BY THE COMPTROLLER GENERAL

Report To The Congress

OF THE UNITED STATES

8340

Reserved Water Rights For Federal And Indian Reservations: A Growing Controversy In Need Of Resolution

Undetermined Federal and Indian reserved water rights in the Western States are causing great uncertainties about existing water uses and for potential water users. This report discusses the origin and nature of reserved water rights, the controversial questions and issues surrounding them, and proposals suggested for resolving them.

There is an urgent need to settle the problem because the controversy is becoming more acute as new and existing water uses place greater demands on the limited water supply in the Western States. This report endorses the President's recently announced water policy initiative which directs the Federal agencies to resolve the reserved water rights issues.

GAO recommends that the Congress review the Federal agencies' progress in carrying out the programs implementing the policy initiative.

CED-78-176
NOVEMBER 16, 1978

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-167941

To the President of the Senate and the
Speaker of the House of Representatives

Undetermined Federal and Indian reserved water rights in the Western States are causing great uncertainties about existing water uses and for potential water users. This report discusses the origin and nature of reserved water rights, the controversial questions and issues surrounding them, and proposals suggested for resolving them.

There is an urgent need to settle the problem because the controversy is becoming more acute as new and existing water uses place greater demands on the limited water supply in the Western States. This report endorses the President's recently announced water policy initiative, which directs the Federal agencies to resolve the reserved water rights issues. We recommend that the Congress review the Federal agencies' progress in carrying out the programs implementing the policy initiative.

We made our review pursuant to the Budget and Accounting Act, 1921 (31 U.S.C. 53), and the Accounting and Auditing Act of 1950 (31 U.S.C. 67).

Copies of this report are being sent to the Director, Office of Management and Budget; the Secretaries of the Interior and Agriculture; the United States Attorney General; officials of the 11 Western States; and other interested parties.

Comptroller General
of the United States

COMPTROLLER GENERAL'S REPORT TO THE CONGRESS

RESERVED WATER RIGHTS FOR FEDERAL AND INDIAN RESERVATIONS: A GROWING CONTROVERSY IN NEED OF RESOLUTION

D I G E S T

Increasing competition for limited water resources plus recent severe drought in the Western United States are signs that another resource crisis--over an adequate water supply--may be rapidly approaching. The manner and time within which present and emerging water supply problems are resolved can have an enormous effect on the country's future.

Undetermined Federal and Indian reserved water rights is one of the difficult water resource problems in the 11 Western States. This problem is causing controversies and litigation, can lead to economic and social disruptions, and inhibits the efficient use of scarce western water resources. The problem probably will get worse as increased demands are made on the available water supply.

GAO prepared this report to air the controversial and unresolved issues and to stimulate an urgently needed solution.

WHAT ARE RESERVED WATER RIGHTS?

During the early period of Western settlement, the Congress, through legislation, permitted the control and distribution of water resources on public lands to pass to the States and invited the public to appropriate and use the water in accordance with State law. Since then, most of the Western water supply has been appropriated as the West was settled and developed. (See p. 3.)

At the time water was being appropriated by the western settlers, however, the Federal Government was creating Indian reservations; military reservations; and other Federal reserves, such as National Parks and Forests, on the public lands. Since 1908 the courts have held that when reservations were created from lands withdrawn from the public domain, there was simultaneously reserved from State appropriations sufficient water to satisfy the purposes for which the reservations were established. This principle is commonly referred to as the "reserved right" or "reservation" doctrine. (See pp. 3 and 4.)

WHAT ARE THE ISSUES AND CONTROVERSIES?

Federal and Indian reservations encompass a substantial amount of Western land. (See pp. 8 and 18.) Further, Federal reservations are a major water source in the Western States. (See p. 8.) Federal and Indian reservations may require considerable water supplies for such uses as energy development and production, timber and forest management, fish and wildlife conservation, and recreation. Adequate water supplies are an important resource for improving the economic and social standing of the Indians. (See p. 20.)

Federal and Indian reserved water rights are a source of growing uncertainty and intensifying controversy in the Western States because the quantity and nature of such rights, with certain exceptions, have not been determined. Reservation-related water resources are often the main source of water supply for irrigation, communities, industries, and other uses off the reservations.

The lack of information on the amount of reserved water rights makes it virtually impossible for potential water users and State administrators to determine what, if any, waters are available for appropriation under State law for new projects and uses, and what water uses may be superseded by exercise of reserved rights.

Federal agencies cite various impediments to determining reserved rights, such as the lack of a national quantification policy and accepted methodology, insufficient funding and manpower resources, and tribal opposition. (See pp. 12 and 22.)

Although the courts have established the reserved rights doctrine and litigation has settled individual disputes, many controversial questions and issues remain unresolved, causing disagreements and polarized viewpoints between Federal and State officials and concerned parties.

Questions and disagreements concern such matters as the definition, scope, and quantification of reserved rights; the appropriate judicial forum for resolving the disputes; the respective authority in Federal and State governments to administer the reserved rights; and compensating those who may suffer loss by the exercise of reserved rights. (See pp. 15 and 24.)

Two very controversial issues concern:

--Determining water quantities reserved for a reservation's future needs. State and private sources argue that such rights should not indefinitely remain dormant in undetermined quantities to meet undefined needs. Federal and Indian sources, however, contend that future reservation water needs cannot be predicted with certainty and, therefore, final determinations should not be made. (See p. 7.)

--Compensating State water rights holders for losses resulting from the exercise of reserved rights. State and private sources contend that although their rights were established after a reservation was created, the reserved rights were undefined and unquantified; also the development of water resources under State water rights systems was encouraged by the Federal and State governments. (See p. 7.)

As of August 1978, there were 44 court cases pending concerning Federal and Indian reserved water rights. GAO examined four of the cases to get a better understanding of the nature and potential effects of the reserved rights controversies. (See ch. 3.) Although the courts continue to address the issues on a case-by-case basis, the judicial mechanism involves complex, protracted, and costly litigation which may continue for decades.

Over the years, many unsuccessful proposals, mostly legislative, have been made for clarifying and modifying the reserved rights doctrine. More recently, several organizations representing various interests issued policy statements for resolving the reserved rights issues. The proposals and statements not only indicate the great concern over the problems but show the range of alternatives considered for removing the uncertainties and resolving the issues. (See ch. 4.)

This report discusses key factors which should be considered for resolving the reserved water rights controversy. One approach, to seek a legislative solution, was proposed in a draft of this report because it could lead to a national quantification policy, narrow the range of issues requiring negotiation or litigation, help solve existing problems, and lessen future controversies. (See p. 51.)

GAO then requested comments on the draft report from the Departments of the Interior, Agriculture, and Justice; officials of the 11 Western States; and the Joint Committee on Indian Water Rights of the National Congress of American Indians and National Tribal Chairmen's Association. Shortly thereafter the President issued his Water Policy Statement.

THE PRESIDENT'S WATER POLICY STATEMENT

The President directed the Federal agencies to work promptly to inventory and quantify Federal and Indian reserved water rights and resolve the controversies surrounding the issues.

Neither the policy statement nor the implementing directives called for a legislative solution. The President's instructions on Federal reserved rights said that quantification action should be taken primarily through administrative means--formal adjudication should be sought only where necessary and resolution of disputes should include a willingness to negotiate and settle such rights in an orderly and formal manner. Regarding Indian reserved water rights, the President stated that negotiation of the rights is favored because judicial resolution of the rights is a time-consuming and costly process.

The President assigned the Secretary of the Interior the responsibility to organize and coordinate the efforts, and directed the Federal agencies to report on their plans and actions to implement the directives by June 6, 1979. (See p. 54.)

FEDERAL, STATE, AND INDIAN ORGANIZATIONS' COMMENTS

Federal and most States' comments indicated agreement with the report message on the need for resolution of the reserved water rights controversy and expressed the view that the subject matter was well presented in a balanced objective manner. However, not all of the parties agreed with the proposal for a legislative solution. Some States offered specific suggestions on the manner in which reserved rights should be established. The Indian reply disagreed with the report presentation, its conclusions, and the legislative proposal. The comments are summarized on pages 54 to 58, and are included in their entirety as appendices IV to VI to provide a complete perspective of their views.

CONCLUSIONS

The reserved water rights controversy is becoming more acute and inhibits the efficient use of scarce Western water resources. While GAO continues to believe that, in the final analysis, legislation

may be necessary to resolve the controversial questions and issues (presented in ch. 2), GAO is endorsing the President's policy initiative because there is an urgent need to address the problem. It represents, for the first time, a comprehensive action program to inventory and quantify Federal and Indian reserved water rights.

If implementation of the administrative approach discloses that legislation is necessary to fully resolve the reserved rights issues, the Federal efforts should provide valuable information to the Congress, in considering a legislative solution, on such matters as the

--problems in defining and quantifying the reserved rights and

--the nature and significance of disruptions to existing water users which may result from the assertion of the reserved rights.

Information on the last matter would help the Congress make knowledgeable judgments if it wishes to consider compensation to those who may suffer loss by the exercise of reserved rights. (See p. 58.)

RECOMMENDATION TO THE CONGRESS

The Congress should review the Federal agencies' progress in carrying out the President's program for resolving the reserved water rights controversy during the legislative oversight and budgetary process. If the Congress decides that effective progress is not being made because of inadequate resources, it should direct the agencies to give the program more attention and funding. If adequate progress is not being made because of the difficulties in resolving questions and issues discussed in the report, the Congress should consider a legislative solution. (See p. 58.)

Contents

ABBREVIATIONS

BIA	The Bureau of Indian Affairs
GAO	The General Accounting Office
NCAI	National Congress of American Indians
NTCA	National Tribal Chairmen's Association

CHAPTER 1

INTRODUCTION

Although the United States as a whole has an abundant water supply, the geographical distribution and availability of its water resources often does not match needs and demands. This condition, magnified by the Nation's continuing population growth and development, has led to water shortages and increased competition for the limited supply.

Today the United States is a highly developed, affluent, and industrial Nation, but new priorities are emerging. The need to meet energy, food, and fiber demands; changing land use policies; preservation and enhancement of environmental, esthetic, and recreational values; and development of Indian reservations place new demands on the Nation's water resources. The manner and time within which existing and emerging water problems are resolved can have an enormous impact on the welfare of the country. The challenge is to reshape water policies and programs to seek solutions that best satisfy the Nation's social, economic, and environmental goals.

As part of our continuing assessment of national issues, and to help direct our audit activities, we have identified what we consider the existing and emerging water supply problems facing the Nation.1/ One of the problem areas identified--Federal and Indian reserved water rights--is the subject of this report because of its potentially significant impact on existing and future uses of our scarce western water resources.

While the reserved water rights issue is highly charged and politically sensitive, we believe that the growing water shortages and the recent severe drought in much of the West may now provide the impetus for its settlement. We hope that this report will contribute to a better understanding of the controversy and issues, and encourage timely consideration of a solution.

THE SCARCITY OF WESTERN WATER SUPPLIES

Although the recent drought has placed increased pressure on available water supplies, water has always been scarce in much of the West. State water resource managers

---

1/GAO staff study "Water Resources Planning, Management, and Development. What are the Nation's Water Supply Problems and Issues?" (CED-77-100, July 28, 1977)

claim that the normal flow of most western streams has been fully appropriated for withdrawal 1/ uses and some are overappropriated. Yet water demands keep increasing not only for irrigation, municipal, industrial, and other uses but also for new uses, such as energy development, production and protection of instream values (fish and wildlife habitat, recreation, and scenic beauty.)

The growing scarcity of usable surface and ground water in the West is depicted in the maps on pages 5A and 5B, respectively. Page 5A shows that surface water withdrawals exceed supply in four of the seven basins in the 11 western continental States--the Great Basin, Lower Colorado, Upper Colorado, and Rio Grande--and that water consumption takes nearly all the average supply in three of these basins--Lower Colorado, Upper Colorado, and Rio Grande. Page 5B shows that ground water is being withdrawn in excess of natural recharge rates over wide areas of the West. Even in areas having an annual water supply surplus, seasonal or short-term shortages or drought periods occur.

THE NATURE OF STATE WATER RIGHTS SYSTEMS

Except for Federal and Indian reserved water rights, generally all water rights are administered under State law. Basically, State systems of water rights law follow one of two doctrines: (1) the common law riparian doctrine, used mainly in the Eastern States, where the owners of property adjacent to a stream or other water body share a right to reasonable use of that water and (2) the appropriation doctrine, which grew out of the customs of the gold miners in the West and has been adopted mainly in the Western States, under which the first to put the water to beneficial use has a right superior to later appropriators. This is often referred to as "first-in-time is first-in-right." In some Western States, a mixture of the two doctrines exists.

An appropriative water right represents a share in a water resource and establishes the rights of water users and uses. Generally, it gives title to the use of specific amounts of water, is transferable like title to land, and is subject to forfeiture or loss by nonuse.

1/ Withdrawal uses consume water to varying degrees but may return considerable quantities to streams or ground water where it may become available for reuse. Water consumption, on the other hand, represents water that is consumed; for example, incorporated in a product and therefore not available for reuse.

The Western States developed the appropriative system because of one common problem--the inadequate supply of water. The trend is to subject both surface and ground water to the appropriative system, and each State has its own system of regulation. Under the State systems and laws, the rights of the water users are regulated and administered by a State officer, commonly designated the "State engineer," who keeps records of water use, receives applications for new water uses and registers his approval or disapproval, appoints river basin commissioners or water masters to supervise the distribution of water in accordance with the rights of record, and may institute court actions to adjudicate water rights. Therefore, State water rights are administratively or judicially declared to the holders thereof and this process provides reliable information on the amount of unappropriated water remaining for future development.

WHAT ARE RESERVED WATER RIGHTS?

Appropriative water rights are quite different from reserved water rights, which are essentially based on ownership and reservation of public domain lands by the United States. As an incidence of ownership, the Federal Government also owned the right to use and dispose of the water on public lands.

Through a series of acts, including the Desert Land Act of 1877, the Congress permitted the control and distribution of water on the public lands to pass to the jurisdiction of several States, and invited the public to appropriate and use the water in accordance with State law. At the same time that the water was being appropriated by the western settlers, the Federal Government was creating Indian reservations, military reservations, and other Federal reserves (such as national parks and forests) on the public lands.

In 1908, in the case of Winters v. United States, 1/, the Supreme Court held that when the Fort Belknap Indian reservation was created, sufficient amounts of water were reserved from appropriations under the State law to fulfill the reservation purposes. This principle is applicable to all Indian reservations whether created by treaty, act of the Congress, or Executive order. In 1963, in Arizona v. California, 2/, the Court applied Winters to non-Indian Federal reservations, holding that, "the principle underlying

---

1/ 207 U.S. 564 (1908).

2/ 373 U.S. 546 (1963), decree at 376 U.S. 340 (1964).

the reservation of water for Indian reservations is equally applicable to other Federal establishments."

This principle, commonly referred to as the "reserved right" or "reservation" doctrine, simply means that when public lands are withdrawn or reserved from the public domain, quantities of the then unappropriated water necessary to fulfill the purposes for which the land is withdrawn is also reserved and exempted from appropriation under State laws. As a result, an Indian or Federal reservation acquires reserved water rights which vests on the date the reservation was created and is superior in right to future appropriations under State law.

Although Indian reserved rights are similar in concept to Federal reserved water rights, they are in at least one respect quite different--the actions of the United States with respect to Indian reserved water rights are limited by its fiduciary duty as trustee to act for the benefit of the Indians. This principle derives from the recognition that the United States holds only a bare legal title as trustee while the Indians retain the equitable title to use the reserved water. As a result, the Federal Government must affirmatively assert and defend Indian water rights. In addition, unlike Federal reserved rights, which the United States must manage in the public interest, Indian reserved rights are private rights which may not be taken without the payment of just compensation. The Federal and Indian Reserved Water Rights doctrine--its origin and development--is discussed more fully in appendix I of this report.

SCOPE OF REVIEW

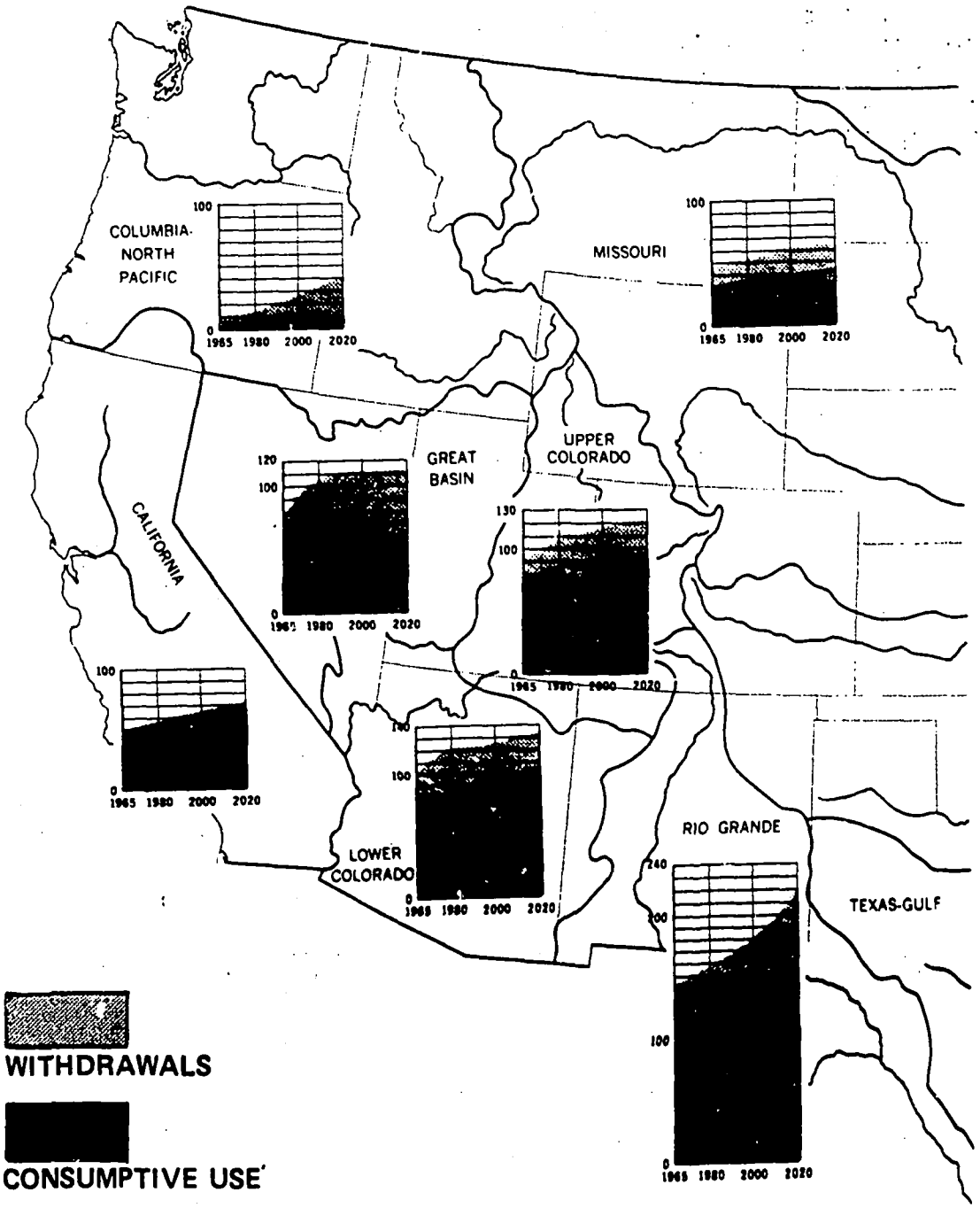
Our review concentrated on reserved water rights in the 11 Western States (see p. 9) where most Federal and Indian reservation lands are located, as shown on the map (appendix VIII). Our review did not cover federally acquired lands or Federal lands held by the Bureau of Land Management for which specific reservations have not generally been made from the public domain.

We discussed Indian and Federal reserved water rights issues and controversies with many knowledgeable persons, both in and out of Government, representing various interests, disciplines, and views, so that we would get a balanced perspective of the problems and proposed solutions. (See Appendix III for a listing of those interviewed.) Also, we examined selected cases of pending litigation to better understand the nature of the issues and the potential effects of reserved water rights controversies.

During our review, a Presidential Water Resource Policy Review Group was conducting a comprehensive review of Federal water resources policy, including Federal reserved water rights. Also, a review of Indian water policy was being made by the Assistant Secretary of the Interior for Indian Affairs. Near the end of our review, the President issued his water policy statement, which listed initiatives for resolving the Federal and Indian reserved water rights issues. These studies and the President's statements and directives were considered in our review and are discussed in this report.

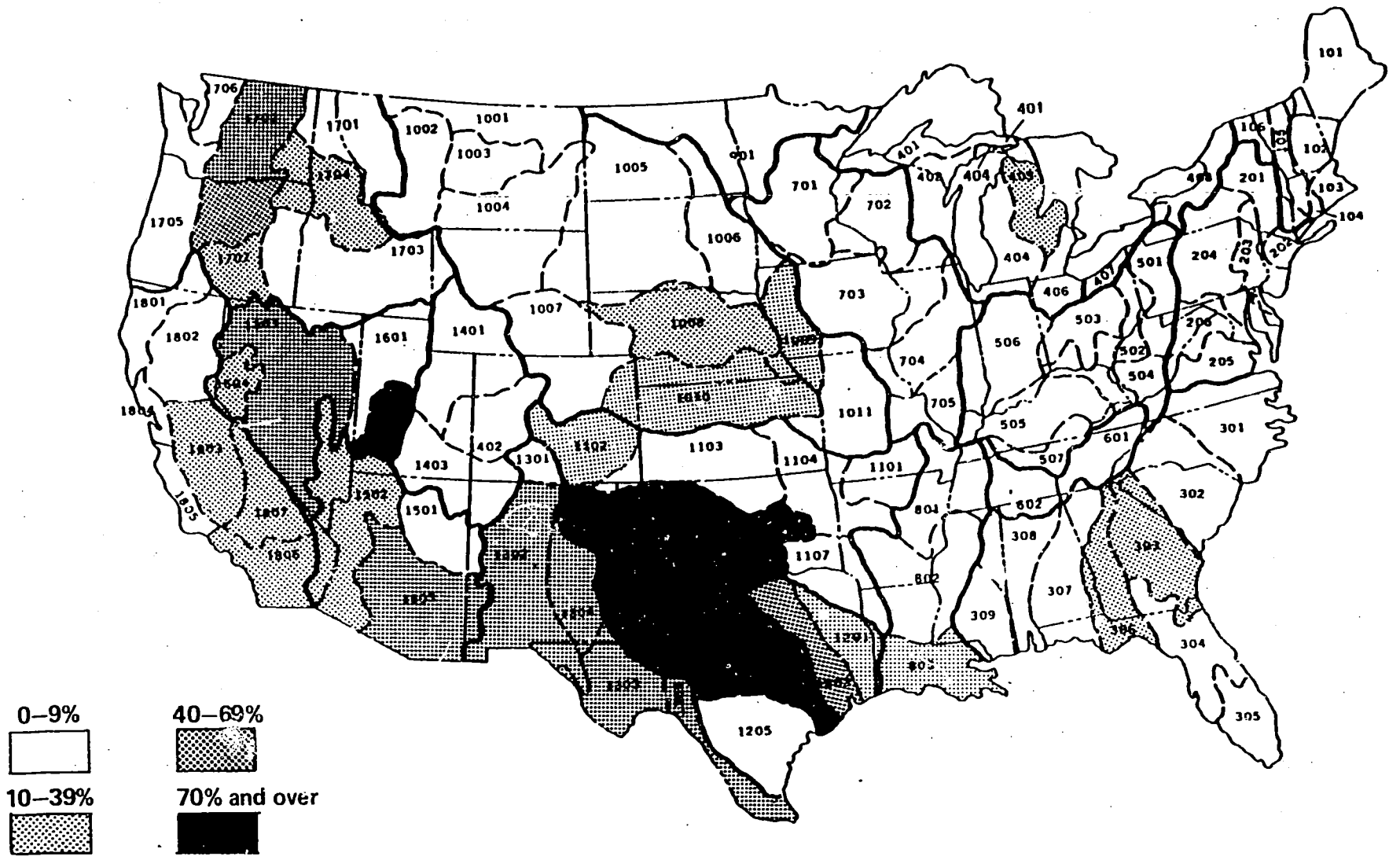
REGIONAL INDICES OF PROJECTED WATER WITHDRAWALS AND CONSUMPTIVE USES FOR THE WESTERN UNITED STATES, 1965–2020

(ESTIMATED AVERAGE SUPPLY EQUALS 100)



SOURCE: WATER RESOURCES COUNCIL 1968 NATIONAL ASSESSMENT

THE PERCENTAGE OF GROUNDWATER WITHDRAWN THAT IS IN EXCESS OF NATURAL RECHARGE RATES---1975



SOURCE. WATER RESOURCES COUNCIL, 1975 NATIONAL WATER ASSESSMENT, DRAFT FINAL REPORT.

CHAPTER 2

FEDERAL AND INDIAN RESERVED WATER RIGHTS

HIGHLIGHTS OF THE ISSUES AND CONTROVERSIES

Federal and Indian reserved water rights are a source of growing uncertainty and controversy in the Western States because the quantity and nature of such rights generally have not been determined but represent potentially significant claims against State-approved water uses.

