UTAH
DNR
NATURAL RESOURCES

Study of Issues Related to State Jurisdiction Over Water Rights

November 2013

A man irrigating in Washington County, Utah

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INTRODUCTION

Water planning, development, and management in Utah have been carried out primarily under state law. The federal government, however, also has a role in the management of scarce water resources in arid areas and traditional state authority must be thoughtfully exercised while meeting the requirements of federal law. Some tension in the federal-state relationship is inevitable because the federal government is a major land owner and water developer in the West. This tension is not, however, a particularly new development. Forty years ago a National Water Commission report summarized:

> If [Federal law] fits with the state law into a single pattern, it creates no problems. When it and state law clash, when gaps appear, when federal law upsets that which state law has set up, when federal law undoes the tenured security that states give to property rights, when federal rights override instead of mesh with private rights, then there is a federal-state conflict in the field of water rights. There is confusion, uncertainty, bad feeling, jealousy and bitterness. To a substantial degree, this is what exists today.[1]

Progress has been made in the last four decades. Still, conflicts and potential conflicts between the implementation of certain federal laws and Utah law continues and this study documents some of those conflicts. It describes how Utah has, for the most part, accommodated federal interests and evaluates the need to continue to carefully monitor conflicts and insure the state's primary role in water resources management is protected in the future.

In this regard, in its 2013 Session, the Utah Legislature passed HB166, directing the Department of Natural Resources to undertake a study of issues related to the State's jurisdiction over Water Rights, including conflicts between state, state agencies, political subdivisions, or citizens of the State and the Federal government relating to water issues and any actions the state needs to take to maintain and defend its jurisdiction over water rights. As a side note, under the direction of the Governor a group of water experts recently completed a series of eight "townhall" meetings throughout the State to discuss water policy. Interestingly, State/Federal conflicts were rarely mentioned in the public participation portions of those meetings as matters of concern to Utahns interested in water matters

This study first examines how Congress delegated to the western states primacy over the water resources within their borders. It then traces the basic history of the settlement of the arid West with respect to the water law, the adoption of the prior appropriation doctrine, and the

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[1] National Water Comm'n, Water Policies for the Future, 459 (1973)(quoting F. Trelease, "Federal-State Relations in Water Law" (1971)).

related Congressional Acts, as interpreted by the U.S. Supreme Court, which granted the Western States primary jurisdiction over water and water rights regulation. The study then addresses various federal laws and doctrines which potentially conflict with state water law and water rights.

Finally, although HB166 requested proposed state legislation to solve these conflicts, the most likely legislative relief should come at the federal level. Nevertheless, state-law based remedies to some of the conflicts which have arisen are explored.

I. HISTORY AND BACKGROUND OF THE PRIOR APPROPRIATION DOCTRINE AND STATE JURISDICTION OVER WATER IN THE WEST

The vastness of the United States as it expanded from East to West, and the dramatic climatic differences within the country, caused different water laws and regimens to be established in arid areas. The final westward expansion into "The Great American Desert" brought the settlers and Congress face to face with the necessity for irrigation and mining uses in a way no previous territorial expansion had. Thus, the development of laws governing water rights in general was markedly different in the West than in the East; the doctrine of prior appropriation developed in response to these differences.

The prior appropriation doctrine had its roots in the mining camps of California and Montana where miners moved water long distances to work their placer claims. Another root of the doctrine arose at about the same time in the Great Salt Lake Valley, where in 1847 Mormon pioneers constructed a dam on City Creek and diverted the water to irrigate crops. Ultimately, all the Western States adopted the prior appropriation doctrine for acquiring water rights to meet beneficial uses.

In 1848, the United States acquired California and most of the Intermountain West from Mexico under the "Treaty of Guadalupe Hidalgo." Pursuant to the cession by Mexico, the United States became the owner of virtually all land (and presumably water) in the Intermountain West. In those early days there were few, if any, laws governing the use of water (or the public land for that matter). Thus, the early miners in California and Montana and the Mormon Pioneers in Utah established their own local laws and customs for water use based on prior appropriation principles, particularly first in time - first in right. Under this doctrine, ownership of land did not necessarily include any right to water.

In response to the initial settlement of the West, the federal government supported development of this "new" form of water law. Through passage of the Mining Act of 1866[2] and the Desert Land Act of 1877,[3] Congress approved past and future appropriations of water on public lands in the West which had been made pursuant to "local laws and customs." In construing these and later Acts of Congress, the U.S. Supreme Court, in a series of cases, held

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[2] Ch. 262, 14 Stat. 251 and 253.

[3] 19 Stat. 377; 43 U.S.C. §§321-323.

that these Acts severed the public lands and water estates in the public domain, directing that rights to use water be established under State (or Territorial) law independently of rights to land. As early as 1879, the Supreme Court in *Broder v. Natoma Water & Min. Company,*[4] observed that local appropriation rights were "rights which the [federal] government had, by its conduct, recognized and encouraged and was bound to protect."[5]

The seminal case for the proposition that Congressional acts directed that the right to use water on public lands be treated differently than ownership of the land itself is *California Oregon Power Co. v. Beaver Portland Cement Company.*[6] This case involved competing water right claims on the Rogue River in Oregon. The first claimant asserted it had acquired the right to use water by virtue of a federal patent its predecessor had received under the Homestead Act of 1862 (essentially a riparian-based right). The second claimant had applied for and was granted a state based appropriative water right from the Oregon State Engineer pursuant to the state law. The U.S. Supreme Court upheld and confirmed the state-based water right. The Court set forth the issue before it as follows:

> "The question . . . is whether - in light of pertinent history, of the conditions which existed in the arid and semiarid land states, of the practice and attitude of the federal government, and of the congressional legislation prior to 1885 - the homestead patent in question carried with it as part of the granted estate the common-law rights which attached to riparian proprietorship."[7]

The Court then discussed the various Acts of Congress that recognized the prior appropriation doctrine, culminating in the Desert Land Act of 1877. According to the Court, these Acts were passed because "it had become evident to Congress, . . . that the future growth and well being of the entire region depended upon a complete adherence to the rule of appropriation for a beneficial use as the exclusive criterion of the right to the use of water. . . . Necessarily, that involved the complete subordination of the common-law doctrine of riparian rights to that of appropriation."[8] The Court then construed the Desert Land Act and held that the Act "effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself. . . . [I]t follows that a patent issued thereafter [for lands in . . . the West] carried with it . . . . no common-law right to the water flowing through or bordering upon the lands conveyed."[9] The Court thus held that "Congress intended to establish the rule that for the

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4 101 U.S. 274 (1879).

5 *Id.* at 276.

6 295 U.S. 142 (1935). The opinion was authored by Justice Sutherland, a noted Utah native.

7 *Id.* at 153-154.

8 *Id.* at 157-158.

9 *Id.* at 158.

future the [public] land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories. . . ."[10]

The recognition of state primacy over public waters, which is a logical extension of its primary authority to protect the health, safety, and welfare of its people, was further buttressed by the Supreme Court in a case involving a federal dam project built under the Reclamation Act of 1902. During the latter part of the 19th century irrigation expanded throughout the arid western states, usually supported by private enterprise or local communities. By the turn of the century, however, most of the lands which could be profitably irrigated by such small-scale projects had been put to use. Pressure mounted on the federal government to provide funding for the larger projects that would be needed to complete the reclamation and settlement of the West. In light of these needs, Congress passed the Reclamation Act of 1902.[11] For discussion purposes here, the salient part of the Reclamation Act is Section 8 which mandates that the federal reclamation projects are subject to state law:

> [N]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and **the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws**. (emphasis supplied)[12]

This section became the subject of litigation of a federal project in California. In *California v. United States*,[13] the U.S. Bureau of Reclamation (BOR) proposed to construct the New Melones Dam on the Stanislaus River in northern California to store 2.4 million acre feet of water as part of the BOR's Central Valley Project. BOR filed an application with the California Water Resources Control Board (the equivalent of the Utah Division of Water Rights) to appropriate water for the project under state law. After a lengthy hearing, the State Board approved the BOR's application to appropriate, but attached 25 permit conditions. The Board concluded that without compliance with the conditions the BOR had failed to meet California's requirements for appropriation.

In response, the United States challenged the imposition of the conditions in federal court, claiming that the BOR could impound whatever unappropriated water was necessary for a federal reclamation project unrestrained by the conditions imposed under California state law. The federal district court and the Ninth Circuit Court of Appeals held for BOR. The U.S.

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10 *Id.* at 162.

11 32 Stat. 388; (codified as amended in scattered sections of 43 U.S.C. §§371-498 (2006)); 43 U.S.C. 391. The Strawberry Valley Project in Utah was one of the first federal reclamation projects constructed under this Act.

12 Reclamation Act of 1902, Ch. 1093 § 8, 32 Stat. 388 (codified at 43 U.S.C. §485(h)-4).

13 438 U.S. 645 (1978).

Supreme Court reversed, holding that under Section 8 of the Reclamation Act a state may impose any condition on the control, appropriation, use or distribution of water in a federal reclamation project which is not inconsistent with clear Congressional directives regarding that specific project. The Court reaffirmed the historical analysis of water development in the West and Congressional Acts in response thereto undertaken by the Court in *Beaver Portland Cement*, mentioned above, and held that the Reclamation Act required full BOR compliance with state law. The Court reaffirmed the principle that the states have total authority over their internal waters and the BOR had to comply with state law. While the Reclamation Act of 1902 provided that BOR projects would be under the control of the Department of the Interior, "[T]he Act clearly provided that state water law would control in the appropriation and later distribution of the water. . . . The legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law."[14]

This decision clarifies that not only do states have primacy over water law issues, even the United States–with certain exceptions discussed below–must comply with state water law in the construction of federal water projects. In a final note, the Court stated that:

> "Perhaps the most eloquent expression of the need to observe state water law is found in the Senate Report on the [1952] McCarren Amendment, 43 U.S.C. § 666(a), which subjects the United States to state-court jurisdiction for general stream adjudications:
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> > In the arid Western States, for more than 80 years, the law has been the waters above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the state in which it is found, which state is vested with the primary control thereof."[15]

II. FEDERAL RESERVE WATER RIGHTS

The discussion in the preceding section demonstrates how the western states came to have general primacy over water use and rights. In the cases which developed that doctrine, however, the U.S. Supreme Court has noted there are two limitations to the states' exclusive control of its water resources: (1) federal reserved water rights, so far as may be necessary for the beneficial uses of federal reservations from the public domain; and (2) the federal navigation servitude. *United States v. Rio Grande Dam and Irr. Co.*,[16] and *California v. U.S.*[17]

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14 *Id.* at 664, 675.

15 *Id.* at 678.

16 174 U.S. 690 (1899).

17 438 U.S. 645 (1978). As the second driest state, for the most part Utah lacks rivers large enough to bring the federal navigation servitude into issue and we will not, therefore, discuss it here. Even though Utah does have some water bodies that have been declared navigable, under federal law the navigation servitude is more likely to create conflicts on, for example, the Missouri River, where

In a nutshell, a federal reserved water right is created when the federal government reserves land from the public domain for a specific federal purpose, and the use of water is necessary to carry out the primary purpose for which the reservation was created. The amount of water so reserved is the minimum amount necessary to carry out the primary purpose of the reservation. The United States can only reserve unappropriated water, however, and the priority date of a federal reserved right as it relates to appropriative water rights is the date the reservation is created. Reserved rights may be established expressly or by implication and may be created by Congress or Presidential proclamation. The Supreme Court has said that reservation of a water right by the United States "is empowered by the Commerce Clause, Art. I § 8 . . . and the Property Clause Art. IV § 3 [of the United States Constitution], which permit federal regulation of federal lands. The doctrine applies to Indian Reservations and other federal enclaves, encompassing water rights in navigable and non-navigable streams."[18]

Federal reserved rights differ from prior appropriative rights in significant ways. While a private appropriator may divert water from a stream and convey it a long distance to its place of beneficial use, the United States may only reserve water located upon, flowing through, or directly bordering a reservation. Nevertheless, reserved rights can impact other junior priority users up or downstream depending on the state based prior appropriation law, thus creating controversy and conflict. Furthermore, unlike a person holding a prior appropriation right who must place his water to beneficial use within a specific time and continue to use it, federal reserved rights can remain dormant and unused for decades. But, once asserted, a reserved right can adversely impact junior state appropriators who may have relied on their water for years and made substantial related financial investments. Also, reserved rights cannot be lost by forfeiture or non-use.

