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Federal Regulatory Rights in Water

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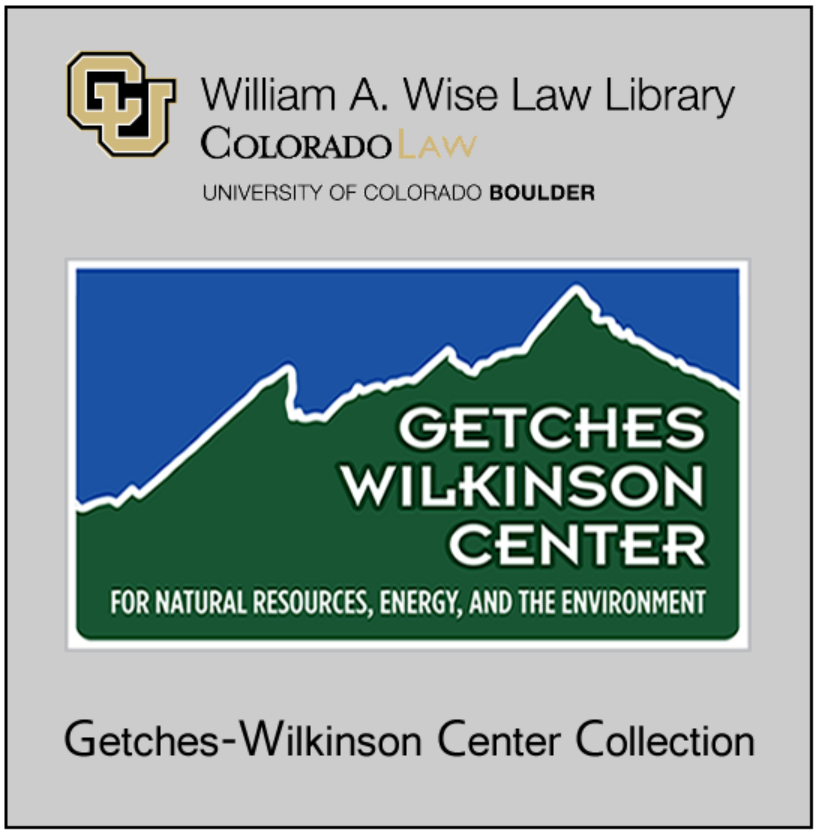

FEDERAL REGULATORY RIGHTS IN WATER

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WATER AS A PUBLIC RESOURCE: EMERGING RIGHTS AND OBLIGATIONS

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FEDERAL REGULATORY RIGHTS IN WATER

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I. Introduction

A. Summary

As a general matter, private rights to the use of water are determined by state law. Originally, federal interest in water extended only to matters involving navigation. Those interests expanded substantially in this century as the federal government became involved in the construction and management of reclamation projects, in the licensing of hydroelectric projects, and in the development of multipurpose river projects. Judicial recognition of water rights attached to reserved public lands also expanded federal interests in water. Most recently, Congress has enacted legislation aimed at achieving environmental protection which gives federal agencies expanded regulatory authority in a number of areas including water.

This outline addresses several areas in which the reach of federal regulatory authority has come into conflict with the traditional exercise of state created water rights. In particular, it discusses the federal laws and regulations relating to hydropower, endangered species, and water quality as they affect state water law. In these laws Congress has expressed its intention not to interfere with such water laws. Nevertheless the exercise of authority provided by these laws has, in some instances, conflicted with state water laws and the exercise of state-created water rights. Where this exercise is in furtherance of "clear and specific" requirements in these federal laws courts have indicated a willingness to tolerate "incidental effects" on such water rights. Congressional deference to state water law means that, wherever possible, federal agencies should seek solutions that minimize effects on state control of water or that maximize state involvement in achieving the solution. In turn, the states must make the necessary changes in their laws and policies to make this possible.

B. General References

1. Federal-state conflicts generally:
   Trelease, "Uneasy Federalism--State Water Laws and National Water Uses," 55 Washington L. Rev. 751 (1980);

Morreale, "Federal-State Rights and Relations," in R. Clark, 2 Waters and Water Rights (1967);

Trelease, "Federal Limitations on State Water Law," 10 Buffalo L. Rev. 399 (1961);

Note, "Federal-State Conflicts Over the Control of Western Waters," 60 Columbia L. Rev. 967 (1960);

Martz, "The Role of the Federal Government in State Water Law," 5 Kansas L. Rev. 626 (1957).

