

WATER USE PRACTICES ON BUREAU OF RECLAMATION PROJECTS

OVERSIGHT HEARING
BEFORE THE
SUBCOMMITTEE ON
OVERSIGHT AND INVESTIGATIONS
OF THE
COMMITTEE ON
NATURAL RESOURCES
HOUSE OF REPRESENTATIVES
ONE HUNDRED THIRD CONGRESS
SECOND SESSION
ON
WATER USE PRACTICES ON BUREAU OF RECLAMATION PROJECTS

HEARING HELD IN WASHINGTON, DC
JULY 19, 1994

Serial No. 103-101

Printed for the use of the Committee on Natural Resources



U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1994

84-879

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-046383-1

COMMITTEE ON NATURAL RESOURCES

GEORGE MILLER, California, *Chairman*

PHILIP R. SHARP, Indiana	DON YOUNG, Alaska,
EDWARD J. MARKEY, Massachusetts	<i>Ranking Republican Member</i>
AUSTIN J. MURPHY, Pennsylvania	JAMES V. HANSEN, Utah
NICK JOE RAHALL II, West Virginia	BARBARA F. VUCANOVICH, Nevada
BRUCE F. VENTO, Minnesota	ELTON GALLEGLY, California
PAT WILLIAMS, Montana	ROBERT F. (BOB) SMITH, Oregon
RON DE LUGO, Virgin Islands	CRAIG THOMAS, Wyoming
SAM GEJDENSON, Connecticut	JOHN J. DUNCAN, Jr., Tennessee
RICHARD H. LEHMAN, California	JOEL HEFLEY, Colorado
BILL RICHARDSON, New Mexico	JOHN T. DOOLITTLE, California
PETER A. DeFAZIO, Oregon	WAYNE ALLARD, Colorado
ENI F.H. FALEOMAVAEGA, American Samoa	RICHARD H. BAKER, Louisiana
TIM JOHNSON, South Dakota	KEN CALVERT, California
LARRY LAROCCO, Idaho	SCOTT MCINNIS, Colorado
NEIL ABERCROMBIE, Hawaii	RICHARD W. POMBO, California
CALVIN M. DOOLEY, California	JAY DICKEY, Arkansas
CARLOS ROMERO-BARCELÓ, Puerto Rico	
KARAN ENGLISH, Arizona	
KAREN SHEPHERD, Utah	
NATHAN DEAL, Georgia	
MAURICE D. HINCHEY, New York	
ROBERT A. UNDERWOOD, Guam	
SAM FARR, California	
LANE EVANS, Illinois	
PATSY T. MINK, Hawaii	
THOMAS J. BARLOW III, Kentucky	
THOMAS M. BARRETT, Wisconsin	

JOHN LAWRENCE, *Staff Director*
STANLEY SCOVILLE, *General Counsel*
DANIEL VAL KISH, *Republican Staff Director*

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

GEORGE MILLER, California, *Chairman*

SAM GEJDENSON, Connecticut	ROBERT F. (BOB) SMITH, Oregon,
CALVIN M. DOOLEY, California	<i>Ranking Republican Member</i>
NATHAN DEAL, Georgia	JAMES V. HANSEN, Utah
PHILIP R. SHARP, Indiana	BARBARA F. VUCANOVICH, Nevada
BRUCE F. VENTO, Minnesota	JOHN J. DUNCAN, Jr., Tennessee
RICHARD H. LEHMAN, California	JOHN T. DOOLITTLE, California
PETER A. DeFAZIO, Oregon	WAYNE ALLARD, Colorado
KARAN ENGLISH, Arizona	KEN CALVERT, California
KAREN SHEPHERD, Utah	RICHARD W. POMBO, California
MAURICE D. HINCHEY, New York	JAY DICKEY, Arkansas
NEIL ABERCROMBIE, Hawaii	
LANE EVANS, Illinois	
THOMAS M. BARRETT, Wisconsin	

JOHN LAWRENCE, *Staff Director*
J. STEVENS LANICH, *Professional Staff Member*
LINCA GORDON STEVENS, *Clerk*
TED CASE, *Republican Consultant on Oversight & Investigations*

CONTENTS

HEARING HELD: JULY 19, 1994

	Page
Member statements:	
Hon. George Miller	1
Hon. James V. Hansen	9
Hon. Robert F. (Bob) Smith	12
Witness statements:	
Hon. Michael Crapo, a Representative in Congress from the State of Idaho	14
Panel consisting of:	
Joyce N. Fleischman, Acting Inspector General, U.S. Department of the Interior	23
Prepared statement of Ms. Fleischman	26
Daniel P. Beard, Commissioner, Bureau of Reclamation, U.S. Department of the Interior	32
Prepared statement of Mr. Beard	34
Panel consisting of:	
A. Reed Marbut, Administrator, Water Rights/Adjudication Division, Oregon Water Resources Division, Salem, OR	49
Prepared statement of Mr. Marbut	51
Antone Minthorn, Chairman, General Council, Confederated Tribes of the Umatilla Indian Reservation (CTUIR), Pendleton, OR, accompanied by Becky Hiers, Umatilla Basin Project Policy Analyst, CTUIR Department of Natural Resources	60
Prepared statement of Mr. Minthorn and attachments	64
Louie Dick, Jr., Member, Board of Trustees, Confederated Tribes of the Umatilla Indian Reservation, Pendleton, OR	134
Panel consisting of:	
Richard L. Erickson, Manager, East Columbia Basin Irrigation District, accompanied by Richard B. Stevens, Director, Quincy-Columbia Basin Irrigation District, Quincy, WA, Jack Yorgesen, Director, South Columbia Basin Irrigation District, and Shannon McDaniel, Manager, South Columbia Basin Irrigation District	142
Prepared statement of Mr. Erickson	145
Katherine P. Ransel, Co-Director, American Rivers, Northwest Regional Office, Seattle, WA	148
Prepared statement of Ms. Ransel	152
Rick Gove, Water Conservation Associate, Columbia Basin Institute, Portland, OR, accompanied by William Bean, President, Columbia Basin Institute	172
Prepared statement of Columbia Basin Institute	176
Panel consisting of:	
Gail L. Achterman, Oregon Water Resources Congress, Salem, OR	207
Prepared statement of Ms. Achterman	210
Legal Issues Outline, Water Spreading Task Force	219
Reed Benson, Coordinator, WaterWatch of Oregon, Portland, OR	229
Prepared statement of Mr. Benson	232
Sheri L. Chapman, Executive Director, Idaho Water Users Association, Inc., Boise, ID	246
Prepared statement of Mr. Benson	249

APPENDIX

JULY 19, 1994

Additional material submitted for the hearing record from:	
Hon. Doug Bereuter, a Representative in Congress from the State of Nebraska: Prepared statement	261
Hon. Jay Dickey, a Representative in Congress from the State of Arkansas	263

IV

Additional material submitted for the hearing record from—Continued

Joyce N. Fleischman, Acting Inspector General, U.S. Department of the Interior:

1. Office of Inspector General Audit Report, "Irrigation of Ineligible Lands, Bureau of Reclamation" (No. 94-I-930), July 1994	264
2. Letter from Ms. Fleischman to Chairman Miller dated July 21, 1994, in response to hearing questions	290
Columbia Basin Institute: Supplemental statement dated December 5, 1994	295
Confederated Tribes of the Umatilla Indian Reservation:	
1. Supplemental testimony of Chairman Antone Minthorn dated August 2, 1994	302
2. Supplemental testimony submitted by Daniel W. Hester, Tribal Attorney Richard L. Erickson, Secretary-Manager, East Columbia Basin Irrigation District: Supplemental statement of the East Columbia Basin Irrigation District, Quincy-Columbia Basin Irrigation District, and South Columbia Basin Irrigation District dated July 29, 1994 [Editor's note.—Aerial photographs of Columbia Basin Project farm units overlaid with land classification map, spring 1994, may be found in the committee's archival records]	318
Umatilla Basin Irrigation Districts: Prepared statement of Tom Myrum, Coordinator	331
Hon. George Miller, Chairman, Committee on Natural Resources: Letter to Chairman Miller from Mary Riveland, Director, Department of Ecology, State of Washington, dated July 18, 1994	336
Idaho Rivers United: Prepared statement of Marti L. Bridges, Water Policy Director	339
Becky Hiers, Umatilla Basin Project Policy Analyst: Photographs of Umatilla River, Wetland Dam (upstream and downstream) and Powder River, below Thief Valley Dam/Baker Project submitted by Ms. Hiers may be found in the committee's archival records.	
Committee on Natural Resources:	
1. May 1994 Majority Staff Report of the Task Force on Bonneville Power Administration of the Natural Resources Committee, "BPA At A Crossroads" (Committee Print No. 7, pp. 37-43)	344
2. "Water Conservation for Instream Recapture on the Bureau of Reclamation's Columbia Basin Project: Opportunities and Obstacles," by the Columbia Basin Institute	352
3. "Water Spreading" by the Bureau of Reclamation, Department of the Interior, dated June 1994	358
4. "Umatilla Basin Report," by Anne Perrault, WaterWatch of Oregon	373
5. "Making a Wrong Thing Right: Ending the Spread of Reclamation Project Water," Reed D. Benson and Kimberley J. Priestley, WaterWatch of Oregon	410
6. Letter from Richard L. Erickson, Secretary-Manager, East Columbia Basin Irrigation District, to Chairman Miller dated June 7, 1994	438
7. Memorandum with attachment from James Ganulin, General Counsel-Assistant General Manager, Westlands Water District, to Fred Hatfield, dated June 29, 1994	440
8. Letter from John R. Donaldson, Ph.D., Executive Director, Columbia Basin Fish and Wildlife Authority, to Walt Fite, Bureau of Reclamation, Pacific Northwest Region, dated July 12, 1994	448
9. Letter from Kaleen Cottingham, Supervisor, Washington State Department of Natural Resources, to Walt Fite, Bureau of Reclamation, Pacific Northwest Region, dated July 15, 1994	451
10. Letter with enclosure from John R. Donaldson, Ph.D., Executive Director, Columbia Basin Fish and Wildlife Authority, to Chairman Miller, dated July 29, 1994	453
11. Letter from Hon. Jay Inslee to Chairman Miller dated August 22, 1994	461
12. Letter from Chairman Miller to Hon. Jay Inslee dated August 23, 1994	462

