28 Aug 1985
Summary

STATE AGENCY FEDERAL RESERVED WATER RIGHTS PRE-MEETING

August 28, 1985
9:00 A.M. - Noon

Commissioner's Conference Room - Twelfth Floor, Frontier Building
Anchorage, Alaska

Attendees: DNR, Departments of Law, Environmental Conservation, and Fish and Game

I. Explanation of Federal Reserved Water Rights

II. Purposes of Federal-State Meeting
- A. Establish closer coordination
- B. Solicit assistance in developing a statewide inventory of federal reserved water rights
- C. Identify ways for federal agencies to notify the state of claimed federal reserved water rights
- D. Identify mechanisms of adjudicating federal reserved water rights in Alaska

III. DNR's Concerns
- A. Little competition for water - may have trouble with quantities
- B. Instream flow quantifications could save state agencies money
- C. Prioritizing basins should be coordinated with other state agencies to ensure data collection will satisfy data and management needs
- D. Methods of adjudicating federal reserved water rights: courts vs. other means which might be cheaper and less time consuming (compacts, DNR administrative adjudications)
- E. The role of other state agencies
- F. Development of a state position
- G. Any other concerns the state agencies may have

FEDERAL RESERVED WATER RIGHTS WORK GROUP

AGENCY	REPRESENTATIVE	TITLE	TELEPHONE	ADDRESS
AK DNR	Mary Lu Harle	Water Resource Manager	672-4317	Pouch 7-005 Anc., AK 99510
	Jack Wilcock	Natural Res. Manager	672-4317	
AK DEC	Dan Wilkerson	Resource Planner	274-2533	437 E. St. Suite 200 Anc. AK 99501
AK DF&G	Carl Yanagawa	Reg. Superv. Habitat Div.	267-2283	333 Raspberry Rd. Anc. AK 99518
	Christopher Estes	Instrm. Flow Coordinator	267-2142	
AK DOL	Michael Frank	Ass't. Attorney General	276-3550	1031 W. 4th Ave. Suite 200 Anc. AK 99501
US BLM	Ron Huntsinger	Physical Scientist	271-3363	AK State Office 701 C St. Anc. AK 99501
US NPS	Ross Kavanagh	Fishery Biologist	261-2637	AK Regional Offic 2525 Gambell St. Room 107 Anc. AK 99503-2892
	Stan Ponce	Chief, Water Rts. Branch	(303) 221-5341	Fed. Bldg. Rm. 343 301 S. Howes St. Ft. Collins, CO 8152
US FWS	Keith Bayha	Dep. Ass't. Reg. Director	786-3537	1011 E. Tudor Rd. Anc. AK 99503
US FS	Ann Puffer	Regional Hydrologist	586-7847	P.O. Box 1628 Juneau, AK 99802
US DOA COE	Ernest Woods, Jr.	Chief, Real Est. Div.	753-2846	P.O. Box 898 Anc. AK 99506-0898
	Lucille Steelman		753-2847	
	Bob Gilliland	Ass't. Dist. Counsel	753-2532	NPAOC P.O. Box 898

FRWR Meeting @ Frontier Bldg. 8/28/85

May have a chance to get the Feds to allow administrative adjudication rather than to have a judicial adjudication.

New regulations may be out

Statewide inventory of Fed Res H2O rights
State work group
State/Fed working group
How Feds notify State of reserved water rights
I have the working group come up with list of areas where we agree on that reserve H2O rights are valid and a list we do not agree on.
ADT 46's 4 points
Have Feds review SB 150

Federal Reserved Water Rights Meeting Attendees 8/28/85

NAME	TITLE	DEPT./DIV. REPRESENTED	TELEPHONE NO.
[illegible]	WATER Resources Mgr	DNR - Water	276-4317
Keith Harding	Nat. Res. Officer	DNR - Water	762-2277
Ric Cannon	Nat. Res. Mgr.	DNR Water	2243
L.A. Dutton	" " "	DNR/DLWM	762-4387
Mike Granata	Natural Resource Officer	DNR - Water	762-2277
Gary Prokosch	Regional Water Officer	DNR - water	762-2777
Carl Yamagawa	Regional Sup	ADF&G - Habitat	2672283
Tom HAWKINS	director Law	DNR	762-4355
CHRISTOPHER Estes	STATEWIDE INSTREAM FLOW COORD	ADF&G/SPORTFISH	267-2142
Jack Wilcock	Nat. Resource Officer	DNR - Water Mgt.	274-4317
Laura Dairo	Asst Attorney General	Dept of Law	465-3600
Chuck Sanders	Nat. Resource Officer	SERO/water	465-3400
MIKE FRANK	ASST AGO - Arch.	LAW	276-3550

FEDERAL RESERVED WATER RIGHTS INVENTORY INDEX

Admin. Agency (2-3 Letters)		Type of Reserve (2-3 Letters)		Map Number (1-3 Letters or Numbers)	Wilderness (W)
FWS	-	WR	-	1a	
NPS	-	NM	-	19	
NPS	-	NPK	-	24	
NPS	-	NPP	-	20	W
NPS	-	NPR	-	27	W
NPS	-	NMP	-	17	
BLM	-	NCA	-	30	
BLM	-	NRA	-	31	
BLM	-	WSR	-	32	
FS	-	CNF	-	33	
FS	-	TNF	-	34	
FS	-	NM	-	35	W

↑ from ANILCA MAP

USFWS - Beaver C. } Kenai
Swanson R.
Indian R

NPS Indian R.

Need coordinated effort re. data gaps for Kenai Penin Streams
Bayhe
USGS

EW → BA → file
cc MV DeHor Jan H

Introduced: 2/12/85
Referred: Resources and Judiciary Land & water mgmt

FEB 19 1985

Director's Office

IN THE SENATE

BY THE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

SENATE BILL NO. 150

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act making miscellaneous amendments to the Alaska Water Use Act (AS 46.15); establishing procedures for administrative and judicial adjudication of water rights under that Act; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 46.15.040 is amended by adding a new subsection to read:

(d) A right to appropriate water granted under this chapter may not be construed against the state as a guarantee of a particular water level or volume, except as provided in AS 46.15.145, as a guarantee of a particular artesian pressure or water quality, or as a guarantee that water may be withdrawn or diverted at a particular cost.

* Sec. 2. AS 46.15.065 is amended by adding a new subsection to read:

(f) The adjudication process for a declaration filed under (a) of this section, which is pending before the commissioner on the effective date of this Act, is to continue under the procedures set out in this section until the commissioner finally determines whether the declarant is entitled to a certificate. If a certificate is issued under this section, the certificate holder may be included as a participant in an adjudication under the procedures set out in AS 46.15.165 or 46.15.166.

* Sec. 3. AS 46.15.140 is amended to read:

Sec. 46.15.140. ABANDONMENT, FORFEITURE, AND REVERSION OF APPROPRIATIONS. (a) The commissioner may declare an appropriation to be wholly or partially abandoned and revoke the certificate of appropriation in whole or in part if an appropriator, with intention to abandon, does not make beneficial use of all or a part of the [HIS] appropriated water. [AN APPROPRIATION SO FORFEITED AND ABANDONED REVERTS TO THE STATE AND THE WATER BECOMES UNAPPROPRIATED WATER.]

(b) The commissioner may declare that an appropriator has [AN APPROPRIATION TO BE] wholly or partially forfeited an appropriation, and shall revoke the certificate of appropriation in whole or in part if the [AN] appropriator voluntarily fails or neglects, without sufficient cause, to make use of all or a part of the [HIS] appropriated water for a period of five successive years.

(c) Failure to use beneficially, for five successive years, all or part of the water granted in a certificate of appropriation raises a rebuttable presumption that the appropriator has abandoned or forfeited the right to use the unused quantity of water, and shifts to the appropriator the burden to prove otherwise to the satisfaction of the commissioner.

(d) A state agency may not abandon or forfeit a certificate of appropriation in whole or in part except after public notice.

(e) If the commissioner revokes a certificate in whole or in part, that portion of the certificate covered by the revocation reverts to the state and the water becomes unappropriated water.

* Sec. 4. AS 46.15.145(f) is amended to read:

(f) At least once each 10 years the commissioner shall review each reservation under this section to determine whether the purpose described in (a) of this section for which the certificate reserving water was issued and the findings described in (c) of this section

still apply to the reservation. If the commissioner determines that the purpose, or part or all of the findings, no longer apply to the reservation, the commissioner [HE] may revoke or modify the certificate reserving the water after notice, hearing when appropriate, and a written determination that the revocation or modification is in the best interests of the state [IN ACCORDANCE WITH AS 46.15.140(b)].

* Sec. 5. AS 46.15 is amended by adding new sections to read:

Sec. 46.15.165. ADMINISTRATIVE ADJUDICATIONS. (a) The commissioner may, by order, initiate an administrative adjudication to quantify and determine the priority of all water rights and claims in a drainage basin, river system, ground water aquifer system, or other identifiable and distinct hydrologic regime, including any hydrologically interrelated surface and ground water systems.

(b) In the order initiating an administrative adjudication, the commissioner shall describe the appropriate geographic and hydrologic boundaries of the adjudication area. During the adjudication, the commissioner may adjust the boundaries to insure the efficient administration of water appropriations among users.

(c) Upon initiation of the adjudication, the commissioner shall

(1) serve the order on each applicant, certificate holder, or permittee listed in the department's records within the adjudication area;

(2) serve the order on any agency of the federal, state, or local government with management authority over land or water within the adjudication area;

(3) serve the order on any person who owns land within the adjudication area if the land is held in trust by the United States or if the patent or deed to the land contains a restriction on alienation imposed under 25 U.S.C. sec. 334 (Indian General Allotment Act of

February 8, 1887, 24 Stat. 389, as amended and supplemented), 25 U.S.C. sec. 372 (the Allotment Act of June 25, 1910, 36 Stat. 855), or 43 U.S.C. secs. 270-1, 270-2 (the Allotment Act of May 17, 1906, 34 Stat. 197), and on the United States on behalf of any such person;

(4) serve the order on the United States and the appropriate governing body of the Annette Island Reserve established by 25 U.S.C. sec. 495 (the Act of March 3, 1891, 26 Stat. 1101) if the land or water of the reserve, or hydrologically interconnected water, is within the adjudication area; and

(5) publish the order once each week during four consecutive weeks in a newspaper of general circulation in the adjudication area.

(d) Service of the order under (c)(1) of this section is sufficient if mailed by certified mail, return receipt requested, to the last known address that the applicant, certificate holder, or permittee has given to the division of the department responsible for administration of water rights. A person served under (c)(1) -- (4) of this section who fails to appear in a timely manner and assert a claim as prescribed by the commissioner is estopped from subsequently asserting any objection to the adjudication of that person's water rights within the adjudication area, unless the person is entitled to a federal reserved water right and has failed to consent under (i) of this section.

(e) In an adjudication under this section, the commissioner may appoint an impartial qualified person as a master to preside over the adjudication; to hold hearings; to take testimony; to collect evidence; to propose to the commissioner an order adjudicating the validity of, quantifying, and determining the priority of all water rights; and to take other action the commissioner decides is necessary. The

master may be an employee of the state.

(f) Any division of the department, or other departments, may provide support during the adjudication, in the form of documentary and testimonial evidence; research; and scientific analysis. If funding permits, the commissioner may obtain similar support from sources outside government. Any state agency may assert a water right on behalf of the state in the adjudication.

(g) In managing an adjudication, the commissioner may take such action as is necessary for the efficient and fair administration and use of the state's water, including but not limited to

(1) determining indispensable, necessary, and convenient parties to the adjudication;

(2) classifying applicants, certificate holders, permittees, and claimants in groups that share similar interests, such as by the amount of water used or the type of use, and restricting their active participation in the adjudication by appointing group representatives for the purposes of receiving notices, examining witnesses, and other adjudicatory functions;

(3) entering such interlocutory orders as may be appropriate to dispose of all or part of the issues in the adjudication, and designating these orders as final ones for the purposes of any appeal to superior court under (j) of this section; and

(4) allocating to a participant any extra costs that the state has incurred in conducting the adjudication because the participant has in bad faith asserted a claim to water wholly without merit or has unreasonably delayed the proceeding.

(h) For the purposes of asserting a water right in an adjudication, a certificate issued under this chapter is prima facie evidence of the water right and its priority date.

(i) If the commissioner has initiated the adjudication, and the federal government or a private person who has been served under (c)(2) -- (4) of this section asserts a federal reserved water right but fails to consent in writing to the adjudication, then the commissioner shall exclude the federal government or that person, respectively, as participants in the adjudication. The commissioner may negotiate the terms of the written consent.

(j) A person adversely affected by a final order of the commissioner adjudicating water rights under this section may appeal to the superior court within 30 days after the decision is mailed or delivered to the person.

(k) The commissioner may adopt regulations setting out procedures for administrative adjudications under this section.

Sec. 46.15.166. JUDICIAL ADJUDICATIONS. (a) Instead of initiating an adjudication under AS 46.15.165, the commissioner may, with the concurrence of the attorney general, file on behalf of the state a complaint in superior court to initiate a judicial adjudication consistent with 43 U.S.C. sec. 666 to quantify and determine the priority of all water rights in a drainage basin, river system, ground water aquifer system, or other identifiable and distinct hydrologic regime, including any hydrologically interrelated surface and ground water systems. The commissioner may initiate an adjudication under this section only if a federal reserved water right has been or might be asserted

(1) by the United States or any of its component agencies;

(2) by or on behalf of a person whose patent or deed to land contains a restriction on alienation imposed by a federal statute cited in AS 46.15.165(c)(3) or (4), or whose land is held in trust by the United States.

(b) Venue is proper if a complaint under this section is filed in a judicial district in which all or a part of the hydrologic regime is located.

(c) In an action brought under (a) of this section, the court may initially appoint a designee of the commissioner as a master to hold hearings, take testimony, collect evidence, and make recommendations to the court regarding the scope and content of a proposed judicial decree that would finally adjudicate the validity of water rights, quantify them, and determine priorities among the water right appropriations in the adjudication area. The master may be an employee of the state. In managing the action, the master may, with the court's permission, take such action as the commissioner would be authorized to take in an administrative adjudication under AS 46.15.165.