2. Hydropower

Whittaker, "The Federal Power Act and Hydropower Development: Rediscovering State Regulatory Powers and Responsibilities," 10 Harv. Env. L. Rev. 135 (1986);

Comment, "Hydroelectric Power, the Federal Power Act, and State Water Laws: Is Federal Preemption Water Over the Dam?" 17 U.C.D. L. Rev. 1179 (1984);

Wolfe, "Hydropower: FERC Licensing and Emerging State-Federal Water Rights Conflicts," 29 Rocky Mt. Min. L. Inst. 851 (1983).

3. Endangered Species

Tarlock, "The Endangered Species Act and Western Water Rights," 20 Land & Water L. Rev. 1 (1985).

4. Water Quality

White, "The Emerging Relationship Between Environmental Regulations and Colorado Water Law," 53 U. of Colo. L. Rev. 597 (1982).

5. Other

Wilkinson, "Western Water Law in Transition," 56 U. of Colo. L. Rev. 317 (1985).

II. Background

A. Federal Navigation Authority

1. In Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) the U.S. Supreme Court determined that Article I,

Section 8 of the U.S. Constitution relating to interstate commerce gave the federal government control over navigable waterways.

2. Federal interest centered primarily on protecting and improving navigation on these "public highways." The Rivers and Harbors Act of 1899 required federal permission for the construction of any bridge, dam, dike, or causeway in any navigable water of the United States.

3. The definition of "navigable waters" has broadened over the years. Thus, in 1870 the Supreme Court defined navigable waters as those that "are used or are susceptible of being used, in their ordinary condition, as highways of commerce." The Daniel Ball, 77 U.S. (10 Wall) 557, 563 (1870). An 1899 decision extended federal authority to nonnavigable reaches if downstream navigability was affected. United States v. Rio Grande Dam v. Irrig. Co., 174 U.S. 690 (1899). By 1940 the Court was willing to extend the navigation authority to waterways which could be made navigable if "reasonable improvements" were made. United States v. Appalachian Elec. Power Co., 311 U.S. 377, 407 (1940).

4. As one writer has summarized:

> Once navigation purposes are present, Congress may in effect use the waters of both

> navigable and nonnavigable streams for whatever purposes and in whatever manner it wishes. In so doing, it can completely override any state water law. It can prevent, in toto, state law from being applied to "federal" waters; or, on a lesser scale, it can prevent state law from being applied to federal waters in a particular situation where its application conflicts with the federal interest.

Morreale, "Federal-State Rights and Relations," in R. Clark, 2 Waters and Water Rights 11 (1967).

B. Other Sources of Federal Authority

1. Beginning with the Reclamation Act in 1902 the federal government began undertaking large water development projects bearing little or no relationship to navigation. The Supreme Court had little trouble finding sufficient constitutional authority for these federal activities.

2. To a considerable degree the navigation power has been subsumed by the larger commerce power. Thus for example, the Court upheld a Corps of Engineers flood control project on the Red River in Oklahoma saying: "Since the construction of this dam and reservoir is a valid exercise by Congress of its commerce power, there is no interference with the sovereignty of the state. . . and the suggestion that this project interferes with the state's own program for water development and conservation is of no avail. That program must bow before the 'superior power' of Congress." Oklahoma v. Guy

F. Atchinson Co., 313 U.S. 508 (1941).

3. In United States v. Gerlach Livestock Co., 339 U.S. 725 (1950) the federal reclamation program was sustained by reference to the spending and general welfare powers:

> Congress has a substantive power to tax and appropriate money for the general welfare, limited only by the requirement that it shall be exercised for the common benefit as distinguished from some mere local purpose. . . . Thus the power of Congress to promote the general welfare through large-scale projects for reclamation, irrigation, and other internal improvement, is now as clear and ample as its power to accomplish the same results indirectly through resort to strained interpretation of the power over navigation.

C. Federal Deference to State Water Law and Administration

1. Beginning with the Acts of 1866 and 1870 and the Desert Land Act of 1877 Congress has continually expressed its deference to state law in matters of water allocation.

2. Thus, section 8 of the 1902 Reclamation Act states:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right required thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws,. . . .

3. Section 9(b) of the Federal Power Act states:

> Satisfactory evidence that the applicant has

> complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act.

Section 27 of this act provides: "Nothing herein contained shall be construed as affecting or intending to affect or in any way interfere with the laws of the respective states relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

4. The 1944 Flood Control Act contains the following policy statement:

> In connection with exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized, to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers; to facilitate the consideration of projects on a basis of comprehensive and coordinated development; and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will result therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.