Additional material submitted for the hearing record from—Continued
Committee on Natural Resources—Continued

13. Letter from Hon. Peter DeFazio, a Representative in Congress from the State of Oregon, and Chairman, Task Force on Bonneville Power Administration, to Daniel P. Beard, Commissioner, Bureau of Reclamation, dated October 12, 1993	464
14. "Water Spreading Stirs Controversy," <i>Capitol Press</i> , June 10, 1994	466
15. "Irrigators Concerned About Bureau of Reclamation Policy," <i>Associated Press</i> , July 11, 1994	468
16. "Columbia Basin Water Users Worry About Policy Change," <i>Columbia Basin Herald</i> , July 12, 1994	469
17. "U.S. Wrongly Diverted Water to Western Farms," <i>The Denver Post</i> , July 26, 1994	471
18. "Excess Water Use in West Kicks Up Dust," <i>The Christian Science Monitor</i> , August 5, 1994	472
19. "Babbitt Says Congress Is Likely To Act on Water Abuse," <i>Associate Press</i> , August 6, 1994	473
20. "Reclamation Bureau Halts Irrigation Action," <i>The Oregonian</i> , September 29, 1994	474
21. "Water Spreaders—Reclamation Threatens Umatilla Basin Offenders," <i>Tri-City Herald</i> , October 12, 1994	475

WATER USE PRACTICES ON BUREAU OF RECLAMATION PROJECTS

TUESDAY, JULY 19, 1994

**HOUSE OF REPRESENTATIVES,
COMMITTEE ON NATURAL RESOURCES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
*Washington, DC.***

The subcommittee met, pursuant to call, at 9:51 a.m. in room 1324, Longworth House Office Building, Hon. George Miller (chairman of the subcommittee) presiding.

STATEMENT OF HON. GEORGE MILLER

Mr. MILLER. The Subcommittee on Oversight and Investigations will come to order for the purposes of conducting a hearing on water use practices on Bureau of Reclamation projects.

In particular, the practice known as "water spreading" will be discussed this morning. Water spreading is best known and has been investigated most aggressively in the Pacific Northwest and I think that is reflected in today's witness list.

There are many definitions and perceptions of water spreading and the practice takes many forms. In general, the term "water spreading" refers to any number of ways in which the Bureau of Reclamation project water is delivered to lands that are not legally eligible to receive project water.

Each Bureau project has its own unique history and was built to serve a certain set of circumstances and to meet special needs. All of the projects in the 17 Reclamation states share the common foundation of Reclamation law. These projects were constructed with Federal tax dollars to make water available for specific purposes under specific conditions. If conditions for project water users change, then there are opportunities to revise water delivery repayment contracts with the United States or to change the law.

Reclamation laws and Bureau projects do not convey special privileges to anybody. There are no special licenses in the Reclamation program. There are no special opportunities for those who might wish to receive special treatment or to carve out special arrangements as a matter of convenience.

Abuses to the acreage limitation provisions of the Reclamation law have been thoroughly documented by this committee, and Congress has responded to those abuses with changes in the law. It is the intent and responsibility of this committee to carefully consider other situations which may constitute abuses or violations of Rec-

lamation law and to consider further changes to the law if it is appropriate.

[Prepared statement of Mr. Miller follows:]

Statement of Congressman George Miller

July 19, 1994

The purpose of this hearing of the Subcommittee on Oversight and Investigations is to receive testimony on various water use practices on Bureau of Reclamation projects.

In particular, the practice known as "water spreading" will be discussed this morning. Water spreading is best known and has been investigated most aggressively in the Pacific

Northwest, a fact obviously reflected by this morning's witness list.

There are many definitions of "water spreading", and the practice apparently takes many forms. In general, the term "water spreading" refers to any number of ways in which Bureau of Reclamation project water is delivered to lands that are not legally eligible to receive project water.

Each Bureau project has its own unique history and was built to serve a certain set of circumstances, and to meet special needs. However, all of these projects in the 17 Reclamation states share the common foundation of Reclamation law. These projects were constructed with federal tax dollars to make water available for specific purposes under very specific conditions. If conditions for project water users change, there are opportunities to revise water delivery or repayment contracts with the United States, or to change the law.

Reclamation law and Bureau projects do not convey special privileges on anybody. There are no special licenses in the Reclamation program, and no special opportunities should be granted to those who might wish to receive special treatment or carve out special arrangements as a matter of convenience.

Abuses to the acreage limitation provisions of Reclamation law have been thoroughly documented by this Committee, and Congress has responded to those abuses with changes

to the law. It is the intent and responsibility of this Committee to carefully consider other situations that may constitute abuses or violations of Reclamation law, and to consider further changes to the law if that is appropriate.

I welcome the opportunity of hearing from our witnesses this morning.

Mr. MILLER. I welcome the opportunity to hear from our witnesses. First, however, member statements will be inserted into the record.

[Prepared statements of Mr. Smith and Mr. Hansen follow:]

**TESTIMONY OF CONGRESSMAN JAMES HANSEN]
BEFORE THE SUBCOMMITTEE
ON OVERSIGHT AND INVESTIGATION
JULY 19, 1994**

**MR. CHAIRMAN, TODAY WE WILL HEAR TESTIMONY ON
WATER USE PRACTICES ON BUREAU OF RECLAMATION
PROJECTS KNOWN AS "WATER SPREADING." I HAVE SEVERAL
CONCERNS REGARDING THIS ISSUE.**

**FIRST, THERE ARE MANY PROJECTS THAT ARE
PRESENTLY CONSIDERED MODEL PROJECTS. THESE PROJECTS
ARE WELL PLANNED AND SERVE CUSTOMERS CULINARY,
IRRIGATION, SECONDARY AND INDUSTRIAL WATER NEEDS. IT
IS MY CONCERN THAT PROJECTS AND RECLAMATION HAVE
HAD A GOOD WORKING RELATIONSHIP AND THAT THE OVER-
SIGHT RELATIONSHIP MAY BE JEOPARDIZED BY
RECLAMATION CLAIMING A "LACK OF AUTHORITY" TO GIVE
SUCH DIRECTION.**

**SECOND, THERE HAS BEEN DISCUSSION UNDER THE
WATER SPREADING POLICY THAT ALL PARCELS IRRIGATED
WHICH ARE FIVE ACRES OR LESS MAY BE CONSIDERED M & I
USE REGARDLESS OF ACTUAL USE, UNLESS A CERTAIN
INCOME THRESHOLD FOR AGRICULTURAL IRRIGATION IS**

MET. ALSO, LANDS ONCE IRRIGATED FOR CROPS WHICH ARE NOW SMALL RESIDENTIAL/PASTURE UNITS, GOLF COURSES, CEMETERIES OR OTHER USES WILL BE CONSIDERED M&I USE AND BE UNAUTHORIZED. RECLAMATION ANTICIPATED AND PLANNED THIS CONVERSION FROM AGRICULTURAL TO M&I USE AND BE UNAUTHORIZED. RECLAMATION ANTICIPATED AND PLANNED THIS CONVERSION FROM AGRICULTURAL TO M&I USE FROM THE BEGINNING OF MANY PROJECTS. SECONDARY IRRIGATION WATER SYSTEMS WERE ORIGINALLY BUILT BY RECLAMATION FOR USE OF AGRICULTURAL WATER.

LANDS CURRENTLY BEING SERVED WATER BY THE DISTRICT MAY BE RULED AS "UNAUTHORIZED LANDS." I BELIEVE THAT A WATER SPREADING POLICY SHOULD BE SUFFICIENTLY PROGRESSIVE AS TO ALLOW A COOPERATION BETWEEN DISTRICTS AND RECLAMATION TO OBTAIN NECESSARY AUTHORIZATIONS FOR CONTINUED USE OF WATER ON "UNAUTHORIZED LANDS," WHERE PRACTICAL. TECHNOLOGY ADVANCES IN IRRIGATION AND LAND USE HAVE ALWAYS ENCOURAGED RECLAMATION AND WOULD SEEM IRRESPONSIBLE NOW TO IGNORE THIS EMPHASIS AND NOT TRY TO FIRST HELP BEFORE PENALIZING THE WATER USERS.

WATER SPREADING HAS PROBABLY OCCURRED TO SOME EXTENT IN MANY DISTRICTS. IN MOST CASES THIS HAS BEEN DONE IN GOOD FAITH AND OFTEN RELYING ON THE BUREAU OF RECLAMATIONS DIRECTION. A PRACTICAL AND LOGICAL WATER SPREADING POLICY IS POSITIVE, BUT I AM CONCERNED THAT THE POLICY SHOULD NOT BE USED AS A METHOD OF TAKING WATER AWAY FROM RECLAMATION PROJECTS AND REALLOCATE SUCH WATER FOR OTHER USES.