To examine the various types of reserved right uses, the following discussion first focuses on reserved rights for Indian reservations and then on rights for other types of federal reservations in Utah.

A) THE "WINTERS DOCTRINE" AND INDIAN RESERVED WATER RIGHTS

The first reserved water rights case arose on the Milk River in Montana in 1906. Beginning in the mid to late 1800s Congress and the President set aside or "reserved" large areas of the public lands in the West as Indian reservations. The perceived purpose of those reservations was to convert Indians from a nomadic to an agrarian lifestyle. Unfortunately, no specific reservation of water resources accompanied these reservations of land.

In 1906, years after Congress had approved the "new" Western water law, the United States brought suit on behalf of the Native Americans living on the Fort Belknap Indian Reservation in Montana asserting the Indians needed all of the water in the Milk River for

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upstream use of state water rights conflicts with the federal role in keeping the lower part of the river high enough to support commercial barge traffic.

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

reservation farming purposes. Montana citizens had previously diverted a significant amount of water from the river for irrigation and domestic uses. They did so under Montana law. They claimed they would be forced to abandon their homes and farms if deprived of water. They stressed the validity of their state-created water rights. Thus, the case of *Winters v. United States*[19] presented the Supreme Court with a genuine dilemma. Had Congress expressly set aside a water right to accompany the Indian reservation land, the case would have been difficult, but more straightforward. But Congress created no such right. In the meantime, Montana settlers had put water to beneficial use. This conflict led the Supreme Court to fashion an equitable remedy. The Court held that when Congress created the Fort Belknap Reservation it must have intended to reserve water as well as land because such water was needed to convert the Indians to "pastoral and civilized people," and without water the purpose of the reservation would be defeated.[20] Thus came into being the implied Indian "reserved water rights" doctrine, or the "*Winters* doctrine."

Unfortunately, the *Winters* decision provided little guidance as to how an Indian reserved right should be quantified. In *Arizona v. California*,[21] the Supreme Court held that the standard for quantifying rights for Indian reservations in the lower Colorado River Basin was the amount of water necessary to irrigate the "practicably irrigable acreage" on the reservations. This became known as the "PIA" test. The Court provided few specifics on exactly how the PIA test should be implemented, and the Court has yet to provide such guidance. However, the Wyoming Supreme Court addressed the specifics of the PIA test in the General adjudication of the Big Horn River system, which included Indian reserved rights for the Wind River Reservation. The Wyoming Supreme Court defined PIA as "those acres susceptible to sustained irrigation at reasonable costs."[22]

As discussed, Indian reserved water rights are different than state appropriative water rights. Basic attributes of reserved rights include: (1) their basis is the creation of reservations; (2) they are important sovereign and property interests; (3) they are not lost through non-use; (4) their priority date is the date of creation of the reservation; and (5) the purpose of the reservation defines them (U.S. Supreme Court precedent indicates PIA for Indian reservations). This chart summarizes the relationship between the two types of rights:[23]

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19 207 U.S. 564 (1908).

20 *Id.* at 576.

21 373 U.S. 546, 600 (1963).

22 *In Re Rights to Use Water in Bighorn River*, 753 P.2d 76, 100-112 (Wyo. 1988). The U.S. Supreme Court agreed to review the decision, but later, Justice O'Connor recused herself and the remaining Justices split 4 to 4, thus affirming the Wyoming Supreme Court ruling without opinion. *Wyoming v. U.S.*, 492 U.S. 406 (1989).

23 The chart originally appeared in American Bar Association, Section of Environment, Energy and Resources, Presentation: *The Negotiated Settlement of Tribal Reserved Water Right Claims - Client Management Issues: Who, What, When, Where and Why?*, by Norman K. Johnson, Utah Attorney General's Office, Salt Lake City, Utah - 31st Annual Water Law Conference, Las Vegas, Nevada June 5-7, 2013.

Attributes of Appropriative Water Rights	Attributes of Indian Reserved Water Rights
(1) their basis, limit, and measure is publicly defined beneficial use;	(1) their basis is the creation of reservations;
(2) they are privately held rights characterized in terms of quantity, nature of use, and time of use;	(2) they are important sovereign rights defined by the purpose of the reservation (U.S. Supreme Court precedent says PIA for Indian reservations);
(3) Non-use, such as abandonment or forfeiture, may lead to their termination;	(3) they are not lost through non-use;
(4) their priority is the date on which an application was filed or, for some, when beneficial use begins;	(4) their priority date is the creation of the reservation;

In addition to having characteristics that differ from and may conflict with appropriative water rights, the more pressing problem with respect to most Indian reserved rights is that they may be very large in scope, yet they remain mostly unquantified. Given their earlier priority dates, they will compete with appropriative water rights in some areas, potentially displacing water rights that may be decades old.

States have taken different approaches to dealing with reserved water rights for Indian reservations. Some have (somewhat inexplicably) ignored their existence. Others have litigated with Indian tribes and the federal government.[24] Most have chosen negotiation as the preferred method of quantifying Indian water rights. While it has its own challenges, negotiation allows the possibility of a "win/win" result for all parties involved without the expense and uncertainty of litigation. Utah has chosen negotiation as the preferred method of resolving reserved water right claims and has achieved important success in these endeavors.[25]

B) RESERVED WATER RIGHTS FOR NATIONAL PARKS, MONUMENTS, AND FORESTS

Utah is blessed with five National Parks and eight National Monuments which provide public recreation and pump millions of tourist dollars into State and rural economies. National Parks and Monuments are created by federal reservation of land from the public domain and are usually administered by the National Park Service.

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[24] To date, it is estimated that Wyoming has expended in excess of $12 million litigating the Indian reserved rights in the *Big Horn* case.

[25] A description of successful negotiations appears later in this Study.

National Parks can only be designated by an Act of Congress, and are managed pursuant to Congressional mandates set forth in the National Park Service Act of 1916.[26] The National Park Service Act provides that the "fundamental purpose of the said parks, monuments, and reservations" is "to conserve the scenery and 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."[27] The National Antiquities Act of 1906[28] authorizes the President, by proclamation, to reserve as National Monuments "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the . . . United States to be national monuments, and may reserve as a part thereof parcels of land . . ."[29]

Over the years Congress and the Presidents have used these Acts to create National Parks and Monuments throughout the country. In the West, these are created by reserving lands from the public domain for the stated purpose of the reservation. Since National Parks and Monuments are reservations of federal land for a federal purpose, the question arose whether the United States also reserved unappropriated water necessary to fulfill the purposes of these reservations.

The first case to acknowledge "non-Indian" federal reserved rights for a reservation not set aside for Indians was *Arizona v. California,*[30] where the United States Supreme Court recognized reserved water rights "sufficient for the future requirements" of the Lake Mead National Recreation Area and two adjacent Wildlife Refuges. In *Cappaert v. United States*,[31] the Court addressed reserved rights for National Parks and Monuments which conflicted with a state-based appropriative water right. There, President Truman in 1952 withdrew and reserved a 40 acre tract of land surrounding Devil's Hole as a part of the then Death Valley National Monument. The Reservation Proclamation made specific reference to the "remarkable underground pool" which was home to "a peculiar race of desert fish . . . found nowhere else in the world," all of which was "of outstanding scientific importance."[32]

The Cappaerts owned a ranch approximately 2 ½ miles from Devil's Hole. In 1968, pursuant to a valid water right obtained from the Nevada State Engineer, they began pumping several wells to irrigate alfalfa. The pumped groundwater came from the same aquifer which was the source for the pool in Devil's Hole. The Cappaerts' water right was junior in priority to the federal reserved rights. The well pumping began to lower the level of water in Devil's Hole

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26 39 Stat. 535-536 (codified at 16 U.S.C. §1 *et. seq.*)

27 16 U.S.C. §1.

28 34 Stat. 225 (codified as 16 U.S.C. §431).

29 16 U.S.C. § 431.

30 373 U.S. 546, 601 (1963).

31 426 U.S. 128 (1976).

32 *Id.* at 132.

to such an extent that the Park Service feared that the Devil's Hole fish would be killed. The United States filed suit in federal court to enforce its prior reserved rights and to enjoin the Cappaerts' groundwater pumping. The District Court granted the injunction and the Ninth Circuit Court affirmed. The U.S. Supreme Court took the appeal and affirmed the Ninth Circuit, upholding the injunction against further groundwater pumping.

The Supreme Court examined the 1952 Proclamation creating the Devil's Hole Monument and held that the Monument's primary purpose was the preservation of the underground pool of water and the rare fish which lived there. The Court concluded there was a reserved water right for the Monument. The Court held that federal reserved rights set aside the minimum amounts of water necessary to fulfill the primary purpose of the reservation and that preservation of the pool was that purpose:

> The Proclamation discussed the pool in Devil's Hole in four of the five preambles and recited that the "pool . . . should be given special protection." Since the pool is a body of water, the protection contemplated is meaningful only if the water remains; the water right reserved by the 1952 Proclamation was thus explicit, not implied."[33]

The Court further noted that ". . . since the implied - reservation - of water - rights doctrine is based on the necessity of water for the purpose of the federal reservation, we hold that the United States can protect its water from subsequent diversions, whether the diversion is of surface or groundwater."[34] The Court concluded that the Cappaert's pumping of groundwater under a junior state water right was damaging the prior federal reserved right and upheld the injunction prohibiting the continued pumping.[35]

It is important to note the slight differences between National Parks and National Monuments. Under the National Parks Service Act the extent of the values and resources sought to be protected is very broad. In the case of National Monuments, the purposes are usually much more narrow and specific, as spelled out in the Proclamation creating the Monument as demonstrated in *Cappaert*. Thus, for example, the Colorado Supreme Court narrowly interpreted the purposes of the portion of Dinosaur National Monument lying in Colorado. After scrutinizing the purposes of the Presidential Proclamation creating the Monument, the court held that water was reserved only for scientific and historic purposes and not for white water rafting. *United States v. City and County of Denver*.[36] However the court also held that the Rocky Mountain National Park's purposes were broader than those of Dinosaur National Monument,

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33 *Id.* at 139-140.

34 *Id.* at 143.

35 While federal reserved rights can be explicit or implied, sometimes there is explicit language that no federal water rights are reserved. For example, President Clinton's Proclamation creating the Grand Staircase Escalante National Monument contains explicit language that no federal water rights are reserved for monument purposes.

36 656 P.2d 1, 29 (Colo. 1982).

these including water for aesthetics, fish and wildlife, and recreational boating.[37] In Utah, the National Park Service has asserted different types of water rights for National Parks uses, such as administrative, sediment movement, protection of fish and wildlife, preservation of "hanging gardens" (think "Weeping Rock" at Zion) and instream flows for aesthetics and recreational uses. The claimed uses vary depending on the unique features of each Park.

Two years after the *Cappaert* decision the Supreme Court addressed federal reserved rights for national forests, and there took a more restrictive approach. In *United States v. New Mexico*, [38] the United States, in a state general water adjudication suit, claimed large amounts of water from the Rio Mimbres as reserved water rights for the Gila National Forest. The New Mexico court held that while the United States may have reserved water for Forest Service purposes, that reservation only included water "as may be necessary for the purpose for which [the land was] withdrawn," but these purposes did not include recreation, aesthetics, wildlife preservation, or cattle grazing.[39] The Supreme Court agreed with the analysis of the New Mexico Court.[40]

The Court began its analysis by restating its prior decisions on federal reserved rights stating that Congress and the President have "the power to reserve portions of the federal domain for specific federal purposes," and are authorized "to reserve appurtenant water then unappropriated **to the extent needed to accomplish the purpose of the reservation**." (emphasis in original).[41] "[T]he Court has repeatedly emphasized that Congress reserved `only that amount of water necessary to fulfill the purpose of the reservation and no more.' Each time the Court has applied the . . . [reserved water right doctrine], it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and **concluded that without the water the purposes of the reservation would be entirely defeated**."[42] (emphasis supplied; initial citation omitted).