Federal and Indian reservations encompass substantial western land. Further, Federal reservations are a major source of the water resources in the Western States. Except for some litigated cases, however, the amount of water reserved for the reservations, from what sources, and for what purposes has not been determined. Federal agencies cite various impediments to making these determinations, such as the lack of a national quantification policy and an accepted methodology, insufficient funding and manpower resources, and tribal opposition.

These reservation-related water resources are often the main source of water supply for irrigation, communities, industries, and other uses off the reservations. Assertion of the reserved rights could pose a threat to investments and economies which are dependent on the water sources in which the Federal Government and Indians have undetermined but potentially extensive rights.

Because State water law systems provide a method for acquiring, recording, and adjudicating water rights, they supply an element of certainty to appropriative rights. This permits State water administrators and new appropriators to determine existing rights and the availability of unappropriated water for additional projects and uses. The reserved rights doctrine has characteristics which are incompatible with the appropriation doctrine. For example, reserved rights are based on ownership of land reserved from the public domain, while ownership of appropriative rights is based on the application of water to a beneficial use. Reserved rights, therefore, can remain dormant indefinitely in undetermined quantities to meet undefined needs.

The lack of certainty concerning Federal and Indian reserved rights makes it virtually impossible for new appropriators and State administrators to determine what, if any, reservation-related waters are available for appropriation and what water uses created under State law may

be superseded by reserved rights. The exercise of senior reserved water rights could also affect the distribution and use of water from Federal water resources projects. Also, the lack of certainty could hinder Federal agencies and the Indian tribes from using such water for reservation purposes; for example, it could generate litigation which might delay such uses.

While the courts have established the reserved rights doctrine and litigation has settled individual disputes, many controversial questions and issues remain unresolved and are the source of disagreements and polarized viewpoints between Federal and State officials, and other concerned parties. The questions and disagreements concern such matters as the definition, scope, and quantification of the reserved rights; the appropriate judicial forum for resolving the disputes; the respective authority of Federal and State governments to administer the reserved rights; and the compensation of those who may suffer loss by the exercise of reserved rights.

The compensation question is especially controversial. Persons whose water rights were established under State law after the date a reservation was created have rights subordinate in priority to the reservation's reserved rights. They are not entitled to compensation for any loss resulting from the exercise of the reserved rights. Because many Federal and Indian reservations were established before the turn of the century, often predating the settlement and development of surrounding areas, the reserved rights doctrine could adversely affect existing water uses and the related capital investments. It raises the possibility that existing State water-right holders may suffer loss without compensation.

Another important question concerns whether reserved rights should remain dormant indefinitely in undetermined quantities to meet undefined needs. State and private sources object to this so-called "blank check" approach and want a final decision on reserved rights quantities. Conversely, Federal and Indian sources contend that future reservation water needs cannot be predicted with certainty, and, therefore, final determinations should not be made. These matters are considered by many parties as the most significant impediments to resolution of the controversy.

The remaining sections of this chapter discuss reservation lands and waters, reservation water demands, efforts to inventory and quantify the reserved water rights, and the many controversial questions which continue to arise.

FEDERAL RESERVED WATER RIGHTS

Federal reservation lands and waters

A comprehensive inventory of lands reserved or withdrawn from the public domain is not available. Information is available, however, which shows that considerable amounts of land and related water resources are involved. It should be noted that because reserved water rights are related to the purposes for which reservations were created, large land holdings do not necessarily indicate large water demands.

Federal land holdings in the United States are shown in the map, appendix VIII. The map shows both unreserved public domain lands--principally those held by the Bureau of Land Management--and lands reserved from the public domain. As shown, most Federal land holdings are situated in the Western United States. The principal Federal agencies responsible for managing the Federal reserved lands are the Forest Service, Department of Agriculture; the Fish and Wildlife Service and National Park Service, Department of the Interior; and components of the Department of Defense.

In the 11 Western States, there is approximately as much federally owned land (358.3 million acres) as privately owned land (350.8 million acres). Those Federal holdings range from about 29 percent of Montana and Washington to about 86 percent of Nevada. They are predominantly situated in mountainous regions and arid basins and exhibit a great diversity of terrain, climate, and natural resources.

According to a report of the Public Land Law Review Commission, 1/ Federal lands are a major source of water in the 11 Western States, providing approximately 61 percent of the total natural runoff in the region. Most of this runoff comes from land withdrawn or reserved for specific purposes. The Forest Service and National Park Service reservations contribute about 88 and 8 percent, respectively, of the runoff from public lands and more than 59 percent of the total yield from all lands of those 11 States.

The importance of water yield from public reserved lands to the 11 Western States' economy--present and future--is clear: tens of billions of dollars have been invested by public and private sources in water storage

---

1/ "One-Third of the Nation's Land," a report to the President and to the Congress by the Public Land Law Review Commission, June 1970 (p. 141).

facilities, irrigation activities, and hydroelectric plants dependent upon public land water yields; most of the 11 Western States' major cities and metropolitan areas are dependent, to some degree, on this water.

Federal reservation water demands

The President's Federal Reserved Water Rights Task Group identified a maximum of about 277 million acres of Federal lands--about one-third of all federally owned lands--which may carry reserved water rights. The maximum they identified for the 11 Western States was about 187 million acres, or about 52 percent of all Federal lands in those States. Following are the amounts, by State, they identified from public land statistics of the Department of the Interior (1976):

State	Total acreage owned by the Federal Government	Federal acreage which may carry reserved water rights	Percent
	(millions)		
Arizona	31.1	19.2	61.8
California	45.2	28.2	62.3
Colorado	23.9	16.4	68.7
Idaho	33.7	21.4	63.5
Montana	27.6	19.0	68.9
Nevada	60.8	13.8	22.7
New Mexico	26.1	11.8	45.5
Oregon	32.3	17.9	55.5
Utah	34.8	13.2	38.0
Washington	12.5	10.8	86.1
Wyoming	29.8	15.1	50.6
Total	358.3	187.2	52.2

A study 1/ conducted for the Public Land Law Review Commission found that in 1967 water uses on Federal reservations took only 2.3 million acre-feet, or less than 1 percent of the 363 million acre-feet of water on the lands of the 11 Western States. While this data suggests that reserved water demands have been small, it is the question of future demand that is causing the great uncertainty about Federal reserved water rights.

1/Public Land Law Review Commission Water Study No. 463.

Some traditional water uses on Federal reservations include watershed protection, cattle grazing, big game and waterfowl refuge, recreation, land occupancy for military and other Government personnel, tree nurseries and seed beds, and firefighting.

Federal agencies indicate that consumptive water demands for existing uses will remain relatively small in relation to total western water supply. For example, a Forest Service official estimated that consumptive water uses for national forest land in Colorado will amount to about two-tenths of one percent of the State's mean annual stream flow. However, the timing and location of small demands could have substantial effects in individual circumstances.

The National Park Service anticipates potentially large nonconsumptive water requirements to protect instream flows for fish and wildlife conservation, recreation, and esthetic values. Where the headwaters of a drainage basin originate on a Federal reservation, instream values can often be naturally protected without adversely affecting potential downstream users. 1/ Conversely, where Federal reservations are situated at the middle or end of a drainage basin, reservation instream flow requirements may often adversely affect upstream State appropriators.

Concerning future water needs, the Department of the Interior's Westwide Water Study, 2/ in commenting on water for public lands, states that:

> "The vast public land holdings of the United States in the West give special importance to the problem of insuring the availability of adequate water supplies for their wisest and best use.
>
> "The consumptive and nonconsumptive needs for water on public lands have never been fully documented. Unless such water requirements are established, it will become increasingly difficult to provide for the optimum use of the lands.

1/Such natural protection can be reduced where transmountain diversions are constructed to transfer reservation headwaters to other drainage basins, as has occurred in northwest Colorado. (See p. 32.)

2/"Critical Water Problems Facing the Eleven Western States," Department of the Interior, Apr. 1975.

"Of particular importance at this time is the fact that the current national energy shortage has renewed interest in increasing energy production through the use of the extensive mineral resources of public lands. Priority consideration is being given to the use of coal, oil shale, and geothermal resources found throughout the West. Urgent and critical energy requirements have raised questions about the responsibility of the Federal Government to provide or reserve water for development of the mineral reserves located on both public and on private lands where the Federal Government has reserved mineral rights.

"Water on public lands is required also for such broad needs as improving the forest environment and providing sustained timber yields; livestock grazing; wildlife and fisheries conservation and management; recreation, domestic, municipal, and administrative site consumption; firefighting and fire prevention; wilderness preservation; flood and soil erosion control; and preservation of aesthetic and other public values."

Interviews conducted during our review indicated that State and private sources are very concerned that the water uses described above could occur and could lead to significant future Federal reserved water rights claims.

Federal efforts to inventory and quantify reserved water rights

To establish the amount of Federal reserved rights, such rights must be inventoried and quantified. Inventorying is a systematic process for specifying (1) the amount of water claimed, (2) the stream diversion point, (3) the purpose of the diversion, (4) the place or places of water use, and (5) the priority date of the claim. Once inventoried, reserved rights are quantified through an adjudication proceeding which establishes the certainty of these rights against all other water right holders of a stream.

The President's Federal Reserved Water Rights Task Group estimated that as much as $225 million would be

required to quantify Federal reserved rights, exclusive of Indian water rights, in the 17 Western States 1/ and Alaska.

We requested the major Federal agencies concerned with Federal reserved water rights to report on the current status of their efforts to quantify those rights in the 11 Western States, and to tell us of any impediments or constraints which are preventing or inhibiting quantification. We also requested that they explain their policy for recording reserved water rights claims. The agencies covered by our request included the Forest Service, National Park Service, Fish and Wildlife Service, Department of the Army in behalf of Army and Air Force installations, and the Department of Energy, with respect to naval petroleum and oil shale reserves.

Several agencies stated that relatively little water quantification activity had been performed. One exception was the Forest Service which has inventoried about 90 percent of current and foreseeable future consumptive uses and less than 10 percent of nonconsumptive water claims on reserved land in the 11 Western States. Several agencies indicated that quantification was necessary as a means for perfecting their Federal reserved rights but had not actively initiated a quantification program. One agency indicated that it inventoried and quantified its reserved rights only when involved in litigation.

The agencies mentioned various impediments or constraints which prevent or inhibit quantification. Generally, they mentioned the lack of a national policy, lack of an accepted instream flow methodology, and insufficient Federal resources and staff necessary to carry out a quantification process. Selected comments from the agencies' replies follow.

--The National Park Service Washington Office commented that in the absence of a national policy on the quantification of Federal reserved water rights, it has not made an effort to quantify and perfect Federal rights to water on the reserved lands in the 11 Western States. The constraints inhibiting its quantification of Federal reserved rights are a lack of a national policy on quantification, a lack of an accepted

---

1/In addition to the 11 Western States previously identified, the President's Policy Study included the States of North Dakota, South Dakota, Kansas, Oklahoma, Nebraska, and Texas.

uniform methodology to quantify rights to the water needed to maintain system area ecosystems and scenic integrity. We concur in the Justice Department position that since there is presently no statutory authorization for quantification, the binding effect of voluntary estimations which may be made by agency officials outside of general adjudication actions is questionable. Accordingly, the Service favors the enactment of legislation that would require the inventory and quantification of Federal reserved water rights by all Federal agencies in a uniform manner.

--The National Park Service Rocky Mountain Regional Office anticipates that a number of conflicts in connection with establishing Federal reserved rights will arise as general adjudications proceed in the various Western States. However, it is readily apparent that the quantification of the rights will be the cause of the largest conflict. Consequently, it is imperative that a suitable methodology and policy for quantification be established at the earliest possible time.

--The Forest Service commented that the quantification of nonconsumptive water claims is a highly technical process, involving complex legal and administrative procedures. The physical process of analysis and quantification will require considerable time and expense. The Forest Service has not undertaken a concerted quantification effort of nonconsumptive claims in view of the great expense and the uncertainties surrounding the nature of these claims under the reservation doctrine. Some nonconsumptive claims have been filed and approved under State water systems with the priority date being the date of the reservation's establishment. Most nonconsumptive claims have not been accepted.

A National Park Service Rocky Mountain Region official mentioned that a method for establishing minimum instream flows for fish and possibly other purposes is being developed by the Cooperative Instream Flow Group, a unit of the Fish and Wildlife Service at Fort Collins, Colorado. The National Park Service cautioned that whether time, money, and manpower will be available to establish this method on a sound basis (if it proves to be an acceptable method) appears to be a paramount question.

Federal agency use of State water rights systems to record claimed Federal reserved rights has varied. Agency opinions on the value and desirability of using those systems to secure and administer reserved rights vary. Selected comments follow.

--The Director, Naval Petroleum and Oil Shale Reserves, Department of Energy:

Our office has not used State water rights systems to obtain water permits. As to the desirability of using those State systems to secure Federal water rights, the States have a substantial interest in the adjudication of water rights within State borders. To a large extent in the water scarce West, the viability of the economy depends upon the judicious allocation of these limited supplies of water. On the other hand, an individual State should not be permitted to avoid the express act of the President or the Congress in creating a Federal reservation dedicated to meet national objectives. In the case of the Naval Oil Shale Reserves, the national objective is to have an abundant supply of oil for use in the event of a national emergency.

--National Park Service Washington Office:

Past Service policy has been to generally comply with the State water laws governing the appropriation of surface and ground water and its use. Such compliance was fundamentally for State administrative officials' inventory use, rather than to "acquire" such priority of right which the United States may have. Current policy in cases where the reserved rights principle is applicable is to notify the proper State agency, as a matter of comity, of current and foreseeable future water requirements in a manner to be developed within each State. Where the principle is not applicable, water rights will be obtained in accordance with State laws. The Service would oppose using the State water systems for its reserved water rights. Our main objection is based on the fact that most State laws do not recognize as beneficial the principal Service uses of water, such as recreation, minimum flows for propagation of fish and wildlife, esthetics, scenic integrity, and maintenance of lake levels.

--The Forest Service:

We have used State water rights systems to record water claims under the reservation doctrine. Assuming that the nature of reserved rights will be more clearly established by the courts, the Service does not object to continuing the use of State water right systems in the future. The States have developed a mechanism to secure, administer, and enforce water rights. It is desirable for the Forest Service to use these existing systems.

--The Fish and Wildlife Service, Region 1:

Except for Alaska and the Klamath Forest National Wildlife Refuge, all water used by the Service is appropriated through State water rights systems or is acquired through mitigation from the Corps of Engineers and the Bureau of Reclamation. It has been and still is Service policy to establish water rights through the State system wherever possible. We see no reason to discontinue this policy. Most of the land, except for Alaska, is acquired either through purchase or easement. The existing water rights often predate the establishment of the refuge or hatchery and, therefore, have a higher priority of right of use in relation to other users. (Similar comments concerning the use of State systems were also received from the Service's Regions 2 and 6. Together with Region 1, these regions cover the 11 Western States.)

Many controversial questions continue to arise

The reservation doctrine is a judicial creation; only the issues framed by each particular controversy are litigated and resolved, leaving further issues to be defined as new controversies arise. Although numerous controversies have been litigated, the law of Federal reserved water rights is unsettled, and is the source of disagreement between Federal, State, and private parties. This was evident from our discussion with the many informed sources representing Federal, State, and private interests. These sources raised many questions about the doctrine, either directly or indirectly, by taking conflicting positions. Their comments and an analysis of available reports and other documentation shows that the matters in question cover (1) definition and scope of Federal reserved

water rights, (2) quantification of Federal reserved water rights, (3) adjudication and administration of Federal reserved water rights, and (4) compensation. Types of questions under each of these classes are set forth below.

Definition and scope of Federal reserved water rights

--What are the purposes for which a reservation was established, and do these purposes limit the uses of water claimed under the reservation doctrine? For example, do the purposes for which a national forest is established include the maintenance of minimum stream flows for erosion control or fire protection?

--What reserved water rights, if any, attach to reservation lands acquired from private sources after the reservation is established?

--Where the quantity of surface water that arises on, flows over, or borders on the reservation is insufficient to fulfill the purposes of the reservation, may waters be reserved in a distant stream to meet the needs of the reservation?

--May reserved water be used off the reservation for which it is reserved or may reserved water be used only on reservation land appurtenant to the water's source?

--May the place or use of reserved waters be changed on the reservation and, if so, are there any limitations applicable?

--Where a Federal reservation is created from a preexisting reservation, does the priority date of the prior reservation apply to the reserved water rights of the new reservation?

--Does the termination of a reservation also terminate the reserved water right when the particular water use continues after the termination?

Quantification of Federal reserved water rights

--In a general adjudication of water rights in State courts, should water rights reserved for Federal reservations be finally quantified?

--Should such general adjudications quantify reserved water rights claimed for future needs?

Adjudication and administration of Federal reserved water rights

--Once the quantity of Federal reserved water rights is established by judicial decree, should such reserved water rights be administered by State officials through State systems or should a Federal system of recording and administering rights be established?

Compensation

--Should a holder of a junior State-conferred water right be compensated as a matter of policy for his loss when a senior Federal reserved right is exercised?

Our interviews indicated that very polarized viewpoints exist between Federal and State officials on certain of the above matters. Such polarization was also reported in the December 1977 Federal Reserved Water Rights Task Group report. The task group made the following statement regarding the scope of Federal reserved rights, which illustrates the degree and kind of disagreements:

"The principal disagreement between State and Federal officials is over the scope of the reserved right. It should be recognized that the scope of reserved rights is based in law and in property rights rather than in policy. Since the courts are still in the process of discovering that area of law, extremely polarized viewpoints exist. State officials generally contend that a reserved right can attach only to the natural flow of a watercourse (and not to water stored as a result of artificial impoundment), to surface waters only (and not to underground waters), and cannot be used for other than the original purpose of the reservation or for the maintenance of minimum stream flows or lake levels. Federal officials, on the other hand, tend to favor an approach which would leave reserved rights as they have been or may be defined by the Federal courts assuming that many of the restrictions which State interests favor would not be upheld by the courts."

The task group report also gave special attention to the matter of compensation, stating that:

> "* * * the specter of a Federal taking of presently established State water rights without compensation raises probably the most significant impediment to resolution of the controversy."

INDIAN RESERVED WATER RIGHTS

Indian reservation lands and waters

Historically, Indian tribes were settled on arid, undeveloped land. These lands were often located at high elevations, had relatively short growing seasons, and little fertile soil. For religious and esthetic reasons, the tribes often preferred to leave the waters of their reservations undisturbed and free flowing.

Indian reserved water rights present a more pressing problem than Federal reserved water rights. Unlike Federal reservations, which are not expected to have large consumptive water demands, many Indian reservations are expected to require significant water quantities to satisfy reservation purposes. Major capital investments in the same water supply may have already been made by non-Indians.

The National Water Commission, in discussing the past Federal policy for encouraging western land settlement, stated:

> "In retrospect, it can be seen that this policy was pursued with little or no regard for Indian water rights and the Winters Doctrine. With the encouragement, or at least the cooperation, of the Secretary of the Interior--the very office entrusted with protection of all Indian rights--many large irrigation projects were constructed on streams that flowed through or bordered on Indian Reservations. With few exceptions the projects were planned and built by the Federal Government without any attempt to define, let alone protect, prior rights that Indian tribes might have had in the waters used for the projects."

According to the American Indian Policy Review Commission's final report, there are over 200 Indian reservations in 26 States, encompassing over 50 million acres of land. In the 11 Western States, Indian lands total about 43 million acres or about 6 percent of all land. The map

(Appendix VIII) shows the principal Indian reservation lands. The following table shows the amount of Indian land in each of the 11 Western States.

State	Acres (thousands)	Percent of State land
Arizona	19,897	27.4
California	547	0.5
Colorado	755	1.1
Idaho	827	1.6
Montana	5,247	5.6
Nevada	1,153	1.6
New Mexico	7,282	9.4
Oregon	761	1.2
Utah	2,275	4.3
Washington	2,488	5.8
Wyoming	1,687	3.0
Total in the 11 Western States	43,119	5.7

Source: Bureau of Indian Affairs Annual Report of Indian Land, June 1975.

Indian natural resources include (1) 5.3 million acres of commercial forest land, encompassing about 38 million board feet of timber, (2) 44 million acres of rangeland, and (3) 2.7 million acres of cropland. These figures reflect estimates for nationwide reservation lands. Recent U.S. Geological Survey and Bureau of Indian Affairs (BIA) mineral investigations have disclosed that Indian lands also contain valuable energy resources, such as oil, coal, and natural gas, which could provide substantial tribal monetary and economic benefits if properly developed.

Indian water demands

BIA officials told us that current Indian water uses vary from domestic supply and irrigation to fishery protection, and that, broadly speaking, Indian tribes may use water both now and in the future for any activity which accomplishes reservation purposes.

The Department of the Interior's April 1975 Westwide Study, in commenting on water for Indian reservations, said that:

> "Because of Federal commitments and responsibilities related to the Indians, the development of resources on the 172 Indian reservations in the 11 Western States poses a special problem. The overall Indian problem is one of a very low standard of living--economic, social and otherwise.
>
> "An important key to improving the economic and social standing of the Indians is the development of the natural resources of the reservations which include vast reserves of oil, gas, and coal, millions of acres of potentially productive farmland, and recreational opportunities. At virtually all of the established Indian reservations in the 11 Western States, the quantity and quality of water readily available determine the degree to which these natural resources can be developed and utilized. * * * A key issue, however, as yet not clearly resolved by the courts, is the Indian position that since the purpose of the Indian reservation is to provide an economic base for the Indian people residing thereon, it must follow that the Indian water right is a right to use the available reservation waters for any beneficial use including irrigation, livestock, domestic, power, recreation, industrial, and municipal purposes, and the maintenance of instream flows to protect biotic and aesthetic values inherent in reservation and related systems."

The volume of water to which Indians have rights may be large relative to present use. This was illustrated in Arizona v. California where the court decreed to five Indian reservations nearly 1 million acre-feet out of a supply estimated at the time to be 6 or 7 million acre-feet. Even though the five reservations were for the most part sparsely

inhabited, the court applied a "practicably irrigable acreage" formula for measuring the quantity of the Indian water rights.

Federal Efforts To Inventory and Quantify Indian Reserved Water Rights

In a letter dated October 20, 1977, to the Assistant Secretary for Indian Affairs, we requested information on (1) the status of BIA's efforts to inventory and quantify Indian reserved water rights and (2) BIA's policy on the use of State systems to record reserved right claims. The Assistant Secretary did not reply; however, interviews and examination of records disclosed that while BIA has initiated a program to inventory and quantify Indian water rights, limited progress has been made in implementing it.

BIA, the Interior Department agency having trust responsibility for Indians, initiated a program to inventory and quantify Indian water rights in 1971. The program entails preparing a series of inventories (multiphased hydrologic and feasibility studies) which gauge the quantum of a particular reservation's water right. "Phase I" studies determine all available reservation water supplies. "Phase II" studies identify actual and potential reservation water uses and the total water required for comprehensive reservation development. "Phase III" studies correlate water supply locations with water demand locations and develop specific programs and plans for meeting reservation water requirements. "Phase IV" studies assess the environmental impacts of selected development proposals.

BIA channels its inventory manpower and monetary resources according to the following priorities:

--Priority 1 activities are required to support litigation in progress.

--Priority 2 activities are in areas where litigation is imminent.

--Priority 3 activities are in areas where a major water controversy is possible.

--Priority 4 activities are required to establish water rights for reservation development.

In fiscal year 1978 hearings before the Senate Committee on Appropriations, BIA presented the following cumulative water resource investigations data which displayed inventorying progress:

BIA area office	Total studies required	Completed	Additional completions by end of FY 1977	Remaining
Aberdeen	50	3	6	41
Albuquerque	115	9	17	a/ 83
Billings	56	14	12	30
Navajo	6	0	1	5
Phoenix	87	0	1	86
Portland	81	8	12	61
Sacramento	200	5	8	a/ 186
Total	595	39	57	a/ 492

a/ the data contains cross-footing discrepancies, but was reprinted exactly as it appeared in the Appropriations Document.

BIA officials stated that their inventorying efforts are being hindered by (1) the effects of the McCarran Amendment, (2) funding constraints, and (3) tribal opposition.

Effects of the McCarran Amendment

Because of the recent Supreme Court construction of the McCarran Amendment 1/ in the Akin case 2/, which provides that State courts have concurrent jurisdiction with Federal courts to adjudicate Indian reserved water rights in general stream adjudications, BIA officials feel that they have been placed in a defensive posture in protecting Indian

---

1/ 43 U.S.C. 666 (1970)

2/ Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), reh. den., 426 U.S. 912 (1976).

water rights. The agency now has more difficulty controlling where inventories are done and where and when Indian reserved water rights are adjudicated. Parties can bring suit at any time naming the United States as defendant, even though BIA may not have made a study of the applicable reservation's water resources and may not be prepared for litigation.

According to the Assistant Secretary of the Interior for Indian Affairs, unanticipated litigation presents practical difficulties in preparing and budgeting for expenses.