**STATEMENT OF CONGRESSMAN ROBERT F. (BOB) SMITH
OVERSIGHT AND INVESTIGATIONS SUBCOMMITTEE
WATER SPREADING ON BUREAU OF RECLAMATION PROJECTS
JULY 19, 1994
1324 LONGWORTH HOB**

Mr. Chairman,

Thank you for holding this hearing today on the issue of water spreading.

It seemed that everywhere I went in Oregon over the July 4th recess, farmers were concerned about water spreading. They are concerned because they believe that the Bureau of Reclamation is going to pursue a policy that will take away their water.

The farmers in Oregon who use Bureau projects believe we can work out a solution to this issue, but that they don't want to shoulder all the financial burden for something the Bureau has helped perpetuate.

They also know that a waterspreading policy that may work in Oregon, probably will not work in other reclamation states. This issue is far too complex to issue a blanket policy. Just ask Secretary Babbitt what happens when you try to dictate a grazing policy with national standards and guidelines. Maybe it's time that this Administration learn from its mistakes.

Yes, there are some individuals who are willfully and unlawfully using federal project water. But these are isolated cases that can be dealt with swiftly by the Bureau. If this Administration wants to exploit this issue so that their war on the west includes small irrigators, I think they have badly miscalculated again.

Shutting down the federal timber program and pricing the small cattle rancher off the land is one thing, taking away people's water is something else altogether, particularly when the Bureau of Reclamation has been a full and willing participant.

The Bureau of Reclamation has noted that irrigation of unauthorized land typically occurs through slow, gradual changes and is not readily apparent because additional water is not used.

They also concede that it may be impossible as a practical matter to avoid irrigating small tracts of lands that are not initially eligible for irrigation. So let's be straight about what is happening here. It's not a conspiracy by farmers to bilk the taxpayers, but rather a complex situation that has evolved since we reclaimed the arid west.

It's unfortunate that the Inspector General's report we will hear about today won't really give us an accurate picture of the situation. In fact, this report contains numbers about losses to the Treasury from waterspreading that are about as accurate as Italy's last penalty kick in the World Cup soccer match. That is, they are way off the mark. The water users have made a much greater financial contribution than the Inspector General has given them credit for. I hope today we can clear up the IG's distortions.

Mr. Chairman, I am confident that we can work out a waterspreading policy that will protect everyone's interest without destroying small agricultural producers that depend on Bureau water. I look forward to the testimony we will hear today.

Mr. MILLER. Congressman Crapo, welcome to the committee. We look forward to your testimony.

**STATEMENT OF HON. MICHAEL CRAPO, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF IDAHO**

Mr. CRAPO. Thank you, Mr. Chairman. And I do have written remarks which I would like to submit for the record.

Mr. MILLER. Without objection.

Mr. CRAPO. Mr. Chairman, thank you for allowing me to testify before the subcommittee. I recognize the heavy schedule that we are all trying to keep these days. So I will not go through all the remarks that I submit.

But I do want to make one point very forcefully. In the past, Congress has repeatedly demonstrated a sensitivity to the need for stability to the western States for the regulation of their water supplies by deferring to State law. However, this year we have seen repeated challenges to that principle of acquiescing to State water management. In fact, this is the third time this month that I have testified before a congressional committee concerning potential Federal intrusion into Idaho sovereignty over its water.

I am deeply concerned that the present administration and, in some cases, others are setting the stage for ignoring long-established statutory provisions concerning State water rights and State water contracts. The traditional means for resolving water disputes seem to be being undercut. Currently, the Endangered Species Act, the Clean Water Act, Salmon Recovery Plans, Rangeland Reform, and proposed wilderness legislation and others are just a few of the current vehicles that are being used to erode State sovereignty over water.

It is imperative that States maintain sovereignty over management and control of their water and reserve systems. All rights to water or reservations of rights for any purposes in the State of Idaho should be subject to the substantive and procedural laws of the State of Idaho, not the Federal Government.

Being a semi-arid State, Idaho's growth and development has been intimately linked to, and sometimes totally dependent upon, water and its variable ability. Unfortunately, the activities of many now threaten the future of Idaho's agricultural community, particularly that segment depending on irrigation water from Federal reclamation projects.

Water spreading has, in many cases, been accomplished by the acquiescence, permission, and encouragement of the Bureau of Reclamation and for reasons of basic fairness, the Bureau should not now seek to reverse what it has allowed in the past.

More importantly, under Section A of the Reclamation Act, State law is to govern the distribution of water from Federal reclamation. As a result, the pending Snake River adjudication in Idaho, which will resolve the issues of irrigated acres of water conserved through increased efficiencies, will be conclusive on the issue of water spreading.

The point that I want to make, Mr. Chairman, and Members of the committee, is that although we may need to look at some of the issues relating to water spreading and exactly how they have evolved over time, many now are saying that the water spreading

issue should lead to the Federal Government through the Bureau of Reclamation trying to recoup water which has been spread through increased irrigation efficiencies or other practices and then allocate the uses of that water to other Federal purposes.

The point I make is that it is State law, substantive and procedural, which determines the allocation and use of water, even water from these Federal projects. And we have a system in Idaho—there are systems in other States—for determining what the usage of water should be, and in Idaho the basic concept is first in time, first in right.

There are senior appropriators and junior appropriators, all who wait to have their share under Idaho's laws which have been established to determine the usage of this water to have their opportunity to have access to it. That is not to say that any particular interest or any particular use should be avoided. It is to say that the government entity making these decisions should be the States not the Federal Government.

I hope that as this committee and as the Bureau of Reclamation looks at this issue, it will not forget the important principle of maintaining the proper boundaries between the Federal and State governments in terms of allocation and use of water.

Thank you, Mr. Chairman.

[Prepared statement of Mr. Crapo follows:]

MICHAEL D. CRAPO
2d DISTRICT, IDAHO
NEW MEMBER LEADER

ENERGY AND COMMERCE COMMITTEE

REPUBLICAN POLICY COMMITTEE

REPUBLICAN TASK FORCE ON
AGRICULTURE
CO-CHAIRMAN

REPUBLICAN TASK FORCE ON
PRIVATE PROPERTY RIGHTS
CO-CHAIRMAN

CONGRESSIONAL RURAL CAUCUS

Congress of the United States
House of Representatives
Washington, DC 20515-1202

THE HONORABLE MICHAEL D. CRAPO
TESTIMONY BEFORE THE NATURAL RESOURCES COMMITTEE,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
JULY 18, 1994

☐ WASHINGTON, DC
437 CANNON BUILDING
WASHINGTON, DC 20515
(202) 225-6531

DISTRICT OFFICES:

☐ 304 NORTH 8TH STREET
ROOM 444
BOISE, ID 83702
(208) 334-1953

☐ 2539 CHANNING WAY
SUITE 330
IDAHO FALLS, ID 83404
(208) 523-6701

☐ FEDERAL BUILDING
250 SOUTH 4TH, ROOM 220
POCATELLO, ID 83201
(208) 236-6734

☐ 488 BLUE LAKES BLVD., #105
TWIN FALLS, ID 83301
(208) 734-7219

MR. CHAIRMAN, THANK YOU FOR ALLOWING ME TO TESTIFY BEFORE YOUR SUBCOMMITTEE TODAY. DUE TO THE AGGRESSIVE SCHEDULE OF THE SUBCOMMITTEE, I WILL KEEP MY REMARKS BRIEF.

IN THE PAST, CONGRESS HAS REPEATEDLY DEMONSTRATED A SENSITIVITY TO THE NEED FOR STABILITY IN THE WESTERN STATES' REGULATION OF THEIR WATER SUPPLIES BY DEFERRING TO STATE LAW. HOWEVER, THIS ADMINISTRATION HAS REPEATEDLY CHALLENGED THE PRINCIPLE OF STATE WATER MANAGEMENT.

THIS IS THE THIRD TIME WITHIN A MONTH THAT I HAVE TESTIFIED BEFORE CONGRESSIONAL BODIES CONCERNING FEDERAL INTRUSION INTO IDAHO'S SOVEREIGNTY OVER ITS WATER. I AM DEEPLY CONCERNED THAT THE PRESENT ADMINISTRATION AND SOME IN CONGRESS ARE SETTING THE STAGE FOR IGNORING LONG ESTABLISHED STATUTORY PROVISIONS CONCERNING STATE WATER RIGHTS AND STATE WATER CONTRACTS.

THE TRADITIONAL MEANS FOR RESOLVING WATER DISPUTES SEEMS TO HAVE BEEN ABANDONED.

THE ENDANGERED SPECIES ACT, THE CLEAN WATER ACT, SALMON RECOVERY PLANS, RANGELAND REFORM, AND PROPOSED WILDERNESS LEGISLATION ARE JUST THE CURRENT VEHICLES BEING USED TO ERODE STATE SOVEREIGNTY OVER ITS WATER. IT IS IMPERATIVE THAT STATES MAINTAIN SOVEREIGNTY OVER MANAGEMENT AND CONTROL OF THEIR WATER AND RIVER SYSTEMS. ALL RIGHTS TO WATER OR RESERVATIONS OF RIGHTS FOR ANY PURPOSE IN THE STATE OF IDAHO SHOULD BE SUBJECT TO THE SUBSTANTIVE AND PROCEDURAL LAWS OF THE STATE OF IDAHO, NOT THE FEDERAL GOVERNMENT.

BEING A SEMI-ARID STATE, IDAHO'S GROWTH AND DEVELOPMENT HAS BEEN INTIMATELY LINKED TO, AND ALMOST TOTALLY DEPENDENT UPON, WATER AND ITS AVAILABILITY. UNFORTUNATELY, THE ACTIVITIES OF THE CURRENT ADMINISTRATION THREATEN THE FUTURE OF IDAHO'S AGRICULTURE COMMUNITY, PARTICULARLY THAT SEGMENT DEPENDING UPON IRRIGATION WATER FROM FEDERAL RECLAMATION PROJECTS.