(d) In an adjudication under this section, the court may incorporate in any order or judgment any final orders of the commissioner previously issued under AS 46.15.165.

(e) Proceedings under this section are conducted without a jury.

Sec. 46.15.167. EFFECT OF DECISION. A final order of the commissioner under AS 46.15.165, or a final judgment of a court under AS 46.15.166, is binding on all parties to the adjudication and on all persons who subsequently make an application for a water right. The court or the commissioner may retain continuing jurisdiction for the periods of time necessary to implement any adjudication order or judgment and to provide for any subsequent water appropriations.

Sec. 46.15.168. OTHER ACTIONS. (a) The state may timely intervene as a party in a superior court action potentially involving a determination of the validity, quantity, use, reservation, or priority of water rights.

(b) The commissioner may accept a remand from a state or federal court of a water rights dispute, and may administratively adjudicate it under AS 46.15.165.

(c) The commissioner may enter into arbitration with a private person or the federal government to resolve a water rights issue.

(d) The commissioner may incorporate and apply as binding upon the parties to an administrative adjudication under AS 46.15.165 any federal court decree concerning the state hydrologic regime involved in the adjudication.

Sec. 46.15.169. FEDERAL RESERVED WATER RIGHTS. Nothing in AS 46.15 is an admission by the State of Alaska that a federal reserved water right exists in the state.

* Sec. 6. AS 46.15 is amended by adding new sections to read:

Sec. 46.15.255. ENFORCEMENT. (a) In addition to a penalty that may be imposed under AS 46.15.180 for violation of an order issued under AS 46.15, the department may

(1) remove or abate unpermitted works of appropriation, diversion, impoundment, or withdrawal;

(2) install corrective controls or control works; and

(3) seek enforcement of the order by filing an action in the superior court.

(b) A person who violates an order issued under AS 46.15.180 is liable for all costs of removal, abatement or installation, and for any related court costs and attorney fees incurred by the state in seeking enforcement of the order.

Sec. 46.15.256. DATA COLLECTION AUTHORITY. To carry out the provisions of this chapter, the department may

(1) inspect books; records; meters; gauges; well logs; works of appropriation, diversion, impoundment, withdrawal, or

control; and any other relevant information or physical condition;

(2) enter private property at all reasonable times, after first obtaining a search warrant from an appropriate judicial officer if the owner refuses consent to entry; and

(3) compel the production of relevant information by an administrative subpoena signed by the commissioner if the commissioner reasonably believes the information is necessary to carry out the purposes of this chapter.

* Sec. 7. This Act takes effect immediately in accordance with AS 01.-10.070(c).

TRANSCRIPT

FEDERAL RESERVED WATER RIGHTS PRESENTATIONS

ALASKA WATER RESOURCES BOARD MEETING

March 5, 1985

Bruce Landon, U.S. Department of Justice.

Because there have been no federal reserved water rights adjudications in Alaska, I have never done one. In the last week or so I have been on the phone with most of the justice attorneys and agency attorneys who have been heavily involved in some of the cases trying to get some of their insights. Since I do a lot of the public land cases up here in Alaska involving the federal government, what I will try to do this morning is to give some of those insights and my impressions on how they might fit into the bigger picture of Alaska land law, and some of the quirky things that we have up here. I will be the contact person for the Department of Justice if there are water right adjudications in the state. I am sure you will be working with people either in Denver or Washington, but for a local contact when you want to initiate conversations, please do get in touch with me. Right now I am located in the U.S. Attorney's Office in Anchorage. We will be moving soon to new offices, but I will remain reachable through the U.S. Attorney's Office there.

I would like to break down the talk this morning, starting out with a definition of reserved water rights and the types of problems they cause in the western water rights appropriations system. I'll talk a little bit about the McCarren Amendment which is the statute which allows for the adjudication of those federal reserved water rights, how it works, some of the alternatives that there are to litigation, some of the attributes of federal reserved water rights that make them different from state water rights, and my insights on a good step by step approach to how we would like to see water rights adjudication occur. I will talk about some of those special Alaskan conditions that I mentioned before and then talk about how we can then get together and maybe resolve some of these disputes with a minimum of time, fees, and cost.

Essentially, the definition of reserved water right is when the federal government reserves public land for a specific purpose, it impliedly reserves sufficient water to fulfill the purposes of that reservation. The problem posed here is that you have a conflict between two basic extremes of the law. One is that Congress, since at least the 1860's or the 1880's, has purposely deferred to the states and state law on the distribution of water in the western states - water on the public lands and off the public lands - and the western states have all adopted prior appropriation water systems. At the same time you have the supremacy clause in the United States constitution saying that, when there is a conflict between state law and federal law, the federal law is going to control. So you have these federal rights next to your state right system, and you're not subject to your state law control.

The other thing that makes them problematic is the way the prior appropriation system works. You probably know about it, but thinking about slices of a pie, you can think of the pie as the river system. The first appropriator gets a slice of that pie but what it is, it's a guaranteed number of calories. It's not the thickness of the slice, sliver or quarter, it's the number of calories. As that pie gets bigger or smaller, the first person in line keeps the same number of calories. If there aren't enough calories for everyone, it's the last person in line that gets none of the pie. This is where you end up with your conflict because you don't know prior to an adjudication or some other resolution of the federal reserved water rights exactly how many calories the federal government has a claim to. If you are in Arizona and you have just gone out and created an orange orchard when the federal government comes and says this is over appropriated and you don't get any of this water - you are in big trouble. This is essentially the conflict presented by the federal reserved water rights. This conflict creates a need for certainty. No one wants to invest a lot of money when they are not assured that they are going to have sufficient water to make their investment work. At the earlier part of this century, there was just no way to get certainty on these federal reserved water rights.

The first recognition of federal reserved rights was in 1908. The Supreme Court held in the Winters case that when the United States set up an Indian reservation in Montana, the U.S. impliedly reserved enough water to make it a liveable reservation. The federal government could go into court and say "stop drying up this river," but the states could not get an adjudication of the federal government. Because of the sovereign immunity of the federal government, you just couldn't get jurisdiction over the federal government in court. That was changed by the McCarren Amendment which is the statute that allows for you to sue the United States for adjudication of these reserved water rights. It's an unusual statute. Usually when the United States allows you to sue it, it makes you go into federal court. The McCarren Amendment says you can go into state court. This is because, as I said before, Congress had in mind the difference in state water law and the interest the states have in controlling their water law. A few words about the amendment: it does require that the proceedings be judicial in nature so that if you have been operating under an administrative-type plan, you are not going to be able to get the United States into the administrative procedure. The second thing about it is that it requires the adjudication be a general stream adjudication. In other words, you have to join all the appropriators that use the stream. This means that you have tons of parties. In preparation of this talk, I looked at the case of the City and County of Denver v. the United States. In the beginning of all cases you have a list of the attorneys. This took up several pages in the printed version, so you are talking about a lot of parties and a very large scale type of litigation. As I understand this question of the judicial nature of the McCarren Amendment, the purpose of SB 150 is to have a state procedure where you can get this sort of resolution and take advantage of the McCarren Amendment.

Some of the attributes of federal reserved water rights are that you are talking about the whole system of prior appropriations, so you are looking at what is this priority that the federal government gets. The priority date is the date of the reservation, the withdrawal, the creation of the park, the monument, whatever. Now this can have occurred before Statehood, it can occur after Statehood. In this respect it's very different from your submerged lands thing where you either have the lands under navigable rivers at Statehood or you didn't get them at all. You are talking about a system where new rights can come into effect as there are new reservations in the state. We have a slew of new ones in Alaska.

Another thing that's interesting about federal reserved water rights is that they can be for purposes not recognized as State law. For example, if you go to some of the dryer states, they won't let you appropriate water for certain purposes, particularly instream flows, fish habitat, boating or recreation. They just think that's too wasteful of their water. They will not recognize that sort of water right in their state law system, but again, because of the supremacy clause, if the purpose of the federal reservation is to protect the fish habitat, for example, that federal reserved water right would be for an instream flow, even though no one else under state law could get that sort of right. They are for different purposes which may or may not be recognized under state law.

The amount of the federal reserved right is the amount necessary to fulfill the purpose of the reservation and no more. OK, that's kind of a vague statement and sometimes it's stated on the reverse side of the coin - it's not more than enough to prevent "the total frustration of the reservation." Again if you think about that, it's difficult to figure out. For example, the Indian reservation, the first recognition of the federal reserved water right. What totally frustrates the purpose of an Indian reservation? Do you have to have the situation where the last member of the tribe dies of thirst? That's obviously not the meaning of it. So there's a vagueness there. You look at this purpose but then you have this problem of quantification.

As I said before, you can have reservations for purely federal purposes and then you also have a lot of reservations for Indian purposes. When we are talking about purposes the courts have to distinguish between what they either call primary purposes versus secondary purposes, or sometimes they are referred to them as purposes as distinguished from uses. Let me give you an example: In New Mexico, there's a national forest that was set aside. The purpose of setting aside the forest under the congressional statute was to protect the timber and to provide favorable flows of water. But a lot of other things go on in the national forest. Since the 1960's, Congress has said that the national forest should be used for multiple-use, there's recreation on them, there's fish and wildlife habitat, things like that. The Supreme Court has to distinguish between permissible uses --things that happen in the national forest--as opposed to the primary purpose that that forest was set up for. It's those primary purposes that you look to in determining what it is that has been reserved.

The litigation under the McCarren Amendment is very costly. I mentioned before the City of Denver case. That was filed in 1967, and it went up and down jurisdictional questions. Then there was a determination of what the purposes of the reservations were. That came out in 1983. Now that we know what the purposes of the various reservations are, everyone is trying to figure out how much water that is. We are trying to figure out a quantity of water--not a quality question, it's a quantity. How many gallons, how many acre feet, how many feet/second do you need to fulfill this purpose? Once you know that purpose, it's not intuitively obvious exactly how many gallons you need. It is very expensive to generate that sort of data. So that case that has been going on since 1976 is still going on, and I imagine it will go on for quite a while. Some of the adjudications in Nevada, I understand, started back in about 1913 and were only disposed of recently.

Because they are so expensive, and because you don't want to do a lot of duplicate work, my suggestion is that adjudications be approached in steps. The first thing you want to make sure about is that there are no problems with the jurisdiction of the court. You want to be in a court that is going to be able to fulfill the requirements, if you can, and you want to make sure that you've got a real general stream adjudication--that you have joined the proper parties--so that you don't have to come back later and get all the way to the top--get this whole system completed--and be told "No, this court could not have decided this, you have to start from ground zero."

I urge that when you are thinking about litigation that we do try to get together and see whether we can do it in a manner so that there is agreement on jurisdiction. If there is not, try to quickly resolve the question of jurisdiction.

After you know you are in the right court and you have got the right parties and the right type of jurisdiction, the next problem is the determination of the purposes. What you do there essentially, you look at the documents that reserved whatever type of reservation it is; you look at the statutes on which those reservations are based. Very often the actual withdrawal document will just say, "For the purposes in the act of..." so you are looking at number of things at the same time. Sometimes these purposes are kind of vague. For example, the Indian reservation. We know some of the purposes of an Indian reservation. There was legislative history in the Winter's case. This reservation was intended to allow this particular tribe to switch from a hunting culture to a more pastoral and agricultural culture, so that sometimes you're in gray areas where you have got a general purpose, but you're trying to really pin that down. And usually I would imagine that there will be disputes. We are not necessarily going to agree on what the purpose of a particular withdrawal is. Work on that.

Sometimes there will be a number of reservations in series. An example of this came up in the Denver case. There was an area, now the Rocky Mountain National Park. Before it was a national park, it was a national forest. So the priorities for water that go with the purposes of a national forest dated way back to the 1800's. There were additional purposes for the park, but those would only have a priority from the date that the park was created--I believe that was in 1927. So sometimes we will be looking at a series, and there will be different priority dates, different purposes.

Some of the examples of the types of purposes that have been found in the Lower 48 are the national forest--that's timber and favorable flows of water. Again, this expression "favorable flows of water", what does that mean? The Supreme Court says that doesn't mean instream flow for fish habitat. But now the question is how much water has to be going through before you have siltation of the channel and flooding in the areas which is an unfavorable condition of water flow. You can still have some purposes knocked out for instream flows, but there may be other reasons why you have an instream flow that aren't immediately obvious.

National parks are set up pursuant to 16 US Code, Sec. 1. Their purpose is, among others, to protect scenery, natural historical objects, wildlife, and "to leave them umimpaired for the enjoyment of future generations." That's a pretty high standard. In wildlife refuges you have a variety of purposes. Sometimes you have a wildlfe refuge and it is set up...I believe Nunivak Island was set up as a reindeer station originally. Now that is not going to need as much water as a refuge that is set up to protect a particular type of fish. Look at the purpose of the reservations.

One thing that we are lucky about in Alaska is that when ANILCA set up all of those new conservation units, each one of those when it was set up has a long list of its purposes. There is a lot less doubt as to those purposes for those sort of reservations. That should help us along. Then, only at that point, go into the quantification because, particularly in this state, it is very often expensive just to get people to the river. You don't want to be generating a whole bunch of information to quantify a certain purpose when it turns out that is not the purpose of the reservation.

I'd suggest that these are the three steps that you should be looking at in pursuing one of these cases.

When I talked to a lot of the people in the Lower 48 who had been working on water rights cases, they were a little bit surprised that we are having this conference because, as a general rule, you worry about your priority when the pie isn't big enough for everybody. Certainly this is a wetter state than the other western states. The purposes for which water is used are quite different. We don't have massive irrigation and we are not likely to have massive irrigation in the future. Some of the areas where you can expect problems would perhaps be hydro projects and in the more concentrated urban areas where you have a lot of domestic and business appropriation.

The use of water on the North Slope for oil and gas drilling--that's an area that gets very little rainfall. But in many instances, there is lack of either a reservation--there is not much of an upstream reservation from Prudhoe Bay, for example--or you simply have no other users, so you don't have much of a problem there.

