in the both the Gila River General Stream Adjudication and the Little Colorado River General Stream Adjudication is approximately 16,000. Unfortunately, the total volume of water associated with these claims could not be determined as we are currently in the middle of a database conversion and our query capacity is compromised.

The cost of the two adjudications to the State of Arizona have been and continue to be immeasurable. The Gila River Adjudication has been pending since 1974 and the Little Colorado since 1978. While much time will be spent on the determination of individual claims, it can be assumed that, given the size and complexity of federal reserved rights claims (both Indian and non-Indian) the quantification of these claims will comprise a large portion, if not the majority of the costs to the State of Arizona, the United States and the many individual claimants. Consequently, ADWR continues to support settlement of these claims in an effort to resolve the uncertainty created by their very nature.

Again, ADWR appreciates the opportunity to participate in this survey and hopes that its responses will aid WSWC in its goals.

Sincerely,

Thomas R. Wilmoth
Deputy Counsel

GALE A. NORTON
Attorney General

MARTHA PHILLIPS ALLBRIGHT
Chief Deputy Attorney General

RICHARD A. WESTFALL
Solicitor General

STATE OF COLORADO
DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STATE SERVICES BUILDING
1525 Sherman Street - 5th Floor
Denver, Colorado 80203
Phone (303) 866-4500
FAX (303) 866-5691

June 30, 1998

Jim Alder, Legal Counsel
Western States Water Council
Creekview Plaza, Suite A-201
942 East 7145 South
Midvale, Utah 84047

RE: Survey of Western State Experiences with Federal Non-Indian Water Claims

Dear Jim:

Before responding to your survey, I would like to make some general comments on your cover letter. I don't mean to be academic, but I don't want Western States Water Council to make statements that could later be used to the states' detriment. You state, "In order to determine ... federal claims to water, states must launch very expensive and time-consuming state court adjudications." While this may be true for other states, Colorado has ongoing adjudications conducted by designated water judges and referees in all seven of its drainage basins. Therefore, while litigating federal claims is expensive and time-consuming, it fits within Colorado's established institutions and procedures and does not involve initiating new adjudications. Given the western states' long battle to force the federal government to assert its claims in state adjudications pursuant to the McCarran Amendment and our desire to have the federal government claim water rights in those proceedings rather than using its permitting authority to exact bypass flows, I believe that we need to be careful in complaining about the expense and we need to be sure that we have fair and efficient adjudication procedures in place.

Second, in your discussion of federal reserved rights, you state, "If Congress authorizes creation of a park, wildlife refuge, national forest, military base, wilderness area, or other reservation of public land that demands water for its success, reserving the land implies an intention to reserve sufficient water to carry out the congressional purposes." This statement glosses over important questions about what constitutes a *reservation* and what the *primary* purposes of the reservation are. It is still an open question, and a hotly contested one, whether the designation of wilderness areas under the Wilderness Act of 1964 created reserved water rights. *See Sierra Club v. Yeutter,* 911 F.2d 1405

(10th Cir. 1990). I am aware of one Idaho lower court decision holding that the 1964 Wilderness Act did reserve water rights, In Re SRBA, Case No. 39576, District Court, Fifth Judicial District, State of Idaho (Dec. 18, 1997), but I believe Idaho intends to appeal the decision.

In discussing federal proprietary claims to water, I think it is important to distinguish between non-reserved water rights and appropriative rights. The former is, as far as I know, theory only. The theory originated in a 1979 solicitor's opinion, generally referred to as the Krulitz Opinion, which stated that a federal agency could claim appropriative rights necessary to serve *any* Congressionally authorized land management function, without regard to state substantive or procedural law. While the opinion was not limited to federal land reservations, it was tied to federal land ownership and concomitant land management responsibilities. The Krulitz Opinion was subsequently modified by the Martz Opinion and then repudiated by the Coldiron Opinion. There is also a Department of Justice memorandum (from Theodore B. Olson to Carol E. Dinkins) that contradicts the Krulitz Opinion. (I can get you copies or citations if you need them.) The point is that, as far as I know (although I'm not familiar with the Yakima basin claims you mention in 2.a.), the federal government has never claimed a water right based on the theory of non-reserved rights and that theory should not be confused with appropriative rights claims made pursuant to state law.

Finally, in discussing other federal claims based on federal law, you refer to "federal regulatory rights." While federal agencies have sought to use their permitting authority to require the holders of water rights to relinquish a portion of their yield, such requirements do not create water rights. I realize that the states and water users sometimes refer to these permit conditions as "regulatory rights" because federal agencies seek to use them as substitutes for water rights, but I think we need to keep in mind that they are not really rights. For instance, bypassed flows will not have a priority date and will not be protected from subsequent diversion by a downstream water user.

I hope those points are useful to you. Turning to the survey, your questions could take several weeks and several hundred pages to answer. I'll give the short version. Please feel free to call me if you need more detail in specific areas.

1.a. In the mid-1970s, the United States filed reserved rights claims in all seven Colorado water divisions, which correspond to the state's seven drainage basins. The claims included surface water rights for both instream flows and out-of-stream uses and ground water rights. The applications did *not* include any wilderness areas *(see Yeutter)* and, to date, the United States has not asserted any wilderness reserved rights. Subsequent Colorado wilderness legislation expressly disclaimed any reserved rights.

There has generally been little dispute over the non-instream flow claims, which are usually for small amounts, and those claims either have not been contested at trial or have been granted by stipulation. There has been some dispute over whether the United States needs to apply for well permits for its claimed groundwater rights, but we have resolved the question by compromising on

something that looks like a permit but isn't. I will try to list all the reservations for which reserved rights were claimed, but won't discuss the non-controversial surface water and groundwater claims. **National parks:** Rocky Mountain National Park; Mesa Verde National Park.

The United States was granted instream flow rights for the west slope of Rocky Mountain National Park with little or no opposition, but the amounts still have not been quantified. The United States was also awarded instream flow rights for all the water on the east slope of Rocky Mountain National Park, despite unsuccessful arguments that water rights were not needed at all given the park's headwaters location and that the federal government had not proven the minimum amount of water necessary. The United States, Colorado, and water users negotiated a decree for Mesa Verde National Park that gives the United States modest instream flows.

National monuments: Black Canyon of the Gunnison National Monument; Dinosaur National Monument; Colorado National Monument; Great Sand Dunes National Monument; Hovenweep National Monument; Yucca House (claims withdrawn).

The United States claimed instream flow rights for Black Canyon, Dinosaur, and Great Sand Dunes national monuments. The claims for Black Canyon were granted with little or no opposition, but the amounts have not yet been quantified. The claims for Great Sand Dunes were decreed by stipulation. The instream flow claims for Dinosaur National Monument were denied.

National forests: The United States claimed reserved rights, including instream flows, for national forests in all seven water divisions.

The instream flow claims in the Colorado, Gunnison, and Yampa river basins were denied because the federal government did not base its case on the primary purposes of the forests. The instream flow claims in the South Platte basin were litigated in a major trial which began in 1990. The water court denied the claims because the United States failed to prove either necessity or the minimum amount of water needed. The Forest Service still has instream flow claims pending in the Arkansas, Rio Grande, and San Juan basins. The state and water users are currently negotiating with the United States in these three cases to try to address all forest purposes in one decree that would foreclose future appropriative rights claims and permit demands for water.

Naval oil shale reserves: The United States obtained decrees for surface and ground water rights on the reservation, but was denied a reserved right from the mainstem of the Colorado River, which is not appurtenant to the reservation.

Public springs and water holes: The BLM claimed the entire yield of over 1,500 water holes and springs on lands withdrawn from the public domain under a 1926 executive order. The Colorado Supreme Court ruled that the BLM was not entitled to the entire yield, but only to that amount of water necessary to prevent monopolization. The rights were subsequently quantified by stipulation.

Mineral hot springs: The federal government's claims for reserved rights under the Pickett Act were granted, but its claims under the Geothermal Steam Act were denied.

Military bases: Fort Carson; Fort Lyon V.A. Hospital. Decreed.

Fish hatchery: Leadville Fish Hatchery. Decreed

Wild and scenic river: Cache la Poudre River. The Poudre was designated in 1986 and the legislation expressly provided for the adjudication of a reserved right, which was subsequently decreed by stipulation.

BLM oil and gas conversion well: One well was decreed over the objection of the leasing entity.

1.b. See above. Generally Colorado's position is that the doctrine of reserved rights should be strictly construed and the United States should be held to strict proof of all the elements of a reserved right. Where possible, the state has attempted to resolve the United States' claims through negotiation and stipulated decrees. The instream flow claims for the national forests have been the most problematic. Colorado's position has been that the Forest Service is not entitled to reserved instream flow rights, but we have been willing to try to negotiate reserved right decrees if- (1) they are subordinate to all existing uses; (2) they will allow reasonable future development; and (3) they will foreclose future appropriative rights claims and federal efforts to require bypass flows as a condition of land use permits. The state's goals are to protect existing uses and a reasonable amount of new development and to achieve maximum certainty for water users.

1.c. The Forest Service has been unwilling to accommodate future uses or to provide reasonable certainty for water users with facilities in the national forests that are subject to future land use authorizations. The state, water users, and the Department of Justice had agreed *in writing* to certain "certainty" principles in the Arkansas River basin case and the Forest Service repudiated the agreement.

1.d. The Forest Service instream flow claims evolved legally as a result of *United States v. New Mexico* and *United States v. Denver,* 656 P.2d I (Colo. 1982), which followed *New Mexico,* and factually as a result of its proof problems in the South Platte case.

1.e. Virtually all of the reserved right claims except the Forest Service instream flow claims have been decreed, are awaiting the entry of final decrees, or have been dismissed. The outcome of the Forest Service instream flow negotiations, particularly in the Arkansas River basin, is very uncertain. If negotiations break down altogether, the United States will have a short time to quantify its claims and the state will vigorously oppose them.

2.a. The federal government has asserted appropriative rights claims, but not non-reserved rights claims, in Colorado. Federal claims for appropriative rights in accordance with Colorado law have generally been granted without serious opposition. Again, the problem has been with instream. flow water rights. Under Colorado law, only the Colorado Water Conservation Board may be granted a decree for an instream flow right. Although there were several instances in the mid-1980s where the National Park Service and the Forest Service purchased existing agricultural rights and obtained decrees changing them to instream flow rights, to date, no federal agency has obtained a decree for a new instream flow appropriation. (The federal government has on occasion claimed to have been awarded instream flow rights for fire protection, wildlife and livestock watering, and recreation. However, the record shows that these rights are not instream flow rights; they are rights for out-of-stream uses that do not require a permanent, man-made diversion structure.) Federal agencies have twice applied for new appropriative instream flow rights. A 1987 Fish and Wildlife Service application for an instream flow right for a wildlife refuge was denied by the water court. In 1994, the Forest Service applied for an instream flow right on a small creek in the Rio Grande basin. That application is still pending.

2.b. Colorado has opposed federal claims for appropriative instream flow rights as contrary to state law. The state encourages federal agencies to request that the Colorado Water Conservation Board apply for rights to protect instream flows on federal lands. When the Forest Service filed its 1994 application for an instream flow right, the CWCB not only opposed the application, but filed its own application to demonstrate that it could and would protect the resource. The CWCB has successfully worked with federal agencies, including the Forest Service, to protect instream flows.

2.c. The response has been mixed. Sometimes federal agencies have been willing to work with the CWCB, but other times they argue that they have a separate mandate to fulfill and cannot rely on a state agency.

2.d. I don't think that there has been a pattern.

2.e. The 1994 Forest Service application is the only such claim pending. The parties agreed to stay that case and the CWCB application while they negotiated, and the cases are now included in the ongoing reserved rights negotiations.

3.a. I believe that most of the water rights for federally-operated reservoirs in Colorado have been adjudicated in state or federal court; some are actually decreed to non-federal entities. Federal agencies have not asserted water rights for Endangered Species Act or Clean Water Act purposes. However, the federal government has asserted that federal agencies have the authority to deny permits if water depletions associated with the facility to be permitted would jeopardize an endangered species or adversely modify its critical habitat. *See Riverside Irrigation Dist. v. Andrews,* 758 F.2d 508 (10th Cir. 1985). Obviously this could conflict with the exercise of state-created water rights and the full development of water allocated to the state by interstate compact or decree. The

Forest Service has also asserted the authority to require bypass flows as a condition of issuing or renewing land use permits. This issue is discussed in the bypass flow task force report (Report of the Federal Water Rights Task Force Created Pursuant to Section 389(d)(3) of P.L. 104-127) and the attached article by Jim Witwer.

3.b. Colorado does not concede that federal environmental statutes supersede interstate compacts and decrees or allow the federal government to preclude the exercise of vested rights without paying compensation. However, we try to work with federal agencies to accomplish their purposes within state law. For instance, we are parties to the Recovery Implementation Program for Endangered Fish Species in the Upper Colorado River Basin and the Cooperative Agreement for Platte River Research and Other Efforts Relating to Endangered Species Habitats Along the Central Platte River, Nebraska. Our bottom line, however, is that federal mandates must be fulfilled within the framework of state law and interstate compacts and decrees. Colorado also strongly opposes the federal government's use of permit conditions as a substitute for acquiring water or water rights pursuant to state law. Colorado has supported water user efforts to develop voluntary coordinated reservoir operation plans that benefit the environment without reducing the yield of decreed water rights.

3.c. Federal agencies take the position that their mandates supersede state law. However, they often wish to avoid litigation and are willing to at least try to negotiate a compromise that is consistent with state law. However, these compromises never fully resolve the issues; rather, they result in a continuing tug-of-war between state and federal interests. Any state entering into an agreement such as a recovery program should be prepared for long-term institutionalized conflict.

3.d. I don't think these positions have changed on either side. The *Riverside* case obviously has influenced negotiating positions.

3.e. The current status is as described above; there never seems to be a final "outcome"; negotiations just advance to another level.

4. 1) There have been thousands of federal claims asserted in Colorado adjudications. If each stream on which the Forest Service claims a right is counted separately, hundreds of disputed claims still remain.

2) Can't estimate. Moreover, the nature of the instream flow claims makes it impossible to quantify them.

3) I assume that this question refers to costs to the state. There are two aspects to the cost of adjudicating the federal claims: the costs associated with the state's role as adjudicator and the costs incurred in its role as a litigant. As to the former, as noted above, Colorado conducts ongoing adjudications, so the water courts, including judges and referees, are already in place and functioning. As to the latter, opposing and/or negotiating the federal claims has been very expensive.

I can't give you even a ballpark estimate of our costs over the past twenty plus years, but they have included the salaries and expenses of from two to four full time attorneys and a paralegal for about fifteen years plus support from Division of Water Resources and Colorado Water Conservation Board staff and outside experts.

5. See answers above. In addition, it apparently has been a Department of Justice policy (unwritten as far as we know) not to claim reserved rights for reservations created from acquired (i.e., non-federally owned) land rather than from the public domain. The Forest Service Manual also contains federal policies requiring it to rely on reserved water rights, obtain water rights under state law, or purchase water rights before using permits to protect instream flows (FSM §§2541.03, 2541.04b, 2541.31, and 2541.42), inventory foreseeable national forest water requirements (FSM §254 1.11); determine the amount of water needed for instream and standing water purposes (FSM §2541.12); and, in states that require that instream flow rights be held in the name of the state or a state agency, work with the appropriate agency to obtain and protect needed flows (FSM §2541.31), all of which the Forest Service routinely disregards.

6. None.

I hope these answers will be helpful to you. Please feel free to call me I you have questions or would like additional information.

Sincerely,

WENDY C. WEISS
First Assistant Attorney General
Natural Resources Section
(303) 866-5008

Enclosure
cc: Peter Evans (without enclosure)
Hal Simpson (without enclosure)
David Holm (without enclosure)

Supplemental Materials

Letter from Howard Holme, Carol D. Angel, Mary Mead Hammond, and Mark T. Pifher to James J. DuBois, Trial Attorney, U.S. Department of Justice (September 16, 1998). The authors of the letter are responding to what they describe as unacceptable Forest Service negotiating tactics, flawed Forest Service public policy, and inadequate legal analysis to support the Forest Service's abrupt reversal of position in regards to its ability to settle its claims to water.

Letter from James J. DuBois to Carol Angel, Colorado Senior Assistant Attorney General (July 31, 1995). The letter sets forth the terms of all purposes for instream flow needs on the National Forest lands in Water Division No. 2 which the Forest Service might have addressed.

Letter from M. M. Underwood, Jr., Rocky Mountain Region Director of Physical Resources for the U.S. Forest Service to Daries C. Lile, Colorado State Engineer (December 18, 1997). This letter sets forth principles for settlement of instream flow claims agreed to by the Forest Service.

Letter from Gale A. Norton, Colorado Attorney General, to Representative Scott McInnis, U.S. Congressman (September 18, 1998). Details the frustrations and difficulties Colorado is experiencing in dealing with Forest Service's about-face regarding settlement authority.

Memorandum from Kenneth D. Paur, Attorney/Advisor, U.S.D.A Office of the General Counsel, to Skip Underwood, Director of Physical Resources, U.S. Forest Service, Rocky Mountain Region (March 16, 1998). This memo provides the basis for the Forest Service's argument that it lacks the authority to settle its claims to water in Colorado.

The Renewal of Authorizations to Divert Water on National Forests, by James S. Witwer. This article appeared in the Colorado Lawyer, volume 24, No. 10, October 1995. The article discusses the origins of the Colorado bypass flow controversy.

IDAHO RESPONSE TO WSWC SURVEY REGARDING
FEDERAL RESERVED WATER RIGHTS

Prepared by Clive J. Strong

1. Description of non-Indian federal reserved water right claims.

   a. Deer Flat National Wildlife Refuge - 1 claim

   Description of Second Amended Notice of Claim for the Snake River Islands Unit.

Period of Year	Amount of Water	Purpose
Jan. 1 through Feb. 28/29 (Upper Reach hereinafter "UR")	5,600 c.f.s.	To maintain water around all islands
March 1 through June 30	12,000 c.f.s.	To prevent mammalian predation of nesting water fowl
July 1 through December 31 (UR)	5,600 c.f.s.	To maintain water around all islands
July 1 through September 30 (UR)	7,500 c.f.s. 7 days out of every 14 days	To prevent recruitment of vegetation that would cause island coalescence
Once every five years (UR)	27,900 c.f.s. average flow for five days	A geomorphic flow to maintain the islands as islands
Jan. 1 through Feb. 28/29 (Lower Reach hereinafter "LR")	7,180 c.f.s.	To maintain water around all islands
March 1 through June 30	17,000 c.f.s. Weiser gage minus Weiser River flow	To prevent mammalian predation of nesting water fowl
July 1 through December 31 (LR)	7,180 c.f.s.	To maintain water around all islands
July 1 through September 30 (LR)	8,620 c.f.s.	To prevent recruitment of vegetation that would cause island coalescence
Once every five years (UR)	55,800 c.f.s. Weiser River gage minus Weiser River	A geomorphic flow to maintain the islands as islands

History of the Claim for a Reserved Water Right for the Snake River Islands Sector of the Deer Flat National Wildlife Refuge.