WATER SPREADING HAS, IN MANY CASES, BEEN ACCOMPLISHED THROUGH THE ACQUIESCENCE, PERMISSION AND ENCOURAGEMENT OF THE BUREAU OF RECLAMATION. FOR REASONS OF BASIC FAIRNESS, THE BUREAU SHOULD NOT NOW SEEK TO REVERSE WHAT IT HAS ALLOWED IN THE PAST.

UNDER SECTION 8 OF THE RECLAMATION ACT, STATE LAW IS TO GOVERN THE DISTRIBUTION OF WATER FROM FEDERAL RESERVOIRS. AS A RESULT, THE PENDING SNAKE RIVER BASIN ADJUDICATION, WHICH WILL RESOLVE THE ISSUE OF EXPANDING IRRIGATED ACRES OF WATER CONSERVED THROUGH INCREASED EFFICIENCIES, WILL BE CONCLUSIVE ON THE ISSUE OF WATER SPREADING.

THE BUREAU SHOULD GIVE DEFERENCE TO STATE LAW WITH THE MCCARREN ACT ADJUDICATION.

THE BUREAU HAS INDICATED THAT INCIDENTAL WATER SPREADING, OR THE IRRIGATION OF SMALL AREAS OF LAND THAT WERE NOT CLASSIFIED AS IRRIGABLE BUT HAVE BECOME IRRIGABLE BECAUSE OF INCREASED EFFICIENCIES SUCH AS SPRINKLERS, WOULD NOT BE A PROBLEM.

IF THIS IS THE CASE, THE NECESSARY MINOR CONTRACT CHANGES SHOULD BE MADE BY ADDENDA TO FORMALLY RECOGNIZE THE PRACTICE---WITHOUT OPENING UP THE ENTIRE CONTRACT OF THE NEPA PROCESS AND OTHER CHANGES THAT MIGHT BE ON THE BUREAU'S AGENDA.

IT IS BURDENSOME TO REQUIRE IRRIGATION DISTRICTS AND CANAL COMPANIES THAT HAVE CONTRACTS WITH THE BUREAU TO PAY THE COSTS OF CONDUCTING WATER SPREADING SURVEYS. THIS SHOULD BE THE RESPONSIBILITY OF THE BUREAU. IN ADDITION, THE BUREAU SHOULD HAVE SOME REASON TO BELIEVE THAT A DISTRICT IS ENGAGING IN WATER SPREADING BEFORE CONDUCTING A SURVEY.

FINALLY, THE BUREAU HAS NOT PROVIDED A JUSTIFICATION FOR ATTEMPTING TO ADOPT THIS POLICY CHANGE WITHOUT GOING THROUGH THE RULEMAKING PROCESS. THE REASONING, IF ANY EXISTS, NEEDS TO BE MADE CLEAR. THE CURRENT STRATEGY OF ADOPTING A POLICY IN THE PACIFIC NORTHWEST REGION AND THEN EXTENDING IT WESTWIDE IS LESS THAN A FULL AND OPEN PROCESS. A WESTWIDE RULE, PROPOSED IN THE FEDERAL REGISTER SHOULD BE MADE AVAILABLE FOR COMMENT BEFORE ANYTHING IS FINALIZED OR ADOPTED.

Mr. MILLER. Thank you. Let me just discuss two questions that you raise in your testimony.

In each of our States, the governing provisions of State law with respect to State water and their permits and/or the contract under which Federal projects are governed is different. Let me just ask a couple of questions. Again, I don't know the particular situation and maybe later witnesses can testify to it, but water from the Federal Reclamation projects where we have built, in some cases, a storage facility and/or the delivery system to these two irrigation districts is generally delivered under a contract for a specified purpose.

If that contract is not being adhered to, what do we do?

Mr. CRAPO. Well, first of all, I think I should say that—and I suggested this in this my testimony—in contract law, where there is an ongoing relationship and where the parties work together to implement the administration of the contract over time, I am not sure that it is appropriate or even permissible for one party to work over a period of 30 to 50 years in one line and then all of a sudden shift and say this is a breach of contract because it is something that has been acquiesced over time.

Assuming you get to a natural breach of the contract provisions, then I think that it is reasonable to go back and see what the breach was, what the harm was, and what the remedy should be. My point in all of this is not that if there is a problem with the contracts not being strictly honored and if the government now says that it must be strictly honored and there isn't a way for that acquiescence to be challenged from past practices, my point is that in that process, nothing gives the Federal Government authority to step in and take unto itself rights that do not exist when the contract was first entered.

Mr. MILLER. That is the second part of the equation, what will or will not happen if there is resulting changes in the quantity of water that is available or not available as a result of those actions, but the question of if we are promised a payment per acre—and I don't know the situation in all the contracts now, whether it is per acre, per acre foot—the acreage is brought into irrigation and there is no payment.

Mr. CRAPO. Then should the payment be made?

Mr. MILLER. Yes.

Mr. CRAPO. Again, without acknowledging the validity of that argument, I think that you can say whatever the contractual terms were, given the statutory background as well at the time the contract was entered, and if those contractual terms were not altered by the agreement in absence of the parties—and these are all issues that I think need to be addressed—then definitely that needs to happen.

I would simply say, however, that it is my understanding, and from some of the legislative history and other information I have read, it is not altogether clear that the payment for the project was intended to be made for every single conceivable acre that was possibly irrigated. There is some language I read—I can't recall specifically where it was—that indicated that basic costs of the project were to be paid out of the basic irrigation project but that the acre-by-acre analysis was not necessarily what was contemplated.

Now, another point that I think needs to be made is that the cost that needs to be paid is the cost of the projects, their operation, their maintenance, their construction, and so forth. If that entire cost has been paid and the Federal Government has received full payment for what it was obligated under the contract, but that payment didn't come necessarily from the right allocation of acres that it now sees, then perhaps those monies should be rebated to those who paid more than their share rather than to the Federal Government.

Mr. MILLER. That is an argument for the irrigation district. That is what makes good neighbors.

Mr. CRAPO. That is right.

Mr. MILLER. I guess my point is, that there are two arguments we hear in the testimony that has been submitted so far today, one is that these are past practices and we should therefore accept that.

I guess the question we are trying to settle is, to what extent do we have to live with the detriment of bad management or does the taxpayer have to underwrite tens of millions of dollars in lost revenues because the Bureau didn't administer the law as the law is written? And we know that that is simple to debate, but that is a central question.

Mr. CRAPO. And the way I would respond to that is, I don't know the numbers, but it is my understanding that the Federal Government is entitled to its piece of what was required to it under the contract. And if the Federal Government has received full payment—let me back up.

As I approach this, and as I see this, this is not a case of the Federal Government exacting a fee. The amount of money that the Federal Government is entitled to get is basically unlimited subject only to the amount of acres that they can get a fee off of.

The Federal Government is entitled to a certain defined amount of compensation for its part of this contractual arrangement. And I don't believe that it is proper for the Federal Government now to say, well, that amount of compensation is unlimited if we can go find other acres. And that gets back to the point that I made before.

Mr. MILLER. Okay. Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. CraPO, as I understand it, a lot of these irrigators have an urge to increase efficiency and to increase production with the concurrence of the Bureau of Reclamation, in fact, at the initiative of the Bureau of Reclamation.

Do you agree with that?

Mr. CRAPO. Mr. Smith and Mr. Chairman, that is my understanding. I don't have personal knowledge of that, but it is my understanding that over the last 30 to 50 years, the practice has been to encourage this.

Now, as the Chairman has indicated, there are those who are now contending that this is bad management and that that practice should not have been followed, and certainly that issue can be debated today. But what I don't think can be debated is that the Bureau, if it is bad management, was culpable. If it was not bad man-

agement, the Bureau at least was a part of developing this policy which is now being questioned.

Mr. SMITH. Do you think we need a national policy?

Mr. CRAPO. No, sir, I don't. In fact, I think that this is one of those critical cases which is typical of so many other areas in which the Federal Government becomes involved and you can't simply create a cookie cutter solution in Washington and meet all of the situations on the ground in terms of water management throughout the west.

And I know just from living in Idaho and being involved in Idaho water law over the last decade or so that it is incredibly complicated. We are now in the process in Idaho of going through a basin adjudication on the Snake River, basically to try to do exactly what is one of the issues we are dealing with here and that is trying to identify where the water rights are and who is entitled to the usage of this water and where and how, and to have that process driven by the Federal Government to me would seem to be a significant mistake.

Mr. SMITH. You are saying Idaho is not in the Central Arizona project?

Mr. CRAPO. That is correct, and I don't have expertise there and I can't tell the exact differences.

Mr. MILLER. Would the gentleman yield.

I think there is a national policy and that the law shall be obeyed and that the terms of contracts shall be adhered to. That is what I see as the basic principle. You don't disagree with that, do you?

Mr. CRAPO. No, I don't disagree with that at all.

Mr. MILLER. And there may be individual circumstances and mitigating circumstances and compelling circumstances and all of the other words of our colleagues in the legal profession to change that, but the underlying principle is that the law will be obeyed and when people came to sign up for the benefits of the Federal projects, they didn't say, yes, we want the benefits and we will get back to you about whether or not we will meet our obligations.

And those relationships have evolved over a period of time but at some point, the central principle still must be adhered to and that is that you cannot, just because you decide upon yourself as a district or as a farmer that you choose to do something that may be contrary to law, get to do it.

