STATE WATER LAWS AND FEDERAL WATER USES: 
THE HISTORY OF CONFLICT, THE PROSPECTS FOR 
ACCOMMODATION

by

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INTRODUCTION

Western governors organized the Western States Water Council in 1965 "to accomplish effective cooperation among western states in matters relating to the planning, conservation, development, management, and protection of their water resources."\(^1\) The need for such cooperation rested on the premise of primary state authority to manage water resources in the western appropriation states. However, as the examples of conflict and controversy set forth in this report demonstrate, the federal government has asserted a growing interest in the management of scarce western water resources. As a consequence, traditional state authority has been challenged. State water planning and management must now, more than ever, take place within the constraints imposed by various federal laws and policies.\(^2\)

Many of the activities of the Council over the years have been directed toward identifying ways to accommodate legitimate federal interests in state water resource management while maintaining vital state prerogatives. This report is another such effort.

This report does not intend to suggest that conflicts dominate the federal/state relationship in water resources. Nevertheless, existing conflicts impede the efficient and effective use of the West's limited water resources and should be

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reduced. At the same time, some tension in the relationship is
inevitable in the West, where the federal government is a major
landowner and water developer, but where the states have the
primary authority for allocating water. However, when this
tension gives rise to open conflicts, the situation becomes
debilitating.

The report of the National Water Commission in 1973 cited
one of its consultants to describe how such conflicts occur:

"If [federal law] fits with the state law into a single
pattern, it creates no problems. When it and state law
clash, and when gaps appear, when federal law upsets that
which state law has set up, when federal law undoes the
tenure security that states give to property rights, when
federal rights override instead of mesh with private rights,
then there is a federal-state conflict in the field of water
rights. There is confusion, uncertainty, bad feeling,
jealousy and bitterness. To a substantial degree, this is
what exists today."  

As this report will show, a similar statement could be made
today. The report will document some of the conflicts that have
arisen between the implementation of certain federal laws and
western state water law, describe how state water laws can
accommodate federal interests, and evaluate the merits of
alternate methods to reduce conflicts in federal/state
relationships. It is written from the perspective of state
representatives and attempts to set forth federal views only to
the extent necessary to understand the states' position. Federal

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3 See NATIONAL WATER COMMISSION, WATER POLICIES FOR THE
FUTURE 460-471 (1973); PUBLIC LAND LAW REVIEW COMMISSION, ONE
THIRD OF THE NATION'S LAND 141-149 (1970); Muys, Comments on

4 See Getches, supra note 2, at 14.

5 NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE
views on federal/state relationships in water resources and ways to improve them are amply discussed elsewhere.\(^6\)

This report was prepared by staff members of the Western States Water Council; namely, D. Craig Bell, Executive Director, and Norman Johnson, Legal Counsel. It relies in part upon information provided by Council members. Further, some Council members reviewed a draft of the report and provided helpful suggestions to the authors. Any errors in the report, however, are the sole responsibility of the Council staff.

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HISTORICAL DEVELOPMENT

Water management in the arid western United States differs from water management in the humid East. Where water is abundant, legal institutions governing its use are geared to enhance navigation and protect against flood. Where water is scarce, however, laws and policies focus on offstream water needs. With some exceptions along the Pacific coast and in the High Plains region, the West is an area of water scarcity where water "development" is emphasized. Among other things, this involves construction of storage facilities to "capture" water from spring runoff for use at other times, especially during late summer and fall. Assurance of sufficient water to meet at least some beneficial uses during times of drought is also a concern.

The prior appropriation doctrine developed in response to these western needs. As such it is an integral part of the history of the West. Early miners applied prior appropriation principles to their use of water. American Indians, Spanish explorers, and Mormon pioneers were also early appropriators of water in the West. The gradual recognition of the appropriation doctrine in the statutes of the western territories and states occurred over a period of years. Initially, and through its first phase of development, prior appropriation principles were used to grant water rights to individual holders in what was essentially a "pure property" system, subject only to some publicly prescribed priorities in use. As the prior

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7 See generally 1 W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 159-65 (1971); 1 R. CLARK, WATERS AND WATER RIGHTS 75-8 (1967).

8 Id. 1 W. HUTCHINS, 159-65.
appropriation doctrine has evolved, particularly in the last 20 or 30 years, "public rights," or public interest concerns, have received much greater attention.

The underlying prerequisite to an appropriative water right is that water must be put to a publicly defined beneficial use. According to the appropriation doctrine, beneficial use is the limit and extent of the water right. Although the definition of beneficial use has changed over time, the necessity of using water beneficially has remained constant. A related rule is the "use it or lose it" principle. This rule penalizes non-use by forfeiture, in order to preclude speculative claims and assure protection of the public interest in the continuous beneficial use of water. Water relinquished by non-use is returned to the water system and is available for appropriation by others.

Another principle of the appropriation doctrine is that priority is based on the proposition that "first in time is first in right." The doctrine thus protects those who put water to beneficial use against impairment of their use by subsequent appropriators. This element of certainty promoted the investment of capital that was necessary to develop water supplies. Such development, in turn, was necessary to sustain other social and economic development in the West. It also assured that in times of drought sufficient water would be available to meet some water needs.

An important characteristic of the appropriative water right is that, once vested, it becomes a constitutionally protected

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9 This requirement is said to be an integral part of appropriative water law because all appropriative rights are usufructuary. In other words, a holder of a vested appropriative water right has the right to use and enjoy a certain volume of water from a given source rather than to own a specific corpus of water.
property interest which can be sold, leased, or otherwise alienated. This characteristic, like the protection of senior users from encroachment by subsequent users, provides protection to investments. A primary treatise on the water law of the western states says simply, "the basic right of ownership and the divestiture of ownership [of appropriative water rights] was so well established in the early development of the appropriation doctrine in the West, and so consistently confirmed, as to be axiomatic."10

The appropriation doctrine has often been criticized as outdated, inflexible, or otherwise unable to meet current water resource management needs, particularly the protection of "public values." For example, in 1975 the National Water Commission reported that state laws were "...in many instances...inadequate to protect important social uses of water."11 Not all observers would concede that this view was accurate in the early 1970's. But in any event, all would agree that the states have since modified the appropriation doctrine to enhance public interest protection.

PROTECTION OF PUBLIC INTEREST VALUES UNDER THE APPROPRIATION DOCTRINE

The traditional appropriation doctrine incorporated public values in some ways. A fundamental tenet of prior appropriation law was that land and water estates were separate and that water

10 1 W. HUTCHINS, supra note 7, at 468. The right to assign a water right to another user, as described in this quote, is not necessarily the same as the sale of a water right to be put to a different or new use. While the law on water right assignments has become "axiomatic" throughout the West, the law and activity related to other transfers varies from state to state.

could be removed from its natural location and used beneficially elsewhere. This facilitated the public purpose of making an inhabitable region out of arid lands. Also, there were preferred uses under traditional appropriative law. They embodied a public sentiment that, for example, domestic, municipal, and agricultural needs should be met before water could be put to other uses. Beyond this, however, little regard could be given to which pending applications might better protect public values. In determining whether to grant a water right, the state official considered the date of application, the amount of water available, and the potential damage that the newly created right might do to existing rights. Maximizing potential economic benefit often equated with public interest protection.

Public Interest Criteria

Since these early times the western states have significantly enhanced protection of public interest values. Both state legislatures and state courts have established and defined public interest criteria that must be met when an application to appropriate water or to transfer a vested water right is considered. These criteria vary from state to state. Among the member states of the Western States Water Council every state but one, Colorado, has some statutory public interest review provisions in its laws governing new appropriations of water. Most states require consideration of public interest

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factors in determining whether to approve a proposed water right transfer.\textsuperscript{14}

Alaska, for example, relies heavily on statutorily defined public interest considerations in evaluating applications to appropriate water. The same criteria apply to both ground and surface water applications and to applications to reserve instream flows.\textsuperscript{15} The criteria are:

(1) The benefit to the applicant resulting from the proposed appropriation; (2) the effect of the economic activity resulting from the proposed appropriation; (3) the effect on fish and game resources and on public recreational opportunities; (4) the effect on public health; (5) the effect of loss of alternative uses of water that might be made within a reasonable time if not precluded or hindered by the proposed application; (6) harm to other persons resulting from the proposed appropriation; (7) the intent and ability of the applicant to complete the appropriation; and (8) the effect on access to navigable or public waters.\textsuperscript{16}

Idaho law requires public interest protection in the consideration of applications to: (1) appropriate unappropriated


\textsuperscript{15} ALASKA STAT. § 46.15.080(6)(1)-(A) (1987).

\textsuperscript{16} Id.; North Dakota has a similar statutory provision, See N.D. CEN. CODE § 61-04-06 (1985).
water;\textsuperscript{17} (2) reallocate water held in trust from some existing hydropower rights;\textsuperscript{18} (3) appropriate unappropriated water for minimum instream flow;\textsuperscript{19} and (4) change the place or nature of use or point of diversion of an established water right.\textsuperscript{20} The Idaho Supreme Court interpreted the term "public interest" broadly to require consideration of numerous variables including assurance of minimum streamflows, encouragement of conservation, protection of aesthetics and the environment, and the effect of the appropriation upon vegetation, fish, and wildlife.\textsuperscript{21} The court defined the state legislature's use of the term "local public interest" by saying the legislature "...intended to include any locally important factor impacted by proposed appropriations."\textsuperscript{22}

A Utah statute requires the state engineer to determine whether approval of an application for a new water use will adversely affect the "...natural stream environment..." or "unreasonably affect public recreation...."\textsuperscript{23} In Nevada, three statutory criteria guide the State Engineer when he considers applications to appropriate water. They are: (1) the availability of unappropriated water; (2) the effect on existing rights; and (3) the public interest.\textsuperscript{24} The public interest criterion, in the State Engineer's view, protects the public

\textsuperscript{17} IDAHO CODE § 42-203A(5)(e)(1987).

\textsuperscript{18} Id. § 42-203C.

\textsuperscript{19} Id. § 42-1503.

\textsuperscript{20} Id. § 42-222.


\textsuperscript{22} Id. 707 P.2d at 449-50.

\textsuperscript{23} UTAH CODE ANN. § 73-3-8 (Supp. 1986).

\textsuperscript{24} NEV. REV. STAT. § 533.370(3) (1989).
welfare by requiring the exercise of broad discretion when ruling on permit applications.\textsuperscript{25}

Using this discretion, the Nevada State Engineer issued appropriative water rights to the United States Bureau of Land Management and Forest Service for recreation, fishery, and wildlife watering, including instream flow rights. He did so even though the statute used to grant the rights did not clearly define the uses as beneficial and contained no specific authority for recognition of instream flow rights. The Nevada Supreme Court upheld this protection of public interest values by the State Engineer notwithstanding arguments by the state Department of Agriculture that issuance of non-diversionary appropriative water rights was contrary to the public interest in Nevada.\textsuperscript{26}

These statutes have had an important effect upon western water resource management. For example, Wyoming law requires rejection of applications to appropriate water that are detrimental to the public interest or welfare.\textsuperscript{27} Recently the State Engineer evaluated two opposing applications to construct a reservoir and develop water on the same site. The application filed first by a private corporation would have provided industrial water and incidental municipal supply. A subsequent application, filed by the Wyoming Department of Economic Planning and Development, intended to supply a larger share of municipal water.

\textsuperscript{25} Memorandum letter from Peter G. Morros, Nevada State Engineer, to Roland D. Westergard, Director, Nevada Department of Conservation and Natural Resources, (Jun. 12, 1986) (copy on file at the Western States Water Council office).

\textsuperscript{26} Nevada v. Morros, 766 P.2d 263 (Nev. 1988).

\textsuperscript{27} WYO. STAT. § 41-4-503 (1977).
Based on public interest considerations, the State Engineer denied the initial application in favor of the State agency's application. The original applicant appealed the matter to the Wyoming Supreme Court, which remanded it to the State Board of Control. The matter was later settled when the initial applicant signed over its rights to develop the project to the Wyoming Water Development Commission. Although the effect of the State Engineer's decision cleared the way for the state project, the state agency still had to perfect its application and meet all requirements of Wyoming law, including public interest criteria.

Arizona statutes require the Director of the Department of Water Resources to consider the potential effect on the public interest and welfare when considering applications to use surface water and to reject such applications where a proposed use is contrary to public values. The Arizona State Land Department (the predecessor to the Arizona Department of Water Resources for reviewing applications to appropriate water) used public interest criteria to deny an application which, if granted, would have resulted in the loss of 1.7% of the total recharge of one of Arizona's ground water basins.

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28 The public interest considerations included lack of due diligence and the concerns with the applicant's intent and ability to develop the project, among other things. See letter from George Christopolus, Wyoming State Engineer, to David Carmichael, et al., Re Petition to initiate a proceeding against and seek rejection of the application of Wyoming Water, Inc., for a permit to construct a reservoir on Deer Creek, a tributary to the North Platte. Temporary Filing No. 216/198 (Dec. 3, 1985) (copy on file at the Western States Water Council office).


30 ARIZ. REV. STAT. ANN. § 45-153(A) (1956).

The State Land Department determined that it would not have been in the public interest to place additional strain on a source of ground water supply experiencing substantial overdraft.\textsuperscript{32} The Arizona Court of Appeals upheld the denial of the application. It emphasized that, in a water short area, even a small reduction in recharge might cause substantial injury to the public welfare, particularly if followed by additional reductions.\textsuperscript{33} Arizona has also used its administrative authority to protect public interest values by recognizing instream uses, as noted in the next section.

\textbf{Instream Flow Laws}

Another method of enhancing public interest protection in western water resource management is through establishment and maintenance of instream flows. The traditional law of prior appropriation favored offstream uses. However, indirect protection of instream flows was provided. Long time New Mexico State Engineer, Steve Reynolds, has observed:

The streamflow required at various points in the State is governed by interstate compacts, international treaties, federal court decrees, water rights conferred by the state..., and legislation authorizing federal water development projects. In many situations, an incidental effect of these institutional constraints is an instream flow having important value in terms of recreation, fish and wildlife habitat, and aesthetics. Furthermore, in many areas of the state the geography and public land ownership patterns adequately protect instream values. Mountain streams generally do not

\textsuperscript{32} Id. 535 P.2d at 622.

\textsuperscript{33} Id. at 623.
provide favorable sites for conservation, storage, and beneficial use of water.34

These comments describe the incidental "base-line" of instream flow protection under the appropriation doctrine and apply to states other than New Mexico. In addition, the western states have established instream flows to enhance preservation of public values in water resource management by providing water for fish, wildlife, recreation uses, and aesthetics. In every western state legal mechanisms are now in place to provide some protection for instream flows.

One method of providing for protection of instream values occurs in California where public interest statutes form a legal basis to protect "use of water for recreation and preservation and enhancement of fish and wildlife resources [as] a beneficial use of water."35 While California law thus recognizes fish, wildlife, and recreational uses as beneficial, a diversion or impoundment of water must be made to establish an appropriative right. So the state, for example, might grant a right to impound water for use downstream from the impoundment to enhance fish and wildlife habitat. Such a right could be issued to a public or a private entity.36 A state agency may also protect instream flows in California, Oregon, and other states, under state public

34 Memorandum from Steve Reynolds, New Mexico State Engineer, Re: House Bill 228 (Feb. 7, 1977) at 4 (State Engineer Files, Santa Fe, New Mexico) as quoted in MacDonnell, Rice & Shupe, Editors, INSTREAM FLOW PROTECTION IN THE WEST 334 (1989).

35 CAL. WATER CODE § 1243 (West 1971).

36 California also recognizes limited riparian rights, which may be similar to appropriative rights for instream flows in some instances. See In re Matter of Hallett Creek Stream Sys., 44 Cal. 3d 448; 749 P.2d 324 (1987).
interest statutes that allow terms and conditions to be included in appropriative rights to maintain bypass flows.\textsuperscript{37}

The effect of these provisions on water for instream uses is twofold. First, the state agency may disallow new appropriations where wildlife or aesthetic values would be harmed. Second, the new appropriation may be allowed only where a by-pass flow can be assured. Further, a transfer proposal may also be disallowed if it is detrimental to the public interest. This assertion might be made by a state agency or, in some instances, by a private party protesting the transfer.

In Montana\textsuperscript{38} a public entity may acquire a water reservation to secure the equivalent of a right for instream flow. The law provides that reservations for the maintenance of minimum flow, level, or quality of water may be made up to a maximum of 50 percent of the average annual flow of gauged streams. Laws in

\textsuperscript{37} CAL. WATER CODE § 1243.5 (West 1971); ORE. REV. STAT. § 537.170 (5)(a). See supra text accompanying notes 12-33.

\textsuperscript{38} MONT. CODE ANN. § 85-2-316.
California,\textsuperscript{39} Oregon,\textsuperscript{40} and Washington\textsuperscript{41} also provide for reservation of water by a state agency, or a similar process.

Wyoming considers instream flow and storage of water for release to maintain instream flow to be beneficial uses under certain conditions, and has established a procedure for appropriating water for such uses.\textsuperscript{42} The Game and Fish Commission identifies stream segments and flow rates that should be appropriated and reports them to the Water Development Commission. The Commission then files an application to appropriate natural flow after analyzing whether natural flow is available, whether storage is required, or whether a combination of both must be used. The date of priority of the appropriative right is the date of the Commission's application. Water commissioners regulate the water course to provide water for the instream use on the basis of its priority.\textsuperscript{43}

\textsuperscript{39} See Lilly, \textit{Protecting Stream Flows in California} 8 ECOL. L.Q. 697 (1979). Note that the use of the term "reserve" in this context refers to the state setting aside, or "reserving" from appropriation, sufficient water to assure maintenance of instream flows and should not be confused with federal "reserved water rights" recognized under the "reserved rights" doctrine. See infra text accompanying notes 226-248.

\textsuperscript{40} ORE. REV. STAT. § 536.410 allows the Water Resources Commission to withdraw waters from further appropriation while the order of withdrawal is in effect. This is somewhat different from the reservation concept in Montana, which involves reservation of a quantity of water with a priority date. Any Oregon state agency may request a reservation of unappropriated water for future economic development under ORE. REV. STAT. §§ 537.356, 537.358. As to instream flow protection, Oregon has a minimum stream flow program authorized by ORE. REV. STAT. § 536.325. As a practical matter, the minimum streamflow program has been largely supplanted by the Water Resources Commission's instream water rights program.

\textsuperscript{41} WASH. REV. CODE ANN. § 90.22.010.

\textsuperscript{42} See WYO. STAT. §§ 41-3-1001 to 1014 (Supp. 1988).