Similar language has been included in other water-related legislation.

5. In 1964 Senate hearings Senator Kuchel introduced material showing 37 statutes with language indicating Congressional intent to defer to state water laws in some way. Cited in United States v. New Mexico, 438 U.S. at 702 n.5. Compare the analysis of the significance of these materials in Note, "Federal Acquisition of Non-Reserved Water Rights After New Mexico," 31 Stan. L. Rev. 885 (1979) with Note, "Federal Nonreserved Water Rights," 48 U. of Chi. L. Rev. 758 (1981).

6. In the 1977 Clean Water Act, Congress included the following policy statement:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce, and eliminate pollution in concert with programs for managing water resources. 33 U.S.C. Section 1251 (b)(1982)

7. An effort was made to add similar language to the Endangered Species Act in 1982. Instead Congress chose to add only a policy statement emphasizing cooperation: "It is further declared to be the

policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species." 16 U.S.C. Section 1531 (c)(2)(1982).

III. Selected Federal Regulatory Programs

A. Hydroelectric Licensing

1. The Federal Water Power Act of 1920 established federal control over the use of navigable waters for electric power generation. Hydroelectric projects require a license from the Federal Energy Regulatory Commission (FERC) which is to be granted only if the proposed project is found to be

> best adapted to a comprehensive plan for improving or developing a water way or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public use, including recreational purposes. 16 U.S.C.-Section 803(a) (1982).

2. The 1946 case of First Iowa Hydro-Electric Cooperative v. Federal Power Commission (328 U.S. 152) held that the comprehensive federal scheme of control established by the Federal Power Act preempted an Iowa law, the application of which would have prevented construction of a

federally approved hydroelectric project.

3. In Federal Power Commission v. Oregon, 349 U.S. 435 (1955) (the Pelton Dam case) the Supreme Court sanctioned construction of a hydroelectric facility on federal reserved lands without regard for a state law requiring protection of anadromous fish.

4. In State of California v. Federal Power Commission, 345 F.2d 917 (9th Cir. 1965) the Ninth Circuit upheld a minimum streamflow condition imposed by the Federal Power Commission against the objection that this condition might interfere with water rights established under state law.

5. A recent declaratory order issued by the Federal Energy Regulatory Commission regarding the Rock Creek Project in Eldorado County, California, stated:

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

Rock Creek Limited Partnership (Project No. 3189-014), quoted in Western States Water, Issue #675,

April 24, 1987.

At issue was a decision by the California State Water Resources Central Board setting minimum bypass flow requirements for a hydroelectric project higher than those previously established by FERC.

6. Federal regulatory rights in this area are now long established and have been upheld by the courts on a number of occasions. Nevertheless, they are once again being challenged as overbroad.

   a. In particular it is argued that FERC should require applicants to first obtain necessary water rights from the state before applying for a FERC license and that conditions in FERC licenses regarding minimum streamflows should be integrated into state water rights schemes. See, Wolfe, "Hydropower: FERC Licensing and Emerging State-Federal Water Rights Conflicts," 29 Rocky Mt. Min. L. Inst. 851 (1983).

   b. It has been noted that, just as California v. United States, 438 U.S. 645 (1978) restored the preeminence of state water rights in the reclamation area, so too should the courts restore the primacy of state water rights in the hydroelectric area.

1) The focus of the 1978 decision was Section 8 of the Reclamation Act, which generally disclaims any intent to interfere with state laws regarding control, appropriation, or use of water. Justice Rehnquist concluded that this provision requires deferral "to the substance, as well as the form, of state water law."

2) The Federal Power Act contains very similar language in Section 27. It also requires in Section 9(b) that license applicants submit to the Commission evidence that the applicant has complied with state laws regarding appropriation, diversion, and use of water for power purposes.

3) Concern about the existence of a state permit power with the possibility for interference with federally sanctioned activities was recently turned aside in the case of California Coastal Commission v. Granite Rock Co. Though not mentioned, First Iowa was thereby implicitly narrowed to situations where the state law, either necessarily

or in application, makes the federally sanctioned activity impossible. The existence of a state permit requirement is not in itself impermissible.

4) Given this greater willingness by the Supreme Court to defer to state law until and unless there is actual conflict with federal law and regulation, there seems little reason not to have a hydropower project proponent obtain necessary state water rights in conjunction with obtaining the federal license.

5) Federally imposed minimum streamflows must be integrated into state water rights administration systems in order to assure their implementation and enforceability. Assuming that FERC in fact has adequate legal authority for requiring such minimum streamflows, such requirements should be integrated into the state legal system (if the state has a minimum streamflow provision).