Now, it may be that somebody gave you permission or they gave you a wink and a nod or they looked the other way, but you get back to the basic principle that the law is to be obeyed, sort of like the cop on the beat. One cop on the beat says it is okay to sell cocaine on the corner. Another cop comes along, you don't say, well, gee, we thought we were given permission. Now the law is, you can't sell cocaine on the corner and I mean that is the principle.

Now, recognizing that every irrigation district has a different contract and State law is different and circumstances are different and this issue has evolved, the issue this morning really is whether or not in fact we have the ability to enforce the law.

There may be a secondary question of whether or not you want to enforce the law, then you have got to come change the law.

Mr. CRAPO. Mr. Chairman, I agree with what you say with one clarification on my part, and that is that I don't think that this is such a simple issue as to be one which would allow us to simply say that the law has been broken and illegal activities have been taking place.

I think you implied there are all the individual contract issues here. And that really does get down not just give different valleys and different rivers, it gets down to different contracts. All I am saying is that when we assume that there has been a violation, let's go in and look under contract law and under statutory law which we will be dealing with here, let's see what the facts are, and if there really has been something that can be called a breach of contract or violation of law, let's see whether that is the kind of thing that you understand the traditional principles of law has been waived or dealt with by the agencies in that context.

But my main point is that in that whole discussion, let's not forget State sovereignty over water issues, because I know a lot of this discussion is driven by a desire to have the Federal Government start managing the waters of these projects in ways that have traditionally been allowed to the States.

Mr. MILLER. Thank you.

Mr. SMITH. Reclaiming my time, I just believe sincerely that we ought to understand as well that this is a continuing rear guard action, more on the west, again. We have had it in timber and grazing and mining. There is another effort. There are people who want to eliminate the Bureau of Reclamation. They think it is a huge subsidy program and I have heard this Chairman talk about that ad infinitum.

So let's make sure we understand the reason for all of this, and that is simply, I think, to undermine the States rights of water privileges and as well to take care of another purpose, and that may be fish versus agriculture, which is a continuing battle. That is what I see this.

So it may be couched in terms of very honorable specific to the contract. Don't breach the gap issues. I think this has ulterior motives which are not discussed in the IG report and probably won't be discussed today, but they are there behind the door constantly.

Thank you.

Mr. MILLER. Mr. Dooley. He is gone.

Mr. DeFazio.

Mr. DEFazio. No questions.

Mr. MILLER. Thank you very much.

Mr. CRAPO. Thank you, Mr. Chairman.

PANEL CONSISTING OF JOYCE N. FLEISCHMAN, ACTING INSPECTOR GENERAL, U.S. DEPARTMENT OF THE INTERIOR; AND, DANIEL P. BEARD, COMMISSIONER, BUREAU OF RECLAMATION, U.S. DEPARTMENT OF THE INTERIOR

Mr. MILLER. The next panel will be made up of the Honorable Daniel P. Beard, the Commissioner of the Bureau of Reclamation, Department of the Interior; and Joyce Fleischman, who is the Acting Inspector General for the U.S. Department of the Interior.

Welcome to the committee, and I will say at the outset that we are going to run into a time problem during this hearing later on

this morning, so the extent to which people can summarize their statements—most of the statements have already been submitted and given to the Members—will be deeply appreciated.

And Ms. Fleischman, we will begin with you. Welcome.

STATEMENT OF JOYCE N. FLEISCHMAN

Ms. FLEISCHMAN. Thank you, Mr. Chairman.

Mr. Chairman, members of the subcommittee, I am Joyce Fleischman. I am actually the Deputy Inspector General. I have been Acting Inspector General at the Department of the Interior now for some 16 months. I am pleased to appear before you today to discuss the issue of water spreading on Bureau of Reclamation projects.

Accompanying me is an auditor from our western regional office in Sacramento, California who worked on this audit, Mr. Dale Cameron. Water spreading, as you know, of course, is generally defined simply as the application of water from Federal projects to lands that are ineligible to receive such water.

We have, as I say, just completed an audit report on the irrigation of ineligible lands. The objective of that audit was to determine whether the Bureau of Reclamation has been ensuring that Reclamation project water was used to irrigate only those lands that the Bureau itself had determined to be eligible to receive such water and, at this time, I would like to submit this audit report for the record of this hearing.

Mr. MILLER. Thank you.

[Editor's Note.—See appendix.]

Ms. FLEISCHMAN. It is important to note that the eligibility to receive water is determined by the Bureau of Reclamation. Under Reclamation law, the Bureau is required to evaluate project lands for irrigation suitability and to formally classify this land as either irrigable or nonirrigable.

Lands classified as nonirrigable as well as lands that have not been classified are not eligible to receive water from Federal water projects. Lands that are outside the boundaries established for Federal irrigation projects or that are outside irrigation district boundaries are also ineligible to receive Federal water under Reclamation law or contractual agreements. It is important to note that under these criteria there are several categories of ineligible land such as land outside the boundaries of the districts, water districts themselves and project districts, and lands that are in excess of acreage limitations which could otherwise be classified as irrigable. That is to say, some of the water spreading that is going on is taking place on lands that are irrigable and that are highly productive and profitable.

In our audit report, we reported on 24 Federal water projects in eight States. We found that the Bureau of Reclamation is not ensuring that Federal water is used to irrigate only eligible lands. We estimated, based on data provided to us by the Bureau itself, that between 370,000 and 429,000 acre feet of water were delivered each year to between 132,000 and 154,000 acres of ineligible land during 1984 through 1992 on these 24 projects alone. It is important to remember, we only looked at 24 projects. We have not at this time looked at all of Reclamation's projects.

We also note that water spreading is not a recent phenomenon. Our research of Bureau of Reclamation records indicates that the Bureau has been aware or was aware as early as the 1950s or the 1960s that water spreading was occurring on at least seven of the 24 projects that we have reviewed.

According to a Bureau crop schedule for 1965 and 1966, approximately 36,000 acres of nonirrigable land in two regions were identified by the Bureau itself as receiving Federal project water. The problem has been exacerbated over the years because improvements in irrigation practices have resulted in water savings. However, because of factors such as the prior appropriation doctrine, farmers are not inclined to give up, save, or conserve water. The doctrine gives the first party to appropriate the water a priority right to that water. However, if water is not used, an irrigator may lose the water rights and, therefore, experience a subsequent decreased market value of his farmland.

Subsequently, there is little economic incentive to provide the saved water for such other needs as instream flows for fisheries, environmental protection and restoration, and municipal and industrial uses. As a result, in some cases, farmers have used the conserved or saved water to irrigate ineligible lands.

In 1983, the Bureau, in implementing the 1982 Reclamation Reform Act, again determined that a substantial amount of ineligible land was receiving water. In 1985, the Acting Commissioner of the Bureau directed that the Bureau take action to identify units of ineligible lands and the reasons for their ineligibility. However, since the Bureau's 1988 reorganization, that effort has not received a high priority. Consequently, the Bureau has not completed the actions necessary to reclassify lands from ineligible to eligible status and has not directed that unauthorized water deliveries be terminated on 21 of the 24 projects that we reviewed.

In our opinion, this past history of nonenforcement has made it more difficult for the Bureau to resolve current problems, instances where ineligible lands are being irrigated with Federal project water. Nonetheless, we believe that the Bureau should determine how it will address each instance of unauthorized water delivery.

We concluded in our audit review that from 1984 to 1992, irrigators received about \$37 million to \$46 million in unintended financial benefits because they were not paying full cost water rates for water used on ineligible lands. Furthermore, we note that there are other critical or competing needs for this water.

For example, we estimate that approximately 75 percent of the water delivered to ineligible lands associated with these 24 projects could have been used to provide additional stream flows for protected species or to reduce potentially toxic irrigation drainage flows. The remaining 25 percent could have been used to help meet requirements for Indian fisheries, Indian water rights or municipal and industrial water supplies.

We have recommended that the Bureau develop and implement the policies and procedures necessary to mitigate water spreading. Specifically, we made three recommendations: First, we recommended that the Bureau establish a schedule for identifying the extent to which ineligible land is receiving Federal irrigation water

and further to develop a plan, including terminating deliveries, for addressing each instance of unauthorized water delivery.

Secondly, we recommended that the Bureau request a formal opinion from the Office of the Solicitor as to whether or not the Bureau has the authority to assess Federal charges in the future whenever water is used to irrigate ineligible lands. If the solicitor determines that the Bureau does not have this authority, we recommend that the Commissioner of Reclamation seek legislation that will provide such authority.

Once that authority is established, we recommend that the Bureau implement a policy to facilitate the prospective recovery of appropriate Federal charges, including a provision for notifying all districts that any water delivered to ineligible lands beyond the effective date of the policy would be assessed for those charges.

I am pleased to note that the Bureau has concurred with these recommendations and has begun to implement the recommendations.

That concludes my prepared statement. I would be pleased to answer any questions that the chairman or members of the subcommittee may have.

Mr. MILLER. Thank you.