The Court noted that:

> This careful examination is required both because the reservation is implied, rather than expressed, and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water. Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law. Where

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37 *Id.* at 28-30.

38 438 U.S. 696 (1978).

39 *Id.* at 698.

40 Forest Service lands are administered by the U.S. Dept. of Agriculture - not the Department of the Interior.

41 *Id.* at 699-700.

42 *Id.* at 700.

> water is necessary to fulfill the very purpose for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only **valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.**[43] (emphasis supplied.)

With this test established, the Court examined the original purposes governing the establishment of National Forests. In 1897, Congress passed the Organic Administration Act governing the establishment and purposes of the National Forest System.[44] In particular, Congress provided:

> "No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States . . .."[45]

In examining the Organic Administration Act, the Court concluded "that Congress intended National Forests to be reserved for only two purposes - `[t]o conserve the water flows [ie: protect watersheds], and to furnish a continuous supply of timber for people."[46] Conversely, National Forests were not to be "reserved for aesthetic, environmental, recreational, or wildlife - preservation purpose."[47] Thus, forests are not parks set aside for non-use, but have been established for economic reasons, which the Court held to be "relatively narrow."[48] The Court interpreted the "preservation of streamflow purposes" as providing water supplies for beneficial use under state laws:

> The water that would be 'insured" by preservation of the forest was to "be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder." Organic Administration Act of 1897, 30 State. 36, 16 U.S.C. § 481 (1976 ed.) As this provision and its legislative history evidenced, Congress authorized the national forest system principally as a means of enhancing the quantity of water that would be available

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43 *Id.* at 701.

44 30 Stat. 34-35, 16 U.S.C. §473 *et. seq.*

45 30 Stat. 35, as codified, 16 U.S.C. §475 (1976 ed.).

46 438 U.S. at 707.

47 *Id.* at 708.

48 *Id.* at 709.

to the settlers of the arid West. The Government, however, would have us now believe that Congress intended to partially defeat this goal by reserving significant amounts of water for purposes quite inconsistent with this goal.[49]

The United States argued that the Multiple-Use Sustained-Yield Act of 1960,[50] expanded the purposes of Forests. That Act provided:

> It is the policy of Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of section 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in the [Organic Administration Act of 1897.][51]

Interpreting the 1960 act the Court stated:

> While we conclude the Multiple-Use Sustained-Yield Act of 1960 was intended to broaden the purposes for which national forests had previously been administered, we agree that Congress did not intend to thereby expand the reserved rights of the United States.[52]

The Court thus held that the additional purposes set forth in the *1960 Act* were "secondary" to the primary purposes set forth in the original Act of 1897:[53]

> [T]he 'reserved rights doctrine' is a doctrine built on implication and is an exception to Congress' explicit deference to state water law in other areas. Without legislative history to the contrary, we are led to conclude that Congress did not intend in enacting the Multiple-Use Sustained-Yield Act of 1960 to reserve water for the **secondary** purposes there established. A reservation of additional water could mean a substantial loss in the amount of water available for irrigation and domestic use, thereby defeating Congress' principal purpose of securing favorable conditions of water flow.[54] (emphasis in original).

As to the United States' claims for stockwatering on the Forest, the Court disagreed:

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49 *Id.* at 712-13.

50 74 Stat. 215, 16 U.S.C. §528 *et. seq.*

51 *Id.* at 713.

52 *Id.*

53 The Court noted that even if the *1960 Act* had expanded the reserved rights, those rights would be subordinate to any appropriation under state law dating prior to 1960.

54 *Id.* at 715.

> The United States contends that, since Congress clearly foresaw stockwatering on national forests, reserved rights must be recognized for this purpose. The New Mexico courts disagreed and held that any stockwatering rights must be allocated under state law . . . We agree.
>
> * * *
>
> There is no indication in the legislative histories of any of the forest Acts that Congress foresaw any need for the Forest Service to allocate water for stockwatering purposes, a task to which state law was well suited.[55]

In short, any Forest Service reserved rights claims in Utah would be subject to the same restrictive test set forth in *U.S. v. New Mexico*.[56]

To summarize, federal reserved rights for National Parks, Monuments, and National Forests are subject to different tests under Supreme Court decisions: (1) regarding Monuments, the Court will look at the primary purpose for which the Monument was created, and reserve only enough water to carry out that primary purpose; (2) National Parks present more of a challenge because of the very broad and expansive purposes for which the parks were created; and (3) National Forests are subject to a very restrictive test which includes limited uses.

C) FEDERAL WILDERNESS AREAS

There has been a good deal of controversy and some litigation over whether Congressional designation of wilderness areas create federal reserved water rights. In 1964, Congress enacted the Wilderness Act,[57] establishing the National Wilderness Preservation System, composed of congressionally designated wilderness areas. This Act is the equivalent of the National Park Organic Act and the National Forest Organic Act discussed above. Usually, Congress follows up with more specific Acts, designating wilderness areas within a state. Pursuant to the Act, only Congress may create a Wilderness Area.

The 1964 Wilderness Act provides that wilderness areas "shall be administered for the use and enjoyment of the American people in such a manner as will leave them unimpaired for future use and enjoyment as wilderness.. . ."[58] Section 4(a) of the 1964 Act implies that Wilderness Areas could be created as "supplemental purposes" within national parks, national forests and national wildlife refuges, but stresses that nothing in the 1964 Act shall be deemed to over-ride the Organic Acts for national forests or national parks or monuments.[59] The 1964 Act

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55 *Id.* at 716-17.

56 We are not aware of any claims by the United States for reserved stockwatering rights on National Forest Lands in Utah. Usually the United States files "diligence claims" for stockwatering under Utah State law.

57 78 Stat. 890-896 (codified as 16 U.S.C. §§1131-1136).

58 16 U.S.C. §1131(a).

59 16 U.S.C. §1133(a).

in Section 4(d)(3) further provides that the designation of a wilderness areas shall not unreasonably deny access for various activities, specifically including "water-lines."[60] Most importantly, under Section 7 of the 1964 Act, Congress specifically deferred to State water law in the creation of Wilderness Areas. "Nothing in this Act shall constitute an **express or implied** claim or denial on the part of the Federal Government **as to exemption from State water laws**" (emphasis added).[61] This statement demonstrates that in creating Wilderness Areas, Congress was not explicitly or impliedly reserving water rights in contravention of State water laws.

In 1984, Congress passed the Utah Wilderness Act.[62] The stated purpose of the Act was to create Wilderness Access within National Forest lands in Utah and "[s]ubject to all valid existing rights, each wilderness area designated by this Act shall be administered by the Secretary of Agriculture in accordance with the provisions of the Wilderness Act of 1964," which deferred to State water law.[63]

The Utah Act then designated 12 Wilderness Areas - all located on National Forest Lands.[64] The Utah Act was specific as to Congressional intent not to create federal reserved rights for the designated areas. Further, Congress provided for access by municipalities to maintain municipal water facilities located now or in the future within these areas. Section 302 of the Utah Act provides:

> **STATE WATER ALLOCATION AUTHORITY**
>
> Sec. 302(a) As provided in section 4(d)(7) of the Wilderness Act of 1964, **nothing in this Act shall constitute an express or implied claim or denial on the part of the Federal Government as to the exemption from Utah water laws.**
>
> (b) Within the Mount Naomi, Wellsville Mountain, Mount Olympus, Twin Peaks, High Uintahs, Mount Nebo, Pine Valley Mountain, Deseret Peak, Mount Timpanogos, and Ashdown Gorge Wilderness areas as designated by this Act, the Forest Service is directed to utilize whatever sanitary facilities are necessary, including but not limited to vault toilets which may require service by helicopter, to insure the continued health and safety of the communities serviced by the watersheds in such wilderness areas in the State of Utah; furthermore, **nothing in this Act shall be construed to limit motorized access and road maintenance by local municipalities for those minimum maintenance activities necessary to guarantee the continued viability of whatsoever watershed facilities**

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60 Codified at 16 U.S.C. §1133(d)(3).

61 Codified at 16 U.S.C. §1133(d)(6).

62 98 Stat. 1657, 16 U.S.C. §1132.

63 Utah Wilderness Act of 1984, Sec. 103(b).

64 Under *U.S. v. New Mexico*, supra., and the 1964 Wilderness Act, the creation of these areas would be "supplemental" to the primary purpose of the National Forest System.

currently exist or which may be necessary in the future to prevent the degradation of the water supply in such wilderness areas within the State of Utah, subject to such reasonable regulations as are deemed necessary by the Secretary of Agriculture. (emphasis supplied).[65]

Thus, the Utah Wilderness Act does two important things: First, it defers to state water law and does not expressly or impliedly reserve federal water rights for wilderness areas; and second, it preserves reasonable vehicular access to municipalities to operate and maintain their public water supply infrastructure located within the designated areas.[66]

In 2009, Congress enacted what is commonly referred to as the "Washington County Lands Bill," as part of the Omnibus Public Land Management Act.[67] Under Section 1972(a) of the Act, Congress created 14 wilderness areas. However, in subsection 9, Congress stated that no reserved rights were to be asserted for those Wilderness Areas:

Nothing in this section . . .

(i) shall constitute or be construed to constitute either an express or implied reservation by the United States of any water or water right with respect to the land designated as wilderness by subsection (a)(1);

(ii) shall affect any water rights in the State existing on the date of enactment of this Act, including any water rights held by the United States; . . . The Secretary shall follow the procedural and substantive requirements of the law of the State in order to obtain and hold any water rights not in existence on the date of enactment of this Act with respect to the wilderness areas designated by subsection (a)(1).[68]

There has been some litigation involving reserved rights for Wilderness Areas, in the Idaho Snake River Basin Water Adjudication. In *Potlatch Corp. v. U.S.*,[69] the United States claimed reserved rights for three wilderness areas. The district court recognized such rights, but the Idaho Supreme Court reversed. The court gave an extremely narrow interpretation of the purpose of the 1964 Wilderness Act, interpreting it merely to "set aside land and prohibits its

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65 Utah Wilderness Act of 1984, § 302.

66 Most, if not all, of the Utah Wilderness Areas, are in the upper headwaters of drainage basins, thus diminishing many potential conflicts with Utah water rights. Utah officials are aware of the conflict that has arisen in Arizona where a fire destroyed a portion of the water system used by the Town of Tombstone and efforts to rebuild that system were thwarted by federal officials because much of the system was located on a federal wilderness area. Officials are aware of no similar conflict in Utah.

67 123 Stat. 991.

68 Omnibus Public Land Management Act of 2009, §1972(b)(9)(A)

69 12 P.3d 1260 (Idaho 2000).

development, nothing more."[70] The Court further held that there was no language in the Wilderness Act that there must be a reservation of water to fulfill the purposes of the Act. In a concurring opinion, one justice emphasized the disclaimer of water rights in the 1964 Wilderness Act.[71]

D) WILD AND SCENIC RIVERS

In 1968, Congress enacted the Wild and Scenic Rivers Act.[72] The purpose of the Act was that "certain selected rivers . . . which, . . . possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values shall be preserved in free-flowing conditions, and that they . . . shall be protected for the benefit and enjoyment of present and future generations."[73]

Like Wilderness Areas, only Congress can designate a Wild and Scenic River. 16 U.S.C. §1273(b) provides for three types of rivers: 1) A "Wild River" is for the most part totally pristine; 2) a "Scenic River" is free of impoundments and major shoreline development, but may be accessible by road; and 3) a "Recreational River" is readily accessible with some impoundment and shoreline development.[74]

16 U.S.C. §1284(c), specifically reserves water rights for Wild and Scenic Rivers, but in a circuitous manner. It reads:

> (c) **Reservation of water for other purposes or in unnecessary quantities prohibited.**
>
> Designation of any stream or portion thereof as a national wild, scenic or recreational river area shall not be construed as a reservation of the waters of such streams for purposes other than those specified in this chapter, or in quantities greater than necessary to accomplish these purposes.

