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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA	)	Subcase Numbers: 77-10795, 77-10798,
	)	77-11537, 77-11569, 77-11657, 77-13915,
Case No. 39576	)	77-13918, 77-13919, 77-13920, 77-13922,
	)	77-13923, and 77-13925
	)	
	)	UNITED STATES' MEMORANDUM
	)	IN SUPPORT OF ITS FEDERAL
	)	RESERVED WATER RIGHT CLAIMS

INTRODUCTION

At issue in these subcase are the United States' claims ("Claims") for federal reserved water rights to provide water to twelve Forest Service administrative sites located in remote areas of the Salmon-Challis, Payette, Boise, and Bitterroot National Forests. The Claims were made on behalf of the Forest Service pursuant to the Organic Administration Act of 1897, 30 Stat. 34-

36 (1897), 16 U.S.C. § 473 *et. seq.* (1994) (“Organic Act”).

These subcases were scheduled for evidentiary hearings pursuant to I.C. § 42-1411A on March 20 and May 15, 2007. At those hearings, the State of Idaho suggested that the Affidavits filed in support of the Claims by the United States may be insufficient to establish federal reserved water rights and, subsequent to the hearings, filed a Notice of Participation in these subcases.¹ As demonstrated below, however, the United States is entitled to federal reserved water rights for the Claims because 1) the Claims are located on federal lands reserved from the public domain, and 2) the use of water is necessary to administer the reserved lands and to fulfill primary purposes of the reservations.

PROCEDURAL AND FACTUAL BACKGROUND

The United States filed the Claims for consumptive uses at nine separate Forest Service administrative sites (“Administrative Sites”). Three of the claims, 77-13915, 77-13918, and 77-18919 are for separate water sources which serve the same site, the Landmark Ranger Station. Two of the claims, 77-13922 and 77-13923, are for separate water sources which serve the Johnson Creek Guard Station. The remaining claims are for the Bernard Guard Station (77-10795), the Yellow Jacket Guard Station (77-10798), the Loon Creek Administrative Site (77-11537), the Cape Horn Guard Station (77-11569), the Warren Guard Station (77-11657), the Big Creek Ranger Station (77-13920), and the Swet Lake Cabin (77-13925).

The lands upon which the Claims are located were reserved pursuant to federal law.

¹ Fourteen subcases were at issue during the hearings, but the State’s Notice of Participation was filed only in the twelve subcases captioned above. In accord with the Court’s *Order Setting Post-Hearing Briefing Schedule* (May 18, 2007), the two remaining subcases, 77-13916 and 77-14227, should be partially decreed.

Eight of the Claims² are based on lands which were reserved under the Creative Act of March 3, 1891, Ch. 561, § 24, 26 Stat. 1103, as amended (codified at 16 U.S.C. § 471) (repealed 1976) (“Creative Act”). The Creative Act, section 24 of the larger General Revision Act of 1891 and a precursor to the Organic Act, authorized the President to create forest reserves.³ The Organic Act, passed six years later, provides that all land subject to reservations made under the Creative Act shall be administered pursuant to the Organic Act. *See* 16 U.S.C. § 475.⁴

The four remaining Claims⁵ are based on land reserved by Congress in 1919 as national forest lands which are “subject to all laws affecting the national forests.” Public L. No 69, Ch. 88, 41 Stat. 324. Thus, all twelve claims are based on reserved lands which are subject to the provisions of the Organic Act.

In each of the subcases for the Claims, the United States has filed Affidavits in support of the Claims (collectively, “*Supporting Affidavits*”). As demonstrated by the *Supporting Affidavits*, the purpose of the Claims is to supply the Administrative Sites with sufficient water necessary to administer National Forest System lands and to effectuate the purposes of the Organic Act. The

² 77-10798, 11537, 11569, 11657, 13915, 13918, 13919, and 13925.

³ “That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.” 16 U.S.C. § 471 (repealed 1976).

⁴ “All public lands designated and reserved prior to June 4, 1897, by the President of the United States under the provisions of [the Creative Act] . . . and all public land that may hereafter be set aside and reserved as national forests under said Act, shall be as far as practicable controlled and administered in accordance with the following provisions [of the Organic Act].” 16 U.S.C. § 475.

⁵ 77-10795, 13920, 13922, and 13923.

Supporting Affidavits also provide evidentiary support for each element of the Claims.

ARGUMENT

A. Under the Federal Reserved Water Rights Doctrine, Water is Impliedly Reserved Where it is Necessary to Accomplish the Purposes of A Reservation.

It is well settled that the national government has the authority to “reserve water for the use and benefit of federally reserved lands.” *United States v. District Court for Eagle County*, 401 U.S. 520, 522 (1971) (*quoting Arizona v. California*, 373 U.S. 546, 597 (1963)). A reservation of water by Congress may be express or, more commonly, implied from the reservation of the land itself. *United States v. New Mexico*, 438 U.S. 696, 699-700 (1978); *see State v. United States*, 12 P.3d 1284, 1287 (Idaho 2000) (a federal reserved water right may be either express or implied). When there is no express reservation of water, courts must consider whether Congress implicitly reserved a water right pursuant to the federal reserved water rights doctrine. This doctrine provides that when the federal government reserves land, the federal government by implication reserves water sufficient to accomplish the purpose of the reservation. *E.g., Cappaert v. United States*, 426 U.S. 128 (1976); *State*, 12 P.3d at 1287.

The principles of the reserved rights doctrine, established for almost one hundred years, were first clearly established in *Winters v. United States*, 207 U.S. 564 (1908). In *Winters*, the Court found that although Congress had not expressly reserved water when it set aside land for the Fort Belknap Indian Reservation, a reservation of water for the purposes of the reservation must be implied, thereby exempting it from appropriation under state laws. *Winters*, 207 U.S. at 576-77. In *Arizona v. California*, the Supreme Court extended the doctrine beyond Indian reservations to other federal reservations of land, including national wildlife refuges and national

forests. *Arizona*, 373 U.S. at 601. Subsequent cases have solidified the entitlement of federal reserved water rights for National Forest System lands. See *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 805 (1976) (“reserved rights of the United States extend to Indian Reservations and other federal lands, such as national parks and forests”) (citation omitted); *United States v. New Mexico*, 438 U.S. at 706 (the Organic Act impliedly reserved waters for the primary purposes of the National Forests); see also *Avondale Irrigation Dist. v. North Idaho Properties, Inc.*, 577 P.2d 9, 17 (Idaho 1978) (non-consumptive water rights are reserved for National Forests in the amount necessary for timber and watershed protection); *In re SRBA*, Case No. 39576, Consolidated Subcase No. 63-25243, *Memorandum Decision Denying the State of Idaho’s Motion For Summary Judgment* at 10-13 (Idaho Fifth Judicial Dist., Dec. 22, 1998) (“*Organic Act Decision*”)(United States is entitled to instream flows on National Forests for erosion control and stream channel maintenance which are necessary for watershed protection).

Perhaps the clearest articulation of the reserved right doctrine is contained in *Cappaert*:

[W]hen the federal government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing, the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of water rights is empowered by the Commerce Clause, Art. I, § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.

Cappaert, 426 U.S. at 138 (citations omitted). The Idaho Supreme Court has recognized these basic principles in finding federal reserved rights in Idaho. See *United States v. Idaho*, 959 P.2d

449, 450-51 (Idaho 1998) (quoting the above language from *Cappaert* and holding that Public Water Reserve 107 reserved water rights for stockwatering purposes).

As explained by the Supreme Court in *Cappaert*, to establish a reserved water right the United States must show 1) a reservation of land, 2) that water is necessary to effectuate the purposes of the reservation, and 3) the minimum amount of water necessary to effectuate those purposes. *Cappaert*, 426 U.S. at 138-141. In determining whether there is a federally reserved water right implicit in a federal reservation, "the issue is whether the Government intended to reserve unappropriated and thus available water." *Cappaert*, 426 U.S. at 139. "Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created." *Id.* In ascertaining whether a federal reserved right exists, the court must examine the documents reserving the land from the public domain and the underlying legislation authorizing the reservation. *See, e.g., United States v. Idaho*, 959 P.2d at 451; *United States v. City and County of Denver*, 656 P.2d 1, 20 (Colo. 1982).

B. The United States is Entitled to a Federal Reserved Right to the Extent Necessary For Administration of National Forests.

As a land management agency, the Forest Service is charged with the administration and management of National Forest System lands, which include the National Forests in question. *See* 16 U.S.C. § 472, 17 U.S.C. § 551; *United States v. Grimaud*, 220 U.S. 506 (1911); *Utah Power and Light Co. v. United States*, 243 U.S. 389 (1917). It is hardly surprising that water is necessary for use in association with federal land. *See Arizona v. California*, 373 U.S. 546, 598 (1963) ("We have no doubt about the power of the United States under the [commerce and property] clauses to reserve water rights for its reservations and property."). The *Supporting*

Affidavits demonstrate, in fact, that the water described by the Claims is necessary to administer National Forest System lands.

Several courts, including the SRBA Court, have held that the United States is entitled to federal reserved rights for National Forest administrative sites. In a ruling in Colorado Water Division No. 1 on federal reserved rights for Forest Service administrative sites, the court stated:

[T]he national forests in Water Division No. 1 must be administered. Such administration requires administrative sites. It is reasonable to assume that Congress intended to reserve sufficient water to serve those sites.

In the Matter of Reserved Water Rights in the Platte River, Nos. W-8439-76, *Memorandum of Decision and Order* at 31 (Colo. Water Div. 1, Feb. 12, 1993) (attached as Exhibit A).

In ruling on a federal reserved right claim for the Deer Park Guard Station on the Boise National Forest, Presiding Judge Wood quoted this language from Water Division No. 1 with approval and ordered that a partial decree issue for the site. *In Re SRBA*, Case No. 39576, Subcase No. 63-30981, *Order of Partial Decree on Uncontested Federal Water Right* at 2-3 (Idaho Fifth Judicial Dist., July 31, 2000) (attached as Exhibit B). In the Monitor Valley adjudication in Nye County, Nevada, the District Court arrived at the same conclusion, holding that the State Engineer properly awarded federal reserved rights for Forest Service administrative sites. *In the Matter of the Determination of the Relative Rights in and to the Waters of the Monitor Valley Southern Part (140-B)*, Nye County, Nevada, Case No. 14906, *Order* at 17-18 (Nevada Fifth Judicial Dist., April 28, 2000) (attached as Exhibit C).

Indeed, in prior litigation, the State has conceded that water for federal administrative sites is a particularly well-grounded basis for a federal reserved right. *See Organic Act Decision* at 6 n. 2 (“At oral argument the State only conceded that the United States might be entitled to a

federal reserved water right ‘in a few instances . . . particularly fire protection and for administrative purposes.’”).

The issue for this Court to decide is “whether the Government intended to reserve unappropriated and thus available water.” *Cappaert*, 426 U.S. at 139. As found by the Colorado Water Division No. 1 Court, it would be unreasonable to conclude that there was no intent to provide water for Forest Service administrative sites on reserved National Forest System land. *See* Exhibit A at 31; *see also* 16 U.S.C. § 551 (National Forests reserved under the Creative and Organic Acts to allow Secretary of Agriculture to regulate occupancy and use of Forests). Because the *Supporting Affidavits* clearly demonstrate that the Claims are necessary for administration of Forest Service lands, this Court should decree the Claims in their entirety.

C. The United States is Entitled to a Federal Reserved Right Because the Administrative Activity is Directly Related to Primary Purposes of the Organic Act.

The water encompassing the Claim also fulfills the primary purposes of the Organic Act. In determining the extent of the reserved right in question, the Court must look to the primary purposes for which the reservation was created. *E.g.*, *New Mexico*, 438 U.S. at 702. The primary purposes of National Forest reservations are to provide a continuous supply of timber and to assure favorable conditions of water flow. *New Mexico*, 438 U.S. at 707.

As set forth in the *Supporting Affidavits*, water at the Administrative Sites is necessary to accomplish the Organic Act's primary purposes. At the evidentiary hearing on May 15, counsel for the State suggested that some of the Forest Service’s administrative activity, such as that related to recreation, is not related to primary Organic Act purposes. A closer look at Forest Service administration, however, indicates the contrary.

For instance, the *Affidavit of Stephen J. Kimball* for the Bernard Guard Station (77-10795) demonstrates that a wilderness trail crew normally uses the administrative site. *Kimball Affidavit* ¶ 7. While this activity could be characterized as related solely to “recreation,” such a view would be superficial. As the *Affidavit* goes on to explain, the trail crew “makes contact with people throughout the summer and reports on other activities and situations they encounter.” It should be obvious that the Forest Service cannot “provide a continuous supply of timber,” *see New Mexico*, 438 U.S. at 707, or protect the Forest against “destruction by fire and depredations,” *see Organic Act*, 16 U.S.C. § 551, without a presence in the Forest and administration of such Forest. As asserted in the *Kimball Affidavit*:

Administration of NFS programs and employee presence in the area serves to protect the forest from depredations and destruction. This ensures the continued viability of the resources on surrounding federally reserved NFS land and directly contributes to watershed protection, preservation of timber stands and to the maintenance of and improvement of watershed conditions, timber production and favorable conditions of water flow.

Kimball Affidavit ¶ 7.