Another thing that is different about Alaska is that Alaska depends economically on many of the uses that other western states find most obnoxious about instream flows. For example, in Nevada they can't believe that you should have fish in rivers--just to keep a river so that fish can remain in it. One of the most famous water rights cases that went to the Supreme Court, is called Cappaert v. United States. There was a very small national monument out in the desert, and there is a cave there. Inside the case is a well, a grotto. There is a fish there that doesn't live anywhere else but in this one cave. It survives on the algae that grows on a slant at the top of the pool. There is a rancher nearby who was taking out, through a well, a lot of the ground water, and the water level of this well was going down until we were starting to run out of ledge with algae on it which was going to kill the fish. The United States brought a suit on that, and of course, if you are a rancher, you think that ranching is a heck of a lot more important than these rare goldfish in the cave.

I think a very different situation exists up here, and it's recognized in Alaska law. The salmon fisheries are very important to the state, recreational boating and tourism are very important to the state, so that we don't necessarily think up here that it's a sin to let a river get all the way to the ocean. Some of the ways that it has been recognized in the Alaska statutes is that you have the ability in AS 46.15.145 to reserve instream flows for fisheries, for wildlife, for boating and recreation. That is kind of unusual for a western state. Also, in your permitting on consumptive appropriations, AS 46.15.080, as part of the public interest determination, the commissioner--or is it the engineer, I'm not quite sure--looks to the effect on fish and wildlife and boating as part of his determination of the public interest, in determining whether permits should be issued.

Another thing that's kind of different in Alaska, there is only one Indian reservation in Alaska, and that is the Annette Island Reservation at Metlakatla. It is an island all by itself and it is pretty much in the rainiest part of the state, so I can't see that there would ever be a problem there. However, the state has an extraordinary number of public domain native allotments. There have been instances in the Lower 48 where the courts have held that there is a reserved water right for allotments. Those have been on reservations. There have also been situations where there have been recognized instream flows for fisheries. A lot of the allotments were fish camps. So you've got this very interesting question that really doesn't exist anywhere else, and I don't know what the answer to the question is or have any suggestion about it, but it is something unique to Alaska and probably deserves some attention. In addition, there are a handfull of cannery sites in Southeast that are owned by IRA organizations and they could also perhaps have some sort of a reserved right.

Finally, we have this raft of new withdrawals with ANILCA, and, as I said before, they are interesting because they are much more specific than most withdrawals are as to their purposes. That should help us out in trying to assess early on what we are actually going to be locked in dispute about.

Before we took our break, there was a good deal of discussion about should Alaska be jumping into litigation, or do we wait until conflicts...is there any alternative to going into court? There are a number of alternatives. One that I think is quite interesting is that Montana has set up, by statute, a Federal and Indian Reserved Water Rights Commission, and the total purpose of this commission is to come up with a settlement and quantification of federal reserved water rights. After a settlement is reached, it has to be adopted by both the legislature in Montana and by Congress. That way you get an act of Congress and state law in agreement and that gets you out of the problem of not having a court decree. It gives you some finality to it.

I gave a copy of that statute to Mr. Wanamaker, and I understand that the copies will be available after lunch. I understand that there are some very encouraging negotiations that have been going on recently, so this may be something that you want to look into. When I talk to people Outside, they did suggest that if you are looking for guidance here in Alaska that perhaps Montana is a good place to look, since it is wetter than most of the other states in the west, and that it does allow in its state law for instream flows, and it has some of the same dependence on recreational boating and also fishing that we have up here--a lot of wilderness areas. That may be one way to look at it. I haven't really gone over the Montana statute and I don't want to say whether it's good or bad. You might want to contact Montana and find out what their frustrations were with their statute, whether it's been working for them.

Another possibility is the fact that you do have the ability under state law to reserve instream flows. One of the problems in other states, for example, Montana allows instream flow reservations, but they haven't worked out a solution or an alternative to adjudication because the date of priority of this instream flow is going to be the date the state makes the reservation. That is usually going to be way down the line. With at least the ANILCA reservations that were made only 3 years ago and in areas where I would suspect that there are relatively few other appropriators, it may very well be that you can use (at least I would suggest that you think about the possibility of trying to use) that system as a way to minimize the need for adjudication.

If there is going to be litigation, I do suggest that you contact me and we sit down with the agencies and do some preplanning, try to get the jurisdiction all cleaned up before we even start, have an idea of our positions, and try to do it as quickly and inexpensively as possible. Not only are we talking about several years in most of these adjudications, but really literally millions of dollars of attorneys' fees, and on top of that all of the technical fees in determining actual scientific quantification that is going to be involved.

Any time you go into litigation you are looking at a long haul, an expensive haul, and I think it's in everyone's best interest to try to make it as painless as possible. I think cooperation is the key to that. In looking over a lot of the briefs and the cases on water rights, I've been struck as to just how hard they have been fought. There is the possibility for cooperation and planning, but these are hard fought cases. Even in situations where there might be... the federal government did not for some reason want to fight for an issue very hard, you do have the possibility of some outside involvement. An example of that is a recent Sierra Club suit. The Sierra Club sued the federal government because of what it alleged was the failure of the federal government to ask for sufficient water for wilderness areas in Colorado. It got before the courts--"You've got to make the federal government ask for more"--and that's still going on.

But, as I say, there is no possibility really of these things not being, I think, very, very closely and strongly litigated. Some of the cases that have started out in litigation have gone to settlement, and if Alaska does not set up a Montana-like system, you can always file your suit and try to work out a settlement. I believe it was within the last year there was a settlement in an Indian reserved water right case, the Ak Chin Reservation in Arizona. One of the things that was interesting about that settlement was that everyone for years was worried about a paper quantity of water that the reservation was going to get. And as it worked out, when they sat down and thought about it, they might get a quantity of water out of the litigation, but the reservation was not linked up to any existing irrigation system. There was no likihood that a new dam was going to be built. So there was the possibility in that situation of trading off some of the absolute quantity of water involved for benefits that the tribe could get by hooking into the existing non-Indian irrigation projects. I could see with instream flows up here, and you're talking about salmon, there may be ways in which less water would be needed if there were other types of safeguards, other types of protection of the habitat, I don't know, salmon scales, or whatever, or stairways, protection from other types of development right near the habitat so that there is that flexibility once you start talking about settlement, to have trade-offs between quantity and other types of advantages. So that's another thing that you might want to consider.

I think I've probably given you enough to try to digest at this point, and if you do have questions, I'll be happy to give it a shot. As I say, I have not been involved personally in the adjudications.

QUESTIONS:

Tom Meacham: Why does the Montana system require legislative approval? Why can't they take the negotiated settlement into court and get a consent decree?

Landon: I think it's because... they can do that, and that's always an option. I think they decided that if they had a commission just working on these reservations with a statewide jurisdiction that might give it a different perspective. And I think you do. When you have a large adjudication, just the costs in serving all the necessary parties becomes immense. I think their perception might have been that just starting litigation with the idea of settling it is a very complex proposition. Now, I'm not sure whether the commission has worked much better or not.

Meacham: You stated that obviously the question of native allotments is going to be a significant federal reserved right question. This may be a little premature, but has the Department of Justice or the Department of the Interior approached the question of whether there were any reserved water rights that went along with native corporate conveyances under ANCSA, and if so, what is the answer?

Landon: Someone asked me that earlier this morning and I hadn't given it much thought. Usually when I call D.C. and try to engage people on ANCSA questions, they plead a headache. I don't think that they had given, at least in D.C., very much thought at all to reserved rights in Alaska because there is so much action going on the drier states, certainly not as to the native corporations.

Stan Rybachek: Alaska has a prior appropriation right to water reservations. The placer mining industry is pretty heavily impacted, I feel, with the federal reserved water rights in regards to water quality. If there is enough water to go around in the some of these streams, its unappropriated...

Landon: The reserved right is generally a question of quantity. Very often with placer miners you have the water going out and being reinserted. You have quality problems; you have EPA administrative actions...

Rybachek: What I want specifically is set down standards like some of the conservation areas or recreation areas for water quality, and they are getting their authority, of course, from the federal reserved reservations, which is not yet quantified. So as regards water quality, we may be able to meet EPA or state water quality standards, but they may set water quality standards that would actually make these rights unuseable.

Landon: Is it your understanding that these quality rights are based on reserved water rights as opposed to some other provision in ANILCA? I haven't heard of this happening, so I can't ... Sometimes quantity will have an impact on quality, in other words, in Nevada in the Pyramid Lake case, the level of the lake was going down, and consequently the lake was getting saltier, so there was a direct relationship between quantity and quality. But usually with reserved water rights, you're talking more about quantity than quality.

Meacham: I can clarify that a little bit, and I'll plead guilty to the charge that I'm the one who did this. I wrote the water definition terms that are in ANILCA, and they say that for each of the wildlife refuges and national parks, the existing quality and adequate quantity of water are reserved, so I think there has been created a "quality" reservation as far as ANILCA reservations go. The real question will be to determine what the existing quality was in 1980. If it was a stream that was already impacted with a history of placer mining, then that is a situation that the reservations are going to be left with. But if it was a situation where placer mining, or other extractive, let's say gravel mining or something like that, has taken place since 1980 that would affect the refuge or the park, then the refuge or the park will have the right to ask for a quality which approaches that which existed in 1980 rather than something that has happened since then. So you might say in Alaska we have a situation that is a little different than usual reserved rights because we have a quality reservation now as well as a quantity reservation.

Randy Wanamaker: Mr. Landon, is there any binding authority, let's say there is an agency such as the Forest Service which negotiates on behalf on the federal government for an area to quantify for a compact reserved water rights, they are willing to enter into a compact under these certain circumstances, but is there any real foundation for people who are negotiating on the other side of the table to be able to rely on the Forest Service being able to keep that compact because Justice won't interfere saying, "No, we don't like those terms, and we will enter in and change those terms that the Forest Service has agreed to." The Forest Service are the experts, but Justice wants a different perception or use of the law. What's to prevent that from happening?

Landon: The Justice Department represents the agencies once things get to court. If you are talking about the Montana system, things don't get to court, they go to the state legislature and to Congress. When they get there, Congress will ask any agency that might be affected for their views on the legislation, and at that time, no doubt, Justice will have to report to Congress. I think, as a practical matter, one thing to keep in mind is that people can be talking in various parts of the country, but that the law on reserved rights affects a number of states, so there is going to be a lot of looking over shoulders. In other words, if you are talking about using a different methodology in Alaska from the one that is being argued and litigated in a court in Utah or Colorado, the Forest Service, at least in D.C. is going to say, "No, you can't take this totally different position." So there is going to be a lot of cooperation between the agencies in different states. They are not going to be able to give you a very different deal or theory than they are using in other states. But, in any event, either going through court or going through Congress, there is going to be someone besides the agency that's going to have to sign off on it.

Mike Niemeyer: Correct me if I'm wrong. My interpretation of the McCarren Amendment was that it was merely a waiver of sovereign immunity for the federal government to be sued and it wasn't a limitation on a federal agency to enter into a negotiation with a state...some kind of a negotiated settlement?

Landon: You can have the negotiated settlement, and the question becomes how you get that finalized. Do you have a court order so that settlement can't be overturned? Do you have an act of Congress so that it can't get overturned? But you do want to have someone's seal of approval on it so you can avoid an administration a few years down the road saying "We thought up a new use and we'd like to rediscuss this with you." Alternatively, there has been a problem in jumping into cases too quickly. This was particularly true 10 years ago when there was a doubt whether the McCarren Amendment allows the U.S. to be sued in state court, but there's nothing in the amendment itself that says you have to go to state court. There was quite a bit of doubt for a long time whether you could go to federal court as well. So there was kind of a race to the court house. The feds and the Indians would prefer to be in federal court, and the state and the appropriators wanted to be in state court, and suits were getting filed before they were totally thought out, it seems, just in this race to the court house. But pretty much now, irregardless of who gets to the court house first, the federal court is going to defer to the state court, so we will be in state court.

Niemeyer: I'd like to add one other thing, too. When Tom Meacham was talking about the possibility of an ANCSA reserved water right, I think there has been some kind of precedent set in the Lower 48 for reserved water rights on private Indian lands, and in New Mexico there was a case dealing with pueblos, which are patented lands rather than trust lands, so there is some precedent.

Meacham: I want to follow up on one suggestion you made that fits in with something Larry Dutton and I were discussing during the break. That is the use of instream flow reservation possibilities in Alaska, either in lieu of a basin-wide adjudication or to forestall the need for a basin-wide adjudication and still allow water planning to go on. I think this is a good way to go. I would encourage the state, if they follow that procedure, to make sure that the instream flow reservation was not seen as an alternative to basin-wide final adjudication of the federal right in that it would be superseded at any time a comprehensive basin-wide adjudication came along. One of the advantages of instream flow reservation by federal agencies at this point would be that you wouldn't have to deal with the whole basin, that you could deal with one stream, that you could deal where the problems are most acute or appear to be building up, and you could use that instream flow quantification for water planning purposes to put everybody else in the proper order and with the proper quantities so the stream wasn't overappropriated. Perhaps this could be used as a viable alternative to comprehensive basin-wide adjudication. I think some of the problems dealing with quantification, finding out how much water is there and how much is necessary to maintain the instream flow, would be quite similar to the same kind of quantification and measurement problems that you would have in the basin-wide adjuducation, except that you wouldn't have to do it on such a comprehensive basis. We might try to find out what has happened in Montana, whether any of the federal agencies have used instream flows as a means to avoid having to do a basin-wide adjudication for a number of years.

Landon: I think it hasn't been used very much because of the old date of the reservations, because the reservations again have the priority.

Meacham: There are no new reservations in Montana, while there are many here that you would only lose 5 years. If there hasn't been much appropriation on the stream to date, that wouldn't be a real problem.

Landon: That's right. Especially because this is a permit state. I didn't get a chance to study the Alaska Water Law too closely, but you have a better idea here who actually is appropriating than you might in other states where you don't have a permit system. It's easier to find the streams where the reserved water right is going to be equivalent to the reserved right because there just aren't any significant prior appropriators.