[Prepared statement of Ms. Fleischman follows:]

**STATEMENT OF
JOYCE N. FLEISCHMAN,
ACTING INSPECTOR GENERAL, U.S. DEPARTMENT OF THE INTERIOR**

**BEFORE THE
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
NATURAL RESOURCES COMMITTEE
U.S. HOUSE OF REPRESENTATIVES**

JULY 19, 1994

MR. CHAIRMAN, MEMBERS OF THE SUBCOMMITTEE, I AM PLEASED TO APPEAR BEFORE YOU TODAY TO DISCUSS THE ISSUE OF "WATER SPREADING" ON BUREAU OF RECLAMATION PROJECTS. "WATER SPREADING" IS GENERALLY DEFINED AS THE APPLICATION OF WATER FROM FEDERAL PROJECTS TO LANDS THAT ARE INELIGIBLE TO RECEIVE SUCH WATER. THE OFFICE OF INSPECTOR GENERAL HAS JUST COMPLETED AN AUDIT REPORT ON THE IRRIGATION OF INELIGIBLE LANDS. THE OBJECTIVE OF THAT AUDIT WAS TO DETERMINE WHETHER THE BUREAU OF RECLAMATION HAS BEEN ENSURING THAT RECLAMATION PROJECT WATER WAS USED TO IRRIGATE ONLY LANDS DETERMINED TO BE ELIGIBLE TO RECEIVE SUCH WATER. AT THIS TIME, I WOULD LIKE TO SUBMIT THIS AUDIT REPORT FOR THE RECORD.

ELIGIBILITY TO RECEIVE WATER IS DETERMINED BY THE BUREAU. UNDER RECLAMATION LAW, THE BUREAU IS REQUIRED TO EVALUATE PROJECT LANDS FOR IRRIGATION SUITABILITY AND TO FORMALLY CLASSIFY THE LANDS AS EITHER IRRIGABLE OR NONIRRIGABLE. LANDS CLASSIFIED AS NONIRRIGABLE, AS WELL AS LANDS THAT HAVE NOT BEEN CLASSIFIED, ARE NOT ELIGIBLE TO RECEIVE WATER FROM FEDERAL PROJECTS. LANDS THAT ARE OUTSIDE BOUNDARIES ESTABLISHED FOR FEDERAL IRRIGATION PROJECTS OR THAT ARE OUTSIDE IRRIGATION DISTRICT BOUNDARIES ARE ALSO INELIGIBLE TO RECEIVE FEDERAL WATER UNDER RECLAMATION LAW OR CONTRACTUAL AGREEMENTS. IT IS IMPORTANT TO NOTE THAT

UNDER THESE CRITERIA, THERE ARE SEVERAL CATEGORIES OF INELIGIBLE LAND, SUCH AS LAND OUTSIDE OF BOUNDARIES AND LANDS IN EXCESS OF ACREAGE LIMITATIONS, WHICH COULD OTHERWISE BE CLASSIFIED AS IRRIGABLE. THAT IS TO SAY, SOME OF THE WATER SPREADING TAKES PLACE ON IRRIGABLE LANDS THAT ARE HIGHLY PRODUCTIVE AND PROFITABLE.

WE REPORTED THAT AT 24 PROJECTS IN EIGHT STATES, THE BUREAU OF RECLAMATION DID NOT ENSURE THAT FEDERAL PROJECT WATER WAS USED TO IRRIGATE ONLY ELIGIBLE LANDS. WE ESTIMATED, BASED ON DATA PROVIDED BY THE BUREAU, THAT BETWEEN 370,000 AND 429,000 ACRE-FEET OF WATER WAS DELIVERED EACH YEAR TO BETWEEN 132,000 AND 154,000 ACRES OF INELIGIBLE LAND DURING 1984 THROUGH 1992.

WATER SPREADING IS NOT A RECENT PHENOMENON. THE BUREAU WAS AWARE AS EARLY AS THE 1950'S OR THE 1960'S THAT WATER SPREADING WAS OCCURRING ON AT LEAST 7 OF THE SAME 24 PROJECTS WE IDENTIFIED. ACCORDING TO A BUREAU CROP SCHEDULE FOR 1965 AND 1966, APPROXIMATELY 36,000 ACRES OF NONIRRIGABLE LANDS IN TWO REGIONS WERE IDENTIFIED BY THE BUREAU AS RECEIVING FEDERAL PROJECT WATER. THE PROBLEM HAS BEEN EXACERBATED OVER THE YEARS BECAUSE IMPROVEMENTS IN IRRIGATION PRACTICES HAVE RESULTED IN WATER SAVINGS. HOWEVER, BECAUSE OF THE "PRIOR

APPROPRIATION DOCTRINE," FARMERS ARE NOT INCLINED TO GIVE UP SAVED WATER. THE DOCTRINE GIVES THE FIRST PARTY TO APPROPRIATE THE WATER A PRIORITY RIGHT TO THAT WATER. HOWEVER, IF WATER IS NOT USED, AN IRRIGATOR MAY LOSE THE WATER RIGHTS AND EXPERIENCE A SUBSEQUENT DECREASED MARKET VALUE OF HIS FARMLAND. CONSEQUENTLY, THERE IS LITTLE ECONOMIC INCENTIVE TO PROVIDE THE SAVED WATER FOR OTHER NEEDS SUCH AS INSTREAM FLOWS FOR FISHERIES, ENVIRONMENTAL PROTECTION AND RESTORATION, AND MUNICIPAL AND INDUSTRIAL USES. AS A RESULT, IN SOME CASES, FARMERS HAVE USED THE CONSERVED WATER TO IRRIGATE INELIGIBLE LANDS.

IN 1983, THE BUREAU AGAIN DETERMINED THAT A SUBSTANTIAL AMOUNT OF INELIGIBLE LAND WAS RECEIVING WATER. IN 1985, THE ACTING COMMISSIONER DIRECTED THAT THE BUREAU TAKE ACTION TO IDENTIFY UNITS OF INELIGIBLE LANDS AND THE REASONS FOR THEIR INELIGIBILITY. HOWEVER, SINCE THE BUREAU'S 1988 REORGANIZATION, THE EFFORT HAS NOT RECEIVED A HIGH PRIORITY. CONSEQUENTLY, THE BUREAU HAD NOT COMPLETED THE ACTIONS NECESSARY TO RECLASSIFY LANDS FROM AN INELIGIBLE TO AN ELIGIBLE STATUS AND/OR HAD NOT DIRECTED THAT UNAUTHORIZED WATER DELIVERIES BE TERMINATED ON 21 OF THE 24 PROJECTS THAT WE REVIEWED. IN OUR OPINION, THIS PAST HISTORY OF NONENFORCEMENT HAS MADE IT MORE DIFFICULT FOR THE BUREAU TO

RESOLVE CURRENT INSTANCES WHERE INELIGIBLE LANDS ARE IRRIGATED WITH FEDERAL PROJECT WATER. NONETHELESS, WE BELIEVE THAT THE BUREAU SHOULD DETERMINE HOW IT WILL ADDRESS EACH INSTANCE OF UNAUTHORIZED WATER DELIVERY.

WE CONCLUDED THAT FROM 1984 TO 1992, IRRIGATORS RECEIVED ABOUT \$37 MILLION TO \$46 MILLION IN UNINTENDED FINANCIAL BENEFITS BECAUSE THEY WERE NOT PAYING FULL-COST WATER RATES FOR WATER USED ON INELIGIBLE LANDS. FURTHERMORE, THERE ARE OTHER CRITICAL OR COMPETING NEEDS FOR THIS WATER. FOR EXAMPLE, ABOUT 75 PERCENT OF THE WATER DELIVERED TO INELIGIBLE LANDS ASSOCIATED WITH THE 24 PROJECTS COULD HAVE BEEN USED TO PROVIDE ADDITIONAL STREAM FLOWS FOR PROTECTED SPECIES OR TO REDUCE POTENTIALLY TOXIC IRRIGATION DRAINAGE FLOWS. THE REMAINING 25 PERCENT COULD HAVE BEEN USED TO HELP MEET REQUIREMENTS FOR INDIAN FISHERIES, INDIAN WATER RIGHTS, OR MUNICIPAL AND INDUSTRIAL WATER SUPPLIES.

WE HAVE RECOMMENDED THAT THE BUREAU DEVELOP AND IMPLEMENT THE POLICIES AND PROCEDURES NECESSARY TO MITIGATE WATER SPREADING. SPECIFICALLY, WE RECOMMENDED THAT THE BUREAU ESTABLISH A SCHEDULE FOR IDENTIFYING THE EXTENT TO WHICH INELIGIBLE LAND IS RECEIVING FEDERAL IRRIGATION WATER AND

DEVELOP A PLAN, INCLUDING TERMINATING DELIVERIES, FOR ADDRESSING EACH INSTANCE OF UNAUTHORIZED WATER DELIVERY. WE ALSO RECOMMENDED THAT THE BUREAU REQUEST A FORMAL OPINION FROM THE OFFICE OF THE SOLICITOR AS TO WHETHER THE BUREAU HAS THE AUTHORITY TO ASSESS FEDERAL CHARGES IN THE FUTURE WHENEVER WATER IS USED TO IRRIGATE INELIGIBLE LANDS. IF THE SOLICITOR DETERMINES THAT THE BUREAU DOES NOT HAVE THIS AUTHORITY, THEN THE COMMISSIONER SHOULD SEEK LEGISLATION THAT WILL PROVIDE THE AUTHORITY. ONCE SUCH AUTHORITY IS ESTABLISHED, THEN THE BUREAU SHOULD IMPLEMENT A POLICY TO FACILITATE THE PROSPECTIVE RECOVERY OF APPROPRIATE FEDERAL CHARGES, INCLUDING A PROVISION FOR NOTIFYING ALL DISTRICTS THAT ANY WATER DELIVERED TO INELIGIBLE LANDS BEYOND THE EFFECTIVE DATE OF THE POLICY WOULD BE ASSESSED FOR THESE CHARGES.

IN ITS RESPONSE TO OUR DRAFT REPORT, THE BUREAU CONCURRED WITH THE RECOMMENDATIONS AND HAS INSTITUTED ACTION TO IMPLEMENT THE RECOMMENDATIONS.