Similarly, the Cape Horn Guard Station (77-11569) includes a recreation guard who “contacts people throughout the summer [and] monitors camp sites and fires at camp sites.” *Montoya Affidavit* ¶ 7. This activity is undoubtedly necessary for the Forest Service to “provide a continuous supply of timber” and protect the Forest against “destruction by fire and depredations.” Accordingly, the recreation guard is necessary for the Forest Service to accomplish its primary purposes. Indeed, such administration was recognized in and required by the Organic Act itself, where Congress instructed the Secretary of Agriculture to

make such rules and regulations and establish such service as will insure the objects of such [Forest] reservations, namely, to regulate their occupancy and use

and to preserve the forests thereon from destruction

16 U.S.C. § 551.

An even more important point is that, in addition to the fire prevention role inherent in Forest Service administration, each of these administrative sites is critically important to the Forest Service's fire suppression program. Two of the sites regularly house fire personnel. A fire engine crew and a fire hand crew is housed at the Warren Guard Station. *Jeffries Affidavit* ¶ 7 (77-11657). A fire crew is housed at the Landmark Ranger Station each summer. *Brown Affidavit* ¶ 7 (77-13915, 13918, 13919).

More fundamentally, any Forest Service administrative site becomes a fire-fighting center when needed. For instance, the Yellowjacket Guard Station was used by fire crews during fires in the area in 2001 and 2002. *Hershey Affidavit* ¶ 7 (77-10798). The Loon Creek Administrative Site was used in 2006 for fighting fires. *Montoya Affidavit* ¶ 7 (77-11537). The Cape Horn Guard Station was extensively used for fire operations in 2001 and 2006, housing over 100 fire personnel at the site. *Montoya Affidavit* ¶ 7 (77-11569). The Landmark Ranger Station, in addition to the fire crew regularly kept there, was used in 2006 as a fire-fighting base for nearby fires. *Brown Affidavit* ¶ 7 (77-13915, 13918, 13919). The Big Creek Guard Station becomes an active fire hub any time there is a fire in the area. *Pope Affidavit* ¶ 7 (77-13920). The Johnson Creek Guard Station was used as a fire camp during fires in 2004 and 2006. *Brown Affidavit* ¶ 7 (77-13922).

Fire prevention and suppression directly enable one of the Organic Act's primary purposes – that of furnishing a continuous supply of timber. The court in Colorado Water Division One stated:

The purpose of the national forests cannot be fulfilled if the forests are not protected from fire. This court concludes that the [Forest Service] is entitled to a reserved water right unlimited in amount as may be necessary for the purpose of fighting fire.

Exhibit A at 30.

In addition, the legislative history quoted by the Supreme Court in *U.S. v. New Mexico* specifically states that one of the “objects for which the forest reservations should be made [is] the protection of the forest growth against destruction by fire” 438 U.S. at 708 (quoting 30 Cong. Rec. 966 (1897)). Indeed, as with administration, the State has conceded that “fire protection” is particularly well-suited as a basis for federal reserved rights. *See Organic Act Decision* at 6 n. 2.

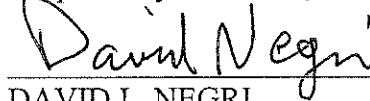
The Forest Service cannot control when or where fire will strike the forest. Each of the Administrative Sites can instantly become a fire-fighting hub, in which case water is obviously needed. To deny these sites the water claimed, on the basis that the water is not needed for primary Organic Act purposes, would not only be contrary to the law but would be foolhardy.

CONCLUSION

As described above, the United States has claimed water necessary to administer the National Forests and to fulfill primary purposes of the underlying reservations. Therefore, the United States should be granted its reserved water rights for the Claims.

DATED this 26th day of July, 2007.

Respectfully submitted,



DAVID L. NEGRI

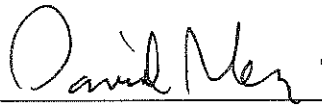
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CERTIFICATE OF MAILING

I certify that on July 27, 2007, I mailed a true and correct copy of the foregoing
United States' Memorandum in Support of its Federal Reserved Water Right Claims to the following by
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David L. Negri

DISTRICT COURT, WATER DIVISION NO. 1, STATE OF COLORADO

Case No. W-8439-76 (W-8977-77, W-9052-77, W-9064-77
and W-9065-77)

FILED IN
DISTRICT COURT
WATER DIV. 1
WELD CO. COLO.
FEB 12 1993

MEMORANDUM OF DECISION AND ORDER

IN THE MATTER OF THE AMENDED APPLICATION OF THE UNITED STATES OF AMERICA FOR RESERVED WATER RIGHTS IN THE PLATTE RIVER IN BOULDER, CLEAR CREEK, DOUGLAS, EL PASO, GILPIN, JEFFERSON, LARIMER, PARK AND TELLER COUNTIES (ARAPAHOE, PIKE, ROOSEVELT AND SAN ISABEL NATIONAL FORESTS)

These cases are brought by the applicant to determine and quantify its claims for reserved water rights for the purpose of channel maintenance in the Arapahoe, Pike, Roosevelt and San Isabel National Forests.

In *United States v. Jesse*, 744 P.2d 491, 500 (Colo., 1987), the Supreme Court of the State of Colorado concluded as follows:

(1) that *Denver I* [*United States v. Denver*, 656 P.2d 1 (Colo. 1982)] does not foreclose the United States from asserting a claim that the Organic Act implicitly reserves appurtenant water necessary to maintain instream water flows in the national forests, and (2) that the United States is not barred by the doctrines of collateral estoppel and stare decisis from claiming instream flow rights to achieve the purposes of the Organic Act.

A lengthy trial was held and a vast number of exhibits were introduced. After considerable effort the court has concluded that it will be impossible to summarize and analyze in this memorandum all of the vast amount of material which has been provided to this court for its guidance. The court will therefore limit its discussion to the main points which underlie its decision.

This case involves the interpretation of two federal statutes, the Creative Act of March 3, 1891, (26 Stat. 1103, as amended, 16 U.S.C. § 471, repealed 1976), and the Organic Administration Act of June 4, 1897 (30 Stat. 34, 16 U.S.C. § 473, et seq.). The Creative Act authorized the president to reserve portions of federal public lands for forest purposes. The Organic Administration Act was in response to certain actions and



policies under the Creative Act which were deemed to be excessive. It included limitations on the lands which could be reserved and defined the purposes for which the reservations could be made.

The acts themselves are largely silent on the specific issues which are before the court in these cases. Accordingly, the court must attempt to divine their intent from any indications which are found in the statutes, the circumstances surrounding the adoption of the statutes, and the approaches which would best achieve their underlying purposes.

The applications for reserved water rights for fire-fighting purposes and for administrative purposes are on a different footing from the remaining claims. In this memorandum, except where the context requires otherwise, reference to applications means applications other than those for fire-fighting or administrative purposes.

I. PURPOSES OF THE NATIONAL FORESTS.

The purposes of the national forests have been authoritatively established by a decision of the Supreme Court of the United States.

United States v. New Mexico, 438 US 696, 57 L Ed 2d 1052, 98 S Ct. 3012 (1978), defined the "relatively narrow purposes for which national forests were to be reserved." This decision contained the following observations:

The legislative debates surrounding the Organic Administration Act of 1897 and its predecessor bills demonstrate that Congress intended national forests to be reserved for only two purposes -- "[t]o conserve the water flows and to furnish a continuous supply of timber for the people." [citations omitted.] National forests were not to be reserved for aesthetic, environmental, recreational, or wildlife-preservation purposes.

"The objects for which the forest reservations should be made are the protection of the forest growth against destruction by fire and ax, and preservation of forest conditions upon which water conditions and water flow are dependent. The purpose, therefore, of this bill is to maintain favorable forest conditions, without excluding the use of these reservations for other purposes. They are not parks set aside for nonuse, but have been established for

economic reasons." 30 Cong Rec 966 (1897)
(Cong. McRae).

Administrative regulations at the turn of the century confirmed that national forests were to be reserved for only these two limited purposes.

United States v. New Mexico, supra, at 438 US 707.

On the subject of possible reservation of water the Supreme Court of the United States concluded as follows:

Congress intended that water would be reserved only where necessary to preserve the timber or to secure favorable water flows for private and public uses under state law. This intent is revealed in the purposes for which the national forest system was created and Congress' principled deference to state water law in the Organic Administration Act of 1897 and other legislation.

United States v. New Mexico, supra, at 438 US 718.

The claims of the United States must be evaluated in the light of these overall principles.

II. WHAT ARE "FAVORABLE WATER FLOWS."

The question of the true meaning of the term "favorable water flows" was a considerable focus of the trial in this case. In considering what is meant by this term the basically utilitarian purposes of the national forests must be kept in mind.

On this question the majority opinion in *United States v. New Mexico* is also instructive.

In that opinion the Supreme Court had occasion to discuss the effect of the Multiple-Use Sustained-Yield Act of 1960 on the question of possible reserved rights for the Gila National Forest in New Mexico. This discussion is enlightening on the question of what is meant by favorable conditions of water flow. The court said:

As discussed earlier, the "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' principle purpose of securing favorable conditions of water flow.

United States v. New Mexico, supra, at 438 US 715.

The Supreme Court thus considered that irrigation and domestic use was the principal purpose of maintaining "favorable conditions of water flow."

This view is amply supported by the record in the present case. An exhibit in the present case quotes Congressman Shafroth of Colorado as follows:

The original purpose of the enactment of the law of 1891 which authorized the President by proclamation to set aside portions of the public land as forest reservations was to conserve the waters for irrigation, so that the snow which falls in that region during the winter will have shade to protect it from melting until midsummer, until late in the summer, until water is most needed for irrigation in the valleys and on the plains below.

30 Cong. Rec. 982 (1897), Ex. A-147.

A leader of congressional supporters of the 1897 legislation stated:

Common sense and science, I think, will agree that the forest cover will hold both the rainfall and melting snow, so they will not rush to the streams in torrents in the spring and early summer. We all know that in a well-timbered country the water goes more gradually into the streams and gives a steadier flow, with fewer overflows and less low water.

As long as the forest stand, the branches, fallen leaves, and roots will hold much of the rain and snow until summer, and thus furnish water not only for the navigation of our rivers, but also for the irrigation of the deserts. Without forests we may expect our rivers to be swollen as they are now in the springtime, but shallow or dry in the summer and autumn.

30 Cong. Rec. 966 (1897) (Cong. McRae). Ex. A-147.

The applicant appears to argue that desire to promote the development of the west had little or no part in the creation of the national forests. This court -- and, it is submitted, the Supreme Court of the United States -- disagree with that view.

Irrigation is of concern primarily in the west which does not enjoy the copious natural precipitation which characterizes the eastern portions of the country. Much of the then current legislation had as its unquestionable purpose the development of the west. Significant legislation to promote irrigation in the West was passed the same year as the Creative Act. Congress in creating national forests must have considered the effect those forests would have on western development.

Just as the forests themselves were created for use, the water flows which are engendered and protected by the forests are intended to be used. One of the principal intended uses was irrigation.

The other principal purpose which the Supreme Court recognized was domestic use. As the areas below the national forests have urbanized, domestic use has largely been merged into municipal use. Municipalities and water districts have come to supply domestic needs for most persons. The observation of the Supreme Court must be viewed in that context. A reasonable interpretation of that observation is that the concern of Congress would extend to those supplies.

III. POTENTIAL IMPACT OF THE FEDERAL CLAIMS.

The applicant is asserting in these applications its claims for reserved water rights in the national forests of Water Division No. 1.

Division 1: Division 1 consists of all lands in the state of Colorado in the drainage basins of the South Platte river, the Big Laramie river, the Arikaree river, the north and south forks of the Republican river, the Smokey Hill river, Sandy and Frenchman creeks, and streams tributary to said rivers and creeks.

C.R.S. §37-92-201(a)

The applications in these cases primarily affect the basin of the South Platte river and its tributaries. They also affect the Big Laramie river (more commonly know as the Laramie river).

The basin of the South Platte contains more than seventy percent of the population of the state. It includes the City and County of Denver and all of its suburbs, and such other major population centers as Boulder, Longmont, Loveland, Fort Collins and Greeley. The 1989 population of the basin was estimated to be about 2.3 million people. Within less than fifteen years the

basin population is expected to grow to about 3.3 million people¹. Thus there is a large and growing water demand for municipal and domestic uses.

The South Platte basin also supports a vibrant agricultural economy, most of which is based on irrigation. There are estimated to be from 1.3 to 1.8 million acres of irrigated land in the basin.

The South Platte river itself and most of its major tributaries arise in the national forests. Over the years a complex and efficient system of diversions for irrigation and other uses has been developed. Much of the effectiveness of that system is dependent on storage of water in the numerous reservoirs which have been developed, not only in the plains but also in the areas of the national forests. These reservoirs are vital to both the municipal water systems and the irrigation systems which serve the area.

Although the great bulk of consumptive use of waters of the South Platte and its tributaries is on the plains below the national forests, many points of diversion are within the forests. There is also substantial storage of water in reservoirs located in the mountainous areas including the national forests.

A number of advantages accrue from storage in the mountainous and national forest regions. There are geologic formations which make construction of reservoirs easier and less expensive. The rock underlying many of those reservoir sites is more impervious to seepage than the porous soils of the plains areas. Cooler temperatures reduce the amount of evaporation. So does the greater depth of typical mountain sites, since the proportional amount of exposed surface area is reduced. Delivery of water may be done by gravity, and the additional money and energy costs of pumping may often be avoided.

In addition storage higher up in the system makes the use of water more flexible than does plains storage. Colorado is dependent on use of water by successive diverters as the return flows pass down the river system. It is estimated that on the average water originating at the headwaters of the South Platte is used four and one half times before it leaves the state at Julesburg. The possibility of such reuse is maximized by storage as high in the system as possible. In addition the possibility of upstream exchanges is increased.

¹ Parenthetically it may be stated that recent news releases by the federal census bureau show Colorado to be the third most rapidly growing state in the nation and there can be no doubt that most of that growth is in the South Platte basin.

Additional important flexibility has been achieved by certain policies which are dependent on upstream storage. Those policies permit out-of-priority diversions to storage by junior reservoirs upstream with the understanding that if the downstream seniors do not subsequently fill, releases will be made to them by the upstream juniors to make up the deficiency. This allows maximum storage and use of spring runoff.