March 25, 1993: The United States files one notice of claim with three priority dates for the Snake River Islands Sector. The monthly average flow claimed for **channel maintenance** varies from a low of 5,000 c.f.s. to 40,000 c.f.s..

February 25, 1994: The United States files an amended notice of claim with three priority dates for the Snake River Islands Sector. The quantity claimed is "all unappropriated water," and the purpose of use is described as **"wildlife.** "

February 1996: United States informs objectors in a negotiation session that it intends to amend its claims at the Deer Flat Refuge.

May 1, 1996: Initial disclosure by the United States. This disclosure included about 17,400 pages of written material and several hundred aerial photos. A document produced on discovery indicates that the purpose of the 1994 amended claim for "all unappropriated water [was] to allow bargaining if all avail [sic] priority date water can't be supported." See Attachment 1.

September 1, 1996: Full discovery began.

December 1996: Objectors request about 3,600 pages of undisclosed documents.

January 15, 1997: United States deposits additional 14,000+ pages of undisclosed documents at its depository.

January 30, 1997: Deposition of Ron Thomasson. Mr. Thomasson describes the proposed amendments to its reserved water right claims as follows: (1) to maintain water around all islands, (2) to prevent mammalian predation of nesting waterfowl, (3) to prevent recruitment of vegetation that would cause island coalescence, and (4) to maintain the islands as islands by a geomorphic flow.

February 14, 1997: United States files a Motion to File: Amended Notice of Claim. The claimed flows in some cases are greater than were described at the deposition on January 30, 1997. The District Court later grants the motion to amend claim.

July 1, 1998: Counter motions for summary judgment filed with SRBA District Court. Oral argument on the motions is scheduled for September

18, 1998.
Positions of the Parties.

The United States contends that because the Executive Orders and Public Land Orders reserved islands and because islands are surrounded by water there is an implied federal reserved water right. The purposes are as described above.

The State of Idaho contends that the wildlife refuge is a secondary use ancillary to the upstream federal reclamation projects. In fact, the refuge was created based upon the knowledge and acceptance of the regulated flows released from the upstream reclamation projects.

Negotiations.

There were numerous efforts to resolve this claim through negotiations; however, those efforts failed when the United States insisted upon state recognition of a federal reserved water right for the refuge.

Miscellaneous.

The Deer Flat claim impacts a huge number of water rights in Idaho. Every water right with a priority date later than August 1937 from a surface or ground water source tributary to the Snake River upstream of Swan Falls Dam potentially could be shut-off as a result of these claims. Over a million acres of farmland in the upper Snake River basin are at risk of being shut-off. In addition, every water right with a priority date later than April 1963 from a surface or ground water source tributary to the Boise, Payette, and Weiser Rivers could potentially be shut-off. The economic impact of such consequences is incalculable.

b. Idaho National Engineering and Environmental Laboratory - I claim

These claims were settled through negotiations. See attachment 2.

c. Yellowstone National Park - I claim

These claims were settled through negotiations. See attachment 3.

d. Craters of the Moon National Monument - 8 claims

These claims were settled through negotiations. An additional claim will be added based on an addition to the Monument. See attachment 4.

e. Forest Service claims

1. Sawtooth National Recreation Area (SNRA) - 5 claims

Description of Claim.

The United States seeks all unappropriated flows within the SNRA as of the date of its creation in 1975. Although the United States admits Congress envisioned future development within the SNRA, it contends that Congress intended to allow appropriation of water under state law only if the Forest Service first finds that the use is compatible with the purposes of the SNRA. See attachment 5. These claims are being made while the Forest Service is requesting additional moneys for purchase of scenic easements to preclude development within the SNRA. If in fact, the Forest Service has a valid federal reserved water right for the SNRA, there is no need for scenic easements because no water exists for any development.

Positions of the Parties.

The State contends that the SNRA is only a land use management statute. Since Congress intended to allow future development within the SNRA, it could not have intended to appropriate all unappropriated flows. Rather, the Congress intended to achieve the purposes of the SNRA through the use of scenic easements.

Negotiations.

None.

Status.

Counter motions for summary judgment are under advisement by the SRBA district court. A decision is expected within the next few months.

2. Wild and Scenic Rivers - 8 claims

Description of Claims.

The SRBA district court held that the Wild and Scenic Rivers Act created an express federal reserved water right; however, the court denied the United States' motion for summary judgment seeking all unappropriated flows in the main Salmon and Middle Fork of the Salmon. See attachment 6.

Positions of the Parties.

While the State acknowledged that the Wild and Scenic Rivers Act appears by negative implication to provide a basis for a federal reserved water right, Congress intended that any reserved water right would be limited to the minimum amount necessary to achieve the stated purposes for the reservation.

Negotiations.

None.

Status.

The next phase of this litigation will be quantification of the amount of water the United States contends is necessary to achieve the stated purpose(s) for each river designated under the Wild and Scenic Rivers Act. The court may order mandatory mediation of the claims.

1897 Organic Act - 12 claims

Description of Claims.

This is a continuation of the channel maintenance type claims rejected by the Colorado Water Division 1 Water Court.

Positions of the Parties.

The United States contends that Congress intended to reserve flushing flows for maintenance of channel structure.

The State contends that flushing flows were never envisioned by Congress and are not within the purposes identified by the United States Supreme Court in *United States v. New Mexico.*

Negotiations.

The United States is bent upon proving these claims so no negotiations have been pursued. Trial of these claims is expected to occur in mid 1999.

4. Wilderness - 7 claims

Description of Claims.

The SRBA district court held that the United States is entitled to a federal

reserved water right for all unappropriated flows for the Frank Church Wilderness of No Return, the Selway-Bitterroot Wilderness and the Gospel-Hump Wilderness. See attachment 7. This decision is on appeal to the Idaho Supreme Court.

Positions of the Parties.

The United States contends that Congress intended the wilderness areas to be maintained in a pristine condition and that this purpose would be entirely defeated in the absence of a federal reserved water right for all unappropriated flows. This argument was made despite the United States' concession that Congress permitted certain future uses within and upstream of the wilderness areas. See attachment 8.

The State contends that because Congress expressly considered the issue of federal reserved water rights and took no affirmative action to create a reserved water right, it is improper for a court to use a rule of construction to imply a reserved water right. A court should not use a rule of construction to rewrite a statute. Moreover, the state contends that the Wilderness Act is simply a land management statute and all of its purposes can be achieved without a federal reserved water right.

Negotiations.

No negotiations have been attempted on these claims.

5. Multiple-Use Sustain-Yield Act (MUSYA) - 37 claims

Description of Claims.

The SRBA district court denied all of the federal reserved water right claims under MUSYA based upon the rationale of *United States v. New Mexico*. See attachment 6. This decision is on appeal to the Idaho Supreme Court.

Positions of the Parties.

The United States contends that *United States v. New Mexico* did not resolve whether MUSYA provided a basis for a federal reserved water right claim. The State takes the opposite position.

Negotiations.

Although some negotiation efforts were undertaken, they never matured.

6. Hells Canyon National Recreation Area - I claim

Description of the Claim.

The SRBA district court has held that the Hells Canyon National Recreation Area Act created a federal reserved water right to all unappropriated flows in streams tributary to the Snake River. See attachment 6. This decision is on appeal to the Idaho Supreme Court.

Positions of the Parties.

The United States contends that because Congress only expressly disclaimed a federal reserved water right in the main Snake River, it impliedly intended to reserve all flows in streams tributary to the Snake River within the HCNRA.

The State contends that since Congress expressly addressed the issue of reserved water rights, the court is without authority to use a rule of construction to imply a federal reserved water right. The State also contends that the HCNRA was a land management statute and all of its purposes can be achieved without a federal reserved water right.

Negotiations.

None.

Forest Service Instream Flow Claim History in SRBA.

In 1993, the Forest Service filed over 3,764 federal reserved water right instream flow claims in the SRBA.

1. Wilderness claims were made only after a concerted effort by Forest Service personnel to overturn a prior Solicitor Opinion concurred in by the Attorney General that no water rights exist for wilderness areas. An internal memorandum in reference to these claims stated: "Please prepare a paper describing the federal reserved water rights under the Wilderness Act issue. Where we are now, and where we need to be. Make the case that we need to make a move so Justice will have a reason to rescind the Meese letter." Attachment 9. A follow-up memorandum stated: "McCleese wants me to finalize it this week; now that we have a more sympathetic Chief, we want to move ahead quickly, surely & wisely Can (sic) you reply by COB tomorrow (Nov 3 rd)?????" Attachment 10.

2. Likewise, the Multiple-Use Sustained-Yield Act claims were made based upon an agenda not a legal theory. Although the Supreme Court previously suggested that MUSYA did not create federal reserved water rights, agency personnel nonetheless pushed for filing of these claims under the federal reserved water rights doctrine. The basis for this action is set out in an internal memorandum. "We have opted to use this authority for the following reasons: 1. instream flows are not available under state law; 2. inholdings and upstream non-NF lands limit our use of special use permits; 3. these claims put the state and future appropriators on notice of what our water needs are; 4. **they form the basis for negotiations with the state;** 5. this is our one and only chance to assert such claims." Emphasis added. The memorandum goes on to state "We are concerned that we have not received any written confirmation from the Chief that we can move ahead with MUSYA claims. ... Can you instigate a letter giving approval for us to assert reserved water rights under the authority of the Multiple-Use Act?? My gut feeling is that George Leonard would support us on this. But you are in a better position to judge that. **If you need any ammunition let me know."** Emphasis added. Attachment 11.

A careful review of other memoranda discloses that the agency was expending large sums of money on these instream flow claims and yet had no clear legal theory other than to impose costs on the state and private water users so that they would acquiesce to the claims. In regard to dual filing of claims the agency personnel stated: "Undoubtedly, the judge and the Idaho Department of Water Resources would be surprised and perhaps upset by a dual filing under state law; that's a real possibility in my judgment. On the other hand, it may allow them to avoid having to recognize federal reserved rights and could result in the allocation of some water to us for instream purposes. It would also change the balance in the upcoming negotiations between the state and the United States over federal water claims that are to precede any litigation." Attachment 10.

Since there was no cost to the Forest Service for filing the claims, it appears that the agency intentionally embarked upon a program of overwhelming the objectors for strategic reasons.

On September 29, 1995, the Forest Service moved to withdraw all but 71 of these instream flow claims. This withdrawal occurred just 17 days before parties to the SRBA were required to file objections to these claims. In explaining the withdrawal of the approximately 3,600 claims, the Justice Attorney stated:

> The election to withdraw the claims voluntarily was *purely a*

> *strategic decision* intended to allow the United States to focus its limited resources on a discrete number of claims that provide the maximum benefit to the National Forests and the Nation.
>
> * * * *
>
> [T]he Forest Service claims were not withdrawn because they were invalid, but because of a *strategic decision* on maximizing the United States' chances of success given very limited resources.

United States Response To State Of Idaho's Motion For Appointment Of Special Master To Determine If Sanctions Should Be Assessed Against The United States, pp. 2, 7.

While it appears that the Forest Service was contemplating this massive withdrawal of claims at least as early as March 7, 1994, more than a year before the actual withdrawal, no notice was given to the state or the objectors of this planned action. Consequently, the objectors expended well in excess of a half million dollars preparing objections to claims the Forest Service knew were going to be with drawn. Attachment 12.

In the summer of 1997, the Forest Service stated an intent to withdraw an additional eleven claims. The State has incurred in excess of $100,000 investigating these claims.

In summary, the Forest Service instream flow claims have shrunk from 3,764 to a mere 60 claims in the course of 4 years. The Forest Service has expended in excess of $8 million in pursuing the remaining claims. Attachment 13. The Forest Service has provided no accounting of the amount expended in preparing the approximately 3,600 claims that were dismissed.

f. Veteran's Administration - claims

The United States is seeking a reserved water right for geothermal water used to heat the Veteran's Hospital and a GSA building. These claims have not been reported or investigated at this time.

g. Corps of Engineers - I claim

The Corps of Engineers contends that it is not required to file water right claims for Dworshak Dam and, therefore, has submitted claims as a matter of comity. Moreover, the United States contends that state water law is preempted by the legislation authorizing the Dworshak Dam.

The State contends that claims must be submitted; the State has taken no position on the merits of the claim.

h. PWR 107 - Over 10,000 claims

Description of Claims.

The SRBA district court held that PWR 107 did not provide a basis for a federal reserved water right for livestock watering. See attachment 14. On appeal, the Idaho Supreme Court reversed and held that PWR 107 created an express reserved water right. See attachment 15. A petition for rehearing was denied July 29, 1998.

Positions of the Parties.

The United States contends that because the Executive Order references water holes, the President must have intended to reserve water for the surrounding public lands. It also relies on the City *and County of Denver* decision as a basis for its claim.

The State contends that PWR 107 merely reserved the land around the water holes so that no one could homestead the water hole and thereby control the surrounding public lands.

Negotiations.

None.

2. What non-reserved right proprietary claims to water have been made by the federal government?

As noted above, the United States contends it is not required to quantify water for Corps of Engineer projects in the SRBA.

Also, the Forest Service is pursuing water right claims under state law as well as federal for MUSYA purposes. The claims are based upon alleged beneficial use and the assertion that Idaho law does not require a diversion. A similar claim is being made by the Fish and Wildlife Service for the Minidoka Wildlife Refuge. The SRBA district court has held that diversion is not a required element of a water right under Idaho law. See attachment 16. This issue is on appeal to the Idaho Supreme Court. Oral argument is anticipated this fall.

Supplemental Materials

Copy of an untitled document produced on discovery in the Snake River Basin Adjudication. The document indicates that the purpose of an 1994 amended claim for "all unappropriated water [was] to allow bargaining if all avail [sic] priority date water won't be supported."

Water Rights Agreement between the State of Idaho and the United States for the U.S. Department of Energy.

Water Rights Agreement between the State of Idaho and the United States for Yellowstone National Park.

Water Rights Agreement between the State of Idaho and the United States for Craters of the Moon National Monument.

United States Supplemental Brief in Response to Inquiries by the Court during Oral Argument regarding Future Water Rights in the Sawtooth National Recreation Area, Snake River Basin Adjudication, Case No. 39576, Idaho Fifth Judicial District, June 30, 1998.

Memorandum Decision granting in part and denying in part the United States' Motion for Summary Judgment on Reserved Water Rights Claims, Snake River Basin Adjudication, Case No. 39576, Idaho Fifth Judicial District, July 24, 1998.

Order granting and denying United States' Motions for Summary Judgment on Reserved Water Rights Claims, Snake River Basin Adjudication, Case No. 39576, Idaho Fifth Judicial District, December 18, 1997.

United States Supplemental Brief in Response to Inquiries by the Court during Oral Argument Regarding the United States' Claims to Federal Reserved Water Rights for Wilderness, Snake River Basin Adjudication, Case No. 39576, Idaho Fifth Judicial District, February 21, 1997.

Electronic mail message from William McCleese to Stephen Glasser, October 1, 1993, regarding "Wilderness Water Rights."

Electronic mail message from Stephen Glasser to R. Russell, G. Boyle, M. Old, and M. Lohrey, November 2, 1993, regarding the "Draft of a Letter to Chief on 2 SRBA Policy Matters."

Letter from Gary Boyle to Stephen Glasser (undated) regarding the use of Multiple Use/Sustained Yield Act-based reserved rights claims for instream flows.

Discussion Outline for a Quantification Point Retention Meeting of the Boise Adjudication Team

Conference Room, March 7, 1994.

Letter from Andrew Fois, U.S. Assistant Attorney General, to the Congressman Don Young, U.S. House of Representatives, December 17, 1997, responding to Congressman Young's request for information about the Department of Justice's expenditure associated with the Snake River Basin Adjudication.

Memorandum Decision and Order Re: Basin-Wide Issue 9, Snake River Basin Adjudication, Case No. 39576, Idaho Fifth Judicial District, December 9, 1996.

United States v. State of Idaho, et al., 959 P.2d 449 (Idaho, 1998). Decision in the matter of Basin-Wide Issue #9 (Public Water Right 107).

Order Accepting, in Part, and Denying, in Part, Special Master's Report and Recommendation, Snake River Basin Adjudication, Case No. 39576, Idaho Fifth Judicial District, October 10, 1997.

RESERVED WATER RIGHTS
COMPACT COMMISSION

MARC RACICOT, GOVERNOR | CHRIS D. TWEETEN, CHAIRMAN

STATE OF MONTANA

Tara DePuy
Rep. Antoinette R. Hagener
Rep. John "Sam" Rose
Sen. Chuck Swysgood

Bob Thoft, Vice-Chairman
Gene Etchart
Sen. Bea McCarthy
Jack Salmond

SURVEY OF WESTERN STATE EXPERIENCES WITH FEDERAL NON-INDIAN WATER CLAIMS

1. a. Please describe in general terms the non-Indian reserved rights claims to water that have been established, are part of a pending adjudication, or are anticipated in your State? This would include claims for National Parks, National Forests, National Monuments, wilderness areas, Wild and Scenic Rivers, etc.

Montana is in the process of completing a state-wide water adjudication. There are four federal agencies claiming non-Indian reserved water rights in Montana for various units. These are:

- National Park Service
  - Yellowstone National Park
  - Glacier National Park
  - Little Bighorn Battlefield National Monument
  - Big Hole National Battlefield
  - Bighorn Canyon National Recreation Area

- U.S. Fish and Wildlife Service
  - Black Coulee National Wildlife Refuge
  - Benton Lake National Wildlife Refuge
  - Red Rocks National Wildlife Refuge and Wilderness Area
  - Charles M. Russell and UL Bend National Wildlife Refuges and UL Bend Wilderness Area
  - Bowdoin National Wildlife Area
  - the National Bison Range

- Bureau of Land Management
  - Upper Missouri National Wild and Scenic River
  - Bear Trap Canyon Public Recreation Site
  - Public Water Reserves (PWR 107)

- Forest Service
  - National Forests (10)
  - Wilderness Areas
  - Range and Livestock and the Sheep Experiment Stations

1. b. How has your state responded to these claims in the course of negotiations, other processes, or adjudications? Please describe in general terms the state's positions that have been advanced regarding these claims.