\textsuperscript{43} See WYO. STAT. §§ 41-3-1001-1014 (Supp. 1988).
Utah has enacted a similar statute.\textsuperscript{44} It allows for acquisition of established water rights by the state to "provide water for instream flows in natural channels necessary for the preservation or propagation of fish within a designated section of a natural stream channel."\textsuperscript{45} In Colorado, the Water Conservation Board may appropriate "such waters of natural streams and lakes as the Board determines may be required for minimum stream flows or for natural surface water levels or volumes for natural lakes to preserve the natural environment to a reasonable degree."\textsuperscript{46}

Idaho law provides two methods to protect instream flows for public use. First, applications to appropriate water for out-of-stream purposes must be evaluated against broad "local public interest criteria,"\textsuperscript{47} which include a determination of minimum streamflow to be retained in the natural channel. Second, a minimum instream flow may be assured by establishing a recorded right for the flow. The Idaho Water Resources Board, an eight-member citizen policy commission, is authorized under state law to apply for and hold such rights.\textsuperscript{48} The Idaho Supreme Court has affirmed the validity of instream flows, and has recognized some instream public uses as beneficial uses under state law.\textsuperscript{49}

\textsuperscript{44} UTAH CODE ANN. § 73-3-3(11) (Supp. 1988).

\textsuperscript{45} Id.

\textsuperscript{46} COLO. REV. STAT. § 37-92-102(3) (Supp. 1987).

\textsuperscript{47} IDAHO CODE § 42-203A(5) (Supp. 1987).

\textsuperscript{48} Id. § 42-1503.

\textsuperscript{49} State Dep't of Parks v. Idaho Dep't of Water Admin., 96 Idaho 440, 530 P.2d 924, 928-9 (1974).
Oregon protects instream flows in a variety of ways. One is legislative\textsuperscript{50} or administrative\textsuperscript{51} withdrawal of streams from further appropriation. Also, since 1955 Oregon has established minimum streamflows by administrative rule, to support aquatic life and minimize pollution.\textsuperscript{52} In 1987, Oregon's minimum streamflow program was largely superceded by the legislature's explicit authorization of instream water rights.\textsuperscript{53} The Oregon Departments of Fish and Wildlife, Environmental Quality, and Parks and Recreation may apply for instream water rights for public use.\textsuperscript{54} Public uses include recreation; conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and any other ecological values; pollution abatement; and navigation.\textsuperscript{55} The Water Resources Commission holds instream water rights in trust for the people of the state.\textsuperscript{56} The Commission has converted most earlier established minimum streamflows to instream rights.\textsuperscript{57}

In Washington the legislature declared in 1949 that the policy of the state was "...that a flow of water sufficient to support game, fish and foodfish populations be maintained at all times in the streams of the State."\textsuperscript{58} The statute allows the Department of Ecology Director to refuse to issue permits where

\begin{itemize}
  \item \textsuperscript{50} ORE. REV. STAT. §§ 538.100 - .300 (1988).
  \item \textsuperscript{51} Id. § 536.410.
  \item \textsuperscript{52} ORE. REV. STAT. §§ 536.235, 536.325.
  \item \textsuperscript{53} Id. §§ 537.332 - .360.
  \item \textsuperscript{54} Id. § 537.336.
  \item \textsuperscript{55} Id. § 537.332(4).
  \item \textsuperscript{56} Id. § 537.341.
  \item \textsuperscript{57} Id. § 537.346.
  \item \textsuperscript{58} WASH. REV. CODE § 75.20.050 (1989).
\end{itemize}
instream flow needs would be harmed. Often, rather than deny permits, the Department issues them with conditions protecting instream flows. Also, Washington law provides a more formal process to protect instream flows. The Department of Ecology, on its own or when requested by the Department of Fisheries or the Game Commission, may establish minimum streamflows and lake levels to protect fish and wildlife resources or recreation or aesthetic values.

In Alaska the Water Use Act allows for the reservation of water for the following instream uses: "(1) protection of fish and wildlife habitat, migration, and propagation; (2) recreation and park purposes; (3) navigation and transportation purposes; and, (4) sanitary and water quality purposes." The statute authorizes local, state, and federal agencies, and private individuals to apply for reservations for instream uses. To aid private entities, the state has published a booklet describing the instream flow reservation program. It contains detailed instructions on how to apply for a reservation.

There are a few states where instream flow appropriations, or their equivalent, are not recognized by statute. Nevertheless, protection may be provided by state administrators pursuant to public interest provisions. In Arizona and Nevada state officials have interpreted their laws that require a

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59 Id.

60 Id. § 90.22.

61 ALASKA STAT. § 46.15.145 (1987).

62 ALASKA DEPARTMENT OF NATURAL RESOURCES, STATE OF ALASKA INSTREAM FLOW HANDBOOK - A GUIDE TO RESERVING WATER FOR INSTREAM USE (1985).

diversion to establish a water right to allow for "in situ" water use. The Arizona Court of Appeals has held that state statutes authorize in situ appropriations for recreation and wildlife purposes. The Arizona Department of Water Resources has issued three permits to appropriate water for instream use. In April 1983 it issued two permits to the Nature Conservancy, and in March 1989 one permit to the federal Bureau of Land Management.

In Nevada, the State Supreme Court upheld the State Engineer's issuance of appropriative water rights to two federal agencies for recreation, fishery, and stock and wildlife watering purposes, including "in situ," or instream, rights. The Court said: "Applications by the United States' agencies to appropriate water for applications to beneficial uses pursuant to their land management functions must be treated on an equal basis with applications by private landowners." Thus, instream rights were provided for use on federal lands under state regulatory authority, not federal proprietary claims. These rights will enjoy the protection of state law and will be integrated into the regimen of rights administered by the State Engineer.

Water Transfers

Transfers may also promote the public interest by allowing established uses to change with evolving values and needs. The

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67 Id., 766 P.2d at 268.
ability to make such transfers was recognized early in the
development of the prior appropriation doctrine. As used here,
"transfer" refers to the conveyance of a water right from one
user to another involving a change in the location or type of
use.

The interrelated nature of appropriative water rights
requires state agencies to play an active role in the water right
transfer process. Generally, before a transfer may proceed, a
"change" or "transfer" application must be filed with and
approved by a state administrative body or a state water court.
This gives third parties the opportunity to protest the transfer
if they believe it may harm their rights. Usually a state agency
or court must also determine whether the transfer will be in the
public interest. Most states allow temporary transfers.

A transfer application is either approved or disapproved
after a time period for objections by third parties and
consideration of the implications of the transfer by a state
agency. Historic consumptive use is generally the quantity of
water that may be transferred. The state agency's decision is
usually subject to judicial review. Complex transfers, with the
potential to affect a number of vested rights, can be costly and
time consuming, while routine transfers are "business as usual"
in many states.

68 See McDonald v. Bear River & Auburn Water & Mineral Co.,
13 Cal. 220, 232 (1859); Thayer v. California Development Co.,
164 Cal. 117, 128 Pac. 21 (1912).

69 A matrix summarizing state by state water right transfer
information was included as part of a report entitled WATER
EFFICIENCY TASK FORCE, REPORT TO THE WESTERN GOVERNORS' ASS'N,

70 Id.
Most states recognize instream flows as a beneficial use to which water may be transferred. However, in some states only state entities are authorized to obtain transfer approval of a diversionary water right to an instream right.\(^71\)

According to a 1986 survey by the Western States Water Council, the annual number of transfers varies significantly from state to state. Alaska, Nebraska, and North and South Dakota have a paucity of transfers, while water rights are transferred frequently in other states. Colorado, Idaho, Nevada, New Mexico, Utah, Washington, and Wyoming reported that 50 or more transfers occur annually. Colorado, Nevada, and Utah reported that more than 300 transfers occur each year.\(^72\)

Recently, some states have simplified the marketing of water rights. In 1979, Idaho formalized some types of water transfer activities by creating a water bank for marketing purposes.\(^73\) The bank "provide[s] a source of adequate water supplies to benefit new and supplemental water uses, and provide[s] a source of funding for improving water user facilities and efficiencies."\(^74\) The Idaho Water Resource Board operates the bank on a statewide basis and appoints committees in local drainage areas. Farmers "deposit" water held under private rights or by allocations in federal reservoirs into either the state or the local water banks where it may be leased by other water users.

The California legislature adopted a policy to encourage transfers. It directs the Department of Water Resources, the

\(^{71}\) Id.

\(^{72}\) Id.

\(^{73}\) See IDAHO CODE § 42-1761 (Supp. 1988).

\(^{74}\) Id.
State Water Resource Control Board, and other appropriate state agencies "to encourage voluntary transfers of water and water rights, including, but not limited to, providing technical assistance to persons to identify and implement water conservation measures which will make additional water available for transfer." The legislature also requested the Department of Water Resources to establish a program to facilitate the voluntary exchange of water rights and to report legal and procedural changes that could be made to facilitate water marketing. Further, the Department must prepare and update a "water transfer guide" and create and maintain a periodically updated list of entities seeking to enter water transfer, lease, or exchange agreements.

Other Developments

The states have acted to protect public interest values in various other ways. For example, Colorado has expanded the

75 CAL. WATER CODE § 109 (West 1971).

76 Id., §§ 470-483 (West 1989).

77 Although this report focuses on state water quantity laws, western states have also become increasingly active in water quality protection. Many surface water pollution control efforts occur under provisions of the federal Clean Water Act, 33 U.S.C. §§ 1251-1376 (1982), which allows states to attain primacy for carrying out most important water pollution control programs, Id. § 1342. The act recognizes "the primary responsibilities and rights of the states" to mitigate and control water pollution. Id. § 1251(b).

In addition to state and federal efforts to mitigate surface water pollution under federal law, every state has acted to protect ground water quality. See, WESTERN STATES WATER COUNCIL, WESTERN STATE GROUND WATER MANAGEMENT, 1986. The states continue to enhance their legal protection of ground water quality. The U.S. Environmental Protection Agency reported in 1989 that, nationwide, 37 states enacted ground water legislation during the period 1985-1987, with 27 states enacting underground storage tank programs and 25 enacting legislation to protect ground water from contamination by agricultural chemicals. Twelve states enacted comprehensive statewide ground water protection
state role in the administration of appropriative water rights, with an increased recognition of the State Engineer's discretion to make rules governing water use. Instead of being guided by the priority of application alone, the Engineer can formulate rules to optimize water use. The courts have expanded this principle, indicating that "maximum utilization" does not require a "single-minded endeavor to squeeze every drop of water" from a water source, but to make "optimum use" of the resource.

Also, the State Engineer enforces due diligence requirements more strictly relating to the acquisition of conditional water rights. In the past, conditional rights, rights established by


States have also expanded upon federal legal protection for surface water. Many states have established standards more stringent than national standards to protect public drinking water supplies, for purposes of secondary wastewater treatment, and with respect to base-line water quality. States have also acted independently of federal law to control water pollution by establishing underground storage tank programs (see, e.g., ARIZ. REV. STAT. ANN. §§ 36-3301 et. seq. (1986); MONT. CODE ANN. §§ 75-10-403 et. seq. (1987); and S.D. CODIFIED LAWS ANN. § 34 A-2-98 (1987)); chemigation controls (see, e.g., CAL. FOOD & AGRIC. CODE § 13145 (West 1986); COLO. REV. STAT. § 35-11-106 (1987); N.D. CONT. CODE § 4-35.1-03 (1987)); pesticide controls (see, e.g., ARIZ. REV. STAT. ANN. §§ 49-301 et. seq. (1986) and CAL. FOOD & AGRIC. CODE §§ 13141 et. seq. (West 1986)); and critical ground water management areas (see, e.g., COLO. REV. STAT. § 37-90-106 (1987); ID. CODE § 42-233 (1985); OR. REV. STAT. § 537.730 (1988)), among other water quality programs. States have also created state super funds and programs to control hazardous waste and toxic substances. See Begley, et al., E pluribus, plures: without leadership from Washington, the states set the environmental agenda for the Nation, Newsweek, Nov. 13, 1989, at 70.


declaring an intent to divert water without making a diversion, have sometimes been maintained for many years with only minimal physical effort or investment. Colorado courts have imposed stricter requirements.\textsuperscript{80} Thus, the water courts are scrutinizing such rights to insure that there is a genuine intent to appropriate, and not merely to speculate.\textsuperscript{81} Further, Colorado law\textsuperscript{82} now requires proof that a project will be completed with diligence before a decree for a conditional right can be issued.\textsuperscript{83} Imposing stricter requirements on conditional rights makes more water available for current demands to meet present economic uses.

In 1987 Oregon enacted a law to provide for the sale or lease of "conserved water."\textsuperscript{84} The law defines conserved water as "that amount...previously unavailable to subsequent appropriators, that results from conservation measures."\textsuperscript{85} "Conservation" is defined as "the reduction of the amount of water (previously) consumed or irretrievably lost...achieved either by improving the technology or method for diverting, transporting, applying or recovering the water or by implementing other improved conservation measures".\textsuperscript{86} Any water right holder may apply to the Water Resources Commission for approval to carry out conservation measures.

\textsuperscript{80} Colorado River Conservation Dist. v. City & County of Denver, 640 P.2d, 1139 (Colo. 1982).


\textsuperscript{83} See Southeastern Colorado Water Conservancy Dist. v. City of Florence, 688 P.2d 715, 718 (Colo. 1984); see also Talco Ltd. v. Danielson, 769 P.2d 468 (Colo. 1989).

\textsuperscript{84} ORE. REV. STAT. §§ 537.455 - 537.500.

\textsuperscript{85} Id. § 537.455(2).

\textsuperscript{86} Id. § 537.455(1).
In determining the applications the Commission must consider whether the project would be feasible, whether the public interest would be served, if any injury would accrue to other vested water rights, and whether the project adequately mitigates effects on other water users. The Water Resources Commission allocates a percentage of the water proposed to be conserved to the applicant (usually 75%), and a percentage (presumed to be 25% unless reasons dictate a lesser or greater percentage) to the state.  

After the applicant successfully carries out the conservation project, the Commission determines the amount of conserved water and issues a new water right certificate to the conserving party for that party's percentage of the water. The certificate contains a priority to the conserved water "one minute after the priority of the water right held by the person implementing the conservation measure." This law encourages water conservation and protects the public interest by allowing a water user not only to benefit from his conservation measures, but at the same time, to increase water available for other public uses. Any person or agency allocated conserved water may reserve the water instream for future out-of-stream use or otherwise use or dispose of conserved water.

Public Trust Doctrine

Public interest values in western water resource management are also protected by the public trust doctrine. This doctrine

87 Id. § 537.470.
88 Id. § 537.475.
89 Id. § 537.485.
90 Id. § 537.490.
is based on ancient common law principles forcefully articulated in the U.S. Supreme Court's 1892 decision in *Illinois Cent. R.R. v. Illinois*. 91 In that case the Illinois legislature had conveyed to the railroad company the bed of Lake Michigan bordering Chicago. Subsequently, the legislature reviewed its action and rescinded the conveyance. The railroad brought a quiet title suit to settle its ownership of the harbor bed. The Supreme Court, relying on Illinois' sovereign power over navigable waters, ruled that the legislature could revoke the conveyance because it had been made initially in violation of the public trust. The ruling appeared to be based on federal common law. In *Appleby v. City of New York*, however, the Court stated that the decision was based on Illinois state law. 92

Many western state courts have recognized the public trust doctrine. 93 Among the various public trust cases, *National Audubon Society v. Superior Court*, 94 and *United Plainsmen v. North Dakota State Water Commission* 95 are important to a basic understanding of the effect the public trust doctrine may have on state systems of water resource management. 96

91 146 U.S. 387 (1892).


95 247 N.W. 2d 457 (N.D. 1976).

In the National Audubon Society case, commonly referred to as the Mono Lake case, the California Supreme Court held that the state can balance environmental water uses against other uses in California, and concluded that the public trust doctrine exists apart from the appropriation doctrine. The court found that the need for public trust protection provides a procedural tool to reexamine and, in some instances, retroactively modify vested appropriative water rights to protect the public trust. The operation of the public trust doctrine as described in Mono Lake was specifically adopted by at least one other state court.\(^97\)

In the United Plainsmen case, the North Dakota Supreme Court declared that, with respect to water resource management, a state statute\(^98\) expressed the public trust doctrine. The court found that state statutory and constitutional laws establish a policy in favor of long term water planning. The court also found that the public trust doctrine confirms the state's role as trustee of its water resources and complements constitutional and statutory authority, but does not impose an independent obligation on the state that requires continual review of vested appropriative water rights.

These and other rulings, including the Illinois Central ruling itself, indicate that the public trust doctrine likely exists in every state, but may be different from state to state. Thus, western states are obligated to give adequate consideration to public trust interests in their administration and management.


of western water resources. This is so even where the public doctrine is currently latent. These uses, however, are not the same in every state. To the contrary, they may differ depending on climate, economics, hydrology, traditional water and land use patterns, and a variety of other factors. Further, the public trust compels no particular decision in any given water use situation. It is neutral as to choices states make, but it requires that trust uses and values be given adequate consideration when the choices are made.

Where public trust uses have received inadequate protection, the public trust doctrine may provide a basis for challenging decisions that resulted from the neglect. However, the United Plainsman case confirms the theory that many state systems of water law, as they presently function, may adequately protect the public trust. Where state water allocations inadequately protect public trust uses and values, the public trust doctrine may provide a tool to modify such allocations.

SUMMARY

In summary, the appropriation doctrine has evolved in the West to provide protection and enhancement of public interest values. This is accomplished primarily pursuant to: (1) provisions requiring consideration of the public interest in water allocation and transfer decisions; (2) laws and programs to enable establishment of instream flows and protection of instream values; and (3) provisions and policies to facilitate and encourage water transfers. These measures are supplemented in varying degrees by the public trust doctrine.

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100 For additional information on protection of the public interest in western water resource management through statutory provisions, instream flow laws, water transfers, and the public trust doctrine see N. Johnson and C. DuMars, A Survey of the
The federal government has also moved to protect and enhance public interest values in western water resources, as defined for its purposes by federal public land and environmental laws. These federal efforts have often resulted in conflicts with western state water law systems as the following section will show.

STATE WATER LAWS VERSUS FEDERAL WATER USES:
THE HISTORY OF CONFLICT

BACKGROUND

The principles of western water law developed before the establishment of formal government. Custom and tradition gave rise to these principles in western mining camps in the late 1840's and early 1850's.\(^{101}\) When mineral development occurred elsewhere, the laws of the California miners spread to other areas.\(^{102}\) Eventually, the western states and territories codified these principles as part of their statutory laws.\(^{103}\)

Congress took a fundamental step in deference to state and territorial water law with the passage of the Mining Act of 1866.\(^{104}\) There Congress confirmed water rights for mining, agriculture, and other uses that had been acquired by private parties on public land under local customs, laws, and court decrees. This occurred even though many of the appropriators were trespassers on federal land.

Congress declared in the Desert Land Act of 1877 that "the right to use waters [of the western states] by claimant[s under the Act] shall depend upon bona fide prior appropriation...."\(^{105}\)

Thus, Congress reconfirmed past and future appropriations of

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\(^{101}\) See, 1 W. HUTCHINS, supra note 7, 159-63.