The importance of storage higher up in the system is likely to increase as rights which have historically been decreed for irrigation are changed to municipal use to serve the growing communities of the state. Many of those communities are near the foot of the front range. Such rights can only be delivered to those communities by gravity feed if the necessary storage sites are located at higher altitudes.

Storage higher in the system is also important in maintenance of equable flows throughout the season of use. As has been noted above, persons who spoke on the subject at or about the time of the Creative and Organic Acts stressed the importance of discouraging flood flows at the time of spring runoff and encouraging flows later in the season.

Municipalities need water all year long, and agriculturists generally have better supplies of water in the spring but are particularly in need of irrigation water later in the growing season. Storage of water in the upper part of the watershed promotes these equable flows. Such equable flows were sought by those whose ideas are reflected in the creation of the national forests, and are exactly what they meant when they referred to "favorable water flows."

IV. EFFECT OF RESERVED RIGHTS CLAIMS.

Applicant makes much of the fact that the same amount of water would be available for use below the national forests as before because the claims of the applicant are essentially nonconsumptive. This is largely true but it overlooks the importance of timing in making those waters useful.

Much of the importance of timing results from the fact that a high percentage of the waters available for storage is in the streams at the time of the spring runoff.

A former state engineer explained the matter as follows:

Generally speaking, what we look for, and I think it is evidenced by the degree to which we rely on storage reservoirs in this state, we have a hydrologic system climate that produces the bulk of the surface runoff in one or two months, May and June.

To meet the year around needs of cities, to meet the sustained demands during the summer for irrigation, we try and reduce the peaks on those spring runoff hydrographs so that water can be stored either underground or in the surface reservoirs for later use.

So I guess, generally speaking, stream conditions that are ideal or approach the ideal are ones that produce a long duration of flow commencing, say, in April or May when the runoff period begins, which are not flashy or have high peaks or low peaks but a broad and sustained sort of hydrograph.

It is interesting to note that the last paragraph of the quotation immediately above, which is from testimony before the court taken in 1990, is exactly parallel to the quotations from leading congressmen at the time of the enactment of the Creative and Organic Acts almost one hundred years ago, as quoted in part II of this memorandum.

The general effect of granting the claims of the applicant would be to accentuate the flood flows in the springtime. This is the exact opposite of what was desired by people whose thoughts on the subject were influential at the time of the enactment of the Creative and Organic Acts.

The federal claims would be in direct competition with rights for storage high in the system. Reservoirs below the national forests may well receive a bonanza, but overall the flexibility and efficiency of the system would be seriously decreased. The inflexible law of gravity would mean that once water had bypassed the upstream reservoirs to meet the requirements of the applicant's claims, it could never be recovered even though the downstream reservoirs were filled. Thus many advantages of storage high in the system would be greatly diluted or lost entirely.

Applicant contends that Congress in creating the national forests was not concerned with the development of the west and the necessities of western domestic and irrigation use of the waters from the forests. If this is true, this section of this memorandum is totally irrelevant. But this court believes such development was a primary aim of the forest legislation, and the Supreme Court of the United States has determined that domestic and irrigation use was the principal purpose of Congress in securing favorable water flows. If this court's interpretation is correct, these considerations are highly significant in determining what, if any, water rights Congress intended to reserve in creating the national forests.

V. NECESSITY FOR RESERVED RIGHTS.

Most of the national forest lands in the Arapaho, Pike, Roosevelt and San Isabel National Forests run to the continental divide. Since this is true, the headwaters of most of the streams in the forests lie in forest lands. Thus for the most part there is no possibility of diversions above the national forests. There are, of course, some areas in which this is not true and where streams run into the national forests from privately held land above the forests. There are also a number of privately held in-holdings traversed by streams which then run through forest lands.

The Forest Service has broad powers to regulate the construction of irrigation structures within the national forests and, as a practical matter, to control the ability of others to make diversions within the forests. Permits are required to establish such structures and these permits must be renewed from time to time.

Over the years the permit system has proven adequate to control development to an extent consistent with the purposes of the national forests. The forest hydrologist of the Pike and San Isabel National Forests was unable to think of any existing structure in those forests which would have to be shut down at any time to preserve channel integrity in those forests. Testimony of Lela Chavez Feb. 5, 1990, pages 142 and 143.

The testimony of Gary Edward Cargill, Regional Forester of the United States Forest Service for the Rocky Mountain Region, contains the following:

Q With regard to the permitting process, is it possible to use the permitting process to maintain stream channels in Water Division 1 in lieu of claiming reserved water rights for instream flows?

A In the short run, we can achieve the same practical effects on the ground by requiring as a term and condition the same regimen of instream flows for which we are asserting our claim. However, that certainly is not a preferred method. And in the long run, it is inferior to the claims which we are asserting in this court. It is a mechanism which would be used under the policy, but it is not our preferred mechanism under the policy nor is it one which has the many benefits of the adjudicated claim.

Q Now you said that it was inferior and didn't have the benefits, what makes the permitting process inferior to the recognition of reserved water rights?

A Permits are typically occupancy driven, which is to say that neither the general population nor the Forest Service knows very much in advance when an application for occupancy and use is going to be filed. If our only recourse were to secure favorable conditions by virtue of terms and conditions, neither we nor the general public nor other water users would have advance notice of what those uses were to be for, which permits were to be issued, nor the terms and conditions that were going to be affixed to them.

There would be no systematic advance public notice of the government's needs, and there would be no certainty to the amount of water which the government requires for securing favorable conditions of water flow.

It would be derived on a case by case basis as those applications were acted upon, and it would require the Forest Service to then administer those terms and conditions to virtually set up a duplicate system for monitoring and evaluating instream flows which the state already has established under their process and administered by the state engineer. It is simply not in the public interest to duplicate to that degree, and in the long run, it would not serve the general public nor the water developers.

Testimony of Gary Edward Cargill, January 22, 1990, at pages 35-37.

The exact meaning of the foregoing testimony is not completely clear to the court. To the extent that the court understands it, the testimony suggests that without the reserved water rights the Forest Service would have to make a case-by-case evaluation of claims and make its decision on that basis.

In cross examination Mr. Cargill manifested some degree of unfamiliarity with the requirements of the state regulatory system. This cast doubt on his conclusion that federal monitoring would be unnecessary under a system of state administration. It is likely that even if the application herein is granted, much of the monitoring would have to be done by the applicant.

The applicant's claims will have a sweeping effect on many long-standing water rights. There are admitted inaccuracies in applicant's quantifications and it would entail great difficulty and expense to make them more accurate. Under these circumstances it would seem that the case-by-case approach might be the preferred one. It has apparently been successful over the years since the national forests of Water Division No. 1 were established.

Gray Francis Reynolds, Director of Watershed and Air Management of the Forest Service, put the matter quite succinctly. His testimony included the following exchange:

Q Well, what I'm trying to understand is why do you need to assert a reserved right as opposed to managing this minimum stream flow problem using the other tools?

A Well, can I use an analogy, too?

Q If you need to, to answer the question, go ahead.

A Most carpenters I know carry more than just one hammer, because there are different jobs to be done. They have big hammers and little hammers, and it is part of the toolbox that the Forest Service land manager has at his discretion to use.

Q Yes. So the Forest Service is just trying to get one more hammer, so to speak?

A No, I asked if I could use an example. Would you agree with me that most carpenters carry more than one hammer?

Q Frankly, I don't know.

A Now we are going to have a hard time with this.

Q For purposes of this, I'll agree.

A How about mechanics, they have two or three screwdrivers. What we are trying to say is that the federal right is there, and we would exercise that right on federal land. I have agreed with you, we also have the right to condition the permits when they are issued.

Testimony of Gray Reynolds, January 18, 1990, at page 81-82.

In a somewhat parallel case the United States Forest Service apparently recognized the adequacy of regulation and the lack of necessity for reserved rights. *Sierra Club v. Yeutter*, 911 F.2d 1405 (10th Cir. 1990), is a case involving reserved water rights in wilderness areas. The need to preserve pristine channels in wilderness areas would seem clearly to be greater than in national forests, yet the opinion in that case contains the following:

One aspect of the question presented by Sierra Club -- whether the Wilderness Act creates federal

reserved water rights -- is undoubtedly legal. [citations omitted]. The other aspect of the question presented to us -- whether federal reserved water rights are necessary to preserve the wilderness characteristics of the wilderness areas -- is either a question of fact or a mixed question of law and fact. Although Sierra Club submitted affidavits alleging that federal reserved water rights are necessary to preserve the wilderness characteristics of the Colorado wilderness areas, the Forest Service's second report generally denies the existence of any threat to the wilderness areas, see second report, at 5-10, apps. II, III, and asserts that other administrative measures could adequately address the preservation of wilderness characteristics.

Witnesses for the applicant thus concede that they have effective means at their disposal to control harmful diversions, but they desire a recognition of reserved water rights as another method of such control.

The Supreme Court of the United States has pointed out that "many of the contours of what has come to be called the 'implied-reservation-of-water doctrine' remain unspecified." *United States v. New Mexico*, 438 US 696, 700, 57 L Ed 2d 1052, 1057, 98 S Ct. 3012 (1978). This court is without a great amount of guidance by the appellate courts as to the effect of alternative, but less disruptive, methods of achieving the purposes of the national forests.

The applicant insists that alternate methods of control are totally immaterial; however, in another but somewhat similar situation the Colorado Supreme Court stated the following:

It is also significant that the federal government has complete control over access to federally held geothermal resources and can therefore fully regulate water appropriation.

United States v. Denver [Denver I], 656 P.2d 1, 34 (Colo. 1983).

The alternate method of control has been effective without resort to quantification of reserved rights. This fact is attested to by the history of the national forests in Water Division 1 since their inception, by their present condition, and by the abundant "favorable water flows" which emanate from them. The hydrologist for the Pike and San Isabel National Forests also testified that the Forest Service could live with all absolute rights presently existing in her national forests, but perhaps not with certain conditional rights. Presumably the unacceptable conditional rights cannot be made absolute without consent, or at

least acquiescence, by the Forest Service.

It is noteworthy that there was little evidence of actually observed ill effects of the long existing diversions in the national forests of Water Division 1 which had interfered with the recognized purposes of the national forests.

The Colorado Supreme Court has also said:

Because the reserved rights doctrine is implied, rather than expressed, and because of the history of congressional intent relating to the federal-state jurisdiction of water allocation, reservations must be strictly limited to the minimum amount of water needed to ensure that the purposes of the reservation will not be entirely defeated.

United States v. Jesse, 744 P.2d 491 (Colo. 1987)

Although this court recognizes that the above quotation from the *Jesse* case does not strictly apply to the point under consideration here, it would seem that the policy of strict construction of reserved water rights would prohibit the quantification of those rights where there is no vital need to do so.

The quantification of those rights is substantially at odds with efficient use of the waters from the forests for irrigation and domestic purposes. Providing water for irrigation and domestic uses is a principal mission of the national forests. It is strange indeed if quantification is required where there is no real necessity for it, and where such quantification impairs those purposes.

Different considerations may apply to cases where there is a potential for diversions at points above the national forests or in inholdings. Those matters should be resolved in applications limited to such circumstances. In this way the matters can be resolved in a manner suited to the specific requirements of each situation.

In one of its briefs the applicant asserts, "The Organic Act gave the federal government a broad management mandate to administer and regulate the national forests...." The court agrees with that statement. The federal government has exercised that mandate in the national forests in Water Division No. 1 for most of a century without resort to the doctrine of reserved rights. That doctrine also has a history of almost one hundred years. Regulation has been successful and the "favorable water flows" remain intact.

The applicant has taken the position that availability of

alternate, less restrictive, methods of control is not relevant. It has also taken the position that the question of injury to other water users is also immaterial. These rather legalistic views seem at odds with the pragmatic views expressed by the early exponents of the conservation movement. For example the writing of Gifford Pinchot, one of the high priests of the conservation movement, contains the following:

The first great fact about conservation is that it stands for development. There has been a fundamental misconception that conservation means nothing but the husbanding of resources for future generations. There could be no more serious mistake. Conservation does mean provision for the future, but it means also and first of all the recognition of the right of the present generation to the fullest necessary use of all the resources with which this country is so abundantly blessed. Conservation demands the welfare of this generation first, and afterward the welfare of the generations to follow.

Conservation advocates the use of foresight, prudence, thrift, and intelligence in dealing with public matters, for the same reasons and in the same way that we each use foresight, prudence, thrift, and intelligence in dealing with our own private affairs. *** Conservation demands the application of common sense to the common problems for the common good.

The application of common-sense to any problem for the Nation's good will lead directly to national efficiency wherever applied.

Gifford Pinchot, *The Birth of "Conservation"* quoted in Nash, *American Environmentalism*, Exhibit A-6 at pages 76-79.

This statement, particularly the first paragraph, seems very conservative today; however, in attempting to ascertain legislative intent in the creation of the national forests and the reservation of those in Water Division No. 1, the court should look at the views prevailing at the beginning of the twentieth century, not those in vogue at its end.

Those persons who were influential in the passage of the legislation leading to the creation of the national forests were motivated by pragmatism. They sought practical results. What would their answer have been to the question, "Should the

appropriators of the 'favorable water flows' arising from the national forests be inhibited in their efficient use of those flows if there are alternate methods of protecting them?" The evidence in this case leads the court to believe that answer would have been a resounding, "No!"

VI. NATURE OF STREAMS IN THE NATIONAL FORESTS.

The parties disagree as to the nature of the streams in the national forests. The applicant contends that the streams are adjustable in nature and that their channels are formed by fluvial processes which were explained in a complete and scholarly manner. These channels, they contend, are controlled by bankfull² discharges -- essentially the same as "channel forming" discharges -- which occur at fairly frequent intervals.