Thus, water is reserved, but only the amount necessary to accomplish the purpose of the Act. The Act also contains a classic *non sequitur* in the preceding section that "[n]othing in this chapter shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws."[75] The Act becomes even more confusing in the next section which reads:

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70 *Id.* at 1266.

71 *Id.* at 1271-72 (Kidwell, J., concurring).

72 82 Stat. 906, (codified at 16 U.S.C. §1271 *et. seq*)..

73 16 U.S.C. §1271.

74 Clark, Waters and Water Rights §37.03(a)(4) (1996).

75 *Id.* at §1284(b)

"The jurisdiction of the States over waters of any stream included in a national wild, scenic or recreational river area shall be unaffected by this chapter to the extent that such jurisdiction may be exercised without impairing the purposes of this chapter or its administration."[76]

Thus, the Act is not a model of clarity.

The Idaho Supreme Court again has provided some guidance. In *Potlatch Corp. v. United States.*[77] The United States, claimed reserved water rights for sections of the Salmon and Rapid Rivers, which had been designated under the Wild and Scenic Rivers Act. The issue was whether water had been reserved - and if so - how much.

In recognizing the United States' claim for reserved rights, the court focused on Congressional intent, and particularly the policy statement in the Act and Section 1284(c) - which is discussed above. The Court stated:

"The legislative intent is awkwardly stated in the negative in section 13(c) of the Wild and Scenic Rivers Act, but it is clear that Congress intended to reserve water to fulfill the purposes of the act [citing subsection (c)]

* * *

Section 13(c) makes little sense unless the legislation reserves water to fulfill the purposes of the Act. It would be anomalous to logic to say that the Act which was expressly created to preserve free-flowing rivers failed to provide for the reservation of water in the rivers. Such a result would run contrary to the language of section 13(c) and the Congressional declaration of policy[.][78]

Thus, the Court held that in designating a Wild and Scenic River, Congress had intended to create a reserved water right. However, the court stated that Congress had specifically intended to reserve only the minimum quantity of water necessary to fulfill the purposes of the Wild and Scenic Rivers Act, and remanded the case for a determination of what that amount would be.

Prior to 2009, Congress had not designated any wild and scenic rivers in Utah. In 2009, Congress enacted what is commonly referred to as the "Washington County Lands Bill," as part of the Omnibus Public Land Management Act of 2009.[79] As part of Section 1976 of that Bill, Congress designated 35 segments of various rivers and creeks as wild, scenic or recreational rivers under the Wild and Scenic Rivers Act. These are all under the general heading of "Zion

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[76] *Id.* at §1284(d).

[77] 12 P.3d 1256 (Idaho 2000). This decision was issued the same day as the other *Potlatch* case dealing with water rights for wilderness areas quoted above. The two cases are separate decisions.

[78] *Id.* at 1258-59.

[79] 123 Stat. 991.

National Park Wild and Scenic River Designation." Most of the river sections are within the boundaries of Zion National Park (which already has a National Park Service reserved water right recognized by Utah through a negotiated settlement), or are located within wilderness areas designated by the same Act, immediately adjacent to the Park.[80] Section 1976(c) states that the designation of these river segments does not affect the Zion National Park Water Settlement Agreement of December 4, 1996.[81] In sum, the designation of these Wild and Scenic River sections are already covered by the reserved water rights of Zion National Park, and will not impose any further material water demands on the Upper Virgin River. The State is currently discussing this issue with the Department of Interior.

E) UTAH'S EFFORTS TO NEGOTIATE SETTLEMENTS OF FEDERAL RESERVED WATER RIGHTS

While one may find the federal reserved water rights doctrine unpalatable, the existence of such rights cannot be denied and must be dealt with either by litigation or negotiation. Litigation can be costly and time consuming.[82] Further, courts lack the power to reach creative solutions to complex issues. Historically, Utah (like some other western states) has chosen negotiation as the preferable method for recognizing and quantifying reserved water rights for Indian Reservations and National Parks and Monuments. These efforts have resulted in the creative, fair and equitable settlements at a fraction of the cost of litigation. In this process, we have found that creative thinking and collaborative discussion regarding water rights, hydrology and legal issues can lead to settlements which protect Utah water users, while recognizing reasonable claims of the United States.[83]

While participating in those negotiations, Utah water officials have been sensitive to the protection of existing state water rights, and, where appropriate, local water users have actively participated in the negotiation process. The following is a brief summary of the agreements reached between Utah and the United States on reserved water rights.

F) INDIAN RESERVED RIGHTS SETTLEMENTS AND ONGOING NEGOTIATIONS

1) SHIVWITS BAND OF PAIUTES

Perhaps more than any other settlement, the Shivwits Settlement Agreement of 2001 demonstrates that creative minds can reach creative solutions. The Shivwits Band has a 10,000 acre reservation along the Santa Clara River in Washington County. The Santa Clara is fully

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[80] As discussed above, the Act stated that these wilderness areas were not to have received water rights. But the Wild and Scenic River sections within them do. To date the only wild and scenic river designated in Utah are those for Zion National Park.

[81] The Zion Park Agreement will be discussed in more detail below.

[82] Anecdotally, prior to the start of negotiations on Zion National Park, it is estimated that the United States had spent nearly $1 million preparing for litigation on Zion.

[83] This is not to say that Utah would not be willing to litigate if the need to do so arose.

appropriated. While most of the state-based water rights pre-date the reservation, the Band's reserved water rights claims could have caused major problems with administration and distribution of Santa Clara water - particularly, with regard to the storage of water in Gunlock Reservoir, and well fields used to serve St. George City. With this in mind the Band, the United States, the Washington County Water Conservancy District, local irrigation companies, and the State were able to accommodate a smaller amount of reserved water than the Band originally claimed, thus minimizing the impact on established rights. A unique part of the Shivwits Agreement is that a large portion of the Band's water is supplied by St. George City's treated waste water, which is pumped from the City's waste water facility back to the Reservation. This is water that otherwise would have flowed to Arizona and Nevada.

2) NAVAJO NATION NEGOTIATIONS

The state has negotiated with the Navajo Nation for the past several years on a reserved water rights settlement for the portion of the Nation in Utah. At this point, the negotiations have taken place between the Navajo Nation and the State, and a federal negotiating team has been appointed and is currently reviewing the proposed settlement. Significant progress has been made and the legislature has set aside $2 million towards Utah's cost share in the settlement agreement. Reaching an agreement is of critical importance to Utah, because whatever water the Navajos have comes out of Utah's Upper Basin Colorado River Compact entitlement, thus potentially affecting rights throughout the Colorado, Green and San Juan Rivers in Utah. Through negotiations, the Navajos claim 81,500 acre feet of water provided that certain drinking water projects are built to bring the water closer to where residents live on the reservation. Further, the Navajos priority dates preceded most of the state based water rights in the area. To solve this problem, the Navajos agreed, in the context of the entire settlement, to subordinate their priority on any unused water to existing state-based rights on tributaries and the San Juan River. This was important. Another important component of the agreement protects the water rights of local communities. The next step in the settlement process after federal negotiators approve the deal is to obtain approval of the agreement by Congress. The major hurdle is funding. The cost of the drinking water projects is estimated to be $156 million. The United States would contribute the great majority of those costs.

3) UTE WATER COMPACT

Unfortunately, the road to a settlement of the Ute Tribe's reserved water right claims has been long and we are not yet to the end. The State began negotiating with the Tribe in the 1970's and a draft Compact was negotiated in 1980. The Utah Legislature ratified the 1980 Compact,[84] but ratification by the Tribe failed due to a lack of a 1/3 quorum of voters required by the Tribal Constitution. Since that time, changes in the make-up of the Tribal Business Committee and legal counsel made further progress difficult, although discussions continued. In 1990, Utah and the Tribe agreed to an Amended Compact which was expressly approved by Congress in Section

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[84] Utah Code Ann. §73-21-1.

5 of the Central Utah Project Completion Act of 1992[85] ("CUPCA"), subject to re-ratification by the State of Utah and the Tribe. During the post-CUPCA years, the Tribe continued to press for additional changes to the Compact. In 2009, the State and the Tribe drafted a further revised Compact which (with a few minor changes) - was approved by the Department of the Interior and the Department of Justice. The Tribe held a referendum to approve the revised Compact. Tribal members voted to approve the new version, but the quorum requirement was not met, so the ratification again failed. After a brief hiatus, the Tribe hired new attorneys and the State negotiating team has been meeting with them to see if agreement can be reached. Those discussions are on-going.[86]

G) NEGOTIATED AGREEMENTS FOR NATIONAL PARKS AND MONUMENTS

Many years ago, Utah decided it was more advantageous to negotiate federal reserved rights for National Parks and Monuments than to litigate them. Unlike Indian reservations using the PIA test, rights for National Parks are more subjective. Given the broad purposes and resources the National Parks were created to protect, each park is unique. This creates huge evidentiary problems if such rights were to be litigated, and the courts are not well equipped to delineate complex and creative solutions. Given that, and for other reasons, Utah has chosen to negotiate these rights. Since Indian tribes are not involved, these negotiations are between the State, the Department of the Interior and the U.S. Justice Department. Such negotiations, beginning with Zion National Park, have resulted in "win/win" solutions. And the Zion Park Agreement has provided a general template for the negotiations that followed, making it easier to reach subsequent agreements.

1) ZION NATIONAL PARK

In the late 1980's Utah and the United States began negotiations to settle the reserved water rights for Zion. The negotiations resulted in the 1996 Zion National Park Water Right Settlement Agreement, signed by Governor Leavitt, Secretary of Interior Babbit and the Washington and Kane County Water Conservancy Districts. The Agreement was subsequently approved by the State District Court as part of the Virgin River General Adjudication. The negotiators sought input from technical experts on hydrology, geology, climatology, fish and wildlife, and other areas of expertise. The Agreement is complex, but the important highlights are as follows:

- The Park agreed to subordinate its reserved rights priority dates to all state based rights with a priority earlier than 1996. There was an exception for rights the Park used for administrative purposes, such as the visitor center, offices, housing and campgrounds. In addition, the Park also subordinated its priority dates to a block

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85 106 Stat. 4650-55.

86 In addition to current negotiations with the Ute Tribe and Navajo Nation the State has had preliminary water right discussions with the Goshute Tribe and certain bands of the Confederated Paiute Tribe of Utah.

of unappropriated water so as to allow for future development of State based rights. This block of water is 6,000 acre feet of depletion on the North Fork of the Virgin River and 5,000 acre feet of depletion on the East Fork (subject to certain conditions).

- The Park was allowed all natural instream flows within the Park.[87]

- To protect the unique groundwater outcropping features such as "Weeping Rock," a groundwater protection zone was created in limited areas adjacent to the Park. The protection zone applied primarily to larger wells.

- The operation of Kolob Reservoir was preserved, subject to certain conditions on the release of storage water.

- The construction of certain reservoirs at specific locations on the East Fork was provided for.

- The Agreement facilitated a land exchange between the Washington County Water Conservancy District and the United States, where the District conveyed a reservoir site it owned above the Park in exchange for the Sand Hollow reservoir site below the Park owned by the BLM. This allowed the District to construct Sand Hollow with a minimum of federal permits.

In short, the Zion Park Agreement was a win-win. The result was certainly better than either party could have expected by long and costly litigation. In the years since the Zion Agreement was signed, things have gone smoothly. There have been no major problems with respect to water management in and around the Park.

2) CEDAR BREAKS NATIONAL MONUMENT

Shortly after the Zion Park Agreement was signed, Utah and the United States began negotiating a water settlement agreement for Cedar Breaks National Monument. The parties used the Zion Park Agreement as a template. Cedar Breaks was somewhat less complex because the Monument is located in a headwaters area. The Cedar Breaks Agreement grants the Park Service instream flow rights on all sources originating within the Monument - but subordinates those rights to all existing state-based water rights, with the exception of a small amount of water used for administrative purposes. The Agreement was signed in April of 2000.