Because court cases receive priority for manpower and monetary resources, BIA must redirect its ongoing inventorying activity to accommodate them as they arise. When court cases are unanticipated, there is little time to prepare precise and detailed support studies. BIA contends that such support studies are absolutely essential for presenting tribal claims. By their very nature, these studies are expensive and time consuming and require adequate planning and lead time. Several BIA officials stated that the result of inadequate support-study development is that a tribe's position cannot be effectively presented.

Funding constraints

To date, BIA officials estimate that they have spent about $8 million inventorying Indian water claims and have completed approximately 100 reservation water claim support studies. BIA estimates that at current funding levels, and without unanticipated future litigation causing BIA to reallocate its program resources, the remaining 500 inventory studies could be completed in about 36 years.

For purposes of the 1975 Department of the Interior Westwide Water Study, BIA estimated that water resource inventorying activity for Indian reservations in the 11 Western States would cost about $35 million. The $35 million inventory cost was based on BIA's original program plan, which was to gather data for planning purposes. BIA officials now believe that the cost will be substantially higher because of inflation, study numbers, and litigation requirements. In addition, litigation has forced BIA to develop more precise, detailed, and explicit support studies. Data gathering of this nature is much more expensive and, according to one BIA official, this factor alone will cause BIA's program costs to "soar."

According to the Assistant Secretary of the Interior for Indian Affairs, funding scarcity could critically affect BIA's ability to defend Indian water rights in State courts. Given the heavy tribal competition for funds, BIA may be unable to develop the crucial technical support studies for those reservations where litigation is imminent.

Tribal opposition

Even though many Indian tribes do not know how much water they will need, tribes have not uniformly supported the concept of a final quantification of their reserved water rights. Some fear that quantification may impose limits on the extent of their water rights entitlement, precluding future reservation water claims. BIA, in its capacity as rights protector, has never attempted to inventory and quantify reservation water rights over a tribe's objection.

Two prominent national Indian organizations--the National Congress of American Indians (NCAI) and the National Tribal Chairmen's Association (NTCA)--recently expressed their position on quantification in an Indian water policy statement submitted in January 1976 to the Assistant Secretary of the Interior for Indian Affairs. The statement includes nine principles as guidelines for Federal action regarding Indian water rights. Regarding quantification, the statement asserted that:

> "Quantification of Indian Winter's Rights is neither necessary nor desirable at this time. A final determination, made at any given date, is inconsistent with the openendedness of the right itself."

According to the Executive Director of NCAI, the oldest and largest representative of Indian tribes and organizations throughout the country, it is unrealistic and unfair to expect tribes to develop specific water claims now because many reservations have neither adequately assessed full development potential nor realized actual reservation development.

Many Controversial Questions Continue to Arise

Like Federal reserved water rights, many uncertainties surround Indian water rights. The National Water Commission's consultant on the reservation doctrine reported 1/ that the

---

1/ "Federal-State Relations in Water Law," Frank J. Trelease, National Water Commission, Sept. 7, 1971 (p. 161).

uncertainties for non-Indian purposes are "nothing to those that surround Indian rights." He commented that "almost no feature commonly thought of as an element of a 'water right' can be stated with certainty in reference to most Indian rights."

In our interviews, many sources raised a number of controversial questions, including the measure and scope of the Indian reserved water rights, that they felt have not been clearly resolved or are still being disputed.

The list of questions and areas of disagreement will vary according to the perspective, interests, or allegiance of the source. The following list, however, reflects the major areas of concern identified by sources interviewed and documents reviewed.

Definition and scope of Indian reserved water rights

--Are Indian reserved water rights limited to water uses envisioned when the reservation was established or are those rights expansive, encompassing rights to meet all potential future uses of water?

--Does the Doctrine of Indian Reserved Water Rights apply to ground water and, if so, what rules, if any, apply to the quantification and use of ground water?

--Does the Doctrine of Indian Reserved Water Rights extend to waters impounded in reservoirs where the reservoirs were not constructed for reservation purposes?

--Where the quantity of surface water that arises on, flows over, or borders on the reservation is insufficient to fulfill the purposes of the reservation, may waters be reserved in a distant stream to meet the needs of the reservation?

--May reserved water be used, leased, or transferred off the reservation for which it was reserved?

--May the place or use of reserved waters be changed on the reservation and, if so, are there any limitations applicable?

--Do Indian allottees and non-Indian successors-in-interest to Indian allottees hold any portion of the reserved water rights?

--When Indian reservations established by treaty or agreement are located on ancestral or aboriginal lands, do their reserved water rights have an immemorial priority date rather than the date the reservation was established by treaty, act of Congress, or Executive order?

Quantification of Indian reserved water rights

--What is the appropriate standard for quantifying Indian reserved water rights where the purpose behind the reservation, wholly or partially, is not to establish an agricultural economy on the reservation?

--Where "practicably irrigable acreage" is the appropriate measure for quantifying the Indian reserved water rights, what standard of economic feasibility, if any, should be used when determining the practicably irrigable acreage?

--Are Indian reserved water rights to be measured based on the use of water under the technology available when the reservation was established or under present and future technology?

Administration of Indian reserved water rights

--What is the extent of the Secretary of Interior's, the States', and the tribes' authority to regulate and administer the use of water on Indian reservations?

--What impact, if any, do Indian reserved water rights have on various interstate water compacts?

Compensation

--Should a holder of a junior State-conferred water right be compensated as a matter of policy for his loss when a senior Indian reserved water right is exercised?

Here again, as in the case of Federal reserved water rights, the matter of compensation is a significant issue.

For example, the National Water Commission report 1/ states that:

> "The Commission believes it is unfair to deprive users of their water supply without compensation when Congress supported investments in projects whose supply was subject to unused Indian rights. Not all water users subject to divestment by the exercise of Indian water rights are beneficiaries of Federal projects, but the Commission believes that these users should receive protection too. The Federal Government led the way in developing the West for non-Indian beneficiaries, and if private investors and State and local governments followed, the protection afforded Federal beneficiaries should be accorded to the others. The Federal Government was the trustee for the Indians and their water rights, yet by its actions in developing its own projects on streams subject to Indian claims it was indicating that such development was proper and that such investments would be secure. If that representation turns out to be wrong, those who suffer injury should receive protection whether or not they take their water from a Federal project."

Another controversial issue concerns the adjudication of Indian reserved water rights in State court proceedings. Until the McCarran Amendment and its interpretation by the the Supreme Court, Federal District Courts had sole jurisdiction over Indian reserved rights. Under the recent Supreme Court construction of the McCarran Amendment, State courts now have concurrent jurisdiction with Federal courts to adjudicate Federal and Indian reserved water rights.

As a result of the McCarran Amendment, Indian tribes, in certain instances, are now faced with litigation in what they deem to be an undesirable forum--State courts. In commenting on this, the National Indian Water Policy Review paper said that both the tribes and the United States are extremely skeptical about whether the State courts possess the expertise and impartiality required to properly adjudicate tribal water rights. We note that while the Indian Water Policy Review paper and the National Water Commission's report favor adjudication of Indian water rights only in Federal courts,

---

1/ National Water Commission final report, "Water Policies For the Future," June 1973 (p. 481).

the Federal Reserved Water Rights Task Group reported that its analysis of public comments disclosed general objections to modifying the McCarran Amendment to exclude State court jurisdiction.

CHAPTER 3

NATURE AND POTENTIAL EFFECTS OF RESERVED WATER RIGHTS CONTROVERSIES

During the years of controversy surrounding the Reserved Water Rights Doctrine, it was contended that few, if any, significant examples of harm could be specifically attributed to it. One Deputy Attorney General proclaimed in 1964 1/ that

> "for all the outcry arising from the Federal-State water rights controversy, not one State, not one county, not one municipality, not one irrigation district, not one corporation, not one individual has come forward to plead and prove that the United States, exercising alleged proprietary rights in the unappropriated waters of the public domain, has destroyed any private property right or rendered ineffective any State or local government regulation."

Sources we interviewed mentioned several examples of adverse effects which they said could have resulted because of the uncertainties surrounding Federal and Indian reserved water rights. They said, for example, that the uncertainties have caused energy companies to delay oil shale development, Indians to delay development of their reservations, and the Federal Government to delay allocating water from reclamation projects. They also said that private investors have had to purchase more water rights than necessary because of difficulties in determining which water rights to seek. One source predicted that the economy in one State would be disrupted, with severe dislocations resulting, if all Indian reserved water rights being claimed are granted.

The recent decision in the Cappaert 2/ case, involving reserved water rights for a Federal reservation (see pp. 61 to 63), significantly affected the Cappaert's ranching operation in Nevada, according to the Cappaert's legal representative. Reportedly, a $7 million private agricultural

---

1/ Hearings on S. 1275 before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs, 88th Cong., 2nd Sess. 39 (1964).

2/ Cappaert v. United States, 426 U.S. 128, 143 (1976).

development was sold at a "fraction" of its cost because water essential to its continued operation was determined by the courts to be reserved for the Federal Government for purposes of protecting the spawning habitat of an endangered species of fish.

Recently, the Assistant Attorney General for the State of Wyoming told us that

> "within the State of Wyoming alone, virtually every proposed project for the development of water resources has been stymied, or contains a caveat respecting limitations upon sources of water supply, due to the claims of the federal government and Indian tribes. The dampening effect of the unquantified, and in many instances unreasonable, claims for reserved rights cannot be so easily discounted."

As of August 1978, there were 44 court cases pending concerning Federal and Indian reserved water rights. We examined four of the cases--discussed later in this chapter--to explore the uncertainties and the nature and potential effects of the controversies.

The first case illustrates Federal reserved water rights problems and the other three discuss Indian reserved water rights problems. The cases were selected for their potential to illustrate a variety of problems, for their apparent precedent-setting potential, and to show a geographic dispersion of cases in the Western States.

The four cases mainly involve existing investments. In other court cases, which we did not examine in detail, potential new investments are apparently being discouraged by unquantified reserved rights. For example, private efforts to obtain water from the Boysen Reservoir, a Bureau of Reclamation project, for the industrial development of natural resources in the Wind River Basin in Wyoming have been indefinitely delayed pending a determination of Indian reserved water impounded by that reservoir. The tribes dispute whether the portion allotted to them is sufficient to satisfy their reserved water rights.

Generally, the four cases examined illustrate several potentially significant adverse impacts:

--Non-Indian and non-Federal investments for irrigation, municipal, industrial, and other water uses are being jeopardized.

--Development of Federal and Indian reservations is being hampered.

--Water resource development planning by public and private interests is discouraged.

--Litigation required to resolve the reserved water rights uncertainties is complex, protracted, and costly.

FEDERAL RESERVED RIGHTS CLAIMS IN NORTHWEST COLORADO 1/

The Northwest Colorado case is a landmark one in quantifying Federal reserved water rights. It involves a general water adjudication in northwest Colorado where the United States, in 1969, was joined under the McCarran Amendment to have its reserved rights adjudicated for several kinds of Federal reservations.

The case has generated several controversial questions of law including the following:

--Whether Federal reserved rights exist in Colorado, considering terms of that State's constitution.

--Whether instream uses of water on national forests carry a priority dating from the time the forests were reserved, near the turn of the century, or later when the Multiple Use and Sustained Yield Act of 1960 (16 U.S.C. 528) was enacted.

--Whether national forest reserved rights are junior or senior to present and future water rights granted by the State of Colorado for domestic, milling, mining, and irrigation purposes.

--Whether reserved rights are possessed by national forest permittees for such uses as concessions, ski lodges, and grazing.

--Whether public springs and water holes on Bureau of Land Management lands are reserved for certain limited uses.

1/ Adjudications in Colorado Water Divisions 1(W-8439), 4(W425-W438), 5(W467-W469), 6(W85-W86), 7(W4667) in the Water Courts for respective water divisions in the State of Colorado.

Six types of Federal reservations are covered in this case, including 7 national forests, 1 national park, 3 national monuments, over 1,500 public springs and water holes, 2 mineral hot springs, and 2 naval oil shale reserves. The United States is asserting water rights for several kinds of off-stream uses on each type of reservation and for maintaining instream flows and lake levels in its forests, park, and monuments. On the other hand, non-Federal parties are claiming State water rights for various agricultural, municipal, and industrial purposes.

The Federal reservations involved in this case are located in Colorado Water Divisions 4, 5, and 6, which are situated primarily in northwest Colorado. These three divisions encompass over one-third of the State's land mass. Since the turn of the century, several extensive transmountain diversions have been constructed to carry water from the west slope of the Rocky Mountains to the east side. Today, approximately one-half of Denver's water supply comes from the west slope, and most of that water is being diverted from the Federal reservations.

Even though the Federal reserved rights have not been fully quantified, the claims are believed by the parties involved to be insignificant for consumptive purposes, with the exception of the claim for the naval oil shale reserves. However, the claims may be significant for nonconsumptive purposes, especially for maintaining minimum stream flows and lake levels for fish and wildlife, esthetic, and recreational purposes.

Non-Federal interests believe that the Federal claims pose a serious threat to existing developments for which appropriative water rights have been obtained, and could seriously affect future municipal, industrial, and agricultural developments in eastern Colorado. For example, a representative of the city of Denver told us that the existence of significant Federal reserved rights for instream flows could greatly restrict Denver's growth.

Forest Service officials told us that if their reserved water right claims for instream flow purposes are not upheld in this litigation, their Federal reservations could be seriously damaged. The Forest Service contends that many streams which are presently dry due to diversions would remain dry, existing water supplies at some recreational facilities would be lost, and very little water would be available for instream purposes.

This case has been in litigation for over 10 years; numerous parties are involved, including five Federal agencies or departments. The Federal Government has already spent more than $550,000 on the case, and other interests, including the city of Denver and the State of Colorado have also spent a considerable amount of money. At the time of our review, recommendations made by the State District Court appointed referee were before the district court for review. It appears likely that the district court decision will be appealed, involving additional years of litigation. The Forest Service anticipates that the decisions reached in this case will set the pattern for future adjudications in other States. The Forest Service also estimates that about $1 million in expenses over 5 years will be required to inventory and quantify its instream flow requirements if preliminary court recommendations are upheld in this case.

UNITED STATES OF AMERICA AND THE PAPAGO INDIAN TRIBE VERSUS THE CITY OF TUCSON AND OTHERS 1/

This case is significant because it represents a claim of Indian reserved water rights to ground water. The principal question in this case is whether Indian reserved water rights apply to ground water and, if so, what criteria should be used to measure the specific scope and priority of this right. The ground water in this case is the only source of water for the San Xavier portion of the Papago Indian Reservation and for the city of Tucson, Arizona, the Nation's largest city relying exclusively on ground water for municipal purposes. This ground water lies in the Upper Santa Cruz River Basin, and is the source of water used for irrigation and for mining activities, which reportedly produce about one-fourth of the Nation's copper.

The Papago Indian Tribe is seeking to restrain the off-reservation pumping of ground water by non-Indian interests in the Upper Santa Cruz River Basin on the basis that it interferes with the tribe's reserved rights to the surface flow and ground water on the reservation.

The city of Tucson has purchased and retired about 12,000 acres of farmland to gain a ground water supply for municipal purposes and has sunk its own wells near

---

1/United States v. City of Tucson, Farmers Invest. Co., et al., Civil No. 75-39 TUC JAW (D. Ariz.) consolidated with Papago Indian Tribe & John Lewis, et al., v. Pima Mining Company Civil No. 75-51 TUC JAW (D. Ariz.)

the northern and eastern edge of the reservation. According to the Assistant City Attorney for Tucson, the city anticipates a need to purchase and retire a total of about 36,000 acres by 1985 and has budgeted about $20 million for that purpose.

Although a large quantity of recoverable water remains underground, the annual amount of recharge to the ground water of the Upper Santa Cruz River Basin is substantially less than the amount extracted and not returned each year. The combined pumping by municipal, agricultural, and industrial interests is causing the water table in various areas to drop at rates ranging from 1 foot to 12 feet a year. This has resulted in a lowering of the water table in some areas by as much as 110 feet. Deeper pumping, combined with the present consumptive use, would mine out the ground water supply in less than 70 years. Also, as the water table on the reservation lowers, it becomes more expensive to pump the water, the water quality deteriorates, and a substantial potential for land subsidence occurs.

The Papago Indian Tribe alleges that if the present level of off-reservation pumping continues, the historical means by which they maintain their livelihood will be jeopardized, additional reservation land will remain unirrigated, homes will be without water, and the reservation and its resources will remain undeveloped and useless. The tribe claims that many reservation wells have already gone dry because of excessive pumping.

Non-Indian interests state that if the Papagos' claim is upheld, Tucson's community growth and development would be stifled; businesses would be unable to operate; and enormous damages would be suffered in lost municipal, industrial, and agricultural investments. One mining company, for example, stated that its capital investment subject to loss exceeds $80 million. The city of Tucson values its wells, tanks, and related ground water pumping improvements at almost $100 million.

Over a 3-year period, the Federal Government has spent about $190,000 preparing this case for trial. The city of Tucson and various mining interests, among others, have also spent substantial money preparing for court action. Informed sources predict that if this case goes forward through the courts, another 15 years could elapse before all the facts are accumulated and a final decision is reached.

BIA representatives told us that neither they nor the tribe have been able to conduct studies to determine reservation water needs because most available funds are required

for water right litigation cases. The chairman and attorney of the tribe acknowledged that unquantified Indian water rights adversely affect the planning ability of Federal, State, and local planners in Arizona. Legal representatives for the city of Tucson and the tribe told us they are hopeful that a negotiated settlement will be reached allocating the ground and surface water supplies of the Upper Santa Cruz River Basin among the various water users.

UNITED STATES AND PYRAMID LAKE PAIUTE TRIBE VERSUS TRUCKEE-CARSON IRRIGATION DISTRICT AND OTHERS 1/

This case, instituted by the United States on December 21, 1973, concerns a claim by the Pyramid Lake Indian Tribe of Nevada for sufficient water from the Truckee River to maintain the long-term level of the lake and to reestablish the tribe's fishery in the lake and in the Truckee River. A question raised in this case is whether the Indians are barred from asserting any new claims for water on the basis that all water rights in the Truckee River, including the reserved water rights of the Indians, were fully adjudicated in an earlier adjudication resulting in the 1944 Orr Ditch Decree.

The Truckee River rises in the High Sierra Mountains; flows through the city of Reno, Nevada; and terminates in Pyramid Lake, a desert lake 20 miles long and 5 miles wide with no outlet. Since 1906, the level of Pyramid Lake has dropped more than 70 feet. The tribe contends that the decreased lake level and river flow have had the effect of making fish native to the lake an endangered protected species and have unsettled the erosion and salinity balance of the lake to a point where the continued utility of the lake as a useful body of water is doubtful. The tribe claims a reserved water right with an 1859 priority to a flow of 385,000 acre-feet of water annually from the Truckee River to maintain the present lake level.

Tribal representatives state that, presently, the Pyramid Lake fishery is the primary source of income to the tribe, contributing about $100,000 annually through sports fishery permit fees and employing an equivalent of about 40 tribal members full time. They predict that both the fishery and lake will eventually die if the water sought is not available. They also contend that if sufficient water

---

1/ United States and Pyramid Lake Paiute Tribe of Indians v. Truckee-Carson Irrigation District, Civil No., R-2987-JBA (decided Dec. 8, 1977 D. Nev.), appeal docketed, No. 78-1493 (10th. Cir. docketed Mar. 7, 1978).

is made available to maintain the lake level and streamflow, Pyramid Lake could become one of the greatest cold water fisheries in the United States, creating considerable potential recreational values and bringing substantial economic benefits to the tribe.

Non-Indian interests contend that the tribe's claim for an 1859 reserved right, representing one of the earliest rights for Truckee River water, would, if granted, result in substantial damage because there is not an easily available alternative source of water. They claim that all facets of life in the area have been and are dependent on the beneficial use of the decreed waters of the Truckee River. Dependents on the river include:

--In the Reno area, 130,000 residents' water supply is dependent upon the Truckee River.

--The Newlands Project which diverts an average of 200,000 acre-feet of water annually from the Truckee River for irrigation.

--Wildlife of the Stillwater Wildlife Refuge, a vital link in the Pacific flyway and an important hunting area, is dependent for its water supply on irrigation return flows from the Newlands Project.

Over a 4-year period, the Federal Government has spent over $3.5 million, excluding Department of Justice salaries and travel costs, preparing for this case. Many non-Federal parties are involved in the case and some of them, such as the city of Reno, the Truckee-Carson Irrigation District, the Pyramid Lake Paiute Tribe, and the State of Nevada have also incurred substantial cost. The State of Nevada, for example, has already spent about $600,000 on the case.

On December 8, 1977, the United States District Court for the District of Nevada ruled that the Indians are barred from obtaining more water for the Pyramid Lake fishery because the earlier Orr Ditch Decree settled all rights to water in the Truckee River. Also, the court rejected the Indians contention that they were not adequately represented in the drafting and preparation of the Orr Ditch Decree because an impermissible conflict of interest existed among the Government lawyers representing them.1/ The court's

---

1/United States and Pyramid Lake Pauite Tribe of Indians v. Truckee-Carson Irrigation District et al, Civil No. R-2987-JBA (decided Dec. 8, 1977 D. Nev.) appeal docketed, No. 78-1493 (10th Cir. docketed Mar. 7, 1978).

decision is being appealed. The final decision is not expected for at least 5 years.

COLVILLE CONFEDERATED TRIBES VERSUS WALTON 1/

This case concerns the applicability of Indian reserved water rights to lands privately held by Indian allottees and their non-Indian successors-in-interest within the Colville Indian Reservation located in north-central Washington.

Approximately 26 percent, or about 350,000 acres, of the Colville Indian Reservation is owned by non-Indians, including the 350 acres purchased by the Waltons. These lands are part of a larger portion of the reservation which the Colville Confederated Tribes allotted to individual tribal members. The decision could have precedent-setting consequences for holders of allotted land within the Colville, as well as other Indian reservations.

The Colville Confederated Tribes claim that the continued ground water pumping and diversion of surface water by the Waltons--non-Indian landowners on the reservation--will prevent the tribes' full development of adjacent reservation lands for fish and wildlife, irrigation, water quality, esthetic, and recreational purposes. Conversely, the Waltons' claim that their means of earning a livelihood will be eliminated if they are prevented from pursuing and diverting water for the irrigation of pasture land and hay fields, stock watering, and the processing and bottling of milk from their dairy farm operation.

There are two basic legal issues involved in this case:

--Do non-Indian successors-in-interest to Indian allottees hold any portion of Indian reserved rights to the use of water? If so, what is the character, nature, and extent of these rights?

--What is the respective extent of the authority of the Secretary of the Interior, the State, and the tribes to regulate the use of water on Indian reservations?

A subsidiary issue is whether or not Indian reserved water can be used for fish and other instream purposes when the original reasons for establishing the reservation are considered.

1/United States v. Walton, Civil No. 3831 (USDC ED Washington) consolidated with Colville Confederated Tribes v. Walton, Civil No. 3421 (ED Wash.)

The Colville Confederated Tribes assert that full equitable title to all of the reservation water reserved to the tribes under the Winters Doctrine resides in the tribes as a corporate entity. They contend that allottees receive no vested rights to the use of water when tribal land is allotted and, therefore, the Waltons received no right to the use of the water when they purchased the Indian allotments.

The Waltons argue that waters within the Colville Indian Reservation were reserved for the equal benefit of tribal members. They claim that reserved water rights pass to Indian allottees, and a non-Indian purchaser of allotted land acquires the same water rights (with equal priority) as those of the Indians.

The State of Washington challenged the Colville Confederated Tribes' contentions and asserted the authority of the State to regulate and control all waters within the State of Washington, including the water on the Colville Indian Reservation. Because of the State's intervention, the United States filed action against the Waltons asserting the congressional grant of authority to the Secretary of the Interior to regulate water on the Colville Indian Reservation and denied the authority of the State of Washington. In addition, the Indian tribes are trying to establish their own codes governing water use on the reservation.

Over a 7-year period, the Federal Government has reportedly spent about $800,000 in preparing the tribes' case, excluding federally financed legal and consulting expenses for the tribe. Additional sums have been spent preparing the Government's case. Substantial costs have also been incurred by the State of Washington and the Waltons. It appears that total court costs already incurred by all parties in this case could easily exceed $1 million.

Many years of litigation will probably be required if the case goes forward through the courts. Some of the parties, however, are hopeful that a negotiated settlement might soon be reached. The trial began in the U.S. District Court in February 1978.

CHAPTER 4

PAST AND RECENT PROPOSALS TO RESOLVE THE CONTROVERSY

The preceding chapters show that generally the courts have developed, on a case-by-case basis, the law of Indian and Federal reserved water rights. State and Federal courts continue to define and clarify the nature and scope of Federal and Indian reserved water rights. Presently, the courts are the only forum available where the measure of Federal and Indian reserved rights may be established. However, the judicial mechanism involves complex, protracted, and costly litigation which may continue for decades before the reserved water rights issues are fully resolved.

This chapter shows that over the years other means, having little or no result, have been offered to define, clarify, or measure the reserved rights.