B. Water Quality Regulation

1. Regulation aimed at protecting water quality may

affect the traditional exercise of water rights if that use of water causes a loss of dilution capacities, alters water temperatures, causes changes in dissolved oxygen levels, causes increased concentrations of minerals, causes changes in levels of suspended solids, or causes increases in alkalinity or salinity.

2. The federal Clean Water Act establishes a national program of water pollution control. Its major provisions are Section 402 (prohibiting the discharge of a pollutant from a point source without a permit), Section 208 (requiring water pollution from nonpoint sources to be remedied through broad-based, area-wide management plans), and Section 404 (subjecting the discharge of dredged or fill material into regulated waters to the permitting authority of the Army Corps of Engineers).

   All of these provisions provide the potential for federal regulatory control to affect private uses of water.

3. The CWA contains a general savings clause which states that: "Except as expressly provided in this chapter, nothing in this chapter shall . . . (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with

respect to the waters (including boundary waters) of such States." In addition an amendment (previously quoted) was added to the policy section in 1977 which states:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate the rights to quantities of water which have been established by any State. Federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce, and eliminate pollution in concert with programs for managing water resources.

a. The legislative history accompanying this amendment indicates Congressional awareness that requirements of the CWA "may incidentally affect individual water rights" and that the intent of the amendment is to emphasize that such effects should be limited to situations involving "legitimate and necessary water quality considerations."

b. In National Wildlife Federation v. Gorsuch, 693 F.2nd 156 (D.C. Cir. 1982), the federal circuit court ruled that EPA did not have to issue a Section 402 permit for discharges from dams since such discharges are not "pollutants" within the meaning of the CWA.

The court did reference Section 101(g) and stated: "We find specific indication in the Act that Congress did not want to interfere any more than necessary with state water management, of which dams are an important component."

c. The 10th Circuit in Riverside Irrigation District v. Andrews, 758 F.2d 508 (1985) agreed that the 1977 amendment indicated Congress's desire not to interfere with state water management "any more than necessary" but noted that its inclusion as a general policy statement "cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly stated purpose." Thus it is necessary to look to the CWA for such "clear and specific" requirements when presented with a possible conflict with state water management. The court added: "A fair reading of the statue as a whole makes it clear that, when both the state's interest in allocating water and the federal government's interest in protecting the environment are implicated, Congress intended an accommodation."

d. The 9th Circuit in United States v. Akers 785

F.2d 814 (1986) used the language from the legislative history to Section 101(g) to uphold an injunction preventing a California farmer from cultivating a wetlands area without first obtaining a Section 404 permit. It stated: ". . . any incidental effect on Akers' rights to state-allocated water from the Pit River is justified because protection of Big Swamp is the type of legitimate purpose for which the Act was intended."

4. To summarize, the federal interest in water quality protection is expressed in the CWA. Where the Act establishes clear and specific requirements as, for example, in the protection of wetlands, incidental effects on state water management systems are acceptable. State water rights systems cannot be used as a barrier to the achievement of specifically required water quality objectives.

5. State water quality programs also will have to be integrated with their water rights allocation systems.

   a. A California case demonstrates the nature of the issue. In United States v. State Water Resources Control Board, 227 Cal. Rptr. 161

(Cal. App. 1 Dist. 1986) the California Court of Appeals ruled that water rights in that state are clearly subject to control as necessary to achieve federal and state water quality standards.

b. At issue are amendments made to previously issued permits held by the U.S. Bureau of Reclamation and the California Department of Water Resources that would reduce direct diversion rights and require additional reservoir releases primarily to prevent salt water intrusion into the Sacramento-San Joaquin Delta.

c. In California, the state Water Resources Control Board is charged both with determining water rights and with establishing water quality standards. In 1978, the Board adopted a Water Quality Control Plan for the Sacramento-San Joaquin Delta and at the same time issued a decision which modified the BOR and DWR permits.

d. The California Appeals Court explicitly noted that the principal enforcement mechanism available to the Board for achieving water quality objectives is "its regulation of water <u>rights</u> to control diversions which

cause degradation of water quality." Moreover, it reads the Section 101(g) policy statement in the CWA as emphasizing that the major responsibility for regulating water quality has been left to the states so that water quality and water rights considerations may be better coordinated.