3) OTHER NATIONAL MONUMENTS

Utah has reached other reserved water rights settlements on many of the other National Monuments in the State. Each settlement represents a significant and important development.

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[87] There are very few state based rights above the Park. The Park's instream flow continues to flow undiminished down the Virgin River to fill state water rights below the Park.

These generally follow the Zion model, but involve smaller amounts of water. The Agreements and dates are as follows:

- Hovenweep National Monument - April 2000
- Golden Spike National Monument - January 2002
- Rainbow Bridge National Monument - January 2002
- Timpanogos Cave National Monument - March 2004
- Natural Bridges National Monument - October 2010

4) ARCHES NATIONAL PARK

The Utah negotiating team is very close to finalizing a water right settlement agreement for Arches National Park. Again, the Agreement follows the Zion model with administrative water rights, instream flows and a groundwater protection zone. There are a few minor details left to be resolved, but it is expected that the Agreement will be finalized in the next few months.

III. MANAGEMENT OF INTERSTATE WATERS, PARTICULARLY THE COLORADO RIVER

A) THE COLORADO RIVER

When a large water source flows through two or more states the states must decide how best to share water from that river. Often this is done by negotiating a compact between the states. The federal government will usually be involved in such arrangements because under the U. S. Constitution, it must ratify such compacts. Utah is a party to three compacts: one pertains to the Bear River and the other two to the Colorado River. Implementation of the Colorado River Compacts is significantly more complicated than the Bear River Compact.

The Colorado River falls more than 12,000 feet as it flows from the Rocky Mountains to its natural outlet in the Gulf of California. The river's large drainage basin covers about 244,000 square miles. It is 1,440 miles long and passes through parts of seven states and Mexico. Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming, are referred to as the Colorado River Basin states. The drainage basin comprises about one-twelfth of the area of the continental United States.

Demands on the Colorado River are not limited to needs within the basin. More water is exported from the basin than from any other river in the United States. The river provides municipal and industrial water for more than 24 million people living in the major metropolitan areas of Los Angeles, Phoenix, Albuquerque, Las Vegas, Salt Lake City, Denver, San Diego and hundreds of other communities. It also provides irrigation water to about two million acres of land. Reservoirs on the River has more than 60 million acre-feet of storage capacity, 4,000

megawatts of hydro-electric generating capacity, and provide more than 20 million annual visitor days of outdoor recreation, most of which occur in Utah.

1) DIVIDING THE RIVER

The Colorado River is described as one of the most regulated rivers in the world. Considering its importance to the states, Indian Tribes, and Mexico, it is somewhat surprising agreements have been reached to divide the river's water. In the late 1800s and early 1900s, sizable agricultural development emerged in California's Imperial Valley. Water was delivered to the valley from the Colorado River in a canal that passed through Mexico. Mexico allowed Imperial Valley farmers to use the channel in exchange for a portion of the water. American farmers became unhappy with the Mexican government controlling their water supply and they pushed for construction of a new canal built entirely within the United States, an "All-American" canal. Disastrous flooding occurred in 1905 along the Colorado River. As additional flooding occurred in 1910 and the Mexican Revolution began, pressure intensified to construct the All-American Canal to bring Colorado River water to the Imperial Valley and build a flood control dam and storage reservoir on the lower mainstem of the Colorado River. Los Angeles was interested in developing hydroelectric power to meet needs of its growing population. California realized construction of the related projects would require the federal government's assistance, which would raise legal and political issues. The other six basin states did not oppose structural control of the river, but were determined to resist projects for California unless they received satisfactory assurance of their future use of the river's water. They feared California would establish the equivalent of first-in-time, first-in-right claims, and would prejudice the equity of any future apportionment among the basin states. The solution appeared to be the development of an interstate compact between the basin states to apportion the Colorado River.

2) COLORADO RIVER COMPACT OF 1922

Discussions on a compact between the Colorado River Basin states began on January 26, 1922, and state and federal negotiators came to agreement on the provisions of the Colorado River Compact on November 24, 1922. The compact split the river system into an Upper Basin comprised of portions of Arizona, Colorado, New Mexico, Utah and Wyoming and a Lower Basin comprised of portions of Arizona, California, Nevada, New Mexico and Utah.[88] It also partitioned the rights to water between the Lower and Upper Basins. The dividing line was at Lee Ferry, approximately 17 miles below today's Glen Canyon Dam. The compact apportioned in perpetuity to the Upper and Lower Basins the exclusive, beneficial consumptive use of 7.5 million acre-feet of water annually. In addition, the Lower Basin received the right to increase its

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[88] The Colorado River Compact of 1922 says the term "Upper Basin" means those parts of Arizona, Colorado, New Mexico, Utah and Wyoming from which waters naturally drain into the Colorado River system above Lee Ferry. The term "Lower Basin" means those parts of the states of Arizona, California, Nevada, New Mexico and Utah from which waters naturally drain into the Colorado River System below Lee Ferry. It also states the term "the Upper Division" means the states of (Continued) Colorado, New Mexico, Utah and Wyoming, and term "the Lower Division" means the states of Arizona, California, and Nevada.

annual beneficial use of water by one million acre-feet. Compact negotiators, however, were unsuccessful in their attempt to divide the river's water between the individual states as originally intended. But the Compact reduced the Upper Basin states' concern that the faster-growing Lower Basin states would monopolize use of the River. The Compact set aside the "first-in-time, first-in-right" principle and allowed each basin to develop its apportioned water as needed without fear of losing it through non-use.

The Arizona Legislature, in contrast to other states, refused to ratify the Compact because it felt the Compact left Arizona unprotected against rapid development in California. Arizona also opposed including tributary water (specifically the Gila River) in the Compact's apportionment. Because of Arizona's refusal to sign the Compact, the U.S. Congress did not ratify it until the Boulder Canyon Project Act of 1928 allowed the Compact to become law with the approval of six states and the enactment by California of a statute limiting its use of Colorado River water. Arizona finally ratified the Compact in 1944.

3) LAW OF THE RIVER

The Colorado River Compact of 1922 was the result of a long process of negotiation, legislation and litigation. And, it was the first component of a collaborative process that continues today and has resulted in a body of law known collectively as the "Law of the River." Principal documents forming the Law of the River are:

- Colorado River Compact of 1922
- Boulder Canyon Project Act of 1928
- Mexican Treaty of 1944
- Upper Colorado River Basin Compact of 1948
- Colorado River Storage Project Act of 1956
- *Arizona v. California*, U.S. Supreme Court decision in 1963
- Colorado River Basin Project Act of 1968
- 1970 Criteria for Coordinated Long-Range Operation of Colorado River Reservoirs
- Minute 242 of the 1973 International Boundary and Water Commission
- Colorado River Basin Salinity Control Act of 1974
- Grand Canyon Protection Act of 1992

- 2001 Colorado River Interim Surplus Guidelines
- 2007 Colorado River Shortage Sharing Guidelines
- 2012 Minute 319 of the International Boundary and Water Commission

Several of the most important components of the law of the River are described below.

4) BOULDER CANYON PROJECT ACT

Even though Arizona refused to ratify the 1922 Compact until 1944, the compact became law in 1928 with passage of the Boulder Canyon Project Act.[89] This act authorized construction of the All-American Canal and Hoover Dam and power plant, and gave Arizona, California and Nevada the option of developing a Lower Basin compact to divide their apportionment of the Colorado River. Lower Division states were unable to agree on dividing their water, and the final apportionment of available mainstem waters was not decided until the Supreme Court ruled in *Arizona v. California*[90] in 1963.

5) *ARIZONA V. CALIFORNIA*

In 1963, after 11 years of legal battles, the U.S. Supreme Court, in *Arizona v. California*,[91] confirmed the Lower Division apportionment of available mainstem waters of the Colorado River in the Boulder Canyon Project Act of 1928 as follows: California - 4.4 million acre-feet and 50 percent of all surplus, Arizona - 2.8 million acre-feet and 46 percent of all surplus, and Nevada - 300,000 acre-feet and 4 percent of all surplus, when available. The Court also held that Arizona's use of the Gila River and its tributaries would not reduce its entitlement under the Colorado River Compact. However, the decision does not interpret apportionment of waters under the 1922 Compact.

The 1908 *Winters* decision[92] referenced above established the doctrine of Indian reserved water rights. The Court held that such rights existed whether or not the tribes were using the water. The *Arizona v. California* decision reaffirmed the *Winters* decision, which awarded reserved water rights to five Indian reservations in the Lower Basin. The court determined the only feasible way the tribes' reserved water rights could be measured was based on the amount of "practicably irrigated acreage" on the reservations. The Court also ruled an Indian tribe's quantified reserved rights must be taken from and charged against the apportionment of water of the state in which the tribe's reservation is located.

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89 45 Stat. 1064.

90 373 U.S. 546 (1963).

91 *Id.*

92 207 U.S. 564 (1908).

6) UPPER COLORADO RIVER BASIN COMPACT OF 1948

Formal negotiations on the Upper Colorado River Basin Compact began on July 31, 1946. The Upper Basin states wanted to construct a major federal project, but federal funding was contingent on an Upper Basin Compact. On October 11, 1948, the Upper Basin states signed the Upper Colorado River Basin Compact to apportion allowable depletions between the states. The Upper Basin Compact gave the states the final protection they needed to develop and use their water gradually without fear of losing it through non-use. The states were uncertain how much water would remain after they met their requirements under in the Colorado River Compact of 1922 and how the Mexican Treaty obligation might affect the available water supply. So, they apportioned the remaining water by percentages (except for the Arizona delivery) as follows:

- Arizona - 50,000 acre-feet *(deducted prior to calculating other state shares)*
- Colorado - 51.75%
- New Mexico - 11.25%
- Utah - 23.00%
- Wyoming - 14%

A major incongruity with the Law of the River is the assumed quantity of water in the Colorado River upon which the Colorado River Compact of 1922 was negotiated. The river's average annual flow (1896-1921) at Lee Ferry was thought to be about 17 million acre-feet. The states now agree the Compact was negotiated during a period of high water supply. Recent estimates show the river's average annual flow to be 15 million acre-feet. Taking into account Compact and treaty apportionments to the Lower Basin and recognizing the impacts of sustained drought periods, the Upper Basin is left with an estimated dependable supply of about 6.0 million acre-feet. As a result, Utah has the ability to deplete 1.369 million acre-feet annually.

7) COLORADO RIVER STORAGE PROJECT ACT OF 1956 & THE COLORADO RIVER BASIN PROJECT ACT OF 1968

The Colorado River Storage Project Act of 1956, authorized construction of the Glen Canyon Dam, Flaming Gorge Dam, and Navajo Dam for river regulation, as well as other projects in the Upper Basin.[93] It also provided for an Upper Basin water resources development plan. The act authorized the Bureau of Reclamation to construct the Central Utah Project ("CUP") as one of the participating projects. The CUP develops part of Utah's remaining share of Colorado River water for irrigation and municipal uses, hydroelectric power, flood control, recreation, and fish and wildlife benefits in a number of areas of the state. The 1968 Colorado

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93 70 Stat. 105.

River Basin Project Act authorized several projects in the Upper and Lower Basins.[94] The Secretary of the Interior was also directed to consult with the basin states to develop long-range operating criteria for the Colorado River reservoir system.

8) WATER FOR MEXICO

The last 75 miles of the Colorado River are in Mexico. Mexico's share of the Colorado River is determined under provisions of a treaty signed in 1944. The treaty guarantees Mexico 1.5 million acre-feet to be increased in years of surplus to 1.7 million acre-feet and reduced in years of extraordinary drought. Since 1944, the U.S. has delivered to Mexico at least the amount of water the treaty requires, both in terms of quantity and quality of water, every year.

Interest has been renewed in recent years to protect and restore the Colorado River delta in Mexico. Before Hoover and Glen Canyon dams were constructed on the Colorado River, from 10 to 20 million acre-feet of water per year passed through the delta. Approximately two million acres of riparian habitat and wetlands existed there. Riparian habitat in the Colorado River delta in Mexico now totals about 180,000 acres. Environmental groups, basin states, federal agencies and the government of Mexico are studying ways to preserve the remaining riparian habitat. In December 2012 the United States and Mexico agreed to Mexican Treaty Minute 319 to allow more flexibility in the Colorado River water delivery between the United States and Mexico.