PAST PROPOSALS

By some counts, over 50 unsuccessful proposals have been made for legislation to clarify and modify the reservation doctrine. Most of the proposals have been directed at removing the uncertainty surrounding the doctrine. Two recurring themes have been (1) to subject the Federal Government, in differing degrees of detail, to State water laws and procedures and (2) to establish mechanisms and procedures to require the Federal Government to inventory and quantify its claimed reserved water rights. Some of the proposals were State-oriented while others reflected a Federal perspective. A majority of the proposals did not deal with the question of Indian reserved water rights; two significant exceptions were the National Water Commission's recommendations and the proposed Kiechel bill.

The proposals remain valuable for consideration and are discussed because they indicate the great degree of concern about Federal and Indian reserved water rights and they show the range of alternatives available for removing the uncertainties and resolving the controversies.

Barrett Bill

The Barrett Bill, introduced in 1956, was an early example of a State-oriented proposal. The bill essentially provided that, in the use of any water, no Federal agency

was to interfere with any right to the beneficial use of water acquired and recognized under State law except when expressly authorized by law and upon payment of compensation.1/ It would have directed that any Federal agency, permittee, licensee or agency employee, as a prerequisite to the use of any water for any Federal program or activity, acquire rights to the use of water in conformity with State laws and procedures. The end result was to have State law govern any Federal use of water.

Agency Bill

A compromise alternative to the Barrett Bill was the so-called Agency Bill submitted in 1958 by the Department of the Interior with the concurrence of the Justice Department, the Departments of Agriculture and Defense, and the Bureau of the Budget. It was an attempt to undo the clear implication of the Pelton Dam case that a reservation of land from the public domain was also an implied reservation of water. In substance, it provided that any reservation of public lands should not affect any right to use the water acquired under State law before or after the withdrawal or reservation. It would not have affected the obligation of the United States to the Indians or any right owned or held on behalf of the Indians. While the bill initially had Federal agency support, it was introduced with a modification injecting a State supremacy theory, and agency support dissolved.

Moss Bill

In 1969, the Moss Bill 2/ was introduced. It, to some degree, would have subjected the United States to State water laws and procedures. It was based on earlier proposals offered by Senator Kuchel in 1963 and 1965.3/ In substance, the Moss Bill provided that a withdrawal or reservation, either before or after the approval of the bill, would not affect any right to use water acquired under State law unless either an act of the Congress or the official authorized to make the reservation promulgated a statement regarding the purpose, quantity, and priority date of the reserved water right. To effectively reserve the water, the promulgation would have to antedate the initiation of a conflicting water use under State law. The bill would have excepted

---

1/S. 863, 84th Cong., 2nd Sess. (1956).

2/S. 28, 91st Cong., 1st Sess. (1969).

3/S. 1275, 88th Cong., 1st Sess. (1963) and S. 1636, 89th Cong., 1st Sess. (1965).

past reservations to the extent of the quantity of (1) water actually used for governmental purposes prior to the enactment of the bill and (2) water rights held by or on behalf of the Indians.

McCarran Bill

The idea of inventorying and quantifying claimed Federal reserved water rights has also had a long and unsuccessful history. As early as 1951, Nevada's Senator Pat McCarran proposed legislation 1/ that would have required the head of each Federal agency to submit a list of its claimed water rights to the Secretary of the Interior. Despite a favorable committee recommendation, the McCarran Bill's attempt to require an inventory of all claimed Federal water rights failed to pass the Senate.

Kiechel Bill

A recent example of a legislative proposal to quantify Federal reserved water rights was the so-called Kiechel Bill. The Bill was drafted in 1975 by the Department of Justice at the request of the Chairman of the Water Resources Council as an alternative to the recommendations of the National Water Commission. Based on the assumption that the most offensive aspect of reserved rights is the unknown quantity, the proposed Kiechel Bill would have directed the head of each Federal agency to prepare, within 5 years of the enactment of the bill, a detailed State-by-State inventory of all reserved, appropriative or other water rights under its administrative jurisdiction, in accordance with regulations promulgated by the Secretary of the Interior. Within 6 years of the date of enactment, the Secretary of the Interior would then submit the inventories to the appropriate State offices and publish them in the Federal Register. The rights listed in the inventories, as well as the administrative determinations made in listing and quantifying the claimed rights, would be subject to judicial review in United States District Court. Also, the bill would have established an office in the Department of the Interior to maintain records of all water rights owned or claimed by the United States.

The States unanimously opposed the proposed Kiechel Bill. Although they tried to develop substitute legislation of their own, they were unable to agree among themselves on an acceptable proposal. The May 1975 report of the Interstate Conference on Water Problems' Special Task Force on

---

1/S. 18, 82d Cong., 1st Sess. 2 (1951). Favorably reported out of committee, see S. Rep. No. 755, 82d Cong., 1st Sess. 1 (1951).

the Proposed Federal Water Rights Legislation summarized the State views on the Kiechel Bill. It concluded that the proposed Kiechel Bill would not "meet any of the intended goals of providing coordination and cooperation with State water agencies, or adequate notice to other water users in the determination of Federal water rights claims." Since the Kiechel Bill was not cleared by the Office of Management and Budget, it was never submitted to the Congress.

Public Land Law Review Commission Recommendations

In the past decade, the reservation doctrine has been the subject of scrutiny by two study commissions. In 1970, the Public Land Law Review Commission's report recommended retention of the reservation doctrine subject to certain limitations, including the quantification of present and projected water needs for reserved areas and the payment of compensation to holders of State-conferred water rights. Quantification would encompass Federal agencies ascertaining projected water requirements in terms of quantity and use for the next 40 years and would forbid further assertions of any reservation claims not included in the inventory. Compensation would be paid where exercise of Federal reserved rights would interfere with State water rights vested prior to the 1963 decision in Arizona v. California.

The recommendations of the Public Land Law Review Commission were directed at the uncertainty caused by unquantified Federal reserved water rights and at the equity of holders of State-conferred rights whose rights may be curtailed by the exercise of Federal reserved water rights. In the Commission's opinion, the solution of these two critical problems in the manner suggested would permit the continued reliance on the reservation doctrine, where necessary, to (1) assure adequate Federal water rights for reserved public lands, (2) minimize disruption of State administrative machinery, (3) promote more effective State and Federal water resource planning, and (4) provide equitable treatment to adversely effected holders of State-conferred appropriative rights.

National Water Commission Recommendations

In 1973, the second study commission--the National Water Commission--did not view quantification of non-Indian Federal reserved water rights as the solution to the problems engendered by the reservation doctrine. The Commission felt that the quantification process would be too expensive and that Government officials would resist a final permanent quantification of Federal reserved water rights as well as make inflated claims to water. Rather, the Commission

adopted separate recommendations for Indian and Federal reserved rights. For Federal reserved rights, the National Water Commission recommended that the United States act in conformity with State laws in establishing, recording, and quantifying both existing and future water uses. The National Water Commission recommended the modification of the noncompensation feature of the Federal reservation doctrine by providing that the priority date for future uses of water on Federal reservations should be the date the water is put to use as determined by State law, rather than the date of withdrawal or reservation of the land from the public domain. For existing Federal uses based on the reservation doctrine, the Commission recommended that the priority date be the date that the reserved land was withdrawn from entry.

For Indian reserved rights, the Commission recommended that such rights be inventoried and quantified. The Commission distinguished Indian water rights from non-Indian Federal reserved water rights on the basis that while the United States may sell or give away Federal reserved water rights, the powers of the United States to sell or dispose of Indian water rights "are constrained by its fiduciary duty to the Indian tribes who are beneficiaries of the trust." The Commission noted that questions of the quantity and priority of Indian reserved water rights "are judicial questions and legislation cannot determine them or adversely affect such rights without just compensation." The Commission further recommended that all existing uses, whether adjudicated or not, be quantified and recorded and that upon adjudication of Indian water rights, such judicial decrees or other binding interpretations be recorded in State water rights records. Also, when requested to do so, the Secretary of the Interior would have the duty to file notice in State water rights records of the existence of unquantified Indian water rights.

Under other recommendations of the National Water Commission, the Federal Government would (1) financially assist Indian tribes that lack the necessary funds to put their water rights to economic use, (2) make a standing offer to the Indian tribes to lease at fair market value water rights tendered by the Indians on fully appropriated streams for a period not in excess of 50 years, and (3) compensate or provide an alternative water supply to a holder of State-conferred water rights, initiated prior to the 1963 decision in Arizona v. California, whose rights are impaired by the construction or operation of an Indian water project.

WHY PAST ATTEMPTS WERE UNSUCCESSFUL

Why the proposals did not produce results is not easy to discern. Some suggested reasons have been the failure of legislative proponents to show that substantial harm would result if the present system is allowed to continue and an unwillingness on the part of Federal officials to subject the water rights of the United States to State control. The Federal Reserved Water Rights Task Group observed that:

> "The concept of a legislative initiative to resolve the Federal Reserved Rights controversy is not new. In the past, a number of proposals have been advanced; but, because those somewhat polarized proposals were based on the constrained viewpoints of competing interests, nothing resulted."

RECENT ATTEMPTS

The Federal Reserved Water Rights Task Group

On May 23, 1977, President Carter announced a Water Resource Policy Study to be conducted by the Office of Management and Budget, the Council on Environmental Quality, and the Water Resources Council. Its purpose was to review water resource policy and to consider potential reform. One area of study was Federal reserved water rights.

In December 1977, the Federal Reserved Water Rights Task Group submitted to the Policy Committee of the President's Water Resource Policy Study its report on the problem and the options identified and considered by the task group. The task group believed that although the courts were resolving many of the issues associated with the doctrine of reserved rights, it would be decades before the judicial system adequately developed the fabric of the law, both substantive and procedural, needed to resolve the controversy.

Besides the option of continuing the status quo, the task group considered other means of facilitating the resolution of the controversy, including (1) streamlining the existing system to remove constraints to the effective functioning of the present system and to speed quantification, (2) abandoning unexercised Federal reserved water rights except for rights to protect certain instream values and to purchase any water needed for future programs, and (3) adopting a comprehensive legislative solution, setting forth procedures and criteria for quantifying Federal

reserved water rights and mechanisms for managing and enforcing the rights. Of the four options, the task group favored a comprehensive legislative initiative to establish procedures for identifying, quantifying, and managing all Federal water rights. As part of this solution, they favored compensating holders of State-conferred water rights injured by the exercise or quantification of Federal reserved water rights.

The National Indian Water Policy Review

Similarly, on July 26, 1977, it was announced that the new Assistant Secretary of the Interior for Indian Affairs was to undertake a study of policy regarding Indian water rights. This study was to be coordinated with the overall study of water policy reform.

On January 24, 1978, the Assistant Secretary of the Interior for Indian Affairs issued a paper on his review of national Indian water policy. The paper points out that the principles of the Winters doctrine provide a nucleus around which a Federal policy regarding the use of water on Indian reservations can be developed. The paper stated in part:

> "However, the legal principles in support of reserved water rights for the Indian tribes and their members, standing alone, have not resulted in the development of the water resources for the benefit of the Indian people. Moreover, the pressure from non-Indian water users for a determination of the amounts of water to which the tribes are entitled has greatly increased in recent years. The expanding use of water in the west requires a fresh look at the various methods by which the tribes can stake out their claims to water with the assurance that they will receive the water which they need to meet future uses on the reservation."

The paper identified three objectives for a comprehensive Indian water policy: (1) to preserve, protect, and assert the water rights of the Indian people, (2) to develop methods to determine the present and future water needs of the Indian people, and (3) to develop and implement a program to insure that dependable water supplies will be made available to support Indian water needs. Further, the paper formulated seven recommendations to aid in accomplishing the three objectives:

--The Government should make a firm commitment to develop Indian water resources.

--Federal courts should have exclusive jurisdiction over the adjudication of Indian water rights.

--To minimize future conflicts, Indian tribes with Federal assistance should participate in the water resource planning process.

--Possible regional or basin-wide legislative solutions for resolving Indian water rights controversies should be explored.

--Methods for facilitating negotiated settlements between the tribes and competing parties should be examined.

--A tribal arrangement for the regulation of water use on the reservations should be developed.

--Federal Government responsibilities in the area of Indian water rights should be clarified.

Regional bills

An example of legislation to settle Indian surface water rights on a regional basis is S. 905, "Central Arizona Indian Tribal Water Rights Settlement Act of 1977."1/ The bill directs the Secretary of the Interior to acquire by purchase or condemnation non-Indian lands with surface water rights and transfer these rights to the five central Arizona tribes in satisfaction of their present and future rights to the use of surface water for farming purposes. The bill, however, would leave such other questions as claims to ground water and to surface water for nonfarming purposes unresolved. Although the concept of a legislative settlement has been endorsed by the Department of the Interior, the Solicitor of the Department of the Interior has committed the Department to prepare an alternative bill to S. 905 for consideration by the Congress.

A legislative settlement is also the approach reflected in Public Law 95-328, July 28, 1978, relating to the settlement of the water claims of the Ak-Chin Indian Reservation. The Act directs the Department of the Interior to study the feasibility of providing ground water from nearby Federal lands to the Ak-Chin reservation. The act envisions that after the feasibility study is completed and submitted to the Congress, the Secretary will enter into a contract with the Ak-Chin Indian community to deliver annually up to 85,000 acre-feet of ground water. The act further

---

1/ S. 905, 95th Cong., 1st Sess. (1977)

provides that as part of the agreement with the Ak-Chin Indian community, the Secretary shall agree to the permanent annual delivery of 85,000 acre-feet of water not later than 25 years after the date of enactment. In exchange for a permanent supply of water, the Ak-Chin Indian community would waive all past and future claims against the United States, the State of Arizona, and others arising out of its right to the use of water except for any claims against the United States for any breach of the contract to deliver water to the reservation. Also, provision is made for the Secretary to receive and consider any claims from water users for losses suffered arising from the enactment of the act.

The water problems of the Ak-Chin Indians were separated from the other central Arizona tribes due to the critical need for a firm supply of water to enable the Ak-Chin Indians to continue farming. The Committee report recommending enactment of the bill also cited the social and economic disruption of litigation as a basis for a legislative settlement:

> "If the litigation were to proceed, potentially all non-Indian pumping would be enjoined without compensation. The catastrophic economic consequences on the non-Indian farmer with no water or compensation would reverberate throughout the area. Defaults on loans and other obligations would create economic instability. Even if the Tribe were not to prevail the litigation could take years, during which all land having water rights would have a clouded title. Banks might be reluctant to capitalize development proposals. In an area where racial tensions are already high, litigation might increase racial animosity. All of these adverse effects would be avoided by enacting S. 1582."

An Indian-only bill

The most recent proposed legislation in the area of Indian reserved water rights is H.R. 9951, "Quantification of Federal Reserved Water Rights for Indian Reservations Act." Generally, the bill seeks to preserve to the Indian tribes the right to use water presently being put to use by them with a priority date as of the date the reservation is established. The bill also establishes a mechanism for quantifying each reservation's water right. The bill sets the standard for quantification at the amount of highest annual actual use in the 5 years preceding January 1, 1977.

Negotiated settlements

Settling Indian water rights by negotiated agreement is another alternative that has recently been used to avoid the social and economic costs and disruptions of litigation. On December 21, 1977, the Secretary of the Interior announced that the Gila River Pima-Maricopa Indian Community and the Kennecott Copper Corporation approved an agreement to settle a long-standing dispute over their respective water rights in Arizona's Gila River watershed. In a Department of the Interior news release, the Secretary was quoted as follows:

> "Anyone who has followed Western water disputes--particularly in the desert southwest--can only view this agreement as a major achievement. I certainly commend both parties for reaching a sensible, mutually beneficial resolution without costly, time-consuming court suits which might also have seriously disrupted the State's economy."

OTHER ORGANIZATIONS' VIEWS

The National Governors' Association and the Joint Committee on Indian Water Rights of the National Congress of American Indians and National Tribal Chairmen's Association recently issued water policy statements for consideration in the President's Water Resources Policy Study. The statements contained the organizations' positions, which are shown here in their entirety, on reserved water rights.

National Governors' Association Statement--Feb. 28, 1978

> "To insure that there is equity and that procedures are prompt and orderly, the processes for the identification of Federal reserved water rights, including those made on behalf of Indians, should be streamlined and accelerated in cooperation with the States, with original jurisdiction in State courts subject to normal appeal. The subsequent administration of such rights should be within State systems.
>
> "Any Federal claims to water asserted under the reservation doctrine or other theory of paramount right including those made on behalf of Indians should include a specific recital of the purpose, location, extent and priority date of every water right claimed, and should relate such claims to the effectuation of the original purpose of the reservation.

Federal legislation is needed to provide full compensation to the owners of water rights vested under State law, if (1) those rights are later taken by the United States or Indian tribes or (2) the exercise of those rights is precluded by actions of the United States."

NCAI and NTCA Joint Committee Statement--Jan. 17, 1978

"1. Indian water rights are not Federal rights to the use of water by Indians as was stated by the Secretary.

"2. Successors in interest to formerly allotted Indian land do not acquire reserved rights to the use of water to the extent that the Indian allottee was using water when the land passed out of Indian ownership, rather, title to these rights of the use of water resides in the Indian Nations and Tribes from time immemorial;

"3. The erroneous statements set forth in the Federal Register of July 18, 1977, that "Indians are owners of a beneficial right to the use of either surface or ground water related to their reservations," should be changed to state that "Indians are owners of the full equitable title to their rights to the use of either surface or ground water related to their reservations," and the United States as Trustee, has legal title which may be exercised only in furtherance of that trust;

"4. The Secretary of the Interior does not have exclusive jurisdiction to control, administer and allocate water resources on the Indian reservation, including tribal lands, allotted lands and formerly allotted lands; rather, the Indian Nations and Tribes have jurisdiction, as owners of the full equitable title to those lands and rights to the use of water, to control, administer, and allocate water resources within their jurisdiction, and the United States, as trustee, should at all times act to protect those tribal rights and control;

"5. An amendment to 43 U.S.C. 666 (the McCarran Amendment) should be enacted exempting Indian rights to the use of water from the applicability of that Act;

"6. The administration will implement the immediate development of Indian water resources by forthwith making available, at the reservation level, a program and funding which will utilize surface and ground water resources to the end that Tribes will benefit from a program, adopting the best and soundest means of protecting, preserving, utilizing, and conserving the Indian Winters Doctrine rights or other rights to the use of water which have been, and are now being threatened to be abridged or lost through a long-time policy within the Department of the Interior of refusing to develop Indian sovereign rights to the use of water for the benefit of Indian people, and the Administration will establish a fund to pay the cost of litigating Indian water rights by the tribes themselves.

"7. To properly implement the trust responsibility of the federal government and to avoid conflicts of interest the Department of Justice and the Solicitor's Office of the Department of Interior will not adopt any legal position that conflicts with the position of the tribe affected.

"8. In view of the great magnitude of Indian interests in national water resources, tribal governments should be directly represented as a voting member of national, regional, and interstate water regulation and water policy planning bodies and commissions, including Interstate Compact Commissions, Interbasin Commissions, River Basin Commissions and others.

"9. Quantification of Indian Winter's Rights is neither necessary nor desirable at this time. A final determination, made at any given date, is inconsistent with the open-endedness of the right itself."

CHAPTER 5

CONCLUSIONS AND RECOMMENDATION

KEY FACTORS IN CONTROVERSY

Considerable uncertainty surrounds water rights in the West because of the unquantified but potentially significant impact of Federal and Indian reserved water rights. It is causing numerous controversies, considerable litigation, can lead to economic and social disruptions, and inhibits the efficient use of scarce western water resources. Such problems will become increasingly acute as new and growing water uses place greater demands on the diminishing available water supply in the Western States.

A final determination of the Federal and Indian reserved water rights would remove most or all of the uncertainties. Many proposals and studies have been directed to that end. While litigation has established the validity of reserved rights and settled individual disputes, the case-by-case approach of court action is expensive, time consuming, and provides only piecemeal guidance for resolving the issues. Relatively little quantification of reserved water rights has occurred other than that required as a result of litigation. Federal agencies cite various impediments to establishing reserved rights, such as the lack of a national quantification policy, lack of an accepted methodology for determining instream flow requirements, and insufficient resources to do the quantification work.

We believe that comprehensive action is necessary to clarify and resolve the reserved rights issues. The action we favor is twofold. First, a national quantification policy and implementing guidelines should be established on the manner in which reserved water rights should be identified, quantified, and administered. The policy and guidelines should address the many controversial questions on definitions and scope, quantification, adjudication and administration, and compensation that are discussed in this report. Second, sufficient resources should be provided to facilitate timely implementation of the policy and guidelines by Federal agencies.

We recognize that an acceptable policy and guidelines for settling the reserved water rights controversies may be very difficult to develop. A disparity of views on how to resolve the controversies has long existed, and many proposed solutions have not received wide support. The following

paragraphs offer factors that we believe are most important to consider in overcoming the difficulties and developing a comprehensive solution.

The two controversial factors of the reserved rights doctrine

--Its "open-ended" nature. State sources object to what they call the blank check approach of trying to reserve water for future needs. They would like quantification standards and procedures which would bring finality to the reserved water rights quantities.

--Its noncompensatory feature. Holders of State water rights believe that because reserved water rights were undefined and unquantified and because the Federal and State government encouraged them to develop water resources under State systems, a fair and equitable compensatory policy is necessary to protect them from any losses suffered by the exercise of reserved rights.

A legislative solution

Even though most past proposals sought legislation and were unsuccessful, certain factors seem to justify that approach: (1) Federal agencies and the courts have progressed very slowly toward achieving solutions, (2) conflict between the reservation doctrine and the State appropriation doctrine continues to exist, (3) the Congress is in the best position to consider all competing interests, (4) a national policy to uniformly identify, quantify, and administer reserved rights seems desirable, and (5) certain unresolved and disputed areas of the law and their interpretation may require clarification or change.

Results of the President's recent study groups

The Federal Reserved Water Rights Task Group advanced four options for resolving the Federal reserved water rights controversy. The group said that, of the four options, the most desirable is the development of a comprehensive legislative initiative to establish new procedures for identifying, quantifying, and managing all Federal water rights.

The task group, comprised of Federal and State representatives, offered three viewpoints on the Federal reserved rights doctrine--Federal, State, and an integrated one which attempts to combine the State and Federal interests. The task group said that the integrated viewpoint may provide

reasonable guidelines for arriving at a national consensus on the scope and management of Federal reserved rights and on the compensation issue. They contended that, although difficult, it is not an insurmountable task to arrive at a consensus on procedures for solving the Federal reserved water rights controversy.

The National Indian Water Policy Review, although not favoring a consensus approach or a comprehensive legislative solution for resolving the Indian reserved rights controversy, stated that in certain areas a legislative approach may assist in the resolution of many of the ongoing controversies over Indian water rights, eliminating the need for expensive and lengthy judical determinations.

- - - -

The legislative initiative proposal of the Federal Reserved Water Rights Task Group parallels our view on the desired approach for seeking resolution of the issues; however, we believe that it should also apply to Indian reserved rights which represent a more pressing controversy. We believe that resolution of reserved rights issues would benefit all parties involved in the controversies:

--The Federal Government and Indians will be more certain of the specific water reserved to them, thus facilitating the orderly planning for and development of reservation resources.

--States and new appropriators will be more certain of their existing rights and the availability of unappropriated waters for additional projects and uses.

--Competing water interests might have less cause for initiating complex, protracted, and costly litigation which often results from controversies over reserved rights.

On May 23, 1978, we requested comments on a draft of this report from the Departments of the Interior, Agriculture, and Justice; officials of the 11 Western States; and from the Joint Committee on Indian Water Rights of NCAI and NTCA. At that time both the Federal Reserved Water Rights Task Group's reports and the National Indian Water Policy Study Review Paper were under consideration by the President's Policy Committee. In the draft report, we proposed that in order to obtain timely resolution of an intensifying controversy impacting on the efficient use of scarce water resources, the Congress should establish a national quantification policy and implementing guidelines, on the manner in which Federal and Indian reserved water rights should be inventoried, quantified, and

administered. In establishing the policy and guidelines, we suggested that consideration be given to the factors discussed in this chapter and controversial questions discussed in chapter 2 of this report. Also, the Federal agncies should be provided with adequate resources to implement the policy in a reasonably short time frame.

THE PRESIDENT'S WATER POLICY STATEMENT

On June 6, 1978, the President issued his water policy statement. He stated that Federal agencies should work promptly and expeditiously to inventory and quantify Federal reserved and Indian water rights. He commented that in several areas of the country, States have been unable to allocate water because these rights have not been determined. Also, he directed that quantification efforts focus first on high priority areas, should involve close consultation with the States and water users, and should emphasize negotiations rather than litigation wherever possible.

On July 12, 1978, the President issued directives to the Federal agencies for implementing his policy statement. Neither the policy statement nor the directives called for a legislative solution. In his instructions on Federal reserved rights, the President again stated that quantification action should be taken primarily through administrative means, adjudication should be sought only where necessary, and resolution of disputes should include a willingness to negotiate and settle such rights in an orderly and formal manner. Regarding Indian reserved water rights, the President again stated that negotiation of the rights is favored because judicial resolution of the rights is a time-consuming and costly process.

The President assigned the Secretary of the Interior the lead responsibility to organize and coordinate the efforts. He directed the Federal agencies to report on their plans and actions to implement the directives by June 6, 1979, to the Secretary who, with the assistance of the Office of Management and Budget and the Council on Environmental Quality, will insure implementation of the directives.