Dave Vanderbrink: You mentioned the Sierra Club entering into a case in Colorado in order to gain water in the wilderness area. What sort of a situation would give rise to that? It would seem that the waters start in wilderness areas in almost all cases, and how could you get more?

Landon: You can have downstream wilderness areas, I imagine, are fairly common in the Great Basin states. I think I have a copy of that case if you are interested. It's just out in the slip opinion right now. The argument was that Sierra Club asserted that there were reserved rights associated with certain wilderness areas, there was an adjudication for the stream that went through those wilderness areas, and that the federal government had not asserted any rights for those wilderness purposes. The argument was that that was an abuse of discretion on the part of the Forest Service. That was what was under review. The case is still ongoing, so it is unclear where it will go from here.

Vanderbrink: Would you repeat the mechanics of the Montana Commission system? How exactly does it work?

Landon: What Montana did was it set up a policy, a commission. Instead of filing litigation, we would give this commission a certain number of years, maybe 7 or 8 years, to try to come to negotiations all around the state, to knock out as many rivers as they could through negotiations. At the end of that period the state would go in and file adjudications on those river systems where they couldn't come to an agreement.

Vanderbrink: It's the same system that any other state would use except that all the details are agreed to beforehand, do I understand that correctly?

Landon: Instead of going to court and working through the attorney general's office and the state, they set up an independent body. One thing that might be an interesting question that you might want to explore with the Montana folks is how they think that worked as far as did the administration think that they had lost control of this somehow? It's got to be approved finally in a statute of the state, so the legislature is always going to be able to assert control at the end, but what they do is avoid going into court essentially.

Vanderbrink: Is there any case where that system has completed a cycle?

Landon: I think they are close in a number of areas.

Meacham: About the wilderness area situation--I think the Sierra Club was dismissed at one level of the proceedings, the court said that they didn't have standing to assert a federal right where the federal government itself hadn't asserted it, but I'm sure Sandy White will have some more information on that.

Where your question may come up, Dave, is that while the national forests in Colorado were created a number of years ago, some of the wilderness areas are only recently designated. If those wilderness areas can be implied to have purposes that were in addition to the original national forest purposes, there may be an increment in additional federal reserved rights that the feds might be able to claim that take priority over a subsequent appropriation downstream, and if they didn't assert those as part of the forest reserved right, then the subsequent appropriators downstream would be getting water that could have otherwise been claimed as part of the wilderness, even though they are upstream from the downstream users in some cases. But I think a lot of the problem may be these transmountain diversions in Colorado where they are taking water from the headwaters of one side of the divide and putting them through a tunnel and taking them to Denver and Colorado Springs, so that's intercepting the water before it flows through the wilderness.

Landon: You also have in a lot of those areas--BLM lands--that end up being wilderness. The wilderness system down below is more...if you've got an area of 5 square miles with no roads going through it, you consider it for inclusion in the wilderness, so you're not necessarily ...in ANILCA we're more familiar with instances where you've got a park or national forest and a certain part of it will be set aside as wilderness.

Meacham: BLM lands, of course, were never subject to a reservation, so once you've created wilderness out of BLM land, does that imply reservation? I assume that if Congress does it, it probably is.

Landon: Yes.

Meacham: I wanted to mention also, Dave, that we have a system in Alaska that eventually may be interpreted by the Alaska Supreme Court, if it ever is presented with the question, a system of state reserved water rights as well as federal, and that is because the state constitution in the water use section, states that all water appropriations in the State of Alaska are subject to the general reservation for fish and wildlife, and that's never really been quantified. One aspect of that has presumably occured in the opportunity to create instream flow reservations. I guess the authority to create instream flows for wildlife preservation purposes as well as for other purposes probably arises from that provision in the Alaska Constitution. When the governor considers creating a recreational

river system across Cook Inlet from Anchorage, one of the authorities he may be able to rely on to guarantee water quality and water quantity over there is this implied state reservation, that any time the state creates something like a reserved river system that it takes advantage of that state implied fish and wildlife reserved right that is in the constitution, so 10 years from now we may be talking about quantifying state reserved rights, as well as federal.

Rybachek: Section 13 indicates that all waters of the state are subject to appropriation, so that's something to think about. You mentioned the supremacy clause in the U.S. Constitution. Could you clarify that?

Landon: When there is a conflict between state law and federal law, federal law controls. In other words, if Congress says we want to reserve enough water for this park and we want this river to flow and to have fish in it, it doesn't matter if, under Utah law, you can't reserve water for fish. Here's another example, it occurs in a lot of instances, if you have allotments, Congress sets up a system for wills and intestacy for Indian allotments and it's inconsistent with the state law. If that Indian allottee dies, it's the federal law that is going to control.

Rybachek: Where does this come into the Constitution?

Landon: It's probably in Article IV, but I'm not quite sure.

Meacham: That was the basis for Federalism.

TRANSCRIPT

FEDERAL RESERVED WATER RIGHTS PRESENTATIONS

ALASKA WATER RESOURCES BOARD MEETING

March 5, 1985

Michael D. White, water law attorney, Denver, Colorado:

There are more unanswered questions than answered. We have about 75 years of experience with reserved rights. The thing to remember is that until about 1963, actually 1953, it was assumed that reserved rights were creatures of Indian reservations only. It's only been since the Pelton Dam case, the FPC v. Oregon, a U.S. Supreme Court case, that we had any conception at all that they applied to non-Indian reservations or withdrawals, so the non-Indian reserved rights game is a relatively young one. I have prepared an outline, called "Reserved Right Litigation, Pragmatic Perspectives from the State Viewpoint." You noticed my name is not on there. It's because I still am not courageous enough to hold myself out as an expert.

I was asked to compare the practical progress of two reserved right adjudications, one in Colorado and one in Wyoming. The Wyoming case is generally referred to as the "Big Horn Adjudication". The Colorado case is usually referred to as "Division 4, 5 and 6 case" or the "7 Courts case". It ended up being U.S. v. Denver or Denver v. U.S. It doesn't make any difference how you say it because both U.S. and Denver appealed and my familiarity with those cases is that I was court-appointed Master in the Colorado case, and I was the lawyer for the State of Wyoming in the Bighorn case, so I have some familiarity with the mistakes we made there. I suppose if I had to entitle what I have to say to you, it would be "Two Hours of Bad News." Whoever and whenever people get involved in reserved rights litigation they are going to make major mistakes. No way you can avoid mistakes whether it is litigation or negotiation. The only thing that you all ought to be anxious to do is to avoid the mistakes that we made. I'll try to cover those as I go along.

The two cases are basically diametrically opposed in the way they were handled. This is all from the state's viewpoint. Let me back up and say something about reserved rights themselves. I really have no major difference with the definition and description of reserved rights that was given this morning. It's really a question of what the syllable you put the emphasis on.

On the front page of the outline, the critical issue is amount in reserved right litigation. I think we agree that the amount of reserved right is that amount necessary to serve the primary purpose or purposes of the reservation. "Necessary" is a key word. But there are other key words

which you ought to remember. Those key words are "meet the minimal needs." So "minimal" you might as well remember. Another one is make sure that the primary reservation purpose is not "entirely defeated." "Minimal" and "entirely defeated" are the words the courts use. Often we get spooked by reserved rights when we don't have to because they may not be the boogey man we think they are if we remember that they are only to serve minimal needs associated with the primary purposes of the reservation, and insure that the primary purposes of the reservation are not entirely defeated. What reserved rights are, in a broad conceptual way, is an insurance policy, to insure that where water rights are not provided by the federal government under state law, and where water is absolutely essential to the continued vitality of that land reservation, there is an escape--there is an insurance policy that provides that water under the reserved right doctrine.

These words are far better than the word "reasonable" that most lawyers love to use because they do have some practical definitions in the case law. There is no one place you can go and learn all about reserved rights because there is no statute that tells you about them, there's no one case that tells you about them. I have four green volumes that collect cases through 1983 in chronological order that we have used and had used against us during the last 12 or 15 years of reserved right litigation. I've got to say that two years ago when we bound those, I was absolutely certain that we had every case possibly involved, and not two weeks after they were bound, we found more cases that are in a supplemental notebook. But that gives you an idea of the magnitude and diversity of the kinds of authority you have to go to when you worry about reserved rights.

"Minimal" and "entirely defeated" are words of art, and they are words that you ought to remember because they impose a substantial limitation on the reserved right. Someone this morning said, "Please remember that the quantification of the reserved right may not be the end result of what the reserved right actually is in terms of an adjudication or settlement." These two words really create that difference between the claim and the eventual award or negotiated deal because quantification of reserved rights by federal agencies tend to optimize the functioning of the reservation, or to preserve the reservation in its natural condition, while what a court will award is not an optimal number, not a preservation number, but "minimal" needs, enough water to make sure the purposes are not "entirely defeated."

One of the things that spooks most of us in the reserved right business when we start the negotiation process and the litigation process is the remarkable nature of the claims that are made up front by the United States. You have to remember that the reserved rights litigation or negotiation is like buying a horse. The seller starts high and the buyer starts low. Somewhere you meet in the middle.

You need not be surprised or set off at the original offer by the seller. The United States is high. Let me give you an example. In the Big Horn Adjudication that we are going to talk about, the lower end of Boysen (?) Reservoir, the virgin flow of the Wind River was 1.6 million acre-feet.

The claims of the U.S. were about 2.4 million acre-feet. The amount of the reserved rights that were awarded by the court and arrived at through negotiations was about 400,000 acre-feet. Even there on the award the court didn't really apply the "minimal" and "entirely defeated" standards. That's one of the issues that is going up on appeal. So when you talk about quantification of federal reserved rights, remember standards and remember the effect of those standards, because when you apply those standards to the claims or the quantification by the agency, generally they are reduced substantially. Don't be surprised if the initial claims are originally high. Expect them to be high, because the agency folks wouldn't be doing their job if they weren't high.

One other thing--how the reserved rights are administered. Usually, at least in the western Lower 48, administration has been the province of the state, except with respect to Indian reservations. There the subject remains up in the air. That's really the result of what are called "disclaimer provisions" in state constitutions and was addressed in the Adson (?) case as a federal issue based on state constitutional law on a state by state basis. Adson (?) basically said the disclaimer provisions did not keep Indian reserved rights from being adjudicated in state court. Now the issue is going to be whether or not they can be administered by the state. That's being dealt with by the state supreme courts.

Now let's talk about these two cases. Colorado first...here we have two cases, the Colorado adjudication in which the state had very little involvement, and the Wyoming adjudication where the state had almost total control. For starters, I ought to compare Colorado, Wyoming and Montana. If you take the amount of state involvement and add the amount of private involvement, Colorado's involvement of the state was probably 5% or less. Private involvement was 95% or more. In Wyoming, state involvement was around 98%, private 2%. That was an important 2% because everything the state did was cleared with private parties. In Montana, the state involvement was 100% and private 0%. You may ask why did Montana go to the compact approach? I'm not in a position to say authoritatively, I think you'll find that the compact approach was designed to reach that precise result so that the private parties didn't mess up the deal, because if you subject the compact to court scrutiny with private parties coming in to defend their interest, the compact falls apart. The compact is only good when you have a deal between the United States and the state. When private parties come in, their interests may not coincide exactly with that of the state. That's one reason that Montana went to the compact approach.

In Colorado, how did this adjudication get started? You may be asking yourselves whether you even want to think about adjudication. In Colorado they didn't have that luxury. They had an interesting situation--the state is a rectangle with the continental divide going down the middle. Denver has 70% of the population and 30% of the water, so it has to go someplace else for water and what it did was develop a series of collection systems in the national forest in the 1920's, and collect water from the headwaters of these streams and shoot it under the mountains by tunnels. They had perfected water rights under Colorado state law with roughly 1920 and later priority dates. The folks on the western slope where these rivers come out were saying, "Denver has basically deprived us of our capital gain. We expect to have no water for our future development. How are we going to deal with this situation?"

A very clever lawyer by the name of Ken Malcolm in Glenwood Springs said, "There is a way we can use reserved rights generally to screw them. The national forest is located along the headwaters of these rivers. The national forest had priority dates 1907 and 1903. If we could have minimum instream flows in those national forests as reserved rights, they would have 1907 priority dates. They would call out Denver's transmountain diversions. The water would have to be left in the stream that comes out of the bottom of those national forests and that will allow the water that is there to be used by us on the western slope."

Denver obviously wasn't excited about the idea. The western slope was the delighted, so Malcolm joined the United States as a private party. He first joined the United States in a little (sic) water district here, and the United States, of course, squealed like a stuck pig. It didn't want to quantify the water rights and everybody else on the western slope said, "This is a good idea", so they joined with three more little water districts. And more folks said, "This is a great idea." The state, by the way, all this time is sitting on its hands. Within 8-10 months you have the area basically west of the continental divide, about half the state, involved in that adjudication. The state itself hadn't done a thing. It was all anti-Denver and an anti-eastern slope movement. You may have heard about the Colorado Big Thompson project that serves the northeastern part of the state, it was also a target. Then there was the Frying Pan-Arkansas project, another basically Bureau project that serves the southeastern part of the state which was also a target. So Colorado's litigation didn't begin by conscious decision by state policy makers. It was started basically as a tool to facilitate private and municipal water wars.

I think I'll deal with the Colorado case first. There are lessons to be learned from Colorado. Without state control, things get out of control and you end up with adjudications that make no sense from a state policy basis, which may make splendid sense from a private water user basis. And the state remained passive through two trips to the U.S. Supreme Court and two trips to the Colorado Supreme Court. It turned out to be an east slope-west slope fight in which the United States looked around for friends and found none. Needless to say it didn't cost the state very much money--at least yet. There are absolutely no benefit spinoffs to the state. We often talked about our national space program having spinoffs to our economy. The same thing is true in streamwide adjudication. It has a tremendous potential for spinoffs to the state, but in Colorado there is none because the state did nothing. It was tried at the leisure of the private lawyers involved. The case has been going on for 17 years and it is far from final resolution.