\(^{102}\) See, Maynard v. Watkins, 55 Mont. 54, 55 (1918).

\(^{103}\) See, 1 W. HUTCHINS, supra note 7, 164-5.


water on public lands that had been made under local customs and procedures. The Act further stated:

"...all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights."  

The Supreme Court held that the effect of the Act was to sever the land and water estates in the public domain. Congress directed that water rights be established under state and territorial laws. Each state had broad regulatory authority over water rights on public lands and the exclusive right to choose its own system of water law subject only to the federal government's right to reserve water for federal lands and to protect navigation. The federal government has never attempted to enact a uniform national or regional water law or to establish a nation-wide water administrative agency to carry out such a law.

With few exceptions, both Congress and the federal judiciary have since built upon this historical foundation and emphasized the deference of the federal government to state law in the appropriation and use of water. The United States Supreme Court

108 Id.
109 Id.; See also Ickes v. Fox, 300 U.S. 82, 94-6 (1937); Nevada v. United States, 463 U.S. 110, 123-4 (1983).
has described this deference, and the reasons for it, in different ways. In 1879 the Court said that appropriative water rights were "...rights which the government had, by its conduct, recognized and encouraged and was bound to protect."\(^{111}\) Later, as noted above, the Court described the effect of congressional policy on western water and land as "severing" the two property estates, providing for state, not federal, control of water rights.\(^{112}\) Also, the Court has noted that water is vital to the economic well-being of the western states, because the West suffers from conditions of aridity "...unlike any that ha[ve] been known in any part of the western world."\(^{113}\) Further, the Court has said that if federal law and state law reigned side by side in each river in the West, utmost confusion would prevail.\(^{114}\)

Congress has declared its deference to state water law by including in most major federal public land and environmental


\(^{113}\) United States v. Gerlach Live Stock Co., 339 U.S. 725, 745-6 (1950). The Supreme Court further commented on the difference aridity can make, hypothetically at least, in Sporhase v. Nebraska, 458 U.S. 941 (1982). There the Court held that ground water is an article in commerce and that its interstate regulation is subject to commerce clause regulation. In so holding the Court struck down a Nebraska statute banning out-of-state export of water. The Court, however, said that:

"A demonstrably arid state conceivably might be able to marshall evidence to establish a close means-end relationship between even a total ban on the exportation of water and a purpose to conserve and preserve water."

458 U.S. at 958.

laws state water law "savings clauses" similar to those in Section 8 of the Reclamation Act of 1902, which reads in part:

Nothing in this Act shall be construed as affecting or intended to affect or 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 this Act, shall proceed in conformity with such laws.\textsuperscript{115}

In United States v. California the Court commented on the effect of this provision on the implementation of the Reclamation Act. It traced the history of federal and state relations in the field of water and concluded with a comment that appears in many court decisions today. The Court said:

The history of the relationship between the federal government and the states in the reclamation of the arid lands of the western states is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress.\textsuperscript{116}

Notwithstanding state law savings clauses and the expressed deference by Congress to state water law, the implementation of a number of federal statutes has conflicted with western water resource management. These federal statutes reflect legitimate and important interests in the management of water resources. These fundamental interests have their roots in federal land ownership in the West and in the United States Constitution.


\textsuperscript{116} California v. United States, 438 U.S. at 653.
Navigation

One principal federal interest derives from the clause that gives Congress power "...to regulate commerce among the several states...."117 In two early cases the Supreme Court held that the power to regulate "commerce" included the power to regulate "navigation."118 Other cases expanded Congressional authority to control navigable waters, and broadly defined the term "navigable."119

Eventually, the Supreme Court determined that it was no longer necessary that a water course be currently navigable.120 As a result, broader definitions were adopted. One example is the present test for navigability for purposes of the jurisdiction of the Federal Energy Regulatory Commission. The test is whether a water course "[1] presently is being used or is suitable for use [for navigation], or (2)...has been used or was suitable for use in the past [for navigation], or (3)...could be

117 U.S. CONST. art I, § 8.


made suitable for use in the future by reasonable improvements [for navigation].”

Historically, the federal interest in water resource management under the Commerce Clause centered on navigation. The federal government dredged channels and harbors, built locks and other navigation-enhancing facilities, and prohibited impedance of navigation by those, for example, who wished to build a bridge across a navigable river or drain a navigable lake. Also, late in the 19th century the United States protected navigation by requiring federal authorization for actions that might affect navigable waters, and by insisting that certain conditions be met as a prerequisite to such authorization.

More recently, the Commerce Clause has been used as a basis to safeguard the environment, regardless of navigation. For example, under Section 404 of the Clean Water Act dredge or fill activities that may affect navigable waters of the United States must be authorized by the U.S. Army Corps of Engineers. The term "navigable waters" has been defined to include all waters subject to the reach of the commerce clause. This means, essentially, that all waters of the United States are covered by the Act. Environmental criteria used to evaluate Section 404

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121 Rochester Gas & Electric Corp. v. FPC, 344 F.2d 594, 596 (2d Cir., 1965).


124 33 U.S.C. § 1344 (1985). States may obtain delegated authority for this program, upon meeting certain criteria, but only one state has done so. See infra note 202.
permit applications often have little, if anything, to do with navigation. 125

Proprietary Interests

Another federal interest in western water management stems from federal land ownership in the West. The Supreme Court has implied to Congress an intent to reserve water rights when it sets aside lands from the public domain to be used for specific

125 Clean Water Act Section 404 reads, "the Secretary of the Army acting through the Chief of Engineers may issue permits...for the discharge of dredge or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344. The conference report which accompanied the bill containing this language explained that Congress intended to assert federal jurisdiction over those waters subject to regulation under the commerce clause, U.S. CONST. art. 1, Sec. 8, stating "...the conferees fully intend that the term 'navigable waters' be given the broadest constitutional interpretation unencumbered by agency determinations..." S. Rep. No. 1236, 92 Cong., 2d Sess. 144 (1972). In 1975, in Natural Resources Defense Council, Inc., v. Calloway, 392 F. Supp. 685 (D.D.C. 1975), the court ordered the Corps to expand the coverage of the 404 program to include all waters that the federal government could constitutionally regulate under the commerce clause.

When the Federal Water Pollution Control Act was reauthorized (and thereafter became known as the Clean Water Act) the broad jurisdictional approach to dredge and fill regulation was retained. 33 U.S.C. § 1344 (1985). In United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), the Court upheld an interpretation of the Corps' Section 404 jurisdiction to include wetlands saturated by ground water rather than surface water. Subsequently, in Barley v. United States, 647 F. Supp. 44 (D. Idaho 1986), a federal district court held that soils sufficiently saturated by groundwater may meet the Corps' wetland definition without the appearance of surface water. See also Quirva Mining Co. v. United States, 765 F.2d 126 (10th Cir. 1985).

purposes. Such reserved rights necessary to carry out the purposes of the reservation are authorized by the Constitution. They constitute an exception to the rule that the land and water estates in the West were severed and that rights to use water must be obtained under state law.

The federal interest in securing reserved rights for federal lands ranges from assuring drinking water for military installations to providing water to fulfill the purposes of national forests, monuments, and parks. Congress has also been deemed to have intended to provide water for use on Indian reservations. This is often described as being accomplished under the treaty power and the "Indian commerce clause" of the Constitution in conjunction with the property clause.

See infra text accompanying notes 226-48.

Some commentators have construed the holding in Winters v. United States, 207 U.S. 564 (1908) to rely on either the property clause or the treaty clause of the Constitution, see TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 9.07[1][6]. Frank Trelease, however, argued that:

The federal functions exercised in the name of the reservation doctrine rest...on the supremacy clause, coupled with the power exercised in making the reservation of land, or with some other power incidentally exercised on the reserved land.

TRELIESE, FEDERAL-STATE RELATIONS IN WATER LAW 147-160 (1971).


Id.

Other federal interests in water resource management arise under the war power and the general welfare power. U.S. CONST. art. I, Sec. 8. But see F. TRELIESE, supra note 127, at 147-60.
Environmental Concerns

In recent years, federal interests in western water management have revolved increasingly around environmental protection, aesthetics, and recreational uses. Thus, federal powers have been used to secure instream flows to protect and enhance fish and wildlife resources, to protect aesthetic values such as wild and scenic rivers, and to preserve endangered species.

This federal phenomenon has occurred concurrently with state efforts to protect these same values through management of western water resources. These state efforts, some of which were described previously,\(^{132}\) have helped provide more water for recreational uses and environmental protection. More importantly for purposes of this report, they have created a favorable environment for the protection of federal interests.\(^{133}\) Nevertheless, many conflicts have developed as a result of federal actions to protect federal interests. These conflicts will be described in the next section.

CONFLICTS

The following information describes examples of conflicts that have arisen between federal laws and western water law. As

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132 See supra text accompanying notes 12-90.

133 A good example of this is water rights for federal wilderness areas. Notwithstanding the contention of many observers that federally reserved rights must be recognized for such wilderness areas to adequately protect their water supply, the solicitor of the Department of Interior concluded that "...Congress intended not to reserve water for those areas." Rather, the Solicitor found, "such water may be acquired by purchase or by appropriation for wilderness or related purposes. (e.g., instream flows for fish and wildlife purposes) under applicable state law." Federal Reserved Water Rights in Wilderness Areas, M-36914 (Supp. III), Department of Interior Solicitor's Opinion, July 26, 1988, at 37.
used here the term "conflict" is broadly construed and refers to instances where the implementation of federal laws adversely affects the operation of state water law. It includes situations where such federal actions negatively affect the exercise of a state issued water right, or where such actions are carried out in disregard of state laws that would otherwise apply.

The Federal Power Act/Electric Consumers Protection Act

When Congress passed the Federal Power Act in 1920, it inserted in the Act "savings clauses" to assure that states would retain the authority to manage and regulate water, notwithstanding that a federal agency would regulate the generation of electricity. During the 1920's, and 30's, the Federal Power Commission interpreted this language literally and therefore required hydropower permit applicants to demonstrate full compliance with state water law as a prerequisite to obtaining a hydropower license.


136 The Federal Power Commission's (FPC) initial annual report issued after passage of the Federal Power Act noted: "(i)n several of the states, particularly in California, action upon applications is awaiting the approval of water rights as required by Section 9(b) of the Act." FEDERAL POWER COMMISSION, FIRST ANNUAL REPORT 27 (1921). The next year FPC's legal counsel opined concerning Section 9(b) as follows:

"The applicant must show that he has obtained, pursuant to the laws of the state, the right to appropriate, divert, and use the water for power purposes. If the applicant has obtained, in compliance with the laws of the state, a permit for the proposed diversion, from the state engineer or other agency of the state having jurisdiction in the matter, such a permit, in my opinion, satisfies the requirement of the statute."

FEDERAL POWER COMMISSION, SECOND ANNUAL REPORT 225 (1922). See also FEDERAL POWER COMMISSION, THIRD ANNUAL REPORT 8 (1923).
This practice stopped after the U.S. Supreme Court narrowly construed the savings clauses of the Federal Power Act, Section 9(b) and Section 27. In *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, the Court held that the Commission could license a hydropower project even though the licensee was in violation of Iowa laws requiring a state permit to build a dam and prohibiting the de-watering of a river. The Court found that 9(b) required only evidence satisfactory to the Commission of steps taken to acquire state approval, rather than actual compliance. Otherwise, the Court determined, states could undermine the effectiveness of the Act.

After *First Iowa* was handed down, federal agencies came to view the savings language in federal laws generally as having a more limited application. However, in 1978 the U.S. Supreme Court ruled in *California v. United States* that the savings language in Section 8 of the Reclamation Act meant what it said; namely, that the Bureau of Reclamation must comply with state water law in the operation of the New Melones dam, absent clear Congressional directives to the contrary.

Federal Power Act Section 27 resembles the language of Section 8 of the Reclamation Act. The case of *California v.*

Several administrative orders issued by the FPC in the 1930's held that state water rights laws applied to hydropower projects licensed by FPC. See 1 FPC, Opinions and Decisions 13, 360-1 (1937).

137 328 U.S. 152 (1946).

138 Id. at 167.

139 Id. at 164.


141 See supra text accompanying note 115.
FERC, the so-called Rock Creek case, gave the Ninth Circuit Court of Appeals the opportunity to revisit the First Iowa holding in light of the California v. United States ruling. The question was whether an applicant before the Federal Energy Regulatory Commission (FERC), the successor to the Federal Power Commission, needed to comply with minimum streamflow requirements imposed as conditions in a state water right permit. The requirements were imposed to protect the downstream fishery. The Ninth Circuit summarily dismissed similarities between Section 27 and Section 8 and any conflict between the Supreme Court's California and First Iowa decisions as addressing two different water use programs distinct in both purpose and history. The court found that "California's interpretation of the 1902 Reclamation Act does not affect First Iowa's interpretation of the FPA...."143

The State of California, with the support of forty-three other states, successfully urged the Supreme Court to review the Ninth Circuit's decision. On the merits, all forty-nine states supported California's position. The decision is pending as of the date of this report.

The eventual resolution of this issue will have significant practical implications. In the late 1970's and early 1980's Congress passed statutes that caused a significant increase in hydropower permit applications to FERC. The applications jumped from about 20 per year in the mid-1970's to nearly 1,900 in 1981. This increase magnified controversies caused by FERC's unwillingness to defer water use decisions involving hydro

142 877 F.2d 743 (9th Cir. 1989).
143 Id. at 749.
145 Id.
projects to state water agencies, even though these agencies manage and allocate water rights, conduct water planning, certify compliance with state and federal water quality laws, and verify the structural safety of dams.

There follows a summary of the problems experienced by western state water resource managers because of FERC's position that it has exclusive authority to regulate water use associated with a hydro project. These conflicts fall within a few general categories.

*Imposition of Instream Flows*

In some cases, FERC has imposed instream flows without consultation with or consideration of state laws and authorities. For example, FERC awarded a hydropower exemption for development of the Vermillion Creek Hydropower Diversion Project in western Montana. The project would divert water through a penstock for several miles to a lower point of return on the creek. The exemption awarded by FERC stipulated that the project could be constructed and operated only if the applicant

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146 An order issued by FERC for the proposed Rock Creek project in California made its position clear, as follows:

The imposition of minimum flow releases for fishery protection and other purposes is an integral part of the Commission's comprehensive planning and licensing powers under Section 10(a) of the Federal Power Act (FPA). As such, the establishment of minimum flows is a matter beyond the reach of state regulation. Allowing states to prescribe minimum flows for licensed projects would interfere with the Commission's balancing of competing considerations in licensing, such as fishery protection and project economics, and would essentially vest a veto authority over projects in the states.

Rock Creek Limited Partnership, 38 FERC ¶ 61,240 (March 11, 1987).

maintained a flow of 75 cfs below the point of diversion. FERC did so without consideration of Montana's water management responsibilities set forth under state law.\textsuperscript{148}

Under Montana law, the reservation process provides the only legal means to establish an instream flow right and this right can be obtained only by a government entity.\textsuperscript{149} Without an instream reservation, Montana maintained that it must continue to allocate water for consumptive use in the reach stipulated by FERC for maintenance of instream flows.\textsuperscript{150} Clearly, the question remains: who is responsible for assuring maintenance of the 75 cfs flow required by FERC? Since there has been no compliance with state law, the state cannot enforce the minimum flow. It is questionable whether FERC, as a practical matter, can enforce the requirement.

Similar problems have developed in Texas in connection with the renewal of the license for the Possum Kingdom Dam on the Brazos River and the licensing of the Guadalupe-Blanco River Authority's Canyon Dam Project No. 3856.\textsuperscript{151}

\textsuperscript{148} Id. at 10.

\textsuperscript{149} See supra text accompanying note 38.

\textsuperscript{150} Id.

\textsuperscript{151} These were not cases where all state laws and authorities were ignored. Rather, in denying the Texas Water Commission's motion to intervene in the Morris Sheppard Dam case, which pointed to the conflict and apparent violation of state law arising from the proposal to use state water for a non-designated beneficial use under the permit, FERC stated that under federal law, it had met all requirements for state coordination cited in §10 of the Federal Power Act through negotiations with the Texas Parks and Wildlife Department. What FERC failed to consider is the expanded role of the Texas Water Commission in assessing the impacts of surface water resource projects on instream uses and fish and wildlife habitat delegated to it by the Texas Water Code. It is the opinion of the Texas Water Commission that the State, and particularly the agency with jurisdiction over its water resources, should not be eliminated from the decision-making process on hydroelectric projects, nor should
In other cases, such as in the Rock Creek case,\textsuperscript{152} state agencies have required hydro applicants to establish instream flows under state law different than those required by FERC. In the Rock Creek case, these required flows were greater than those imposed by FERC. FERC has advised its applicants, however, that they need not comply with state law.

These problems have occurred despite FERC's lack of comprehensive authority to enforce or protect instream flow rights and its lack of the capability to weigh and balance the local interests that underlie decisions to establish rights to protect instream flows. On the other hand, in every state where such instream flow conflicts have arisen, appropriate methods exist under state law to establish instream flow rights.\textsuperscript{153}

\textsuperscript{152} California v. FERC, 877 F.2d 743 (9th Cir. 1989).

\textsuperscript{153} See supra text accompanying notes 34-67.
Order of Application

In some instances FERC has granted preliminary permit applications to develop hydropower sites to entities that do not hold and cannot obtain related state water rights. This is particularly troublesome where the holder of a state granted water right also seeks to develop the hydropower potential of a site.

For example, American Falls Reservoir District No. 2 and the Bigwood Canal Company own and operate the Milner-Gooding Canal in Lincoln County, Idaho. Located on the canal is the Dietrich drop-site. American Falls and Bigwood intended to develop a hydro project at the site and obtained a hydropower water right from the state of Idaho with a priority date of September 15, 1980. 154 However, on May 25, 1982, FERC granted a preliminary permit to develop the site to Idaho Renewable Resources, Inc., and the City of Ashton, Idaho. 155 In its license order FERC concluded that there were no significant, substantiated differences in the plans for development presented by the parties. However, concerning man-made irrigation facilities, Idaho law provides that water cannot be appropriated for hydropower development without the permission of the owner of the facilities. 156 The FERC permittee had no such permission.

The FERC order issuing the preliminary permit to Idaho Renewable Resources, Inc., and the City of Ashton, Idaho resulted in one party having the FERC approval to develop the site, even though a competitor was the only entity which could obtain the necessary water right under state law. Since there was almost no

155 Id.
156 Id.
difference in the development plans of the parties, it was
difficult for the state of Idaho to understand the reasoning that
led to granting the right to develop hydropower potential to an
entity which could not obtain a state water right. If FERC
required demonstration of compliance with state water law as a
prerequisite to granting a hydropower permit application, such
controversies would not arise. 157

Subordination of Upstream Rights

In some instances, FERC has refused to subordinate
hydropower water rights to upstream diversionary rights necessary
for other types of development. This has occurred even though
all parties other than FERC and its licensee, including
appropriate state water resource agencies, have viewed the
hydropower rights as subordinate.