6. Thus, in the water quality area there are certain clear and specific requirements established by the CWA which are enforceable nationally. In cases of direct conflict between these requirements and state water management systems, accommodation is desirable but not required. The states themselves are free to establish their own programs for achievement of national objectives as well as additionally established state objectives. So long as national requirements are satisfied the approach taken by the state is a matter for each state to determine.

   a. Thus, in Colorado the legislature has explicitly attempted to ensure that water quality decisions are separated from water quantity determinations and the administration of existing water rights. Colo. Rev.-Stat. Sections 25-8-104, 103(14), 501, and 503(5). See White, "The Emerging

Relationship Between Environmental Regulations and Colorado Water Law," 53 U. of Colo. L. Rev. 597 (1982).

b. Consequently, in recent water court determinations regarding the transfer of substantial quantities of water from the Arkansas River basin for use in urban areas in the Platte River basin, effects on water quality in the Arkansas were not considered.

c. However, where federal permits are involved, compliance with federal and state standards must be considered in the environmental assessment. In the current permitting process for the Two Forks Project in Colorado the adequacy of the Colorado provisions for meeting federal requirements (such as the anti-degradation provision) is becoming an important issue.

C. Endangered Species Protection

1. The federal Endangered Species Act provides protection for threatened and endangered plant and animal species. 16 U.S.C. Sections 1531-1543. Any federal action likely to "jeopardize the continued existence of such. . .species. . .or result in the destruction or modification of habitat of such species. . ." is prohibited.

Moreover, the "taking" of any endangered species--defined to mean to "harass, harm, pursue, hurt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct"--is declared to be "unlawful for any person subject to the jurisdiction of the United States. . ."

2. Water development almost always entails federal permits. The issuance of such a permit must not be found to endanger a protected species or its habitat.

3. In Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978), the U.S. Supreme Court held that as the result of the ESA a major federal dam project could not be completed because its operation would result in the extinction of the only known population of an endangered species of fish, the snail darter.

   a. The court's language is very strong. For example, the court stated that "examination of the language, history, and structure of the legislation under review here indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities."

   b. Characterizing Section 7 of the ESA as an affirmative "command" to federal agencies to

insure that their actions do not jeopardize an endangered species, the court added: "This language admits of no exception."

4. Water development projects in certain wildlife sensitive areas in the West--primarily the Upper Colorado River Basin and the Platte River Basin--have been directly affected by the ESA.

   a. In the Upper Colorado there are three endangered species of fish--the Colorado squawfish, the humpback chub, and the bonytail chub.

   b. The species of primary concern in the Platte is the whooping crane.

   c. In both basins the Fish and Wildlife Service has maintained that, without mitigation, any additional water development will jeopardize the species of concern.

5. In the Upper Colorado the so-called "Windy Gap" process developed whereby projects would be given a "no jeopardy" opinion if they agreed to pay a one-time "depletion charge" based on the amount of water to be taken from the river sytem. The money would be used by FWS for its research and habitat improvement activities. Between 1981 and 1985 34 such agreements were entered into involving water depletions of 416,000 acre-feet per year and total

assessments of about $6 million. General Accounting Office, "Endangered Species: Limited Effect of Consultation Requirements on Western Water Projects" March 1987.

6. In the fall of 1986 the Upper Colorado River Basin Coordinating Committee (which includes representatives of FWS, BOR, the states of Colorado, Utah, and Wyoming, water development interests, and environmental organizations) issued a draft "Recovery Implementation Program for Rare and Endangered Fish Species in the Upper Colorado River Basin." The major activities to be undertaken under this program are: (1) provision of water needed to supply instream flows essential to support the fish through improved management of Bureau of Reclamation projects and acquisition of water rights; (2) habitat management and improvement; (3) propagation and stocking of the endangered fishes; (4) protection of endangered fishes through management of nonnative fish; and (5) improved research and monitoring activities.

   a. Of special interest, the instream flows to be established to protect the species are to be "appropriated, or acquired, and administered pursuant to State law and will, therefore, be legally protected as any water right under

State laws."

b. The plan proposes a $10 million fund for the purchase of water rights. The money must be appropriated by Congress.