Dr. Luna Leopold, a recognized expert in the field of fluvial geomorphology, testified as follows:

As we said previously, the channel forms and maintains its own -- the river forms and maintains its own channel, and it maintains and forms a channel not large enough to carry the maximum floods or flow which it will receive over a period of time. It carves its channel and maintains it at some intermediate size both in a cross-sectional area and depth.

The reason is the very largest flows that occur; only one, for example in many years, is so infrequent that it doesn't have as large a role in channel formation as does the intermediate sized flows. And it turns out that the flow that is most important in carving and maintaining the channel is a flow that occurs approximately once or twice a year, and it is

² The use of the term "bankfull" is one of the somewhat confusing aspects of this case. The applicant and its experts use it in the sense employed by Dr. Leopold. In their usage bankfull flow is essentially the same as the channel forming flows. It is frequently attained when water reaches a point somewhat below the top of the physical bank of a stream. On the other hand the objectors and their experts use "bankfull" in the sense of reaching the top of the physical bank of a stream.

In this memorandum the term "bankfull" is used in the sense employed by the applicant. When used in that sense the term does not necessarily reflect channel capacity, as the physical bank may be -- and frequently is -- capable of containing flows in excess of the "bankfull" flows.

called the channel forming discharge. It has been given many terms, but channel forming discharge is one way to express it.

Testimony of Luna Leopold, January 24, 1990. Page 31.

Again he testified:

So to summarize this part, the adjustment process involves much more than the adjustment of width and the building of the point bar, it involves the alternation of deeps and shallows, both related to channel width. It includes the actual form of the curve that the river takes, whether it be a high amplitude bend or a low amplitude bend, it involves the actual radius of curvature of the bends and the wave lengths of the bends, all being some aspect of river channel width. And remember that river channel width is the function of the square root of the discharge and therefore the fluvial geomorphologist can say the square root of the discharge is one of the most highly important relationships in the manner of how streams form themselves and maintain themselves; that is, the wave length is related to the square root of the discharge, and thus since the square root of the discharge is also related to the length of the curve and to the pool and riffle sequence, they are all highly tied together through the interaction of hydraulic and sediment variables.

Yes, but let us make sure that we understand that not all of these things are present at any one place or any one time. You can have, for example, a channel particularly when it is bounded on one or both sides to a narrow width by a terrace or by bedrock, the channel therefore may be prevented from making a wide flood plain, but it will attempt to do so, and if you look carefully you can usually find some little remnant of an incipient flood plain being formed by the channel.

Secondly, the adjustment process may not include such things as the pool and riffle sequence, it may not be able to adjust vertically, because it happens to be flowing over some very large boulders that perhaps were excavated out of the glacial material on a moraine, and therefore adjustment vertically often does not take place. But that does not prevent adjustment of the remaining verticals. A river is often prevented from exercising or realizing the tendency the physical processes lead toward, but the river will attempt to

adjust those parameters that are adjustable under the circumstances.

In many cases the tendencies for adjustability are masked or subdued and become extremely subtle or even absent.

Testimony of Luna Leopold, January 24, 1990. Pages 85-87.

The objectors, on the other hand, contend that those streams flow in channels cut in materials which are large in size and are not easily moved, even by the sort of flows contemplated by the applications herein. They emphasize that the circumstances which inhibit normal fluvial processes, referred to by Dr. Leopold, are particularly prevalent in the national forests in Water Division No. 1, and in many, if not most, of the quantification points designated by the applicant.

Dr. Stanley A. Schumm, also an eminent fluvial geomorphologist and a member of the faculty of Colorado State University, testified as follows:

Q How would you characterize the mountain streams in Water Division 1?

A I characterize them as steep, very highly variable in their morphologic characteristics. In a very short distance you find that the channel changes character; it is influenced greatly by factors other than hydrology and hydraulics.

Q Would you please explain what you meant when you said they are influenced greatly by factors other than hydrology and hydraulics?

A Well, as one walks along these streams and observes their morphology, you see the effect of bedrock, you see the effect of very large boulders that clearly are not transported by the stream at the present time, colluvial boulders or boulders brought into that reach of the valley by glacial activity. We see the effect of log jams, timber in the stream, and, of course, beaver dams, beaver activity are important.

Testimony of Stanley A. Schumm, March 21, 1990, at pages 64-66.

The objectors contend that those channels are resistant to

the usual processes of fluvial geomorphology associated with fully adjustable streams, and are controlled by much larger and less frequently occurring floods.

The parties are also in disagreement as to the nature of sediment in the streams in the national forests. The applicant contends that the full bankfull discharges are necessary to carry the sediment which comes into the streams from various sources. The objectors claim that the sediment coming into the streams is small in amount and in size. They assert that the streams have sufficient energy to carry much more than their present load. Even if the flows of those streams are significantly reduced, objectors contend that they would be able to carry the sediment load.

The court concludes from the evidence and from the field trips which were a feature of this case that a great diversity of stream types exist in the national forests. Quantification points are placed in locations manifesting varying stream characteristics. It is fair to say, however, that a very high percentage of quantification points lie on streams located in areas which would be highly resistant to changes based on alterations of stream flows in the range applicant seeks in these cases.

VII. NECESSITY OF CHANNEL MAINTENANCE.

The parties also disagree as to whether channel maintenance is implicit in the stated purpose of the national forests to secure "favorable conditions of water flow." Objectors, or at least some of them, appear to maintain that the maintenance of channels is totally irrelevant. The applicant maintains that Congress intended that the stream channels must be maintained totally unimpaired.

This court thinks that the truth is somewhere in between. At the time of adoption of the Creative and Organic Acts and at the time the national forests in Water Division No. 1 were reserved, there was widespread appreciation in both scientific and legislative circles that forests were vital to the maintenance of favorable water flows. The importance of maintaining a reasonable degree of integrity for the water courses was implicit in this understanding.

But this is not to say that the stream channels were to be totally maintained in their pristine condition as in the national parks. Congressmen and administrators alike were unanimous in their assertions that the forests were for use. The waters generated in those forests were also for use, particularly for irrigation and domestic purposes.

The Organic Act itself included the following provision:

All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder.

30 Stat. 36 (1897), Ex. A-5.

Use of waters for domestic, mining, milling, or irrigation proposes all require diversions. The applicant argues that this section refers only to use on the reservation itself; however, this court does not see such a limitation in the act. Diversion for use outside the forests seems clearly to be anticipated.

The knowledge of fluvial processes was sufficiently advanced that Congress and the early administrators of the national forests no doubt were aware that diversions in the national forests for purposes of irrigation and domestic use would have some effect on stream channels. Indeed it is the heart of the applicant's case that such knowledge was widespread.

Yet diversions were countenanced, indeed encouraged, by those early administrators, including Gifford Pinchot himself. The interpretations by early administrators charged with the duty of carrying out legislation is entitled to great weight in interpreting the intended purposes of such legislation. Unquestionably, some alteration in the stream channels was anticipated.

Indeed, by implication the applicant seems to recognize that the total maintenance of the stream channels in their condition at the time of the reservation of the various forests was not what Congress had in mind. By these applications and by its policy of subordinating its claims to certain junior uses, what the applicant seems to be trying to do is to maintain the channels in their present condition -- close to a century after the reservations were made.

Complete perpetuation of existing stream channels unchanged, is in any event impossible if the policy of making national forests available for use, including recreational purposes, is to be continued. Fluvial processes are dynamic processes. As one expert testified on a field trip overlooking a broad alluvial valley, the stream at one time or another had been over every foot of that valley.

Many natural and artificial forces other than stream flows contribute to changes. The activities of beavers in particular are a substantial factor. In addition activities of the forest service itself and those engaging in forest service work lead to substantial erosion. Seemingly innocent activities such as the

maintenance of horse trails for recreational purposes have their effect. Testimony of Lela Chavez, February 5, 1990. On a field trip the devastating effects of use of motorized recreational vehicles in the forests was clearly evident.

Timber cutting itself has the great potential of affecting stream flows. The forest service has employed administrative techniques to control these effects. An expert in forest service policy testified as follows:

Well, in the basic design of the timber sale in deciding which streams are going to be harvested and the location relative to streams and our ability to harvest those trees without adversely affecting or creating additional erosion or without adversely affecting streams, they are protected by specific provisions of the timber sale contracts and through administration of those contracts to insure that they are carried out.

Testimony of George E. Leonard, January 17, 1990, at page 18.

Unless the forests are converted to outdoor museums rather than places for use, work and recreation, processes which alter the natural environment will continue.

Change is inevitable. The creators of the national forests knew that and knew that diversions would contribute to that change. Even so, diversions in the national forests were contemplated and encouraged.

It is this court's view that channel maintenance is necessary to effectuate a purpose of the national forests. But such maintenance is required only to a reasonable degree consistent with both the requirements of stream flows and the necessities of efficient irrigation and domestic use. Intelligent administrative regulation can achieve such maintenance in the future as it has for nearly one hundred years, while flexibility of use of the national forests and their resources can be maintained.

It appears to the court that the weight of the evidence and the legislative history is that Congress, in creating the national forests, intended that the purposes of the forests would be achieved through intelligent regulation. It is inconceivable that it was intended that water rights were to be reserved to an extent that they would interfere with efficient use of the "favorable water flows" for irrigation and domestic purposes.

VIII: PRESENT CONDITIONS OF THE NATIONAL FORESTS AND
OBSERVATIONS ON FIELD TRIPS.

Part of the presentation of evidence in this case took the form of field trips to sites selected by the parties to illustrate the processes which had been testified to, and to show the effect -- or lack of effect -- of diversions. These field trips were both interesting and highly enlightening. It is appropriate here to set forth the court's observations and conclusions from such field trips.

It is fair to say that at most of those sites there was some evidence of channel differences above and below diversions. But those differences generally were subtle and would probably not have been noticed by the court had not experts been present to point them out³. The experts disputed whether those differences were caused by the diversions, or by the omnipresent differences in geology, slope, and other natural circumstances above and below the diversions. The court concludes that the diversions had some effect, but so did the other natural circumstance.

With one possible exception at no point was the flow of the stream in question seriously impeded by the accumulation of sediment or by encroachment of vegetation. The possible exception is the site visited on the Laramie River.

This is a very complex location. The area near the river is a marshy plain with evidence of beaver activity. There are a number of diversions in the area, one being the Larimer-Poudre Tunnel which diverts at that point. Other water was directed to satisfy obligations to Wyoming. One dry channel was pointed out by experts for the applicant as the natural channel of the Laramie River, and it is clearly too small to carry the entire flow of that river now. The applicant's experts attributed that to the effects of the diversions.

The objectors' experts, however, disputed the assertion that the channel in question had ever been the entire channel of the

³ This court does not wish to suggest that even the hundred odd days of testimony in this case has converted it into an expert in the field of fluvial geomorphology. But in reviewing the testimony of Dr. Leopold, quoted at length in part VI of this memorandum, the court was struck by his statement, "and therefore the fluvial geomorphologist can say the square root of the discharge is one of the most highly important relationships in the manner of how streams form themselves and maintain themselves." [emphasis supplied]. Since the square root of the discharge is the key relationship, this court is bold enough to conclude -- at least in a footnote -- that even substantial changes in flows are likely to produce much smaller changes in the channel.

Laramie River. They contended that because of the flat, marshy terrain and the beaver activity, the river had divided into numerous channels of which the example was only one. This theory was hotly contested by applicant's geological expert who contended that there was no geological evidence of such numerous concurrent channels.

This court does not know which set of experts is correct in regard to the Laramie River site. What is most significant to the court is the fact that of the numerous sites visited, this was the only one which may have shown the grievous effects predicted by applicant. And even here the question was a matter of dispute which this court is unable to resolve.

The totality of the evidence in this case is consistent with the court's observations on the field trips. The preponderance of the evidence is that there are differences in the stream channels above diversions and below diversions. It is unclear to what extent those differences are caused by the diversions themselves, and to what extent they are caused by changes in the natural topography, particularly slope. It appears to the court that, for the most part, those changes which appear to have been caused by diversions affect relatively short stretches of the streams involved. Natural forces usually soon take over as the dominant control.

The preponderance of the evidence did not show nor was observation made of the accumulation of sediment in the stream in excessive quantities below diversions. This appears to be explained by the fact that the majority of the streams in the national forests in Water Division No. 1 are capable of transporting larger sediment loads than they are currently called on to carry. Thus a lowering of the stream flow does not necessarily result in the deposit of sediment under current conditions.

Likewise the court did not observe specific examples of the incursion of vegetation into a stream below a diversion to an extent that the free flow of the stream was impeded. There was pictorial evidence of growth of vegetation in dry channels, but overall the court does not conclude that those examples constitute any real threat to the purposes of the forests.

In summary, it is the court's view that although the field trips and the evidence showed some changes in stream characteristics which may be as a result of the diversions in question, those changes did not seriously impair the integrity of the stream channels. Such changes, even if they were caused by diversions, are well within the bounds which a reasonably informed person must have contemplated when diversions in the national forests were allowed in the first place. Considering that some of those diversions are a century or so old, they

cannot be viewed as a threat to the purposes of the national forests.

The applicant has devoted considerable attention to its contention that the claimed rights are required as a flood-control mechanism. No evidence was introduced of any substantial additional flood damage caused because of presently existing diversions. Floods are to be expected for, as Dr. Leopold pointed out in testimony quoted at length above, the stream "maintains and forms a channel not large enough to carry the maximum floods or flow which it will receive over a period of time." During one field trip, a group of homes built in a flat area closely adjacent to the stream was visited. Because of their location they are no doubt at risk for flooding whether or not the applications herein are granted.

Catastrophic floods will no doubt continue from time to time. Neither the granting or denial of these applications will substantially affect the damage which will result from such floods. Such flood flows are simply of a different order of magnitude from those which the channels are capable of containing.