For example, on July 30, 1986, FERC issued an order granting
the Boise Cascade Corporation a license for the 9.5 megawatt
Horseshoe Bend hydroelectric project, but refused to include
language in the permit subordinating its water use to future
upstream diversions, as requested by the Idaho Department of
Water Resources. 158 The Commission concluded in a footnote that
such a condition would vest in the Department, rather than the
Commission, ultimate control over operation and continued
viability of the project. The footnote referred to the First
Iowa decision. 159

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157 This particular controversy was eventually settled by
agreement among the parties, but no change in FERC policy
resulted. Letter from Keith Higginson, Director of the Idaho
Department of Water Resources, to Craig Bell (Nov. 11, 1989) (on
file at the Western States Water Council office).

158 Boise Cascade Corporation, Project No. 5376-001, 36 FERC
§ 61,135 (July 10, 1986).

159 Id., p. 61,332, n.21.
The Department responded by pointing out that the Commission's decision presumed to vest in FERC, rather than the states, ultimate control over any future diversions upstream of any FERC licensed project. The Department argued that this was inconsistent with congressional intent as manifested in the Federal Power Act. Nevertheless, FERC subsequently denied a request for rehearing by the Department. Contrary to the assertions of the Department, FERC concluded that the burden was on the Department, not the Commission, to supply the information needed to substantiate its allegations that a license should be conditioned so as to allow future upstream diversions.\textsuperscript{160}

FERC offered the following concession: "We can require the licensee to reasonably reduce its use of water for generation to coincide with reductions in flows caused by future upstream diversions if we...conclude that it would be in the public interest to accommodate such upstream diversions. IDWR (the Department) can petition the Commission at any time to have us exercise our authority...."\textsuperscript{161}

In response, Keith Higginson, Director of the Idaho Department of Water Resources observed: "FERC's control is being asserted over river basins that they have only seen on a map," the names of which they "cannot spell or even pronounce...."\textsuperscript{162}

He pointed out that the result is to give a hydropower developer a veto over new diversions on an entire river system and preclude any upstream development unless it is approved by FERC and its licensee. This, he argued, places FERC in a position of

\textsuperscript{160} Horseshoe Bend Hydroelectric Co., 42 FERC ¶ 61,072 (January 25, 1988).

\textsuperscript{161} Id. at p. 61,325-6.

\textsuperscript{162} Press release by R. Keith Higginson, Director of the Idaho Department of Water Resources (January 29, 1988).
attempting to make decisions concerning water development and management that are clearly within the prerogatives of state water agencies under state law and that FERC has neither the authority nor the capability to make.163

FERC maintains that it will give special consideration to comprehensive state water plans pursuant to a provision of the Electric Consumers Protection Act. However, while maintaining that the provision provides opportunity for recognition of state interests, FERC has taken the position that it will only consider such plans as part of the "record" it develops in reaching its licensing decisions.164

The Endangered Species Act

The Endangered Species Act (ESA)165 requires federal agencies, permittees, and licensees to protect endangered species. Its implementation has conflicted with the exercise of state water rights.

The Act requires that endangered species be designated and listed, and prohibits the "taking" of such endangered species. The ESA further requires the Secretary of Interior to insure that any action "...authorized, funded, or carried out by any [federal]...agency... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after

163 See id.
consultation as appropriate with affected states, to be critical.\(^{166}\)

Conflicts have usually centered on the effects to state water rights from actions to protect endangered species habitat. A related issue is the potential of such federal actions to affect water entitlements under Congressionally approved interstate water compacts. A description of some of these conflicts follows.

**Nevada**

In *Pyramid Lake Paiute Tribe v. Lujan*,\(^{167}\) the Pyramid Lake Indian Tribe brought an action alleging that the federal government is violating the ESA in its operation of Lake Tahoe Dam. The United States owns the dam, which is operated by an irrigation district as the United States' agent. The dam releases water from Lake Tahoe into the Truckee River, which flows through parts of California and Nevada and terminates in Pyramid Lake. The United States operates the dam as a storage reservoir for downstream consumptive uses in Nevada, particularly for irrigation uses in the Newlands Reclamation Project. The water rights of Nevada users, including users of the Newlands Project, were quantified in the Orr Ditch decree.\(^{168}\)

In its complaint the tribe alleged that the ESA requires the United States to release sufficient water from Lake Tahoe Dam to protect endangered species in Pyramid Lake, specifically the

\(^{166}\) Id. § 1536(a)(2).

\(^{167}\) No. S-87-1281-LLK (E.D. Cal.).

cui-ui and Lahontan cut-throat trout. If such releases were made, the availability of water for existing consumptive uses in California and Nevada authorized under state law would be significantly reduced, particularly consumptive uses in Nevada adjudicated in the Orr Ditch decree. The states of California and Nevada have intervened in the action, as have a number of water users in Nevada. The action is pending in the federal district court in Sacramento.

In an earlier related case, the Ninth Circuit Court of Appeals held that the Secretary of Interior has discretion under the ESA to devote the entire project yield of Stampede Dam and Reservoir -- which impounds water from a Truckee River tributary in California -- to the restoration of the endangered species in Pyramid Lake. The Secretary could do so instead of making water available for agricultural use in the Truckee Meadows area in Nevada, even though the project was authorized for agricultural uses. Water rights from the project were sanctioned under state law. Since the municipalities of Reno and Sparks, located in the Truckee Meadows, have been acquiring agricultural water rights from project users, the operation of the project for endangered species has adversely affected water availability for these cities.

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169 Letter from Roderick E. Walston, California Deputy Attorney General, to Norman Johnson (Oct. 6, 1988) (on file at the Western States Water Council office).

170 Id.

171 Id.

172 Pyramid Lake Paiute Tribe v. Lujan, No. S-87-1281-LLK (E.D. Cal.).

173 Carson-Truckee Water Conservancy Dist. v. Clark, 741 F.2d 257 (9th Cir. 1984).

174 Letter from Roderick E. Walston, California Deputy Attorney General, to Norman Johnson (Oct. 6, 1988) (on file at the Western States Water Council office). The municipalities in
Federal agencies have also challenged state water rights related to the Stillwater Wildlife Management Area located adjacent to the Newlands Reclamation Project. It is the largest wetland area in Nevada, consisting of some 200,000 acres of desert and marsh habitat for nesting and migratory water fowl. Water permits for recreation and wildlife use at the refuge have been issued by the Nevada State Engineer. The federal government, however, through issuance of its final operating criteria and procedures for the Newlands Reclamation Project, has asserted that such use of water is a "waste" under Nevada law and under the ESA. Hence, it alleges, water use efficiency in the Newlands Project must be substantially increased and water deliveries to the Stillwater refuge and other related wildlife areas must be curtailed so that less water will be diverted from the Truckee River and therefore more water will be available for the enhancement of threatened and endangered species located at Pyramid Lake. This matter is presently under appeal in the federal district court in Nevada.

the Truckee Meadows area had brought the action, alleging that the Secretary must make the project yield available for municipal uses in the Truckee Meadows area. The court rejected the claim noting, among other things, that the congressional act authorizing the dam and reservoir established agricultural use as a project purpose, not municipal use. Carson-Truckee Water Conservancy Dist. v. Clark, 741 F.2d 257 (9th Cir. 1984).

175 Newlands Project, Nevada-California Operating Criteria and Procedure, Record of Decision at 8-11 (April 15, 1988).

176 Letter from Peter G. Morros, Nevada State Engineer, to Norman Johnson, October 12, 1988 (on file at the Western States Water Council office).

177 Id.

178 Pyramid Lake Paiute Tribe v. Lujan, No. R-85-197-BRT (D. Nev.). The Newlands Reclamation Project also encountered problems because of the Endangered Species Act. Located in western Nevada, the project uses water from both the Truckee and Carson rivers to irrigate more than 70,000 acres of land. In the early 1980's, a federal district court, over the objection of the
Colorado

The Riverside Irrigation District and the Public Service Company of Colorado proposed to build a dam and reservoir on Wildcat Creek, a tributary of the South Platte River, in Morgan County, Colorado, to store water for irrigation and for cooling a coal-fired power plant. After obtaining a state water right for the dam's construction, the irrigation district sought a nationwide Section 404 dredge and fill permit required under the Clean Water Act.

The Corps of Engineers denied the Section 404 permit on the basis of the potentially harmful effects of the discharge of sand and gravel during construction of the dam. Behind this federal government, affirmed that project users held the water rights within the project. United States v. Alpine Land and Reservoir Co., 697 F.2d 851 (9th Cir. 1983). The Truckee-Carson Irrigation District, on behalf of these project users, filed numerous applications to change the place of use of certain water rights under Nevada law. NEV. REV. STAT. §§ 533.345 et seq. Under the Endangered Species Act, the Pyramid Lake Paiute Indian Tribe and the federal government have challenged virtually all of the proposed transfers, in part on the basis that approval of the applications will result in increased diversions from the Truckee River to the detriment of endangered and threatened species in Pyramid Lake. Letter from Peter G. Morros, Nevada State Engineer, to Norman Johnson (Oct. 12, 1988) (on file at the Western States Water Council office). However, the federal district court in Nevada affirmed the State Engineer's approval of change applications on the alternative ground that Nevada water law did not apply. On appeal, the Ninth Circuit held that Nevada law applied to transfers of water rights under the Alpine decree. United States v. Alpine Land & Reservoir Co., 878 F.2d 1217 (9th Cir. 1989). Further, the record supported the State Engineer's findings that the transfers of water rights would not prove detrimental to public interests nor threaten existing rights. United States v. Alpine Land & Reservoir Co., 878 F.2d 1217 (9th Cir. 1989).

179 Riverside Irrigation District v. Andrews, 758 F.2d 508, 511 (10th Cir. 1985).

180 Riverside Irrigation District v. Andrews, 758 F.2d at 511-2.
decision, however, was the alleged environmental impact of the diversion of water from the creek on whooping crane habitat.\textsuperscript{181} A Fish and Wildlife Service biological opinion had concluded: "The Wildcat Reservoir is likely to jeopardize continued existence of the Whooping Crane and adversely modify a 53-mile reach of the Platte River which is critical habitat for the Crane."\textsuperscript{182} The habitat is located some 250 miles downstream from the reservoir.

The biological assessment identified the need for a peak flow runoff, which the dam intended to impound, for purposes of scouring the streambed in the crane's critical habitat area to remove objects that might allow predators of the crane to disguise themselves while preying upon the crane. The proponents of the dam questioned whether such incidentally related effects could reasonably serve as the basis for the denial of a nationwide permit.

Before the Tenth Circuit, Colorado argued that only direct effects of depletion could be considered in evaluating whether to grant the Section 404 permit. The Tenth Circuit, however, held that the Corps should consider all effects of depletion, both direct and indirect.\textsuperscript{183} Colorado also argued that the Corps' decision was precluded by Clean Water Act Section 101(g), where Congress adopted a policy of non-interference with state water laws and entitlements.\textsuperscript{184} The state further urged the court to disallow the Corps' decision because it precluded Colorado's use of its entitlement under the South Platte River Compact. The circuit court characterized the language of 101(g) as only a

\textsuperscript{181} Id.

\textsuperscript{182} Fish and Wildlife Biological Opinion addressed to the U.S. Army Corps of Engineers, December 20, 1979.

\textsuperscript{183} Id.

\textsuperscript{184} Id. at 513.
policy statement. Further, it said that "...[e]ven if denial of a nationwide permit is considered an impairment of the state's authority to allocate water, a question that we do not decide, the Corps acted within its authority."\textsuperscript{185} The court then held that the Corps acted within its authority in denying the nationwide permit.\textsuperscript{186}

\textit{Wyoming}

The Wyoming Water Development Commission proposes to construct Sandstone Reservoir on a tributary of the Little Snake River in the Colorado River Basin. The state has signed an agreement supporting the Colorado River Endangered Species Recovery Implementation Plan.\textsuperscript{187} Under the plan, the states agreed to pay an annual sum certain, plus an additional sum per acre-foot of water depleted from the river system, as mitigation for proposed water projects on the Colorado River. In consultation proceedings under ESA Section 7,\textsuperscript{188} the federal Fish and Wildlife Service decided to require additional mitigation with respect to Sandstone Reservoir. In its view, "sufficient progress" had not been made on the recovery plan.\textsuperscript{189}

Therefore, the Service asked Wyoming, as a project proponent, to

\textsuperscript{185} Id.

\textsuperscript{186} Id. at 514. A nationwide permit is "one covering a category of activities occurring throughout the country that involve discharges of dredge or fill material that will cause only minimal adverse effects on the environment when performed separately and will have only minimal cumulative effects. See 33 U.S.C. § 1344(e)(1)." Id. at 511. Riverside and the State of Colorado thought the routine activity that Riverside sought to carry out fit within this definition.


\textsuperscript{189} Letter, \textit{supra} note 187.
contribute more than the amount contemplated under the original plan as an "insurance policy" for the recovery efforts.\textsuperscript{190} Specifically, the Service requests instream flows below the reservoir, with a guarantee of protection for those flows beyond the Wyoming/Colorado state line. No provisions exist under Wyoming law to guarantee such an instream flow.\textsuperscript{191}

Another conflict occurred in Wyoming concerning the Grayrocks Reservoir on the Laramie River. There, after a Clean Water Act Section 404\textsuperscript{192} permit was issued for the construction of the dam, the permit was challenged for noncompliance with both the ESA\textsuperscript{193} and the National Environmental Policy Act.\textsuperscript{194} After construction began, the State of Nebraska and several environmental groups obtained an injunction in the federal district court in Nebraska to halt the construction activities.\textsuperscript{195} While the case was pending in the Eighth Circuit Court of Appeals, a settlement was reached whereby, among other things, the project proponent agreed to make certain releases from the reservoir ostensibly to protect endangered species in central Nebraska. The agreement requires the project to provide for a specified flow at the mouth of the Laramie River on the North Platte River. Wyoming is not a party to the agreement, and no entity has obtained an instream flow right under Wyoming law for the Laramie River. Consequently, any releases made from the

\textsuperscript{190} Id.
\textsuperscript{191} Id.
\textsuperscript{195} Letter, supra note 187.
reservoir become flows available for appropriation, according to Wyoming law.\textsuperscript{196}

\textit{Other Examples}

Other conflicts have arisen in western states as a result of the implementation of the ESA. These conflicts concern the construction of water development projects.\textsuperscript{197} In each case, water rights had been granted or were available to the project sponsors under state law. These conflicts include the Cheyenne Water Development Project and the Windy Gap Project in Wyoming, and the Moon Lake Power Plant, the White River Dam and Reservoir, and the Quail Creek Reservoir in Utah.\textsuperscript{198} More recently, endangered species designations have conflicted with construction of the congressionally authorized Milican Reservoir and the Colorado River Municipal Water District's Stacy Reservoir Project in Texas.\textsuperscript{199}

According to a report of the Western States Water Council, over half of the 60 species of fish listed as endangered or threatened by the Fish and Wildlife Service in 1985 had an historic range covering one or more of the Western states, including Arizona, California, Colorado, Nevada, New Mexico, Oregon, Texas, Utah, and Wyoming. Also, the Council found that in 1985 three additional fish species were listed as endangered or threatened and another dozen were proposed for listing. The

\textsuperscript{196} Id.

\textsuperscript{197} Endangered Species Act Authorizations Hearings before the Subcommittee on Environmental Pollution of the Committee on Environment and Public Works, 99th Cong. 1st Sess. 70-78 (1985) (Statement submitted by the Western States Water Council).

\textsuperscript{198} Id.

\textsuperscript{199} Letter from Jackson Kramer, Texas Water Commission, to Craig Bell (Sep. 22, 1988) (on file at the Western States Water Council office).
proposed listings each reflected the belief that the species faced existing or potential adverse impacts due to destruction or modification of habitat by water related activities such as construction of dams, impoundments, or other instream barriers, water diversions and depletions, channelization, siltation, the lining and dredging of irrigation canals, ground water pumping, livestock watering, and water pollution. The Council concluded that, as the list of endangered species lengthens, conflicts with western water-related water resource management would increase. 200

Clean Water Act Section 404

Section 404 of the Clean Water Act has also sparked conflict with the exercise of western state water rights. 201 Section 404 requires a permit from the U.S. Army Corps of Engineers for the discharge of dredge and fill material into the waters of the United States. 202 The broad jurisdiction of the law includes not

200 Id.


202 States may assume authority to issue individual and general Section 404 permits, 33 U.S.C. § 1344(g)-(1). Only one state, Michigan, has assumed this authority. The original EPA regulations outlining requirements for delegation of the Section 404 program were criticized as unnecessarily demanding, too complex, and too paperwork-intensive, Lori Williams, "EPA Revises Wetlands Regulations," (10 NAT'L WETLANDS NEWSL. (Envtl. L. Inst.) 13 (Sept.-Oct. 1988) as cited in WILLIAM WANT, LAW OF WETLANDS REGULATION 3-5 (1989). EPA published new regulations governing state assumption of the Section 404 program in 1988. 53 Fed. Reg. 20,779-80 (June 6, 1988) (to be codified at 40 CFR 233.21(d)).
only waters navigable in fact, but other water bodies, adjacent wetlands, and other wet areas, as well. Section 404 can affect the exercise of state water rights because a federal permit is often required for construction of water diversion or impoundment structures. Denial of such a permit, or issuance of a permit with specific conditions, may preclude or limit the exercise of state water rights. Also, special conditions in Section 404 permits may conflict with conditions included in water use permits issued under state law.

Although the number of conflicts has decreased form the late 1970's and early 1980's, recent expansion in the wetlands protection efforts of the Environmental Protection Agency and the U.S. Fish and Wildlife Service threatens to result in further conflicts. As a result of this increased emphasis on protecting wetlands, water development projects based on state authorization may become more difficult to construct. Furthermore, an increased number of special conditions are expected to be included in Section 404 permits. These conditions will relate

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203 See supra note 125.

204 See Johnson, Section 404 of the Clean Water Act (1981) (published by the Western States Water Council). However, conflicts could increase again in connection with developments and implementation of a national "no net loss of wetlands" goal. A recent memorandum of agreement (MOA) between the Corps of Engineers and the EPA relating to this goal brought a severe protest from several western governors. They argued, among other things, that the MOA had been developed without ample input from state officials. See Letter from Steve Cowper, Governor of Alaska, to President George Bush (Dec. 7, 1989); letter from George A. Sinner, Governor of North Dakota, to North Dakota Congressional delegation (Jan. 9, 1990); letter from Norman H. Bangerter, Governor of Utah to John H. Sununu, Executive Office Chief of Staff (Feb. 7, 1990); and letter from Mike Sullivan, Governor of Wyoming to John Sununu (Feb. 6, 1990) (copies on file at the Western States Water Council office).

