

RESOLUTION
on the
Federal Government's Role in Expediting State General Stream Adjudications
October 21, 2005

WHEREAS, the Western States Water Council, representing eighteen western states, most of which are actively engaged in general stream system adjudications, wish to hereby communicate their recommendations on how the federal government might help expedite such adjudications in the West; and

WHEREAS, states in the West have developed comprehensive judicial and administrative proceedings (general stream adjudications) to quantify and document relative water rights within basins, including rights to waters claimed by the United States under either state or federal law; and

WHEREAS, these adjudications are typically complicated, expensive civil court and/or administrative actions that involve hundreds or even tens of thousands of claimants, but such adjudications give certainty to water rights, provide the basis for water right administration, reduce conflict over water allocation and water usage, and incidentally facilitate important market transactions for water rights in the West; and

WHEREAS, Congress recognized the benefits of state general adjudication systems and by adoption of the McCarran Amendment (43 U.S.C. §666), required the federal government to submit to state court jurisdiction for the adjudication of its water right claims; and

WHEREAS, although water right claims by federal agencies are often the largest and/or most complex claims in state general adjudications, the United States Supreme Court, in the case of *United States v. Idaho*, 508 U.S. 1 (1992), determined that the McCarran Amendment does not require the United States to pay filing fees, which pay for a portion of the costs associated with conducting adjudications; and

WHEREAS, this holding means that the cost of adjudicating some of the most difficult claims in a state general adjudication has shifted entirely to private water users and state taxpayers, representing a drain on the resources of states which significantly inhibits the ability of both state and federal agencies to protect private and public property interests; and

WHEREAS, because they are not subject to fees and costs like other water users in the adjudication, federal agencies have filed questionable claims that may have been otherwise tempered;

WHEREAS, western states have attempted to address this problem in the Congress, where bills have been introduced to require all federal agencies filing water right claims in state adjudications to pay fees and costs to the same extent as a private party to the same proceeding; however, this proposal, as well as alternative legislation developed by New Mexico to provide federal funding support to states for general stream adjudications, based on a formula assessing the relative need for such support, have not advanced within Congress as yet.

NOW THEREFORE BE IT RESOLVED that the Western States Water Council recommends policy changes at the federal level as follows:

1. As a matter of policy, federal agencies should pay a fair share of the costs associated with adjudicating their claims in state adjudications. One alternative would be to establish a uniform federal fee structure, which we recognize may require that the money for such fees be diverted from some other federal programs. A federal representative should be designated to work with western state water administrators either to establish an equitable uniform fee structure for adjudicating federally held water rights or to devise some other means of providing for federal payment of a fair share of adjudication costs, and to help identify sources of federal funds for such fees. Importantly, the federal government has discretion to adopt such a policy as a matter of fairness, even though not presently required to do so by law. Payment of filing fees by federal agencies was in fact a common practice prior to the unfortunate U. S. Supreme Court ruling on the Forest Service claims in Idaho.
2. The federal government should not pursue separate actions in federal court that deal with the subject matter of a state court adjudication during the pendency of the adjudication, such as the Lower Rio Grande quiet title action filed in 1997 in federal district court in New Mexico and the 2001 Adair filings in federal district court in Oregon. Such actions divert substantial resources from state adjudications and are contrary to the intent of the McCarran Amendment.
3. Negotiations and mediation often occur with regard to federal claims within the context of ongoing adjudications. To be effective, there must be high-level federal involvement in such negotiations. Experience has shown that without the involvement of federal participants who have the authority to make decisions, achieving agreements can be illusory and delay mutually beneficial outcomes. Policy direction must be provided by the relevant federal agencies.
4. Federal agencies should be given policy direction to ensure that federal claims filed in state adjudications have a sound basis in fact and law. States continue to encounter claims by the Forest Service which are entirely inconsistent with the United States Supreme Court holding in *United States v. New Mexico*. We believe that direction to follow the holding of *United States v. New Mexico* would avoid questionable claims that can be very costly to evaluate, thus diverting limited state resources from completing general stream adjudications, and which are ultimately of no benefit to the United States.
5. Another way to ensure that claims have a sound basis in fact, and also to facilitate timely review of those claims is to require that the federal government provide whatever evidence it may have to substantiate its claims at the time of filing. Given the complexity and the contentiousness involving such claims, we believe states are justified in asking the federal government to take this step. Doing so will expedite the process in two ways: (1) it will minimize the filing of questionable claims in the first place; and (2) it will provide a basis for states to ascertain early-on the level of resources that states need to commit to the investigation of such claims.