9) COLORADO RIVER BASIN SALINITY CONTROL PROGRAM

The Colorado River Basin Salinity Control Program, as authorized by Section 202(c) of Title II of the Colorado River Basin Salinity Control Act of 1974, as amended, authorizes federal agencies to cost share with state and local organizations for the construction of projects, mostly in the Upper Basin, to control salinity in the Colorado River by decreasing the amount of salt entering the river.[95] Salinity control projects have been installed in Utah, Colorado, Wyoming, New Mexico and Nevada. The majority of the projects have involved improvements in irrigation system efficiency. In Utah, over 100,000 acres of salinity control efficiency improvements have been installed in the Uintah Basin and an additional 40,000 acres are being installed in the Price/San Rafael rivers area. The great benefit of this program in Utah is the increased irrigation efficiencies with attendant agricultural production increase at a reasonable cost for the agricultural producer. Since the downstream states of Arizona, California and Nevada and the federal government are the beneficiaries of improved water quality, they provide up to 85 percent of the cost share funds needed for the program.

10) UPPER COLORADO RIVER ENDANGERED FISHES RECOVERY PROGRAM

The Upper Colorado River Endangered Fishes Recovery Program, discussed in more detail below, is an interagency partnership created to recover the endangered Colorado pike

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94 82 Stat. 886.

95 88 Stat. 266.

minnow, razorback sucker, humpback chub and bonytail fishes. This program assures compliance with environmental laws for water use from the Colorado River in the Upper Basin. Utah is one of the original program partners, along with Wyoming, Colorado, the Department of the Interior, and the Western Area Power Administration. The program has been successful in meeting the Endangered Species Act requirements by providing the elements necessary to serve as the reasonable and prudent alternatives for successful section 7 consultations with the U.S. Fish and Wildlife Service for federal and local water projects. The success of this program has allowed construction of water development projects in Utah; for example, the Central Utah Project.

11) ANNUAL OPERATING PLAN PROCESS

The Secretary of the Interior is charged with developing an Annual Operating Plan for Lower Basin reservoirs, taking into account the available water supply, operational needs, water supply requests, and limitations and requirements of the Law of the River. In consultation with the Colorado River Basin states and other interested entities, the Secretary determines the quantity of water that will be made available for use in the coming calendar year and declares whether it is a normal, surplus or shortage year. This declaration will govern water use in the Lower Basin for the next calendar year.

12) UTAH'S CURRENT USES OF COLORADO RIVER WATER

Portions of Utah lie in both the Upper and Lower Colorado River Basins. Most of the eastern half of the state is in the Upper Basin, while the Virgin River and Kanab Creek drainages, located in Washington and Kane counties, are in the Lower Basin.

In the Upper Basin, the Colorado River enters Utah west of Grand Junction, Colorado, but few diversions in Utah are made directly from the river in this area. The largest use of Colorado River water is from the Duchesne River system in the Uintah Basin. Lesser amounts are diverted from the Price, San Rafael, Dirty Devil, Escalante and San Juan river systems. Water is also exported from the Uintah Basin to the Wasatch Front by the Central Utah Project, Provo River Project, Strawberry Project and several smaller diversions.

Most of Utah's water use in the Lower Basin is from the Virgin River and tributaries. The Virgin River is a non-compact interstate stream originating in Utah that passes through Arizona and Nevada before entering the mainstem Colorado River at Lake Mead. According to the *Arizona v. California* decree, the Boulder Canyon Project left tributaries, including Kanab Creek and the Virgin River in Utah, to the exclusive use of the state in which they arise. Utah believes it has the right to develop and use flows of Kanab Creek and the Virgin River. Agriculture is currently the biggest user of water from Kanab Creek and the Virgin River drainages in Utah. But municipal and industrial uses are expected to increase three fold in the next 50 years, exceeding agricultural uses.

13) UTAH'S PROJECTED USES OF COLORADO RIVER WATER

According to projections for the year 2020, Utah will have about 200,000 acre-feet of undeveloped Colorado River water available for future use. During the energy crisis in the 1970s, oil shale development in the Uintah Basin seemed imminent, and many observers believed such development would use much of the state's remaining Colorado River water. By the early 1980s it became apparent that such development was not economically feasible.

The Central Utah Project will probably be the last major federally funded water development project in Utah. Additional private development of thermal power may occur at existing plants in Emery and Uintah counties. Additional municipal, industrial and agricultural water development will occur as growth continues. In the Lower Basin, water diversions from the Kanab Creek and Virgin River drainages will increase approximately 58,000 acre-feet per year by the year 2050, increasing depletions by about 36,000 acre-feet. The population of the Lower Basin, one the fastest growing areas in Utah, is expected to grow at an average annual rate of 2.96 percent over the next 20 years.

14) UNRESOLVED ISSUES

The Colorado River Basin states and the federal government have been in the process of managing the sharing of the use of water in the Colorado River for almost 100 years. The states and federal agencies have been able to cooperate to resolve many difficult problems, and emerging issues continue to surface. Since the states signed the 1922 Compact, major issues on the River have been discussed and resolved among the states without a formal organization. This informal process has allowed flexibility and encouraged innovation. The informal process requires the seven Colorado River Basin states to reach consensus on important matters. As part of this process, participants must develop an understanding of all sides of issues and be willing to achieve solutions in which needs of all states are met without unduly jeopardizing any single state's position. The process is slow and difficult, but the solutions have the support of all the states, which makes implementation easier and more efficient.

15) UNRESOLVED COLORADO ISSUES IN UTAH

1. How will conflicts over the use of Utah's remaining depletion under Colorado River Compacts be resolved?

2. How will future needs for water in the Virgin River Basin be met?

3. What is the best way to resolve the reserved water rights claims of the Ute Tribe and the Navajo Nation and how will this impact existing uses?

16) UNRESOLVED BASIN-WIDE ISSUES

1. Can Colorado River reservoirs be managed for environmental and recreational uses and still meet increasing consumptive use demands?

2. How will the Endangered Species Act and other federal legislation affect current and projected uses of Colorado River water?

3. How will the Bureau of Reclamation continue to meet federally approved water quality requirements for Colorado River water delivered to Mexico?

4. How will environmental concerns in the Mexico delta of the Colorado River be resolved.

5. How will the states deal with long-term drought and climate-change issues?

IV. STOCK WATERING WITH GRAZING ALLOTMENTS ON FEDERAL LANDS

A) INTRODUCTION

Livestock watering rights on federal land presents a unique issue where the federal government controls access and the ability to graze an allotment of federal land, whereas the states have the ultimate control over issuing, recognizing, and administering the water rights. Grazing livestock on federal land requires the federal government to authorize the permit holder to graze the livestock, and authority under a state water right permitting the stock to drink from a water source on federal land. This system invariably invites conflict over control and access to the state's water resources.

The western states seeking to protect their authority and control over water rights have been active in crafting legislation to address these issues. Specifically, state legislative efforts have attempted to help the grazer assert a water right takings claim due to the cancellation of the grazing permit or assert control over the water rights.

B) WATER RIGHT TAKINGS CLAIMS BASED ON THE CANCELLATION OF A GRAZING PERMIT

Much of the states' legislation to support a water right taking claim based upon the cancellation of grazing permits is rooted in language in *Hage v. United States*.[96] In *Hage*, the Court found "as a matter of common sense, that implicit in a vested water right based on putting water to beneficial use for livestock purposes was the appurtenant right for those livestock to graze alongside the water."[97] However, the *Hage* Court seemed to abandon the notion that a Nevada water right carried with it an implied right to graze land, rather it found that ditch rights-

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96 42 Fed Cl. 249 (1998).

97 *Id.* at 251.

of-way under the 1866 Mining Act, recognizing local custom and law (in Nevada), carried with them a 50 foot forage right along each side of the ditch.[98]

In a step back from the suggestion that a water right on federal land includes an appurtenant grazing right, *Colvin Cattle Co., Inc. v. U.S.* found that any water right obtained under Nevada law "could not and did not include an attendant right to graze on public lands." [99] In 2012 the Court of Appeals for the Federal Circuit reviewing the *Hage* taking claims acknowledged the finding in *Colvin Cattle* and provided some helpful language regarding a takings claim and access to water.

> "We agree with the Hages that the government could not prevent them from accessing water to which they owned rights without just compensation. The government, for example could not entirely fence off a water source, such as a lake, and prevent a water rights holder form accessing such water."

Estate of Hage v. U.S.[100]

To summarize, the ability to assert a taking of a water right based on the restriction of a grazing privilege is limited, if not eliminated, by the *Hage* and *Colvin Cattle* cases. Furthermore, with the ability to file a change application and otherwise beneficially use the water, a taking claim based on the retirement of a grazing permit is unlikely to succeed.

C) STATES CONTROL OVER WATER RIGHTS FOR GRAZING ON FEDERAL LAND

Grazing on federal land has created unique issues for the states in managing and overseeing the water rights including the passing of title to the water rights and the manner of acquiring or recognizing water rights for livestock on public land.

Generally, water rights are appurtenant to the place where they are beneficially used provided those putting the water to use also own the land where the water is used. As a consequence, water rights typically pass with the land where they are used unless specifically reserved. If the federal government holds the water rights they will remain with the government because the privilege to graze on an allotment does not transfer title of the land and therefore does not transfer title to the appurtenant water rights. However, if water rights are held by the permittee there is no unity between ownership of land and water – the water is beneficially used (by watering livestock) on federal land; thus, the water cannot pass as appurtenance to the land where the stock is watered.

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98 51 Fed. Cl. 570 (2002).

99 468 F.3d 803,807 (Fed. Cir. 2006).

100 687 F.3d 1281,1290 (Fed. Cir. 2012).

This presents two separate but related dilemmas. First, in an abundance of caution, some states would prefer that a permittee hold livestock water rights rather than the federal government because it insures water rights for livestock will remain dedicated to that purpose. Second, if the permittee holds the water rights, how does title transfer to subsequent grazing permittees rather than being sold for other uses. Nevada addresses both of these questions legislatively and Idaho's Supreme Court has addressed both issues in a 2007 decision.

D) SUMMARY

In Idaho and Nevada, a water right for stock watering on federal land is appurtenant to the adjacent privately-owned land, which is benefitted by the watering of stock on the federal land. Under Idaho law the United States cannot claim a pre-statutory water right where it has not beneficially used the water. Nevada prevents the United States from filing stock watering rights on federal land by requiring that the applicant have an ownership or proprietary interest in the stock being watered.

E) WHO OWNS THE WATER RIGHTS?

In determining who owns the water rights for livestock watering on federal land, the first or original owner must be identified. Identifying the original owner of the water right requires an understanding of the methods of acquiring a water right. Generally, water rights can be acquired by beneficially using the water prior to a state enacting its water code (pre-statutory claims), or by complying with the state's statutory appropriation procedure. Nevada has approached appropriative rights legislatively while Idaho's Supreme Court has effectively found that the federal government cannot make a pre-statutory claim for livestock watering on public land.

Nevada

In 1995, Nevada changed its statute to define when the State Engineer may and may not issue a permit to appropriate or certificate for watering livestock on federal land.

> "The State Engineer shall not issue a permit to appropriate water for the purpose of watering livestock on public lands unless the applicant for the permit is legally entitled to place the livestock on the public lands for which the permit is sought."[101]

A 1997 published Opinion of the Nevada Attorney General advised the State Engineer that the Bureau of Land Management (BLM) was not a qualified applicant for a permit or certificate under 1995 revisions to the statute.[102] Later that year the State Engineer, apparently relying on the Attorney General's advice, denied the BLM's applications. The Nevada Supreme Court found, in reviewing the denial, that the BLM is a qualified applicant because as the owner

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101 Nevada Revised Statute § 533.503 (1997).