205 See e.g. Letter from Jackson Kramer, Texas Water Commission, to Craig Bell (Sep. 22, 1988); letter from Rosellen Sand, North Dakota Assistant Attorney General, to Norman Johnson (Oct. 6, 1988); letter from Dee Hansen, Executive Director, Utah
to maintenance of minimum continuous flows and purchase of lands for mitigation. Such conditions may be contrary to state laws and decisions.

Although conflicts with respect to Section 404 may arise independently of the implementation of another federal statute, this is usually not the case. For example, as has been previously described, the Corps of Engineers, in consultation with other federal agencies, sometimes denies a permit because there will be an adverse impact on endangered species habitat from the construction of facilities utilizing state granted water rights.206 Thus, in many instances a Section 404 permit has been the vehicle for asserting the federal interest in protecting endangered species.

In Texas, the State issued a water permit for development of the Choke Canyon reservoir project. It included a special condition requiring the permittee to provide not less than 151,000 acre feet of water annually for estuarine maintenance.207 However, a Section 404 permit condition stated that the releases for the estuaries "...be in consonance with U.S. Fish and Wildlife Service recommendations."208 This, in the view of the state, placed some management and operation responsibilities for the reservoir in the hands of a federal agency rather than the state and its licensed developer. A second Section 404 permit condition would require construction of bypass channels if

Department of Natural Resources, to Norman Johnson (Dec. 19, 1988) (each on file at the Western States Water Council office). 206 Riverside Irrigation District and the Colorado Public Service Company's Section 404 permit for Wildcat dam was denied on this basis. See supra text accompanying notes 179-86.

207 Letter from Jackson Kramer, Texas Water Commission, to Craig Bell, September 22, 1988 (on file at the Western States Water Council office).

208 Id.
operation of the project causes reduction in the inundation frequency of a delta marsh.209 Conflict with downstream water right holders will occur if the bypass channels are constructed.

Superfund Amendment Reauthorization Act

The Superfund Amendment Reauthorization Act210 says in Section 121(e) that "No federal, state, or local permit shall be required for the portion of any removal or remedial action conducted entirely on site, where such remedial action is selected and carried out in compliance with this Section."211 Arizona has several Superfund sites. Recently, concerning one of the sites, EPA took the position that this provision made it unnecessary for the responsible parties to apply for state ground water permits.212

The Arizona Department of Water Resources issues permits for activities such as well construction, poor quality ground water withdrawal, hydrologic testing, and other activities involved in a Superfund cleanup. These state permits give the applicant the right to drill wells or withdraw ground water and, through permit conditioning and enforcement of permit requirements, allow the state to monitor activities carried out under the permit to assure they comply with state law. They also give the state the opportunity to bring an enforcement action against the applicant where permit conditions are violated.213

209 Id.
211 Id.
213 Id.
In response to EPA's position that no state permit was required, the state argued that EPA seems disposed to allow parties engaged in Superfund site cleanups to "do anything ...(they) want() to at a Superfund site...including the extreme case of complete and total pumpage of all ground water within an aquifer."\textsuperscript{214} The state did not disagree with EPA's position with regard to action taken in an emergency. However, it objected when circumstances were such that obtaining a state permit would not in any way jeopardize actions taken under the Superfund program. The state believed that most ground water withdrawal permits would fall within this latter category. Nevertheless, EPA continued to take the position that no state permits were required under any circumstances. The only remedy available to the state appeared to be going to federal district court to seek an action against a violator of any of the substantive requirements of state law.\textsuperscript{215}

The conflict was temporarily resolved when, despite EPA's advice to the contrary, the party conducting Superfund cleanup chose to cooperate with the state and applied for necessary state permits.\textsuperscript{216} Further, although EPA still insists that "no permits are required," the agency has recently agreed to allow language in a consent decree to require parties to obtain applicable licenses (a broad definition encompassing Arizona's permits) and to strongly urge responsible parties to comply fully with state requirements.\textsuperscript{217}

\textsuperscript{214} Id.
\textsuperscript{215} Id.
\textsuperscript{216} Id.
\textsuperscript{217} Telephone conversation between Laurence Linser, Arizona Department of Water Resources, and Norman Johnson (Dec. 19, 1989).
Migratory Bird Conservation Act

The Migratory Bird Conservation Act\(^{218}\) authorizes the Secretary of Interior to acquire, develop, and maintain refuges for migratory birds. The Migratory Bird Hunting Stamp Act (Duck Stamp Act) of 1934 provided basic funding for acquisition of refuge land.\(^{219}\) In addition, other federal wetland laws have generated funds to acquire and preserve migratory bird habitat.\(^{220}\) The purpose of these acts is to preserve and enhance the habitat of migratory water fowl. From time to time, the Department of Interior has pursued a non-monetary form of land acquisition to preserve fish and wildlife habitat. It involves the acceptance of land donations into a perpetual non-development easement program. These lands, in turn, are placed in the federal national wildlife refuge system.\(^{221}\)

In December, 1986, the Federal Fish and Wildlife Service, acting under its bottomland hardwoods acquisition program, accepted an easement donation of 3,802 acres of privately-owned land from the Little Sandy Hunting and Fishing Club located in Wood County, Texas. The purpose of the easement was to protect habitat for migratory water fowl and other wildlife resources. The terms of the agreement required maintenance of the status quo and approval by the Service of any changes in land use and management by land owners. Further, any significant action, such as development of a reservoir project, which would inundate part of the easement, would require the approval of Congress.\(^{222}\)


\(^{219}\) Id. at § 718.

\(^{220}\) See, e.g., id. §§ 668 and 715.

\(^{221}\) Letter from Jackson Kramer, Texas Water Commission, to Craig Bell (Sep. 22, 1988) (on file at the Western States Water Council office).

\(^{222}\) Id.
According to the Texas Water Commission and the Sabine River Authority, an agency of the State of Texas, the Service accepted the easement donation from the Little Sandy Hunting and Fishing Club with minimal consultation with appropriate state agencies, or the general public.\textsuperscript{223} The final environmental assessment concerning the donation concluded that no significant environmental impact would result and that no comprehensive environmental impact statement was required. The Service was aware that the River Authority proposed to develop the Waters Bluff Reservoir and Dam Project in conflict with the easement donation. Still, the federal agency concluded that no impact assessment was necessary because construction of the project could proceed if sponsors can secure congressional approval. The effect was to preclude construction of the reservoir in conflict with Texas water planning and management responsibilities.\textsuperscript{224} Texas has determined that 17 of the 45 proposed major reservoirs identified in the Texas Water Plan as necessary to meet state water demands by the year 2030 could be affected by the FWS bottomland hardwoods acquisition program.\textsuperscript{225}

Reserved Rights Doctrine

Another area of conflict between federal law and western water resource management is the federal reserved water rights doctrine. Few western water law topics have engendered as much interest among commentators as has the reserved rights

\textsuperscript{223} Letter from Jackson Kramer, Texas Water Commission, to Craig Bell (Sep. 22, 1988) (on file at the Western States Water Council office.)

\textsuperscript{224} Id.

\textsuperscript{225} Letter from Allen Beinke, Executive Director, Texas Water Commission, to Craig Bell (Nov. 2, 1989) (on file at the Western States Water Council office).
Moreover, some 60 cases are pending where reserved rights claims are at issue. It is beyond the scope of this report to discuss in detail the issues involved in those cases. However, given the importance of the reserved rights doctrine to an understanding of federal/state relations in water law, a brief overview is provided.

The doctrine is a judicial creation, based on federal proprietary interests and federal constitutional powers.


See supra text accompanying notes 126-31.
was first articulated in an Indian water rights case. It provides that when the United States sets aside a federal reservation from public land holdings at large the amount of water necessary for the primary purposes of the reservation is impliedly reserved for use on the reservations. Reserved rights for older reservations have the potential, when quantified, to conflict with many water rights created under state law, because their priority date precedes most other rights. Reserved rights for newer reservations, such as Bureau of Land Management Wilderness Areas, have the potential to tie up remaining available water supplies in some areas.

The doctrine was created by the Supreme Court, even though Congress had repeatedly and explicitly deferred to state law in a series of statutes passed to encourage settlement and private development in the western territories and states. In the Mining Act, the Desert Land Act, and the Reclamation Act, and other laws, Congress required acquisition of water rights under state and territorial custom and law. Thus, the United States government did not simply acquiesce in this regard, but instead

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230 The recognition of reserved water rights for wilderness areas is controversial. In Sierra Club v. Block, 615 F. Supp. 44 (D. Colo. 1985), the court held that when U.S. Forest Service land is set aside as wilderness land a reserved water right for wilderness purposes is created. One commentator described this anomaly as "a kind of double reserved right." Address of Rod Walston to the Western States Water Council Water Policy Seminar April 14, 1989. In a formal opinion the Department of Interior Solicitor concluded that reservation of wilderness land creates no reserved water right. Federal Reserved Water Rights in Wilderness Areas, M-36914 (Supp. III), Department of Interior Solicitor's Opinion, July 26, 1988.
directed that settlers and developers of public lands acquire water rights under state and territorial legal systems.\textsuperscript{231}

At the same time the federal government was enticing private entities to settle western public lands, it was reserving certain parcels of these lands for its own specific purposes. However, the United States made no express reservations of water for these withdrawn lands. This left to the judiciary the task of determining by implication whether Congress intended to exercise the constitutional power necessary to create federal water rights for use on federal reservations.

The first case to decide this question was \textit{Winters v. United States}.\textsuperscript{232} The Supreme Court decided \textit{Winters} in 1908, years after the creation of many of the reservations. It held that Congress must have intended to reserve water for lands it set aside for the Assiniboin and Gros Ventre Indians, because otherwise, the lands would be valueless.\textsuperscript{233} These water rights were determined to be prior in right to non-Indian appropriations acquired after creation of the reservation, even though the appropriations occurred prior to actual Indian uses.

The "Winters doctrine," as the principle from the case came to be known, was initially viewed as an aberration of federal Indian law.\textsuperscript{234} More than fifty years passed before the U.S. Supreme Court ruled that the Winters doctrine of implied reserved water rights applied to non-Indian federal reservations as well.

\textsuperscript{231} See supra, text accompanying notes 104-109.

\textsuperscript{232} 207 U.S. 564 (1908).

\textsuperscript{233} Id.

\textsuperscript{234} An historian who reviewed the case carefully noted that the decision "...took all parties by surprise, ..." Huntley, "The 'Winters' Decision and Indian Water Rights: A Mystery Reexamined," in THE PLAINS INDIANS OF THE TWENTIETH CENTURY 77 (P. Iverson ed. 1985).
as Indian reservations. 235 Even now courts have quantified only a small percentage of all reserved rights claims. In the meantime development of water resources under state law continued; agricultural uses increased and western cities and industries expanded, such that most of the West's river basins became fully appropriated, or nearly fully appropriated.

Estimates vary as to the quantities of water that are being claimed or that may be claimed for reserved rights. However, the sheer amount of federally reserved land in the West indicates that the volume of reserved water rights for use on that land is substantial. 236 In Arizona, for example, the potential for conflict is great. The total dependable water supply for the state is less than five million acre feet per year. The adjudicated Indian water rights, together with the reserved rights claims for Indian reservations in the state (not counting non-Indian federal reservations), exceed the dependable supply. 237 In other states Indian reserved rights claims are only a fraction of dependable water supply, in some instances a small fraction. 238 Still, when compared to the amount of water available for new uses, the claims are substantial in almost every instance. The potential for conflict is great because when all reserved rights claims are quantified, the early priorities of most reserved rights may mean that they will displace a significant number of existing state water rights.

236 See N. JOHNSON, INDIAN WATER RIGHTS IN THE WEST 93–95 (December 1983). This study was prepared for and published by the Western Governors' Association.
238 See INDIAN WATER RIGHTS IN THE WEST, supra note 236, at 93.
The fact that most reserved rights are not quantified is thus a major issue. However, it is by no means the only pending reserved rights issue. In the eighty or so years since Winters was decided, more questions have been asked than answered about the reserved rights doctrine. Controversies abound relating to the nature and characteristics of reserved rights, how they should be measured, and who should have jurisdiction to administer them once they are quantified. 239 The resolution of these questions will have important implications relative to the eventual impact of reserved rights on state issued water rights. Thus, such questions have been the source of significant conflict.

To appreciate the nature of these conflicts, one must understand the differences between reserved water rights and appropriative rights. Reserved rights do not depend on publicly defined beneficial uses, but upon the implied intent of Congress, which is often difficult for the judiciary to determine. 240 Appropriative water rights are for a specific quantity of water to be used at a specific time and place; reserved rights are rarely stated in terms of a definite place or time of use. 241


240 For a discussion of the difficulty faced by the courts in determining whether the reserved rights doctrine applies to ground water and whether Congress intended to reserve water to provide for instream flows on Forest Service land see infra text accompanying notes 256-74.

241 Shortly after the U.S. Supreme Court affirmed the Wyoming Supreme Court's opinion in In re the Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, 753 P.2d 76 (Wyo. 1988), aff'd, Wyoming v. United States, 109 S. Ct. 2994 (1989), the Wyoming State Engineer observed:
The abandonment and forfeiture characteristics of appropriative rights ("use them or lose them") are not shared by reserved rights, which continue to exist inchoate whether or not they are used. The priority date of a reserved right is not always clear.

Further, different restrictions apply to the transfer of Indian reserved water rights than apply to appropriative rights. This issue is of paramount importance. Native Americans view a firm water supply as the key to the continued viability of their reservations. They seek to develop water for use on-reservation for agricultural, industrial, and municipal needs. In addition, some seek to lease or otherwise transfer reserved

The Wyoming Supreme Court decision and various lower court decisions are...very general. Huge blocks of water have been granted without regard to points of diversion, sources [of supply], or ...[other] questions about [quantification and use].... This moves us...to...all of the administrative questions. How as State Engineer do I structure [things]? How do I take this Wyoming Supreme Court decree and begin to administer those water rights for the tribes? Now that the quantification has taken place, how do the tribes move forward in implementing and making use of this very valuable resource to benefit the tribes?

Address by Jeff Fassett, Wyoming State Engineer, Meeting of the Western States Water Council (Jul. 14, 1989) (included as part of the minutes on file at the offices of the Western States Water Council).


The priority date is usually thought to be the date of the treaty creating an Indian reservation, United States v. Walker River Irrig. Dist., 104 F.2d 334, 336 (9th Cir. 1939), or the date of withdrawal for non-Indian reservations, Arizona v. California, 373 U.S. 546, 596 (1963), but may be earlier for some Indian reservations, United States v. Adair, 478 F. Supp. 336, 350 (D. Or. 1979), United States v. Gila Valley Irrig. Dist., Globe Equity No. 59 (D. Ariz. June 29 1935).

See generally AMERICAN INDIAN RESOURCES INSTITUTE, SOURCEBOOK ON INDIAN WATER SETTLEMENTS (1989).
rights off-reservation to generate funds for economic development.\textsuperscript{245} Whereas state water right transfer law is generally clear, significant questions exist with respect to the transfer of Indian reserved water rights.\textsuperscript{246}

In short, there are many differences between reserved water rights and appropriative water rights. These differences help explain the conflicts between reserved rights and rights created

\textsuperscript{245} See generally G. WEATHERFORD, ET AL., LEASING INDIAN WATER: CHOICES IN THE COLORADO RIVER BASIN (1988).

\textsuperscript{246} See SLY, RESERVED WATER RIGHTS SETTLEMENT MANUAL, 132-135 (1988). Arguments in favor of the transferability of Indian reserved rights are often economic. Such transfers would help Indians and Indian tribes become more self-sufficient by creating a stream of revenue to capitalize water development projects, or for other purposes, and would help facilitate settlement of Indian water right claims. See generally Shapiro, An Argument for the Marketability of Indian Reserved Water Rights: Tapping the Untapped Resource, 23 IDAHO L. REV. 278 (1986-87).

Arguments against off-reservation use are based on the scope of the reserved rights doctrine and on the Indian Non-Intercourse Act. Reserved rights quantified based upon practicably irrigable acreage on a reservation must, it has been argued, be appurtenant to the irrigable lands, or at least to the reservation where the lands are located. See generally Palma, Considerations and Conclusions Concerning the Transferability of Indian Water Rights, 20 NAT. RES. J. 91 (1980).

Legally, the Indian Non-Intercourse Act, 25 U.S.C. § 177, requires that Congress approve any transfer of Indian trust property including, presumably, Indian reserved water rights. However, some argue the Congress may have authorized tribal corporations chartered under the Indian Reorganization Act, 25 U.S.C. § 477, to transfer water rights off-reservation.

In In re the Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, 753 P.2d 76 (Wyo. 1988), the Wyoming Supreme Court left intact the district court holding "that \"[t]he Tribes can sell or lease any part of the water covered by their reserved water rights but the said sale or lease cannot be for exportation off of the Reservation.\" 753 P.2d at 100. The U.S. Supreme Court affirmed the Wyoming Supreme Court's opinion, Wyoming v. United States, 109 S. Ct. 2994 (1989).
under western state water law. Yet reserved rights must eventually be integrated with appropriative rights. 247

In recent years efforts have been made to settle conflicts through negotiation rather than litigation. Successful negotiations have occurred in Montana, Colorado, California, and Arizona, although implementing the negotiated settlements is yet underway in some instances. 248 Other negotiations are pending. Nevertheless, the number of pending cases in the West where these conflicts are at issue, indicates that much needs to be done to resolve federal/state conflicts over reserved rights.

SUMMARY

This report has highlighted developments in state water law, particularly the evolution of the appropriation doctrine regarding protection of public values in water resources. It then described briefly the genesis and development of federal interests in western water resources and documented conflicts that have occurred as those interests have been pursued. The intention has been to demonstrate the nature and extent of those conflicts, as viewed from the perspective of state water managers. It is recognized that other perspectives are important, particularly federal views. These views are adequately set forth elsewhere. Also written from the same state perspective, the next section will discuss ways in which such conflicts might be reduced.

247 To appreciate some of the challenges involved with this integration process see supra note 241. See also TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW 117-174 (1971).

248 Sly, supra note 246, at 25-33.
METHODS TO REDUCE CONFLICTS:
THE PROSPECTS FOR ACCOMMODATION

In large part, the following methods to reduce federal/state conflicts in water resources represent the synthesis of western state experience, and are illustrated with case histories. Six basic approaches are examined: (1) urging federally regulated entities to comply with state law, despite a federal agency's position that such compliance is not necessary; (2) developing and implementing comprehensive procedures to improve and enhance consultation and coordination between federal and state agencies; (3) seeking favorable interpretations of federal law through litigation; (4) attempting to amend federal laws to require the desired deference to state water law authority; (5) urging amendments to state law to improve its capability to recognize and protect all legitimate federal interests in water resources allocation and management; and (6) executing agreements to define clearly state and federal roles with regard to specific federal acts and programs.

Reviewing the experience to date with these various approaches should help to evaluate their merit for the future, and help define the best approach to improving federal/state relations in water resources management.

