

October 27, 2005

Position #272(b)  
(See also Position #247)

The Honorable Gale A. Norton, Secretary  
U.S. Department of the Interior  
1849 C Street, NW  
Washington, DC 20240

and

The Honorable Alberto R. Gonzales  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

Dear Secretary Norton and Attorney General Gonzales:

I am writing on behalf of the Western States Water Council to communicate some suggestions on how the federal government might help expedite state general stream systems adjudications in the West. While the suggestions should not be viewed as a comprehensive listing, the steps we have identified, if implemented, would accelerate achievement of the mutually beneficial goal of quantifying the amounts, priorities, and other elements of water rights in river basins of the West. We hope to engage in further discussions with you regarding this important objective.

First, some background may be helpful for those with whom you may choose to share this letter. States in the West have developed comprehensive judicial and administrative proceedings (general stream adjudications) to quantify and document relative water rights within basins, including the rights to waters claimed by the United States under either state or federal law. These adjudications are typically complicated, expensive civil court and/or administrative actions that involve hundreds or even tens of thousands of claimants. 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. 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.

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. 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. This drain on the resources of states and lack of federal government financial support significantly inhibit the ability of both state

and federal agencies to protect private and public property interests. This is nowhere more evident than in the Klamath Basin where approximately 400 of the 700 claims being adjudicated are federal claims. The complexity of these federal claims, coupled with a series of lawsuits filed in federal court by federal agencies, has significantly delayed the state adjudication. Further, 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. In Idaho, for example, the Forest Service initially filed 3,700 last-minute claims in the Snake River Basin adjudication just prior to the initial court action on the adjudication fee issue. After the Forest Service used these last-minute claims to quantify the fiscal impact of paying fees and after the State of Idaho incurred considerable expense investigating these claims, the Forest Service withdrew all but 61 of the claims, and the state adjudication court has since dismissed all but 9 of the claims.

With this background, the western states have attempted to address this problem in the Congress. Bills were introduced in the Congress 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. These proposals did not advance within the Congress as yet, and so we would like to suggest some policy changes for this Administration's consideration as follows:

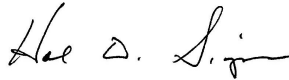
1. As a matter of policy, federal agencies should pay a fair share of the costs associated with adjudicating their claims in state adjudications. One alternative would be to establish a uniform federal fee structure, which we recognize may require that the money for such fees be diverted from some other 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.

We are anxious to engage in further discussions regarding these matters with you and/or your representatives. We look forward to hearing from you in this regard.

Sincerely,



Harold D. (Hal) Simpson, Chair  
Western States Water Council