The Montana Reserved Water Rights Compact Commission (Compact Commission) was created by statute in 1979 to negotiate with federal agencies (and Indian tribes) that claim reserved water rights in Montana as part of the ongoing state-wide water adjudication. The Compact Commission negotiates on behalf of the Governor, and its statutory mission is to conclude compacts "for the equitable division and apportionment of waters between the state and its people and the federal government." Mont. Code Ann. § 85-2-703. An outline of the Compact Commission's statutory settlement process and the procedures used during negotiations is attached.

The State of Montana initiated negotiations with the federal agencies to resolve all claims to federal reserved water rights within the state. While negotiations are proceeding, the federal agency is not required to file claims and is not subject to adjudication proceedings. (Should negotiations be terminated by either party, the agency would have six months to file its claims in Water Court.) The Compact Commission negotiates with each agency separately. Some agencies have made formal proposals to the Compact Commission which set out each "claim" to reserved water. Other agencies have outlined the purposes and goals that they claim need water, but do not identify a quantification number prior to active negotiations. The Compact Commission does a general review of the legal and factual basis for each claim and a detailed examination of the practical implications of recognizing a reserved water right in each circumstance.

c. How have federal agencies responded to state efforts regarding their claims? Please describe in general terms the federal positions that have been advanced regarding these claims.

Each agency has been willing to negotiate and assigned negotiating teams. Each agency has been willing to address a much broader range of issues and possible solutions in negotiations then would have been required in litigation.

d. Please describe, wherever possible, how the above-mentioned federal claims have evolved over time, if at all.

As described in 1 (b), the federal agencies were not required to file formal claims prior to negotiations.

e. What is the outcome or current status of such contact, negotiations, court pleadings, etc., regarding these claims?

National Park Service - A copy of the Compact with the National Park Service is attached. Mont. Code Ann. § 85-20-401. All claims are settled and the Compact has been filed with the Water Court for review and incorporation in decrees.

Some of the more interesting provisions of the Compact include establishing a controlled groundwater area, legislative basin closures, and subordination agreements. The northern boundary of Yellowstone Park lies within Montana. Concern had been expressed that groundwater withdrawals outside of Yellowstone would impact hydrothermal features within the Park. Although scientific evidence was unclear, Congressional action creating a buffer zone around the park had been considered. The National Park Service Compact created a controlled groundwater area outside the boundary of Yellowstone Park. The Compact does not recognize a reserved water right outside of the Park, but groundwater use is monitored and thermal groundwater use is restricted to prevent impact to the hydrothermal system within the Park. The controlled groundwater area is managed by the State and monitoring and testing is paid for by the National Park Service.

Agreements providing for water management, subordination to existing water rights, etc., require that the status quo at the time of agreement be maintained and compacts often include provisions for basin closure. Basin closure means that the drainages specified in the compact are closed to new water uses. Certain types of future water uses are excluded from most basin closures, such as domestic wells and stock water. Because all agreements reached with federal agencies must be ratified by the Montana Legislature, we have flexibility to include provisions that change state law.

The National Park Service Compact does not contain any immediate basin closures but provides for basin closure at a future date after a specified amount of water is developed. We call this the "reverse approach" because it quantifies existing and future state water use instead of the reserved water right. This is a very useful approach for instrearn flows. For several streams in the National Park Service Compact the agreement recognizes a reserved water right to the entire flow of the stream but subordinates that right to all existing and some level of future use under state law. After levels of future use identified in a compact are reached, the basin is closed to new appropriations. This eliminates the need for actual quantification of the instrearn flow itself and prevents any future enforcement controversies.

Since the North Fork and the Middle Fork of the Flathead River form a common boundary of Glacier National Park and the Flathead National Forest, the Forest Service

agreed that the instrearn flow recognized in the National Park Service Compact would also settle the instrearn flow for the wild and scenic claims by the Forest Service for these rivers.

U.S. Fish and Wildlife Service - A copy of the Compact with the U.S. Fish and Wildlife Service for Black Coulee National Wildlife Refuge and Benton Lake National Wildlife Refuge is attached. Mont. Code Ann. § 85-20-701. All claims for these two units are settled. The Compact subordinates the recognized reserved water right to existing water rights and closes these basins to new appropriations. Small wells and small stock ponds are exempted from the basin closure.

Negotiating parties are continuing work on the four remaining U.S. Fish and Wildlife Refuges for which federal reserved water rights are claimed, the priority being Red Rock Lakes National Wildlife Refuge followed by Bowdoin National Wildlife Refuge. A negotiating session was held on February 6, 1998 in Helena to discuss the Commission's preliminary response to the FWS proposal of September 1996 for Red Rocks. A portion of the proposal includes negotiation of cooperative agreements with water users upstream from the Refuge to allow satisfaction of the FWS request for minimum flows on these streams. In June, Commission staff visited personally with upstream water users to discuss cooperative agreements. The parties hope to be ready to submit a compact for Red Rock Lakes National Wildlife Refuge to the 1999 legislature.

Bureau of Land Management - A copy of the Compact with the Bureau of Land Management is attached. Mont. Code Ann. § 85-20-501. All claims for the Upper Missouri National Wild and Scenic River and the Bear Trap Canyon Public Recreation Site are settled and the Compact will soon be filed with the Water Court for review and incorporation in decrees.

The drainage basin above the Upper Missouri National Wild and Scenic River is very large (41,000 square miles). The Compact again used a "reverse approach" which quantified existing and future state water use instead of the reserved water right. Instead of quantifying the reserved water right as the entire flow of the river and subordinating the right to existing and future uses as was done in the National Park Service Compact, here the reserved water right is defined as all water remaining in the stream after certain levels of water is development under state law. After the levels of future use identified in a compact are reached, the basin is closed to new appropriations. This eliminates the need for actual quantification of the instrearn flow itself and prevents any future enforcement controversies.

Bear Trap Canyon Public Recreation Site is a straight quantification of a reserved water right. The amount of water recognized matches required minimum releases from Madison Dam directly above Bear Trap Canyon so no conflict exists.

The Bureau of Land Management has approximately 1,900 claims for Public Water Reserves (PWR 107). These are small, geographically dispersed claims for human and stock consumption. Because formal adjudication of reserved water rights is suspended under our system until a settlement is reached or negotiations are terminated, the Compact Commission recently terminated negotiations with the Bureau of Land Management concerning all remaining claims so the Water Court may adjudicate them. The Bureau of Land Management voluntarily filed claims in the Water Court for these uses as reserved rights. The United States has not been consistent in how it wants these claims handled. In some areas the United States has submitted motions to the Water Court to change the basis of the PWR 107 claims from reserved water rights to state-based water rights. However, the United States has been unwilling to formally change all these claims to state-based claims. It is still not clear whether this will be processed as reserved water right claims or as state-based claims.

Forest Service - The Compact Commission and the Forest Service have a Memorandum of Understanding which sets out procedural "phases" of the negotiations. Phase 11 of the Memorandum of Understanding involves identification and tentative agreement on fundamental substantive issues in the negotiations. The issues raised by the Forest Service involve recognition of reserved instream flows uses for 1) securing favorable flows for channel maintenance and riparian vegetation; 2) fishery needs; 3) recreation and aesthetic uses on streams or portions of streams identified as having outstanding or unique recreational and aesthetic qualities; 4) Wilderness Act uses in areas designated as wilderness under federal statutes, plus small consumptive uses. The issues identified by the Compact Commission that need to be addressed are 1) protection of existing water rights; 2) availability of water for future development under state law; 3) administration and enforcement under state law; 4) by-pass flows as a condition to a present or future special use permit not be used to augment reserved water rights; and 5) no separate, special recognition of "wilderness" water rights. During the negotiating session on October 31, 1997, the parties reached tentative agreement on the issues in Phase 11 of the Memorandum of Understanding The Compact Commission has agreed to recognize a reserved water if the identified State needs are met. However, any compact would not identify a water right for a specific use but would be expressed as the quantity of water that the Forest Service accepts in full satisfaction of its claim for reserved water rights on the national forests. The Forest Service has agreed in principle to need the State's needs, except on the by-pass flow issue (discussed in Question 3 below).

Phase III sets up test watersheds. Alternative quantification methodologies and settlement options will be tested in these basins. Potential future water requirements will also be identified. Eleven test basins have been selected which cover most of the different factual flow/use situations that exist throughout the National Forest in Montana. The Compact Commission has developed GIS maps that display the locations of National Forest natural flow claims and existing state-based water rights.

These maps will help to identify areas of potential conflict.

2. *a. What non-reserved right proprietary claims to water by federal agencies have been established, are part of a pending adjudication, or are anticipated in your state? Example: Although the Dept. of Interior's Solicitor has indicated as a matter of policy that the Department will not pursue the so-called Non-Reserved Rights Doctrine, the Bureau of Reclamation has asserted an ownership interest of both surface water and groundwater in the Yakima basin of Washington.*

The Army Corps of Engineers manages Fort Peck Reservoir and Hungry Horse Reservoir. The Corps had originally filed state-based claims with the Water Court for these facilities but has attempted to withdraw those claims conditioned on Court recognition of a superior federal proprietary right that would not be quantified in the state-wide water adjudication. The basis for this claim remains uncertain. For Hungry Horse Reservoir the Water Court has found the Corps has "no rights" but left the door open for them to submit new information. Questions concerning this issue should be directed to Tim Hall (406) 444-6702, e-mail - thall@.mt.gov.

b. How has your state responded to these claims in the course of negotiations, other processes, or adjudications? Please describe in general terms the state's positions that have been advanced regarding these claims.

The State objected to the federal claims in Water Court.

c. How have federal agencies responded to state efforts regarding their claims? Please describe in general terms the federal positions that have been advanced regarding these claims.

See above.

d. Please describe, wherever possible, how the above-mentioned federal claims have evolved over time, if at all.

See above.

e. What is the outcome or current status of such contact, negotiations, court pleadings, etc., regarding these claims?

See above.

3. *a. What other assertions that would affect the use of water, based on federal law, have been made, are part of a pending adjudication, or are anticipated in your*

state? Example: In the Klamath basin of Oregon, where federal agencies have filed over half of the more than 700 claims to be adjudicated, the Bureau of Reclamation has asserted under its regulatory authority to operate federal projects to reallocate deliveries of water without state sanction, claiming that because the Bureau's and others' water rights have not yet been adjudicated, it may put to use the water in its projects to fulfill what it perceives as other federal obligations. Also, federal advocates believe that the Endangered Species Act, and possibly the Clean Water Act, create a federal right to preclude exercise of state water rights and state prerogatives to allocate new rights.

By-pass flows - A major issue raided by the Compact Commission as part of the negotiations is that of by-pass flows as a condition on special use permits issued by the Forest Service. The Forest Service has stated that, as a matter of law, it cannot limit its land use authority in a compact quantifying reserved water rights. One of the purposes of a comprehensive adjudication is certainty for water users. Montana would like to ensure that, if the Forest Service's water rights are quantified through agreement, the Forest Service will not be able to augment its water right by requiring additional bypass flows as a condition on a special use permit. Congressional clarification of this issue would help Montana in our negotiation efforts and provide more certainty for state water users.

b. How has your state responded to these claims in the course of negotiations, other processes, or adjudications? Please describe in general terms the state's positions that have been advanced regarding these claims.

The Forest Service seems entrenched in its legal opinion and it is doubtful it will change its position at this point in the negotiations absent judicial or congressional action.

The Compact Commission currently plans to work with the Forest Service to obtain long-term easements or other agreements instead of special use permits for individual water right holders within the National Forest who want them. Long-term easements reduce the number of periodic review of the land use and consequently reduce the opportunities for the Forest Service to add conditions to a special use permit. Other avenues are also being explored to constrain the Forest Service's ability to exercise its land use authority to require additional flows.

c. How have federal agencies responded to state efforts regarding their claims? Please describe in general terms the federal positions that have been advanced regarding these claims.

The Forest Service has stated it will work with the State on this issue, although staff has indicated that it has been a difficult issue for them in other states.

d. Please describe, wherever possible, how the above-mentioned federal claims have evolved over time, if at all.

The Forest Service's position has remained the same in the past 5 years regarding this issue.

e. What is the outcome or current status of such contact, negotiations, court pleadings, etc., regarding these claims?

Negotiating teams are exchanging information and remain committed to finding a practical solution to resolving all issues concerning federal water rights in Montana.

4. *If federal claims have been made as part of a general stream adjudication, please state for each such adjudication, wherever possible:*

   1) *the total number of federal claims:* See answer to Question 1 (b).

   2) *the total amount of water claimed, and,* See answer to Question 1 (b).

   3) *the approximate cost of adjudicating these claims.*

The Compact Commission's annual funding is $550,000. The Commission has a staff of eleven; a program manager, two attorneys, a historical researcher, an agricultural engineer, two hydrologists, a soils scientist, a GIS specialist, a GIS assistant, and an administrative assistant. It is impractical to break down the cost of each negotiation since Compact Commission and their staff handle the negotiations for all Indian and non-Indian reserved water rights claims. In addition to the federal agencies identified in Question 1 (a), there are seven Indian reservations in Montana plus the Turtle Mountain Band of Chippewa with water claims but no reservation. The completed compacts with the federal agencies are listed in the response to Question 2(e). The State of Montana also has completed compacts with the Assiniboine and Sioux Tribes of the Fort Peck Reservation, the Northern Cheyenne Tribe, and the Chippewa Cree Tribe of the Rocky Boy's Reservation.

5. *Please share any knowledge that you can of any federal policies directing agencies in regard to the filing or establishment of federal claims to water. Please discuss what you believe are the implications of these policies, an other developments regarding federal claims/assertions.*

6. *What other experiences could you share that might shed further light on this subject?*

BOB MILLER
Governor

STATE OF NEVADA

PETER G. MORROS
Director

R. MICHAEL TURNIPSEED, P.E.
State Engineer

DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
DIVISION OF WATER RESOURCES
123 W. Nye Lane, Suite 246
Carson City, Nevada 89706-0818
(702) 687-4380 • Fax (702) 687-6972

June 9, 1998

Jim Alder, WSWC Legal Counsel
Creekview Plaza, Suite A-201
942 East 7145 South
Midvale, Utah 84047

Re: State Survey Regarding Federal Non- Indian Claims to Water

Dear Mr. Alder:

This letter is in response to a survey request for a workplan item of the Western States Water Council. The response is as comprehensive as time and resources allow it to be, therefore, there are some approximations. I begin by noting that the most significant impact to the Division of Water Resources Adjudication Section's ability to complete the adjudication of water sources in Nevada is the filing of a significant number of federal non-Indian reserved water right claims.

While many federal acts of Congress more than 100 years old separated the allocation of water resources from the land, the various agencies of the federal government, through the continued filing of reserved and vested right claims, will not accept that as the law of the land. I cannot stress enough that these claims overwhelmingly impact the Adjudication Section of the Division of Water Resources, that enormous amounts of time and money are spent in dealing with these claims, and yet the United States refuses to comply with Nevada law that provides for the recovery of costs from the parties to an adjudication, and refuses to pay one dime of the significant costs generated by the U.S.' filings. The continued expansion of bases pursuant to which the United States, through its agencies, continues to assert new reasons that it's claims should support reserved water rights has little basis in law and has a tremendous impact on this State's resources with apparently no concern or consideration for those impacts. The United States, through its agencies, apparently has an agenda and does not appear to have any concern for how that agenda is accomplished or the effect it has on the states. Following are Nevada's responses to your survey questions.

1. **a.** Please describe in general terms the non-Indian reserved rights claims to water that have been established, are part of a pending adjudication, or are anticipated in your state. This would include claims for National Parks, National Forests, National Monuments, Wilderness Areas, Wild and Scenic Rivers, etc.

RESPONSE:

Established non-Indian Reserved Right claims: No non-Indian reserved right claims have been definitively established pursuant to an adjudication conducted by the Division of Water Resources in Nevada as none of the proceedings in which such reserved right claims have been asserted have proceeded to Findings of Fact, Conclusions of Law and a final Decree being issued by a district court. However, on the Truckee River the Special Master adjudicating the claims treated the water right for the Newlands Reclamation Project as if it were a type of implied reserved right and stated so in his report to the Federal District Court. In view of the U.S. Supreme Court's decision in Nevada v. U.S. in 1983, which said the water rights on the Project belonged to the farmers with the United States only having a lienholder's interest, this interpretation of a type of implied reserved right for an irrigation project appears to no longer be valid.

Pending claims: In pending adjudications over 1,600 non-Indian federal reserved right claims have been filed to date with many more anticipated each time a new area is adjudicated. The US Forest Service files claims under the Creative Act, the Organic Act of 1897, the Multiple Use Sustained Yield Act of 1960, and various wilderness acts. Most of the reserved right claims filed by the Bureau of Land Management are for public water reserves pursuant to an Executive Order #107 of 1926. The US Fish and Wildlife Service has also filed reserved right claims for fish habitat, wildlife and recreation purposes.

In the **Las Vegas Adjudication,** the State settled a reserved right claim with the U.S. Air Force for Nellis Air Force Base, and the Order of Determination issued at the final administrative stage recognized a right to the use of ground water for Nellis Air Force Base for national defense/national security purposes. However, the agreement specifically provided that the State Engineer agreed not to rule on the applicability of the reserved rights doctrine to ground water and it was agreed that no precedent was set pursuant to the agreement as to the reserved rights doctrine applying to ground water in Nevada. The water right is not transferable or marketable, can only be used on behalf of the air force base, and is only available for use after the USAF has utilized, to the

extent practicable, its State permitted or vested water rights, and/or its contractual right to reclamation water. Exceptions to the settlement of this claim have been filed in the District Court and have not been resolved to date.

The USFWS filed reserved right claims for wildlife purposes within the Desert National Wildlife Range with a priority of 1936 which were determined to be valid in the Order of Determination. The USFWS filed a reserved right claim for wildlife and quasi-municipal purposes from ground water which was rejected by the State Engineer on the grounds that the Winters doctrine did not extend to ground water, but the Service abandoned said claim during the adjudication process. The USFWS also filed a reserved right claim for irrigation and wildlife purposes to spring waters in support of the Desert National Wildlife Range. The State Engineer recognized the reserved right for wildlife purposes, but found the irrigation portion of the claim, which included stock water and domestic uses, was covered by a vested rights claim.

The USFS filed reserved right claims pursuant to the Nevada Wilderness Act of 1989 which expressly reserved water rights and these were recognized by the State Engineer in the Order of Determination.