BY-PASSING FEDERAL AGENCIES

Confronted with perceived intransigence from federal agencies, state water managers have sometimes elected simply to go around them and work directly with members of the regulated community, in an effort to convince them that they should comply with state laws regardless of the federal agency's position. The Arizona Department of Water Resources took such an approach when the U.S. Environmental Protection Agency (EPA) determined that
state permits were not required for Superfund sites located in Arizona, as described in a previous section of this report. 249

Given EPA's position, the Department chose to go directly to the responsible parties at the Superfund sites and convince them that they should comply with state law, with the result that the responsible parties applied for the necessary state permits. 250 Further, EPA agreed to language as part of a consent decree that will help avoid further problems in Arizona.

However, because EPA maintains its legal position that permits are not required under the law, the underlying problem remains unresolved. If a responsible party at a Superfund site elsewhere chooses not to obtain state permits or to meet the substantive requirements of state law, it may rely on EPA's legal position. Arizona argued that such a position ignores the issue of water rights and the potential adverse effects of ground water pumpage in a given area. It pointed out that EPA's posture frustrates the state's ability to work with the EPA toward resolution of problems for the common good. 251

It may be concluded, therefore, that while such arrangements with the regulated entities avoid exacerbating conflicts between federal and state interests, they fail to resolve underlying differences that may lead to further conflicts. Nevertheless, in some cases, where federal and state interests are adverse and compromise is infeasible, then such an approach may be the best alternative. It allows the respective federal and state agencies to maintain their positions, but avoids the conflict that would

249 Letter from C. Laurence Linser to Norman Johnson (Sep. 27, 1988) (on file at the offices of the Western States Water Council).

250 Id.

251 Id.
otherwise result. Such an approach relies on convincing the regulated entities that, despite the federal agency's position, compliance with state law is in their long-term best interests. Such voluntary compliance is uncertain at best and should perhaps be considered as a temporary resolution, while efforts at more permanent solutions are sought. This is especially so because permit conditions would essentially have to be viewed as unenforceable from the federal agency's perspective.

LITIGATION

Litigation is a familiar staple among the tools available to state water managers to resolve conflicts with their federal counterparts. Indeed, while usually viewed as the means of last resort, a particular species of litigation, a "general stream adjudication," is seen as a necessary and desirable action. It enables water rights to be established inter se, leading to a settled regime among existing uses. This in turn facilitates future planning and management.252

States have insisted that federal claims be subjected to state court jurisdiction as part of such adjudications, while the federal government has resisted such efforts.253 After more than a decade of litigation, the states were victorious in this dispute and made clear their intent that such claims be adjudicated in the same forum as all other water right claims in a given stream system.254 However, resolving the questions regarding the appropriate forum to determine federal claims has


253 Id. at 622.

254 E.g., MacIntyre, Quantification of Indian Reserved Water Rights in Montana: State ex rel. Greeley in the Footsteps of San Carlos Apache Tribe, 8 PUB. LAND L. REV. 33, 58 (1987).
not resolved differences concerning the scope of such claims. This has proven particularly difficult with regard to federal reserved right claims.\textsuperscript{255}

For example, in \textit{Cappaert v. United States}\textsuperscript{256} the Supreme Court faced squarely the issue of whether the reserved rights doctrine applied to ground water. The private litigant had drilled wells and began pumping ground water, which in turn resulted in a lowering of the water level in Devil's Hole, a large underground cavern inhabited by an endangered fish species. The federal government brought suit to enjoin the pumping. It claimed rights to the ground water in Devil's Hole, so that the water level could be preserved to maintain the fish, meaning that the private litigant's pumping should be enjoined accordingly.\textsuperscript{257}

The United States argued that the reserved rights doctrine should apply to the ground water in Devil's Hole.\textsuperscript{258} On the other hand, Nevada and almost every other western state weighed in on the opposite side.\textsuperscript{259} The Ninth Circuit held that the doctrine applied to ground water and enjoined Cappaert from pumping to the extent it would jeopardize the pupfish in Devil's Hole.\textsuperscript{260}

When the Supreme Court granted certiorari to review the case, it was assumed it did so to consider the important issue of whether the reserved rights doctrine applied to ground water.

\textsuperscript{255} \textit{E.g.} \textit{PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND} 146-47 (1970).

\textsuperscript{256} 426 U.S. 128 (1978).

\textsuperscript{257} \textit{Id.}

\textsuperscript{258} \textit{See id. at 135-6.}

\textsuperscript{259} \textit{Id. at 130, n. + .}

\textsuperscript{260} 508 F. 2d 313 (1974).
Prior to this case, it had been applied only to surface water. Nevertheless, to everyone's surprise the Supreme Court determined that the water in Devil's Hole was actually surface water and that, consistent with principles of Nevada water law, jeopardy to a prior surface right from ground water pumping could be prevented.

Because it was not settled in Cappaert or in subsequent cases, this issue was again raised in the recent Big Horn litigation in Wyoming. Confronted with precisely the same arguments that were presented in Cappaert, the Wyoming Supreme Court held that the reserved rights doctrine did not apply to


263 Despite the clear intention of the Court to duck the issue, some commentators argue that the Supreme Court really did what it took considerable liberty to avoid doing. They conclude simply that Cappaert v. United States broadened the implied reservation doctrine by applying it to ground water, and rejecting the states' argument that the reservation doctrine was limited to surface water. E.g., W. GOLDFARB, WATER LAW 50 (2d ed. 1988); Smith, Competition for Water Resources: Issues in Federalism, LAND USE AND ENVTL. L. 177, 181 (1986). This conclusion simply ignores the language of the opinion.

It rests apparently on the argument that the effect is the same, regardless of whether the water in Devil's Hole is considered surface water or ground water; namely, the private landowner's pumping may be enjoined. However, the distinction made by the Court is vital with respect to the precedent of the case. The case simply does not stand for the proposition that reserved rights attach to ground water. The Court did not address the issue, holding only that reserved rights attaching to surface water can be protected from injury, whether that injury is caused by a diversion of surface water or ground water, a holding which the Court found was consistent with principles of Nevada water law.

264 In re the General Adjudication of All Rights to Use Water in the Big Horn River System, 753 P.2d 76 (Wyo. 1988).
ground water. An equally divided United States Supreme Court subsequently affirmed the lower court's decision without opinion. Thus, this issue will likely continue to be contested until settled explicitly by the Supreme Court. This experience points up the drawback in attempting to nail down this elusive doctrine in the courts.

The battle over the issue of reserved rights to instream flows on national forests proves that even an apparently clear victory can be slippery. In United States v. New Mexico the United States claimed instream flows on national forest lands for recreation, aesthetic, and wildlife purposes. The Supreme Court denied such claims, siding instead with the states' argument that Congress intended to reserve water rights only for the two primary purposes set forth by the Organic Act of 1897, under which the national forests were created. These two purposes were to secure favorable conditions of water flows and to furnish a continuous supply of timber for the use and necessities of the people. In so holding, the Court reiterated that Congress reserved "only that amount of water necessary to fulfill the purpose of the reservation, no more." The Court further stated that the United States would need to acquire water for other than the primary purposes of the reservation pursuant to state law.

265 Id. at 100.
268 Id. at 718.
269 Id. at 700. The court first pronounced this limitation on the scope of reserved rights in the Cappaert case, 426 U.S. at 141.
270 Id. at 701-703.
The Court's decision was widely seen as a significant narrowing of the reserved rights doctrine, and an explicit rejection of claims for instream flows on national forest lands. Nevertheless, a few years later, the United States was again in court claiming instream flows based on "recent advances in the science of 'fluvial geomorphology,'" that demonstrated that "strong recurring instream water flows are necessary to maintain efficient stream channels and to secure favorable conditions of water flows, and that diversions of water within the national forests by private appropriators reduce streamflows and threaten the equilibrium that threatens natural stream channels." A Colorado water court granted partial summary judgment against the United States on the basis of the holding in United States v. New Mexico and also on a finding of collateral estoppel. But the United States appealed to the Colorado Supreme Court, which reversed and remanded for trial.

The higher court held that the federal government should be allowed to prove its claims, since the court was not convinced "that the federal government, by implication, did not intend to recognize such a (instream) right so long as it furthers the primary purpose of the Organic Act." Thus, the consequences which the states feared if the government's claims were upheld in the New Mexico case, are again threatened in Colorado because the federal government has found a different basis for its argument.


273 Id.

274 Id. at 502.
The **Big Horn** case in Wyoming demonstrates other disappointing aspects of litigation. The case began in 1977 and was subsequently divided into three phases. Phase 1 aimed at resolving Indian reserved water right claims. After 13 years and the expenditure of $8.5M by the state of Wyoming,\(^{275}\) phase 1 resulted in a 4-4 affirmanse by the Supreme Court upholding the 3-2 decision of the Wyoming Supreme Court.\(^{276}\) And still questions remain that could yet result in further litigation.\(^{277}\)

For example, while the Wyoming Supreme Court granted large blocks of water to the tribes, it did so without regard to points of diversion or sources, and did not specify how the water could be used. In this context, Wyoming administrators face many questions in terms of the tribes' water rights.\(^{278}\) To give the state time to set up a mechanism to carry out the decision on behalf of the tribes, the state and the tribes reached an agreement in which the tribe received payment for deferring certain water uses for the period of one year.\(^{279}\) Further, all

\(^{275}\) Telephone conversation between Jane Caton, Wyoming Assistant Attorney General, and Norman Johnson (Apr. 10, 1990). The other parties in the litigation also incurred substantial expenditures, probably equalling those of Wyoming.


\(^{278}\) Address by Gordon Fassett, Wyoming State Engineer, Western States Water Council Quarterly Meeting (Jul. 14, 1989) (included as part of the minutes on file at the office of the Western States Water Council).

\(^{279}\) Id.
the major parties recognize that negotiations must continue to resolve outstanding questions left unresolved by the courts.\textsuperscript{280}

As these examples demonstrate, federal and state agencies have expended considerable time, effort, and expense in litigating questions regarding the scope and administration of reserved rights. And yet answers have largely eluded them.

Part of the problem in resolving the dimensions of the reserved rights doctrine on a case-by-case basis is the fact that the doctrine lends itself to the exercise of creative minds.\textsuperscript{281} The federal claim to instream flows to provide flushing flows on national forests in Colorado, notwithstanding the Supreme Court's decision in \textit{New Mexico}, is just one example. Some have proposed that reserved rights also be claimed for purposes of energy development on federal lands.\textsuperscript{282} One commentator asserts that implementation of the Endangered Species Act in the West has resulted in creation of related federal water rights; namely, "regulatory property rights" that would vest in the federal government for the protection of endangered species.\textsuperscript{283} Congress

\textsuperscript{280} \textit{Id}; \textit{see also} Address by John Washakie, Chairman of the Shoshone Business Council, Meeting of the Legal Committee of the Western States Water Council (Jul. 13, 1989) (included as part of the minutes on file at the offices of the Western States Water Council).

\textsuperscript{281} \textit{See F. TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW} 111-138 (1977); Address by Ralph Tarr, Solicitor of the Department of Interior, Western States Water Council Quarterly Meeting (Jan. 13, 1989) (included as part of the minutes on file at the offices of the Western States Water Council).

\textsuperscript{282} \textit{See Tarlock and Fairfax, Federal Proprietary Rights for Western Energy Development: An Analysis of a Red Herring?}, 3 J. ENERGY L. \\ & \textsc{POL'Y}. 1 (1982).

\textsuperscript{283} Tarlock, The Endangered Species Act and Western Water Rights, 20 LAND \\ & WATER L. REV. 1 (1985). According to Professor Tarlock, western states encourage reliance on this theory by their success in limiting the scope of the reservation doctrine. \textit{Id}. at 15-17. The theory contemplates that appropriate federal agencies would be granted water rights sufficient to assure
has made no such claims, nor has any court upheld such claims.\textsuperscript{284} However, that such arguments persist is not only a testimony to the imagination of law professors and the federal bar, but also to the vagaries of the judicially created doctrines that underlie federal claims to water rights in the West.\textsuperscript{285}

Thus, federal claims to water have provided fertile ground for conflict and litigation. Furthermore, Congress has become reluctant to enter the fray.\textsuperscript{286} It seems probable, therefore, that litigation will continue to be prevalent in issues involving federal/state relationships in water resources. However, given the drawbacks that follow from resort to the courts, other alternatives should be considered.

\begin{footnotesize}
\begin{enumerate}
\item protection of endangered species, which water rights would be exempt from the substantive requirements of state water law. \textit{Id.} at 26. Such water rights could result in a demand for reservoir releases. \textit{Id.} at 13. Moreover, they could conceivably be transferred for related purposes as are other water rights. Professor Tarlock does not discuss this aspect, but it could be considered a logical consequence of his theory of proprietary rights that would be subject to state procedural law. Application of this theory would not only override state law, but also conflicting interstate compacts. \textit{Id.} at 24-5.

Assuming federal agencies may take action to prevent the exercise of state water rights which would conflict with the pre-eminent federal purpose under the Constitution, this result does not lead to a basis for the assertion of property rights by the federal government. White, \textit{The Emerging Relationship Between Environmental Regulations and Colorado Water Law}, 53 COLO. L. REV. 597, 619 (1982).

\textsuperscript{284} \textit{Id.}


\end{enumerate}
\end{footnotesize}
COMPREHENSIVE PROCEDURES TO ENHANCE COORDINATION AND CONSULTATION BETWEEN FEDERAL AND STATE AGENCIES

Urging fundamental and comprehensive changes in federal/state relationships has historically been an unproductive effort. Former Georgia Governor, George Busby, speaking to other governors said, "Begging Congress or the Administration to pay attention to federalism is, in my opinion, a waste of time. Governors and legislators are not treated much differently from the 'National Association of Ball-Peen Hammer Producers,' - except that [they] have a PAC and you don't."\(^{287}\)

Despite the Governor's advice, governors attending the 1988 National Governors' Association meeting responded to the call of their chairman, John Sununu, when he asked for a return to federalism and a new division of authority between federal and state governments.\(^{288}\) The governors urged the establishment of a constitutional convention to restore states' rights and released a list of recommendations calling for relief from 163 different federal rules and regulations.\(^{289}\)

Experience in the area of western water laws and policies mirrors the history of federal/state relationships in many other areas. The federal budget crisis has led the federal government to reduce financial support for western water development and protection.\(^{290}\) Phasing out the construction grants program for sewage treatment plants is one example.\(^{291}\) Others are


\(^{288}\) Id.

\(^{289}\) Id.


\(^{291}\) Id.
represented by the federal retreat from financing water development projects, with the concomitant insistence on state and local financing and cost sharing,292 and by federal refusal to appropriate money for the non-federal dam safety programs or to maintain its financial commitment to basic water data collection.294 The result of these changes has been a shift of greater responsibility to the states. In turn, states have enhanced their water policy and planning processes to assume what have traditionally been federal responsibilities.295

As this trend continues, the opportunities for state initiative and innovation harbor the chance for resolution of many of the challenges they confront.296 However, while significantly reducing financial support, the federal government has expended the exercise of its regulatory muscle.297 This threatens to debilitate the states in their new responsibilities

292 UNITED STATES BUREAU OF RECLAMATION, ASSESSMENT '87...A NEW DIRECTION FOR THE BUREAU OF RECLAMATION 1 (1987).


295 See R. SMITH, TRADING WATER: AN ECONOMIC AND LEGAL FRAMEWORK OF WATER MARKETING 1-3 (1988); STATE WATER PLANS: SIXTH ANNUAL WESTERN STATES WATER COUNCIL WATER MANAGEMENT SYMPOSIUM PROCEEDINGS (T. Willardson ed. 1989). Decreased federal assistance is not, of course, the only reason for states assuming greater responsibility. For a discussion of this trend, see authorities cited supra note 2.

296 Newsweek, November 13, 1989, at 70-72.

and to stifle or curtail the initiative and innovation that states are uniquely suited to apply to our current problems. 298

One commentator describes the prospects as follows:

"Given prevailing constitutional, political, and fiscal trends, states and localities may eventually confront the worst of all possible worlds. In the past the Supreme Court protected them from excessive federal incursions, and federal influence came mostly through grants and subsidies. Now that those political and legal defenses have eroded and federal budget constraints have grown, federal mandates and preemption may become the principal form of intergovernmental interaction.... What is described as the new cooperative federalism may even prove to be more akin to cooptive federalism." 299

Thus came the call by the governors for relief from so many federal laws and regulations. 300

While it may be difficult to change existing laws and regulations, it should be feasible to improve coordination and consultation between federal and state governments. This in itself would do much to resolve many of the conflicts that have developed in a process where state officials are confronted with an attitude that they are little more than another special interest group before federal agencies. 301 The clearest examples

298 See id. at 14.


300 See supra note 287.

301 See Governing, December 1989, at 22 (published by Congressional Quarterly); Conlan, Federalism After Reagan, The Brookings Review 29 (Fall 1988). The author concludes that the ability of state and local governments "to defend their interests had reached a low point" at the time of the Supreme Court's 1985 decision in Garcia v. San Antonio Metropolitan Transit System, in which the Court held that it would no longer adjudicate disputes pitting Congress' power to regulate interstate commerce against claims of state sovereignty. He further states: "During the
of this attitude have been displayed by the Federal Energy Regulatory Commission, as demonstrated by the problems that have been previously described.\textsuperscript{302} However, FERC does not stand alone in this regard. Other examples may be illustrative.

Section 404 of the Clean Water Act requires a permit from the Army Corps of Engineers for water projects affecting wetlands.\textsuperscript{303} As described in this paper, numerous conflicts have developed between the Corps and project developers with respect to conditions included in Corps permits that inhibit developers' abilities to exercise state granted water rights.\textsuperscript{304} Moreover, the permit process itself has sometimes frustrated the ability of the state to make decisions regarding projects which are subject to Section 404 scrutiny. Governor Romer of Colorado made the following comment about the process in the context of the Two Forks Project near Denver:

"I am placed in the decision making chain, but only with the authority to recommend approval or denial of the specific project (permit). That process does not give me the authority to change the recommended solution and to see that it happens. I would have no hesitancy...to take an alternative approach...but I do not have that power...."

Past three decades state and local governments have greatly increased the size and sophistication of their lobbying presence in the nation's capital. Over the years, this 'intergovernmental lobby' had its share of important victories, from enactment of general revenue sharing to securing and protecting federal funding for Medicaid. Yet the need to develop such a lobbying presence, in part to compensate for the political changes described above, may well constitute a sign of weakness rather than strength. Given the doubling of all interest groups in Washington since 1960, the state and local sector has, at best, only kept pace with its frequent competitors."

\textsuperscript{302} See supra text accompanying notes 134-64.