Let's turn to the Big Horn Adjudication. Let me tell you how that got started. It was started in reaction to the Indians on the Wind River Indian Reservation in Wyoming, the Arapahoe and Shoshone tribes. Two things happened...the joint tribal councils adopted a resolution in 1975 that said they claimed all the water that is on the reservation. Everybody thought they were just blowing smoke and we won't worry about it. Then in 1976, September, the city of Riverton decided to expand its municipal water

supply. It needed either federal funding or federal loan guarantees and had gotten them lined up for the expansion of their water system when the city council got a letter from the tribal council that said, "Expand the system at your own peril. We own all the ground water and if you drill any more wells you can pump them until we need the water but don't count on continuing availability of the water." As soon as that letter was received, the federal involvement in financing dried up and the mayor was on the phone screaming at the governor and you can imagine what happened then. The only question then was "How soon can we get things started?"

To his ever living credit, the attorney general as well as the governor and the state engineer sat down and said "Do we really want to start one?" The conclusion was yes. It was a thought out decision. The reason they decided to go was not just because of the federal reserved right claim, but because Water Division 3, the Big Horn Basin in which the Indian reservation is located, had been an administrative mess for years in terms of the water rights involved. This basin runs along the eastern edge of Yellowstone National Park and into Montana. One of the interesting questions to file away and remember that you heard it 10 years from now is, what effects are any compacts which Montana may ever get negotiated with the Indians and federal government going to have on interstate streams? It's not a problem that you have, but the states that surround Montana are sitting back and smirking, saying, "You guys go ahead and cut your deal with the Indians but its not going to affect the surrounding states."

That's the way the adjudication was brought to this discreet basin, where we have a federal reserved rights problem and where there were real problems with state water rights. The fundamental concern there was that the state had started a water development fund and had several million dollars programmed for that fund to develop the remaining water in that state. Until they figured out the federal reserved rights and got its own house in order in terms of water rights, it was impossible to spend that money with any degree of assurance that the projects that were funded would actually produce water. So the decision to go was a two pronged decision and it did go.

Wyoming had the problem similar to Alaska's. It has basically a permit system with the appropriation doctrine. Frank Trelease, who was Dean of Law of the University of Wyoming, helped draft the Alaskan statute, so there are remarkable similarities. So we sat down and thought, "We are going to start an adjudication. Do we have a statute that allows us to do it?" We came to the conclusion that we didn't and we had to have one. About November, the decision was made to go. We drafted three or four different alternative approaches, met with the joint leadership of the Wyoming legislature, discussed the alternatives. There were three significant pieces of legislation to pick from. Predictably, they picked the shortest one, and it turned out to be an amendment to the Declaratory Judgement Act that was signed on January 22, 1977, and we filed a 23,000 page complaint on January 24. The United States said that they had been sandbagged. So that's how the case got started. It was a calculated decision that took several months of discussion between the Governor, the

Attorney General, and the State Engineer whether or not that was the time to adjudicate. Part of that discussion was whether there was any reasonable probability that negotiations would pay off, at least prior to litigation. The conclusion was, "Litigate, we'll talk negotiations later." As it turned out that worked to the substantial advantage to the state.

So in summary, Wyoming thought out its position, and was very active in the litigation. There was continued coordination between the state and private lawyers, and the state and local political officials. There was substantial political involvement. That really became important when it came time to settle because we needed the support of elected state officials as well as the Wyoming congressional delegation to make the deal fly. In Colorado, they just sat on their hands during negotiation and nothing was settled except a few private deals that were meant to subvert the jurisdiction of the court. In Wyoming, the political process was in full sway and you got a remarkable settlement that we will describe. It was very expensive for the state. I think to date in the entire adjudication we spent about 7 1/2 million bucks extending from 1977 through 1985. You have got to remember that the Indian reservation absorbed at least 90% of that just because of some peculiar circumstances there. Within the remaining 10%, we settled all the non-Indian claims by the federal government. That wasn't really that expensive.

The state had a remarkable spinoff in terms of benefits. As part of the litigation we decided that we cannot even talk about litigation strategy, let alone negotiate, unless we know the impacts of the reserved right claims. We have to be able to respond to the "what if" questions. What if the national forest gets the instream flows claimed with the 1907 priority date? Who is going to be cut out of the system, if anybody? If nobody is going to be cut out of the system, do we really care? Is there any state water right that is going to dry up because of that claim? If not, why worry about it? There was a reason to worry. We will cover that later. As a result, the state developed a model which at that time, 1983, was the state-of-the-art. It was a model that incorporated the inflow of the system, all the state water rights, their use, which included depletions to the system, diversions and return flow to the system, and administrative assumptions, such as everyone being administered in inverse order of priorities. It was verified by checking against stream gages. We just kissed Wyoming goodby there. It ended up being an administrative model administration and planning. Colorado didn't get that. Colorado probably spent 1/10th what Wyoming did and got nothing for its money.

I'm on page 3 of the outline. Lets run through the chronology of these cases.

In 1967, the Denver v. U.S. case was begun. The United States was served in the case. The United States fought being brought into court. It went for writ of prohibition in the Colorado Supreme Court. The Colorado Supreme Court ruled that the state courts did have jurisdiction. The United States then took them to U.S. Supreme Court, who again ruled that

the Colorado state courts had jurisdiction. It was only in 1971 after the case had been up to the U.S. Supreme Court in two versions that the United States submitted its claims. If you begin a litigation process, you ought to expect a major portion of time, several years, in which the United States resists the jurisdiction of the state courts. After the state submitted its claims, a master referee was appointed. There was a trial that extended off and on over two years along with a number of pretrial conferences with about 170 parties involved. The state sometimes showed up. It turned out to be about 10,000 pages of transcript and about 70 lawyers actively involved.

In 1976, the master submitted a partial report on just the U.S. claims. There were lots of other water rights involved. This is a copy of the report. You'll get a kick out of it. There were objections to the master's report. There were hearings before the district court. The district court took about a year and a half. Remember at this time the U.S. v. New Mexico case--the Rio Mimbres case came out. Some of the awards that the master had made to the United States in terms of its rights to instream flows were no longer legally correct. The Supreme Court had decided that you didn't get instream flows for fish, wildlife, and recreation purposes in national forests, so that portion of the report was deleted. Basically the report was confirmed, went up to the Supreme Court and then in 1982 the Colorado Supreme Court ruled basically against the United States, but remember the United States got much of what it sought in the Colorado adjudication. No successful appeal was taken to the U.S. Supreme Court.

Now the matter has been remanded to the district court for hearings on certain things, the most significant of which is Dinosaur National Monument. The master suggested an award to maintain the natural conditions in that monument, maintaining the virgin flow. The district court and the Supreme Court said "no." The purpose of that monument was to preserve archaeological and fossil remains and allow a place to investigate those, and so only as far as the water was required to maintain endangered species or ancient species or the fossil situation, would it be allowed. So its back in the district court primarily dealing with that one matter.

Big Horn Adjudication:

Those first dates should be 1976 rather than 1972 on page 5. I'll describe how it got started, how the complaint was filed. There were some problems with service; getting the litigation started we'll describe later. The complaint got filed within 6 months after the problem arose. There the United States removed the case to U.S. district court--absolutely frightened of the treatment it would receive in state court. I suppose in some western states there may be some justification for that, but as it turned out, the Wyoming district court wanted no part - the federal district court wanted no part of that litigation and quickly remanded it back to state court. Again once it was back to state court, the United States challenged the jurisdiction of the court and it took a while to get that taken care of.

Finally, by 1979 there ws a master appointed and he got things rolling. The master, I should say did some interesting things. That was a case in which I wasn't the master so I can brag on him and complain about him both. The master got the idea, a good idea, that the water rights involved in the adjudications really ought to be categorized. So he divided the case into 3 phases: phase 1) Indian claims 2) United States claims of a non-Indian nature 3) the state awarded water rights. As a result, some of those phases were able to go on serially and some contemporaneously and things moved along pretty fast so that by 1981 we actually had a trial. It lasted 42 weeks of trial on the Indian claims and a year later we settled all the non-Indian claims without a day of trial except for a prima facie case in support of the stipulated decree. There may be a correlation there, between the state being willing to go to trial--willing to go to the wall with the United States--and the United States willingness to negotiate later. Depends on who you talk to.

In 1983, then, all the non-Indian claims to the United States were settled with only a half day of trial. I'll pass this around. This is a settlement decree on the non-Indian cases. The Indian claims remain in dispute, some negotiation efforts are ongoing on those and probably ought not to be discussed in public. The only issue, Indian claims, are on their way up on appeal and we'll talk about the details of those if we have time. Also, what remains to be dealt with are the claims based on state law. We have, in Wyoming Big Horn adjudication, about 20,000 parties who have interests in between 10-12,000 state awarded water rights. The adjudication of those state awarded water rights is a matter with which we've not yet dealt.

Let's compare in a more detailed way the two adjudications. Attached to your outline is something called a generalized comparison. I'm going to refer to that as we go through this.

The first issue is the area involved. In Colorado, we have about half the state. In Wyoming, we had only one portion of the state, one major drainage that was picked by the state. In Colorado, the adjudication was initiated by a conservation district. The state had absolutely no decision about whether or not to get it going. In Wyoming, litigation was started by the state to resolve a conflict between the Indian reservation and a municipality, as well as to straighten out the state situation on the rest of the basin. In Colorado, the state role was one of absolute passiveness. In Wyoming, they were very active and took the lead. In Colorado, they had nothing to say about the issues raised and the way it was dealt with. In Wyoming, the state had virtually total control over the prosecution, how the case moved along. In Colorado, there were no expressions of state policy, at least initially. Now the state is starting to get involved, but still has to describe, at least for itself, its litigation policy. In Wyoming, the state described that policy early on. The first policy was to get the reserved rights quantified. The second policy was to protect state awarded water rights. The state felt it had an obligation to the folks to whom it had issued water rights under the state system. So the number one state policy under negotiation and litigation was to protect the state system of water rights. It didn't protect any individual person, just to protect the system as the state had set it up.

Jurisdiction:

In Colorado it took two cases in the U.S. Supreme Court to define jurisdiction. Wyoming sat back and said, "Well, if the U.S Supreme Court will agree that the Colorado statutes are those which confer jurisdiction on state courts, then we ought to model our legislation after those Colorado statutes," which they did.

I need to say one word about jurisdiction. I would refer you all to the Pacific Live Stock Company case described on page 10 of the outline. There you start to worry about the jurisdictional issues. Remember in the Eagle County case, we started out in little Water District 37, and the United States said, "No jurisdiction, we haven't waived sovereign immunity. The McCarren Amendment doesn't apply." The McCarren Amendment requires general adjudication, requires everybody on the stream system to be joined as parties. Little Water District 37 just has a tributary, the Eagle River of the Colorado River. It doesn't include all the water users in Colorado, let alone all the water users on the Colorado within the United States. The U.S. Supreme Court said that may be over-technical, so it was decided that if you happen to have a hydrological unit, and if all users within that unit were joined, you've got a general adjudication.

The issue for Alaska is the word "suit". Remember the McCarren Amendment was enacted to waive sovereign immunity in any suit, and to allow the application of state law and state court jurisdiction to the United States in a suit. The question comes up, "What is a suit?" In Wyoming, we have the same problem I perceive you have here...we have a permit system. The question is whether or not that permit system in the administrative adjudications that are involved under that permit system satisfy the provisions of the word "suit" in the McCarren Amendment. Senator McCarren, who proposed that amendment as a rider to the appropriations bill for the Dept. of Justice in 1952, is from Nevada, which also has a permit system. He would probably roll over in his grave if he knew that the courts have said that the administrative system just didn't hack it for a suit. A suit requires some judicial involvement and that Pacific Live Stock case is the one that we ended up relying on in Wyoming saying, look, that U.S. Supreme Court case says that as a part of the adjudication there has to be judicial involvement, not an appeal under the Administrative Procedure Act, not the possibility of some other kind of appeal without the necessity of any action by any party of the case finally has to be resolved by judicial decree. Without that you don't have a suit. You can imagine what Senator McCarren would say today because he comes from a permit state. He didn't have that in mind, but that's what the courts have basically said. You want to make sure in Senate Bill 150 that you have the last step under any circumstances be a suit, a judicial involvement in the action.

Service:

That's a difficult one. The Schroeder case cited in the outline is a case that, of all things, came up out of New York. The Pacific Live Stock case came up out of Oregon. The City of New York was trying to condemn riparian water rights for their city water system. The question was how much notice is enough to allow due process to all the water users on the stream. The

Supreme Court there in the mid 40's said, based on the tax records, "You have to make a reasonable effort to notify everybody. It doesn't require service by the sherriff. It could be registered mail--but it requires something probably more than publication," which New York did. New York published and also put signs up along the river saying, "Folks, we're going to take your water rights and we're not going to pay you anything for it unless you file a claim." Nobody saw the signs and nobody saw the publication which was probably buried in the obits someplace, so they didn't have to pay anything, and all of a sudden Mr. Schroeder who had a cabin up on the river said, "Hey, that's not fair," and the Supreme Court agreed. Out of Frankenstein cases come bad law, and I think we're all stuck now with the necessity of giving some sort of personal notice. Publication itself probably won't do.

That personal notice is one of the real surprises in the expense of a case. South Dakota started an adjudication several years ago knowing what the cost would be, but after a period of drought, (its an agricultural state and when you have a period of drought, state income drops), I thought for sure the service alone to start that adjudication--the Rippling Waters Ranch case--was going to bankrupt the state. They finally decided they were going to drop the adjudication. They couldn't even afford the service. So you have to look at the costs all the way along and the first big cost is going to be the service joining the appropriate parties to the adjudication. You might say, "Ah, that's something we might be able to avoid by way of negotiation," but let me tell you, there's no way the results of the negotations are going to be binding on anybody unless you get them served. The question is, do you serve them now or do you serve them later.

The master:

One of the most important decisions you can make if you decide to go the litigation approach is the master that you get. The master has to have a judicial temperament, he has to be thoroughly capable in the technical areas of water and water rights, he has to know the rules of evidence and the rules of civil procedure, and he can't have a conflict. If you sit down and think about the lawyers in the state of Alaska just as we sat down and thought about the lawyers in the state of Wyoming and people before us sat and thought about the lawyers in the state of Colorado, and figure out who knows the rules, who understands water, who has a judicial temperament, and doesn't have a conflict. Ha. Nobody. So one of the earliest disputes, once you dissolve the jurisdictional struggle, is the selection of the master.