FEDERAL, STATE, AND INDIAN ORGANIZATIONS COMMENTS AND OUR EVALUATION

By September 15, 1978, about 4 months after we requested comments on a draft of the report, we had received replies from the Forest Service, Department of Agriculture; the Department of the Interior; officials from 7 of the 11 Western States; and NCAI which submitted the views of the

Joint Committee on Indian Water Rights of NCAI and NTCA. We have enclosed the replies as appendices to this report in their entirety to provide a full perspective of their views.

Most of the replies indicated their agreement with our basic message on the need for resolution of the reserved water rights controversy and expressed the view that the subject matter was well presented in a balanced objective manner. However, not all of the parties agreed, and in a few cases, comments were not made on our proposal for a legislative solution. The Indian reply disagreed with and objected to the report presentation, its conclusions, and the legislative proposal. A discussion of the replies follow.

Federal agencies' comments (app. IV)

Interior's reply stated that the most glaring shortcoming of the existing quantification process is the interminable delays and resultant "paper" water rights produced by the present litigation process and that the process causes frustrations for Federal agencies in carrying out congressionally mandated program goals. Interior agreed with the legislative approach and suggested that it should provide sufficient flexibility to allow site-specific agreements to be worked out by the people most affected.

The Forest Service stated its support for a national quantification policy and guidelines. It encouraged a comprehensive analysis of current efforts, water needs of Federal reserved lands, and probable impacts to water resources planning and development, as a basis for establishing effective quantification policies and guidelines.

States' comments (app. V.)

By September 15, 1978, we received comments from Arizona, California, Idaho, Montana, New Mexico, Washington, and Wyoming. Replies were not received from Colorado, Oregon, Nevada, and Utah.

While Arizona and Idaho were silent on the legislative proposal, Montana, Washington, and Wyoming indicated their support for a legislative solution. California and New Mexico did not support the legislative approach.

New Mexico stated that while a legislative solution was attractive, something was to be learned from the repeated failure of the Congress to make any progress. It said also that a legislative solution would have a profound and adverse impact on State water rights administrators and substantially

change Federal-State relations in western water matters. New Mexico commented also that the courts would have to shorten the distance between the competing Federal and State interests before there is a chance of passing any meaningful legislation.

California did not directly express disagreement with a legislative approach but suggested that one approach which should be evaluated as an alternative was to quantify the reserved rights through negotiation on a case-by-case basis because this method would be more suitable to deal with the complex and varied quantification problems.

In addition, California stated its opposition to quantification because it would be detrimental to its interests and the failure to quantify had not hindered the economic development of the Western States. To illustrate the first reason, the State commented that if reserved water rights were defined to include underground water it would create nearly impossible problems to quantify the relative rights of the parties whose properties overlie a ground water aquifer. It seems to us that while such determinations may be difficult to make, the quantification of the rights would be in the interests of the parties not only to protect their share of the ground water supply but to effectively plan for future uses. Concerning the economic effects from not quantifying reserved water rights, we believe this report fully discusses and presents examples of the severity of the problems which will arise if the reserved water rights controversy is not promptly resolved.

State comments also mentioned these matters:

--Federal reserved water rights should be quantified within certain time periods, and Federal legislation should require compensation for adversely affected holders for water rights obtained under State law.

--Until reserved rights are quantified and integrated into State water allocation and management programs, a national, well-administered State water rights program cannot be achieved.

--A distinction between Federal and Indian reserved water rights should not be made because there is no real difference in concept or doctrine although the Indian rights may not be taken without compensation.

--While Federal consumptive-use claims may be small, the Federal nonconsumptive claims can have a very significant dispossessive impact on communities and industries.

In addition, some of the States offered specific suggestions on the manner in which reserved water rights should be quantified and established.

Indian comments (app. VI)

The Indian reply, representing the views of the Joint NCAI/NTCA Indian Water Rights Committee, generally disagreed with our draft report, its conclusions, and the legislative proposal. Also, they alleged inaccuracies and omissions in the report.

The alleged inaccuracies concerned the report's presentation of the three law suits involving Indian reserved water rights. We considered the specific allegations reported to us in finalizing this report. The discussion of the law suits is intended to show the nature and potential significance of the reserved water rights controversy and not the merits of the cases or the parties' contentions.

The alleged omissions concerned the water rights appurtenant to Indian aboriginal title lands and the Indians' entitlement to just compensation for the loss of their reserved water rights. These matters were covered in our draft report and are discussed on pages 66 and 69, respectively, of this report.

The Indians expressed their views as to why a legislative solution was not the answer and stated that it made far more sense to allow the present process of resolution of Indian reserved rights through negotiation and litigation to take its course.

We believe that legislation may be necessary to establish a national quantification policy, to narrow the range of issues which will require negotiation or litigation, and to help resolve existing problems and lessen future controversies.

In interpreting our conclusions, the Indians said that we placed "the burden of compromise and loss upon Indian tribes" and that "The GAO Report has clearly concluded that the existing law supporting Federal reserved rights and Indian reserve rights is detrimental and inconvenient to non-Indian interests and must therefore be changed." We did not intend that such interpretations would be drawn and we made certain revisions in this report to help clarify our intent.

By suggesting the need for balanced objectivity in seeking resolution of the reserved water rights controversy, we sought to respond to the effects of the polarized viewpoints and competing interests which have impeded past attempts for resolving the issues. The purpose of this report is to contribute to a better understanding of the issues and why their resolution is so important. We do not advocate compromising Indian reserved water rights nor do we wish to suggest the specific manner in which the reserved rights should be inventoried, quantified, and administered.

CONCLUSION

We continue to believe that, in the final analysis, legislation may be necessary to resolve many of the controversial questions and issues presented in chapter 2 of this report. However, it became increasingly clear when we discussed this matter with informed parties and noted the lack of agreement on past legislative initiatives, that there is an urgent need to settle the controversy. The problem becomes more acute as new and existing water uses place greater demands on the limited Western water resources.

Therefore, we endorse the President's policy initiative. It represents, for the first time, a comprehensive action program to inventory and quantify Federal and Indian reserved water rights. Also, employing an administrative approach has certain advantages if a legislative solution will eventually be necessary. For example, it should provide additional information on the (1) problems in defining and quantifying the reserved rights, (2) feasiblity or likelihood of negotiated settlements, and (3) nature and significance of disruptions to existing water users which may result from the assertion of the reserved rights. Information on the last matter would help the Congress make knowledgeable judgments if it wishes to consider the payment of compensation to those who may suffer loss by the exercise of reserved rights.

RECOMMENDATION TO THE CONGRESS

We recommend that the Congress review the Federal agencies' progress in carrying out the President's program during the legislative oversight and budgetary process. If the Congress decides that effective progress is not being made because of inadequate attention or resources, it may wish to direct the agencies to give the program more attention and increased funding. If adequate progress is not being made because of the difficulties in resolving the controversial questions and issues discussed in this report, we hope that the Congress will consider a legislative solution.

THE RESERVED WATER RIGHTS DOCTRINE, ITS ORIGIN AND DEVELOPMENT

FEDERAL RESERVED WATER RIGHTS

In the latest of a long line of cases, the Supreme Court confirmed the fundamental attributes of the reservation doctrine:

> "When the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. * * * The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams."1/

The doctrine is at the core of Federal-State conflicts over water in the West. The National Water Commission's Report noted several characteristics of the reservation doctrine that conflict with basic principles of State water law:

> "If a reserved Federal water right is determined to have been created, it has characteristics which are quite incompatible with state appropriation water law: (1) it may be created without diversion or beneficial use, (2) it is not lost by nonuse, (3) its priority dates from the time of the land withdrawal, and (4) the measure of the right is the amount of water reasonably necessary to satisfy the purposes for which the land has been withdrawn."

An important consequence of the conflict is that persons who appropriate water under State law after the date the Federal reservation or enclave is established are not entitled to compensation for any loss suffered by the subsequent exercise of Federal reserved rights. However, because most Federal reserved water rights remain unquantified and

---

1/ Cappaert v. United States, 426 U.S. 128, 138 (1976).

and unrecorded in State water rights records, the existence, amount, location, and priority of the reserved rights remain speculative.

Federal reserved water rights exist today because of the way ownership of the land and water was obtained in the past. The Federal Government at one time owned all western lands as successor to the sovereigns from whom the lands were acquired, subject to rights privately held under prior sovereigns. The proprietary rights of the Federal Government included the power to dispose of the public lands and water in the West, either separately or together. Part of the problem has been an assumption by some parties that the Congress, through a series of acts, had disclaimed any and all proprietary interests of the Federal Government in water on the public domain.

The second half of the 19th century saw the settlement and development of much of the public domain in the West under the authority of the various homestead acts. The Homestead Act of 1862 opened the public lands to settlement and private acquisition, and the act of July 26, 1866, confirmed vested water rights recognized by local law and custom.

In 1877, the Desert Land Act opened all surplus water upon the public lands for the appropriation "and use of the public for irrigation, mining and manufacturing purposes subject to existing rights." Its effect was to sever the previously unappropriated water on the public domain from the land and to allow the States to regulate the appropriation of surplus water.1/ As later Supreme Court decisions made clear, however, the United States had not divested itself of title to all the water in the West, as some parties had assumed.

The first indication that the United States retained some water rights free from State control appeared in a 1899 Supreme Court case.2/ However, it was not until 1908 that the Supreme Court, in Winters v. United States, 207 U.S. 564 (1908), squarely confronted the conflict between the water rights of an appropriator under State law and the water rights retained for reserved land, in this case Indian reservation lands. The Court held that the right to use

---

1/ California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).

2/ United States v. Rio Grande Dam and Irrigation Co., 174 U.S. 690 (1899).

enough of the waters of the Milk River, a nonnavigable stream forming the northern border of the Fort Belknap Indian Reservation, to develop the Reservation was impliedly reserved from appropriation under State law. Moreover, the Supreme Court rejected the argument that the admission of Montana to the Union, "'upon an equal footing with the original states;'" repealed the reservation of water.

Since Winters v. United States, the reservation doctrine has continued to evolve judicially. Before 1955, the Winters decision was considered by some to be a special quirk of Indian water law. However, in the 55 Pelton Dam case,1/ a controversy arose concerning the authority of the Federal Power Commission to license, over State protest, the construction of a dam across a river bounded on both sides by Federal reserved land. Although the decision did not involve water rights per se, the decision's implication was clear--unlike unappropriated water on the public lands, the Desert Land Act did not sever unappropriated water from reserved lands. In other words, the reservation of the land was similarly a reservation of water from appropriations under State law.

The evolutionary process continued in Arizona v. California, 373 U.S. 546 (1963). There, the Supreme Court specifically reaffirmed the Winters decision and, for the first time, upheld reserved water rights claims for non-Indian reservations. The claims involved waters of the Colorado River and some of its tributaries for such reservations as the Gila National Forest, Havasu Lake and the Imperial National Wildlife Refuges, and the Lake Mead National Recreation Area.

Recent Supreme Court decisions continue to develop the fabric of the law of reserved water rights. In the 1971 Eagle County 2/ and the 1976 Akin cases, 3/ the Supreme Court interpreted the McCarran Amendment, to permit State Courts to determine Federal reserved and Indian reserved water rights, respectively, in general stream adjudications. More recently, the Supreme Court's decision in the Cappaert case recognized the hydrological relationship of ground water and surface water and ruled

---

1/ Federal Power Commission v. Oregon, 349 U.S. 435 (1955).

2/ United States v. Colorado District Court in and for Eagle County, 401 U.S. 520 (1971).

3/ Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), reh. den., 426 U.S. 912 (1976).

that "the United States can protect its water from subsequent diversion, whether the diversion is of surface or ground water." The Cappaert case provides a good illustration of the reservation doctrine as it relates to Federal enclaves or reservations.

In 1952, President Truman, by proclamation issued under the authority of the American Antiquities Preservation Act, 16 U.S.C. 431, withdrew from the public domain a 40-acre tract of land containing a limestone cavern known as Devil's Hole and made it a detached component of the Death Valley National Monument. The significance of Devil's Hole lies in the fact that below the cavern mouth lies a remnant of the prehistoric Death Valley Lake System wherein flourishes cyprindon diabolis, or Devil's Hole pupfish, a fish unique to Devil's Hole and whose lineage dates from the prehistoric Pleistocene era.

The Cappaerts operated a 12,000-acre ranch in Nevada that, at the time, represented an investment of more than $7 million with an annual payroll in excess of $340,000. In 1968, the Cappaerts started pumping ground water for irrigation from an underground aquifer that is also the source of water for Devil's Hole. As a result of the ground water pumping, the water level of the pool decreased, exposing a large rock shelf used by the pupfish for spawning and feeding purposes. The reduction in available spawning and feeding area impacted directly on the ability of the pupfish to breed in sufficient quantities to maintain the species. In 1971, the United States filed suit in the United States District Court for Nevada to limit ground water pumping by the Cappaerts from six wells near Devil's Hole.

The Cappaert case clarified several aspects of the reservation doctrine. It disposed of the troublesome question of intent to reserve water. Opponents of the Federal reservation doctrine have argued that if the intention to reserve water is not expressed in the legislation or order authorizing the withdrawal, or if it is not clearly implied from the authorization, then the Federal Government should not be deemed to have reserved rights. The Court stated that:

> "In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created." 426 U.S. at 139 (citations omitted).

The decision also throws some light on the relationship between quantity of water reserved and the purposes for which the reservation was created. The 1952 proclamation reserving Devil's Hole noted in detail the scientific and historical significance of the Devil's Hole pool of water and concluded that "the said pool is of such outstanding scientific importance that it should be given special protection." The 1952 proclamation directed the Director of the Park Service to administer the 40-acre tract as provided in the National Park Service Act, 16 U.S.C. 1 et seq. The fundamental purpose of the act is:

> "to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. 1.

On the basis that the purpose of the reservation as gleaned from the 1952 Presidential proclamation and the National Park Service Act was to preserve the habitat of the Devil's Hole pupfish, the Court pointed out that "The implied-reservation-of-water doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more." Accordingly, the District Court's injunction limiting pumping only to the extent necessary to preserve an adequate water level in the pool to protect its value as a national habitat for the pupfish was approved.

Other significant cases in the area of Federal reserved water rights have come out of State courts. For example, the Idaho Supreme Court ruled that under the McCarran Amendment "the United States is bound by Idaho State law, and therefore must quantify the amount of water claimed under the reservation doctrine at the time of the general adjudication of water rights."1/ The decision noted that if the United States is not required to finally quantify the nature and extent of their claimed reserved water rights, doubt and uncertainty would continue to exist with regard to the water rights of all parties in the stream. Only recently, the Supreme Court of New Mexico has ruled that the United States possesses reserved water rights in a national forest only when the original purposes for which the national

---

1/Avondale Irrigation District v. North Idaho Properties, 96 Idaho 1, 523 P. 2d 818, 821-822 (1974).

forest was established require such a reservation. 1/ The Court then found that the original purpose of the Gila National Forest did not include recreational and minimum stream flow purposes.

On appeal, the United State Supreme Court held that the United States, in setting the Gila National Forest aside from other public domains lands under the Organic Administration Act of 1897, had not reserved water for esthetic, recreational, wildlife preservation, and stock watering purposes. 2/ However, questions remain whether the United States (1) reserved water rights for instream flows in national forests established after the Multiple Use Sustained Yield Act of 1960 and (2) may assert rights to minimum instream flows for erosion control or fire protection under the Organic Administration Act of 1897.

INDIAN RESERVED WATER RIGHTS

The doctrine of Indian reserved water rights has its foundation in the landmark case of Winters v. United States. In Winters, the Supreme Court ruled that when the Fort Belknap Reservation was established, there was impliedly reserved from appropriation under the laws of the State of Montana an amount of water sufficient to fulfill the purposes of the reservation. The practical result of this ruling was that the off-reservation diversions of water for non-Indian lands were enjoined in favor of diversions to Indian lands. In view of its landmark nature, the controversy involved and its disposition by the court is summarized below.

The controversy involved the Fort Belknap Reservation established by agreement of May 1, 1888, between the United States and the Assiniboine and Gros Ventres tribes that transferred to the United States all lands except the lands of the present Fort Belknap Reservation. The reservation lands were arid, suitable for stock grazing and, with the aid of irrigation, for cultivation and farming. After the reservation was established, several individuals and a cattle company appropriated water under the laws of the State of Montana for irrigation of forage crops. Subsequent to

---

1/Mimbres Valley Irrigation Co. v. Salopek, 564 P. 2d 615, 617-618 (N.M. 1977).

2/ United States v. New Mexico, 46 U.S.L.W. 5010 (U.S. June 26, 1978)(No. 77-510).

these appropriations, an Indian irrigation project was completed which, due to the upstream off-reservation diversions, lacked adequate quantities of water.

Winters argued that before any water was appropriated by either the United States or the Indians, he had settled and cultivated the land and ultimately received title to it. Also he pointed out that prior to any diversion of water by the United States or the Indians, he had appropriated water for irrigation pursuant to the laws and customs of the State of Montana. To resolve the case, the Supreme Court looked to the agreement of May 1, 1888, and the circumstances surrounding the creation of the reservation:

> "The reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such the original tract was too extensive, but a smaller tract would be inadequate without a change of conditions. The lands were arid and, without irrigation, were practically valueless."

Winters, on the other hand, argued that the Indians knew the lands reserved were arid and yet made no provision in the 1888 agreement for water. Moreover, the lands transferred by the Indians to the United States were also arid and valueless without irrigation and, Winters suggested, should not the transfer of the land to the United States carry with it the water to cultivate the otherwise arid lands? The "conflict of implications" was resolved in favor of the Indians:

> "We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession. The Indians had command of the lands and the waters--command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable and adequate?"

> "The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. The United States v. The Ric Grande Ditch [sic] and Irrigation Co., 174 U.S. 690, 702; United States v. Winans, 198 U.S. 371. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years."

Controversy still surrounds the theory underlying the Winters doctrine. One view is that the Indians reserved to themselves water in sufficient quantities to meet the present and future needs of the reservation. 1/ Under this view, the Winters right is an "aboriginal, immemorial and paramount right." The other view argues that the water reserved for an Indian reservation was reserved by the United States as sovereign for the benefit of the Indians.2/ Both views find support in the Winters decision and, to date, no court has had to resolve the controversy. The application of one view rather than the other may lead to different results. For example, if the theory that the Indians reserved the water to themselves is accepted, an Indian reservation established by treaty on aboriginal lands may have a priority dating from time immemorial rather than from the date the reservation was established. In such events, even appropriators of water prior to the time the reservation was established would be junior to the Indian reserved water rights.

Some Indian water rights may be based on a theory different than the Winters doctrine, such as aboriginal rights. These rights which may exist in the Southwest are not technically reserved rights since, as in the case of the Pueblo Indians, there has never been a reservation or withdrawal by the United States nor are the rights governed by State laws. Although for purposes of adjudication they may be treated in the same manner as Indian reserved water rights, the priority date and purposes for which water may be used may differ from reserved water rights.

1/Veeder, "Indian Prior and Paramount Rights For the Use of Water," 16 Rocky Mtn. Min. L. Inst. 631 (1971).

2/Bloom, "Indian 'Paramount' Rights to Water Use," 16 Rocky Mtn. Min. L. Inst. 669 (1971).

Since Winters, there have been numerous decisions applying the doctrine of Indian reserved water rights. For example, in United States v. Powers, 305 U.S. 527 (1939), the Supreme Court reaffirmed the Winters decision and found an implied reservation for allotted lands without defining the extent or precise nature of the right to water. United States v. Walker River Irrigation Project, 104 F. 2d 334 (9th Cir. 1939), established that Indian reserved water rights could be impliedly created by Executive order as well as by treaty or agreement. Other cases have established that the Indian's reserved water rights are not limited to actual beneficial use at the time the reservation is established but include enough water to fulfill both the present and future needs of the Indian reservation.1/ For purposes of priority, the date the reservation is established is generally the priority date for Indian reserved rights although, in certain situations, an immemorial right may be argued.

Since Indian reserved water rights represent an unquantified amount of water for the present and future needs of the reservations and, unlike a State-conferred water right, are not lost by nonuse, the uncertainty and the potential for conflict regarding the respective rights of Indians and non-Indians in a particular water source is great. In 1963, the Supreme Court dispelled some of this uncertainty by decreeing fixed water rights for five mainstem Colorado River Indian reservations.2/ The decision reaffirmed the proposition that the quantity of water reserved was in amounts sufficient to satisfy both the present and future needs of the reservation. However, the Court decreed a specified amount necessary to fulfill these needs--the amount of water necessary to irrigate all the "practicably irrigable acreage" in the reservation:

> "We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations. Arizona, on the other

---

1/Conrad Investment Co. v. United States, 161 Fed. 829 (9th Cir. 1908); United States v. Ahtanum Irrigation District, 236 F. 2d 321 (9th Cir. 1956).

2/Arizona v. California, 373 U.S. 546 (1963), decree at 376 U.S. 340 (1964).

> hand, contends that the quantity of water reserved should be measured by the Indians' 'reasonably foreseeable needs,' which, in fact, means by the number of Indians. How many Indians there will be and what their future needs will be can only be guessed. We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage." (emphasis added).

Until recently, there was no single forum available in which all the rights to the use of water in a river system or water source could be adjudicated and quantified. Prior to 1952, Federal district courts had sole jurisdiction over Indian reserved water rights. However, in 1952, Senator McCarran added a rider to the Department of Justice Appropriation Act waiving the sovereign immunity of the United States "in any suit * * * where it appears that the United States is the owner of or is in the process of acquiring water rights under state law, by purchase, exchange, or otherwise." 43 U.S.C. 666 (1970). In 1971, the Supreme Court interpreted the McCarran Amendment to include the reserved water rights of non-Indian Federal reservations.1/ In 1976, the Supreme Court ruled that since the United States holds title to Indian reserved water rights in trust for the benefit of the Indians, the United States was the owner of the Indian reserved rights within the meaning of the McCarran Amendment.2/ Now both State and Federal courts have concurrent jurisdiction to adjudicate Indian and Federal reserved water rights.

Although Indian reserved rights are similar in concept to Federal reserved water rights, they are in at least one respect quite different. Unlike Federal reserved rights, the actions of the United States with respect to Indian reserved water rights are limited by its fiduciary duty as trustee to act for the benefit of the Indians. This principle derives from recognition of the fact that the United States holds only a bare legal title as trustee while the Indians retain the equitable title to the right

---

1/ United States v. District Court In and For Eagle County, 401 U.S. 520 (1971).

2/ Colorado River Water Conservation Dist. v United States, 424 U.S. 800 (1976), reh. den., 426 U.S. 912 (1976) referred to as the Akin case); see also State ex rel Reynolds v. Lewis, 88 N.M. 636, 545 P. 2d 1014 (1976).

to use the reserved water. As a result, the Federal Government must affirmatively assert and defend Indian water rights. In addition, unlike Federal reserved water rights which the United States must manage in the public interest, Indian rights may not be taken without the payment of just compensation.

PRESIDENT'S WATER POLICY STATEMENT ON FEDERAL AND INDIAN RESERVED WATER RIGHTS

The President is directing Federal agencies to take steps to facilitate resolution of controversies surrounding water issues regarding Federal lands and Indian rights. Background and description of the initiatives follow.

Federal Reserved Rights

The Federal Government, in setting aside tracts of land for National Parks and Forests, Wildlife Refuges, and other Federal purposes, also reserves sufficient water pertinent to the reserved land to accomplish the purpose of the land reservation. This water is a Federal reserved water right.

Because of the importance of the quantity and priority of these reserved rights to other water users, it is desirable to facilitate the resolution of reserved rights controversies in a timely and fair manner. To this end, the President is directing Federal agencies:

-- To increase the level and quality of their attention to the identification of Federal reserved water rights, focusing particularly on areas where water planning and management will be improved, where the protection of Federal water uses is of highest importance, and where it is essential to reduce uncertainty over future Federal assertions of right. States and water users should be closely consulted as this is accomplished.

-- To seek an expeditious establishment and quantification of Federal reserved water rights consistent with the priorities set out, and this action should be accomplished primarily through administrative means, seeking formal adjudication only where necessary. Resolution of disputes involving Federal water rights should include a willingness to negotiate and settle such rights in an orderly and final manner, seeking a balance with conflicting and established water uses. Where adjudication is necessary, it should be actively pursued by the agency to a speedy resolution.

-- To utilize a reasonable standard, when asserting Federal reserved rights, which reflects true Federal needs, rather than theoretical or hypothetical needs based on the full legal extension of all possible rights. The agencies will be further directed to develop procedures and standards for the purposes of this directive, consulting with the Department of Justice as appropriate.

Indian Water Rights

Indian water rights are an important component of the long term resolution of water problems in the West. There have been several important court decisions--Winters v. United States and Cappaert v. United States in particular--which have established that there were water rights attached to Indian reservations upon their creation.

The priority and quantity of these rights present a question, however, because the quantification of the rights must be determined by examining the documents establishing each reservation. These issues can, of course, be resolved through judicial proceedings. This is a time consuming and costly process. The President strongly favors a negotiation process instead. Where negotiation is unsuccessful, the rights should be adjudicated in the Federal courts.