In the **Monitor Valley Adjudication,** the USFS filed reserved right claims for the following:

- for all waters within the boundaries of wilderness areas;

- for watershed protection (but a review of the filings indicates they are actually for the administrative sites on the National Forests, including stock watering and domestic use);

- for instream flows for watershed protection under the Organic Act of 1897 to secure favorable conditions of flow described in hearings to mean a minimum flow to allow vegetation to grow along the banks of the creeks, and a high water flushing flow to remove sediment from those same creeks; and

- for fisheries resources under the Multiple Use Sustained Yield Act of 1960.

The BLM has filed reserved right claims for public water reserves which were originally filed for livestock, wildlife, and domestic purposes, but were later amended to read human and animal consumption.

In the **Owyhee, Bruneau, Jarbidge River Adjudications,** the BLM has filed many reserved right claims under the public water reserve concept. The USFS has filed wildlife, fish habitat, and recreation claims, as well as claims similar to those mentioned above.

In the **Walker River Adjudication,** the United States has moved to re-open a decree finalized by the Federal District Court in 1936 to assert new claims for military installations, the BLM, the USFS and for tribal interests. Many of these claims are for ground water.

It is anticipated that the National Park Service may file reserved right claims to spring waters in support of Death Valley National Monument.

1. **b.** How has your state responded to these claims in the course of negotiations, other processes, or adjudications? Please describe in general terms the state's positions that have been advanced regarding these claims.

RESPONSE: The State of Nevada has responded in various ways to the pending federal reserved rights claims.

A. In the Las Vegas Adjudication, the decision was made to attempt settlement of both the Indian and non-Indian claims. The State strongly believes the reserved rights doctrine does not apply to ground water and chose not to litigate that question in a ground water basin that did not have a surface water source for the claimants asserting the reserved right claims.

B. In the Monitor Valley Adjudication, in the Preliminary Order of Determination, the State Engineer rejected the USFS instream flow claims; allowed the wilderness claims on the grounds that the Nevada Wilderness Act expressly provides for reserved rights (so there was no issue of an "implied" right); allowed the claims for administrative sites on the National Forests (which is under dispute in the present stage of the proceedings); and rejected any claims under the Multiple Use Sustained Yield Act of 1960 for instream flows. The State Engineer recognized the BLM claims for public water reserves, but required those claims be amended to state human and animal consumption rather than for domestic and stockwater purposes in order that the claims more closely comply with the Executive Order #107. There is no quantity of water assigned to these PWR 107 Claims. However, these determinations cannot be accepted as the final determinations by the State Engineer as many were objected to and

no final Order of Determination has been issued by the State Engineer. The State of Nevada cannot state its final position on those claims in this letter. The State Engineer has not issued the final Order of Determination and it would be improper in this context to provide the State Engineer's final decision.

Other process which the State Engineer has looked to for resolving these types of claims was to suggest that the USFS file applications through the state permitting process for instream flow claims instead of trying to assert them through the adjudication process as the State Engineer could consider such claims under Nevada law.

1. c. How have federal agencies responded to state efforts regarding their claims? Please describe in general terms the federal positions that have been advanced regarding these claims.

RESPONSE: The USFS is very strongly arguing that the State Engineer should not issue stock water rights to the private citizen on public lands. While it participated in and had no objection to the recognition of those rights for decades, it now wants to change its position and assert that only the USFS can own stock water rights on the national forests. The USFS argues that neither the Mining Act of 1866 or the Desert Land Act of 1877 authorized private acquisition of stock water rights on federal range land on the grounds that stock watering was not within the definition of agriculture. This position is interestingly contradictory to a position stated in a 1961 letter in the files of the State Engineer where the BLM told the State Engineer to issue the water right to the present range user. The US also argues that the water right should not be appurtenant to the cattle, but rather to the federal land.

As to instream flow claims, the USFS is responding to a statement from the Ninth Circuit Court of Appeals that perhaps with the right science an instream flow claim on the national forests could be proved by presenting evidence and testimony as to why the forests would be a better place if instream flows were granted. The position the USFS appears to be taking is to overwhelm them with evidence; however, to date, that evidence is not convincing as to how instream flows fulfill the primary purposes of a national forest reservation or benefit a downstream user.

1. **d.** Please describe, wherever possible, how the abovementioned federal claims have evolved over time, if at all.

RESPONSE: There is really no response to this question as Nevada is for the first time just getting into actually dealing with the arguments being presented, except to say that the reserved right claims were first filed on behalf of Indian tribes and now are being filed for all sorts of reasons.

1. **e.** What is the outcome or current status of such contact, negotiations, court pleadings, etc. regarding these claims?

RESPONSE: This question has actually been responded to in part in the above answers - Most of the questions remain unresolved at this point in time; however, Nevada is taking an active role to take some of the questions and move them along through the adjudication process. The Las Vegas Adjudication is presently at the district court stage of the process and no final settlement has been reached with the USAF and the objecting parties. The Monitor Valley Adjudication is at the final stage of the administrative process, i.e., the State Engineer is drafting the Order of Determination, after which it will move through the judicial phase of the adjudication process. The Owyhee Adjudication is in the field work stage and the State Engineer has not yet issued the Preliminary Order of Determination. The Ruby/Clover Valley Adjudication has not gone past the stage for filing of proofs of appropriation and takes a back seat to the Owyhee River Adjudication.

2. **a.** What non-reserved right proprietary claims to water by federal agencies have been established, are part of a pending adjudication, or are anticipated in your state?

RESPONSE: In the years prior to the U.S. Supreme Court's decision in U.S. v. New Mexico, the State Engineer granted some vested right claims to stock water in the name of the United States. The U.S. takes this and argues that the State Engineer has done it before and must do it again. In those cases, there was no claim on behalf of a private individual vs. the United States' claim to the same water. The U.S. filed the claim tracing back to the original user and did so without any challenge; thus, the State Engineer recognized the rights claimed. One adjudication that was in process and was too far along at the time of the New Mexico decision also recognized vested stock water rights in the United States. Since the New Mexico decision, the State of Nevada takes the position that the stock water right should be granted in the name of the private citizen that filed for the vested claim and not in the name of the United States.

The BLM has over 300 vested right claims on file for stock water; the USFWS has vested claims on file for irrigation and quasi-municipal purposes; the USAF has claimed a vested right for military installation support purposes; the USFS has over 1,100 claims on file for stock water, wildlife, and recreation, and is actively pursuing efforts to have stock water rights on the national forests recognized in its name rather than the private citizen.

2. b. How has your state responded to these claims in the course of negotiations, other processes, or adjudications? Please describe in general terms the state's positions that have been advanced regarding these claims.

RESPONSE: The State has not negotiated any of these vested right claims. In the adjudication process, prior to the decision in New Mexico, if the US filed claims for stock water that were unchallenged by a private citizen claiming the same water, but led back to the original people who developed those water sources, the State Engineer granted the water rights to the US. In the Monitor Valley Adjudication, the State Engineer, in the Preliminary Order of Determination, rejected the U.S.' vested stock water right claims to water sources where a private citizen also claimed the water source for stockwatering purposes. In the Las Vegas Adjudication, the State Engineer recognized the USAF's vested right claim to ground water for military installation support purposes. The remaining claims are unresolved and are part of pending adjudications. The State Engineer takes no position as to how those claims will be resolved until the analysis they deserve and require can be conducted.

2. c. How have federal agencies responded to state efforts regarding their claims? Please describe in general terms the federal positions that have been advanced regarding these claims.

RESPONSE: The federal agencies have responded with extensive legal briefing in the Monitor Valley Adjudication. They advance arguments that the separation of the water from the land found in the acts of the late 1800's did not apply to vested rights for stock watering, and that stock watering is to be looked at as being in a separate category. The US argues that the water right must be appurtenant to federal land upon which the water sources originate and not to the rancher's cattle, and that it cannot effectively manage the federal lands if it does not own the water.

2. d. Please describe, wherever possible, how the above

mentioned federal claims have evolved over time, if at all.

RESPONSE: There is really no response to this question as Nevada is for the first time just getting into actually dealing with the arguments being presented.

2. **e.** What is the outcome or current status of such contact, negotiations, court pleadings, etc. regarding these claims?

RESPONSE: As described above, some unchallenged vested right stock water claims were granted to the US prior to the New Mexico decision. The USAF vested right claim is before the district court in Las Vegas under an objection. The vested right claims in the Monitor Valley Adjudication are before the State Engineer for decision.

3. **a.** What other assertions that would affect the use of water, based on federal law, have been made, are part of a pending adjudication, or are anticipated in your state?

RESPONSE: The federal agencies have yet to assert that the Endangered Species Act or the Clean Water Act creates a federal right to preclude the exercise of state water rights and state prerogatives to allocate new rights. However, the U.S. Bureau of Reclamation, supposedly as a non-aligned party, has intervened in the Newlands Reclamation Project transfer applications protested by the Pyramid Lake Paiute Tribe. The BOR adopts all the Protestant Tribe's arguments which contain issues alleging that the granting of the transfer applications would be detrimental to the public interest based on endangered species arguments. These applications are not part of a pending adjudication, but the parties argue that it is an attempt to re-adjudicate waters already adjudicated.

3. **b.** How has your state responded to these assertions in the course of negotiations, other processes, or adjudications? Please describe in general terms the state's positions that have been advanced regarding these assertions.

RESPONSE: The State Engineer has ruled that the protestant did not prove the transfer applications would threaten to prove detrimental to the public interest and granted the change applications.

3. c. How have the federal agencies responded to state efforts regarding their assertions?

RESPONSE: The federal agency has participated in the appeal of the State Engineer's decision. one decision has been in litigation for 13 years. It is now before the Federal District Court for the third time and is probably headed to the Ninth Circuit for the third time.

3. **d.** Please describe, wherever possible, how the above mentioned assertions have evolved over time, if at all?

RESPONSE: There has not been an evolution of these types of assertions as Nevada has not had to deal with these types of claims other than the one mentioned.

3. **e.** What is the outcome or current status of such contact, negotiations, court pleadings, etc., regarding these assertions?

The federal district court upheld the State Engineer's decision on this question in the first round of litigation, but many of the same questions are before the State Engineer in several hundred additional transfer applications and it is not known if the protestant will take a different evidentiary position.

4. If federal claims have been made as part of a general stream adjudication, please state for each such adjudication, wherever possible:

    1. the total number of federal claims;
    2. the total amount of water claimed; and
    3. the approximate cost of adjudicating these claims.

RESPONSE: I am unable to answer these questions at this **time.** During the research in preparation to answer your request the Adjudication Section found errors in the computer entry for many of the claims filed. Therefore, the numbers you have been provided in the sections above at this time are merely estimations. Several years ago federal claims came in by the hundreds and were filed at a time when the adjudication section had lost its staff and data entry was done by persons who were not well versed in the implied reservation doctrine and did not completely understand that some claims were being filed as vested right claims. Further, even if I could get you an accurate number I have no way of estimating what it will cost to adjudicate said claims, but I suspect it will ultimately be millions of dollars.

5. Please share any knowledge that you can of any federal

policies directing agencies in regards to the filing or establishment of federal claims to water. Please discuss what you believe are the implications of these policies, and other developments regarding federal claims/assertions.

RESPONSE: Exhibits submitted during the Monitor Valley Adjudication included copies of portions of the USFS manual (I have attached a copy of that exhibit for your further review as it is quite informative) in which it states that policy in obtaining water rights is:

1) to rely on the reservation doctrine;

2) to obtain water rights in recognition and compliance with State law if the reservation doctrine does not apply; or

3) to purchase water rights not otherwise available.

It directs the Chief to develop policies, programs and procedures for obtaining water needed for National Forest System purposes. The implications of the policies found in the attached Forest Service Manual pages reflect concepts in claiming implied reserved water rights for continually expanding purposes, which means expanding financial and staff impacts on the State.

6. What other experiences could you share that might shed further light on this subject?

RESPONSE: The U.S. has refused to pay the fees for the filing of these thousands of claims, and has refused to comply with Nevada law which requires the participants to an adjudication to reimburse the State for the costs of the hearing which includes court reporters fees. While it is the U.S. , its agencies, or Indian tribes, and their actions that have been the factors in requiring these time consuming and costly adjudications, the U.S. takes no responsibility for the impact this has on the State. Nevada feels it is imperative that the U.S. accept responsibility for the costs its claims are imposing on the State of Nevada. While the Division of Water Resources has not passed on those costs directly to the other participants in the adjudication, those costs are paid directly by the taxpayers of this state.

The problems the states faces are partly exacerbated by the arrogance and unbending attitude of the Justice Department. Justice has never liked the McCarran Amendment and does everything it can to

frustrate the adjudication process. They ignore case law if it does not favor their agenda. The U.S. needs to realize that they are a major benefactor to state adjudications and should pay their proportionate share. Nevada does not charge for the adjudication process. The statutory filing fee is $50.00 for stockwater claims and $100.00 for any other type of claim. The only other charge is reimbursement of transcripts if there are hearings.

I hope this response satisfies your inquiry. If I can be of further assistance, please feel free to contact me.

Sincerely,

R. Michael Turnipseed, P.E.
State Engineer

RMT/bk

Supplemental Materials

U.S. Forest Service Manual, Chapter 2540 - Water Uses and Development. Includes official policies and procedures to be used by the Forest Service to obtain water rights for National Forest lands.

November 17, 1998

NORTH DAKOTA RESPONSE
TO
WESTERN STATES WATER COUNCIL

SURVEY OF WESTERN STATES EXPERIENCES WITH FEDERAL NON-INDIAN WATER CLAIMS

Questions 1, 4, and 5.

There are no established non-Indian reserved claims in North Dakota and there are no adjudications regarding such claims pending or anticipated. We are not aware of any federal policy directing agencies in regards to filing or establishing federal claims to water.

Questions 2, 3, and 6.

The federal government has generally acquired its water rights pursuant to state law. In 1905, North Dakota enacted a statute as part of its irrigation code that authorized the United States to acquire water rights by filing a notice with the State Engineer of the intent to utilize certain waters. Once the notice was filed the waters were not subject to further appropriation for a period of three years. If the United States did not file plans within that three-year period, the water then became available for appropriation again.

Prior to the repeal of this statute in 1943, the predecessors of the United States Fish and Wildlife Service (Service) filed several claims for water in North Dakota. References (Ref.) 1 & 2. Most of the rights obtained by the Service are for use at its wildlife refuges. Although water rights associated with these claims were acquired under state law, the Service has taken the position that it complied with all legal requirements at the time it made the filings and these rights are not subject to further administration by the state engineer. Ref. 3 & 5. In some cases, water used exceeds the amount filed for. The service has taken the position that if the state investigates any of the Service's rights with the intent to alter those rights, it must undertake a general stream adjudication and join the United States as required under the McCarren Amendment. The Service has objected to the cancellation of a water right obtained by filing such a claim because it is a property right that only Congress has the authority to relinquish. Ref. 5. The state's position is that these water rights are subject to further state administration, such as being subject to the state's perfection process to determine the amount of water beneficially used, and to the state's forfeiture provisions. Ref. 4. The State Engineer's decision to cancel a Service water right was upheld by an administrative law judge. Ref. 6 & 7.

The Service has claimed a vested right under federal law for water impounded without a permit. Ref. 8 & 9.

The Service has acquired other water rights pursuant to the state's permitting system. As a matter of course, the Service adds a disclaimer to its water permit applications stating that it is applying only as a matter of comity and the application does not waive any of its rights to water, any rights it has under the Supremacy Clause of the United States Constitution, any other rights it may have under federal law. Ref. 10.

The Service, in obtaining water rights under state procedures, has objected to conditions placed on its state permitted rights that the Service believes will interfere with federal laws such as the National Wildlife Refuge System Administration Act. Ref. 11.

Baldhill Dam was constructed and is operated by the Corps of Engineers (Corps). It was authorized by the 1944 Flood Control Act. Several downstream municipalities have obtained state water permits for the water stored behind Baldhill Dam. The federal government does not hold a water permit for any of the water stored in the facility. The Corps has taken the position that federal laws, including the Fish and Wildlife Conservation Act of 1934, the Endangered Species Act, the Clean Water Act, the Recreation Act of 1976, govern its operation of the dam and must be considered before making releases to satisfy downstream needs or water rights. Ref. 12, 13, & 14. While the state and the Corps disagree, the Corps has generally made the releases requested by the state.

The Service has acquired easements covering wetlands on private property designated as waterfowl production areas. The Service has objected to the issuance of water permits from groundwater if the appropriation of ground water will impact the water in the wetland. The Service asserts that if water table drawdown caused by pumping aggravates the effects of annual evaporation losses and climatic cycles, it would harm the Service and its real property interests in the wetlands. The Service has argued that any impact is prohibited under the National Wildlife Refuge Act which prohibits persons from knowingly disturbing or injuring property of the United States in any area of the National Wildlife Refuge system and may violate the terms of the easement. Ref. 15. The state has not conditioned or denied water permits because of impacts the appropriation may have on the wetlands. There are no water rights associated with the wetlands. To deny a water permit based on impacts to the water in a wetland, would in effect be to elevate that interest to the status of a prior water right and could severely impact the development of water resources in those areas where the Service has easements on wetlands that are impacted by the development. In addition, what the terms of the easement mean is the subject of dispute between some of the appropriators and the Service and is an issue more appropriately resolved between them. Ref. 16, 17, 18, & 19.

North Dakota and the U.S. Bureau of Reclamation are negotiating the transfer of an irrigation test area to the state of North Dakota. Ref. 20. The irrigation test area is upstream of wildlife refugees in North and South Dakota. The Fish and Wildlife Service has attempted to broaden state water rights it has associated with these wildlife refuges by requiring the transfer agreement to contain restrictions on use of water for irrigation to alleviate impacts to the wildlife refuge and to ensure refuge compatibility for refuges in both North Dakota and South Dakota. The restrictions require more water to flow to the refuges than the Service is entitled to under its state water rights.

The Service objected to issuance of a water permit to a rural water system because of potential impacts the appropriation of water may have on the western prairie fringed orchid, a federally listed threatened plant species. Ref. 21 & 22. The water is needed for a portion of the rural water system funded with federal money. If the appropriation does jeopardize or adversely affect the orchid, the Endangered Species Act may be utilized to require water to remain in the aquifer.

Attached are copies of correspondence between the state and federal governments and other documents that set forth the above issues/positions in more detail.

Supplemental Materials

Letter from Henry A. Wallace, U.S. Secretary of Agriculture, to R. E. Kennedy, North Dakota State Engineer (February 21, 1935). The letter states the intent of the U.S. to utilize specified unappropriated waters in South Rock Lake and Mauvais Coulee.