Necessity is the sine qua non for reserved water rights. The history of the national forests in Water Division No. 1 and their present condition is a powerful argument that applicant has failed to show that necessity.

IX. THERE IS NO DANGER THAT THE STREAMS IN THE NATIONAL FORESTS IN WATER DIVISION NO. 1 WILL BE TOTALLY DRIED UP.

The underlying assertion of the applicant seems to be that if the streams in the national forests in Water Division No. 1 were totally dried up, that their channels would ultimately be destroyed and the purposes of those forests would be defeated as far as favorable water flows are concerned. The court is inclined to agree with the applicant in this regard, but is unable to see a real possibility of any such dire occurrence.

As pointed out above, the applicant has a wealth of administrative remedies to prevent this. But in addition the nature of Colorado water law is such as to make it a practical impossibility.

The most senior water rights in the South Platte system are for direct flow irrigation on the plains. Many senior storage water rights are for reservoirs on the plains. Such water rights will naturally require that the flows of the streams in the national forests be transmitted through the forests and to the plains below. These legal requirements would keep any greedy upstream juniors from drying up those streams.

Hydrographs in evidence tend to show that this is what has happened, as it appears that in actuality the streams in the national forests generally have had the benefit of peak flows despite lack of quantified reserved water rights. This may account in substantial part for the good condition of the streams shown by the evidence and observed on field trips.

If actual rather than theoretical necessity is the test, then necessity has not been shown in this case.

X. THE METHODOLOGY EMPLOYED BY APPLICANT FAILS TO IDENTIFY THE MINIMUM FLOWS NECESSARY FOR CHANNEL MAINTENANCE.

Regardless of the question of whether or not there are reserved water rights for the purpose of channel maintenance as claimed by the applicant, the applications herein must be denied for failure of the applicant to identify those flows.

While many of the contours of what has come to be called the "implied-reservation-of-water doctrine" remain unspecified, the Court has repeatedly emphasized that Congress reserved "only that amount of water necessary to fulfill the purpose of the reservation, no more."

United States v. New Mexico, 438 US 696, 700, 57 L Ed 2d 1052, 1057, 98 S Ct. 3012 (1978).

Because the reserved rights doctrine is implied, rather than expressed, and because of the history of congressional intent relating to federal-state jurisdiction of water allocation, reservations must be strictly limited to the minimum amount of water needed to ensure that the purposes of the reservation will not be entirely defeated.

United States v. Jesse, 744 P.2d 491, 503 (Colo. 1987).

In a footnote on the same page the Colorado Supreme Court issued the following instructions to the water court:

For each federal claim of a reserved water right, the trier of fact must examine the documents reserving the land from the public domain and the Organic Act; determine the precise federal purposes to be served by such legislation; determine whether water is essential for the primary purposes of the reservation; and finally determine the precise quantity of water necessary to satisfy such purposes. [emphasis supplied].

The court has found that the methodology employed by

applicant fails to define "the precise quantity of water necessary to satisfy such purposes" even assuming that the theories of the applicant regarding the necessity of the claimed flows is correct. Throughout the trial serious problems regarding the applicant's quantification process became evident.

It is beyond the scope of this memorandum to reproduce in full the elaborate methods employed by the applicant in its attempt to measure its claimed reserved water rights. The court will briefly discuss only those aspects which have convinced the court that those methods signally fail to produce a reliable quantification.

1. The method used to estimate bankfull at the quantification points is fatally flawed. The flow which constitutes bankfull discharge at the quantification points is crucial to the plan advanced by applicant for quantification of its claimed reserved water rights. This bankfull discharge is the flow the applicant claims to be necessary to maintain the integrity of the channels, and is what is sought to be secured by these applications.

This discharge was not measured at the quantification points by the applicant. It was calculated on the basis of four equations. These equations were termed the Leopold D84 equation, the Leopold D50 equation, the weighted Water Division No. 1 equation, and the Limerinos equation.

The Leopold equations were based on research done by Dr. Leopold and have scientific basis if they are used in circumstances to which they are intended to apply. Unfortunately, in the applicants studies they were from time to time applied under other circumstances.

The weighted Water Division No. 1 equation was apparently developed solely for the purpose of this litigation, and does not appear to be based on scholarly research. In this court's view it has little if any scientific basis, as it assumes a water velocity of approximately four feet per second in all cases. Even Dr. Troendle, a well informed expert called by the applicant, testified that it would have the tendency to overestimate bankfull discharge.

When applied to a given quantification point, the four equations frequently gave widely differing results. The applicant chose the result it deemed most appropriate. The highly suspect weighted Water Division No. 1 formula result was selected in about a third of the cases.

In the court's view this exercise in essence gave a scientific tone to what was essentially speculation.

This is not to denigrate the efforts of the Forest Service. It was confronted with a monumental problem, one that is perhaps insurmountable.

As Dr. Troendle stated:

There is no question we found, as the watersheds become smaller in size, you go to a step-pool system or whatever, the ability to predict bankfull discharge rate or velocity becomes a problem.

Testimony of Charles A. Troendle, November 29, 1990, at page 58.

Yet it is exactly small watersheds and step-pool system streams that characterize the national forests in Water Division No. 1. This raises the question if it is even practically possible to quantify the minimum amounts of water needed to accomplish channel preservation under applicant's theories. Applicant has clearly not done so here.

2. The method used to predict average annual runoff at quantification points is inaccurate. The calculation of average annual runoff at the quantification points is also a highly important aspect of the methodology utilized by the applicant. This calculation is important in determining the total volume in acre feet of water claimed at each quantification point. Again these figures were not measured at each quantification point but rather were extrapolated from twenty gauging stations. These stations varied greatly from the quantification points, in size, altitude, aspect and other respects. The gauging stations were related to the quantification points by two equations -- the North equation and the South equation. There is dispute and admitted error in the assignment of stations to each equation.

Particularly problematic is the fact that the North equation and the South equation are averages of the gauging stations. Application of the formulas to the individual gauging stations themselves would not correctly predict the runoffs at those stations.

Mr. Jon Altenhofen, an expert for the objectors, testified as follows:

For example on the north equation, the South Fork of the Poudre, the actual equation gives 28 percent more than the actual runoff at the South Fork of the Poudre. Little Beaver near Idelwild, this average relationship gives 26 percent more than the actual runoff that occurred at that gauge. This gauge point that is below the average line, Little Beaver near Rustic, it was 21 percent.

Correspondingly for the south, the Goose Creek station, the regression gave 26 percent more than what actually ran off and was measured at the Goose Creek gauge and the Michigan Creek gauge which is the extreme of all of them, was 47 percent, the actual regression when applied back to that gauge, sort of a calibration step, as I might call it, was 47 percent greater than the actual flow.

Testimony of Jon Altenhofen, August 8, 1990, at page 37.

In making its extrapolations from the gauging stations to the quantification points a principal criterion which was adopted by the applicant is that of mean elevation. In fact, extrapolations from a single gauging station were made to quantification points the altitude of which varied greatly. Proximity was also claimed to have been considered, but in fact the extrapolations were made over very substantial distances.

A number of other aspects were given less consideration than they deserved in determination of the propriety of extrapolations. These included particularly the question of whether mean annual runoff was dominated by rainfall or by snow melt. It appears that the mean annual runoff at certain of the gauging stations was dominated by rainfall, yet extrapolations from those stations were made to quantification points where the runoff was controlled by snowmelt.

In addition the aspect of the drainage basins -- the direction they face -- appears not to have been given due weight. The runoff from a slope facing south and exposed to direct sunlight may be expected to be substantially different that from a slope which faces north and is shielded from the sun.

3. The methods used by applicant to estimate bankfull and mean annual runoff at quantification points give hydrologically inconsistent results. The objectors made analyses to serve as cross checks regarding the question of whether or not these extrapolations gave results which were consistent with generally accepted principles of hydrology.

One cross check was to determine the ratio between Q_a , the mean annual runoff estimated at the quantification points expressed in cubic feet per second, and Q_b , the extrapolated bankfull flow also expressed in cubic feet per second. Hydrologists and fluvial geomorphologists, including Dr. Leopold, have discovered a general rule of fluvial geomorphology that at sites which are snowmelt dominated there is a consistent ratio between Q_a and Q_b . There is a similar consistency at sites which are rainfall dominated; however, the ratio is different there.

Examination of the ratios of the estimates derived at the quantification points by the applicant fails to show the expected hydrological consistency. It therefore appears that the quantifications are wrong. Mistakes in these quantifications result in incorrect claimed flows. The preponderance of the evidence in this case is that the errors apparent here would tend to exaggerate the claimed flows.

An additional cross check was to compare the ratio of Q_a to Q_b at the quantification points to the same ratio at the base stations from which the extrapolation was made. The theory behind this check is that if the quantification point is truly hydrologically similar to its related base station, the ratios should be similar. In fact these ratios turn out to be much different in many cases. This casts further doubt upon the accuracy of the extrapolations.

4. The chapter 30 procedure was used in situations to which it was not intended to apply. The applicant purports to be applying the principles set forth in Chapter 30 of the Forest Service Manual. That chapter contains at page 31.11 the following caveat:

At present the procedures can only be applied to watersheds or stream flow that is perennial and dominated by snowmelt runoff. Methods applicable to rainfall dominated perennial and ephemeral and intermittent streamflow have not yet been developed.⁴

The low elevation of certain gauging stations and analysis of their $Q_a:Q_b$ ratios lead to the conclusion that certain of the gauging stations are rainfall dominated rather than snowmelt dominated. As discussed above, a certain range of ratios is expected at rainfall dominated sites which is different from that expected at snowmelt dominated sites. In at least two or three of the gauging stations the ratios indicate that rainfall predominates. Extrapolations to numerous quantification points were made from those stations. Chapter 30 itself casts doubt upon the propriety of that procedure.

5. The claimed water rights would fail to give applicant the flows it desires. Despite the elaborate calculations made by applicant it appears clear that the applicant's procedure would not capture the flows desired. The applications are stated in a manner which claims a particular flow at a precise time and for a specified period. In short it is inflexible.

⁴ The text as set forth above is taken from a brief. Exhibit A-203 contains a reproduction of page 31.11 which differs from this reading but which appears to be erroneous.

Nature, unfortunately, does not produce results which are sufficiently consistent to fit the pattern prescribed by these applications. Matching the flows claimed by the applicant with the historical hydrographs applicable to the streams in question shows that in most years the applicant would have failed to capture the bankfull flows it desires.

The affected appropriators would be handicapped in diverting during the time the claims of the applicant were in priority, yet the applicant would not secure the benefit it seeks. This is an irrational result.

6. The applicant inferentially admits the inaccuracy of its quantifications, and that the amounts claimed in its present applications are not the minimum amounts required. The applicant freely admits that there is a substantial range of error in its quantifications.

Applicant's reply brief to objector's opening technical brief contains the following revealing passages at pages 17 and 18:

An enormous amount of effort, time and money would be required to improve the basis upon which the claimed quantities were determined under the 1989 and 1990 procedures.

For example, in order to improve the estimate of the mean annual flow, it would be necessary to put a gaging station at each quantification point and operate it for a number of years. Five years of actual measurements at a quantification point are not as good as a regional relationship based upon 15 or 20 years of record at many different gages. If the Forest Service wanted to know the mean annual flow to plus or minus 10%, in Colorado one would need roughly 12 to 15 years of record before that determination could be made. If greater accuracy were desirable, plus or minus 5%, then the gaging stations would have to be operated for 20 to 25 years. This would have to be done at every quantification point at which the mean annual flow was to be obtained. *** To obtain an accuracy of plus or minus 5% would require a period of 20 years and more than \$50,000,000.00.

This court is not suggesting that the applicant should spend \$50,000,000.00 to make these determinations. But quantifications which admittedly do not reach the plus or minus 10% level of accuracy do not permit this court to "determine the precise quantity of water necessary" to fulfil the purposes of the national forests even as viewed by the applicant.

The court is considering only the 1989 quantifications. At page 164 of its technical brief the applicant says:

Comparisons of the 1990 and 1989 claims to the U.S.G.S. gaging stations demonstrate that, on average, the 1990 claim would reduce the amount of water claimed over the long-term, or at least it would remain the same.

This is virtually an admission that the 1989 claims are not the minimum amount required, at least in certain years and perhaps overall.

XI. CLAIMS FOR FIRE FIGHTING.

The purposes of the national forests cannot be fulfilled if the forests are not protected from fire. This court concludes that the applicant is entitled to a reserved water right unlimited in amount as may be necessary for the purpose of fighting fire.

Mr. Cargill, whose background with the forest service includes much experience in the field of fire protection, testified as follows:

I may have stated earlier that without the capacity to protect the forest from fire, we would be unable to fulfill either of the purposes for which they were reserved; a continued supply of timber to meet the needs of the American people would be in jeopardy, and certainly favorable conditions of water flow couldn't be secured were we denied the use of water as a fire-fighting tool.

Testimony of Gary Cargill, January 22, 1990, at pages 37-38.

He also stated:

It is virtually impossible to predict with any degree of certainty the type of fire season to be experienced from one year to the next. Therefore it is virtually impossible to predict the amount of water that will be used from one fire season to the next, and it can vary tremendously.

Testimony of Gary Cargill, January 22, 1990, at pages 24-25.

This court agrees completely with these observations by Mr. Cargill.

The objectors ask for a determination that if water in reservoirs is required for fire fighting, then the applicant must pay for it. That is beyond the scope of these applications and must await decision if and when circumstances require. Perhaps the use of water placed in storage would constitute a taking of private property requiring compensation. On the other hand it is perhaps not impossible that such water will be viewed as impressed with a sort of "lien" allowing recapture by applicant if it is needed for fire-fighting purposes.

As in most cases, it is preferable that the question be decided in the context of an actual dispute if one should ever arise.