I suppose nobody in either one of those adjudications was happy with the master that was selected. I was the master in one of them and I represented the state in the other, and I sure wasn't happy with the guy that got appointed in Wyoming and I know a lot of people weren't happy with me in Colorado. They got me as basically a raw rookie who didn't know up from down and we got a fellow at the other end of his career, who was retired in Wyoming, who didn't care if up was down.

If you want the practical aspects of this thing one of the most difficult things is going to be to find the master, and I suppose if we made a mistake in Wyoming, it was of saying, "We want to have a master from within the state, we want to have a master who can understand the impact that reserved rights can have." We finally ended up with a retired United States Congressman to do the work. It was clear that he did not understand how a trial worked even though he had been admitted to the bar for many years. At one time he told one lawyer in the case, "If I have to read the rules of evidence we'll be here for 6 months, so I'm not going to bother." It went from there.

Finding that master is going to be difficult, but I suspect that in Alaska as in Wyoming, your interests may be better served by going outside the state to find somebody who doesn't have a conflict but has the other criteria. Even that is going to be difficult because anybody that knows anything about it has been on one side or the other.

State litigation strategy:

In Colorado, there obviously was none, just sort of wait and see who thought up what next. In Wyoming, it might have been a mistake. We took a very hurry up approach. We thought that we could out-gun the United States. It was true. Whenever we had to, we could. The United States is a sleeping giant, the most powerful litigant on earth, but then when you think about Von Klauswitz had to say about war, "Mass is the critical principle of war...it doesn't depend upon how large your army is, it depends on how many folks and what force you can focus on a particular spot." That is a constant weakness of the United States. It cannot quickly bring a lot of experts and a lot of lawyers to bear on a specific point at a specific time, and that's something the state can do. We thought to ourselves, "We'll take advantage of that; we'll run these guys ragged." Well, it worked, at least at first. And then, after the third extension of the trial when the United States came in and said, "We're not ready", the judge said, "Why not?" "We promise to be ready in two years or two months." Finally the master got tired after the third extension and said, "You're going to trial whether you're ready or not." We thought we'd have a tremendous advantage by pushing the case, but as a practical matter that advantage was negligible except with respect to the later negotiations where we thought that the earlier litigation really paid off.

Consultants:

You're not going to try one of these law suits without technical consultants. We'd tried to do that. Colorado didn't even bother. Every expert witness that was..reserved rights are a battle of expert witnesses. You have a few legal issues that may get taken care of earlier, but it turns out to be a battle of expert witnesses. In Wyoming, the case was made to have a mix of experts. There were going to be some experts for political reasons from within the state, and some experts that could come from anywhere. As it turned out, our very best experts and our very worst experts were from within the state. The folks from outside the state were adequate to very good. One of the things I would caution you about if you

can avoid the problem--I don't know if you can, under your state statutes--is when you get to litigation, when it's that important, don't go local just for the sake of going local. I grew up in Wyoming, it is basically my home even though I happen to reside in Denver, and I've got to admit that was one of the biggest mistakes we made, going local, and they were some of my friends.

One thing we did as the litigation got along is to require personal service contracts. We had started by having contracts with individual consulting firms, whether it was our agricultural engineer, our hydrologist, our computer modeling guy, or terrestrial ecologist, our dendrochronologist, whoever, we had contracts with their firms. I don't know how it is in this neck of the woods, but the concept of free agency has come to the consulting world. Consultants float from firm to firm and we found that we had grown to rely on Mr.Jones with the XYZ firm, the contract was with the XYZ firm, but all of a sudden Mr. Jones was with the ABC firm. Boy, if you don't think that caused some tightness! So we eventually decided the heck with this. We no longer are going to deal directly with the firms themselves. We picked up the individual consultants so that we knew we had those rascals, at least until one guy went to Saudi Arabia.

Among the consultants, once you have them hired, its absolutely imperative to have a coordinator. We didn't figure that out. I thought, by golly, I'm a graduate engineer, I can coordinate these guys. I soon found out how wrong I was. We needed to have somebody who is a full time coordinator of all these experts. Once we did that, life became a lot more simple because, as you will see from these flow charts, running one of these litigations is not simple. It's not impossible, but it's not simple because you have a large number of experts doing a lot of different things that are interrelated. For example, until your hydrologists figure out the virgin flow of the stream, there's not much you can do with your model. Until you get some things done with your model, you can't decide where to focus you effort. You don't know what claims are hurting you.

In each of the cases I've been involved with, the first thing we've done is set up little flow charts--who does what when, and who's relying on what. The half life of a flow chart is about one month. These things do not stay current very long, but you've got to have them. No consultant is going to show you these flow charts because they aren't very pretty and there's no point in making them pretty because they change so fast.

This is a flow chart from the early days of the South Dakota adjudication outlining the way the lawyers were going conduct their affairs. There was a team of outside special council and folks from the Attorney General's office, and it was important to split up the responsibility and make sure everything got done. We ended up dropping out and adding here as other experts: fisheries, wildlife, aesthetics, recreation, agricultural economics, history, socio-economics, dendrochronology, survey and mapping, and water quality. Those we just said the heck with it. We finally said, "We want each one of you to come up with this so we can figure out where we're going," and this is where that coordinator becomes important. This flow chart is the most important of them all--a flow chart of the Wyoming model, without which we would have been absolutely helpless. I'll leave a copy with you.

This is the end product, what is now being used in Arizona. It is a consolidation of all those other flow charts plus the various editions of how the system is supposed to work from the state's viewpoint. I can't leave it here.

Jurisdiction:

When you start worrying about reserved rights cases, the first issue is jurisdiction. You are going to fight about jurisdiction. If you don't fight about jurisdiction, you're foolish. The reason is that nobody has ever figured out whether or not you can agree on jurisdicition in a reserved rights case. There are two kinds ofjurisdiction--lawyers will tell you that--personal jurisdiction--over the party, and the subject matter jurisdiction--jurisdiction over the controversy. Since water adjudications are quasi (unintelligible) actions, almost like a quiet title action, the issue may not be personal jurisdiction over the United States. They can waive personal jurisdiction. You can stipulate personal jurisdiction. You can't stipulate subject matter jurisdiction unless you...that can be raised any time. You can have an agreement on jurisdiction, get all the way to the appellate level and somebody can raise it for the first time or the appellate court can raise it itself, and if you don't have subject matter jurisdiction, you are lost. Until we get a definitive case from the McCarren Amendment whether it is subject matter or personal jurisdiction that's involved, you ought not to even consider for a minute stipulating jurisdiction. You want to get that as an issue before the court and take it up as an issue before the court so it doesn't get raised later on.

Reservations, priority dates, and purposes:

The first thing you do in an adjudication is identify the reservations, what reservations are you going to have to deal with in that particular drainage. Here we had an Indian reservation, a couple of national forests, some power site withdrawals, a recreation area, a whole bunch of BLM reservoirs and wells, stock driveways, instream flows within the national forest, plus the public lands instream flows that were claimed.

Wyoming started out to be an adjudication not just for reserved rights, but federal non-reserved rights. You may have heard of the federal appropriative rights doctrine that was adopted during the Carter administration and finally killed during the first term of the Reagan administration. This case was responsible for its death. The problem arose out of the U.S. v. New Mexico case in which it was said the reserved rights exist only for the primary purpose of the reservation. All other uses, secondary uses or traditional uses were to be acquired under state law. Some of those traditional uses were not called "beneficial" under state law, like instream flows. Some would end up with priority dates very junior if they got the priority date of the adjudication, which happens in most states. So the United States not only filed reserved right claims, but also filed claims for non-reserved rights, and said that regardless of the fact that they hadn't adjudicated the water rights previously, they are entitled to a priority date for the uses that they made as of the time the

use was begun. That sort of blew everybody's mind. Part of the negotiations leading up to the settlement on the non-Indian claims was a decent burial for the federal appropriate right doctrine. It was just an attempt to skirt state law with respect to secondary uses.

So the first thing you do is decide what reservations you have and where they are. We were surprised at how difficult it was to figure out what reservations existed within the basin and exactly where the boundaries are. We finally convinced the master that the very first step in the litigation ought to be the judicial definition of those reservations. We called them "The boundaries and dates file". Everybody submitted evidence of where they thought the reservations were and what the date of their priority was. Remember, however, that most of these national forests in the Lower 48 are a patchwork quilt. You have reservations that have been made throughout history, ever since the turn of the century.

Once you decide what reservations are involved you can make a good guess at what the court is going to decide are the primary purposes, and within those primary purposes you can make a fairly decent guess as to what the eventual claims of the United States will be. Having done that, if you have a model, then you ask youself what uses of water do we have under state laws? That is possible a fairly early decision.

The model:

These are all the irrigation rights in the basin. What if claims for the Indian reservation totals the virgin flow of the stream? It turned out the claims of the United States in total were for 1.6 times the virgin flow. The claims turned out to be worse than we thought they would be if we take virgin flow in average years. Water rights in red are going to be knocked out. These are going to be dry areas. What about dry years? In dry years the red areas start to look like that. So all of a sudden the pucker factor got way high, we decided we better get serious about federal reserved rights. It blew out completely the reclamation project, destroyed basically everything upstream from the reservation, and started a consumptive use on the Indian reservation that had a dramatic effect on everything downstream. This was just based on claims of the Indian reservation. We did a similar thing in respect to the national forest. We identified the water rights that would be affected by each one of those.

Then we did a consolidated run where we added all the claims together and said, "OK, who is going to be hurt"--every place there is a red dot. Then we asked the model, "What particular claim causes this injury?" With one general exception, if the claims of the United States did not affect any water rights, we said, "We won't fight you on it." That was the general strategy. That is why having a model is so important.

Models are not cheap. For that basin which is about 125 miles long and 70 or 80 miles wide, an informed guess is that we spent about 2 1/2 million bucks on the model. The results were fairly worth while because we found that we had over 200,000 acres of land that would be going out of irrigation because of the claims the United States had made. If you figure conservatively at $1000 an acre, all of a sudden you recognized the economic impact it would have on the state.

Claims involved in the two adjudications:

In both adjudications there were more than federal reserved rights involved. That's because under the McCarren Amendment we've got to have all the users on the stream involved. It creates a very sticky problem. If you've got water users out there that have already got their water rights based on their permits or license, and you tell them they've got to go back in and readjudicate their water rights, they get a little feisty.

I noticed that in your bill you did the same thing we did, and that was a provision that the document itself--the permit or license--is prima facie truth of the content. In Wyoming, we came to the pretrial conference--all parties were invited to submit exhibits ahead to time to get their admissibility ruled on--with three or four carts of state certificates and permits all marked and indexed, and said, "Judge, we want them admitted as prima facie truth of contents." The judge said, "OK". The United States was not happy but that's the way the statute read. One advantage you had in state court, you control the evidentiary rule. If you have to have a short cut to deal with existing state rights, it gives you a chance to do that. I think you have approached that just right in your proposed legislation.

In each of these cases the master did the same thing, he separated the claims into different categories. You can read the type of claims involved there. In Colorado, there were no Indian reserved rights involved. In Wyoming, there are lots of non-Indian claims involved, but the real expense in the case was dealing with the Indian claims because of the tremendous impact it had on the state.

The resolution:

In Colorado, virtually everything was litigated. The private parties wouldn't agree on a thing. As a master that really made me happy--no time off to go fishing. In Wyoming a lot of issues just fell by the wayside. The question of whether or not they were important was did they affect anybody? We took numerous trips up the Big Horn Basin to talk with the private counsel. If we hadn't gone up there, if we had tried to cut them out like is being done in Montana, they probably would have cut us up and fed us to the coyotes. We did keep them involved and as a result they were pretty passive during litigation, although every now and then when we needed a little sex appeal, some of the lawyers, clients, and experts would come down out of the basin and give their testimony. It was very helpful to have that resource available.

In the Colorado case, there was virtually no negotiation with one exception--the BLM claimed instream flows for off-reservations, basically a precursor of the federal appropriative right. Everybody fought those as a legal matter until they discovered the size of the claims: they were 1/100 of a cfs, 5/100 of a cfs. I wouldn't say this in public but one of the experts testified that one of the claims was less water than could be produced by a bull elk, so as a result everybody said, "You've got to be kidding. We don't want to fight about that." The private party said, "The cost/benefit approach is not worth fighting about", so those are the only

things that didn't get litigated. In the Wyoming case, the only things that got litigated were the Indian claims. The non-Indian claims, the national forest, national parks, recreation areas, didn't get litigated, they got negotiated. This is basically how that story works.

During the Indian trial, we realized that we had a problem...that we probably couldn't afford to have the kind of litigation on the non-Indian claims that we had on the Indian claims. Not only could we not afford it, we probably didn't have the energy to do it. Lawyers peeled off that case like skin off an onion. They just got worn out after awhile. The same thing happened to experts. I said that one went to Saudi Arabia, I'm fully convinced, just to escape that case.

We thought maybe we could settle on the non-Indian claims, and there had been discussion of settlement. Finally we just up and asked, "Are you guys interested in settling?" And the answer came back, "Yes". We had made a decision to fight about things that weren't important during the Indian case, just make sure that the United States is interested in settlement because prior to the trial on the Indian claims there wasn't much interest in settlement. We thought maybe we can get their attention. The way we did it was to adopt a hedgerow to hedgerow approach in defending against those claims. There wasn't anything that didn't go by without substantial discovery and cross examination and opposition at trial. After the Indian trial was over, we said, "We'll reinforce the pattern." We set up an intensive series of depositions on the non-Indian claims. After the third week of that we then said, "Would you like to settle?" And sure enough, with the trial about three weeks away the answer was, "Yes". So there has been a been a complete turn around in about a year and a half. During 1982 we talked settlement.