APPENDIX II

In order to facilitate the negotiation process:

-- The Bureau of Indian Affairs, through the Department of Interior, is being directed to develop and submit a plan for the review of Indian water claims to be conducted within the next 10 years. The plan will include the development of technical criteria for the classification of Indian lands which reflect and make allowance for water use associated with the maintenance of a permanent tribal homeland.

-- All Federal water development agencies are being directed to develop procedures to be used in evaluating projects for the development of Indian water resources and to increase Indian water development in conjunction with quantification of rights. These procedures will be consistent with existing laws, principles, standards and procedures governing water resource development.

APPENDIX III

INTERVIEWEES ON RESERVED WATER RIGHTS ISSUES AND CONTROVERSIES

Representatives of the Federal Government

Department of Agriculture:
- Forest Service, Headquarters Office, Washington, D.C.

Department of the Interior:
- Bureau of Indian Affairs, Headquarters Office, Washington, D.C.
- Bureau of Reclamation, Headquarters Office, Washington, D.C.
- Fish and Wildlife Service, Cooperative In-Stream Flow Services Group, Fort Collins, Colorado
- National Park Service, Headquarters Office, Washington, D.C.; Rocky Mountain Regional Office, Denver, Colorado
- Solicitors Office:
  - Headquarters Office, Washington, D.C.
  - Field Solicitor, Boise, Idaho
  - Portland Regional Office, Portland, Oregon

Department of Justice, Headquarters Office, Washington, D.C.

Water Resources Council, Washington, D.C.

Representatives of State Governments

Arizona State Water Commission, Phoenix, Arizona

California:
- Colorado River Board of California, Los Angeles, California
- Department of Water Resources, Sacramento, California
- Governor's Commission to Review California Water Rights Law, Sacramento, California
- Office of Attorney General, Los Angeles, California
- State Water Resources Control Board, Sacramento, California

Colorado State Engineer, Denver, Colorado

Idaho Department of Water Resources, Boise, Idaho

Oregon Water Resource Department, Salem, Oregon

Utah State Engineer, Salt Lake City, Utah

Washington:
Office of Attorney General, Olympia, Washington
Washington State Department of Ecology, Olympia, Washington

Wyoming State Engineer, Cheyenne, Wyoming

Multiinterest organizations

Interstate Conference on Water Problems, Ray Rigby, Chairman, Rexburg, Idaho

National Water Resources Association, Ed Southwick, President, Ogden, Utah

Pacific Northwest River Basin Commission, Donel Lane, Chairman, Vancouver, Washington

Upper Colorado River Commission, Ival Goslin, Executive Director, Salt Lake City, Utah

Western States Water Council, Jack Barnett, Director, Salt Lake City, Utah

National Congress of American Indians, Albert Trimble, Executive Director, Washington, D.C.

Other knowledgeable sources

Paul Bloom, Deputy General Counsel, Federal Energy Administration and former General Counsel for the New Mexico State Engineer's Office, Washington, D.C.

LaSelle Coles, Manager, Ochoco Irrigation District, former President of the National Water Resources Association and former Chairman of the Oregon Water Board, Prineville, Oregon

Rich Collins, Attorney, Native American Rights Fund, Boulder, Colorado

Ralph Johnson, Professor of Law, University of Washington, and Legal Consultant to the National Water Commission, Seattle, Washington

APPENDIX III

Raphael Moses, Attorney; Consultant to the Colorado State Water Board; former Director of the Western States Water Council; and former Special Assistant to the Colorado State Attorney General, Boulder, Colorado

Bob Pelcyger, Attorney, Native American Rights Fund, Boulder, Colorado

Frank Trelease, Sr., Attorney, Professor of Law, McGeorge School of Law, University of Pacific, consultant for the National Water Commission; and former Dean of the University of Wyoming School of Law, Sacramento, California

Bill Veeder, Attorney, and former Department of Justice representative, Washington, D.C.

Charles Trimble, former Executive Director, National Congress of American Indians, Washington, D.C.

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

JUL 25 1978

Mr. Henry Eschwege
Director, Community and Economic
Development Division
General Accounting Office
441 G Street, N. W.
Washington, D. C. 20548

Dear Mr. Eschwege:

At your request, we have reviewed GAO Draft Report: "Water Rights Reserved for Federal and Indian Reservations: A Growing Controversy in Need of Resolution."

We find the document to be comprehensive and well written and in general concur with the recommendations contained therein. We suggest, however, that if a final decision is reached to pursue a legislative approach for resolving the quantification issue, it may be appropriate for the GAO to consider recommending that the Executive Branch, acting through affected departments and agencies, assist the Congress in drafting such a proposal. We believe that any legislative approach should provide sufficient flexibility to allow site-specific agreements to be worked out by the people most affected, namely the water users. Should negotiations fail, however, access to the courts for protecting vested property rights should, of course, be provided.

The GAO may wish to consider expanding the report to include the needs of Federal agencies that do not rely on the Reservation Doctrine for their water rights. Examples of such water rights are those acquired through Congressional mandate and those appropriative and riparian water rights acquired through compliance with State law. Of particular concern are the water rights of the United States that have been acquired under applicable State statute pursuant to section 8 of the 1902 Reclamation Act. This can be illustrated most vividly in the Pyramid Lake case, where conflicts between the water rights of Reclamation projects and Indian reserved water rights are of deep concern.

APPENDIX IV

The GAO may also wish to consider expanding the report cc include water rights and water needs of Federally acquired lands or Federal lands administered by the Bureau of Land Management for which specific reservation has not been made. We believe that not only does the problem of Federal water rights involve potential Federal ownership of water across reserved lands, but it also involves problems of potential Federal ownership of water across public domain lands. Also, the report should more fully address such uses that are not normally requested by State law as recreation, fish and wildlife needs, etc. In addition, the problem of established fixed quality and later unforeseen future needs should be discussed.

Concern of a general nature and one which we believe to be the most glaring shortcoming of the existing process for quantifying reserved water rights, is the interminable delays and resultant "paper" water rights that are produced by the present litigation process. After many years and often decades of litigation, the United States can expect to derive a right to use water, then proceed through feasibility studies and related environmental evaluations to seek the necessary Congressional authorization and funding for actually using the water right. The process literally takes decades for tangible results. Although this issue is recognized to some extent in the report, we feel that it should be stressed with full recognition of the frustration that Federal agencies face in carrying out Congressionally mandated program goals and objections.

Page i, paragraph 2, line 1: The report concentrates the focus of the reserved water rights controversy on the 11 Western States. Those other States that were originally a part of the public domain contain reserved lands that may also have reserved water rights.

Page ii, first full paragraph, line 6: Reserved water rights are also claimed for lands that were never a part of the public domain but were reserved to Indian tribes by treaty.

Pages 26 and 64: We note the reference and description of court findings in the Mimbres Valley and Pyramid Lake cases. Insofar as those cases have been or are expected to be appealed, the court findings described in the report should be qualified to reflect the tentative nature of those decisions.

Page 87: National Park Service Headquarters Office, Washington, D. C., and Rocky Mountain Regional Office, Denver, Colorado, should be listed under Department of the Interior to document the cooperation and assistance rendered to GAO personnel via personal interviews, several telephone conversations, and the transmittal of relevant material.

APPENDIX IV

Page 88: We note that representatives of certain Indian interest groups were contacted, including the Native American Rights fund and the National Congress of American Indians. Since those organizations are of a multi-interest nature, representing many Indian communities, it may be appropriate to list them under the heading "Multi-interest organizations."

We appreciate the opportunity to review and comment upon the subject draft Report.

Sincerely,

for Larry E. Meierotto
Deputy Assistant Secretary
Policy, Budget and Administration

APPENDIX IV

UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICE
P.O. Box 2417
Washington, D.C. 20013

2540

JUN 2 1 1978

Mr. Henry Eschwege
Director
Community and Economic
Development Division
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Eschwege:

We appreciate this opportunity to review and comment on your proposed report to Congress entitled "Water Rights Reserved for Federal and Indian Reservations: A Controversy in Need of Resolution." The draft report is a commendable discussion of concerns surrounding the application of the Reserved Water Doctrine. The Forest Service recommends the report be forwarded to the Congress. We have the following specific comments for your consideration:

a. Although implied in the description of instream flows as nonconsumptive, future confusion might be avoided by clearly stating that instream flows, in many instances, are available for appropriation after leaving the reservation.

b. Page 17, last paragraph--The Forest Service also anticipates large nonconsumptive water requirements to protect instream flows for fish and wildlife conservation, recreation, and aesthetic values.

c. Page 21, first paragraph, last sentence--This statement implies that no Federal water rights have been quantified or recorded. Some have, although the bulk have not.

The Forest Service is in favor of a national quantification policy and implementing quidelines. We are placing greater emphasis on the quantification of water necessary for the development, use, and management of resources on National Forest reserved lands. This effort is conducted within the framework of existing Federal law and Administration policies. We fully recognize the need for additional guidelines to conduct our quantification effort.

APPENDIX IV

Before a national quantifications policy with implementing quidelines is developed, we encourage a comprehensive analysis of current quantification efforts. This analysis should examine the extent of current quantification, procedures of quantification, the nature of water needs to accomplish the purpose of Federal reserved lands, and probable impacts to water resource planning and development. Such an investigation is paramount to the establishment of an effective national quantification policy and implementation guidelines.

The Forest Service would be interested in participating in the formulation of a quantification policy.

Sincerely,

John R. McGuire

JOHN R. McGUIRE
Chief

APPENDIX V

Thomas L. Judge, Governor

MONTANA DEPARTMENT OF NATURAL RESOURCES & CONSERVATION DNRC

MEMBERS OF THE BOARD - CHAIRMAN CECIL WEEDING, J. VIOLA HERAK, DAVID G. DRUM, DR. WILSON F. CLARK, DR. ROY E. HUFFMAN, WILLIAM H. BERTSCHE, CHARLES L. HASH

Ted J. Doney, Director

August 2, 1978

Elmer Staats
General Accounting Office
General Accounting Building
441 G Street
Washington, D. C. 20548

Dear Mr. Staats:

Although this letter may be somewhat late, I wish to comment on the draft of a proposed report to the Congress on Water Rights Reserved for Federal and Indian Reservations: A growing Controversy in Need of Resolution. We obtained a copy of the draft through the Western States Water Council.

It is my opinion that the report does an excellent job of discussing this most controversial subject. The legal problems and opposing points of view are fairly presented.

Although the recommendations are fairly general in nature, Montana supports them as far as they go. I was somewhat disappointed that more specific recommendations were not presented, as we were disappointed in the President's recently adopted water policy on this same subject. However, Montana definitely supports the establishment of some kind of procedure which will lead to the quantification of reserved water rights, other than the present litigation system. Without quantification, water planning and allocation by the states essentially is done in the dark, particularly in Montana with seven Indian reservations and vast amounts of federal reserved lands.

More specifically, we support federal legislation which would require federal reserved water rights to be quantified within certain time periods, and that would compensate adversely affected holders of water rights obtained under state law. The state of Washington, under the leadership of Charles Roe, Assistant Attorney General, has drafted and proposed such legislation, and is now working with the Western States Water Council on it. We support Washington's efforts and the concepts expressed in the draft legislation.

32 SOUTH EWING, HELENA, MONTANA 59601 (406) 449-3712

APPENDIX V

I would hope that the GAO in its final report adopt more specific recommendations, so that all concerned parties will have more "to chew on" in commenting on the report. Thank you for the opportunity to express our thoughts.

Sincerely,

Ted J. Doney

TED J. DONEY
DIRECTOR

TJD/nj
cc: Dean Hart
Ted Schwinden
Western States Water Council
Charles Roe, State of Washington
Henry Loble
Orrin Ferris

OFFICE OF THE ATTORNEY GENERAL
SLADE GORTON ATTORNEY GENERAL
TEMPLE OF JUSTICE OLYMPIA, WASHINGTON 98504

July 18, 1978

Mr. Henry Eschwege, Director
General Accounting Office
441 G Street NW
Washington, D.C. 20548

Re: Draft Proposed Report to Congress - WATER RIGHTS RESERVED FOR FEDERAL AND INDIAN RESERVATIONS: A GROWING CONTROVERSY IN NEED OF RESOLUTION

Dear Mr. Eschwege:

This is written in relation to your request for comments on your "draft of a proposed report to the Congress" entitled "Water Rights Reserved for Federal and Indian Reservations: A Growing Controversy in Need of Resolution."

I begin by commending your office on developing an excellent report. You have centered your efforts on an issue of growing conflict which should be settled, in a reasonable fashion, as quickly as possible. The background material is balanced and fairly presented. Most importantly, your recommendation that Congress enact legislation to resolve the ambiguities and conflicts involved is clearly on the right track.

Wilbur G. Hallauer, Director of the Washington State Department of Ecology and administrator of his state's water right laws, joins me in the aforementioned commendation and in the comments which follow.

We strongly support the fundamental recommendation of your report that a national policy of quantification of reserved rights, correlated with other rights on streams and lakes of the western Unites States, should be established by the Congress. Until the reserved rights of the United States are quantified and integrated (consistent with the long-established federal congressional policy of recognizing the dominancy of state water rights laws) into state water allocation and management programs, a rational, well-administered state water rights program cannot be achieved.

As you proceed to development of your final report, we suggest the following amplification upon the basic thrusts of your draft.

First, we support congressional action which deals with both Indian and other federal reserved water rights in a single piece of comprehensive water rights legislation.

Second, turning to the specifics of such legislation, we suggest the following as fundamental concepts in addition to the base concept of comprehensive quantification.

A. All existing federal impliedly reserved rights, other than those established for Indians, not now exercised should be extinguished immediately.

B. All rights established by the United States in the future, not based upon state water right laws, should be created expressly by the President in a precise form after extensive public notice and full opportunity for public comment.

C. As to long dormant federal impliedly reserved rights held for Indians, the Indians should be provided a reasonable time period to exercise these dormant rights and, after the running of that period, all such rights still remaining dormant should be extinguished and the Indian beneficiaries compensated in the amount, if any, required by the United States Constitution.

D. The method for quantification of federal impliedly reserved and other water rights should be through "general adjudications" as those words are understood in western water law. Such adjudications should be conducted, at the instigation of state water right administrators, in state courts. If state administrators do not initiate such actions in reasonable fashion, then the responsibility for instigation should fall upon a federal agency such as the Department of Justice, Water Resource Council, or Department of the Interior.

E. Finally, the Congress should reconfirm the dominancy of state water rights laws, so long recognized as federal congressional policy, as to all waters within the states including those located on federal reservations.

I commend the incorporation of the fundamentals into your final report.

In closing, I strongly suggest that your report take into account in its final form the many, many valuable teachings contained in two treatise-like opinions announced by the United States Supreme Court last week. I refer to United States v. New Mexico, and California v. United States, both of which were decided on July 3, 1978. For your convenience copies of the Court's "slip opinions" are enclosed. These opinions are of pertinence to your report.

Under separate cover I will provide you with a few suggestions of a editional-grammatical nature.

Please feel free to contact me if you desire further comment.

Sincerely,

Charles B. Roe, Jr.
Senior Assistant Attorney General

CBR:lh
071729

Enclosures

cc: Honorable Slade Gorton,
Attorney General, State of Washington

Wilbur G. Hallauer, Director
Washington State Department of Ecology

APPENDIX V

State of Idaho
DEPARTMENT OF WATER RESOURCES
STATE OFFICE, 373 W. Franklin Street, Boise, Idaho

JOHN V. EVANS
Governor

C. STEPHEN ALLRED
Director

Mailing address:
Statehouse
Boise, Idaho 83720
(208) 384-2215

July 21, 1978

U.S. General Accounting Office
Division of Community &
Economic Development
Washington, D.C. 20548

RE: Comments on Proposed GAO Report to Congress on Reserved Water Rights

Gentlemen:

We appreciate the opportunity to review your draft report entitled, "Water Rights Reserved for Federal and Indian Reservations: A Growing Controversy in Need of Resolution." The report appears to successfully identify the concerns that Idaho and many other Western States have regarding federal reserved water rights.

The report apparently aims to reflect the varying attitudes taken by state, federal, Indian and private interests toward the doctrine of reserved water rights. The result is informative. Since the report does not attempt to persuade in favor of any one interpretation of reserved rights, the comments made herein are of a general nature.

1. Federal versus Indian Reserved Rights

The report appears to reflect throughout, beginning with its title, the position that there is a fundamental difference between water rights reserved for use on Indian reservations and those reserved for use on other federal enclaves. It is submitted that there exists under the doctrine of reserved water rights no basis for this distinction. Cappaert v. U.S. 426 U.S. 128 (1976)

The draft report, at page 43, supports the distinction between Indian and federal reserved rights with a statement describing the fiduciary duty of the United States as trustee to act for the benefit of the Indians. While the trust responsibility of the United States may properly affect the management of Indian reserved water rights, it does not determine the fundamental nature or extent of such rights.

2. Purposes for which Waters are Reserved

Since the preparation of the draft report, the United States Supreme Court has decided United States v. New Mexico 46 L.W. 5010 (July 3, 1978). The decision affirms the State position that waters are reserved

APPENDIX V

only to satisfy the original purposes for which a given reserve was established. Although the decision deals specifically with national forests, the reasoning and holding of the Court is expected to be applicable to all types of federal land reserves, including Indian reservations.

Thank you again for allowing us a chance to comment on the draft report.

Sincerely yours,

Phillip J. Rassier

PHILLIP J. RASSIER
Legal Counsel, Department of
Water Resources

PJR:dlc

cc: Steve Allred
Western States Water Council

APPENDIX V

BRUCE E. BABBITT, GOVERNOR

Arizona Water Commission

222 NORTH CENTRAL AVENUE, SUITE 200
Phoenix, Arizona 85004
TELEPHONE (602) 256-7561

June 28, 1976

Mr. Henry Eschwege
Director
Community & Economic Development Div.
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Eschwege:

I very much appreciate the opportunity given me to review and comment on your proposed report entitled "Water Rights Reserved for Federal and Indian Reservations: A Growing Controversy in Need of Resolution."

The draft report is well prepared and, in general, fairly objective. There are a few specific areas, however, which I would like to call to your attention.

In the digest on page iv and again on page 13 the statement is made that rights established under state law after the date the reservation was created "are not entitled to compensation for any loss resulting from the exercise of the reserved rights." While this may be true under strict interpretation of the law, certainly, moral entitlements exist in light of the long history of federal encouragement and promotion of non-federal uses. In the body of the report this argument and the importance of compensation to resolution of the problems of reserved rights are recognized and fairly treated. I would urge, however, that the digest and other summaries contained in the report be modified to reflect the fact that there is substantial disagreement over the issue of compensation and to recognize the importance of that issue to resolution of the reserved rights controversy. Otherwise, those who because of time constraints confine their reading of the report to the summary are apt to reach the wrong conclusion.

The report's effort to draw a distinction between Indian reserved water rights and federal reserved water rights serves no useful purpose and fails utterly because there is no real distinction in concept or doctrine. The only

APPENDIX V

difference between Indian reserved rights and federal reserved rights identified in your report or elsewhere, to my knowledge, is the fact that Indian rights may not be extinguished without compensation. This hardly constitutes a conceptual or doctrinal difference.

Thanks again for the opportunity to review the draft report.

Sincerely,

Wesley E. Steiner
Executive Director

cc: Jack Barnett

APPENDIX V

STATE OF CALIFORNIA—RESOURCES AGENCY

EDMUND G. BROWN JR., Governor

DEPARTMENT OF WATER RESOURCES
P. O. BOX 388
SACRAMENTO
95802

(916) 445-9248

JUN 22 1978

Mr. Henry Eschwege, Director
Community and Economic Development Division
United States General Accounting Office
Washington, DC 20548

Dear Mr. Eschwege:

We at the California Department of Water Resources have reviewed the GAO's proposed draft report "Water Rights Reserved for Federal and Indian Reservations: A Growing Controversy in Need of Resolution" furnished to us by Jack Barnett, Executive Director of the Western States Water Council. The draft presents an excellent discussion of the Federal and Indian reserved water rights doctrine, its origin, history and the judicial development of the doctrine.

The proposed draft accurately identifies the most controversial issues regarding Federal and Indian reserved water rights. However, the report in parts seems to dwell on the old notion that failure to quantify reserved water rights in the past has hindered economic development in the Western States. This represents a scare tactic often used by proponents of quantification and yet to date economic chaos has not occurred in the west.

There are several other issues which the report should consider more closely. First, the establishment of some time period (for example, ten or fifteen years) in which Indians are given an opportunity to develop presently unexercised reserved rights. Secondly, whether the Indians will receive compensation for any unexercised reserved rights which may be lost and the standard for determining such compensation.

APPENDIX V

The draft report sets forth three general recommendations for the development of an integrated reserved water rights policy. Although these recommendations are general and leave important details to be worked out in the future, whether a final determination of Federal and Indian reserved water rights is reached will depend upon the willingness and fair-mindedness of both Federal agencies and state governments to seek an equitable solution.

Opposition to quantification not only exists amongst the Indians but the State of California and several other states are opposed to quantifying all reserved water rights because it would be detrimental to their interests as well. For instance, if reserved water rights are defined to include underground water it would create numerous problems. In a state such as California where ground water rights are not appropriative but rather exist if one overlies a ground water aquifer and uses a reasonable share of the supply in relation to other overlying owners, it would be nearly impossible to quantify such water rights.

In addition to legislation, one approach that the draft report should evaluate as an alternative means of quantifying reserved rights is to quantify through negotiation on a case by case basis. This method would be more suitable to deal with the complex and varied problems of quantification of reserved water rights. Indeed, this is the essence of the approach that has been recommended by the President's National Water Policy Study and it deserves further consideration.

Sincerely,

for Ronald B. Robie
Director

APPENDIX V

THE STATE OF WYOMING

ED HERSCHLER
GOVERNOR

Attorney General

CHEYENNE, WYOMING 82002

V. FRANK MENDICINO
ATTORNEY GENERAL

July 6, 1978

Mr. Henry Eschwege, Director
United States General Accounting Office
441 G Street N.W.
Washington, DC 20548

Dear Mr. Eschwege:

I have reviewed your draft of a proposed report to the Congress entitled "Water Rights Reserved for Federal and Indian Reservations: A Growing Controversy in Need of Resolution." I am in basic agreement with both the content of your report and the conclusion that a national policy to quantify reserved rights is necessary to provide the certainty requisite to the efficient management of our nation's water resources, especially in the west. My position on this matter is more fully set forth in a recent law review article "Indian Water Rights: A State Perspective After Akin," (a copy of which I have enclosed herewith), which I believe points out the many unresolved and disputed areas of the law and the impact of nonresolution of those issues.

I am of the belief that the issues respecting both federal proprietary reserved rights and those of the Indians are one and the same, with the principal difference being the greater magnitude of water rights claimed by the tribes. With respect to both sets of rights, however, it is my opinion that inventorying and quantifying those rights is absolutely necessary.

Since I am uncertain about the possibility of obtaining successful congressional legislation mandating quantification, it is my position that until such legislation exists, that the federal and Indian reserved rights be quantified within state water right systems, which have existed for many years and have acquired the expertise necessary to adjudicate rights to the use of water within their borders. (See 57 Neb. L. Rev. p. 310-318).

Aside from these general remarks, I have a few specific comments concerning your report. On page 6 of your draft, you states that rights other than federal and Indian reserved rights

APPENDIX V

are administered by state law. If you would poll the western states, I'm sure the consensus would be that federal and Indian reserved rights should also be administered under state law, a view supported by the McCarran Amendment (43 USC 666).

On page 17, I found a rather misleading paragraph respecting the alleged de minimis effect of federal claims within the State of Colorado. While the federal government claims about two-tenths of one per cent of the state's mean annual flow, it is the timing and location of those claims that could have a devastating effect upon certain stream segments within that state, especially in view of the great quantities of water which are diverted out of the basin and those quantities required by compact or court decree to pass across that state's borders. Reprinted on p. 55 of your draft, is a statement indicating that no private property has been destroyed nor state or local government regulation rendered ineffective because of federal reserved right claims. Within the State of Wyoming alone, virtually every proposed project for the development of water resources has been stymied, or contains a caveat respecting limitations upon sources of water supply, due to the claims of the federal government and Indian tribes. The dampening effect of the unquantified, and in many instances unreasonable, claims for reserved rights cannot be so easily discounted.

With respect to the area of compensation, I would like to see an additional element raised in your report. As the National Water Commission report, Water Policies for the Future (1973), aptly pointed out, the federal government, which now seeks to deprive water users of their long standing source of water supply, is the same entity which encouraged the settlement and reclamation of semi arid lands in the west under the various homestead acts. See National Water Commission Report at p. 474. I believe it is this element that tips the scales in favor of the private water user, whose source of supply may now be placed in jeopardy by a heretofore unexercised claim to water made by the federal government on its own behalf or on behalf of certain Indian tribes.