THAT CONCLUDES MY PREPARED STATEMENT, AND I WOULD BE PLEASED TO ANSWER ANY QUESTIONS THE SUBCOMMITTEE MAY HAVE AT THIS TIME.

Mr. MILLER. Mr. Beard.

STATEMENT OF DANIEL P. BEARD

Mr. BEARD. Thank you, Mr. Chairman.

My name is Dan Beard, and I am the Commissioner of the Bureau of Reclamation. I appreciate this opportunity to appear before the subcommittee this morning. As the Acting Inspector General noted, they have completed an audit report on water spreading, and the Bureau of Reclamation has concurred with the IG's recommendations and is proceeding to implement them.

We are committed to ending the practice of water spreading by bringing water users into compliance with Reclamation law and contracts and by focusing our enforcement efforts on those that seek to abuse the benefits of federally developed water. In this manner, I think we protect more fully the rights of those water users with valid existing rights. It will also enable Reclamation to satisfy better the requirements for alternative uses of the water.

We have already begun the process of addressing the issue. At this time, however, we are not even certain of the full scope of the problem. As the commissioner, I intend for Reclamation to proceed in a manner that protects the due process rights of all water users and attempts to be responsive to the needs of the rural economies as we proceed.

Reclamation first recognized the water spreading problem in the early 1980s, as the Inspector General noted, when we had a land classification task force that identified a number of water spread lands. Subsequently, we have made a number of attempts to identify exactly what the magnitude of the problem is. To date, we have not developed a comprehensive estimate. Based on the review of materials in the files in 24 projects, the IG's report estimates that approximately 132,000 to 155,000 acres are receiving water illegally in these projects.

Our Pacific Northwest region has undertaken an aggressive program to address water spreading practices. Using the public involvement process, the region has developed a draft policy to address water spreading.

One element of the public involvement process or program is a task force, which was established at my request. The task force has regional representatives from agricultural interests, environmental interests, Native Americans and the States of Idaho, Oregon and Washington to provide varying perspectives on the problem and possible solutions.

Another element of the public involvement program we have under way is a series of educational meetings throughout the region. The regional office is now seeking public comment on a draft policy through a Federal Register notice and public meetings throughout the region. We expect to finalize this policy sometime in October. We hope this policy will be developed in a way that will enable the other four regions of Reclamation to adopt it, and that it will provide an agency-wide approach for addressing the problem.

Reclamation has collected sufficient overview data to know that water spreading is a significant problem and is occurring in all five Reclamation regions. Because of the expense in time, money, and

personnel to collect this data, we don't have that data for all districts.

The overview data we do have will allow us to set priorities agency-wide for the resolution of water spreading problems. Because of the continuous change in cropping patterns, detailed project-specific data typically is not collected today, so it will be a while before we can address each individual case.

Reclamation contractors who are spreading water are violating their contracts or violating State or Federal law. We intend to stop the practice by attempting to bring these contractors into compliance. I think it is important to recognize that water spreading practices are not uniform and they must be remedied in a way that attempts to be responsive to the needs of the local economies. In some cases, we have incidental irrigation of nonirrigable lands as a result of modern sprinkler technology, and I am sure you will hear of these instances later from other witnesses.

We believe that incidental irrigation of nonirrigable lands is an issue that can be remedied easily through land reclassification procedures but, at the other end of the spectrum, we do have project water being applied outside of project boundaries. In these cases, we intend to implement a remedy disallowing the practice. It is difficult at this time to quantify how much water will be available for other purposes and I think it would be premature for anybody to view the solution to water spreading as a means by which we can address a number of other water problems requiring additional water.

Implementation of policies to eliminate water spreading practices and the disposition of any water made available may be affected by State water law, by the contracts and by Federal law. If water service to ineligible lands is reduced or eliminated, project water associated with these lands may be available for instream flows if project authorizations and State water law so allow.

In the case of Indian rights for instream flows, of course, Federal law will apply. However, under some State laws freed up water will go up to the next priority or remain in storage. In other States, like Oregon, a portion of the water may be transferred to instream flows with the same priority if other priorities are not injured. And except for certain portions of the Lower Colorado River Basin, the administration of water rights, including instream flows, rests with each individual State.

The administration is committed to resolving the water spreading issues through agency action. It is premature for us to know whether any legislation will be needed to address these problems. Our position is that the irrigators, the States, the tribes and other interests affected should share in the identification, correction, and enforcement of the water rights and the contract entitlements where water spreading is occurring. Because of the complexities of water spreading, I think policy implementation will require a long-term, sustained effort.

I would be happy to answer any questions you might have.

[Prepared statement of Mr. Beard follows:]

STATEMENT OF
DANIEL P. BEARD
COMMISSIONER, BUREAU OF RECLAMATION
BEFORE THE OVERSIGHT AND INVESTIGATIONS SUBCOMMITTEE
OF THE HOUSE COMMITTEE ON NATURAL RESOURCES

WASHINGTON, D.C.

JULY 19, 1994

Introduction

Chairman Miller, my name is Daniel P. Beard, and I am the Commissioner of Reclamation. I appreciate the opportunity to appear before the Subcommittee today to discuss the Administration's efforts to eliminate the practice of "water spreading" throughout the western United States. "Water spreading" is the term commonly used for the unauthorized use of Federal facilities or the application of Federally-developed water supplies on lands not previously approved by Reclamation.

I am pleased to appear today with Joyce Fleischman, the Acting Inspector General (IG) for the Department of the Interior. As she will testify, the IG's office has conducted an audit report on water spreading, which is discussed later in my testimony. However, I would like to point out that Reclamation has concurred with the recommendations of the IG's audit report, and intends to implement those recommendations.

Water spreading is a problem that developed over time, and it will not be resolved overnight. The practice was allowed to continue because there were no other widely perceived needs for the water. Those perceptions are gone. The reality is that Reclamation, as a water resources management agency, is responsible for managing Federally developed water for a variety of competing needs in the face of increasing water demands.

Therefore, we are committed to ending the practice of water spreading by bringing water users into compliance with Reclamation laws, and by focusing our enforcement efforts on those who seek to abuse the benefits of Federally developed water. In this manner, we protect more fully the rights of those water users with valid existing water rights. It will also enable Reclamation to satisfy better the requirements for alternative uses of the water.

We have already begun the process of addressing this issue. At this time, however, Reclamation officials are not even certain of the full scope of the problem. As Commissioner, I intend for Reclamation to proceed in a manner that protects the due process rights of all water users and attempts to be responsive to the needs of rural economies as we proceed.

What is water spreading?

Water spreading refers to certain situations in which the water user is not in compliance with Federal Reclamation law. It occurs when:

- ♦ project water is applied in contravention of water contracts and, typically, project authorizations to lands that lie outside established district or project boundaries;
- ♦ project water is applied to lands not classified by Reclamation as eligible to receive project water or on lands classified as non-irrigable;
- ♦ the nature or place of project water use has been changed in violation of contract provisions, project authorizations or without Reclamation's required approval;
- ♦ project water is applied on lands that do not possess a State water right where such water right is legally required; or
- ♦ any combination of factors that causes the number of acres irrigated to exceed the number certified irrigable and authorized for project service.

Water spreading is the unauthorized expansion of the total number of acres receiving Federal project water. For example, expansion occurs when land originally classified as non-irrigable adjacent to irrigable land begins to be irrigated because of technological advances such as sprinkler irrigation, or land modifications such as leveling. Also, unclassified land within or outside of district or project boundaries may begin to be served with water conserved by improved water management, improved conveyance systems, or conversion to sprinkler irrigation.

Urbanization in certain areas of the West has resulted in the conversion of lands from agricultural to municipal, residential and industrial (MR&I) uses. In those cases where the contract or the project authorization prohibits such use, then water spreading has occurred.

Water spreading is sometimes a willful consumption of water in violation of State water rights and Federal water service or repayment contracts. While such consumptive uses may occur without objection from senior water right holders because they are not aware of their existence or are not injured and do not have cause to file complaints with State authorities, the fact remains that these uses occur outside legal authorizations. Where Indian Tribes are involved, the problems typically are

different. Generally, Tribes have prior vested water rights which may be diverted by others through water spreading practices.

How Water Spreading Came to Our Attention

It is my understanding that Reclamation first recognized water spreading was taking place in the early 1980's, when a land classification task force identified water spread lands. In 1993, the Department of the Interior's IG conducted an audit of water spreading practices on Reclamation projects westwide. The IG's report identified water spreading on 24 projects in eight States. The IG estimates that approximately 132,000 to 154,000 acres are receiving water illegally from these projects as a result of water spreading practices. According to the IG's estimates, 370,000 to 429,000 acre-feet of water westwide is applied to this acreage, with underpayments to the U.S. Treasury in the range of \$37 million to \$46 million based on full-cost rates.

Current Efforts

Our Pacific Northwest Region, which covers most of the States of Idaho, Oregon, and Washington, has an aggressive program underway to address water spreading practices in that region. Using a public involvement process, the PN Region has developed a draft policy to address water spreading. One element of the public involvement program is a task force with regional representation from agricultural interests, environmental interests, Native Americans, and the States of Idaho, Oregon, and Washington, to provide varying perspectives of the problem and solutions.

Another element of the public involvement program is a series of educational information meetings throughout the region. The PN Region is now seeking public comment on the draft policy through a Federal Register notice and public meetings throughout the region. The policy is expected to be finalized by October 1994. The PN Region will then systematically address each water spreading situation.

I anticipate the other four Reclamation regions will be able to adopt the Pacific Northwest Region's policy with minor revisions.