Letter from Henry A. Wallace, U.S. Secretary of Agriculture, to R. E. Kennedy, North Dakota State Engineer (September 1, 1934). The letter states the intent of the U.S. to utilize specified unappropriated waters in the Mouse River, the Des Lacs River, the James River, the Pipestem River, the Bois des Sioux River, the Sheyennne River, the Turtle River, the Forest River, all other tributaries of the Red River in North Dakota, and all tributaries of the Missouri River in North Dakota.

Letter from Wilbur N. Ladd, Jr., Acting Regional Director of the U.S. Fish and Wildlife Service, to David Sprynczynatyk, North Dakota State Engineer (July 15, 1992). Letter responds to N.D. concerns that Fish and Wildlife Service water rights filed during the 1930s be perfected.

Letter from David Sprynczynatyk, North Dakota State Engineer, to John L. Spinks, Jr., Deputy Regional Director, U.S. Fish and Wildlife Service (January 19, 1994). Letter addresses priority date of Fish and Wildlife Service water rights filed in the 1930s.

Letter from John L. Spinks, Jr., Deputy Regional Director, U.S. Fish and Wildlife Service, to David Sprynczynatyk, North Dakota State Engineer (November, 19, 1993). Letter addresses Conditional Water Permit Application #4671 and water rights for Lake George National Wildlife Refuge.

State Engineer's Opening Statement, In the Matter of: The Cancellation of a Portion of United States Fish and Wildlife Service's Claim 169-47-Lake George.

Administrative Order No. 95-1, Findings of Fact, Conclusions of Law, and Order, In the Matter of: The Cancellation of a Portion of United States Fish and Wildlife Service's Claim 169-47-Lake George.

Letter from Cheryl C. Williss, Chief, U.S. Fish and Wildlife Service, Division of Water Resources, to David Sprynczynatyk, North Dakota State Engineer (May 17, 1998). Letter addresses proposed "administrative corrections" to Fish and Wildlife water rights in the Coal Mine and Sheyenne Lakes impoundment.

Letter from David Sprynczynatyk, North Dakota State Engineer, to Cheryl C. Williss, Chief, Mountain Prairie Region, Water Resources Division, U.S. Fish and Wildlife Service (November 10, 1998). Letter addresses Coal Mine Lake priority date and relevant North Dakota Code sections.

Application for Conditional Water Permit, filed by the U.S. Fish and Wildlife Service (April 20, 1998), for water on the Edmore Coulee.

Letter from Galen L. Buterbaugh, Regional Director, U.S. Fish and Wildlife Service to David Sprynczynatyk, North Dakota State Engineer (March 12, 1991). Letter addresses the Service's concerns about water right permit conditions for projects on the Upper Souris and J. Clark Salyer National Wildlife Refuges.

Memorandum from Craig Odenbach, Water Resource Engineer, North Dakota State Water Commission, to David Sprynczynatyk, North Dakota State Engineer (July 24, 1992). Provides a summary of discussions with the U.S. Army Corps of Engineers on the operation of Baldhill Dam and water rights associated with water stored in Lake Ashtabula.

Letter from Robert F. Post, Chief, St. Paul District, Engineering and Planning Division of the U.S. Army Corps of Engineers, to David Sprynczynatyk, North Dakota State Engineer (March 31, 1994). Letter addresses management of water stored in Lake Ashtabula.

Letter from David Sprynczynatyk, North Dakota State Engineer, to Robert F. Post, Chief, St. Paul District, Engineering and Planning Division of the U.S. Army Corps of Engineers (June 8, 1994). Letter addresses management of the Baldhill Dam/Lake Ashtabula.

Letter from Cheryl C. Williss, Chief, Mountain-Prairie Region, Water Resources Division, U.S. Fish and Wildlife Service, to David Sprynczynatyk, North Dakota State Engineer (February 14, 1997). Letter addresses Fish and Wildlife concerns over possible impacts of a groundwater application before the state engineer.

Memorandum from Scott Parkin, Hydrologist, North Dakota State Water Commission, to David Sprynczynatyk, North Dakota State Engineer (April 3, 1998). Memo address water permit application #5070 and concerns of the Fish and Wildlife Service.

Letter from Donald R. Becker, Attorney, to David Sprynczynatyk, North Dakota State Engineer (April 22, 1997). Letter addresses Fish and Wildlife Service wetlands easements.

Letter from W. M. Schuh, Hydrologist, North Dakota State Water Commission, to Cheryl C. Williss, Chief, Mountain-Prairie Region, Water Resources Division, U.S. Fish and Wildlife Service (July 17, 1998). Letter addresses Fish and Wildlife Service comments regarding Water Permit #5070.

Letter from Cheryl C. Williss, Chief, Mountain-Prairie Region, Water Resources Division, U.S. Fish and Wildlife Service, to W. M. Schuh, Hydrologist, North Dakota State Water Commission (August 19, 1998). Letter responds to State Water Commission concerns regarding Water Permit #5070 expressed in above-listed letter.

Letter from David Sprynczynatyk, North Dakota State Engineer, to Arden Freitag, Title Transfer Team Leader, Bureau of Reclamation (October 22, 1996). Letter addresses a proposed memorandum of understanding and concerns relative to a proposed transfer of water in relation to the Fish and Wildlife Service's water rights.

Letter from Allyn J. Sapa, Acting Field Supervisor, North Dakota Field Office, U.S. Fish and Wildlife Service, to David Sprynczynatyk, North Dakota State Engineer (February 10, 1998). Provides comments of Fish and Wildlife Service on application for groundwater filed by Ransom-Sargent Water Users, Inc.

Memorandum from Robert Shaver, Hydrologist Manager, North Dakota State Water Commission, to David Sprynczynatyk, North Dakota State Engineer (June 9, 1998). Memorandum address U.S. Fish and Wildlife concerns over application for groundwater permit #5188, filed by Ransom-Sargent Water Users, Inc.

Oregon

John A. Kitzhaber, M.D., Governor

Water Resources Department
Commerce Building
158 12th Street NE
Salem, OR 97310-0210
(503) 378-3739
FAX (503) 378-8130

June 29, 1998

OREGON RESPONSE
TO
WESTER STATES WATER COUNCIL

SURVEY OF WESTERN STATES EXPERIENCES WITH FEDERAL NON-INDIAN WATER CLAIMS

1. a. Please describe in general terms the non-Indian reserved water rights claims to water that have been established, are part of a pending adjudication, or are anticipated in your state.

Established: The only non-Indian federal reserved rights established in Oregon are U.S. Forest Service water rights for fire control and road construction and maintenance in the Fremont National Forest in South-central Oregon. These rights were quantified in the 1990 Lost River Supplemental Adjudication and carry a 9/17/1906 priority date.

Pending: The following is a summary of the non-Indian federal reserved water rights pending in the Klamath River Adjudication (Oregon's only current adjudication proceeding):

The U.S. Forest Service filed 214 claim forms claiming 416 water rights. The USFS filed claims for six different consumptive uses, livestock springs, instream rights for channel maintenance, fish and recreation, and instream rights in five wilderness areas.

The U.S. Bureau of Land Management filed claims for 51 waterholes and 1 wild and scenic river.

The National Park Service filed ten claims for instream water rights in Crater Lake National Park and 11 claims for 44 consumptive uses in the Park.

The U.S. Fish and Wildlife Service filed claims for water rights in four wildlife refuges. The US F&W claims include nine claims for irrigation of over 63,000 acres, 12 claims for over 200,000 acre feet of water per year for wildlife refuge uses and one claim for over 80 cfs for stockwater.

The U.S. Bureau of Indian Affairs filed claims on behalf of the Klamath Tribe for consumptive uses, minimum water levels in Upper Klamath Lake and the Klamath Marsh, in-stream flows on streams and rivers within the former Klamath Indian Reservation and claims for 334 wildlife seeps and springs within the former Klamath Indian Reservation.[1]

Anticipated: The U.S. Forest Service, Bureau of Land Management and U.S. Fish and Wildlife Service administer federal land in most of Oregon's river basins. Oregon anticipates these agencies will file reserved water right claims in most if not all basins at the time either adjudications or supplemental adjudications are initiated. Under Oregon law, the Director of the Water Resources Department is authorized, and typical does, initiate adjudications basin-by-basin as he/she deems appropriate.

b. How has your state responded to these claims in the course of negotiations, other processes, or adjudications?

Negotiations: The Water Resources Department (Department) initiated an alternative dispute resolution (ADR) process for claimants, including the federal agency claimants, and other interested parties as a part of the Klamath Adjudication.

Other Process: None.

Adjudication: Claims for federal reserved water rights have been received and filed in the Klamath Adjudication. To date, the state has not responded to these claims. The state's response will either come in the ongoing ADR, when the adjudication summary of claims is published and in the Department's finding and determination to be transmitted to the Klamath County Circuit Court.

Both the Fremont and Winema National Forests filed claims in the 1990 Lost River Supplemental Adjudication without the statutory claiming fees (ORS 539.081). The state demanded the fees. The Fremont National Forest paid the fees and its claims were adjudicated. The Winema National Forest did not pay the fees and these claims were rejected. No appeal was filed.

---

[1]Technically, the BIA filed these claims on behalf of the Klamath Tribe; however, the claims were filed in the name of the Tribe for in-stream flow protection, not for use by individual Indians.

c. How have the federal agencies responded to state efforts regarding their claims?

The federal agencies are willing, active participants in the Klamath ADR. Generally, each claimant agency is represented at every ADR session.

Several federal attorneys have expressed concern about the Department's intent to issue a summary of claims as apart of its administrative review. Under Oregon's adjudication statute and the Department's administrative rules, the Department must summarize all claims. This summary, which must be published before the adjudication open inspection period, will contain the Department's determination of the amount of water allowed for each claim. The federal attorneys have indicated they do not want such a determination to be published in advance of submittal of the claims to the Circuit Court. However, the summary must be published and must contain the amount allowed determination.

2. a. What non-reserved right proprietary claims to water by federal agencies have been established, are part of a pending adjudication, or are anticipated in your state?

Established: The Bureau of Reclamation has permitted (post-1909 water code) water rights in most Oregon river basins. These rights were established under Oregon's water right permitting statute. *(ORS 537.110 et seq.)*

The U.S. Fish and Wildlife Service has decreed and permitted water rights on a number of their wildlife refuges acquired as a part of private land purchases.

Pending: The Bureau of Reclamation filed seven consolidated claims for the Klamath Project in the Klamath Adjudication. These seven claims state that the Bureau diverts 3,505 cubic feet per second to irrigate 218,654 acres in the Project. In addition, the Bureau filed a claim to store 486,830 acre feet of water in Upper Klamath Lake, 92,300 acre feet in Gerber Reservoir and 481,300 acre feet in Clear Lake. Water users in the Klamath Project, including approximately 20 irrigation districts have filed parallel claims in the Klamath Adjudication (same water, use and area).

b. How has your state responded to these claims in the course of negotiations, other processes, or adjudications?

Negotiations: The only official discussions and/or response was to work with the Bureau of Reclamation to make sure the Bureau followed state water law process for making changes (transfer) in their rights. To date, the Bureau has followed state law procedure.

Other processes: None

c. How have the federal agencies responded to state efforts regarding their claims?

With the exception of the Bureau's action under its "Operation Plan" in the Klamath Basin described in 3.a. below, to date the federal agencies have followed state law with regard to acquisition and transfer of state water rights.

d. How have non-reserved, proprietary claims evolved over time?

In general, it appears as though the federal agencies are beginning to assert more interest in controlling water on federal land holdings. To date, the only actual assertion of control is by way of the Klamath Basin Operation Plan described in 3.a. below. However, the U.S. Forest Service has recently begun to indicate that it has the right to control water and canals located on National Forests.

e. What is the outcome or current status of such contact, negotiations, court proceedings, etc., regarding these claims?

To date, there has been no "outcome." The Oregon Attorney General (Steve Sanders) issued a legal opinion that the Bureau of Reclamation holds no water right per se for use on property in a project and has no authority to allocate water for uses not set out in the project authorizing law. U.S. Solicitors for the Bureau countered with an opinion that the Bureau does have such authority. We are currently at a stand-off on this matter.

3. a. What other assertions that would affect the use of water, based on federal law, have been made, are part of a pending adjudication, or are anticipated in your state?

Assertions made: Other than the assertions contained in the Bureau of Reclamation's Klamath Basin Operation Plan (See below), there are two assertions of "federal control." The first assertion is by way of the Endangered Species Act (ESA). The National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service have listed a number of aquatic species in Oregon's waters as threatened or endangered. Given the effect of the holding in *United States v. Glenn-Colusa Irrigation District,* the ESA listings "will affect the use of water."

The second assertion is part of the Bureau of Reclamation's participation in Oregon's irrigation district "remapping" program. As a result of legislation originally enacted in 1989, Oregon is just completing a major irrigation district remapping program. The

purpose of the program is to bring the state's irrigation district place of use into conformance with the Department's water right records. The Bureau of Reclamation has asserted that the state has no authority to change the "Bureau's" water right in this process.

In addition, the Bureau of Reclamation has recently asserted that it has authority to operate the Klamath Project to serve a number of purposes other than the traditional Project purpose (irrigation). This assertion takes the form of an annual "Operation Plan" for the Klamath Project. The Bureau issued several annual Operation Plans between 1992 and 1998. In 1998, the Bureau conducted what it termed an "Environmental Assessment" to develop a more permanent Operations Plan. All of the Operations Plans have directed the Bureau to operate the Project for multiple purposes, with the primary purposes being allocation of Project water for fish and tribal "trust" interests.

On March 18 1996, Oregon Attorney General's office issued an opinion concluding that "[W]ater rights for the Klamath Project were acquired for irrigation purposes. No state or federal authority has reallocated this irrigation right to other uses. The specific nature and scope of Klamath Project, federal reserved and private rights will be determined in the Klamath Basin Adjudication."

In early 1997, the United States Department of the Interior Solicitor's office issued a memorandum stating that the Bureau of Reclamation is authorized, in fact is obligated, to "manage and operate the Klamath Project consistent with all of Reclamation's responsibilities and obligations concerning senior water rights, tribal trust resources, Project water users' contractual rights, the Endangered Species Act and other requirements mandated by law and within the authority of the Secretary." Reclamation's 1998 Operations Plan allocates water first for Upper Klamath Lake fish, second for instream flows in the Klamath River for downs-stream tribes and lastly for irrigation, and incidentally, for the Klamath Basin wildlife refuges managed by the U.S. Fish and Wildlife Service.

The latest twist in the Klamath Project conflict revolves around the operation of the hydroelectric facility at the mouth of Upper Klamath Lake. Upper Klamath Lake is the major storage facility for Project irrigation water. The Lake is also home to two species of sucker fish which have been listed as endangered under the

ESA. Water is diverted for irrigation of the Project directly from the Lake at the Link River Darn. The Link River Dam is operated by PacifiCorp under contract with the Bureau of Reclamation. In 1997, the Bureau ordered PacifiCorp to release water at the Dam for instream flows in the lower River. A Federal District Court action was initiated by the Project private water users to enjoin the releases alleging that the Project water users are third-party beneficiaries of the contract between the Bureau and PacifiCorp. PacifiCorp also asked for a declaratory ruling that such releases would not cause it to violate its FERC license conditions.

Judge Michael Hogan ruled that the Project water users are not third-party beneficiaries of the contract and that the Bureau has the authority to order release of instream flows. See *Klamath Water Users Association v. Bureau of Reclamation,* Civil No. 97-3033 - 110 (1998). In addition, Judge Hogan's Order included a discussion concerning requirements of the ESA and tribal trust rights.

Adjudication: The Bureau of Reclamation has filed claims to the water in the Klamath Project in the Klamath Basin adjudication, asserting ownership of the right. However, the Project water users have also filed parallel claims to the same water. The claims are not identical, especially has to the volume of water stored in the Project.

b. *How has your state responded to these assertions?*

See discussion of the Klamath Basin ADR and Oregon Attorney General's opinion above.

c. *How have federal agencies responded?*

See discussion above.

d. *How have the federal assertions evolved over time?*

The Klamath ADR is ongoing with full federal participation. The Klamath adjudication is ongoing and the federal claims are under evaluation.

No other state action has been taken with regards to the various federal assertions outlined above.

e. *What is the outcome or current status of contact, negotiations, court pleadings, etc. ?*

See discussion above. The State did not intervene in the PacifiCorp case. It is anticipated that the Hogan Order will be appealed by the Project water users.

4. *If federal claims have been made as apart of a general stream adjudication, please state for each such adjudication the number of claims, amount claimed and approximate cost of adjudicating the claims.*

See discussion under #1 above.

Oregon has estimated that the cost of adjudicating the federal claims in the Klamath Basin adjudication to be approximately $1,200,000. This includes the cost of adjudicating the BIA claims filed on behalf of the Klamath Tribe.

5. *Federal policies.*

See discussion above.

6. *Other experiences.*

The above discussion should be adequate.

Supplemental Materials

Klamath Water Users Association v. Patterson, (unpublished). The Federal District Court for Oregon ruled that the plaintiffs were not third party beneficiaries to a contract between the Bureau of Reclamation and Pacificorp, the operator of the Link River Dam, thus denying plaintiffs standing to challenge the defendant's modification of their operating contract without plaintiff's approval.

Letter from Stephen E. A. Sanders, Oregon Assistant Attorney General, to Martha Pagel, Director, Oregon Water Resources Department (March 18, 1996). This letter provides an analysis of Bureau of Reclamation water management authority in the Klamath River basin pending completion of the Klamath Basin adjudication.

Memorandum from David Nawi, Regional Solicitor, Pacific Southwest Region, U.S. Dept. of the Interior and Lynn Peterson, Regional Solicitor, Pacific Northwest Region, U.S. Dept. of the Interior, to Regional Director, Region 1, U.S. Fish and Wildlife Service, et al. (January 9, 1997). This memo provides a federal agency review of the Sanders letter noted above.

South Dakota responses to a

SURVEY OF WESTERN STATE EXPERIENCES WITH FEDERAL NON-INDIAN WATER CLAIMS

Submitted by:
John Hatch, Chief Engineer
Department of Environment and Natural Resources
Water Rights Program

May 29,1998

Question 1:

To date, no non-Indian federal reserved rights claims have been made in South Dakota. State law provided that the US government could apply for a US water withdrawal from 1907 through 1983. One benefit of a US withdrawal was that the water source from which a US withdrawal was made could be withdrawn from -further appropriation until such time that the US withdrawal was developed or canceled. In 1983 these statutes were repealed and the federal government has since used the same permitting mechanism as used by any other applicant. Recently, the US Fish and Wildlife Service applied for and received approval of a state water right permit to protect a state threatened fish (Pearl Dace) located within the US LaCreek Wildlife Refuge. Even though the application was contested by several area landowners, the US Fish and Wildlife Service continued within the state water appropriation system and did not claim any type of reserved right. Numerous US withdrawals were issued prior to 1983 and following 1983 many state water rights have been issued to federal agencies.