XII. ADMINISTRATIVE SITES.

No matter what the ultimate outcome of these cases, the national forests in Water Division No. 1 must be administered. Such administration requires administrative sites. It is reasonable to assume that Congress intended to reserve sufficient water to serve those sites.

The applicant recognizes the impossibility of quantifying its requirements at present. It has suggested that the court decree such reserved water rights exist, and that quantification of those rights be postponed until the actual need arises.

This appears to be a reasonable solution. A decree should enter determining that reserved water rights for administrative sites in the national forests exist. Those rights are for not more than one site for each 100,000 acres of national forest, and not more than ten acre feet per site. The actual amount reserved for each site shall be determined as the need may arise, and the court should retain jurisdiction for that purpose.

The applicant suggests that the limitations imposed should be subject to revision in the event of "unforeseen circumstances or Congressional action which might require additional sites." This court thinks such a provision is not proper. The theory of reserved water rights is that the rights were reserved at the time of the reservation of the forests. It can hardly be credited that water was reserved then for purposes which are not evident even now, many years later.

XIII. THE PROPOSED AMENDMENT FOR 1990 CLAIMS.

The court refused to allow the applications to be amended to reflect the 1990 claims and is being asked to reconsider its decision in that regard.

At the time of its original ruling the court fully explained its reasons. These included the fact that the request came after

many months of trial and involved a very substantial change in the applicant's proposal. To have allowed the amendment would no doubt have triggered a new round of investigations by all parties and several more months of trial. This would have been unfair to the objectors who had already spent much time and treasure in connection with this case.

The court will adhere to the views expressed at the time of its ruling on the motion and briefly summarized above, but will also add another thought.

The applicant developed its 1989 claims after about fourteen years of study using the vast resources in personnel and money of the Forest Service, yet its conclusions were successfully challenged. To avoid this challenge the 1990 claims were devised by a small team, and all or nearly all of the members were involved in this case. They were operating under the hurried time constraints imposed by the pending litigation. This would not seem to be the ideal environment for careful scientific study.

This court has come to the conclusion that the applicant has not shown the claims for reserved water rights to be necessary, but is under no apprehension that its word will be the final one on this question. If on appeal this court is reversed on the question of necessity but affirmed in its findings that the methodology employed was faulty, a new trial will be required and a new proposal will be necessary.

In view of the importance of this claim to the future of the inhabitants of Water Division No. 1, a proposal developed under calmer and more scholarly circumstances would be appropriate.

XIV. CONCLUSION.

The court has concluded that the applications herein must be denied except insofar as they request determination of reserved water rights for fire-fighting purposes and for administrative sites. This denial is based on two determinations, each of which is sufficient independently to support the denial. These are:

1. The applicant has failed to show that the reserved water rights claimed are necessary to preserve the timber or to secure favorable water flows for private and public uses under state law.
2. The applicant has failed to establish the minimum amount of water needed to ensure that the purposes of the reservation of the national forests in Water Division No. 1 will not be entirely defeated.

The court has concluded that the applications for reserved

water rights for fire-fighting purposes and for administrative sites should be granted. The granting of the applications is based on the following determinations:

1. The applicant has demonstrated that reserved water rights for fire-fighting purposes and for administrative sites are necessary to preserve the timber and to secure favorable flows of water for private and public uses under state law.

2. Applicant has established that the minimum amount of water for fire-fighting purposes needed to ensure that the purposes of the reservation of the national forests in Water Division No. 1 will not be entirely defeated is whatever amount is necessary to fight fires.

3. Applicant has established that the minimum amount of water for administrative sites needed to ensure that the purposes of the reservation of the national forests in Water Division No. 1 will not be entirely defeated is not more than ten acre feet of water for each of not more than one site for each 100,000 acres of national forest. The court may reserve jurisdiction make the exact quantifications as needed.

The court will adhere to its previous ruling denying the amendments requested by the applicant.

ORDER

For the reasons set forth above, it is

ORDERED by the court as follows:

1. A decree will enter granting the applications to the extent that they provide for water for fire-fighting purposes. That decree will be unlimited in amount.

2. A decree will enter granting the applications to the extent that they provide for water for administrative sites. That decree will provide for reserved water rights for not more than one site per 100,000 acres of forest land, and not more than 10 acre feet of water per year for each site. The court will reserve jurisdiction for an indefinite period to quantify the precise amount of water for each site.

3. Applicant's request that the court reconsider its denial of the 1990 amendments to the applications herein is denied.

4. A decree will enter that, except as hereinabove provided, the applications in this case are denied.

5. The parties shall submit for the court's approval proposed forms of decrees in accordance with the foregoing instructions.

Dated February 12, 1993.

BY THE COURT:


Water Judge

200 JUL 31 PM 3: 38
DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	ORDER OF PARTIAL DECREE ON
	)	UNCONTESTED FEDERAL WATER RIGHT
Case No. 39576	)	
	)	For Water Right 63-30981

On May 11, 2000, a *Special Master's Report and Recommendation on Uncontested Federal Water Right* was filed for the above water right. No Challenges were filed to the *Special Master's Report and Recommendation* and the time for filing Challenges has now expired.

Pursuant to I.R.C.P. 53(e)(2) and *SRBA Administrative Order 1*, Section 13f, this Court has reviewed the Findings of Fact and Conclusions of Law contained in the *Special Master's Report* and wholly adopts them as its own subject to one notation.

The water right at issue is an implied reserved water right on a Forest Service administrative site within the boundaries of the Boise National Forest. The *Special Master's Report and Recommendation* correctly states the elements for federal reserved water rights as follows:

A state has plenary control of water located within its territory. *Kansas v. Colorado*, 206 U.S. 46 (1907). A claim to a federal reserved water right is an exception to a state's plenary control of water. *United States v. Rio Grande Dam and Irrigation Co.*, 174 U.S. 690 (1899). Reserved water rights may be express or implied. *United States v. New Mexico*, 438 U.S. 696 (1978). An express reservation of water is created by the explicit language in the act creating the reservation. *Id.* An implied reserved water right must be based on a reservation of land, *Arizona v. California*, 373 U.S. 546 (1963), and may be granted if the following three criteria are satisfied:

(1) An implied reservation of water exists only if necessary to fulfill the primary, not the secondary, purpose for which the reservation of land was created, *United States v. New Mexico*, 438 U.S. at 702;

(2) Without water, the purposes of the reservation must be entirely defeated, *Id.*; and

(3) The water claimed must be the minimum amount necessary to achieve the purposes of the reservation, *Id.* At 700.

***Special Master's Report and Recommendation*, page 2.**

While not expressly stated in the *Special Master's Report and Recommendation*, implicit in recommending the claim are the necessary findings of fact and the conclusions of law that the three criteria stated above are satisfied.

The claim is for a *de minimis* amount for domestic use, and as noted earlier, is within the forest boundaries for an administrative site (a guard station). Another court has already dealt with a similar claim. In 1993, the Colorado District Court for Water Division No. 1 denied the federal government's claims for reserved rights for channel maintenance instream flows in certain national forests, but upheld its claims for firefighting and administrative sites. As to the administrative sites, the Court reasoned as follows:

No matter what the ultimate outcome of these cases, the national forests in Water Division No. 1 must be administered. Such administration requires administrative sites. It is reasonable to assume that Congress intended to reserve sufficient water to serve those sites.

In the Matter of Reserved Water Rights in the Platte River, Nos. W-8439-76 (Colo. Water Div. 1), Feb. 12, 1993, page 31.

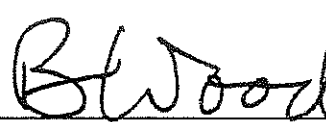
This Court finds the above reasoning to be persuasive as to *de minimis* domestic claims, reasonable in number, for administrative sites within the boundaries of the national forest such as

those for which this claim was made.¹

Finally, the Court notes that the claim was not contested, which indicates that all parties to the SRBA agree that this *de minimis* domestic water claim at the administrative site within the boundaries of the national forest is reasonable and satisfies the three criteria of an implied reserved water right.

Therefore, IT IS ORDERED that water right 63-30981 is hereby **decreed** as set forth in the attached *Partial Decree Pursuant to I.R.C.P. 54(b)*.

DATED JUL 31 2000.



BARRY WOOD
Administrative District Judge and
Presiding Judge of the
Snake River Basin Adjudication

¹ The Court recognizes that Judges should abstain from public comment about pending cases. *See e.g. Smith v. Smith*, 124 Idaho 431, 435, 860 P.2d 634, 638 (1993). Therefore, to be clear, this Court agrees with this reasoning as to administrative sites only and expresses no present opinion on any other type of claim. Specifically, there are pending before this Court reserved claims for instream flows for channel maintenance and the Court expresses no opinion thereon or with the Colorado Water Division No. 1 Court's decision on the topic.

~~77081~~

FILED

Case No. CV 14906

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LM
NYE COUNTY CLERK
BY DEPUTY

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF NYE

IN THE MATTER OF THE DETERMINATION)
OF THE RELATIVE RIGHTS IN AND TO)
THE WATERS OF THE MONITOR VALLEY) ORDER
SOUTHERN PART (140-B),)
NYE COUNTY, NEVADA.)

1. Introduction.

The conflicts between the parties will be addressed in the following manner. (1) Did the state engineer properly determine Congressional purpose in reserving the Toiyabe National Forest and the amount of water needed to achieve that purpose? (2) Did the state engineer properly define the regulations governing the distribution of water rights in the PWR's? (3) Did the state engineer properly grant the federal government water rights on the administrative sites? (4) Did the state engineer properly grant the federal government in stream water rights on the wilderness areas?

2. The State Engineer properly determined Congress purpose in reserving the National Forests under the Organic Act of 1897 and the Toiyabe National Forest and the state engineer properly determined the amount of water to achieve those purposes.

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90-1-0-2100

FIFTH JUDICIAL DISTRICT COURT
ESMERALDA, MINERAL AND NYE COUNTIES





1 A. The legal framework and resulting issues.

2 As the parties agree on the legal framework and the resulting issues, this court will only
3 briefly state them. Under the implied water rights doctrine, the federal government when
4 reserving land automatically reserves the amount of unappropriated, appurtenant water necessary
5 to achieve the primary purpose of that reservation. US v. New Mexico, 438 US 696, 57 L Ed 2d
6 1052, 98 S Ct 3012 (1978); Cappaert v. U.S., 426 U.S. 128 (1976). In determining the primary
7 purpose of the reservation, courts examine both the purpose of the reservation of the National
8 Forests under the Organic Act of 1897 as well as Congressional purposes for making specific
9 reservations. US v. New Mexico, 438 US 696, 700, 57 L Ed 1052, 1057 (1978). To grant the
10 Federal Government water under the implied water rights doctrine, a court must find the
11 purpose of the reservation would be entirely defeated without the claimed water. US v. New
12 Mexico, 438 US 696, 700 L Ed 1052, 1057 (1978).

13 This framework generates the following issues: (1) What was Congress primary purpose
14 in reserving National Forests under the Organic Act of 1897? (2) What was Congress primary
15 purpose in reserving the Toiyabe National Forest? (3) How much water is absolutely needed to
16 achieve the primary purpose of the reservation in question?

17 B. The State Engineer properly determined that Congress did not under the Organic Act
18 reserve the National Forests to create in stream flows to preserve stream channel integrity.

19 The Organic Act of 1897 states "No national forest shall be established, except to improve
20 and protect the forest within the boundaries, or for the purpose of securing favorable conditions of
21 water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of
22 the United States..." Organic Administration Act of June 4, 1897, 30 Stat.34, 16 USC 473 et seq.
23 (1976).
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FIFTH JUDICIAL DISTRICT COURT

ESMERALDA, MINERAL AND NYE COUNTIES



1 The Federal Government contends it needs instream water rights to achieve the primary
2 purpose for which Congress reserved the National Forests under the Organic Act of 1897. The
3 federal government concedes that the Organic Act of 1897 reserved National Forests primarily to
4 allow people downstream from National Forests to economically use the water flowing through
5 the National Forests. The federal government contends when Congress reserved the National
6 Forests to "secure favorable conditions of water flows", Congress intended to protect stream
7 channel integrity. By protecting instream channel integrity, water would flow constantly through
8 the National Forests and through such flows allow people downstream to economically employ the
9 water. The government contends it needs instream water rights to promote periodic flushing to
10 keep the stream beds free from debris to "secure favorable conditions of flow" and hence allow
11 economic use of water flowing from the National Forests. US Opening Memorandum of Law, 7-
12 9.

15 The State Engineer agrees with the Federal Government that Congress reserved the
16 National Forests to promote economic use of water. However, the state engineer argues Congress
17 did not intend to promote economic activity by preserving the integrity of the stream bed channels
18 but rather to promote timber and forest ground cover and stream side vegetation. Such stream
19 side vegetation would adequately promote the favorable conditions of flow which were needed to
20 supply downstream water users an amount of water needed to promote economic activity. State
21 Engineer's Answering Brief, at 12.