Finally, I would take issue with your remarks on page 47 respecting reserved rights litigation in the State of Wyoming. You cite the Wyoming case as an example of unanticipated litigation which impedes the ability of the BIA to inventory and quantify Indian water rights. In fact, this litigation was initiated by the State, in part, because of the vast claims to water which appeared in a joint resolution of the Shoshone and Arapaho tribes within our State, in which they laid claim to:

APPENDIX V

> "All waters, including those on the surface and underground, occurring on, arising upon, passing through, or bordering upon the Wind River Indian Reservation, Wyoming; all water that may now or in the future be artificially augmented or created by weather modification, by desalination or presently unusable water supplies, by production of water supplies as a by-product of geothermal power development, or by any other scientific or other type of means within the Wind River Reservation, Wyoming."

In the face of such expansive claims to the waters within the State of Wyoming, I can hardly believe that litigation challenging those claims came unexpectedly.

These comments aside, I would again commend the GAO for its objective analysis of the reserved rights problem. Your report will hopefully assist in obtaining a reasonable and speedy resolution of this controversy.

Very truly yours,

Jack D. Palma II
Senior Assistant
Attorney General
State of Wyoming

JDP:gmv

APPENDIX V

STATE OF NEW MEXICO

STATE ENGINEER OFFICE

SANTA FE

S. E. REYNOLDS
STATE ENGINEER

BATAAN MEMORIAL BUILDING
STATE CAPITOL
SANTA FE, NEW MEXICO 87503

June 15, 1978

Henry Eschwege, Director
Community and Economic Development Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Eschwege:

Mr. Jack Barnett of the Western States Water Council has forwarded to this office a copy of your draft report entitled, "Water Rights Reserved for Federal and Indian Reservations: A Growing Controversy in Need of Resolution," and asked that any comments we might have be communicated directly to you. Perhaps the following may be useful.

Generally speaking I believe the draft report is well organized and well written. On balance it is fairly objective, and unlike many such reports it does not seem to doggedly champion the federal view of the matter. There are three items, however, that I feel warrant your consideration in preparing the final report.

In litigation over the nature and extent of federal reserved water rights the United States has frequently argued that judicial recognition of its non-Indian claims would not have a significant impact on rights vested under state law. Your draft report seems to share this opinion. On page 17 of the draft it is noted by way of example that the consumptive use resulting from all federal water right claims in the State of Colorado is equal to 2/10 of 1% of Colorado's streamflow. On page 34a of the draft the view that only federally reserved rights for consumptive uses will have profound effects on rights vested under state law is further indicated. There it is said, "(u)nlike federal reservations which are not expected to have large consumptive water demands, many Indian reservations are expected to require significant water quantities to satisfy reservation purposes."

The difference between consumptive needs and non-consumptive needs is elusive. For instance, while the Forest Service maintains that a small portion of 1% of Colorado's streamflow will be affected by its consumptive claims, a substantial per-

APPENDIX V

centage of that stream flow will be just as profoundly affected by its non-consumptive claims. For instance, the Twin Lakes Reservoir and Canal Company has historically diverted waters in the headwaters of a forest stream in the amount of some 50,000 acre feet per annum, essentially drying up the stream below the diversion point. Recently the Forest Service has claimed a "non-consumptive" minimum instream flow below the company's point of diversion. The effect of the Forest Service's claim, if judicially confirmed, would be to cut in half the company's appropriation. In New Mexico the mining operation of Phelps-Dodge, Inc. shows an even more cogent example of the potential effect of the recognition of non-consumptive rights. Here the Forest Service has recently claimed a minimum instream flow below Phelps-Dodge's point of diversion for a major smelting operation which involves a total capital investment of approximately $450,000,000 and supports a community of approximately 5,000 people. Historically the stream has been dried up by Phelps-Dodge's diversion. If the Forest Service's claim were recognized, the "non-consumptive use" could be 100% "consumptive" of Phelps-Dodge's vested rights under state law in the amount of 11,756 acre feet per year.

In short, while the United States is quick to quiet the western states' apprehension by noting that its consumptive use claims are small, in so doing it dissembles the comparatively profound effects of its "non-consumptive" claims. Characterizing a claim as non-consumptive tells us nothing about the dispossessive effect of the claim vis-a-viz. state-created water rights, and Congress should not be fooled in this regard.

The second item that disturbs me is the distinction made between "Indian reserved water rights" and "federal reserved water rights." At the outset the distinction is seemingly made to facilitate discussion of the magnitude of the problem presented by Indian claims on the one had and non-Indian claims on the other. At p. 41 of the report, however, it is suggested that there is a fundamental conceptual difference between the Winters doctrine and non-Indian reserved rights.

It is true that Indians whose reservations were created by treaty are urging that they did the reserving instead of the United States -- to the chagrin of Indians with executive order reservations--but no case except the circuit court's decision in Winters in 1906 has so held. On review in the Supreme Court it was held that the United States did the reserving: "The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be." /Winters v. United States, 207 U.S. 564, (1908)/. As noted at p. 20 of the report, the Supreme Court has never changed its mind on the subject:

> When the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves

> appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.*** The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams. /Cappaert v. United States, 426 U.S. 128, 138 (1976)/.

On p. 44 of the report "the essential attributes of Indian reserved water rights" are summarized as follows:

> They represent an amount of water necessary to fulfill both the present and future needs of the reservation;
>
> They apply to all Indian reservations whether established by treaty, agreement, act of Congress, or executive order;
>
> They have a priority date of no later than the date the reservation is established and all state-conferred rights established after the date the reservation is established are subordinate to the Indian reserved water rights;
>
> They are not dependent upon diversion and application to a beneficial use as are state-conferred rights nor are they lost by nonuse or lapse of time.

Given your view of the matter, a brief review shows that these attributes are no different than the attributes of "federal reserved water rights," and you will find no theoretical distinction between Indian and non-Indian reserved rights in the case law, except that Indian rights may not be taken or extinguished without compensation -- a fact which in no way differentiates the conceptual basis for determining the nature and extent of Indian and non-Indian rights.

By distinguishing between Indian and non-Indian reservation doctrines, the report suggests that there may be a doctrinal difference in determining the extent of the rights. The Indians, of course, are now taking this position, but the alleged difference has never been articulated in the cases. In either situation the reserved right has been delimited by the purposes for which the reservation was created. As you might understand, the principle of "minimal need" announced in Cappaert is anathema to the Indians; they prefer to urge upon the courts a doctrine which gives to them the entire available supply, which they would then transmute into a blank check drawn against existing non-Indian users and the federal treasury. In its present form the report seems to lend a

measure of approbation to this unsupported doctrinal distinction. Such an implication might cause the Congress to treat the Indian claims with undue deference.

My third concern relates to the report's proposed solution, namely the adoption of the Federal Reserved Water Rights Task Group's option of enacting comprehensive legislation establishing procedures for identifying, quantifying and managing all federal water rights. I don't need to discuss the impact of such an approach on established systems of state water rights administration -- it would be adverse and profound and would substantially change the matrix of federal-state relations in western water matters. Just as important a consequence of such an approach, however, would be the impact on the states by permitting federal agencies to define the extent of their own rights. That's an enviable position, but certainly less than advantageous insofar as the states are concerned.

In conclusion I would point out that a legislative solution to the problem is attractive. However, I think that something is to be learned from the repeated failure of the Congress to make any progress. It may be that the courts will have to shorten the distance between the competing federal and state interests before there's a chance of passing any meaningful legislation.

Sincerely,

Richard A. Simms
General Counsel

RAS:rr

cc: Jack Barnett

APPENDIX VI

NATIONAL CONGRESS OF AMERICAN INDIANS

SUITE 700, 1430 K STREET, N.W., WASHINGTON, D.C. 20005 (202) 347-6520

July 10, 1978

Messrs. Henry Eschwege
and Bob Hartz
Community and Economic
Development Division
U.S. General Accounting Office
Washington, D.C. 20548

Dear Messrs. Eschwege and Hartz:

Thank you for your patience in extending the deadline to accept our comments on the proposed Comptroller General's report to Congress entitled "Water Rights Reserved for Federal and Indian Reservations: a Growing Controversy in Need of Resolution."

Our comments are submitted herewith.

Please note that attorneys for the National Congress of American Indians believe that the report contains substantial inaccuracies and should be rewritten or rejected by the Comptroller General.

We sincerely appreciate the opportunity to review the draft and offer our comments which we believe are sincere, objective and based on factual information bases.

Sincerely,

Albert W. Trimble
Executive Director

AWT:ss

APPENDIX VI

NATIONAL CONGRESS OF AMERICAN INDIANS
RESPONSE TO THE PROPOSED
COMPTROLLER GENERAL'S REPORT TO THE CONGRESS ENTITLED
"WATER RIGHTS RESERVED FOR FEDERAL AND INDIAN RESERVATIONS:
A GROWING CONTROVERSY IN NEED OF RESOLUTION"

I. INTRODUCTION

The draft GAO report, entitled "Water Rights reserved for Federal and Indian Reservations: A growing controversy in need of resolution", reflects a process underway in state and federal water policy-making of "blaming the victim". Since the arrival of European invaders on the North American continent, Native Americans have been continually forced to defend their land and water from white appropriation in the name of development. The structure of the GAO Report, and its recommendations, reflects the conclusion of state governments and powerful non-Indian interest groups that Native American rights are posing a threat to non-Indian interests because the ultimate quantity of the Indian water rights, and the point in time when these rights may be exercised, is often not known; and water committed under state prior appropriation laws to large non-Indian investments may become subject to Indian use.

The GAO Report is written as if the major problem with Western water supply is the unquantified nature of the federal reserved rights and the Indian reserved rights. This, of course, is not the problem. The problem is that there is very little water in the West, and non-Indian interests are unwilling to establish any ceiling on their use of water for economical development and population growth.

II. VIOLATION OF THE FEDERAL GOVERNMENT'S TRUST RESPONSIBILITY

The Federal Government is the trustee of Indian land and water rights. It is held to the most exacting fiduciary standards in its dealings with respect to Indian property. Seminole Nation v. U.S., 316 U.S. 286 (1942). Nonetheless, the trustee is almost wholly responsible for the situation presently being blamed on Indian water rights. Throughout the history of white occupation of the American West, but particularly since the passage of the Reclamation Act of 1902, the Federal government has encouraged white settlement and occupation of the West by subsidizing water develop-

APPENDIX VI

ment. The GAO Report s es (page 53) that "The Federal yernment led the way in developing the West for non-Indian beneficiaries". This fact is also noted in the background paper on White House Water Policy Message of June 6, 1978. In that background paper, it is stated that 40% of the surface water used for irrigation in the 17 Western States is supplied by the United States Bureau of Reclamation. Ninety per cent of the water used in the arid West is used for irrigation. The use of this water for non-Indian development is thus heavily subsidized by the Federal Government.

The United States has known, or should have known, since at least 1899 when the United States Supreme Court decided United States v. Rio Grande Dam and Irrigation Company, 174 U.S. 690 (1899), that Indian tribes hold substantial unquantified water rights throughout the Western United States. This fact became crystal clear in 1908 when the Supreme Court decided Winters v. United States, 207 U.S. 564, holding that the Tribes of the Fort Belknap Reservation of Montana hold reserved rights sufficient to make their reservation economically productive. This concept has been elaborated and developed by a number of subsequent Supreme Court decisions. The development of non-Indian water uses in the West in complete disregard of the known water rights claims of Indian tribes constitutes a callous and inexcusable breach of fiduciary duties by the trustee United States.

III. INACCURACIES IN THE GAO REPORT

The GAO Report discusses, by way of example, three lawsuits currently in litigation which involve Indian reserved water rights. These cases are United States v. City of Tucson, Farmers Investment Company, et al., Civil No. 75-39 TUC JAW (D. Ariz.), United States and Pyramid Lake Paiute Tribe of Indians v. Truckee - Carson Irrigation District et al., Civil No. R-2987 - JBA (D. Nev.) United States v. Walton, Civil No. 3831 (E. E. Wash.). The GAO Report has been reviewed by attorneys representing tribes involved in each of these lawsuits. All of them have reported substantial inaccuracies in the GAO Report's summary and discussion of these cases. For this reason alone the GAO Report should be rewritten or rejected by the Comptroller General.

APPENDIX VI

IV. OMMISSIONS IN THE GAO REPORT

The GAO Report discusses Indian water rights strictly in the context of recognized "reservation" lands. It completely omits any discussion or consideration of water rights appurtenant to Indian aboriginal title lands. In areas where tribes hold unextinguished aboriginal title, there are concomitant appurtenant unextinguished aboriginal title water rights. Coboba Band of Mission Indians v. U.S., 337 Indian Claims Commission 326. These rights are not reserved rights or rights established under any concept of prior appropriation. For purposes of adjudication, they should probably be treated in the same manner as Winter's Doctrine rights, however, many tribes, particularly in the Southwest, hold unextinguished aboriginal Indian title and unextinguished aboriginal Indian title water rights which may be very extensive. These water rights must be given the same consideration as rights appurtenant to recognized reservation lands.

V. CONCLUSIONS OF THE GAO REPORT

1. The conclusions of the GAO Report, as usual where non-Indian and Indian rights and interests come into conflict, place the burden of compromise and loss upon Indian tribes. The problems presented by the existence of unquantified Indian reserved water rights are discussed as if they arose in a vacuum or as a result of some inexplicable slight-of-hand. The conclusions of the report nowhere discuss the fact that the problem has been largely created by federal stimulation and subsidization of non-Indian water use and consumption to the detriment of Indian interests. Nonetheless, the Report concludes that comprehensive action is necessary to clarify and resolve the Indian reserved rights issues. The action proposed is a legislative solution justified by 1) an alleged need to "strike a balance between the competing considerations of fulfilling the Federal Government's responsibility as trustee of the Indians' reserved water rights and manager of Federal reservations, and of achieving fair and equitable treatment of holders of water rights who may suffer loss as a result of the exercise of reserve water rights and 2) "the opportunity to weight reasonableness and equity with existing legal doctrine in seeking resolution of the controversies,...". The Courts, of course, are bound to uphold the law as it exists. The GAO Report has clearly con-

cluded that the existin law supporting Federal reserved ights and Indian reserve rights is detrimental and inconvenient to non-Indian interests and must therefore be changed. This is just one more example in a long, depressing history of the Federal government and the dominant culture changing the rules with respect to Indians whenever those rules become economically inconvenient or disadvantageous to non-Indians. The suggestion that the trustee should support an effort to compromise Indian water rights is a novel and wholly inappropriate approach to trust law. Under the ordinary law of trusts, the trustee is bound to strictly uphold and protect the rights and interests of the beneficiaries. Striking the balance between the interests of the beneficiaries and conflicting interests is a clear breach of trust.

The GAO Report and the background paper on the White House Water Policy Message of June 6, 1978, admit that federal subsidization of water development has played a major role in non-Indian settlement of the arid West. It is astounding that anyone should suggest that non-Indian holders of water rights who may suffer a loss as a result of the exercise of Indian water rights have not received more than fair and equitable treatment. The conclusions of the GAO Report are really a thinly disguised restatement of the same racist attitude and policy which justified the Indian removal programs of the early-19th century and the allotment and tribal termination policies of the late 19th and mid-20th centuries. Once again, Indian rights are in the way and must be liquidated.

2. One of the more striking aspects of the GAO Report and its conclusions is its utter failure to discuss or consider the fact that Indian water rights are protected by the 5th Amendment. Any compromise, appropriation, or expropriation of Indian water rights pursuant to a legislative solution will entitle tribes to compensation under the 5th Amendment. This will be true whereever tribes can show that they received less under the legislative solution than they would otherwise have received. It must be understood that the expropriation of Indian water rights would cost the United States billions of dollars in compensation to the tribes. Despite the extreme solicitousness with respect to possible non-Indian losses, there is absolutely of the report of compensation to Indians for their losses. In this respect, the GAO Report is an extremely

unrealistic and incomplete analysis of the situation.

3. One of the justifications offered by the GAO Report for the proposed legislative solution is that it will reduce the need for costly and long-drawn-out litigation which would otherwise be necessary to resolve issues of Indian water rights, and to quantify the Indian water rights. The Report fails to discuss the fact that a legislative solution which gives tribes anything less than they could expect under existing law will result in litigation comparable in scope to that allegedly avoided to determine the tribes' rights to compensation. The unresolved issues of Indian water rights which are so disturbing to the GAO would have to be judicially resolved in any event in the course of that process. The legislative solution bears the disadvantage that it would precipitate an immediate flood of litigation by tribes to assert their claims for a "taking" under the 5th Amendment prior to the expiration of the six-year statute of limitations for claims against the United States. The financing and resolution of these law suits over such a short period of time is probably unmanageable. A legislative solution would place the burden of resolving these issues squarely on the tribes alone, and would undoubtedly result in further compromise of their rights and massive breach of trust as a result of the Federal government's chronic and predictable failure to adequately fund the protection of Indian rights or deal responsibly with its obligations as trustee.

A legislative solution is not the answer. It makes far more sense to allow the present process of resolution of Indian reserved rights through negotiation and litigation to take its course. Some tribes will want to quantify their rights immediately, and will therefore satisfy the concerns of states and non-Indians who wish to know the extent of the Indian rights. It may not be necessary for other tribes to quantify for quite some time. Those who wish to appropriate and develop Western water who are concerned about potential overhanging unquantified Indian reserved rights can protect themselves by negotiating appropriate agreements and financial arrangements with tribes in the particular watershed in which they wish to use water. This has been done successfully in a number of instances.

VI. NCAI RECOMMENDAT' 'S RE: WESTERN WATER POLICY AND ''DIAN RESERVED RIGHTS

1. The GAO Report is so incomplete and inadequate that the Comptroller General should be requested not to publish it.

2. State and non-Indian interests should be challenged to place a ceiling on their own water use, rather than calling for Indians to place a ceiling on their water rights.

3. There should be an immediate termination of federal subsidies to all non-Indian water development in the West. It is inconsistent with the federal government's responsibility as trustee to continue to stimulate growth in the West through subsidized water development, and it is irrational in view of the fact that the limited water supply in the arid West cannot support a population greatly expanded over its present size. Any new water projects undertaken should be entirely locally funded. This will eliminate the egregious conflicts of interest to which the Federal government is now subject partly as a result of its construction and funding of water projects in conflict with Indian water rights.

4. President Carter should propose legislation to exempt Indian representation on all Interstate Stream Commissions and Interstate Compact Commissions which are responsible for watersheds in which Indian lands are located. Indians must be allowed to participate in the planning and decision-making process for their watersheds.

5. President Carter should propose legislation to exempt Indian water rights from the impact of the McCarran Amendment.

6. In the next few years substantial funding should be made available directly to tribes for water development planning. Sufficient funding should be made available to enable tribes to contract with private consultants for the planning work. Every tribe in the Nation with unquantified water rights or open-ended water decrees should have an opportunity to undertake and complete such planning. (Note that the President recommended an increase from $3 million to $25 million in the federal funding of State water planning. See p. 8 of President Carter's Water Policy Message of June 6, 1978.)

7. A large-scale funding program for development of tribal water projects and other tribal projects requiring a water supply should be initiated by the current

federal administration. This program should not be contingent upon tribal agreement to a final quantification of their water rights. During the last century, non-Indian users have had the benefit of large federal subsidies for development of water without any limitations or the ultimate amount to be appropriated.

8. Where tribes do not wish to quantify their rights at this time, states and other interests who plan to make substantial investments which depend on the use of water to which those tribes may hold a reserved right would take steps to negotiate arrangements with those tribes which will protect the tribes and the non-Indian interests. Tribes that know what their immediate and/or future water use needs are, should be allowed to quantify their water rights on the basis of existing law.

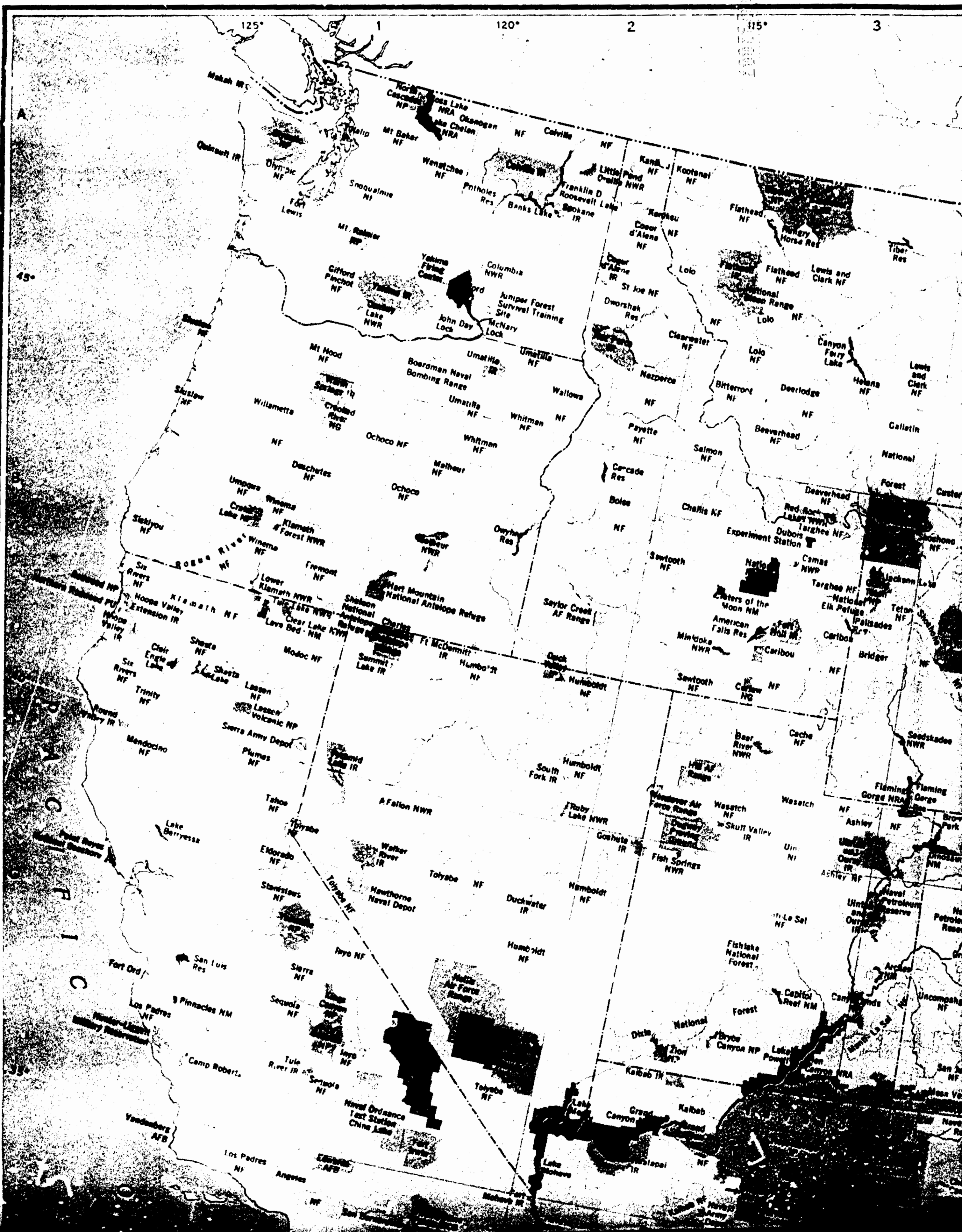
9. There should be a broad-scale moratorium on further federal development of water in the west pending 1) completion of water development planning studies for the tribes, and 2) completion of a study on the ultimate limits of population and economics development in the arid West. Genuine consideration of the upper limits to growth in the arid West must be part and parcel of any rational water policy for the region.