102 1997 Nev. Op. Atty Gen. 27.

of the public land the BLM has a legal right to graze livestock on public land. *United States v. State Engineer.*[103] Justice Becker, in a lengthy concurrence and dissent, provided an analysis of constitutional violations in the 1995 statute and some insight on how the United States Supreme Court might view the statute by acknowledging that the Court might "conclude that defining 'public lands' so as to target BLM managed lands is direct discrimination or regulation of the United States in violation of the Supremacy Clause."[104]

The Nevada Legislature in 2003 again revised the permit to appropriate or certificate standards for livestock watering. Ostensibly following Justice Becker's guidance the statute was revised to remove the words "public" from lands and add a requirement for some form of ownership interest in the livestock being watered.

> "The State Engineer shall not issue a permit to appropriate water for the purpose of watering livestock on the lands for which the permit is sought unless the applicant owns, leases, or otherwise possesses a legal or proprietary interest in the livestock on or to be placed on the lands for which the permit is sought . . .."[105]

It remains to be seen whether the revised statute can withstand a legal challenge.

Idaho

In *Joyce Livestock Company v. United States*,[106] the Idaho Supreme court addressed competing pre-statutory claims of Joyce Livestock Company (Joyce) and the BLM in the Snake River Basin Adjudication. The question before the court was essentially who held title to the livestock watering right. The Court found that United States could obtain water rights for stock watering by simply applying the water to a beneficial use; however, the United States never used any of the "water at issue to water *its* livestock."[107] Therefore, the Court upheld the denial of the United States' claim to a pre-statutory right because it had not beneficially used the water. In making this finding the Court was quick to point out that the United States might obtain a water right for stock watering on federal land by applying for a permit and ultimately perfecting the water right. The court further found that Joyce's predecessors obtained water rights on federal land for stock watering by watering *their* stock. Finally, for Joyce to have current title to the water right the court found that the right was appurtenant to its private land located adjacent to the grazing allotment.

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103 27 P.3d 51 (Nev. 2001).

104 *Id.* at 66.

105 Nevada Revised Statute § 533.503 (2003).

106 156 P.3d 502 (Idaho 2007).

107 *Id.* at 519 (emphasis supplied).

F) HOW DOES TITLE TO WATER RIGHTS FOR LIVESTOCK WATERING ON FEDERAL LAND TRANSFER?

Nevada and Idaho both define livestock watering rights (where the beneficial use occurs on federal land) as appurtenant to the private land which is located adjacent to and benefitted by the grazing allotment. Nevada implemented this change in SB 76 (2003) by statute.

> "A water right acquired for watering livestock by a person who owns, leases or otherwise possesses a legal or proprietary interest in the livestock being watered is appurtenant to: (a) the land on which the livestock is watered if the land is owned by the person who possesses a legal or proprietary interest in the livestock; or (b) other land which is located in this state, is benefitted by the livestock being watered and is capable of being used in conjunction with the livestock operation of the person who owns the land if that land is owned by the person who possesses the legal or proprietary interest in the livestock being watered."[108]

Idaho's Supreme Court found that a livestock watering right on federal land is appurtenant to the patented private properties.[109] Relying on prior Idaho precedent which found an easement to a spring as a beneficial and useful adjunct of nearby property and thus appurtenant, the court reasoned that like an easement appurtenant bears a relation to the dominant estate, the water rights on public lands are a beneficial and useful adjunct of the nearby ranch. The court explicitly rejected the United States' argument that appurtenance requires a physical relationship to the base property.

Utah law addressing title transfer for water rights for watering livestock on federal land is different from both Idaho and Nevada. The Utah statute attempts to tie the water right to the grazing allotment permit: "[a] livestock watering right is appurtenant to the allotment on which the livestock is watered."[110] On its face this appears problematic if title to the water right is meant to pass to each permittee because a grazing allotment is a privilege. If that privilege ceases the issue is whether title to the water right would remain with the last permittee. Additionally, where the permittee is the owner or a joint owner, the permittee could transfer the title by quit claim deed to a party without a permit to graze the land. That grantee might file a change application to move the point of diversion off federal land, thereby taking away the water source for the grazing permit and in effect retiring the grazing permit.

Another reading of the statute is also potentially problematic. In the statute the term allotment is defined as the designated area of public land available for livestock grazing. This definition might be construed to mean that the water right is appurtenant to the federal public land which would take the permittee out of the chain of title.

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108 Nevada Revised Statute §533.040 (2013).

109 156 P.3d at 514.

110 Utah Code Ann. § 73-3-31(5).

G) VESTED RIGHTS V. UNRECOGNIZED RIGHTS OR NEW APPLICATIONS

Two separate situations are involved in federal ownership of livestock watering rights on federal land in Utah. First, where the federal government (through public land management agencies) holds a vested water right, little can be done to divest the federal government of that property right absent adjudicating the right as forfeited or abandoned. Many such rights are held by federal agencies either through decreed adjudication claims based on pre-statutory use, or based upon applications filed and approved by the state engineer under Utah law. Where pre-statutory claims are still pending, adjudication of competing claims for livestock water use on public land by the grazer and the federal government are a possibility.

Competing claims based on pre-statutory use to livestock water right ownership in Utah is the product of decisions made when Utah was admitted as a state in 1896. The enabling act in Section 3 provided "that the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the appropriated public lands lying within the boundaries thereof." In contrast the Utah Constitution Article XVII "recognized and confirmed all existing rights to the use of water." Public range lands in Utah were widely used by ranchers prior to statehood as if they were privately owned. At statehood the land and water ownership estates were split. The land remained the property of the United States while the water rights were confirmed in the name of individuals who were using the water on the land at the time.

A grazer on public land may make pre-statutory claims to water rights associated with their beneficial use of water on those lands, provided he was the person who put the water to use in the pre-statutory period or he can demonstrate succession of title, presumably through water right deeds. The United States may also assert claims to pre-statutory use based on beneficial use activities that have been occurring on public lands with the government's consent over an uninterrupted period of land ownership which extends before statehood. While the federal government has been quite consistent in filing claims as allowed under Utah law, individual livestock grazers have only sporadically done so. Where a contest over claims ensues, general adjudication courts will ultimately settle the issue. Where only one claimant or the other is present, if the state engineer, after review, finds the claim could be valid, he issues a proposed determination that the court must adopt in the absence of a contest. Many uncontested livestock watering claims have been adjudicated in the name of the United States.

The Utah legislature, concerned about retaining livestock water rights on public lands for the benefit of those permitted to use the lands for grazing, modified Utah water rights statutes in 2009 to address livestock water rights on public lands. Statutory provisions are found in Utah Code Section 73-3-31. The new section requires water rights acquired or changed on public lands for livestock watering by a public agency to be jointly acquired or changed by the federal agency and persons permitted to graze livestock on the land.

H) QUESTIONS CREATED AND LEFT UNANSWERED BY THE CURRENT VERSION OF UTAH CODE ANN. § 73-3-31

The Utah livestock watering statute deserves a closer look to determine whether it is meeting its objectives, avoiding situations which could be the basis for constitutional challenges, and minimizing confusing or unproductive requirements. The Division of Water Rights experience since the Act was enacted has been one of greater cooperation between grazing permittees and public land management agencies. Some questions, however remain.

The first question is what a livestock water user certificate is and whether it grants the holder of the certificate any rights. If the livestock water use certificate serves no real purpose, reference to it should be eliminated in the statute. On the other hand, if the issuance of a livestock water use certificate is an attempt to convey title to the beneficial user – the grazer – then the statute appears to authorize an unconstitutional taking of the federal government's property. The State Engineer cannot convey portions of a water right by granting certificates; just as the State Engineer could not grant a water right certificate to a municipal water user in a city as the beneficial user of the city's water right. Likewise, the State Engineer cannot segregate shares in an irrigation company to individual shareholders as an individual water right absent the company authorizing a share segregation.

The second question is presented in the provisions permitting the beneficial user to file a non-use application and requiring the consent of the beneficial user for a change application (in effect, a change application veto). While this appears to give the beneficial user of the water some rights, those rights essentially terminate if the grazing permit ceases. "Beneficial user" is defined as "the person that has the right to use the grazing permit." Utah Code Ann. § 73-3-31(1)(c)(i). It does not, however, include the "public land agency issuing the grazing permit." Utah Code Ann. § 73-3-31(1)(c)(ii). Apparently, no change application can be filed unless there is a grazing permit also in force.

The third and fourth questions are created by the requirement to jointly acquire new water rights. On the face of the statute it would appear that a public land agency – the BLM or Forest Service – can only acquire a livestock water right on or after May 12, 2009 jointly with a beneficial user. No such requirement exists for the beneficial user. The provision apparently treats the federal government differently than other applicants and could be stuck down if challenged. Accordingly, the statute should be clarified.

The fourth question is how title passes between beneficial users if they are one of the joint owners. The statute ties water right title to the grazing allotment, by noting that a livestock water right is appurtenant to the allotment on which the livestock is watered. As the beneficial user is a stranger to the title of the federal land and merely enjoys a privilege to the graze the allotment, appurtenance to federal land does not pass title between beneficial users. It does not pass without deed to another grazing permit holder.

V. POTENTIAL CONFLICT WITH FEDERAL ENVIRONMENTAL LAWS

A) ENDANGERED SPECIES ACT

The Endangered Species of 1973[111] requires all federal agencies to "conserve" listed species, and "conservation" is defined broadly.[112] Section 9 prohibits "taking" by anyone, and that too is broadly defined.[113] The section prohibiting takings poses potential water and land use conflicts because use of water may be a "taking" when it affects the habitat of a species that has been designated as endangered. The majority of Endangered Species Act difficulties in Utah related to water rights have occurred in the Colorado River Basin.

1) BACKGROUND

What Is the RIPRAP?

Four endangered fishes are endemic to the Colorado River Basin: razorback sucker, Colorado pike minnow, humpback chub, and bonytail chub.[114] In the late 1970s, when the Bureau of Reclamation and others proposed major water projects in the Upper Basin, the United States Fish and Wildlife Service (FWS) responded by writing "jeopardy opinions,"[115] outlining how the projects would harm the continued existence of the endangered species.[116] However, while "the FWS must reject a project if no reasonable and prudent alternatives are identified that will avoid jeopardy to a listed species," completely stopping all water projects would conflict with the "well-entrenched Law of the River, under which upper basin water users are allowed to continue to develop their water rights."[117] As a result of this conflict, in 1988 the Upper Colorado River Basin Endangered Fish Recovery Program (Recovery Program) was implemented as a "cooperative effort to recover the endangered fish in the Upper Basin (Green and Colorado Rivers only) while providing for water development to proceed" under each state's applicable water and other laws, and applicable federal laws.[118] This agreement provides

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111 81 Stat. 884 (codified at 16 U.S.C.A. §§1531-43).

112 16 U.S.C.A. §1532(3).

113 16 U.S.C.A. §§1532(19) & 1538(1).

114 Endangered and Threatened Wildlife and Plants; Determination of Critical Habitat for the Colorado River Endangered Fishes: Razorback Sucker, Colorado Pike minnow, Humpback Chub, and Bonytail Chub, 59 Fed. Reg. 13374 (notice of final rule March 21, 1994) (codified at 50 C.F.R. § 17.95) [hereinafter Fed. Reg. Critical Habitat Designation].

115 Robert W. Adler, *Restoring the Colorado River Ecosystems: A Troubled Sense of Immensity* 120 (2007).

116 *Id.*

117 *Id.* at 121.

118 Fed. Reg. Critical Habitat Designation at 13374.

participants with a "reasonable and prudent alternative" to avoid a jeopardy finding and the "likely destruction or modification of critical habitat" designated for the endangered fishes.[119]

There are two parts to the Upper Colorado River Basin Endangered Fish Recovery Program, called the RIPRAP. The term "RIP" stands for Recovery Implementation Plan, which outlines objectives to recover the endangered fish wile providing for continued water development in Utah, Colorado and Wyoming pursuant to state law, Interstate Compacts, and the Endangered Species Act. The term "RAP" stands for the Recovery Action Plan, which identifies specific actions necessary to protect and recover the endangered fish.