It's hard to guess how much that settlement cost. In terms of absolute direct costs, it probably cost $500,000-700,000. Contrast that with the cost of the Indian litigation which must be in the neighborhood of $6 millon. You can see that negotiation certainly does have benefits. But there has to be footnotes there. One of the things we did in the negotiation was use the model. We knew where we had to have victories in the negotiation to make the deal fly. Without the model we wouldn't have. The total cost of that model was absorbed in the Indian resolution. None of those costs were ascribed to the non-Indian settlement.

In addition, a great deal of the impetus for settlement on the non-Indian version claims came from the very hard line approach the state took to litigation on the Indian claims. As a result, whatever the causes were, we cut a deal. I think you ought to compare the claims stated by the United States and those awarded by the court. For the non-Indian reserved right claims, two small wells were given a reserved right. There were no other reserved rights in the state of Wyoming. The federal government was given a water right which expressly was not called a reserved water right.

The United States got water rights which were a) junior to all state water rights b) they were junior to all waters which had been identified for potential development by the state. (We started calling it a state reserved

right.) Each one of those had a little fudge factor attached to it to make sure we had a little slack in the system. Only after that, in the third general priority came federal reserved rights. We saw that as a major victory for the state.

Remember, down there, the state has for years struggled with the issue of instream flows, whether or not the state ought to encourage instream flows. The answer there, unlike Colorado, was no. Never could get the legislature to adopt an instream flow bill. As a practical matter, all the senior water rights are down at the mouth of the streams, so they call water down to their headgates from the upper reaches of the streams, and instream bills aren't needed. As a general matter, the senior water rights are low on the stream and call water to themselves and preserve the instream flow.

We have real problems in the national forest. The original claims for the United States were for quantification points at the boundary and at the mouths of each one of these tributaries. We were quite certain that they'd take the approach that was taken in Colorado and say, "We want a minimum flow in cfs throughout a stream reach." We didn't see any claims for reaches. We saw claims for quantification points. But those quantification points did have cfs attached to them. Our biggest problem was that upstream of these quantification points, there were state awarded water rights--diversions--which would be cut out sort of like Denver's transmountain diversion. We had to do something.

The original claims of the forest were for 78% of the natural flow. Now this is after the New Mexico case where it was decided that there were no instream flows for fish, wildlife, and aesthetic purposes. This was for production of timber and protection of watershed. One of the biggest surprises of the Rio Mimbres case was when the Supreme Court said that national forests were not created for recreationl purposes--they were created for commercial purposes, to provide timber supply and to provide water for downstream municipalities and users. The United States said, "We need 78% of the virgin flow" to do that. We thought that was a little much. We started negotiating. Soon that was down to 22%--the amount necessary for flushing flows to maintain the integrity of the channels. Once we had the 22%, we went back to the model and said, "Where are the red areas?" All of a sudden the tributaries started turning up with red areas--diversions above quantification points. We eliminated this quantification point right here on the mainstem. With that eliminated, this fellow was no longer red. He was blue--he was irrigated. And we can't eliminate this one--the United States started to get a little antsy with all these zeros. Their quantification points kept disappearing. We just moved them all upstream of the diversions. And when we couldn't agree to moving them upstream, and we couldn't agree to deleting them, we just assigned them a streamflow value of zero. That negotiation process took a long time. The United States got to the point where they said, "We can't accept any zeros. It doesn't look good. The Sierra Club might sue us." And we finally agreed that every place there was a zero, we'd just move it upstream above all the major diversions.

So the final result was there were no reserved rights for non-Indian purposes in the Big Horn Basin. The water rights of the United States were just called "water rights of the United States" based on state law, subordinated to all existing state water rights. We also identified all potential storage programs and potential water development projects on each of these streams, and subordination was made to those as well, and after that subordination was made and the quantification points moved basically above every significant diversion and storage facility, we had a deal. That deal we took to district court. The United States asked that the state put on its prima facie case in support of the deal and the deal went to bed. It took about twenty years and three quarters of a million bucks. As you can tell, the progress of it was a little different from the negotiations you might expect. It was all due, basically, to the model. The lawyers like to say, "Hey, it was the lawyers who won the case," but, in that case, the model did.

QUESTIONS:

Keith Bayha (USFWS): Question on flushing flows (unintelligible)

White: It was originally set up so that the quantification of these various points were made in acre-feet per year and cfs during particular months. (Remarkable similarity to habitat preference curves.) We got rid of all the cfs and we thought we were going to get just acre-feet per year on those quantification points until somebody wised up. And we ended up getting, if you look at that stipulated decree, we got total acre-feet per month. So, that instream flow, according to the deal, could all be satisfied in one day. If during January there were 12 acre-feet at the quantification point, if it came in one day, the deal was satisfied. That's the basic national forest claim that's being made now. I think we've dropped from 78% to some lesser number. We're just in the middle of discovering Colorado to find out what that current number is.

Wanamaker: In the books there, I didn't really see anything dealing with mining properties. Did I miss them? It seems to me that the mining community--and I know there is some in Colorado--have a great deal of concern over how this was developed. There would be advantages and disadvantages to either side prevailing or settling something that was unsuitable for (unintelligible).

White: The mining industry was very active in the Colorado case until the Supreme Court ruled that there were no instream flows for national forests based on the original Organic Act purposes. The mining industry is very concerned. But since the additional purposes came into existence in the 1960 Multiple Use and Sustained Yield Act, they assumed that if there were reserved rights for those additional purposes they would be from 1960 and later. Most of the significant mining water rights predated 1960. They weren't worried. Then when the Supreme Court said, "You don't even get water rights for 1960 act purposes", the Colorado court said, "You have no instream flows at all for national forests in Colorado."

Part of the problem was the United States had failed to claim instream flows for the original Organic Act purposes. They claimed instream flows only for the 1960 act purposes. Part of the requirement for a general adjudication is that if you are served and made a party to the adjudication, you file all your claims or you lose them. What the United States failed to do was to assert claims for the original purposes of the forest. They asserted instream flow claims only for the 1960 act purposes. Therefore they lost the chance to make those claims. Later they came in and tried to make amendments to include those other purposes, and the court said, "Forget it." That issue now is on appeal to the Colorado Supreme Court. Basically how many years after the final decree can you amend your claims? This amendment issue is going to be a real barn burner. All the private parties have blood pressure through the roof, and the feds, Department of Justice folks, find it may be the only way to escape some pleadings that were drafted in the early days of reserved rights before anybody had any reason to understand the way it was going to go.

Rybachek: Under the 1872 Mining Law, has anybody addressed the reservation for water that goes with the federal claim?

White: That's a section 497 argument. It was raised in Colorado, and was ruled on by the lower court favorable to the mining industry. The Colorado Supreme Court, as I recall, either dealt with it in sort of a back handed way, or else said, "There aren't any instream flows, we aren't going to worry about it." It is one of those issues that dropped out because it was no longer important.

Wanamaker: Two chief concepts of "minimal" and "entirely defeated", who decides what are minimal needs, and if the purpose is not entirely defeated? If I were an Indian, I would be very worried. Is it the national forest or state court?

White: The Forest Service decides what it is going to claim. The state court or the federal court makes the eventual decision.

Meacham: We've had an ongoing concern in Alaska about the state being the only agency that can bring about a basin-wide adjudication. I know Charlie Roe in Washington state has complained about the fact that a lot of private parties have brought basin-wide adjudication on basins that are not very important from the state standpoint, but the state gets drawn into the litigation and spending a lot of money. Are you aware of any state legislation that absolutely precludes anybody but a state agency to adjudicate basin-wide?

White: Wyoming has. It's fairly explicit. It says, "The Attorney General acting upon the direction of the governor shall...". That's the kick-in clause in that particular amendment to the Declaratory Judgements Act.

Meacham: The Senate Bill 150 that has been introduced here says, "The Commissioner of Natural Resources shall initiate...". If it is discovered there are federal reserved rights within that basin, then it moves into judicial mode.

White: I wonder if you have an administrative adjudication, and later the United States comes up with a reserved rights claim, you are going to have to go back and do a judicial anyway, because the administrative adjudication in the Pacific Live Stock case isn't going to be one of those things the United States is bound by. It's not a suit. So I would worry about the necessary judicial character of the suit under the McCarren Amendment in your drafting on 150.

Meacham: I think it's designed so that as soon as there are any federal reserved rights identified that it would go judicially. There may be some smaller discrete basins in Alaska where there wouldn't be a federal reserved right identified at all.

White: Let me say something about the Sierra Club case, the Block case. I think you have a copy of Judge Kane's decision. He has a pretty good feel for reserved rights legislation. What happened was the Sierra Club came in to state court and asked they be allowed to intervene in the adjudication of the United States claims. The state court said, "Go away, you're too late, even if you had standing." Then they brought the action to the federal district court against the United States for failure to assert the claims to the wilderness area. The interesting question is, let's assume that the U. S. district court said, "Yes, the federal government should have asserted those claims." The Colorado court said, "It's too late to assert those claims," what's the net result? That's the probable outcome.

Meacham: I can see that happening also in the context of Indian rights where the federal government may fail to assert rights on behalf of an Indian or native. I assume the remedy there, if the state court adjudication has been completed, would be a court of claims money damages.

White: The tribes tried to come in and reopen Arizona v. California to assert additional claims. The U.S. Supreme Court said, except for some issues that were expressly left open the first time around, "Go away." So I suppose that court of claims approach may be the approach. That's been rumored in the Wyoming case. In the Wyoming case, the Indians received state water rights in 1905, which would give them the most senior priority on the stream to irrigate 150,000 acres of land. Those basically were surrendered by the United States. They were obtained with money derived from sale of Indian lands. They sold Indian lands, took that money, acquired state water rights to irrigate 150,000 acres, senior most water rights in the stream, then abandoned those water rights to seek federal reserved rights. They got federal reserved rights to irrigate 100,000 acres. The suggestion has been that the tribes do have a court of claims claim.

Now if you want to find some interesting reading, take a look at the United States briefs in the court of claims on these kinds of cases. All of a sudden where the United States has been claiming pretty substantial amounts of water in the adjudication, when they are defending, all of a sudden "minimal needs" and "entirely defeated" and "moderate standard of living" pop up and they say, "Look, these guys weren't entitled to any water anyway." It's fun to take the court of claims briefs and use them in the adjudication.

Meacham: What was the strategy behind abandoning the senior appropriative rights and planning federal reserved rights?

White: I don't know. They started out with about 150,000 acres worth of water rights. Then about 1965, which was two years after Arizona v. California, they abandoned about 60,000 acres worth of water rights. Those were water rights which had never been developed. The State Engineer of Wyoming had granted a series of 5-year extensions to keep those water rights alive. In the Wyoming system, you obtain a permit and make your appropriation, and after you actually divert the water and apply it to beneficial use, you get a certificate. Permits had been issued in 1905 but never certificated. So 5-year extensions have been given. In 1965, the United States refused them to extend them. The State Engineer wrote them a letter saying, "Please extend, they are going to be abandoned if you don't extend them." The United States just didn't answer. They abandoned them. They had roughly 90,000 acres left under state rights for which they claimed only 50,000 acres of reserved rights, and the rest of the reserved rights claims were for future projects. They left out about half of the actual use on the reservation, and then the district court cancelled all the state water rights that were overlapped by federal reserved rights.

Meacham: Sounds like some of the federal lawyers are cutting their water law teeth on that case.

White: It's easy to jump on the Dept. of Justice lawyers, but they are in an impossible situation; they get very little cooperation from the agencies sometimes, especially the BIA. The state has all the advantages. When talking about a well coordinated litigation effort and negotiation effort, the state has the advantages. It's an impossible situation for the feds. That's why you will hear time and time again, let's negotiate.

Montana is a wonderful example. Somebody asked this morning how many actual settlements had come out of the Montana negotiation? The answer is zero. The way that was set up, when Montana started their adjudication process, everybody had to file their claims by a certain date. Excused from that filing requirement were claims by the United States and the Indians as long as there were negotiations going on. So they began negotiations, were excused from that, but the negotiations had to be finished by a certain time. If the negotiations weren't finished, that time was extended. It's about to run out. I think its been extended yet again. The great question asked after the Western States Water Council meetings, "How many water rights have you got quantified by negotiation?" I think it's fair to say that among the ongoing activities, only Wyoming for the non-Indian claims got any quantification by negotiation.

Christopher Estes, ADF&G: While the status of the basin is unknown, what happens to the people that haven't appropriated water that are standing in line? Is there a moratorium on appropriations?

White: What happens to those people in the state system that are trying to get into the system? A good question that also applies to SB 150. In Wyoming, we desperately tried to get the Board of Control, which is the

senior state agency--it's a constitutional agency for adjudication of water rights--to be the master, because the State Engineer issues permits, and the Board of Control, which is made up of all the division engineers plus the State Engineer, issues certificates. We wanted that state system to keep going, so there wouldn't be the kind of interruption that you have suggested by your question. We suggested to the court that the state Board of Control be the master. The United States and the tribes came absolutely unglued. We tried it four times before we learned that we weren't going to get any state agency as the master. The latest was about two months ago.

It's absolutely clear that in terms of politics of litigation we are going to have complete agreement on the advantages of the master or its going to be a real fight, and we're not going to have a state agency as a master. If you don't have a state agency as a master, how do you deal with continuing business under the state system? We concluded that it was an adjudication and therefore any changes in permits and certificates need not be brought before the court. The state administrative apparatus could continue to deal with those. Then the question came up whether the State Engineer could issue new permits. We said, "Yes, he can do that because the adjudication doesn't take place until you get a certificate." Under Wyoming law you can divert water without going to jail if you have a permit. It's not necessary to go on to the certificate. So as a practical matter we let the system go on but we just never let the Board of Control deal with certificates in the adminstrative adjudication of water rights. We said all adjudication issues are before the court. Extensions were freely given.

Estes: (paraphrase) Can I get a copy of the transcripts of these presentations on federal reserved rights?

White: I want to make it clear that it was John Hill from the Dept. of Justice that was speaking this afternoon.