\textsuperscript{304} See supra text accompanying 201-209.
This decision should be a Colorado decision, not a federal decision...."305

States have also been disappointed in the role they have been given under Section 518 of the Clean Water Act, which allows Indian tribes to be treated as states for certain purposes under the Act.306 This program was accompanied by the congressional requirement that the EPA Administrator, in promulgating regulations implementing the section, consult with affected states sharing common water bodies with Indian tribes and to provide a mechanism for the resolution of any unreasonable consequences that may arise as the result of different water quality standards that may be set by states and Indian tribes located on common bodies of water.307 On various occasions, states reminded EPA of this responsibility to consult with them. Such consultation is important in light of the potential effects of the implementation of this program, particularly on the many reservations which contain substantial non-Indian populations within their exterior boundaries.308

In response to expressions of state concern, EPA designated an additional state representative to provide input to one of the working groups in drafting Section 518 regulations. This meant that three state officials were involved in one of the four


307 Id.

Section 518 work groups.\textsuperscript{309} States also had the opportunity to review and comment on draft rules, as proposed in the \textit{Federal Register}.\textsuperscript{310} Finally, EPA sponsored two meetings to which tribes and states were invited, with the opportunity for providing input. EPA felt that these efforts went beyond the statutory requirements of Section 518(e) and that the agency's consultation efforts "have been adequate and appropriate."\textsuperscript{311}

The states responded that the statutory requirement to "consult affected states" in promulgating regulations meant something more than the participation by three state officials in one of the four Section 518 work groups.\textsuperscript{312} Likewise, it meant something more than allowing the states the usual opportunity to comment on draft rules proposed in the \textit{Federal Register}.\textsuperscript{313} In a similar vein, states felt that the meetings came too late in the process to afford meaningful input. The states therefore reiterated their request that, in accordance with Section 518, EPA take steps necessary "to consult all states affected by the treatment of Indian tribes as states under the Act."\textsuperscript{314}

That EPA and the states should have widely different views as to what constitutes sufficient consultation with the states comes as no surprise. And yet this divergence of views should not be passed over lightly. States have had valuable experience

\textsuperscript{309} Letter from Rebecca Hanmer, Acting Assistant Administrator for Water, to Craig Bell (Sep. 29, 1988) (on file at the Western States Water Council office).

\textsuperscript{310} Id.

\textsuperscript{311} Id.


\textsuperscript{313} Id.

\textsuperscript{314} Id.; 1987 ANNUAL REPORT OF THE WESTERN STATES WATER COUNCIL 40 (1988).
in assuming delegation of programs under the Clean Water Act.\textsuperscript{315} That experience would have been useful in promulgating regulations for Indian tribes to assume such delegation. Further, given the potential for real conflicts, it would have been in the interest of everyone, including EPA, to maximize the opportunities for consultation with the states and tribes, rather than to minimize them.

The above examples, as well as many others that could be cited, underscore that communication between federal agencies and their non-federal counterparts is often inadequate, and often occurs after too much momentum has been built towards a policy decision.\textsuperscript{316} George O. Griffith of the While House Intergovernmental Office recently put it this way: "The more difficult job is moving it (participation by state and local officials) back in the process, penetrating policy development early enough to really make a difference. When the decision's been made is a terrible time to try to do anything...."\textsuperscript{317} If this situation is to be corrected, then comprehensive and fundamental changes in the role of the states in the development and implementation of federal policies must be affected.

The Reagan Administration made an attempt to do so by way of an executive order issued October 28, 1987. The preamble stated its purpose "to restore the division of governmental responsibilities between the national government and the states that was intended by the framers of the Constitution."\textsuperscript{318} It was

\textsuperscript{315} For a list of dates when states received approval for delegation, see R. CLARK, 3 WATER AND WATER RIGHTS 381-2 (1988).


\textsuperscript{317} Id. Governing, at 24.

to affect regulations, legislative comments or proposed legislation and other policy statements or actions that have substantial direct impacts on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.\textsuperscript{319}

To the extent permitted by law, executive departments and agencies were to follow certain criteria when formulating and implementing policies that have federalism implications in order to avoid preemption and to foster state administrative discretion.\textsuperscript{320} For example, national standards were to be avoided. When national standards were required, consultation

\textsuperscript{319} Id. at 253.

\textsuperscript{320} The order provided the following guidelines: (1) to the extent practicable, the states should be consulted before any action was implemented which might limit the policy making discretion of the states; (2) federal action limiting such policy making discretion should be based on clear constitutional authority and address problems of national scope; (3) with respect to national policies administered by the states, the national government was to grant the states the maximum administrative discretion possible; (4) when undertaking to formulate and implement policies that have federalism implications, executive departments and agencies were to encourage states to develop their own policies to achieve program objectives, refraining from establishing uniform national standards, instead deferring to states. Id. at 254.

The executive order also set up special requirements prerequisite to the preemption of state law based on the fundamental requirement that such preemption only be exercised when the statute contained an explicit preemption provision, or where that result was compelled according to firm evidence, or when the exercise of state authority directly conflicted with the exercise of federal authority. Any regulatory preemption of state law was to be restricted to the minimum level necessary, and as soon as the executive department foresaw the possibility of a conflict between state law and federally protected interests, then that agency was required to consult, to the extent practicable, with appropriate officials and organizations representing the states in an effort to avoid such a conflict. Id. at 255.
with appropriate officials and state organizations was to take place in developing those standards.\textsuperscript{321}

The executive order further specified that when an agency proposed to act through adjudication or rule making to preempt state law, the department or agency "shall provide all affected states notice and an opportunity for appropriate participation in the proceedings."\textsuperscript{322} The order also set up special requirements for legislative proposals designed to avoid preemption of state law.\textsuperscript{323} With regard to agency implementation, the order required appropriate officials to determine which proposed policies had sufficient federal implications to warrant the preparation of a "federalism assessment." Upon such a determination, an assessment was required to accompany any submission concerning the policy that was made to the Office of Management and Budget.\textsuperscript{324} The assessment was required to identify the extent to which the policy imposed additional costs or burdens on the states, including the likely source of funding for the states and the ability of the states to fulfill the purpose of the policy. It was also to identify the extent to which the policy would affect the state's ability to discharge traditional state government functions. Finally, the executive order required OMB to take such action as necessary to ensure that the policies of the executive departments were consistent with the order. In the last paragraphs of the order, it specified that it was intended only for the internal management of the executive branch and did not create any right or benefit enforceable by law against the United States.\textsuperscript{325}

\textsuperscript{321} Id. at 254.

\textsuperscript{322} Id. at 255.

\textsuperscript{323} Id.

\textsuperscript{324} Id. at 255-6.

\textsuperscript{325} Id. at 256.
It subsequently became clear that the agencies themselves were not about to voluntarily submit to this imposition. When the order was brought to the attention of EPA officials responsible for implementing Section 518, they had no knowledge of the executive order, and declined to prepare an assessment, despite the clear implications of the Section with regard to the states' governing powers within their borders. The order therefore provided only brief encouragement to states.

Given the resistance by federal agencies to such an approach, if the imbalance is to be corrected, it will require something stronger than an unenforceable executive order. Relying on the voluntary efforts of federal agencies to consult with states has proven largely fruitless. Moreover, the current requirements for consultation are inadequate in this regard. But, unless by some means states are brought into the process as policies are being developed, and before the momentum towards a policy decision has gone too far, then we may hope in vain for improvement in basic federal/state relationships.

ENACTING AND/OR AMENDING FEDERAL LAWS

Another way of resolving conflicts between federal and state laws is to pass federal laws to remove the basis for the conflicts. However, from a state perspective the history of attempts to do so is not encouraging.

As discussed in the background section of this paper, in a series of federal land laws Congress invariably expressed deference to state law in the acquisition of water rights associated with western settlement. When the United States

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326 See letter from Rebecca Hanmer, EPA Acting Assistant for Water, to Craig Bell (Sep. 29, 1988) (on file at the Western States Water Council office).
itself became a water user, its major program of storage and distribution of water, the Reclamation Act of 1902, specified in Section 8 that the Secretary of Interior would "proceed in conformity with" the laws of the states "relating to the control, appropriation, use, or distribution of water use in irrigation." Subsequently, many related acts carried essentially the same provision.

Agencies of the federal government also complied with state laws as a matter of policy. For example, the National Park Service acquired all of its water rights under state law although not instructed by statute to do so. In addition to directing settlers and developers to resort to state law for acquisition of water rights, Congress also protected vested water rights acquired under such laws.

As a result of such provisions in federal laws, western congressional delegations felt secure that they had protected the authority of states to determine water uses within their borders. Furthermore, water rights created pursuant to that authority would not be threatened by federal actions.

However, the Supreme Court, in what one expert called "an amazingly free-handed construction" of statutory language, determined in the First Iowa case that such provisions in the Federal Power Act only required the applicant to show evidence that was satisfactory to the Federal Power Commission of steps taken to secure state approval. Actual compliance was necessary only with regard to those laws that the Commission considered to

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328 F. TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW 77 (1971).
329 Id. at 78.
330 Id.
be consistent with the purposes of the federal license. The Court found that a dual system over power projects would be cumbersome and complicated, and that a state could undermine the effectiveness of the federal act. 331

The Federal Energy Regulatory Commission relies on the Supreme Court's decision in the First Iowa case for its position that applicants need not comply with state law, resulting in numerous conflicts with state water law. 332

Initially, savings clauses contained in the Reclamation Act met the same fate. In Fresno v. California, 333 the Supreme Court in dicta stated that "Section 8 does not mean that state law may operate to prevent the United States from exercising the power of eminent domain to acquire the water rights of others... Rather, the effect of Section 8 in such a case is to leave to state law the definition of the property interests, if any, for which compensation must be made." 334

In a companion case, Dugan v. Rank, 335 water right holders, whose water was captured by a project dam, were informed that the only remedy available was a suit for money damages. Together, these two cases emasculated Section 8 so that the situation could be described by one commentator as follows: "The decision empowers the Bureau to seize the water it desires, leaving the state powerless to enforce its laws and leaving private appropriators with an action in the court of claims. The

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331 Id. at 83.
332 See supra text accompanying notes 135-64.
334 Id. at 630.
decision thus reverses 64 years of administrative interpretation and practice."\(^{336}\)

Savings clauses in other federal laws were similarly construed.\(^{337}\) However, in a case arising in California, states urged the Supreme Court to reconsider the meaning of Section 8 of the Reclamation Act. In *California v. United States*,\(^{338}\) the Bureau of Reclamation had applied to the California State Board for permits to appropriate water for the New Melones Project. The State Board granted the permits, subject to several conditions restricting both the appropriation and distribution of water.\(^{339}\) The United States sued to overturn the conditions, arguing that according to *Ivanhoe* and subsequent cases, the Board had no authority to impose conditions on the federal right to store and use water. The United States prevailed in the district court and before the Ninth Circuit Court of Appeals.\(^{340}\)

However, the Supreme Court granted certiorari and reversed the lower ruling. Relying on the history of federal/state relations, which the Court said demonstrated a "purposeful and continued deference to state water law by Congress,"\(^{341}\) the Court concluded that Congress intended this policy of deference to be incorporated in the Reclamation Act by enacting Section 8. Under that provision, state law applied in two ways: "First,


\(^{337}\) See F. TRELEASE, *supra* note 328, at 85.


\(^{339}\) United States v. California, 694 F.2d 1171, 1173, 1182-5 (9th Cir. 1982).


...the Secretary would have to appropriate, purchase, or condemn necessary water rights in strict conformity with state law. Second, once the waters were released from the dam, their distribution and individual landowners would again be controlled by state law."\textsuperscript{342} However, the Court qualified its holding by stating that state law cannot be applied if it is contrary to "clear congressional directives."\textsuperscript{343}

In the wake of the California decision, several courts have now upheld specific state laws as applied to federal reclamation projects, particularly in California.\textsuperscript{344} California's attorney in the case has expressed the view that "the main impact of the California decision may be in resolving the major jurisdictional dispute between federal and state water agencies, thus allowing these agencies to concentrate on increasing the efficient utilization of the West's sparse water resources. Indeed, in California itself, federal and state agencies have agreed on coordinated operation of the federal and state projects...."\textsuperscript{345} He notes, however, that "this is not to suggest that all federal/state conflicts have ended and that no differences remain. To the contrary, much has yet to be decided. The courts have yet to fully clarify the kind of congressional "directives" that will be held to preempt state laws under the California decision."\textsuperscript{346}

The California decision constituted a major victory for the reclamation states, and gave them hope that similar provisions in

\textsuperscript{342} Id. at 665, 667.

\textsuperscript{343} Id. at 672-3.


\textsuperscript{345} Id.

\textsuperscript{346} Id.
other federal statutes might be reinterpreted in light of the Supreme Court's decision. This hope supported the successful effort of the states in urging the Supreme Court to review the Rock Creek case. It is not yet known what the result of these efforts will be. However, if the states are not successful before the Supreme Court, then legislation may be introduced to remedy the situation.\footnote{347}

If states contemplate an effort to secure a legislative remedy, however, it will be well to remember the experience in the area of reserved rights. Soon after the Pelton Dam case threatened that reserved rights would be applied to non-Indian lands, western delegations reacted by introducing legislation to reverse the reservation doctrine.\footnote{348} Between 1956 and the publication of the study by the National Water Commission, 50 such bills had been introduced.\footnote{349} However, no congressional or even committee action was ever taken on any of these bills.\footnote{350}

The purpose of the bills was to remove the cloud over western appropriations created by the uncertainties of the reserved rights doctrine. It should be noted, however, that these bills did not address Indian water rights, although this application of the doctrine represented the biggest potential for conflicts with western water rights.\footnote{351} The federal establishment steadfastly opposed these bills, arguing that reserved rights constituted valuable federal assets, all the more attractive because of the economic advantage of not having to pay


\footnote{348} F. TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW 130-31 (1971).

\footnote{349} Id. at 131.

\footnote{350} Id.

\footnote{351} Id. at 133.
compensation to persons whose rights were impaired by the exercise of such federal rights.352

For its part, the National Water Commission also recommended the enactment of legislation in 1973; namely, a "National Water Rights Procedures Act."353 Seeking to integrate federal water rights and the state water right administration, it espoused a basic principle; namely, that the United States should be required to adopt a policy of recognizing and utilizing the laws of their respective states relating to the creation, administration, and protection of water rights. It should do so: "(1) by establishing, recording, and quantifying existing non-Indian and federal water uses in conformity with state laws; (2) by protecting non-federal vested water rights held under state law through the elimination of the no-compensation features of the reservation doctrine and the navigation servitude; and (3) by providing new federal procedures for the condemnation of water rights and the settlement of legal disputes.354 An exception to this general policy applied in the case of Indian water rights and where state law conflicted with the accomplishment of a federal program or purpose.355

The Commission had hoped thereby to establish federal/state partnerships where federal powers would be protected and state interests would be furthered through integration of federal rights within state administration and the elimination of the no-compensation features of the reservation doctrine. However, no bill was ever introduced based on the recommendations of the

352 Id. at 133-4.

353 NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE 461-68 (1973).

354 Id. at 461.

355 Id. at 462.
Commission. Furthermore, given the history of such generic legislation in the area of federal/state conflicts in water resources, it seems unlikely that such legislation can be successful.

Another approach would be to amend federal laws to address specific areas of conflict. However, here too, success may be elusive.

Section 101(g) of the Clean Water Act represented an attempt by Congress to respond to the concerns of western water interests regarding the potential conflicts between environmental laws and state water management. It reads as follows:

It 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 further the 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.

The precise effect of the language of the statute is unclear. However, considering that it is an expression of policy only, it does not mean that states are given a veto over federal agency actions otherwise authorized by the Act. Rather, other things being equal, federal agencies are encouraged by the provision to

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accommodate state as well as federal objectives in carrying out their respective responsibilities under the Act.\textsuperscript{359}

A similar effort was made in 1982 to amend the Endangered Species Act to include a section similar to that of Section 101(g).\textsuperscript{360} In the end, Congress chose to impose a duty of cooperation on the Department of Interior, by stating: "It is further declared to be the policy of Congress that federal agencies shall cooperate with state and local agencies to resolve water resource issues in concert with conservation of endangered species."\textsuperscript{361}

One commentator has suggested that there remains, "[a] slim statutory basis to argue that a federal agency has abused its discretion under the above provisions."\textsuperscript{362} However, in light of the context in which they are expressed, it seems clear that these statements leave open the possibility that the exercise of state-created water rights may be conditioned or even precluded by federal agencies carrying our their respective responsibilities under these acts.\textsuperscript{363}

The current controversy in Congress over water rights for wilderness areas also demonstrates the difficulty in obtaining congressional approval to limit the scope of federal power. This controversy can be seen vividly in the context of the debate over the El Malpais National Monument.

\textsuperscript{359} Id.
\textsuperscript{360} Id.
\textsuperscript{361} 16 U.S.C. § 1531(c)(2) (1982); Id.
\textsuperscript{362} Tarlock, supra note 379, at 19.
On December 17, 1987, the Senate amended and passed H.R. 403, establishing the El Malpais National Monument in north central New Mexico. On December 18, the House concurred with Senate amendments. On the floor, Senator Jeff Bingaman of New Mexico stated, "Section 509 of the bill expressly reserves water to fulfill the purposes of the new monument, conservation area, and wilderness area.... Congress...intends that the relationship that exists between federal and state water law which incorporates the well-settled reserved water doctrine be continued." Bingaman added, "...this reserved water right is subject to valid existing rights, for the doctrine allows only the reservation of waters which are unappropriated at the time of designation, and gives them a priority date of the date of passage of this legislation. The bill is not intended as a precedent, nor as indicative of Congress' intent in enacting any other legislation, past or present."

New Mexico's senior Senator, Pete Dominici, confirmed his colleague's interpretation: "Section 509 does not...reflect the intent or will of Congress regarding water rights in other wilderness areas. This federal water right does not preempt the water law of the State of New Mexico. For instance, the water right would be perfected pursuant to the procedural requirements of the law of the State of New Mexico."

However, Senator William Armstrong of Colorado argued the bill "creates the first express federal reserved water right for wilderness purposes...without requiring the federal government to

367 Id.
368 Id. at S 18251.
go through state water adjudication to perfect the right. Neither the quantity nor the purposes of the federal water right are defined. In addition, the language imposes federal instream flow rights incongruous with the historic priority water diversion systems of the West.... How can such a right be incorporated into the state water administration system without major disruption of the existing private water rights?  

Senator Armstrong has introduced legislation whereby Congress would expressly disavow reserved rights for wilderness areas.  

The House bill was originally silent on the water rights issue, but Rep. Larry Craig of Idaho, among others, urged Congress to address the issue. "Congress and not the Courts, should decide whether various land designations create a federally reserved water right...," according to Craig. He referred, however, to quite different language in S. 1675 and S. 1335, which respectively create the Hagerman Fossilbeds National Monument and the City of Rocks National Reserve. Craig pointed out that "...each explicitly specify that there is no federal water right for the specific land withdrawal from the public domain. Under these bills, if the United States wishes to acquire a water right, it may do so under the substantive and procedural requirements of the laws of the State of Idaho."  