23 The Court must first define the standard of review. "The decision of the state engineer
24 shall be prima facie correct, and the burden of proof shall be upon the party attacking the same."
25 NRS 533.450 (9). The language the statute employs confirming this deferential standard of
26 review. The statute describes the hearing challenging the state engineer's findings as "in the
27 nature of an appeal." NRS 533.450 (1). The statute contemplates that this deference applies to all
28

1 decisions the state engineer makes. The statute states "Any person feeling himself aggrieved by
2 any order or decision of the state engineer...may have the same reviewed by a proceeding for that
3 purpose..." NRS 533.450.(1).
4

5 Case law confirms and expands these conclusions. A party aggrieved by a state engineer's
6 order of determination does not receive a de novo review but rather must bring his case in the
7 nature of appeal bearing the burden of proof to over come the prima facie correctness of the state
8 engineer's order. Revert v. Ray, 95 Nev. 783, 786, 603 P.2d 262, (1979). The court should
9 determine whether or not the State Engineer's finding is supported by "substantial evidence":
10 "With respect to the a limited review in the nature of an appeal, neither the district court nor this
11 court will substitute its judgment for that of the State Engineer; we will not pass upon the
12 credibility of the witnesses nor reweigh the evidence, but limit ourselves to a determination of
13 whether substantial evidence in the record supports the State Engineer's decision." Id.
14

15 This deferential standard of review applies all the state engineer's decisions in preparing
16 the order of determination. Id. at 787. The deferential standard of review presupposes the fairness
17 of the proceedings. For the proceedings to be fair, the state engineer must give all the parties a full
18 opportunity to be heard and "must clearly resolve all crucial issues presented." Id. The State
19 Engineer's duty to resolve "all crucial issues" indicates that the deferential standard of review
20 applies to all the decisions the State Engineer must make to prepare his order and determine water
21 rights.
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23 The record indicates substantial evidence supports the State Engineer's decision regarding
24 the primary purpose of Congress reservation of the National Forests under the Organic Act of
25 1897 and that the federal government has not met its burden of overcoming the presumption that
26 the State Engineer's decision is prima facie correct.
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FIFTH JUDICIAL DISTRICT COURT
ESMERALDA, MINERAL AND NYE COUNTIES



1 The State Engineer presented substantial evidence that Congress reserved the National
2 Forests to protect forest cover and timber rather than the integrity of the stream channels
3 themselves. Order of Determination, 43-45.

4
5 US v. New Mexico, 438 US 696, 706, 57 L Ed 1052, 1061 (1978) supports the State
6 Engineer's conclusion that Congress reserved the National Forests to provide for favorable
7 conditions of water flow via timber and forest cover rather than by creating instream water rights
8 to maintain stream channel integrity. The court stated Congress was concerned that destruction of
9 the forests would not only deplete the nation's supply of timber but destroy the watersheds which
10 regulate water flow and prevent floods. To support this claim, the court cited the Creative Act of
11 March 3, 1891, 24, 26 Stat 1103, as amended, 16 USC 471 [16 USCS 471] (repealed 1976). That
12 act "set apart and reserve, in any State or Territory having public land bearing forests, in any part
13 of the public lands wholly or in part covered with timber or undergrowth, whether of commercial
14 value or not, as public reservations." US v. New Mexico, 438 U.S. 696, 705, 57 L Ed 2d 1052,
15 1060 (1978). In discussing the shortcomings of the Creative Act of 1891, the court stated "fires
16 and indiscriminate timber cutting continued their toll." US v. New Mexico, 438 U.S. 696, 706, 57
17 L Ed 2d 1052, 1060 (1978). The court's discussion an language indicates Congress' intention to
18 regulate the flow of water by establishing National Forests to promote timber and forest growth
19 along the side of water channels rather than by maintaining the integrity of stream channels
20 through instream water rights. This court agrees with the State Engineer that "Congress enacted
21 the Organic Act to allow the headwaters to be protected so they could act as the natural sponge
22 that created reliable, perpetual stream flows downstream. Congress never considered stream
23 channel maintenance. It assumed stream channels would operate properly if the forest cover were
24 protected from over grazing, logging, and fires." State Engineer's Reply Brief, at 12.
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1 The Federal Government hasn't presented evidence sufficient to rebut the presumption that
2 the State Engineer has properly determined Congressional purpose in reserving the National
3 Forests. The Federal Government can establish that Congress established the National Forests to
4 preserve the watershed, but it cannot demonstrate that Congress sought to protect the watershed
5 through in stream water flows in addition to stream side vegetation and forest regulation.
6

7 For example, the Federal Government attempts to demonstrate its position with the
8 following evidence citation: "The increase in the number of forest fires raging in the mountains of
9 Colorado is alarming in a region where the forest once destroyed cannot easily reproduce itself,
10 and upon the mountains where forest covering is necessary to preserve the integrity of the
11 channels and the constant flow on numerous important streams essential to irrigation of wide areas
12 of arid territory." Federal Government's Reply Brief, at 13. Though the Federal Government
13 relies on the phrase "integrity of the channels" to establish its point, it fails to link integrity of the
14 channels to instream water rights which should flush the stream beds. Rather, the citation the
15 Federal Government offers clearly indicates Congressional intent to regulate watersheds, or stream
16 channels, by forest cover: "where forest covering is necessary to preserve the integrity of the
17 channels." Federal Government's Reply Brief, at 13.
18

19 Some of the evidence the Federal Government offers establishes a link between watershed
20 protection and instream water flows. Bulletin No.2, Report on the Forest Conditions of the Rocky
21 Mountains does contend that deforestation was requiring the forest service to spend money
22 dredging streams. Federal Government's reply brief, at 14. Bernhard E. Fernow's Report of the
23 Chief of the Division of Forestry for 1889 does discuss the problems of sediment accumulations to
24 water flow. Federal Government's reply brief, 14-15. These documents do discuss watershed
25 maintenance and the preservation of channel integrity via water flow. However, this court does
26
27
28



1 not find that they establish Congressional intent regarding the purpose of the reservation of
2 National Forests sufficient to rebut the presumption that the State Engineer's findings are correct.

3
4 The State Engineer has substantial evidence to show that Congress did not intend instream
5 water rights to exist on the National Forests. The implied reservation water rights doctrine
6 requires a party to establish Congressional purpose in making the reservation at the time it made
7 the reservation. The State Engineer contends that the concept of in stream water rights did not
8 enter prior appropriation water law until the mid 1970's. A review of water law confirms this
9 claim. The Federal Government's own witnesses also admit this claim: "In fact, Mr. Schmidt
10 testifies that it was not until the 1970's that the USFS began to even think about instream flows,
11 and the term itself is a modern term." Order, at 52.

12
13 US v. New Mexico, 438 U.S. 696, 57 L Ed 2d 1052 (1978) confirms that instream water
14 rights do not exist on National Forests absent Congress clearly stated intent to create such rights.
15 In that case, the Federal Government claimed in stream water rights to achieve the alleged
16 recreational purposes for which Congress reserved the Gila National Forest. US v. New Mexico,
17 438 U.S. 696, 709, 57 L Ed 2d 1052, 1062 (1978). The court showed the historical context
18 demonstrated that Congress in reserving National Forests was primarily concerned about
19 efficiently, economically exploiting National Forests. US v. New Mexico, 438 U.S. 696, 706, 57
20 L Ed 2d 1052, 1060 (1978). Hence, when Congress reserved National Forests for recreational
21 purposes, it explicitly so stated. US v. New Mexico, 438 U.S. 696, 709, 57 L Ed 2d 1052, 1062
22 (1978). Likewise, "When it was Congress' intent to maintain minimum instream flows within the
23 confines of a national forest, it expressly so directed, as it did in the case of the Lake Superior
24 National Forest." US v. New Mexico, 438 U.S. 696, 710, 57 L Ed 2d 1052, 1063 (1978).
25 Congress did not expressly create an in stream water right.
26
27
28



1 C. THE STATE ENGINEER PROPERLY DETERMINED CONGRESSIONAL INTENT
2 IN RESERVING THE TOIYABE NATIONAL FOREST.

3 To determine the primary purpose of any Congressional reservation of a national forest, a
4 court must examine not only the Congress' primary purpose in reserving the national forests under
5 the Organic Act of 1897 as well as the specific purposes of the particular reservation in issue.
6 U.S. v. New Mexico, 438 U.S. 696, 700, 57 L Ed 2d 1052, 1054 (1978). To determine the specific
7 purposes of the reservation, the court in New Mexico relied upon Forest Service Manuals and
8 Handbooks. US v. New Mexico, 438 US 696, 57 L Ed 2d 1052, footnotes 7 and 16, (1978).

9 The State Engineer's determination of Congressional reservation of the Toiyabe National
10 Forest is supported by substantial evidence. The State Engineer considered the primary purposes
11 for which Congress reserved all national forests under the Organic Act of 1897. Order of
12 Determination, 42-45. The State Engineer then analyzed Congressional purpose in reserving the
13 Toiyabe National Forest. Order of Determination, 45-55. Since evidence of Congressional intent
14 in reserving the Toiyabe National Forest is scant, the State Engineer based analyzed three items: a
15 letter from the Toiyable Forest Supervisor to the Chief Forester, parts of an Annual Forest Plan,
16 and a 1933 Technical bulletin. He concluded Congress reserved the Toiyabe National Forest to
17 prevent overgrazing by sheep and to regulate conflicts between cattlemen and sheep ranchers. The
18 State Engineer then synthesized this conclusion with the general purposes for which Congress
19 authorized the general reservation of national forests. He concluded that timber production did not
20 constitute a primary purpose of the reservation of the Toiyabe National Forest and that "the only
21 watershed protection issue regarding these National Forests was protection of the forest forage
22 cover in support of cattlemen who had base home ranches downstream which supported their
23 operations." Order of Determination, at 49.



1 The Federal Government raised three objections to the State Engineer's analysis. The
2 Federal Government contends the evidence on which the State Engineer relied upon does not
3 demonstrate that the Toiyabe National Forest was reserved to prevent overgrazing nor do the
4 documents in themselves show Congressional intent. The Federal Government also contends the
5 State Engineer ignored the general purposes for which Congress reserved the National Forest
6 system under the Organic Act. United States' Opening Brief, 19-20.

7
8 The State Engineer properly determined the purpose of the reservation of the Toiyabe
9 National forest. The record shows substantial evidence supports the State Engineer's conclusions.
10 Given the lack of other information concerning the reservation of the Toiyabe National Forest, the
11 State Engineer properly relied upon the available evidence. Further, US v. New Mexico, 438 U.S.
12 696, 57 L Ed 2d 1052, (1978) employed documents similar to those the State Engineer employed
13 in the present case to determine the purpose of the reservations of the National Forests. The
14 content of the documents also supports the State Engineer. The Forest Supervisor's letter
15 indicates that uncontrolled grazing of sheep was destroying the forest ground cover. Such
16 overgrazing was creating conflicts between cattlemen and sheep ranchers. Finally, the Federal
17 Government has not presented evidence regarding the purpose of the reservation of the Toiyabe
18 National Forest sufficient to rebut the presumption that the State Engineer is correct.

19
20
21 **D. THE STATE ENGINEER PROPERLY DETERMINED THE AMOUNT OF WATER**
22 **NEEDED TO ACHIEVE THE PURPOSES OF THE RESERVATION.**

23 Considering Congress' primary purpose in reserving the National Forests under the
24 Organic Act and Congress' primary purpose in reserving the Toiyabe National Forests, the State
25 Engineer determined that the snow and rain that fell upon the forest would sufficiently protect the
26 watershed as it supports forage for grazing. Order of Determination, at 55.
27
28

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1 Engineer determined that the snow and rain that fell upon the forest would sufficiently protect the
2 watershed as it supports forage for grazing. Order of Determination, at 55.

3
4 The Federal Government contends that instream water rights are necessary to achieve the
5 primary purpose of Congress' reservation of the Toiyabe National Forest. It presented four expert
6 witnesses to support its claim: Mr. Larry Smith, a hydrologist; Dr. Chambers, an expert in
7 streamside ecology; Mr. Potyondy, an expert in surface water hydrology; and Rick Jameson, a
8 Forest Service staff specialist charged with administering Forest Service water uses and water
9 rights for the Humboldt-Toiyabe National Forest. The Federal Government contends the
10 testimony of these experts showed how instream water rights were necessary to achieve the
11 primary purpose of the reservation. United States' Opening Memorandum, 24-28.
12

13 The State Engineer heard the testimony of the Federal Government's witnesses, and
14 concluded that the testimony established the value of streamside vegetation but did not establish a
15 connection between instream water rights, streamside vegetation, and benefit to downstream water
16 users like cattlemen. "The State Engineer concludes that the USFS did not provide sufficient
17 evidence that these instream flow claims are essential to the primary purpose of these particular
18 reservations which was watershed protection, which included forage that had been overgrazed."
19 Order of Determination, at 55.
20

21 The State Engineer's Order of Determination is in the nature of an appeal and the court
22 will not "substitute its judgment for that of the State Engineer: we will not pass upon the
23 credibility of the witnesses nor reweigh the evidence, but only limit ourselves to a determination of
24 whether substantial evidence in the record supports the State Engineer's decision." Revert v. Ray,
25 95 Nev. 782, 786, 603 P.2d 262, (1979). To establish a water right under the implied reservation
26 of water doctrine, the Federal Government must show that "without the water the purposes of the
27
28



1 reservation would be entirely defeated." US v. New Mexico, 438 US, 696, 700, 57 L Ed 2d 1052,
2 1057 (1978).

3
4 The record reveals that substantial evidence supports the State Engineer's determination
5 regarding that the Federal Government's witnesses did not establish a connection between
6 instream water rights and the primary purpose for which Congress reserved the Toiyabe National
7 Forest.

8 The Federal Government's witnesses did not provide a sufficient basis for their
9 interpretation of how the Organic Act of 1897 employed the phrase "secure favorable conditions
10 of water flow." Mr. Schmidt testified that he understood the Organic Act of 1897 required the
11 Forest Service to practice watershed management as including stream system and stream bed
12 integrity. Order,, at 51. The State Engineer concluded however, that Mr.Schmidt did not provide
13 any basis for his interpretation of the Organic Act of 1897. Id.