Commissioner Wunnicke: (paraphrase) Yes, our staff can supply you with copies...(unintelligible)

White: Yes, there were that kind of inholdings. The reservation was originally shaped like a big square. The river comes through like this, the Wind River, and the Little Wind comes in like that. In 1905--remember I said the Indian lands were sold--those Indian lands were everything north to the river, the big lands, and everything east to the Little Wind. The tribe essentially ceded those lands to the United States and the U.S. then sold some of those lands and gave the money to the Indians. The lands that were not sold in about 1940 were restored to the reservation. The red and blue dots on those maps are water rights obtained by non-Indians under state law after the session. In addition, once this became Indian reservation through the Birch Act, individual Indians could obtain their own lands and deeded allotments. Those allotments ought to have ....(unintelligible).

Ross Cavanaugh, NPS: (paraphrase) What is the history of the expressions "minimal needs" and "entirely defeated"? I'm wondering whether those words and phrases have been set in concrete.

White: I plagerized those words from the U.S. Supreme Court. This line of cases started in 1976 or 1977 with the Cappaert case that Bruce mentioned this morning. Whether its labor law or whatever field of law you think about, the pendulum swings back and forth, and by the mid 70's, the pendulum swung about as far as it was going to go, at least in current history on behalf of reserved rights.

(unintelligible) The Cappaert case was the turning point. As Bruce described in the Devil's Hole National Monument portion of Death Valley...(unintelligible). Some people by the name of Cappaert put in a well over here on their land. They had a state water right and what made it particularly frustrating to the Cappaerts, they had only just acquired that land that the well was on, they had made a trade with the federal government. As they began to pump water out of that well, the cone of depression began to spread and pretty soon the water level in that limestone cavern began to drop to the point where it affected the vegetation on this little ledge that was the spawning ground for those fish. Without the vegetation, the fish wouldn't spawn and they'd disappear. As a matter of fact, Harry Truman's executive order setting aside the land, in 1952 or 1956, said it was not only the land but the water that was set aside so they had an expressed reservation.

Everybody was surprised by what the court did. The United States came in and got an injunction against the Cappaerts. The district court says "Thou shalt not pump". It got to the U.S. Supreme Court and something different happened that meant a lot. First of all the U.S. Supreme Court says, "We never before held and we're not holding now that the reserved rights applies to ground water." If that isn't ground water, what the hell is? The Supreme Court says, "It's a surface pool, it may be a subterranean cavern but its a surface pool." Everybody laughed and giggled about that. The United States cites it as a case for reserved rights applied to ground water and now everybody else points out the language and says, "No, it doesn't apply to ground water." It's one of those laughers in the area of law.

The most important thing was that the United States sought to totally curtail pumping so long as it had any effect on the water level in that limestone cavern and the Supreme Court said, "No." It said that there is a little copper washer on the side of the cavern and as long as the water level is a certain distance from that washer there is going to be enough plant growth there for the fish to survive. So the injunction was modified to read that the Cappaerts were enjoined from pumping only if their pumping resulted in the water level dropping below a certain point..."minimal needs". The United States wasn't entitled to maintain the pool in the cavern, only enough to keep that vegetation growing for the fish.

That's why when you throw up your hands in despair over national parks or whatever as may be requiring a pristine environment, think about Devils Hole, because there the United States tried that and they didn't get it. They got just a minimal amount, enough necessary to preserve that breeding ground. If the breeding ground had been much further down there wouldn't have been much water required.

The catch to your materials are, as Larry kindly provided, the executive order statutory provisions applying to the Kenai National Wildlife Refuge. It's interesting to compare the purposes there. On the executive order you see that it's reserved for the purpose of protecting the natural breeding and feeding range of the giant Kenai moose. That was set aside to protect the pup fish. Lest you get excited when you are told that wildlife refuge has to be maintained in its natural condition, remember the pup fish.

Meacham: There's another point there...I suppose you could argue that the preservation of moose habitat dates from 1941, preservation of dall sheep and other habitat dates from 1980...

White: That's exactly right. If you didn't make that argument you should be disbarred. Here's the 1941 reservation by executive order, and another 250,000 acres was added to it in 1980. We got a portion of this reservation with a 1941 priority date, a portion with a 1980 priority date, and compare the purposes in the executive order and the purposes set out in the 1980 statute and you'll see that they are different. The purposes set out in the 1980 statutes get a 1941 priority date only if there is exact correspondence between the 1941 and the 1980 purposes. Otherwise if the new purposes don't correspond with the old purposes, they get a 1980 priority. One of the things I was going to do if I had time was sit down and go through this thing.

Craig Lynd: A question on this subterranean water thing. Did the court make the distinction between the amount of water to protect every last fish, or to protect a portion of the population?

White: They didn't talk about it in terms of what portion of the population they were going to protect, just in terms of protecting that spawning area. I suspect if there had been evidence that there were other lichens lower down, then the court might have dealt with it. But this is the only one, so really it was a double or nothing issue for the Court. The only way that ..(unintelligible)..that impact was that the pool doesn't have to remain full. It can drop down till it's just about to the critical point.

Meacham: I assume its also significant in that case that the Devil's Hole pupfish was an endangered species and this was the only place it is known to inhabit, that if any of them died, it would have a material effect on the viability of the remaining population.

White: What the Court did was say we have an expressed reservation of water here to maintain this population of fish. We are going to honor that reservation but only to make sure it is not entirely defeated, give it minimal amount of water necessary.

Vanderbrink: Does any of this affect the National Park Service, expanding the Kenai National Wildlife Range to include the Tustamena Lake and are they about the close down the ADF&G enhancement hatchery there because things have to be left in a pristine condition?

White: I don't know. (Unintelligible comment)

Estes: (Unintelligible question re Wyoming and Colorado water rights systems.)

White: Remember there are two versions of the prior appropriation doctrine in the American west. One is called the mandate version where it is strictly a court operated activity, and the other is called the permit version where it is a state administrated entity. In Colorado (this is a lie, but it's about 99 % true) administrative agencies have absolutely nothing to do with granting water rights. You get a water right by going out and diverting and using the water and then you go to court and get a confirmatory decree of your appropriation. The system of water courts continue in business. Each year is a new adjudication. Business continues as usual. Each year water rights that are granted based on applications filed in that year are junior to applications in previous years, so the United States really doesn't care. The traditional general adjudication that used to occur in Colorado and now is occurring in Wyoming, so long as you file your claim during the tenancy of that adjudication, you take your place depending on your date of appropriation and then everybody that files a claim on the next adjudication, if there ever should be one again, God forbid, will be junior regardless of their date of appropriation. The problem in Wyoming is that the first adjudication stayed open so long that it had chilling effect on state administrative action. In Colorado you didn't have the same problem.

Dutton: In Alaska there are many areas where there are basins involving federal reservations (unintelligible). Do you see any particular advantage in being hasty in adjudicating those reserved rights?

White: No. The one exception to that is where the state has identified a major water development project that is going to require quantification of all water rights before you can decide whether you want to go ahead with it. There may not be any water right associated with that future project. That was the big bugaboo in Wyoming that we worried about and had to create a state reserved water right for.

Dutton: We know that a number of federal agencies are either quantifying or thinking about quantifying instream flow reservations. Under Alaska law, instream flow may be reserved for recreation, navigation, wildlife habitat, and water quality purposes. Can you offer any precautionary guidelines in adjudicating applications from federal agencies for instream flow reservation under state law where instream flow reservations needed for reserved rights under the purposes of the reservation are involved? In other words, we are not adjudicating federal reserved rights. We have an obligation for, say, habitat when that's not the purpose of the reservation.

White: The question is when you have an opportunity, should the state create an instream flow water right rather than forcing the federal government to do it? I think that's a question of state policy. If the state wants to encourage instream flows for specific purpose, it should go

ahead and do that and not figure that the United States ought to do it's dirty work for it. On the other hand if it doesn't, it ought not to be doing the United States work for it.

Dutton: Is there anything we could do that would protect the state down the road when we get to the point of having to adjudicate the federal reserved rights where we have already managed instream flow reservations for other purposes to that particular agency?

White: Under state law?

Dutton: Yes.

White: I guess I'd answer it the same way. State policy to encourage, do it yourself instead of depending on the feds to do it. If later on you get in a bind you can't point to the feds though.

Dutton: This is what we were getting at this morning. Am I confusing the issue?

Meacham: One advantage would be you if could give the federal government some assurance of protection and at the same time you wouldn't have to be adjudicating basin-wide and you wouldn't have to involve other appropriators except to the extent they might have priority over the instream flow if they previously filed.

White: Under normal circumstances is it an administrative process for state reserved stream flows?

Meacham: Yes.

White: If I were the federal government I'd say, "I appreciate your motives but what have you done for me lately?" Because administrative procedure isn't going to have any lasting effect. If push comes to shove down the road you've got to have an decree. An administrative order is utterly worthless vis a vis the United States.

Meacham: Unless in this situation the instream flow granted in 1985 is really not materially different than what we have been granted by a reserved right claim as of a 1980 priority.

White: There's another aspect of that which we ought to speak of privately.

Rybachek: That's very nice that we should take concern for the federal interest here. You've mentioned lots of money here and the state is always coughing up the money. It's a federal reserved right and it seems appropriate to me that if the federal government wants the reservation, they should foot the bill. There hasn't been any discussion along that lines.

White: Litigation isn't free for the feds either. They had a tag that's roughly comparable to the state in Wyoming. The question came up earlier in the Wyoming litigation about who was going to pay for the master. I don't know how it is in Alaska, but in Wyoming, retired Congressmen don't come cheap. We had to pay that rascal by the hour-- not only him but his 18 assistants. The best we were able to do was to get a court order that the United States pay half the master's fee. They paid it under protest.

Rybachek: Seems like they're only paying half of the bill because it's a federal issue. There was no problem in the areas prior to the federal reservation and the adjudication is required due to the reservation. If this reservation delineated out for the purpose of the withdrawal, they should pay for it. Or the users of the withdrawal should pay for it through a user's fee. Somehow the taxpayers of the state shouldn't be footing the bill for the federal government.

White: There are two problems. First, the McCarren Amendment prohibits the assessment of costs against the United States. They said, "You can make us a party, but don't expect us to pay for the refreshments." The question comes up, what are costs? Colorado, under the old approach, each party had to pay a prorata portion of the cost of the adjudication depending on how much water they received. The United States was assessed with costs based on roughly that approach. Costs may apply to experts' and attorney's fees, but it doesn't apply to the fundamental cost of administering the adjudication. Unless you have a process by which every water right claimant is tagged for a portion of the cost of adjudication, you are not going to be able to stick the United States for that under the McCarren Amendment.

Vanderbrink: I hate to stop this, but if I don't we'll be in trouble down the road. This has been one of the most interesting testimonies I have heard in a long, long while.

TO: Jack Sedwick
Director, Div. of Land
and Water Management
DNR - Anchorage

DATE: Nov. 19, 1982

FILE NO: 166-262-83

TELEPHONE NO:

FROM: Wilson L. Condon
Attorney General

By:
Kenneth C. Powers
Assistant Attorney General
AGO - Anchorage

SUBJECT: In-Stream Flow Water Reservation
A.S. 46.15.145

On August 27, 1982, you requested this office's legal advice concerning the in-stream flow water reservation contained in A.S. 46.15.145. Specifically, you asked whether, in the wake of the Reagan adminstration's modification of Solicitor Krulitz' opinion concerning non-reserved water rights, 1/ the in-stream reservation of water is still needed to deal with the federal government's assertions of water rights. 2/

The short answer is yes. Without setting forth in detail the history of the state-federal disputes concerning jurisdiction over water rights, our advice is based upon the

1/ Solicitor Krulitz Opinion is Dept. of Interior Solicitor's Opinion No. M-36714, 86 I.D. 553 (1979). It was rejected by the United States Department of Justice in a memorandum entitled Federal "Non-Reserved" Water Rights, dated June 16, 1982.

2/ It is important to note at the outset that the legislative history of A.S. 46.15.145 indicates that concern about the federal non-reserved water rights theory, although considered by the legislature, was not the major purpose for the statute. Rather, the statute was designed to permit state regulation of numerous in-stream uses of water, such as navigation, fishery production, hydroelectric uses, suction dredge mining, etc., to ensure and simplify procedures for protection of these vital in-stream uses. See Governor's transmittal letter and Report of Resources Committee on CSHB 118, attached to this Memorandum as Exhibits "A" and "B".

following three major premises which appear in federal decisional law, federal statutes, and the current administrative position regarding federal water rights.

1. Regardless of the basis for the federal assertion of a water right, whether a "reserved" water right, a "non-reserved" water right, or a specific congressional directive, state laws and procedures control federal rights and liabilities where the state law in not inconsistent with specific congressional directives or authorizations and where the application of state law would not frustrate the primary purposes for the management of federal lands or the construction and operation of federal projects. California v. United States, 438 U.S. 696 (1978); United States v. New Mexico, 483 U.S. 696 (1978); Federal "Non-Reserved" Water Rights, United States Department of Justice Memorandum at 76 (June 16, 1982). (hereinafter "Justice Memorandum").

2. The federal "non-reserved" water rights theory proposed by Solicitor Krulitz has been rejected as a basis for any assertion of federal water rights. Justice Memorandum at 79. However, the existence and extent of federal "reserved" water rights must be decided on a case-by-case basis. Thus, the State may still be faced with assertions of federal water rights based upon express or implied federal reservations or other theories

which may be developed in the future. Justice Memorandum at 76-79. See also Cappaert v. United States, 426 U.S. 128 (1976).

3. A.S. 46.15.148, establishes state substantive law and procedure which, if not inconsistent with specific expressions of congressional intent, will control any federal assertion of rights to minimum in-stream flows. The McCarren Amendment, 43 U.S.C. § 666, provides that the United States consents to join as a defendant in any suit for the adjudication of rights to the use of water of a river system or other source. As a result, the United States may be brought into state court in a general water adjudication. See e.g. U.S. v. District Court for Eagle County, 401 U.S. 520 (1971). In such adjudications, the state in-stream flow statute and regulations would apply and important factual questions (e.g. How much water is needed for the purpose of the reservation?) will be decided in accordance with state law.

Please do not hesitate to contact this office if you have any further questions or would like to discuss in greater detail the legal principles set forth in this memorandum.

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Attachments