Question 2 and 3:

No federal agencies have asserted a non-reserved proprietary right or similar type of right in South Dakota. However, the Bureau of Reclamation is currently completing an EIS as part of the contract renewal for irrigators using water from the Angostura, Irrigation Project located on the Cheyenne River. A segment of the Cheyenne River borders on the Pine Ridge Indian Reservation several miles downstream from the project. The EIS is being prepared at the request of the Oglala Sioux Tribe. As part of the EIS, the tribe wants federal reserved rights, water quality issues, affects on streamside vegetation, and fishery issues addressed. The tribe has indicated that while they believe they have a claim to the water, the tribe is not willing to quantify that claim. We are closely following this contract renewal to see how the Bureau addresses the tribal interests. It is possible the Bureau may assert some form of proprietary right or other federal regulatory right.

Question 4:

No general stream adjudications are occurring in South Dakota.

Question 5 and 6:

To date, we have not had any federal agency seeking to establish a water right outside of the state appropriation system. Based on discussions with the Bureau of Reclamation concerning the Angostura Irrigation Project, it is apparent the Bureau is seeking some means to address downstream tribal concerns. Whether this takes the form of a federal reserved right remains to be seen. A draft EIS is due towards the end of 1998.

Western States Water Council
Federal Non-Indian Claims to Water

1) Adjudication of Water Rights Upper Rio Grande above Ft. Quitman

In reference to the Western States Water Council's request for information regarding federal claims to water, the State of Texas provides the following information. The primary federal/state water issue in Texas relates to the federal Rio Grande Project associated with Elephant Butte Reservoir.

Elephant Butte Reservoir is located in southern New Mexico north of Truth or Consequences. The reservoir was constructed as a Bureau of Reclamation project for the irrigation of land associated with two irrigation districts, one in New Mexico (Elephant Butte Irrigation District) and one in Texas (El Paso County WID # 1). The two irrigation districts have repaid all of their debt associated with this project.

Several years ago, the States of Texas and New Mexico individually started separate water rights adjudications of the water rights associated with the Rio Grande Project and other water rights of the area within each state. Reclamation intervened in both proceedings asserting that neither state had jurisdiction to adjudicate the water associated with the Rio Grande Project. They also asserted theat neither atates' adjudication was binding on Reclamation since neither adjudication constituted a stream adjudication binding on the United States pursuant to the "McCarren" amendment. The New Mexico adjudication went forward in State court with the judge ruling the adjudication did constitute a stream adjudication binding on the United States. The Texas' adjudication, which is an administrative adjudication subject to court review, has been continued indefinitely as many of the parties in the New Mexico adjudication are also parties in the Texas adjudication.

Subsequent to the ruling in the New Mexico adjudication, the United States (DOJ) filed a quiet title lawsuit in federal district court in New Mexico. The quiet title suit sought to recognize the United States ownership of all waters of the Rio Grande from Elephant Butte Reservoir to Fort Quitman, Texas. It appears the United States is asking not only for title to the water rights, but also claims ownership of all waters in the region including water other than those associated with the Rio Grande project. The State of Texas was not named as a party in the law suit; however, the state has filed a motion to intervene in the litigation. **The State of Texas seeks to protect its ownership of the waters that flow into Texas in accordance with its various compacts and maintains its right of jurisdiction to administer the water within its boundaries in accordance with its laws and regulations.** The State of Colorado and others (including native Americans) have also filed motions to intervene in the lawsuit. The court has not ruled on the motions for intervention. The Court has ruled that the parties (including Texas) are to attempt to mediate the issues in the litigation. It is anticipated the mediation will extend to issues beyond the litigation, (operating agreements for Elephant Butte Reservoir, water quality, and others). At this time mediation has not commenced.

Attached for your information are the filings made by Reclamation in the Texas adjudication asserting their ownership of the waters, as well as the filing by DOJ in the quiet title litigation.

2) FERC Licensing of Hydroelectric facilities

In addition to the above, the Federal Energy Regulatory Agency (FERC) has asserted their ability to override state regulations and requirements through their licensing procedures for hydroelectric facilities in the state. Such actions by FERC can affect the ability of the state to properly plan and utilize its limited resources. FERC has the capability to significantly impact the ability of a water right holder and therefore the state's water resource management and planning agencies to maximize reservoir projects for water supply purposes if there is a hydroelectric facility associated with such a project.

3) Federal Reservoir Projects for which there is no Local Sponsor

Texas has several federal projects for which the federal agency, the Corps of Engineers, has built reservoir projects for which all or a large part of the storage and hydroelectric use has not been authorized by the state. The federal agency claims that the authorization from Congress overrides any state law or requirement that the federal agency obtain a water right and that only local sponsors or users who divert or take water from the project are required to obtain such rights. In other words, it is okay for federal agencies to require or tell state or local users what to do in a FERC related matter, but the federal agencies do not have to comply with any state regulations in relation to the siting, construction and use of federal projects.

4) Regulation of Streamflow through the Clean Water Act

There is a growing concern that EPA will begin to use the federal Clean Water Act (CWA) provisions to force states to limit or reduce the use of its surface waters in order to fully protect the water quality of streams. This issue is becoming more obvious due to the recent initiatives by EPA to require states to establish total maximum daily loads (TMDLs) for critical water bodies. It appears that EPA has not yet determined how they plan to utilize the TMDL process from both a water quality and water quantity perspective. All we know is that EPA has mentioned this as a possibility.

Staff Contacts: TX Natl. Resource Conservation Commission: James Kowis, Water Policy and Regulations Div. (512) 239-4705; or Herman Settemeyer, Water Quality Div. (512) 239-4707.

STATE OF UTAH

OFFICE OF THE ATTORNEY GENERAL

JAN GRAHAM
ATTORNEY GENERAL

CAROL CLAWSON
Solicitor General

REED RICHARDS
Chief Deputy Attorney General

PALMER DEPAULIS
Chief of Staff

MEMORANDUM

DATE: October 22, 1998

TO: Jim Alder, Legal Counsel
WESTERN STATES WATER COUNCIL

FROM: Michael M. Quealy, Assistant Attorney General

RE: Response to Survey on Federal Non-Indian Reserved Water Right Claims

This memo will attempt to respond to your survey on Utah's experiences with federal non-Indian claims for water. In reading through the survey, not all of the items covered are applicable to or have arisen in Utah and I will only attempt to respond to those portions of the survey with which we have had experience.

I. The first portion of the survey requests information non-Indian reserved water rights for reservations such parks national forests, national monuments, wilderness right claims relating to as national areas, etc. Generally, most of the federal reserved in Utah up to this point have related to water rights for national parks and monuments, although there has been some activity on national forest lands and wildlife refuges. I will address each of these in order.

1. National Parks and Monuments There has been quite a bit of activity over the last four or five years in Utah relating to reserved water rights for national parks and monuments. Since Utah contains more national parks and monuments than most other Western States, this has been a major item for us. The major success story has been with Zion National Park on the Virgin River. The State Engineer currently has an ongoing general water adjudication in the Virgin River and the United States filed a claim for virtually all

of the natural flow of the North and East Forks of the Virgin River above and through Zion National Park. When we first started meeting with federal officials to address these claims, it became apparent to the State that the Federal Government had

decided to make Zion Park the "flagship" case for a reserved water right for national park purposes. The Federal Government had at that time expended several million dollars in doing numerous studies to support their reserved water right claims should the matter go to litigation. There had not been a definitive case other than U.S. v. Cappeart which defined the nature and scope of a reserved right for a national park.

Further, Zion National Park would have carried a priority date in the early 1900's, and the State was concerned that any reserved water right claims would interfere with numerous private water rights, as well as our ability to develop additional water above the Park. Much of the land above the Park is privately owned. As a result of these concerns, and considering the extensive and expensive litigation that may result, the State embarked on an effort to negotiate a settlement of these claims. The basic approach taken was to protect all existing water rights on the Virgin River that were junior to the National Park's claimed priority date plus reserving an additional block of water for future development. In exchange, the State would simply grant the Park a reserved right to all the remaining flows in the River without having to quantify an exact amount of water for each of the reservation purposes.

While the Zion Park settlement is somewhat complex, its major components are as follows:

> --With the exception of a small amount of water allowed for administrative purposes, the Park Service agreed to subordinate its reserved rights to all presently-existing water rights on the system above the Park and additionally subordinated its rights to approximately 15,000 acre-feet of water for future development on both the North and East Forks of the Virgin River.
>
> --In exchange, the State agreed to recognized a reserved water right for all flows above and through the Park.

--A buffer zone of two miles was placed around the Park boundaries in which groundwater withdrawals are to be severely restricted so as to protect the streams and seeps feeding various Park features.

--The local water conservancy district agreed to abandon certain proposed dam sites above and adjacent to the Park in exchange for other dam sites below the Park.

Based on the Zion model, the State of Utah is presently negotiating with the National Park Service on several other parks and monuments in the State. We are quite close to reaching agreement on Hovenweep National Monument and Cedar Breaks National Monument. This approach seems to have worked quite well in Utah, is leading to constructive results, and is avoiding contentious and expensive litigation. The negotiation process has also lead to positive personal relationships between State officials, Park Service officials and Department of Justice attorneys that will hopefully lead to further negotiations.

2. Forest Service Claims In the eleven general stream adjudications currently pending in Utah, the United States has also made claims for instream flow purposes on national forest lands. For whatever reason, the United States has not been pushing the forest service claims as hard in Utah as they seem to be in some of the surrounding States. Not wanting to incur substantial litigation expenses, the State of Utah has been content to let these claims sit and is currently monitoring the litigation which is ongoing in other Western States. However, in the last year or so, the Forest Service has pushed for resolution of several of their forest service claims, particularly in the Dixie National Forest.

While we are not following the Zion model completely, the basic approach we are attempting is to figure out a mechanism for protecting the instream. values on the Forest Service lands through the State law process, without expressly recognizing a reserved water right. While we have received support of this concept from local Forest Service people, we worry that such may not be the case with officials in Washington, DC. Nevertheless, we remain optimistic.

3. Wilderness Areas Thus far, the United States has not strenuously pushed any particular wilderness water right claim in Utah. Nevertheless, this remains a concern to us because many of our desert wilderness areas lie downstream from existing points of diversion and we are monitoring this situation carefully.

4. Wildlife Refuges Several years ago, the United States filed a fairly massive reserved water right claim for the Bear River Migratory Bird Refuge in the northern part of Utah on the Bear River. While they were claiming a 1932 priority date, the size of the claim would have made it very difficult for Utah to develop any additional water on the Bear River and it thus caused us some concern. However, after doing some research it was determined that ninety percent of the Bear River Migratory Bird Refuge occupied lands below the surveyed meander line on the Great Salt Lake, and were thus located on lands which actually belonged to the State of Utah. Hence, the United States, in our minds, could not make a claim to a reserved water right since the land they were occupying for the Bird Refuge was not reserved from the public domain but was being occupied with permission from the State of Utah. Once the United States was appraised of this fact, they quickly withdrew their claims.

5. Wild and Scenic Rivers Currently, there are no congressionally-recognized wild and scenic rivers in the State of Utah. Hence, the United States has not made any specific claims to water for wild and scenic river purposes. However, several streams or rivers in the State are being considered for wild and scenic river status, and we are carefully monitoring that situation with regards to any claimed reserved water rights if those designations are eventually made. our concern is not only for the stretches designated, but any effects upstream which may impair the ability for water users to obtain federal permits or federal funding.

6. Conclusion Given the approach that Utah is taking, which is to attempt to negotiate these types of federal reserved water rights, there is currently no active litigation of any federal reserved water right that falls into this category. It is Utah's hope that its approach to negotiation will continue to bear fruit.

II. The second part of the survey deals with "non-reserved right proprietary claims." To the best of my knowledge, the Federal Government has not made any such claims in the State of Utah at

this time. In many instances, if the Federal Government needs water for federal purposes, it has simply applied to the Utah State Engineer and has obtained a State water right--but usually these are quite small in nature.

III. As I read the third item in your survey, it requests input on non-proprietary federal rights or regulations which may impair the ability of Utah to fully develop its water resources. Clearly, the Clean Water Act and the Endangered Species Act are having significant impacts on water development in Utah. This is particularly true in the Colorado and Virgin River drainages. The endangered fish recovery program on the Colorado River, to which Utah is a signatory party, has helped mitigate some of the effects of the Endangered Species Act, but it still remains a day-to-day practical concern. We are simply addressing those controversies on a case-by-case basis and are entering into cooperative agreements or conservations agreements with the U.S. Fish & Wildlife Service when we deem that to be in the best interest of the State. One such agreement is currently being negotiated on the Virgin River drainage at the present time.

So far as Bureau of Reclamation authority over allocation and distribution of water, this does not seem to be a problem in Utah at the present time.

IV. CONCLUSION Despite our numerous other fights with the Federal Government, Utah's current position regarding the interplay between federal and State water rights is one of negotiation rather than litigation. Given the other extensive legal battles currently ongoing in other Western States, Utah may be unique in this approach. Nevertheless, it has served us well thus far and we hope it will bear fruit in the future. In spite of Utah's position, however, we remain committed to litigation as a last resort in order to protect Utah's ability to allocate and administer its valuable water resources.

WASHINGTON STATE RESPONSES TO THE WSWC SURVEY OF WESTERN STATE EXPERIENCES WITH FEDERAL NON-INDIAN WATER CLAIMS

1.a. Over one hundred non-Indian federal reserved right claims were filed in the Yakima basin adjudication in the early 80s by the U.S. Forest Service, the Department of Defense, and the U.S. Fish and Wildlife Service. The claims were negotiated and stipulated in 1989. The US Forest Service claims are variously for domestic supply, stock-water, irrigation, power generation, dust abatement, road construction and maintenance, pesticide application, and fire protection. The DOD claims are for domestic use, stockwater, wildlife, and fire control on the Army's Yakima Firing Center. The Fish and Wildlife Service claims are for wildlife habitat maintenance, and irrigation on the Toppenish National Wildlife Refuge. In 1995, the U.S. attempted to claim additional water for the Toppenish refuge and for secondary uses of the National Forest lands.

1.b. The initial claims were settled amicably and with little fanfare. The claims were generally reasonable and consistent with case law regarding reserved right claims. The state generally did not challenge the claims. The state was more than willing to settle them and turn attention to other more problematic parts of the adjudication. The state objected to the 1995 additional claims and those claims were denied as untimely.

1.c. Both the USFS and DOD were very cooperative on the earlier filed claims. The federal position was that the claims were related to primary federal reservation purposes.

1.d. Once filed, negotiated and settled, the initial claims did not change. However, as indicated above additional claims were filed later.

1.e. The federal non-Indian reserved right claims were awarded by the court in conditional final orders and continue to await completion of other phases of the adjudication when a final decree encompassing all water rights will be issued.

2.a. The U.S. Army Corps of Engineers owns and operates nine large hydroelectric/navigation projects on the main stems of the Columbia and Snake Rivers and three multipurpose dams in western Washington. Like other rps projects these were authorized by Congress and constructed with federal funds. The Corps has never applied for nor received state law based water rights and basically claims that state law is preempted when Congress authorizes a Corps project. In some cases the Corps claims supremacy to state law (and other proprietary rights) based on the doctrine of navigation servitude. In other cases, such claims are based more generally on the federal supremacy clause of the Constitution. The Corps has generally complied with state water rights procedures for ancillary facilities that have been added later (e.g. worker housing and wildlife mitigation projects using irrigation).

The lack of state water rights raises questions regarding whether there is a protectable interest in the projects that the state is obligated to honor. Although the projects were never explicitly subordinated to subsequent water developments upstream which incrementally reduce the flow to the projects, the Corps has generally not challenged continued upstream development on the basis that some form of federal water right is being impaired. The Corps has consistently planned its Columbia River power

developments and future operations using assumptions of increased future depletions, especially from irrigation. No Corps projects have been involved in a water rights adjudication to date.

The Corps' navigation operations on the Lake Washington ship canal project are frequently in conflict with City of Seattle municipal water diversions and tribal fisheries. Negotiations over operations occur almost annually. Although the Corps claims navigation servitude, it generally has been cooperative. During drought years, the Corps even regulates lockages to preserve water for the benefit of other water interests in the basin.

The Bureau of Reclamation is a major participant in the Yakima basin water rights adjudication. The Bureau operates a project in the basin that provides water to about 450,000 acres of irrigated land. Five major reservoirs are owned and operated by the Bureau. The Bureau also built extensive water conveyance facilities in the basin that are owned and operated by irrigation districts. The Bureau also owns two relatively small power plants. The Bureau filed claims in the adjudication for all of these facilities. The adjudication is only addressing surface water.

Recently, the Bureau joined the Yakima Indian Nation (in a separate lawsuit from the water rights adjudication) in challenging twenty-seven ground water permits proposed to be issued by the state in the lower Yakima basin. The wells already exist but have only been permitted to operate during drought situations. The owners would like to obtain permanent water rights for supplemental irrigation during dry years. About five hundred other pending applications of a similar nature in the lower Yakima basin are awaiting a decision by the state.

The Bureau and YIN claim that pumping the wells will reduce return flows to the lower Yakima River, thus damaging fisheries resources and frustrating attempts by the Bureau to augment stream flows in the lower River (authorized in 1994 federal legislation). The Bureau also claims in affidavits that the groundwater to be tapped is federal project water subject to the control of the USBR. They claim the water is present in those aquifers only because of seepage from irrigation conveyance and application systems that are supplied with Bureau developed water.

A similar disagreement occurred between the state and the Bureau in the late 1960s and early 1970s regarding groundwater in the nearby Columbia Basin Project. The Bureau has state issued water rights for Grand Coulee Dam and the associated irrigation of over 600,000 acres. The project was designed to collect drain water and redistribute it to other irrigation blocks in the south part of the project. There is no question that irrigation seepage created ground water resources that were not present naturally. Some areas became wetlands due to high water tables. The state thought the groundwater became unappropriated waters of the state subject to reappropriation by the state. The Bureau believed the water remained Bureau property until leaving the boundaries of the project. The Bureau prevailed in several legal cases.

In the Yakima adjudication, the Bureau has been expansive in its water claims, primarily by claiming sufficient water to irrigate all "irrigable lands." The state on the other hand has argued that the Bureau's/irrigation district's rights should be based on the quantity of water that has historically been beneficially used as provided in both state and federal statutory law. Basing the water rights on "irrigable land" would considerably expand the water right beyond historic beneficial use. In similar

fashion the Bureau has also claimed the right to control so-called floodwaters and to provide that water to contractors. No state water right has ever been issued for such waters.