14
15 The testimony of Mr. Schmidt and Dr. Chambers did not sufficiently establish how the
16 purpose of the Toiyabe National Forest would be defeated without streamside vegetation and the
17 water needed to promote it. Testimony indicates that " Streamside vegetation maintains and
18 restores stream channel form and function, provides protection from stream bank and flood plain
19 erosion, can increase water storage thereby moderating flood impacts, and creates perennial
20 streams and improves water quality. Like Mr. Schmidt, Dr. Chambers' testimony never made a
21 link between floods being an issue or streamside vegetation being part of the primary purpose for
22 which these forests were reserved, nor did she refute that vegetation was historically removed to
23 increase the water yield if the system for downstream users. Dr. Chambers' testimony did not
24 sufficiently demonstrate how this streamside vegetation increases water yield to the downstream
25 user in any significant quantity outside the forest boundary or prevents destructive floods in the
26 area of the lands of the downstream citizen in this adjudication. Although the State Engineer
27
28



1 believes there may be some benefit to wildlife and fisheries by providing streamside vegetation, he
2 has a difficult time tying these goals to the primary purpose for which the Toiyabe National Forest
3 was created." Order of Determination, at 53.

4
5 Neither Mr. Schmidt nor Mr. Potyondy established that without implied water rights for
6 instream flows to promote periodic flooding so as to keep stream beds clear from sediment and
7 debris the primary purpose of the reservation of the Toiyabe would be defeated.

8 Testimony demonstrated "high flows were needed for channel maintenance to convey sediment
9 through the stream system....but did not provide any evidence of how this flushing benefitted the
10 downstream user." Order, at 53. Natural high water flows will accomplish any flushing needed to
11 achieve the purpose of the Toiyabe reservation, protection of forage for grazing.

12
13 The State Engineer concluded that "It is perfectly clear that the historical concern was
14 forest cover, ie grasses and shrubs, and not the new concept of streamside vegetation for stream
15 channel maintenance or high flushing flows. The evil that congress sought to prevent in 1897 was
16 the denuding of forests in conjunction with the forage cover which when in place regulated water
17 flows for downstream use and provided trees for the prosperity of the nation. The concern was not
18 riparian vegetation to stabilize stream banks, to hold water, and to flush pollutants. While the
19 State Engineer personally believes the goals the USFS now seeks to implement are valuable, he
20 does not believe they were part of the concept for which national forests were reserved and do not
21 warrant the granting of an implied reserved water right. The State Engineer concludes that the
22 USFS did not provide sufficient evidence that these instream flow claims are essential to the
23 primary purpose of these particular reservations which was watershed protection, which included
24 forage which had been overgrazed." Order Of determination, at 55.

25
26
27 E. THE FOREST SERVICE SHOULD NOT RECEIVE DEFERENCE IN
28 INTERPRETING THE ORGANIC ACT OF 1897.



1 The Federal Government contends this court should give it deference on its interpretation
2 of the Organic Act of 1897. The Federal Government contends that if "a statute is silent or
3 ambiguous with respect to the specific issues, the question for the court is whether the agency's
4 answer is based on permissible construction of the statute." United States' Opening Brief, at 10,
5 citing Chevron U.S.A., Inc. v. NRDC, Inc., 476 U.S. 837, 842-42 (1984). As the phrase "securing
6 favorable conditions of flow" is unclear, the Federal Government contends its view that the phrase
7 includes stream bed maintenance via instream water rights should receive deference.
8

9 This Court disagrees. The Federal Government admits a court must find that the agency's
10 interpretation of the statute is sufficiently rational. The State Engineer observed, "As noted by Mr.
11 Poryondy, the understanding of what constitutes favorable conditions of flow is changing over
12 time because our scientific understanding changes over time. It is not what we in the modern
13 world believe that determines an implied reserved water right, but rather it was the intent of
14 Congress at the time the Organic Administration Act of 1897 was enacted, and at the time these
15 forest reservations were set aside in 1907." Order of Determination, at 54. The Federal
16 Government does not reasonably connect "secure favorable conditions of water flow to benefit
17 downstream users" to instream flow rights. It uses biological concepts to link conditions of flow
18 to watershed protection to stream channel protection to instream flow rights. This interpretation is
19 unreasonable because biological concepts Congress did not employ when it passed the Organic
20 Act of 1897 establish the connections. Further, the concept of "instream flow" did not exist in
21 prior appropriation law until the mid 1970's. Hence, Congress could not have contemplated that
22 to serve purposes of its reservation it would require an instream flow. Even if Congress had held
23 some of the concepts the Federal Government now asserts to support its claim, the Federal
24 Government does not indicate why an instream flow reservation, as opposed to other activities (ie
25 stream dredging or vegetation control) might not promote the purpose of the reservation. Hence,
26
27
28



1 the Federal Government's interpretation is unreasonable because it has not shown had the purpose
2 of the Toiyabe reservation would be defeated without an implied water right.

3 3.THE STATE ENGINEER PROPERLY ESTABLISHED REGULATIONS FOR PWR
4 107.

5
6 The State Engineer adopted guidelines to help determine claims to water rights at public
7 water reserves. Based upon these guidelines, the State Engineer denied four of the Federal
8 Government's claims to water in public water reserves.

9 Congress has traditionally allowed state law to govern prior appropriation doctrine.
10 California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163-164 (1935) in
11 construing the 1877 Desert Lands Act, stated that "The Desert Land Act does not bind or purport
12 to bind the state to any policy. It simply recognizes and gives sanction, in so far as the United
13 States and its future grantees are concerned, to the state and local doctrine of appropriation, and
14 seeks to remove what otherwise might be an impediment to its full and successful operation." In
15 California v. United States, 438 U.S. 645, 57 L Ed 2d 1018, the Supreme Court held that the
16 Federal Government, though acting pursuant to the Reclamation Act of 1902, as amended, 43
17 U.S.C.A 372, 383, had to comply with State Law regarding prior appropriation: "The Legislative
18 history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer
19 to the substance, as well as the form, of state water law." U.S. v. New Mexico, 438 U.S. 696, 701,
20 57 L. Ed. 2d 1052, 1058 (1978) reiterates this view: "Where Congress has expressly addressed the
21 question of whether federal entities must abide by state water law, it has almost invariably
22 deferred to state law."
23
24

25 When Congress created PWRs, it followed the general Federal policy of allowing state and
26 local custom of prior appropriation to govern the allocation of water.
27
28



1 Nevada law of prior appropriation allows the State Engineer to establish "reasonable rules
2 and regulations as may be necessary for the proper and orderly execution of the powers conferred
3 by law." NRS 532.120 (1).

4
5 Each of the regulations the State Engineer established to govern PWR's complies with
6 NRS 532.120 (1).

7 The State Engineer bases his regulations on his interpretation of the purposes of the PWR
8 107. Congress sought to provide public access to water holes and springs but to allow the law of
9 prior appropriation to govern the allocation of excess waters in the springs and water holes the
10 PWRs control. Order of Determination, at 69, citing U.S. v. City and County of Denver, 656 P.2d
11 1. 31-32 (Colo. 1983). The State Engineer shows that the water court has held that PWRs contain
12 restrictions on use: they were created to prevent monopolization of vast land areas in the arid
13 states by providing a source of drinking water for animal and human consumption. Order of
14 Determination, at 68. The State Engineer also presents evidence to show that the PWRs contains
15 restriction in quantity: as the PWR is intended to provide public access to watering holes, it
16 applies only to sources capable of providing enough water for the general public.
17

18
19 The first guideline states that a right created by PWR 107 has a priority date commencing
20 with the executive order establishing PWR 107 and that PWR 107 does not establish rights for
21 water holes or springs which came into existence after that date. The Federal Government
22 contends the guideline is unclear and ambiguous. United States' Opening Memorandum, at 34.
23 This court disagrees. The State Engineer has properly grounded his regulation in the language of
24 PWR 107. It refers to land which contains a water hole, and not to land which might contain a
25 water hole. Hence, the State Engineer's regulation complies with NRS 532.120 (1).
26

27 The third guideline states that PWR 107 guidelines do not apply to artificially developed
28 water sources and apply only to human and animal consumption. The Federal Government



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1 contends the term "artificial" is not defined and that PWR 107 should apply to waterholes which
2 have been partially developed. United States' Opening Memorandum of Law, at 34. The Federal
3 Government does not offer any argument to support its claim that "artificial" is an unclear term or
4 that PWR 107 applies to artificially developed water holes. The State Engineer contends the
5 guideline comports with the purpose of PWR 107: securing public access to naturally occurring
6 water holes. As PWR 107 creates public access to land which "contains a spring or water hole",
7 this court finds the State Engineer's regulation reasonable per NRS 532.120 (1).
8

9 The fourth guideline limits PWRs to one per 40 acre subdivision of land and that contain
10 water fit for human or animal consumption. The Federal Government contends PWR 107 does
11 not contain any such limitations. The State Engineer's regulations, however, are reasonably
12 related to Congressional purpose in establishing PWRs. As shown, Congress established PWRs to
13 prevent the monopolization of water sources on public lands and it did so by reserving the
14 minimum amount of water necessary to do so. Hence, the State Engineer's limit on the number of
15 PWRs available reasonably accomplishes this goal. Congress created PWRs for human and
16 animal consumption. Requiring PWRs to contain potable water reasonably promotes this goal.
17

18 **4. SUBSTANTIAL EVIDENCE SUPPORTS THE STATE ENGINEER'S REJECTION OF**
19 **FEDERAL GOVERNMENT'S PROOFS NOS. R-04525, R-07325 AND R 07326.**
20

21 The Federal Government contends the State Engineer improperly denied proof R-07325
22 because he relied on his fourth regulation in doing so. The State Engineer properly established the
23 regulations, and he properly relied on it in denying the permit.
24

25 The Federal Government contends the State Engineer denied proof R-04525 without
26 adequately stating why and without finding there was no water available. The State Engineer
27 contends he rejected this claim pursuant to his fourth guideline and because the water had been
28 appropriated by the Hages pursuant to decree 5038.

The Federal Government contends the State Engineer improperly rejected proof R-07326 because its evidence shows this proof does not refer to the same water source or the same 40 acre subdivision as that claimed by Hage. The State Engineer contends evidence showed the source of this PWR was the same as that claimed by the Hages pursuant to decree 5038.

This Court agrees with the State Engineer's decisions regarding the 3 contested permits. The validity of decree 5038 constitutes substantial evidence for his rejection of permits R-04525 and R-07326. The validity of his regulations justify his rejection of permit R-07325.

5. THE STATE ENGINEER PROPERLY GAVE THE FOREST SERVICE WATER RIGHTS FOR THE MEADOW CREEK ADMINISTRATIVE SITE, THE BARLEY CREEK ADMINISTRATIVE SITE, AND SCUFFE'S ADMINISTRATIVE SITE.

Pursuant to the implied water rights doctrine, the State Engineer awarded the Forest Service water rights for the administrative sites it uses to manage the Toiyabe National Forest.

Under the implied water rights doctrine when Congress reserves land for a specific purpose, it impliedly reserves the amount of unappropriated, appurtenant water necessary to achieve that purpose. US. V. New Mexico, 438 U.S., 696, 700 57 L Ed 2d, 1052, 1056 (1978). For unappropriated, appurtenant water to be necessary, the primary purpose of the reservation must fail without the implied reservation of water. U.S. v. New Mexico, 438 U.S., 696, 700, 57 L Ed 2d, 1052, 1057 (1978).

Hage objects to the State Engineer's grant of water rights at the Barley Creek, Meadow Creek, and Scuffe's site. Hage contends that there was no unappropriated, appurtenant water available when Congress reserved the Toiyabe National Forest. Hage's Opening Brief, 3-4. Hage contends civil decrees 558 and 5058 establish this fact. *Id.* Hage argues that though the administrative sites help achieve the primary purpose of the Toiyabe National Forest, the administrative sites are not necessary to achieve that purpose. *Id.* To support this claim, Hage,



1 contends that administrative sites occupy undefined, variable locations and claims the Forest
2 Service is seeking to expand its water right via the administrative sites. Id.

3
4 The State Engineer properly awarded the Forest Service water rights for administrative
5 sites. The minimal amount of water the administrative sites use show unappropriated water was
6 available at the time Congress reserved the Toiyabe. As shown, Congress reserved the Toiyabe
7 National Forest to regulate the conflicts between sheep and cattle ranchers. It seems inconceivable
8 to accomplish this goal without rangers and horses, and it seems impossible to have rangers and
9 horses without water.

10 **6. THE STATE ENGINEER PROPERLY AWARDED WATER RIGHTS ON THE**
11 **WILDERNESS AREAS.**
12

13 The State Engineer awarded the Federal Government an implied water right to all
14 unappropriated water in the Alta Toquima and Table Mountain Wilderness Areas. State
15 Engineer's Answering Brief, at 27. The Nevada Wilderness Act seeks to keep the environs under
16 its ambit in a pristine, untrammelled state. Id. To accomplish this goal, the Act expressly reserved
17 the amount of water sufficient to fulfill the purposes of the wilderness areas created. Id.

18
19 Hage contends the water right the State Engineer awarded to the Forest Service is junior to
20 the Hage's water right. Hage contends that the Forest Service is attempting to expand its water
21 right and is concerned that the State Engineer cannot prevent the Forest Service from attempting to
22 expand its right. Hage also contends that the purpose of the Nevada Wilderness Act will not fail
23 without the water right. As the Nevada Wilderness Act itself prohibits future diversions of the
24 water in the Wilderness Area, an award of an implied water right is superfluous to the purposes of
25 the Nevada Wilderness Act. Hage contends the Forest Service claimed the water right as
26 necessary to manage the stream and stream side ecology. Such active management, says Hage,
27 does not preserve the wilderness areas in a pristine condition or natural state. Finally, Hage
28



CERTIFICATION OF SERVICE

The undersigned hereby certifies that on the 28th day of April, 2000, she mailed (or hand delivered) copies of the foregoing Order to the following:

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GERIE CLIFFORD, Secretary to
DISTRICT JUDGE

FIFTH JUDICIAL DISTRICT COURT
USMCINALDA, MINERAL AND NYE COUNTIES