7. In the Platte basin the conflicts between water development and endangered species protection appear to be more intractable.

a. Litigation involving the Grayrock Project in Wyoming was resolved through an agreement by which the project proponents agreed to establish a whooping crane trust fund of $7.5 million for maintaining and protecting the critical habitat of the whooping crane in Nebraska.

b. Litigation involving the proposed Wildcat Dam and Reservoir on a very small tributary of the South Platte River in northeastern Colorado extended over a five-year period and involved four separate legal decisions. At issue was a decision by the Army Corps of Engineers to require the project proponents to apply for a special permit rather than allow it to proceed under a nationwide permit under Section 404 of the CWA. The basis for the Corps' decision was a biological opinion rendered by the FWS stating that operation of

the project was likely to jeopardize continued existence of the whooping crane and adversely modify its critical habitat about 250 miles downstream. The 10th Circuit upheld the Corps' decision noting:

> The Endangered Species Act does not, by its terms, enlarge the jursidiction of the Corps of Engineers under the Clean Water Act. . . . However, it imposes on agencies a mandatory obligation to consider the environmental impacts of the projects that they authorize or fund.
> Riverside Irrigation District v. Andrews, 758 F.2d 508, 512 (10th Cir 1985).

8. Professor Tarlock has characterized the ESA as creating "regulatory property rights" in the federal government. "The Endangered Species Act and Western Water Rights," 20 Land and Water L. Rev. 1, 3 (1985). That is because the "federal government now has a new basis to claim that specific but undetermined amounts of water either be released from a reservoir or not be impounded."

9. In a March 1987 report the General Accounting Office concluded, on the basis of a detailed examination of consultations under the ESA involving water development projects between October 1977 and March 1985 that "no consultation. . .led to a project's termination, and in only 68 instances did a consultation contribute to

a project's delay, modification, or cost increase. This represents about two percent of the consultations involving water development projects during the period." At 16.

IV. Summary and Conclusions

A. While those of us from the West involved in water matters like to think that water issues somehow are unique, in fact it is just one of many areas in which conflicts arise between federal interests and state interests.

B. Of course, constitutionally speaking, the deck is stacked in favor of the federal government. Nevertheless this is an area in which the western states are clearly willing to go to battle to protect their perceived interests. Congress has accorded considerable deference to state interests in water matters and recently the Supreme Court has shown a more pronounced willingness to allow or at least tolerate a greater state role in areas which once might have been viewed to be exclusively federal.

C. A useful summary of factors to be considered (by the federal government) in an analysis of federal-state conflicts was provided in a Justice Department memorandum regarding federal reserved and nonreserved water rights:

> The extent to which federal programs can be or have been adapted to state law; the role played by the federal government, the significance of the federal interests at stake, and the risks to federal goals and interests posed by application of state law; and the extent to which application of federal rules will disrupt private expectations. Olsen Memorandum at 77.

D. As the 10th Circuit noted in Riverside, what is needed is to find an "accommodation" of federal and state interests.

1. In the first instance, the burden of making this accommodation is placed on the responsible federal agency--FERC, EPA, Corps of Engineers, and Fish and Wildlife Service.

2. To a considerable degree such accommodations will have to be worked out on a case-by-case basis.

3. It must necessarily be based on the directives in the relevant legislation. Where those directives are very explicit, the responsible federal agency will nave little discretion in their implementation.

4. At the same time, in the context of water, it is relevant to recognize that Congress has stated its desire to minimize interference with state water law.

E. One significant issue the states must address to make this accommodation possible is whether they are willing to make necessary adjustments in their own laws. Many

of these laws are based upon a view of water rights that is no longer tenable. As Professor Tarlock has stated:

> What seems to be emerging out of recent water adjudication is that state-created water rights are not different from any other property rights despite the vast energy dissipated by western water lawyers to will a contrary result. Thus, state water rights are not immune from the retroactive application of state police power or of federal constitutional authority.
> "The Endangered Species Act and Western Water Rights," 20 Land and Water L. Rev. 1, 17 (1985).

F. It seems to me that a key to the ability of the states to protect their interests in water is their ability to adapt their systems in ways that permit them to maintain primary control while at the same time addressing the dominant federal interests.

G. I am encouraged by the kind of effort represented by development of the draft recovery plan on the Upper Colorado.

1. It represents more than two years of hard bargaining among federal, state, and private interests.

2. While still a long way from being implemented, it sets forth a concrete program for achieving the dominant federal objective (recovery of endangered species of fish) while accommodating state concerns about maintaining control of their water rights systems by assuring that instream flows are

managed within the state water law system. It is not purely coincidental that both Utah and Wyoming passed legislation establishing systems permitting instream flows in 1986.

H. As a general matter the federal agency should not be especially concerned with the approach taken to achieve congressionally mandated objectives and requirements. Given congressional recognition of the special concern for state control of its water, federal agencies should seek solutions that minimize effects on state control of water or that maximize state involvement in achieving the solution. In turn the states must make necessary changes in their water law to make this possible.