Rep. George Miller supported approval of the El Malpais bill, but he did not support the water rights language in H.R. 403, which he said is "superfluous," as it only "preserves the status quo." Miller stated, "This method of recognizing the

369 Id. at S 18249-50.  
372 Id.  
373 Id. at H 11768.
need for water to fulfill the original reservation purposes is not intended to be a statement by Congress that this is the only method for reserving needed water either for future reservations or in interpreting past designations.\textsuperscript{374} Miller's House Interior Committee had previously rejected a water rights amendment to the Montana wilderness legislation similar to the language in H.R. 403.\textsuperscript{375} According to Miller, "No existing users of water are threatened by water rights for wilderness because of their relatively late priority date and the fact that by definition they involve no diversion or consumption of water."\textsuperscript{376}

Thus, the two senators from New Mexico argued that the language in question would neither serve as a precedent, nor disrupt state law, while their colleague from Colorado expressed the opposite view. On the House side, one representative urged Congress to deal explicitly with the issue of reserved rights, while another thought it entirely superfluous to do so. It is likely that this diversity in Congressional thinking regarding the issue of reserved rights for wilderness areas also would attend any proposal for legislation to "fix" conflicts in the area of federal/state relationships in water resources. Thus, such legislation would be difficult to attain and could well be counterproductive in the process. Case-by-case negotiation and compromise may be a more viable alternative.

AMENDING STATE LAW

If federal legislative solutions are out of reach, what about amending state laws to avoid areas of conflict? Frank Trelease, who authored a 1971 study and recommendations for the National Water Commission, urged the Commission to adopt the

\textsuperscript{374} Id. at H 11769.

\textsuperscript{375} Id.

\textsuperscript{376} Id.
following recommendation to the states: "To promote cooperation and comity in the field of federal-state relations in the law of water rights, they should...improve state water law to eliminate federal objections and make it suitable for use by the federal government and adequate to accomplish federal purposes." This appears to be the only recommendation forwarded by Dean Trelease that has been implemented.

The Commission's report, which was published in June of 1973, found that "state laws in many instances are inadequate to protect important social uses of water." Specifically, the Commission concluded that "appropriation doctrines of the West make it virtually impossible...to preserve instream values."

Whatever may be said regarding the merits of these statements at the time, they are clearly not true now. Legal mechanisms now exist in virtually every state to protect the public interest in the allocation and use of water resources and specifically to enable establishment and maintenance of instream flows. Moreover, states have acted in numerous ways to facilitate transfers of water rights to enhance efficiency in the


378 All of the other recommendations pertained to enactment of a "National Water Rights Procedures Act." No bill was ever introduced based on the proposed act.


380 Id. at 271.


382 See supra text accompanying notes 34-67.
use of existing supplies.\textsuperscript{383} Most states also require
consideration of the public interest in determining whether to
approve a transfer.\textsuperscript{384} These laws have been utilized repeatedly
in recognition of interests expressed in federal laws.\textsuperscript{385}

Although several commentators have acknowledged this
evolution in state water law and policy\textsuperscript{386} it is often not
recognized by proponents of federal interests. One Justice
Department attorney, for example, concluded that, "the states
have treated the federal government's requests for water with
very little favor.... Several states have demonstrated their
distrust of the federal government by narrowly interpreting state
law to deny legitimate acquisitions.... Rather than respond to
the merits of the federal government's applications for water on
a case-by-case basis, the states would rather react with wild
accusations and allegations of a federal take-over."\textsuperscript{387}

The federal attorney cites two cases to support these
conclusions. However, in one of the cases, the state engineer
granted the federal claims, although the attorney general opposed
them. More importantly, in both cases the federal claims were

\textsuperscript{383} See supra text accompanying notes 68-76.

\textsuperscript{384} 1 R. CLARK, WATER AND WATER RIGHTS 169 (1967).

\textsuperscript{385} See, e.g., State v. Morros, 766 P.2d 263 (Nev. 1988);
United States v. Jesse 744 P.2d 491 (Colo. 1987); Trelease,
Uneasy Federalism - State Water Laws and National Water Uses, 55
WASH. L. REV. 751, 771-2 (1980); D. Grant, supra note 381, at
711, 717.

\textsuperscript{386} See e.g., R.CLARK, supra note 414; D. Grant, supra note
411.

\textsuperscript{387} S. Dunn, Cooperative Federalism in the Acquisition of
Water Rights: A Federal Practitioners Point of View, 19 PAC. L.
upheld by the state's supreme court.\textsuperscript{388} In contrast to these two dubious examples of states' resistance to federal claims, many other examples could be cited of cooperation and accommodation.\textsuperscript{389} Rather than based on fact or experience, it is suggested that this attitude reflects earlier sentiments "that only federal executives and judges are to be trusted with the determination and protection of federal property."\textsuperscript{390} This attitude may explain the long fight by the Justice Department to prevent state courts from adjudicating reserved rights within state court systems. The results so far clearly show that this attitude was and is unwarranted.\textsuperscript{391}

\textsuperscript{388} Id. at 1328; State v. Morros, 766 P.2d 263 (Nev. 1988); In Re Matter of Hallett Creek Stream System, 44 Cal. 3d 440, 749 P.2d 324 (1987).

\textsuperscript{389} See, e.g. Walston, Federal-State Relations in California: From Conflict to Cooperation, 19 PAC L. J. 1299 (1988). As a further example, the Director of the Alaska Department of Natural Resources writes as follows: "In Alaska under AS 46.15.145(a) agencies of the United States are allowed to file for state instream flow water rights. This statute was written expressly to allow the federal government to participate in the instream flow reservation process. The Bureau of Land Management (BLM) filed an application for instream flows for the Beaver Creek Wild and Scenic River and the Department of Natural Resources has granted that instream flow reservation. BLM has told us that it expects to continue to use the state instream flow law and this past summer invited DNR staff to assist its hydrologists in field data collection for the Delta River. We believe this coordinated effort is a good way to integrate instream flow needs of the federal government." Letter from Gary Gustafson, Director of the Alaska Department of Natural Resources, to Craig Bell (Nov. 7, 1989) (on file at the Western States Water Council office);

\textsuperscript{390} See F. TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW 255 (1971).

\textsuperscript{391} See, e.g. In re the Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, 753 P.2d 76 (Wyo. 1988) (described as a major victory by the tribes; address by John Washakie, Chairman of the Shoshone Business Council, Meeting of the Legal Committee of the Western States Water Council (Jul. 13, 1989) (included as part of the minutes on file at the Western States Water Council office); United States v. Jesse, 744 P.2d 491 (Colo. 1987) (allowing federal claim for
The western states are well aware that it is in their interest to accommodate legitimate federal interests in water resource management. It has been made clear that to fail to do so risks federal preemption. For example, in discussing his opinion holding that Congress did not intend to reserve water for wilderness areas pursuant to the Wilderness Act, the Solicitor of the Department of Interior stated that he hoped states would facilitate acquisition of water for wilderness areas.

Speaking particularly to recognition of instream flows for wilderness purposes, he said: "That situation is going to be played out in the very near future and tension will arise to the extent that the purposes of a federal reservation, as Congress may see them, cannot be advanced, because water cannot be acquired under state water law." He cautioned the states, therefore, not to overplay the hand that was dealt to them by his decision, thus "forcing the Congress to step in and decide these issues at the federal level."

In his discussion, Solicitor Tarr recognized that both sides tend to overplay their hands at times. He acknowledged that "we have a few departments in the federal government that get quite interested in the game of how much more water can be acquired, what new theories can be provided to take water for our side. I

Instream flows on national forests); State v. Morros, 766 P. 2d 263 (Nev. 1988) (upholding federal claims to water for wildlife).


Address by Ralph Tarr, Solicitor, Dept. of Interior, Meeting of the Western States Water Council (Jan. 13, 1989) (included as part of the minutes on file at the Western States Water Council office).

Id. at 14.

Id. at 15.
must say that I see that from some of your state interests at times as well." This kind of balanced perspective seems vital in improving federal/state relationships. In the contest over jurisdiction to allocate a scarce resource, conflicts will continue to arise and "games will be played" on both sides. However, federal interests will hopefully recognize that the rules of the game have been changed, so that the interests they seek to protect can be accommodated under state law.

This is not to say that state law is perfect. Some states have gone further than others in their methods to protect the public interest. However, objective observers must concede that the trend toward such protection has been established and will continue. There is considerable public support for protecting instream values, and that support will grow and continue to express itself in state forums.

At the same time, federal interests must not expect more than a level playing field. Their claims should receive the same scrutiny as do those of other claimants. In those instances where legitimate federal interests cannot be accommodated under state law, then changes in state law should be considered. However, the ability to accommodate federal interests does not equate to a willingness to uphold all federal claims of interest. Nevertheless, if federal representatives can forget past attitudes and recognize the opportunities now afforded them under state law, then a great many conflicts in federal/state relationships can be avoided.

\[\text{396 Id. at 11.}\]

\[\text{397 D. Grant, supra note 381, at 717.}\]
AGREEMENTS REGARDING IMPLEMENTATION OF SPECIFIC FEDERAL LAWS AND PROGRAMS

Where conflicts between federal and state interests exist, negotiated agreements can avoid potentially lengthy and expensive litigation, as well as the arduous and uncertain process of amending the law. This is not to say that such negotiations cannot also be time-consuming and expensive. But such negotiated agreements can provide for tailor-made solutions that are agreeable to all the parties, a result difficult to achieve through litigation or through the legislative process.

Recognizing the advantages to such agreements, there has been considerable emphasis on negotiation of Indian water right disputes. Recent successful efforts have encouraged others to pursue this approach. Although such future settlements may prove more difficult in light of increasing pressure on federal budgets and western water resources, such efforts have much to commend them.

A negotiated settlement of differences also resulted from controversy over implementation of the Endangered Species Act in the Upper Colorado River Basin. The parties reached an


399 See Id. at 25-33.

400 The Western Governors' Association and the Western Regional Council have taken an active role, together with the Native American Rights Fund, the National Congress of American Indians, and the Council of Energy Resources Tribes, in encouraging the federal government to implement reserved rights settlements. P. SLY, supra note 398, at 25, n.1.

agreement to protect endangered species while allowing water development in the Upper Basin. The agreement was signed January 21, 1988 by the chief executive officers of the Department of Interior, Western Area Power Administration, and the of Colorado, Wyoming, and Utah.\footnote{402} It provided for a 15 recovery program consisting of a broad range of measures to protect endangered and threatened fish. These programs were to be funded by federal appropriations, state contributions, and a one-time $10/acre-foot surcharge levied on new water uses.

The money would be used to purchase state water rights to maintain instream flows for the fishes and other conservation activities, including construction of fish passageways and hatcheries for native fish stocking.\footnote{403} Other elements of the recovery program involve non-flow habitat development and maintenance, controlling non-native species and sport fishing, and research, data management and monitoring activities.\footnote{404}

In signing the agreement, Secretary of Interior Hodel said, "By working together on this problem, we have overcome a major hurdle in the road to recovery of the species. With this recovery program, the needs of the fish will be identified and met while still allowing water development interests to proceed."\footnote{405} Governor Romer of Colorado added: "This landmark agreement should serve as a model of what can be accomplished when groups with differing philosophies look for ways to solve a common problem without sacrificing either environmental quality or economic growth."\footnote{406} It remains to be seen whether the

\footnote{402}{Id.}
\footnote{403}{Id.}
\footnote{404}{Cooperative Agreement, supra note 401.}
\footnote{405}{News Release, supra note 401.}
\footnote{406}{Id.}
agreement will fulfill the promise identified by these two public officials. However, given the history of conflict and acrimony in the Upper Basin regarding this issue, the agreement was a major step forward.

A cooperative approach also resulted in an agreement between the State of North Dakota and United States Department of Interior concerning the acquisition of land by the Fish and Wildlife Service for migratory bird habitat. The agreement, signed in January of 1987, states as its purpose to establish "a cooperative and mutually supportive relationship." The 1987 agreement supplemented an earlier agreement that established the terms and conditions for the Governor's approval of the "North Dakota Migratory Bird Habitat Acquisition Plan." The agreement further states:

407 According to an attorney for the State of Wyoming, the U.S. Fish and Wildlife Service is insisting on greater mitigation than that required by the agreement in connection with the proposed construction of Sandstone Reservoir in the Upper Colorado River Basin. She cites demands for instream flows and reservoir releases to assure protection beyond state borders, although the state has no jurisdiction beyond its boundaries. Letter from Jennifer Hager, Assistant Attorney General for the State of Wyoming to Norman Johnson (Dec. 4, 1989) (on file at the Western States Water Council office).


409 Id. The agreement expired on July 1, 1989. North Dakota and the Fish and Wildlife Service are in the process of negotiating another agreement. Letter from Patrick K. Stevens, North Dakota Assistant Attorney General, to Craig Bell (Feb. 9, 1990) (on file at the Western States Water Council office).

410 Id.
"[It] is intended to launch a new partnership between North Dakota and the FWS to improve the development, management and protection of water and wetland resources within North Dakota. This agreement signifies a good faith and vigorous effort to end the institutional and political conflicts over wetland acquisition and management programs. This agreement attempts to resolve specific wetland acquisition and management issues which have been in conflict, so that future wetland acquisition and management programs can proceed with mutual support. This agreement also recognizes that the water development and wetland preservation activities must be balanced to protect and accommodate North Dakota's agricultural, water, and wildlife resources. This agreement, therefore, is intended to establishment the terms, conditions and mechanisms by which mutual cooperation can be established."

A similar approach has been taken in the state of Wyoming. However, a different experience resulted in Texas from the acquisition of land by the Fish and Wildlife Service for migratory bird habitat, as previously described. Indeed, the Texas experience represents the antithesis of the cooperative approach adopted in Wyoming and North Dakota.

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411 Id.

412 WYO. STAT. § 23-1-106 (1977 rev. ed.).

413 See supra text accompanying notes 222-5.

414 Not all potential conflicts with the Fish & Wildlife Service are covered in the North Dakota agreement. An Assistant Attorney General for the state writes as follows:

The Fish and Wildlife Service has also demonstrated a willingness to acquire easements in attempts to halt projects which are sponsored by the state or by the local entity. In two cases, Hurricane Lake and White Spur, the Fish and Wildlife Service obtained easements along the proposed line of the project. In the Hurricane Lake case, the Fish and Wildlife Service actually purchased an easement on the outlet of a proposed flood control project. Because it was necessary for the project to go through the easement, the Fish and Wildlife Service was able to exact mitigation and require various conditions upon a solely state and local supported project.
While the Fish and Wildlife Service acquired the desired lands in Texas for its purposes, the non-monetary costs would seem to have been significantly higher than for lands acquired in cooperation with the states of North Dakota and Wyoming. This is especially so if the good will of the state and its subdivisions is considered. Litigation was brought challenging the action of the Fish and Wildlife Service in Texas, which is still pending, and bills have been introduced in Congress to reverse the effect of the actions. Efforts to consult and reach a cooperative arrangement with the state and local interests may not have precluded these results in the end, but they certainly would have increased the chances of doing so.

Cooperative agreements have great potential to resolve federal/state conflicts. Considering the adverse effects and the drawbacks of other alternatives for resolving such conflicts, efforts to reach such agreements are clearly worthwhile.

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415 Sabine River Authority v. United States No. TX-87-36-CA (E.D. Tex., filed March 19, 1987).

CONCLUSION

Much of the history of federal/state relationships in water resources has been one of cooperation and achievement in pursuit of mutual objectives. Even when interests do not coincide, potential conflicts are avoided in most instances. Such cooperation has always been vital in the West where the federal government is a substantial landowner and water developer. It is even more vital now given the substantial federal interest in water resource allocation established by a number of federal environmental statutes. However, it is also true that real conflicts exist, and these conflicts represent a significant obstacle to the kind of intergovernmental cooperation that is necessary to optimize the use of western water resources.417

Historically, many of the conflicts have centered around the inherent emphasis in the traditional appropriation doctrine on off-stream utilitarian uses and the contrasting federal interest in preserving instream uses to protect the environment.418 It is a central point of this report, however, that the appropriation doctrine has evolved so that federal interests can be accommodated. If this is to happen, federal proponents must recognize that western state water laws are not inimical to instream uses. The movement toward the recognition of such uses began over a half century ago,419 and today a considerable

417 See SCARCE WATER AND INSTITUTIONAL CHANGE 11 (K. Frederick ed. 1986); Walston, Federal-State Water Relations in California: From Conflict to Cooperation, 19 PAC. L. J. 1320 (1988); see generally authorities cited supra note 3.


variety of state authority is available for this purpose. As a consequence, state law provides a variety of opportunities to protect federal interests. Federal officials need not resort to the specter of federal preemption to accomplish federal statutory objectives.

In those few instances where federal interests cannot be accommodated under state law, a process of negotiated compromises resulting in formal agreements seems the most desirable approach to resolve conflicts. Of course, litigation will continue to be a tool available to both federal and state interests, and indeed a necessary tool in settling the rights of the United States vis-a-vis all other water right holders in the stream system through the vehicle of a general stream adjudication. Also, refinements in federal and state statutes may be necessary. Further, some across-the-board improvements in federal/state relationships would result if states were elevated from the "special interest group" status where they now reside in the eyes of most federal agencies. Meaningful consultation with state representatives in the development of federal policies before the momentum towards a decision is practically irreversible, would be the most important facet of this increased state role.

Increased sensitivity to state interests by federal agencies in implementing their statutory mandates could avoid many of the instances where states must by-pass federal agencies to urge the involved parties to comply with state law. This, in turn, requires recognition of the state's role in planning for its future. This planning may emphasize economic growth and

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420 See e.g., Potter, The Public's Role in the Acquisition and Enforcement of Instream Flows, 23 L. & WAT. L. REV. 419 (1988); see also supra text accompanying notes 34-67.
development, or outdoor enjoyment and recreation, or both. It can lead to allocation of water to private use such as irrigation, manufacturing and power production, or to public uses for recreation and wildlife habitat and other environmental values. The basic point is that states should decide the mix, because they are clearly in the best position to balance the various interests competing for use of a limited resource.\footnote{421 See F. TRELEASE, supra note 418, at 772-5.}

But if federal representatives choose to pursue their interests in disregard of the states' role, then Dean Trelease's warning is pertinent:

"But if there is real ground for...us to fear that 'the Feds' will take our future from us and override our plans and our decisions in the name of single-purpose management of the federal lands, I believe Congress would be willing to say that federal supremacy...does not require federal domination of water to the exclusion of state desire for multiple-purpose development."\footnote{422 Id. at 775.}

Neither federal nor state domination of water to the exclusion of the other should be necessary. Abundant opportunities exist whereby the interests of both can be protected and enhanced. This then should be the goal of both federal representatives and state water managers. To do otherwise would ignore important lessons from the history of federal/state relationships in water resources.