The Bureau has also generally encouraged the state court hearing the case to rule that due to the size and influence of the federal project, the Yakima basin is a "federalized river basin" in which the Bureau has control over all water and the rights thereto.

Many of the twenty-eight recognized Indian tribes in Washington claim instream flow rights relating to the treaty reserved right to fish "in common with the people" of Washington. The treaties reserving these rights were negotiated in the 1850s when non-Indian settlement of the area that would become Washington was only beginning. Salmon and steelhead were a staple of native people's diet and the center of culture and religion. In the 1960s and 70s, treaty fishing rights became highly controversial, leading to court decisions confirming tribal rights to take fish and to co-manage the fisheries resources. A second phase of litigation was begun, but never completed, regarding the claim of "environmental servitude" on the part of non-Indians to assure the continuation of the fish runs in perpetuity. Instream flows to protect the runs were a major part of the claim. Subsequent litigation in Montana, Oregon and Washington has essentially confirmed that such rights do exist.

In the Yakima basin adjudication, the state court found that the Yakima Indian Nation (YIN) has an instream flow right for the purpose of maintaining the fisheries, though in that case the rights were diminished by acts of Congress and the YIN's prior acceptance of payments for lost fishery resources. The priority date of the right is "time immemorial" (i.e. superior to any non-Indian water rights in the basin). The Court did not quantify the instream flow right. Rather, it directed the Bureau of Reclamation to consult with a group of fishery experts annually regarding the flows necessary to maintain the fish. Since the early 1990s negotiations have occurred annually and the Bureau operates its reservoirs in a manner that provides for the flows. In future adjudications, it can be expected that other Indian tribes will claim similar water flows for fish.

2.b. The state has not strongly insisted that Corps of Engineers obtain water rights for at least two decades. There has been no litigation on this issue to date. The state has generally not concerned itself regarding whether the Corps projects are to some degree impaired by allowing continued upstream developments that incrementally deplete the flow of the river. However, it remains a concern that someday the federal government may challenge existing state based water rights that deplete river flows. The state opposed several Corps project expansion proposals in the 1970s and 80s that would have further increased the hydraulic capacity of several mainstem power facilities. The opposition was based on concerns that the expanded projects could preclude further upstream development. The expansions occurred anyway, but were somewhat scaled back.

The state is an active participant in the development of a habitat conservation plan for the Lake Washington basin. The Corps has generally been cooperative to date.

The state is negotiating with the Yakima Indian Nation and the Bureau of Reclamation regarding the lower Yakima groundwater situation. No agreement has been finalized yet.

Following the loss of litigation over control of Columbia Basin Project area groundwater, the state recognizes federal ownership of seepage waters until those water leave the project. The Department of Ecology adopted rules in 1973 and 1975 recognizing artificially stored groundwater. The Bureau issues water service contracts to persons wishing to use some of that water. The state issues a permit that essentially waives any objection. Since the early 1990s, the Bureau has had a freeze on issuing any new contracts for groundwater due to endangered fish concerns in the Columbia and Snake Rivers.

The state has vigorously opposed what it views as unreasonably expansive claims by the Bureau in the Yakima adjudication. The trial court has generally favored the claims of the districts and the Bureau. The state recently prevailed in the state Supreme Court on appeal of the issue of "irrigable" versus "irrigated" as the basis of irrigation rights in the basin. Further appeals are likely as the trial court completes its work.

The state has also vigorously opposed the Bureau's federalized river basin argument in Court. Hundreds of water rights were established under state law prior to the Bureau coming into the basin in 1905. Natural flow rights exist on the tributaries and the main stem Yakima that are independent from the federal project. The Court has swayed back and forth considerably on this issue of control.

The state did not oppose the fishery related instream flow claims of the Yakima Indian Nation. In essence the state was neutral. Irrigation interests in the Yakima basin vigorously opposed the claims in court. It has been the long-standing policy of the Department of Ecology that when such claims are verified in an adjudication, the state will honor those rights. The state has generally favored the idea of negotiation of the claims on a case by case basis. Although the state's watershed planning efforts will not legally resolve Indian claims, they are intended to incorporate those needs into the overall matrix of future water needs that must be addressed. In many cases this means that some way of restoring instream flows will have to be found.

2.c. The Corps of Engineers has not been approached in recent years on the issue of water rights for its projects. In response to a state proposal on Columbia River management in 1978, a federal solicitor's opinion claimed that "any water withdrawal which significantly adversely affects the use of McNary and John Day (dams) for any use other than navigation can be enjoined." Navigation is excluded only because the O'Mahoney-Milliken Amendment to the 1944 Flood Control Act specifically subordinated navigation (but not other federal project purposes like power or flood control) to further development of beneficial consumptive uses under state law. A copy of the opinion can be provided on request.

The Bureau was aggressive in asserting ownership and control over seepage water in the Columbia Basin Project and ultimately prevailed in litigation.

The Bureau was jawboned into joining the Yakima Indian Nation appeals on the lower Yakima groundwater permits. The Bureau has stated that it does not wish to control groundwater in the Yakima basin, and yet it objects to the state's management of that resource. In an affidavit by one

its employees, the Bureau does assert ownership and control of that groundwater. However, the Bureau has been willing to negotiate a solution and sponsor the collection of additional technical information.

The state and the federal government have been in primarily adversarial roles in the Yakima water rights adjudication. The Bureau and the Justice Department, supported by the Interior Solicitor have aggressively pursued expansive claims in the adjudication. It appears to be the strategy of the United States to maximize the extent of its water rights, perhaps for the purpose of having as much maneuvering room as possible to meet previously unmet trust obligations to the Yakima Indian Nation.

Tribes have generally been content to claim instream flow rights, but not seek their adjudication. The Yakima Indian Nation was an exception. The Yakima adjudication occurred after the YIN asked the federal court to determine its on- and off-reservation water rights. Other tribes have threatened to go to court to protect their rights from time to time when disputes over water have arisen, but have not actually done so. The Justice Department and the Interior Department have been supportive of the tribal water claims.

2.d. The Corps "claims" to the Columbia and Snake River have not evolved over the last several decades. Several Corps studies have examined the conflicts among various uses and claims to the Columbia and Snake Rivers, but no significant policy movement has occurred. After the state objected, the Corps did back down from the most ambitious expansion plans for several Columbia River power projects, but did pursue smaller alternative expansion plans. The federal government has not openly opposed continued upstream water developments that incrementally reduce the flow to the projects. However, recently, the Corps has been conditioning section 404 and section 10 permits under a no net loss policy adopted by the National Marine Fisheries Service. Presumably the Corps is doing this to comply with Section 7 of the federal Endangered Species Act and not out of self-interest in limiting depletions and thus maximizing power production.

The Corps has not aggressively claimed preemption of state based rights in the Lake Washington situation. Cutting into Seattle's major source of water supply would bring considerable political pressure on the Corps. The Corps has generally been cooperative in attempting to work out problems year to year and more recently in the format of a habitat conservation plan being developed for the Lake Washington basin.

Bureau of Reclamation concerns over groundwater development in the Yakima basin are relatively new, and may reflect the increasing recognition throughout the state of the close interrelationship of ground and surface water. There have been some recent high profile state court decisions recognizing that relationship. In addition, the Bureau appears to be more sensitive than in the past to its trust responsibilities to the Yakima Indian Nation. Finally, the Bureau is spending an increasing amount on efforts to restore flows in several dewatered reaches of the Yakima River in accordance with recent federal legislation and in anticipation of probable listing of several fish stocks on the endangered species list.

The Columbia Basin groundwater situation has been relatively stable since the early 1990s when the Bureau froze the signing of new water service contracts for groundwater use.

The Bureau has become more aggressive and adversarial over time in claiming water in the Yakima adjudication. The state suspects this attitude may be driven more by the Department of Justice than by the Bureau.

Indian water claims for instream flows were generally unheard of prior to the 1970s. The litigation over fish rights brought these claims to the foreground of the water policy debate in the state. Although the general overall claim ended up stalemated in the Ninth Circuit Court of Appeals in 1982, since then specific cases in Oregon, Montana, and Washington have pretty much confirmed the legitimacy of those claims.

2.e. There is no active forum regarding the Corps' Columbia and Snake River project "claims". A habitat conservation plan for the Lake Washington basin is under development by the principal interests, including the Corps.

The state is negotiating with the Yakima Indian Nation and the Bureau of Reclamation regarding the lower Yakima groundwater situation. No agreement has been finalized yet.

There is no forum currently regarding groundwater pumping the Columbia Basin Project.

The Yakima water rights adjudication continues in its twenty-second year. The irrigable/irrigated issue was remanded to the trial court, but no modified decision has yet emerged from the Court. Other issues in which the state and the Bureau are in conflict will probably be subject to future appeals when the appellate phase of the case is reached.

The Indian water rights claims, including those for instream flow are also in limbo in the ongoing Yakima basin adjudication. They will also be folded into a final decree and further appeals are possible.

3.a. Federal regulatory activities may be impinging on state issued water rights in several ways. The Endangered Species Act is being brought to bear for numerous listed and proposed for listing fish stocks in Washington. These actions are most mature in the Columbia River basin. The National Marine Fisheries Service has become very active in efforts to recover listed fish stocks.

NMFS has not directly attacked any state issued water rights to date. It has however, influenced the Corps of Engineers Section 404 and Section 10 permits for pumping facilities from the Columbia and Snake Rivers and tributaries, even where the projects already have obtained a state water right. NMFS issued biological opinions (Biops) for several large diversion projects that strictly condition the projects to the NMFS flow targets for the Columbia and Snake. The fundamental policy of NMFS is that there should be no net loss of flow during spring and summer due to new pumping plants. This is the time of year when the CRPS and other sources are providing flow augmentation water. The owners of such plants must cease diverting or provide replacement water when the flows are not being met. The NMFS target flows are sufficiently high that the regulatory

requirement is likely to be invoked every summer. The Biops for these pumping projects also require the Corps of Engineers to review federal permits previously issued to pumping plants. The implication is that previously approved facilities could be reconditioned under the NMFS flow regulatory scheme. Existing facilities operating under state water rights could thus be impacted.

Also under the auspices of the Endangered Species Act, the National Marine Fisheries Service has become very active in influencing the operation of federal water projects in the Columbia River Basin. In accordance with Biops and recovery plans prepared by NMFS for listed fish species, the Bureau of Reclamation has modified the operation of the federal Columbia Basin Project, especially Grand Coulee Dam, to provide for flow augmentation downstream in the Columbia River during the spring and summer. No modifications to the state issued water rights for the project have been sought in connection with these operations. No adjudication is underway or anticipated in this situation.

Operations of Corps of Engineers dams on the Columbia and Snake Rivers have also been modified to accommodate endangered species (salmon and steelhead) concerns. Both Bureau and Corps dam operations are expected to continue to be affected by ESA section 7 consultations with the National Marine Fisheries Service. Corps dams do not have state water rights. No adjudication of rights is underway or planned for the Snake or Columbia Rivers at this time.

In 1999 NMFS is scheduled to review the Biop under which the Columbia River power system operates and issue anew opinion and jeopardy determination. This could result in further major changes in river operations, including the possibility of dam removal, mandatory drawing down of reservoirs, and/or flow augmentation.

3.b. The state has had discussions with the NMFS regarding its flow protection Biops affecting new pumping plants. It is generally acknowledged that NMFS is acting within its legal authorities under the ESA.. This view could change if attempts are made to condition previously perfected water diversion projects.

The state has not objected to altered federal project operations to date. Nor has it informed the Bureau of any concerns regarding whether water rights cover the amended operations. Certainly, the state has general concerns regarding the effects on the state's economy from efforts to recover listed fish stocks. The Columbia River is a powerful economic engine by providing power and water to various enterprises throughout the region. However, the state also strongly supports efforts to recover the fish stocks.

3.c. NMFS asserts that a federal nexus is established for new diversion projects because federal permits relating to the pumping plants are required by federal law. The federal nexus in turn triggers section 7 (ESA) consultation requirements. NMFS then determines whether the action could be deleterious to the listed species in a biop and determines measures to avoid harm to the listed species. The Corps of Engineers has so far accepted NMFS' recommendations on several pumping project permit actions.

NMFS admits that it does not have very good tools under the ESA for addressing existing state issued water rights. NMFS is attempting to cooperate with state authorities to the extent possible because in light of the large number of fish stocks listed or proposed for listing on the west coast, NMFS does not have sufficient resources to do the job of recovering these stocks on its own. It needs states to cooperate and to do much of the heavy lifting.

A direct federal nexus exists for federally owned and operated water projects. No one has questioned whether NMFS can lawfully consult and provide for strong controls on operations as required to help in fish stock recovery, but the economic costs are questioned by some interests.

3.d. NMFS water withdrawal policies were developed within the last two years. Prior to that, NMFS expressed concerns about new withdrawals, but did not act to oppose them (even though the first listings occurred in 1992). In 1996-97, NMFS commissioned a study by the Bureau of Reclamation regarding the effect of water withdrawals on Columbia and Snake River flows. From those hydrologic studies, NMFS concluded that existing water withdrawals make a significant contribution to flow depletion during critical parts of the year for fish. This led to the NMFS no net-loss policy with regard to new diversion plants. The veracity of that study has been challenged by irrigation interests. The benefits of flow augmentation (a closely related issue) are challenged strongly by Idaho and Montana, states where the augmentation water is being acquired.

3.e. These are issues that are continuing to evolve. There has been no resolution to date. So far no one has taken NMFS, the Corps, or the Bureau to court based on property takings claims, but this remains a strong possibility, given that water rights are a form of property right.

4.1. All the federal water claims for the various agencies and uses of water were filed under one consolidated claim by the United States in the Yakima adjudication. Most were for small quantities relating to Forest Service guard stations, fire control, wildlife habitat, and stockwater. Several were for significantly large quantities relating to the federal Yakima basin irrigation project and for the Yakima Indian Nation on- and off- reservation water claims.

4.2 Total quantity of water claimed: The Forest Service claimed water from 68 separate sites for 4.7 cfs and 173 acre-feet per year. The Fish and Wildlife Service claimed water from 16 sites for the 2,110 acre-feet per year. The Department of Defense claimed water from 81 sites for 590.6 acre-feet per year. The United States on behalf of the Yakima Indian Nation claimed an unquantified amount of water for instream flows on streams flowing through the reservation and outside the reservation at usual and accustomed fishing places; also for water to sustain hunting, gathering, and pasturing (unquantified); also for irrigation of all existing irrigated lands including Indian allotments and practicably irrigable lands within the reservation (unquantified); also for present and future recreational, municipal, industrial purposes on the reservation (unquantified), and also for the Wapato Irrigation Project in the amount of 727,000 acre-feet plus 350,000 acre-feet and 720 cfs. The United States also claimed an unquantified amount of water for the Yakima Reclamation Project.

4.3. Approximate cost to adjudicate federal claims: It was not possible to disaggregate the cost of

adjudicating federal claims from other claims in the Yakima adjudication. Federal involvement is pervasive in the basin, especially the Bureau of Reclamation.

5. The United States appears to accept state court jurisdiction in the Yakima adjudication, but only after extensive litigation on the jurisdiction issue early in the case. The policy of the Bureau of Reclamation appears to be to maximize the amount of water it controls in the basin in light of both its fiduciary responsibilities to its water contractors as well as its trust responsibilities to the Yakima Indian Nation. Despite the clear statement in the federal Reclamation Act of 1902 declaring that beneficial use is the measure of a water right, the Bureau has insisted on claiming quantities of water that have not previously been put to use for irrigation of acres that, while classified as irrigable, have not been irrigated in the past.

The Bureau and the State of Washington cooperated in seeking passage of federal legislation in 1994 for water conservation, water acquisition and reservoir optimization for the Yakima project. We continue to cooperate in this venue, while litigating in the adjudication. Most recently, the Bureau has claimed an interest in groundwater in the basin by joining an appeal of state ground water right decisions. Negotiations over a possible settlement are underway. In the Yakima basin, one apparent objective of the Bureau is to protect instream flows in the lower Yakima River. This is a state goal as well. There is precedent in the Columbia Basin Project for the Bureau to claim and secure through litigation the right to groundwater that is presumed to be present due to seepage from a federal reclamation project.

The Corps of Engineers views itself as immune from state water right requirements for water projects authorized by Congress. It also asserts the doctrine of navigation servitude and federal supremacy under the Constitution. In the Lake Washington situation, the Corps has been willing to cooperate with the state and other parties to share water shortages. In addition, the Corps has been cooperating with the National Marine Fisheries Service in conditioning federal permits for pumping projects to protect streamflows from diminishment. Arguably this is establishing a form of regulatory water right for anadromous fish in the Columbia and Snake Rivers.

The National Marine Fisheries Service has established flow targets for the Columbia River during spring and summer in its biological opinions on the federal power system and on individual irrigation diversion projects. The consequences include a significant alteration of storage operations in the Columbia and Snake basins, acquisition of augmentation flows by purchasing water from Idaho irrigators, and protection of that water from downstream diversion by new irrigation pumping. Though NMFS does not use water rights terminology regarding its actions, it is in effect creating regulatory water rights under the authority of the Endangered Species Act. NMFS is also concerned about the cumulative effects of long-standing diversions of water. No action has been taken against any existing perfected water rights, but it is NMFS belief that such action would be within its authority under the ESA if it could show that the illegal taking of a listed species was caused by such diversion. NMFS has indicated a willingness to identify and sanction existing water diversion facilities that block passage or otherwise harm listed fish stocks. As NMFS turns its attention to tributaries and to western Washington, a collision with state water right holders is more likely.

The United States and twenty-eight federally recognized Indian Tribes in Washington believe that

the treaties with the tribes established a form of environmental servitude relating to the reserved rights of tribes to take fish. These claims, which courts appear to be willing to recognize (e.g. in the Yakima basin adjudication) are for instream flows with a priority date of "time immemorial" and thus predate nearly 150 years of state-based water rights. Once adjudicated, such rights would have priority over long-standing water rights and would subject some or all of those rights to periodic regulation. The treaty language that supports these claims is unique to Pacific Northwest treaties negotiated by territorial Governor Stevens in the 1850s.