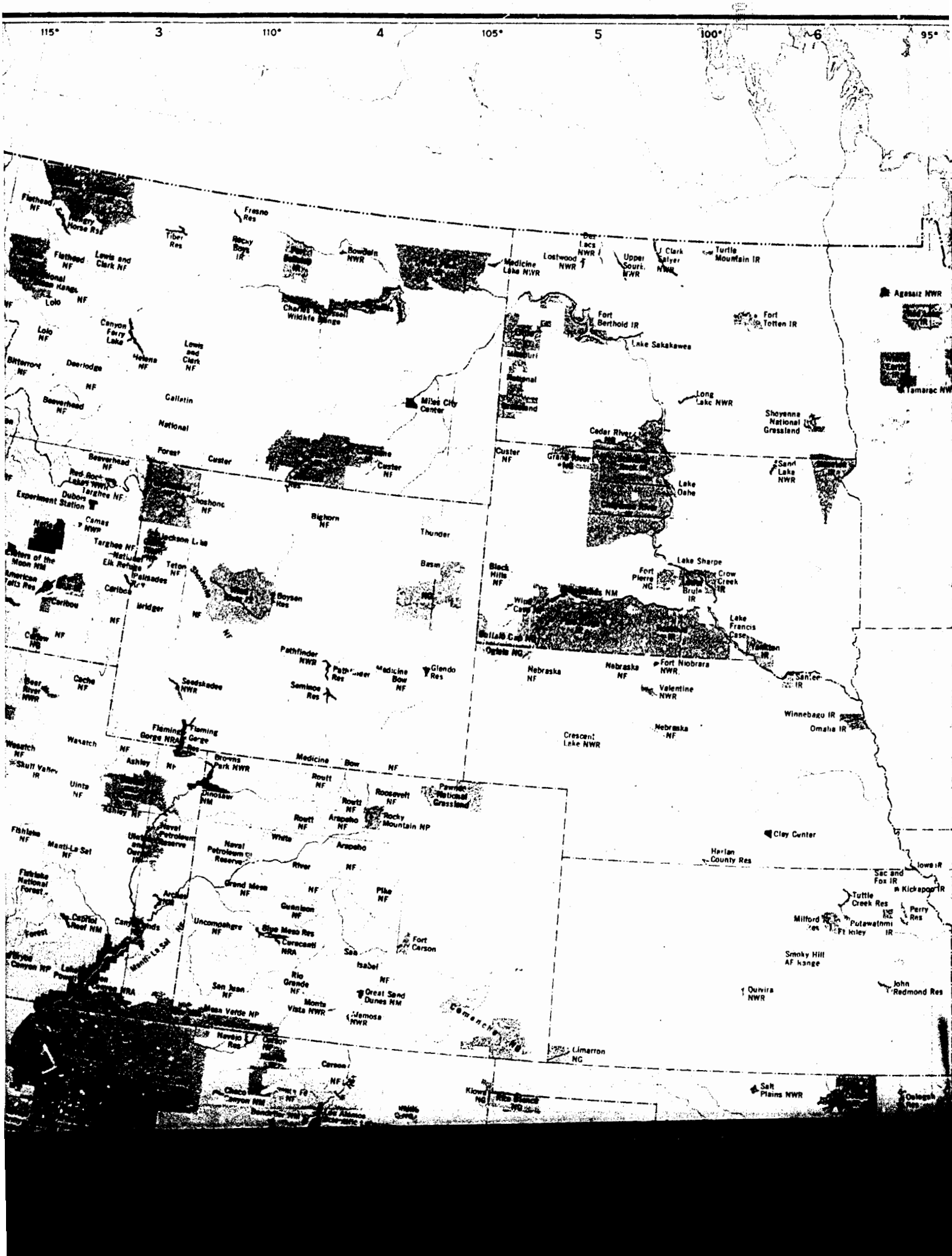
10. In the background paper for President Carter's Water Policy Message of June 6, 1978, there is a discussion of the fact that cost/benefit analysis methods are not properly applied to Western water projects, and that many projects are not economically feasible if cost benefit analysis is done properly. The background paper also notes that the federal government has created disincentives to water conservation by charging very low rates for water supplied by federal projects. All use of water from federally-funded projects should be both efficient and cost effective.

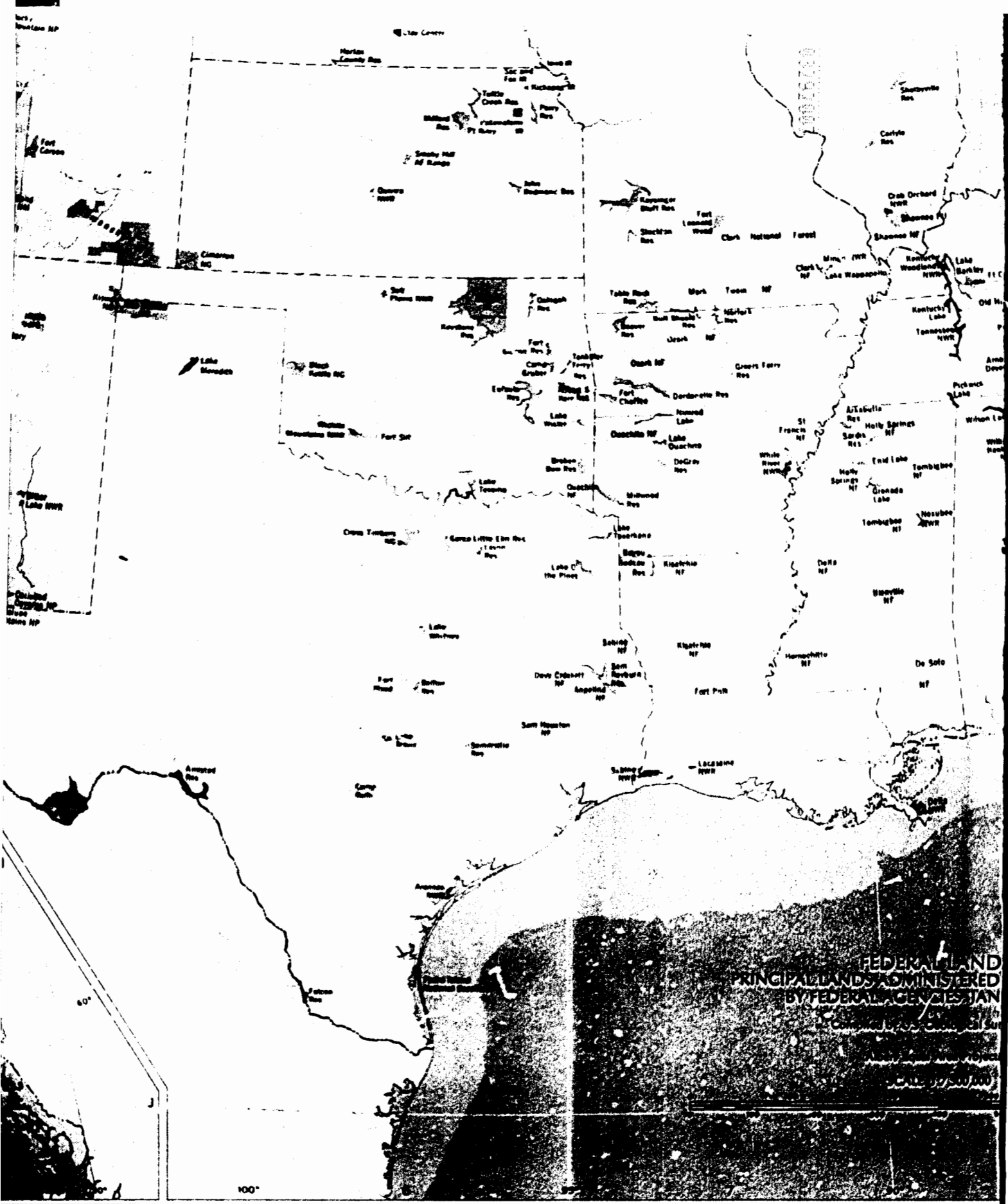
PRINCIPAL OFFICIALS RESPONSIBLE FOR ADMINISTERING ACTIVITIES DISCUSSED IN THIS REPORT

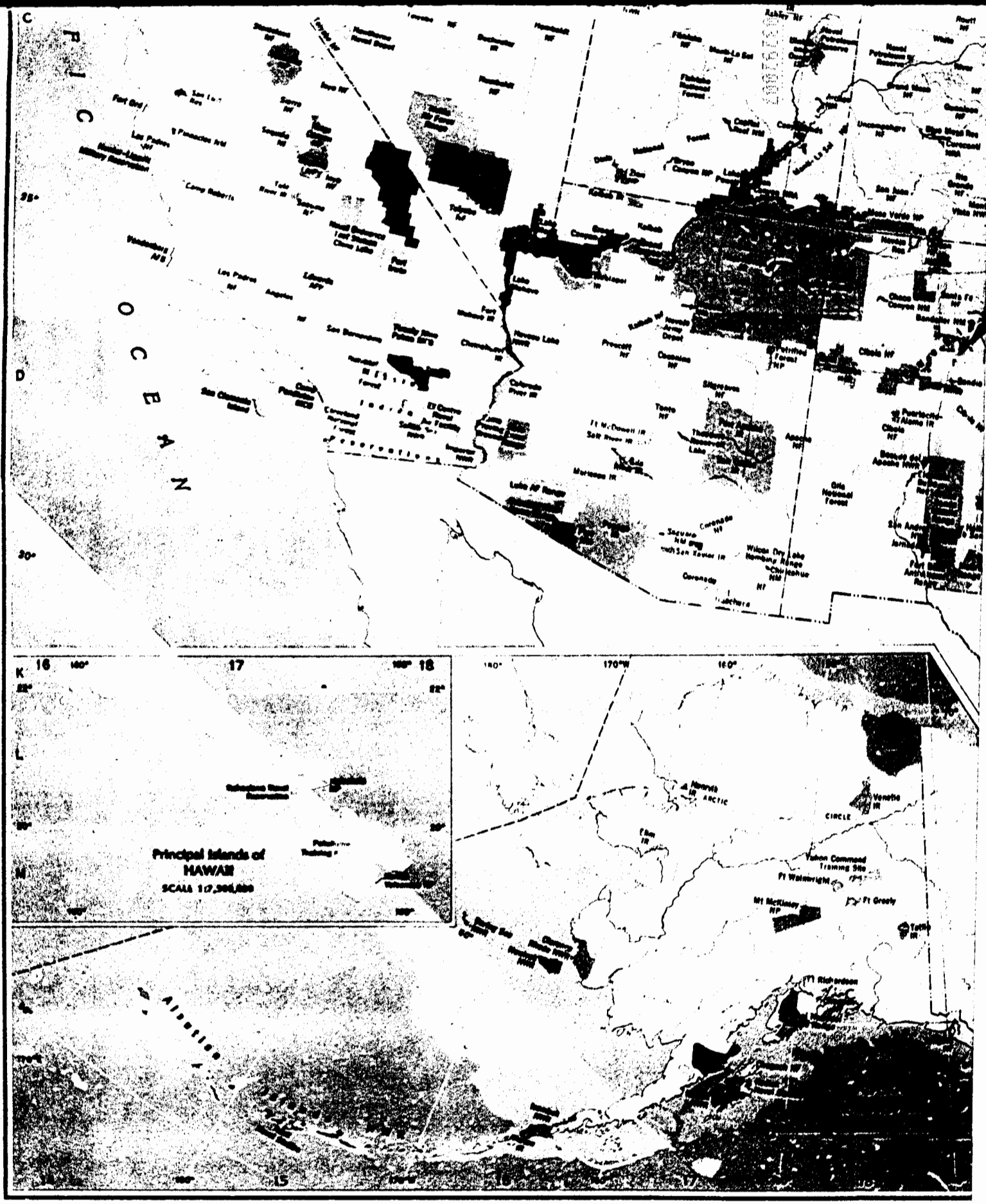
	Tenure of office	
	From	To
DEPARTMENT OF THE INTERIOR		
SECRETARY OF THE INTERIOR:		
Cecil D. Andrus	Jan. 1977	Present
Thomas S. Kleppe	Oct. 1975	Jan. 1977
Stanley K. Hathaway	June 1975	Oct. 1975
Ken Frizzel (acting)	May 1975	June 1975
Rogers C. B. Morton	Jan. 1971	May 1975
Fred J. Russell (acting)	Dec. 1970	Jan. 1971
Walter J. Hickel	Jan. 1969	Nov. 1970
DEPARTMENT OF AGRICULTURE		
SECRETARY OF AGRICULTURE:		
Bob Bergland	Jan. 1977	Present
John Knebel (acting)	Oct. 1976	Jan. 1977
Earl L. Butz	Dec. 1971	Oct. 1976
Clifford M. Hardin	Jan. 1969	Nov. 1971
Orville 1. Freeman	Jan. 1961	Jan. 1969
DEPARTMENT OF JUSTICE		
ATTORNEY GENERAL:		
Griffin B. Bell	Jan. 1977	Present
Edward H. Levi	Feb. 1975	Jan. 1977
Willian B. Saxbe	Jan. 1974	Feb. 1975
Robert H. Bork, Jr. (acting)	Oct. 1973	Jan. 1974
Elliot L. Richardson	May 1973	Oct. 1973
Richard G. Kleindienst	June 1972	Apr. 1973
Richard G. Kleindienst (acting)	Feb. 1972	June 1972
John N. Mitchell	Jan. 1969	Feb. 1972

(08533)

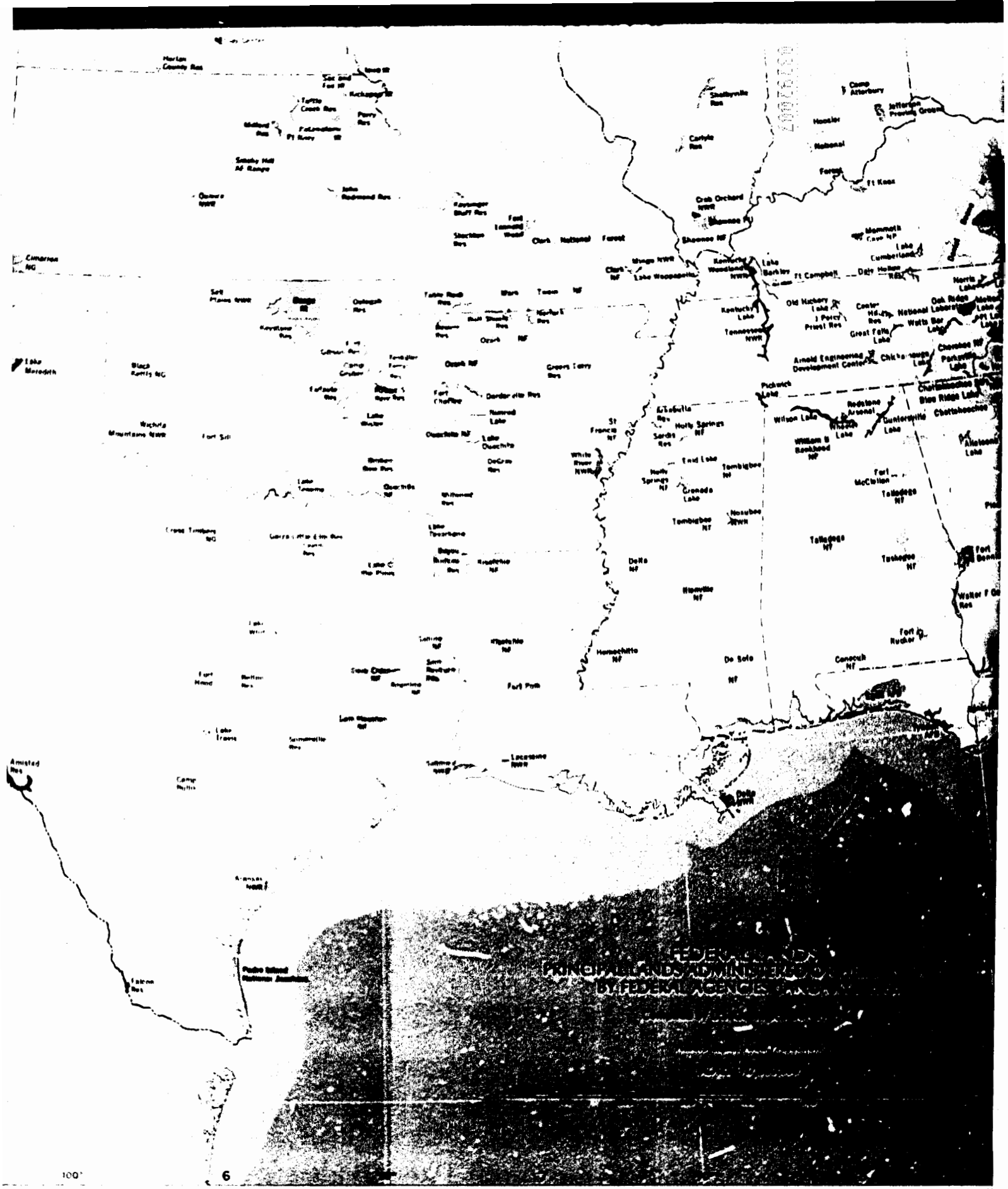

125°
120°
115°
1
2
3
A
45°
35°
Makah IR
Quinault IR
Olympic NF
Snoqualmie NF
Fort Lewis
Mt Baker NF
Wenatchee NF
Okanogan NF
Colville
Lake Chelan NRA
Potholes Res
Banks Lake
Franklin D Roosevelt Lake
Spokane IR
Little Pend Oreille NWR
Kaniksu NF
Kootenai NF
Flathead NF
Hungry Horse Res
Mt Rainier NP
Gifford Pinchot NF
Columbia NWR
Juniper Forest Survival Training Site
John Day Lock
McNary Lock
Coeur d'Alene NF
St Joe NF
Dworshak Res
Clearwater NF
Lolo NF
Flathead NF
Lewis and Clark NF
Tiber Res
Canyon Ferry Lake
Helena NF
Mt Hood NF
Boardman Naval Bombing Range
Umatilla NF
Wallowa
Whitman NF
Nezperce
Bitterroot NF
Deerlodge
Beaverhead NF
Gallatin
National
Forest
Willamette NF
Ochoco NF
Malheur NF
Payette NF
Salmon NF
Siuslaw NF
Deschutes NF
Umpqua NF
Winema NF
Klamath Forest NWR
Cascade Res
Boise NF
Challis NF
Red Rock Lakes NWR
Targhee NF
Dubois Experiment Station
Siskiyou NF
Rogue River
Fremont NF
Owyhee Res
Sawtooth NF
Camas NWR
Six Rivers NF
Klamath NF
Hoopa Valley Extension IR
Lower Klamath NWR
Tule Lake NWR
Clear Lake NWR
Lava Bed NM
Hart Mountain National Antelope Refuge
Saylor Creek AF Range
Craters of the Moon NM
American Falls Res
Minidoka NWR
Teton NF
Palisades
Caribou
Bridger
Shasta NF
Shasta Lake
Clair Engle Lake
Modoc NF
Summit Lake IR
Ft McDermitt IR
Humboldt NF
Sawtooth NF
Caribou
Six Rivers NF
Trinity NF
Lassen NF
Lassen Volcanic NP
Sierra Army Depot
Mendocino NF
Plumas NF
Humboldt NF
South Fork IR
Bear River NWR
Cache NF
Seedskadee NWR
Wasatch NF
Skull Valley IR
Ashley NF
Flaming Gorge NRA
Tahoe NF
Fallon NWR
Ruby Lake NWR
Goshute IR
Fish Springs NWR
Lake Berryessa
Toiyabe
Eldorado NF
Walker River IR
Toiyabe NF
Humboldt NF
Stanislaus NF
Hawthorne Naval Depot
Duckwater IR
Naval Petroleum Reserve
Manti-La Sal NF
Fishlake National Forest
Inyo NF
Humboldt NF
Fort Ord
San Luis Res
Sierra NF
Nellis Air Force Range
Arches NM
Capitol Reef NM
Pinnacles NM
Sequoia NF
Los Padres NF
Dixie National Forest
Zion NP
Bryce Canyon NP
Camp Roberts
Tule River IR
Sequoia NF
Inyo NF
Naval Ordnance Test Station China Lake
Toiyabe NF
Kaibab NF
Grand Canyon
Vandenberg AFB
Los Padres NF
Angeles
Edwards AFB
Lake Mohave
Hualapai IR
Fort Mohave IR

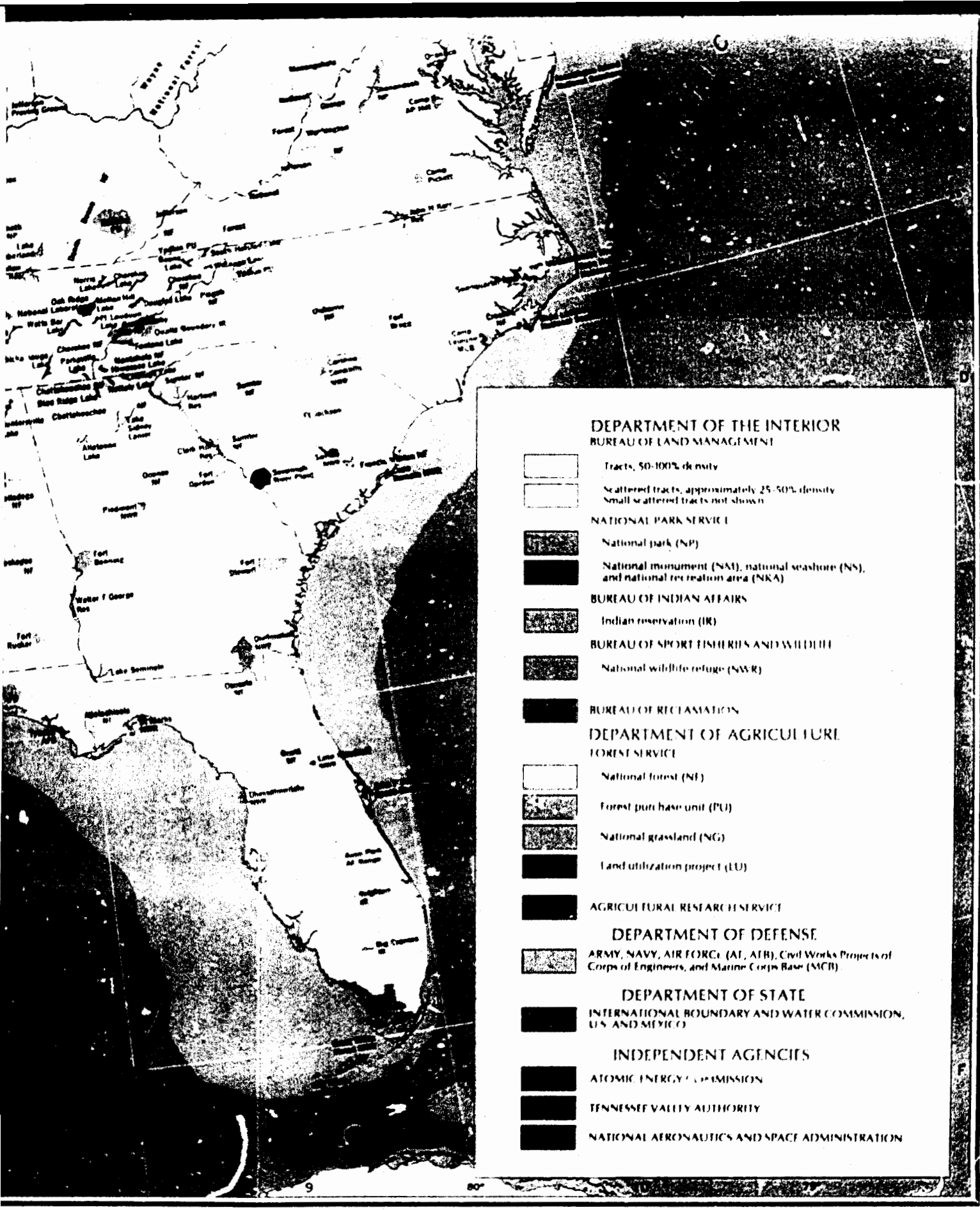

115°
3
110°
4
105°
5
100°
6
95°
Flathead NF
Fresno Res
Tiber Res
Rocky Boys IR
Bowdoin NWR
Medicine Lake NWR
Lostwood NWR
Upper Souris NWR
Turtle Mountain IR
Agassiz NWR
Fort Berthold IR
Fort Totten IR
Lake Sakakawea
Lewis and Clark NF
Lolo NF
Canyon Ferry Lake
Helena NF
Deerlodge NF
Beaverhead NF
Gallatin National Forest
Miles City Center
Long Lake NWR
Shoyenna National Grassland
Cedar River NG
Custer NF
Grand River NG
Sand Lake NWR
Lake Oahe
Red Rock Lakes NWR
Targhee NF
Dubois Experiment Station
Shoshone NF
Bighorn NF
Thunder Basin
Jackson Lake
Teton NF
Palisades Res
Caribou NF
Bridger NF
Boysen Res
Black Hills NF
Lake Sharpe
Fort Pierre NG
Crow Creek IR
Buffalo Gap NG
Lake Francis Case
Pathfinder NWR
Medicine Bow NF
Glendo Res
Seedskadee NWR
Seminoe Res
Nebraska NF
Fort Niobrara NWR
Santee IR
Valentine NWR
Crescent Lake NWR
Winnebago IR
Omaha IR
Wasatch NF
Flaming Gorge NRA
Ashley NF
Browns Park NWR
Dinosaur NM
Routt NF
Roosevelt NF
Pawnee National Grassland
Rocky Mountain NP
Arapaho NF
Naval Petroleum Reserve
Uinta NF
Clay Center
Harlan County Res
Iowa IR
Sac and Fox IR
Kickapoo IR
Tuttle Creek Res
Perry Res
Milford Res
Ft Riley
Potawatomi IR
Fishlake NF
Manti-La Sal NF
Grand Mesa NF
Gunnison NF
Uncompahgre NF
Pike NF
Capitol Reef NM
Canyonlands NP
Arches NP
Blue Mesa Res
Curecanti NRA
Fort Carson
Isabel
Rio Grande NF
San Juan NF
Great Sand Dunes NM
Monte Vista NWR
Mesa Verde NP
Jemez NWR
Smoky Hill AF Range
Quivira NWR
John Redmond Res
Comanche NG
Navajo Res
Carson NF
Limarron NG
Chaco Canyon NM
Kiowa NG
Rita Blanca NG
Salt Plains NWR
Optima Res


FEDERAL LAND
PRINCIPAL LANDS ADMINISTERED
BY FEDERAL AGENCIES, JAN



U.S. DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY


FEDERAL LANDS
PRINCIPAL LANDS ADMINISTERED
BY FEDERAL AGENCIES



INTERIOR—GEOLOGICAL SURVEY, WASHINGTON, D.C. — 1970
FOR SALE BY U.S. GEOLOGICAL SURVEY
WASHINGTON, D.C. 20242
SEPARATE SALES EDITION
SHEET NUMBER 272