The Recovery Program is intended to be flexible as the need arises. The RIPRAP is reviewed annually and modified or updated if necessary. The RIPRAP is intended to provide the "reasonable and prudent alternatives" for water projects in Utah, Colorado and Wyoming, undergoing ESA Section 7 consultation. The importance of the Recovery Program cannot be overstated. Without it, the FWS could again issue "jeopardy opinions" on large and even small water projects (such as rebuilding of a diversion structure). Such action would severely impact the further development of Utah's share of the Colorado River and could even impact the rights of existing water users.

Recovery Program partners work together in a collaborative effort to implement the RIPRAP. The partners are listed as:

- U.S. Fish and Wildlife Service
- U.S. Bureau of Reclamation
- National Park Service
- Western Area Power Administration
- State of Colorado (including Colorado Department of Agriculture, Colorado Division of Parks and Outdoor Recreation, and Colorado Division of Wildlife)
- State of Utah (including Utah Division of Wildlife Resources and Utah Division of Water Resources)
- State of Wyoming (including Wyoming Game and Fish Department)
- The Nature Conservancy
- Western Resource Advocates

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119 *Id.*

- Colorado Water Congress
- Utah Water Users Association
- Wyoming Water Development Association
- Colorado River Energy Distributors Association[120]

The original agreement was authorized for fifteen years. In 2009, the same parties signed an authorization to extend the cooperative agreement to 2023.[121] Ordinarily, under the ESA the proponents of a project "must demonstrate project-specific 'reasonable and prudent alternatives' that would avoid jeopardy."[122] This would likely halt projects that required further depletions.[123] The Recovery Program provides for further water development and ESA compliance.

The RIP recites the scope and purpose of the RAP as well as outlining a "framework for conducting Section 7 consultations on depletion impacts related to new projects . . . and impacts associated with historic projects in the Upper Colorado River Basin."[124] The purpose of the RIP is "to provide reasonable and prudent alternatives which avoid the likelihood of jeopardy to the continued existence of the Colorado River fishes . . . . [and] . . . to avoid the likely destruction or adverse modification of critical habitat . . . . while existing and new water development proceeds."[125] The Recovery Program has, as of June 3, 2013 provided ESA compliance for 231 water projects and 96,999 acre-feet of new depletions since 1988 and 517,670 acre-feet historic depletions prior to 1988 of Utah's Colorado River Basin water. This compliance has been accomplished without a single legal challenge.

The RAP as the action plan for implementing the agreement, outlines action taken or to be taken for general recovery program support and for specific areas in the basin. The Green River is split into the mainstem, Yampa and Little Snake Rivers, and the Duchesne River. Specific actions are listed within each section. Actions in the RAP include, among other things,

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120 *See* The Upper Colorado River Endangered Fish Recovery Program Website, http://coloradoriverrecovery.org /.

121 *U.S. Department of the Interior, Fish and Wildlife Service, Cooperative Agreement for Recovery Implementation Program for Endangered Species in the Upper Colorado River Basin* (1988); *U.S. Department of the Interior, Fish and Wildlife Service, Extension of the Cooperative Agreement for Recovery Implementation Program for Endangered Species in the Upper Colorado River Basin* (2001).

122 Robert W. Adler, *An Ecosystem Perspective on Collaboration for the Colorado River*, 8 NEV. L.J. 1031, 1035 (2008).

123 *Id.*

124 *U.S. Dept. of the Interior, Fish and Wildlife Service, Recovery Implementation Program for the Endangered Fish Species in the Upper Colorado River Basin Part One*, III. (1988, revised March 8, 2000).

125 RIPRAP, *supra* note 110, at III.1.

identifying and legally protecting instream flows, specific scientific studies to measure populations of the endangered fishes, determining availability of water in certain areas, estimating future water needs in certain areas, evaluating genetic integrity, and reducing impacts of nonnative fishes.[126] The RAP is updated by September 30 of every year.[127]

The FWS determines whether or not the RIPRAP provides "a reasonable and prudent alternative" to avoid a jeopardy finding based on enumerated factors listed in the RIP. They are:

1. Actions which result in a measurable population response, a measurable improvement in habitat for the fishes, legal protection of flows needed for recovery, or a reduction in the threat of immediate extinction.

2. Status of fish population

3. Adequacy of flows.

4. Magnitude of the impact of projects.[128]

A critical habitat designation for the Green River was finalized in 1994, designating habitat for the four endangered fishes on federal, state, tribal and private lands.[129] In the designation, the Green River was identified as the only place in the basin where the numbers were high for Colorado Pike minnow.[130] Destruction of critical habitat can constitute a "take" of an endangered species if there is "harm" to the species.[131] As noted previously, the broad definition of "harm" includes "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."[132]

Utah and its partners have made significant progress implementing the RAP, including: (1) providing and protecting instream flows (habitat management); (2) restoring habitat (habitat development and maintenance); (3) reducing impacts of nonnative fishes and sportfish management activities (nonnative and sportfish management); (4) Managing genetic integrity and

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126 *Id.* at Part Two.

127 *Id.* at Agreement, II.

128 *Id.* at Part One, II (emphasis added).

129 Fed. Reg. Critical Habitat Designation, at 13374.

130 *Id.*

131 16 U.S.C. § 1532(19) (2009) (defining "taking" as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct").

132 50 C.F.R. § 17.3 (2009). *See also Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 696-700 (1995); *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1237-1239 (2001).

augmenting or restoring populations (stocking endangered fishes); and (5) monitoring populations and habitat and conducting research to support recovery actions (Research, monitoring, and data management).[133]

The most relevant required actions are listed under "provide and protect instream flows" section. The specific actions to achieve this goal are listed as: (1) identifying year-round and seasonal flows, legally protecting those flows; (2) delivering the identified flows; (3) executing contracts with water users to subordinate diversions associated with approved or perfected water rights; (4) holding public meetings to establish future appropriation policy; (5) adopting and implementing policy; and (6) evaluating the effectiveness of policy.[134]

2) IDENTIFICATION OF AND LEGAL PROTECTION OF FLOWS

The Recovery Program has identified flows for the Green River in Utah requiring protection for recovery of the endangered fish.[135] Limited progress on legal protection was accomplished through a policy used by the State Engineer in 1994 (Green River Endangered Species Policy).[136] The policy was made in response to the 1992 Biological Opinion (BiOp) for the operation of Flaming Gorge Dam, rather than specifically in response to the RIPRAP.[137] The BiOp "concluded that the continued operation of Flaming Gorge Dam, as in the past, is likely to jeopardize the existence of the endangered fish species."[138] Accordingly, the State Engineer determined that the "most appropriate alternative is the adoption of a policy that all new approvals be conditioned on bypassing the required flows."[139] The State Engineer said that this policy was targeted at protecting the flows from the Flaming Gorge Dam "to the confluence of the Green River and Duchesne River for the summer and autumn periods [specific in the Flaming Gorge BiOp]."[140] A biologic opinion for the entire Green River in Utah was completed in 2005 and flow protection for the entire river has been added as an action item in RIPRAP. Recognizing the complexities and scope of authority required to implement protection the Department of Natural Resources with support of the Recovery Program has embarked on a multi-year effort to identify mechanisms and constraints needed to complete the RIPRAP goal. One possibility, if the Lake Powell Pipeline is built, is that water could be released from Flaming Gorge for the pipeline to be rediverted at Lake Powell. As that water flows down river, it can

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133 RIPRAP, *supra* note 110, at Part Two.

134 *Id.* at Green River Action Plan: Mainstem, I.A., IA.4.-I.B.c.

135 *Id.*

136 Utah Div. of Water Rights, Office of the State Eng'r, Policy Regarding Applications to Appropriate Water and Change Applications Which Divert Water from the Green River Between Flaming Gorge Dam, Downstream to the Duchesne River (Nov. 30, 1994).

137 *Id.* at 1.

138 *Id.*

139 *Id.* at 3.

140 *Id.* at 5.

help provide a good portion of flows to protect the fish. Some changes in state statues may be necessary to protect such flows between Flaming Gorge and Lake Powell. Legislative authority as a mechanism is part of the study plan for the project so further discussion of this issue with the legislature is likely in coming years.[141]

3) CONCLUSION

The goal of the Recovery Program is to balance beneficial use of water as part of the operation of the Law of the River with restoration of the four types of endangered fishes in the Upper Basin. This goal is accomplished through the specific actions listed and updated annually in the RIPRAP. So long as sufficient progress is being made on the actions of the RAP, the Recovery Program serves as a reasonable and prudent alternative to a jeopardy finding under the ESA. If a new large appropriation of water out of the Green River were made, however, both historic and new projects would likely be impacted. For historic projects, a new biological opinion would need to be written and sufficient progress on those identified actions taken to avoid a jeopardy finding. For new projects, the actions identified in a biological opinion would need to be completed before the project could move forward.

B) CLEAN WATER ACT

Section 404 of the Clean Water Act also has the potential to conflict with the exercise of water rights in Utah. Section 404 requires a permit from the U.S. Army Corps of Engineers for the discharge of dredge and fill material into the waters of the United States.[142] The broad jurisdiction of the law includes not only waters navigable in fact, but other water bodies, adjacent wetlands, and other wet areas as well.[143] Although conflicts with the exercise of water rights have been uncommon, Section 404 compliance could theoretically create such conflicts because a federal permit is often required for construction of water diversion or impoundment structures. A Utah stream alteration permit[144] is often required as well. Utah has authority under a Corps of Engineers-approved "nationwide permit" to issue stream alteration permits that also comply with Section 404 permitting requirements. This avoids many conflicts. But, some projects, particularly larger ones, require an individual permit.

Denial of a Section 404 permit, or issuance of a permit with onerous conditions, could preclude or limit the exercise of a state-issued water right.[145] Theoretically, special conditions in

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141 *Id.*

142 33 U.S.C. §1344.

143 *South Florida Water Management District v. Miccosukee Tribe*, 541 U.S. 95 (2004); *Rapanos v. United States*, 547 U.S. 715 (2006).

144 Utah Code Ann. §73-3-29.

145 Given the new, expansive definition of water covered by Section 404, in the future the need for such a permit seems more likely to impact the development land than the exercise of water rights.

Section 404 permits could conflict with conditions included in a water use permit issued by the State. Further, while Section 404 conflicts may arise independently of the implementation of other federal statutes, Section 404 can also arise in conjunction with the operation of other statutes.

VI. CONCLUSION

Much of the history involving federal-state relationships in water resources has been based on cooperation and achievement in pursuit of common objectives. In most instances, potential conflicts are avoided, even when interests do not necessarily coincide. Such cooperation is part of the inherent tension in the West, where the federal government owns large amounts of land and has developed large amounts of water. Cooperation is more vital today than ever. It is also true, however, that real conflicts exist, that such conflicts may be a significant obstacle to the genuine sovereign-to-sovereign cooperation, and that Utah must be ever vigilant in protecting its sovereignty over its water resources.

The most significant conflict between Utah and the federal government related to water rights is the federal reserved water rights doctrine. For the most part Utah has approached such reserved rights in the best possible fashion - seeking to negotiate such rights in a way that serves both governments. The same is true of the conflict related to the Federal Endangered Species Act. Utah works with other western states and the United States to facilitate appropriate management of the Colorado River. There may be work yet to be done concerning water rights for grazing allotments on federal lands. And, there are other potential conflicts as well. In this regard, we should be ever vigilant, keeping in mind the words of western water law icon Frank Trelease:

> But if there is real ground for . . . us to fear that "the Feds" will take our future from us and override our plans and our decisions in the name of single-purpose management of the federal lands, I believe Congress would be willing to say that federal supremacy . . . does not require federal domination of water to the exclusion of state desire for multiple - purpose development.[146]

Neither state nor federal domination of water to the exclusion of the other should be necessary. Utah has primacy to administer its water resources. For the most part, federal officials are content to operate within the State system. When conflicts arise, federal officials have been willing to work with State officials to attempt to resolve them. The objectives of the federal government and Utah citizens are now, and will continue to be, met under Utah water law. We should continue to administer all water rights in Utah through that system.

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[146] Trelease, *Uneasy Federalism - State Water Laws and National Water Uses*, 55 Wash L. Rev. 751, 772-75 (1980).