6. That about covers it.

SURVEY OF WESTERN STATE EXPERIENCES WITH FEDERAL NON-INDIAN WATER CLAIMS

STATE OF WYOMING'S RESPONSE

THE BIG HORN RIVER GENERAL STREAM ADJUDICATION

Most of the State of Wyoming's experience with federal non-Indian water claims has been within the context of its ongoing general stream adjudication, In Re: The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming. The State of Wyoming filed its complaint commencing the Adjudication in January, 1977, in the District Court of the Fifth Judicial of the State of Wyoming. The case was divided into three phases: Phase I is the quantification of Indian reserved rights, Phase 11 is the quantification of federal non-Indian rights, and Phase III is the adjudication or cancellation of all previously uncanceled and unadjudicated water right permits issued by the State. On January 2 1, 1982, following the trial on the United States' Indian reserved right claims, the Special Master continued Phase II in order to allow the United States and the State of Wyoming an opportunity to settle the United States' non-Indian water claims. The parties successfully settled those claims and the District Court entered its Partial Interlocutory Decree and Supporting Documents Regarding the United States' Non-Indian Claims on February 9, 1983. This response describes the United States' non-Indian claims in the Big Horn Adjudication and the District Court's Phase 11 Decree. The Phase 11 Decree is a final adjudication of all of the United States' water right claims within Water Division No. 3 which are based upon any precept or theory of federal law, except those claims made on behalf of the Wind River Indian Reservation Tribes.

The Phase 11 Decree contains several noteworthy general provisions. First, the rights of the United States under the decree are to be administered by the State, i.e., prior to seeking judicial enforcement of any right under the decree, the United States must ask the State Engineer to exercise his administrative authority. Second, the United States must install measuring devices reasonably required by the State Engineer to administer the decreed water rights. Third, nothing in the decree is intended to enlarge or limit the authority of the United States to manage its lands provided that such authority is not exercised for the primary purpose or effect of enhancing or enlarging any water right awarded under the decree. Fourth, water rights for discrete uses may only be changed under certain conditions and such changes are to be obtained from the Wyoming State Board of Control in accordance with Wyoming law. Fifth, water rights for discrete uses run with the land; water rights for all other uses terminate if the reserved status of the land terminates or ownership of the land is transferred. Finally, the decree constitutes a final statement, quantification and adjudication of the water rights of the United States in Water Division No. 3, except those held on behalf of the Wind River Indian Reservation Tribes.

For the purpose of facilitating administration of the decreed water rights, boundaries and establishment dates of the federal non-Indian reservations within Water Division No. 3 are delineated in the Phase 11 Decree. Those reservations for which the United States claimed water rights include: a portion of Yellowstone National Park, established March 1, 1929; Big Horn

Canyon National Recreation Area, established October 15, 1966; pubic water reserves and stock driveways with various establishment dates; Big Horn National Forest, established March 1, 1898; Shoshone National Forest, established March 30, 1891; and Wood River Administrative Site, established October 18, 1945. In addition to these reservations, the United States claimed water rights for non-reserved lands and purposes including: stock driveways and stock driveway reservoirs; water producing oil and gas wells; Bureau of Land Management wells and reservoirs; East Fork and Whiskey Basin Elk Winter Ranges; Department of Interior fisheries and wildlife habitat; and power site withdrawals. A brief description of the non-Indian federal water rights ultimately awarded to the United States under the Phase 11 Decree is set forth below.

Yellowstone National Park

Within the boundaries of Yellowstone National Park, the United States was awarded the right to maintain the flows of Middle Creek and its tributaries, to maintain the natural levels of two described lakes located within the Middle Creek drainage basin, and to maintain the flows of all springs and seeps of water within the Middle Creek Drainage. Although the United States claimed the amount of groundwater required to maintain the Park in its natural condition, the Court found it impossible to define or describe that right. However, the Decree provides that the United States is not barred from bringing an action in a court of competent jurisdiction to protect the Park from groundwater withdrawals detrimental to the natural condition of the Park. The United States was also awarded the right to divert no more than one acre-foot of water per year from Middle Creek for domestic use at the East Entrance Ranger Station. All of these water rights have a priority date of March 1, 1929, the establishment date of the Park.

Big Horn Canyon National Recreation Area

All claims by the United States for reserved water rights in the Big Horn Canyon National Recreation Area were specifically denied by the Court.

Public Water Reserves

The Phase 11 Decree grants a water right for approximately 500 public water reserves to the extent there are not already permits or certificates issued by the State of Wyoming. The public water reserves are to be used for drinking by human beings and wildlife and for stockwatering. Most of the rights are for one gallon per minute, but no award is higher than 50 gallons per minute. The priority dates for these rights range between 1913 and 1933, although all of the decreed rights are to be administered and enforced as junior to any pennitted or certificated state water rights as of the date of the Decree. Water rights for any other water reserves must be obtained in compliance with with state law.

Stock Driveways and Stock Driveway Reservoirs

The United States was awarded water rights to maintain stream flows on stock driveway within 28 specified stream reaches. The instream flows are to be used for stockwatering and

drinking by human beings. The quantities awarded range from .05 to .84 cubic feet per second and the priority dates for these water rights range between 1918 and 1943. The decreed rights are to be administered and enforced as junior to any permitted or certificated state water rights as of the date of the Decree.

The United States was also awarded water rights for 50 stock driveway reservoirs to the extent there was not already a permit or certificate issued by the State of Wyoming. The reservoirs are to be used for stockwatering and drinking by human beings. The quantities awarded range from one acre foot to a maximum of 20 acre feet of water. The priority dates for these rights range from 1918 to 1932. The decreed rights are to be administered and enforced as junior to any permitted or certificated state water rights as of the date of the Decree. The Court also affirmed water rights held by the United States pursuant to state permits and certificates for another 16 stock driveway reservoirs.

Water-Producing Oil and Gas Wells

On July 15, 1980, the United States and the State of Wyoming entered a Stipulation agreeing that the United States has reserved water rights in two water-producing oil and gas wells and holds valid state permits and certificates for nine other such wells. The Court approved the Stipulation and adjudicated the only reserved water rights in the Phase 11 Decree for the two oil and gas producing wells. The quantities of water reserved for the two wells are six and nine gallons per minute with priority dates of 1968 and 1969. The Court also affirmed the United States' right to use water pursuant to state permits for the nine other water-producing oil and gas wells for quantities ranging from .5 to 15 gallons per minute with priority dates ranging from 1962 to 1971.

Bureau of Land Management Wells and Reservoirs Located on Non-Reserved Public Lands

The Court awarded to the United States water rights for 141 wells located on nonreserved public lands managed by the Bureau of Land Management in quantities ranging from one to 35 gallons per minute, all with a priority date of November 1, 1982. The use of the water is limited to providing drinking water for people, stock and wildlife. The Decree also lists 113 Bureau of Land Management groundwater wells for which the United States has obtained state permits and certificates. The status of these state water rights will be determined in Phase III of the Adjudication.

The Court also awarded water rights for approximately 1400 reservoirs located on non-reserved public lands managed by the Bureau of Land Management, all with a priority date of November 1, 1982. The use of the water is limited to providing drinking water for people, stock and wildlife. The amount of storage capacity awarded under the Decree ranges from one to 20 acre-feet. Reservoirs which are capable of storing more than 20 acre-feet are required to obtain water rights for the additional storage in compliance with Wyoming law. The Decree lists approximately 500 Bureau of Land Management reservoirs for which the United States had obtained state permits and certificates. The status of these state water rights will be determined in Phase III of the Adjudication.

Bureau of Reclamation

On January 31, 1980, the major parties in the Adjudication entered a Stipulation in which they all agreed that no reserved water rights exist on behalf of the Bureau of Reclamation within Water Division No. 3. The Phase 11 Decree states that the United States has no reserved rights and no federal non-reserved appropriative water rights on behalf of the Bureau of Reclamation. The Decree further states that all water uses by the Bureau of Reclamation must be authorized under Wyoming law.

East Fork and Whiskey Basin Elk Winter Ranges

Although the United States claimed reserved water rights for the East Fork Elk Winter Range, those claims were subsequently withdrawn. The Phase 11 Decree declares that the United States has no water rights for any purpose on behalf of the East Fork and Whiskey Basin Elk Winter Ranges.

Department of Interior, Fisheries and Wildlife Habitat Claims

The United States claimed the right to maintain certain levels of instream flows on streams flowing through public lands managed by the Bureau of Land Management to preserve and enhance fisheries and wildlife habitat. The United States subsequently withdrew these claims and the Court decreed that the United States has no right to maintain instream flows on said lands in Water Division No. 3.

United States Forest Service

1. Wood River Administrative Site

The United States was granted the right to use 10 gallons per minute of water for domestic purposes from the Forest Service's well at the Wood River Administrative Site with a priority date of October 18, 1945, the establishment date for the Site.

2. Quantified Waterflow Uses

The United States made claims for rights to pass certain amounts of water, measured in acre feet, past specified points on certain natural streams in the Bighorn and Shoshone National Forests in order to achieve the purposes of the Forests under the Organic Act of 1897. The United States also made claims for the right to maintain certain levels of instream flows on those same streams to accomplish the additional purposes of the Bighorn National Forest under the Multiple Use-Sustained Yield Act of 1960. The Phase H Decree provides that the United States has the right, within certain limitations, to pass specified amounts of water past 239 identified points on specified streams in the Bighorn and Shoshone National Forests. The instream flow rights are quantified in acre-feet per month with yearly totals ranging from 1 3)4 acre-feet to

19,146 acre-feet. Most of the instream flow rights for the Bighorn National Forest have a priority date of March 1, 1898, the establishment date of the Forest, but a couple of the rights have a priority date of December 23, 1904. Although many of the instream flow rights for the Shoshone National Forest have a priority date of March 31, 1891, the establishment date of the Forest, numerous rights have later priority dates ranging from May 22, 1902 to March 4, 193 1. The Decree states that the United States shall have no other instream flow rights on the Bighorn and Shoshone National Forests.

The Decree provides several limitations on the United States' instream flow rights in the National Forests. All of the instream flow rights are to be administered and enforced as junior to any permitted or certificated state water rights existing as of the date of the Decree. The Decree identifies 14 streams upon which sites for future new or enlarged reservoirs have been studied or planned and provides that the instream flow rights are to be administered as Junior to any of these reservoirs. The Decree also provides that the instream flow rights will be administered and enforced as junior to additional, but as yet not identifiable, upstream development if the total future uses on each of the 239 identified streams does not exceed specified quantities of water, ranging from 45 acre-feet to 159,059 acre-feet.

3. Springs, Seeps and Other Sources

The Phase 11 Decree awards to the United States the right to maintain but not divert water up to a total amount of 1600 acre-feet per year from numerous springs and seeps in the Bighorn and Shoshone National Forests, but the water right for any individual spring or seep shall not exceed one acre-foot per year.

4. Discrete Water Uses

The Court decreed that the Bighorn and Shoshone National Forests have direct flow and groundwater rights for ten discrete stockwater and domestic uses. The amount of the awards ranges from .001 to .005 cubic feet per second with a priority dates of March 1. 1898 for the Bighorn National Forest Uses and March 1, 1891, and January 29, 1903 for the Shoshone National Forest uses. The Decree identifies 16 water rights with state pen-nits or certificates, the status of which is to be determined in Phase III of the Adjudication. The Decree also grants the United States water rights not to exceed 200 acre-feet annually for future development of discrete uses with the priority being the Forest reservation date. The Phase 11 Decree also awards water rights for approximately 600 other discrete stock, domestic and other uses with a November 1, 1982 priority date. The quantities awarded range from .001 cubic feet per second to .015 cubic feet per second and from . I acre-foot per year to one award of 3.5 acre-feet per year.

5. Unquantified Administrative Uses.

The Phase 11 Decree grants to the United States the right to divert up to 400 acre feet of water annually from streams and lakes in the Bighorn and Shoshone National Forests for timber production and watershed protection purposes, including haul road construction, dust suppression,

watering of riding stock, and general domestic needs of Forest Service personnel. The priority dates for these rights is the date the land upon which the water source is located was reserved for National Forest purposes.

6. Water Use for Fighting Forest Fires

The United States was awarded rights to use whatever quantity of water is required to control and suppress forest fires on the Bighorn and Shoshone National Forests. The priority dates for these rights is the date the land involved was reserved from the public domain. The Decree states that it is not to be interpreted to prevent Wyoming or any other person or entity from seeking all such redress as may be allowed by law for damages resulting from the United States' use of water for the control and suppression of forest fires on the Bighorn and Shoshone National Forests.

7. General Stockwatering

The Court awarded to the United States the right to de minimus quantities of water for stockwatering with a priority date of June 12, 1960. The Decree states that it is not to be interpreted to prevent Wyoming or any other person or entity from seeking all such redress as may be allowed by law for damages resulting from the United States' use of water for general stockwatering purposes on the Bighorn and Shoshone National Forests.

Power Site Withdrawals

The United States claimed reserved water rights for generation of hydroelectric power at numerous water power site withdrawals. The Court dismissed these claims with prejudice on December 5, 1980. The Phase 11 Decree confirms and adopts the dismissal of these claims and states that the United States has no reserved water right or any other federal water right for any purpose in or on behalf of any power site withdrawals in Water Division No. 3. However, the United States may apply to the State for permits of certificates for water rights for water power site withdrawals.

Final Adjudication

The rights decreed in the Phase 11 Decree are a final adjudication of all rights which the United States claimed or could have claimed within Water Division No. 3 under either federal or state law with the exception of. 1) Phase I claims made by the United States on behalf of the Wind River Indian Reservation Tribes, and 2) claims for water rights under state permits and certificates the status of which is to be determined in Phase III of the Adjudication.

OTHER ASSERTIONS OF FEDERAL LAW AFFECTING STATE WATER RIGHTS

The federal government has attempted to assert control over Wyoming water in areas other than reserved and non-reserved federal water rights. The National Environmental Policy Act (NEPA), the Clean Water Act (CWA) and the Endangered Species Act (ESA) are being used to

further expand federal rights. Federal actions under these acts threaten to prevent Wyoming citizens from exercising their state water rights and to block development of water allocated to the State under various interstate compacts and decrees.

Regulations adopted by the Army Corps of Engineers implementing Section 404 of the Clean Water Act have enabled the federal government to exercising further control over the State's water. Section 404(b)(2) regulations heighten federal involvement in defining the "purpose and need" of proposed water projects. Under the present federal scrutiny of project purpose and need, the State's desire to develop water for future use is considered unnecessary and the project is therefore undoable under the the Section 404 permitting process. The application of the project purpose and need criteria in the Corps' regulations also forces project proponents to undertake a lengthy and expensive alternatives analyses that go far beyond what is often reasonable. Furthermore, the current "least damaging practicable alternative" investigations and analyses make it extremely difficult and expensive to obtain approval of any project which would make additional water supplies available.

Unreasonable levels of mitigation imposed by the Corps of Engineers for wetland disturbance, alteration, and loss created by water project development is another impediment to development of the State's water resources. The ability of individuals working for the Corps of Engineers to unilaterally decide that two for one, three for one, four for one, or greater level of mitigation for impacted wetlands is required can frustrate progress on developing water and cause financial impacts and hardships for water project proponents that seem unreasonable.

Under the Clean Water Act, attempts are being made to thrust upon the states a national water law in the name of "ecological integrity", "biodiversity" and "water quality." EPA has used its Clean Water Act Section 404(c) veto authority to halt new water supply projects which the Corps of Engineers had found to be in the public interest. Under some proposals that have been considered, but so far rejected by the U.S. Congress, riparian water law principles of natural flow would become the law of the land and the prior appropriation doctrine would be frustrated.

Since the U.S. Fish and Wildlife Service has taken the position that water diverted anywhere upstream of endangered species habitat is equivalent to water diversions in areas where endangered species reside, water projects upstream in Wyoming face the same constraints relative to a project's depletive effects as as those downstream. While Wyoming's interstate apportionments are established in federal law and allocated in perpetuity, implementation of the Endangered Species Act poses severe challenges to water development in Wyoming.

Nevertheless, the State of Wyoming is committed to work with the federal government in order to meet both federal objectives under NEPA, CWA, and ESA and the State's desire to allocate and regulate Wyoming's water for the benefit of the State and its citizens. There are numerous areas where the State of Wyoming is working with the federal government in collaborative partnerships and cooperative, multi-agency activities that meet both federal and state objectives.

Since 1988, Wyoming has participated with Colorado, Utah, three federal agencies, and

water, power and environmental groups in a proactive approach that allows Wyoming to be a partner in complying with the ESA recovery efforts in the Upper Colorado River. The Recovery Implementation Program for Endangered Fish Species in the Upper Colorado River Basin has the dual objectives of recovering the endangered fish species while allowing water development to proceed in compliance with the ESA, state water law, and interstate river compacts.

In 1994, the Deparment of Interior, Wyoming, Colorado, and Nebraska entered into a Memorandum of Agreement for Central Platte River Basin Endangered Species Recovery Implementation Program. The purpose of the MOA is to develop a mutually acceptable program that would conserve and recover federally listed species, protect designated critical habitat for such species, and prevent the need to list more basin species pursuant to the Endangered Species Act. In 1997, Nebraska, Colorado, Wyoming, and the Department of the Interior entered into a Cooperative Agreement to initiate a Platte River Endangered Species Recovery Implementation Program. The signing of the Cooperative Agreement constitutes a federal action that will require National Environmental Policy Act and Endangered Species Act compliance activities that are anticipated to require three years to complete. At that time, with favorable results, the Recovery Implementation Program will get underway.

Another example of long-term cooperation between the State of Wyoming, other states and the federal government is the Colorado River Basin Salinity Control Program. Because the Colorado River is over-appropriated, and the water is used and reused numerous times as it flows downstream, the resulting salinity concentrations create significant detrimental economic impacts in the Lower Colorado River Basin. The State of Wyoming is a member state of the Colorado River Basin Salinity Control Forum, established in 1973 to coordinate with the federal government on the maintenance of the state-adopted and EPA-approved basin-wide water quality standards for salinity. Overall, the combined efforts of the basin states, the Bureau of Reclamation and the Department of Agriculture have resulted in one of the nation's most successful non-point source pollution control programs.

The State of Wyoming is an active participant in a number of other interstate work groups and organizations. These include the Glen Canyon Adaptive Management Work Group, which is a Federal Advisory Committee Act (FACA) committee created pursuant to Secretary Babbitt's October 19, 1996, Record of Decision and chartered in 1997. Wyoming is also a member of the Colorado River Operations Management Group which develops the draft Annual Operating Plan (AOP) for the Colorado River Reservoir System each year in advance of the Secretary of the Intenior approving the AOP at the beginning of each water year.

Wyoming participates in a number of interstate organizations that either have considerable interfacing with the federal goverment or have federal representation or membership. These include the Western States Water Council, the Interstate Conference on Water Policy, the Missouni River Basin Association, and the Colorado River Water Users Association.