Extent of Water Spreading

Reclamation has collected sufficient overview data to know that water spreading is a significant problem and is occurring in all five Reclamation regions. Because of the expense in both money and human resources, we have not attempted to collect detailed data on all districts. The overview data will allow us to set priorities agency-wide for the resolution of water spreading.

Because of the continuous change in cropping patterns, detailed project-specific data typically will not be collected until we are ready to resolve an individual case.

I can give you some examples which illustrate how diverse water spreading practices are throughout the West:

- ♦ In the Mid-Pacific Region, on the Solano Project and others, there are outlying suburbs where districts are delivering project water to small ranchettes or hobby farms. Although the land is irrigable, many operations do not meet the intent of a commercial farm enterprise and, therefore, are receiving water outside the contract authorization.
- ♦ In the Upper Colorado Region, most of the projects provide supplemental water. The supplemental water is carried through the same conveyance system as the primary water source (nonproject water) and we have not been able to adequately monitor application of project water.
- ♦ On the Umatilla Project in the Pacific Northwest Region, project water has been transferred to approximately 17,000 acres of land outside the district boundaries.

Implications of Water Spreading

Reclamation contractors who are spreading water are violating their contracts and we intend to stop the practice by attempting to bring these contractors into compliance. I think it is important to recognize that water spreading practices are not uniform, and they must be remedied in a way that attempts to be responsive to the needs of local economies.

In some cases of incidental irrigation of non-irrigable lands as a result of modern sprinkler technology, it is currently impossible not to irrigate some of those acres. However, by irrigating non-irrigable lands with project water, they are in violation of their contract. We believe incidental irrigation of non-irrigable land is an issue that can be remedied through land reclassification procedures.

At the other end of the spectrum, however, we have project water applied outside the project boundaries. In these cases, we intend to implement a remedy disallowing the practice.

Water spreading practices have resulted in increased consumptive use of project water. In some cases, this results in greater diversions than authorized and reduced river flows that may be needed for other purposes. In other cases, diversions from streams may not have increased, but with increased consumptive use by the crops grown on these ineligible lands, the return

flows have decreased with a corresponding decrease in instream flows through and below the project. Increased consumptive use also results in a reduction of carryover storage supplies.

It is difficult at this time to quantify how much water will be available for other purposes once water spreading practices are remedied.

Connection with Indian Water Rights

In some cases, water spreading practices may detrimentally affect Indian trust assets and treaty rights, particularly with respect to instream flows and Tribal fishing rights. Reclamation has a shared responsibility with other Federal agencies to protect treaty rights and trust assets held in trust for Indian Tribes by the Federal Government. Any water spreading policy adopted by our regions to address and eliminate water spreading practices will include a provision requiring consultation with Tribes whose trust assets and treaty rights may be affected by resolution of water spreading cases.

Will Water be Made Available for Instream Flows?

Implementation of policies to eliminate water spreading practices and the disposition of any water made available may be affected by State water law. If water service to ineligible lands is reduced or eliminated, the project water associated with those lands may be available for instream flows if project authorizations and State water law so allow. In the case of Indian rights for instream flows, of course Federal law will apply. Under some States' laws, freed up water will go to the next priority or remain in storage. In other States, like Oregon, a portion of the water may be transferred to instream flows with the same priority if other priorities are not injured. Except for certain portions of the Lower Colorado River Basin, the administration of water rights, including instream flows, rests with each State.

The ability of some western streams to support a healthy fishery has been degraded significantly by project diversions. We are seeing opportunities to restore these streams, without damaging the local economies dependent on irrigated agriculture. The resolution of water spreading cases will give us an opportunity to consider increasing instream flows.

Conclusion

The Administration is committed to resolving water spreading issues through agency action. It is premature for us to know whether any legislation will be needed to address these problems. Our position is that irrigators, States, and Tribes should share

in the identification, correction, and enforcement of water rights and contract entitlements where water spreading is occurring. Because of the complexity of water spreading, policy implementation will require a long-term sustained effort.

Mr. Chairman, that concludes my testimony. I would be happy to respond to any questions Members may have.

Mr. MILLER. Thank you very much.

Both in the IG report and in your testimony, Commissioner Beard, and even in the statement of Congressman Crapo, the suggestion has been that this problem has been going on a long time. Why are we addressing it now and under what authority?

Mr. BEARD. I think that is a question for my predecessors to answer. I am not going to be bound by the failure of those who preceded me to enforce the law. For whatever reasons, they were made aware of the evidence that various aspects of Reclamation law were not being enforced and they were unable or unwilling to act.

And I didn't take this job to perpetuate the past shortcomings of their leadership, or their unwillingness or inability, to enforce the law. The fact is that the findings of the Inspector General and of our own previous studies could provide significant evidence or fodder for dozens of lawsuits, many of which maybe have substantial prospects for success.

My feeling is that unless we act now to enforce the law and the contracts and address this problem head on, the administration of the entire program is going to be turned over to the Federal Courts. If we don't address the problem now, then I think the courts will.

Mr. MILLER. Let me ask you a question. And, again, I will make the caveat, this is not an attempt to have one solution on all, but I think there are some common features to these projects. I assume most of the projects have some competing interest in terms of priorities and/or expected benefits because you have Native Americans that expected some benefits from the project that were promised in some instances.

You have the question that has been raised now with respect to the project's impact on fish and wildlife. You have irrigators who are waiting for water from projects but have not yet received water, and I guess in the Central Valley you have people from the east side of the valley who have been waiting for water for years and people on the west side of the valley that have water.

And the question is whether the water is used in excess—you know, if water is used outside the bounds of the law and water is freed up—then there is a competing interest for that water, is there not?

Mr. BEARD. There is a competing interest, but what usage is made of that water will depend on the individual project authorization.

Mr. MILLER. I understand that, but if I am a farmer or a landowner, I may not be farming because I don't have water. But if I am a landowner in an irrigation district that is awaiting water and I am aware of the water spreading, why would I not sue if I think that is in excess of the law and in violation of law? Why would I not sue to bring that back in hopes that I maybe have access to water.

Mr. BEARD. I think the answer to that question would be up to that individual. But the problem you raise is a problem of competing uses. I mean, if there is one characteristic common to the projects that we have, it is that we don't have enough water to meet all the needs out there.

Congressman DeFazio and Congressman Smith are here, and they can relate to the problems in the Northwest. I mean, there is water for salmon and water for power production, and there are many competing demands for water in the Pacific Northwest. And you know, water spreading is a practice that has been going on in the Northwest for years.

We have a problem out there of unknown proportions. All we can tell you, and what the Inspector General's report tells you, is that we have a fuzzy image of this problem. We know it is a problem. We have known for some time it is a problem. Reclamation has known it is a problem for 10 years, but we don't know exactly what it looks like. Until we go in and look at each individual project and examine the contracts and the laws and the State laws and then look at the individual land use and water use in that individual district, we aren't going to know whether this is a problem of profound proportions or minor proportions.

And there is something that Congressman Crapo said that I thought was very important when he testified this morning. He referred to "stability," and I think that is a very important thing for us to keep in mind. This problem casts a cloud over water use in many parts of the western United States, and I think it is up to us to move as quickly as possible to clear that cloud, to provide some clarity and stability to water use with these individual districts. I suppose we could turn around and continue to ignore the problem, although then we would end up in court.

Mr. MILLER. I am not sure you get to continue to ignore it. That may be convenient and that may be what took place in the prior administrations, but the fact is, you have got to be held accountable to the law. If you don't like the law, you change the law. And I just wonder to what extent you feel bound. I mean, there is a suggestion again in most of the testimony that there was outright permission or encouragement or perhaps just simple looking of the other way or not asking for the information.

Do you feel bound by that?

Mr. BEARD. Well, I have to look at the individual instance. I think there will be instances as we get into this where government officials looked the other way or verbally agreed to certain practices and those practices have been continuing for years. Those cases will raise fundamental equity questions which I am sure we will be right back here addressing, because I don't think there is any way under the law that we can agree to or countenance those uses.

Mr. MILLER. Again, are there not two standards. It may be that if you try to change the contract or get district adherence with the contract, you may be at fault as one party to that contract. But I don't think you get to operate in excess of your granted authority under the laws of the United States.

Mr. BEARD. We can't.

Mr. MILLER. So, I mean, there are two distinctions going on here. The fact that somebody within the Bureau of Reclamation allowed a practice to continue doesn't make that practice necessarily legal.

Mr. BEARD. No, it doesn't.

Mr. MILLER. It is still a violation of law.

Mr. BEARD. It is, but it may raise an equity question. In which case, we would have to come back here and get the law changed.

Mr. MILLER. It may raise an equity question if you try to go back and recapture what you think are revenues owed you, but it also raises a question—the more serious question in my book—which is whether or not you can continue to operate outside of the law.

Mr. BEARD. At least in my case, as a result of the Inspector General's report, that is no longer a question, we can't operate outside the law.

Mr. MILLER. Do you have the authority under the law? Do you have to ask Reclamation districts whether or not they are in compliance with both Reclamation and/or their contracts.

Mr. BEARD. Sure.

Mr. MILLER. Why don't you ask them?

Mr. BEARD. Why haven't we in the past asked them?

Mr. MILLER. Or why don't you in the future?

Mr. BEARD. Well, we will be. By agreeing with the Inspector General's recommendations, we have laid out a process by which we are going to approach this problem. We have laid out time schedules and what we are going to do within each time schedule.

Mr. MILLER. But the districts have the information.

Mr. BEARD. And the Bureau has information as well. And there may be information which neither of us have that is relevant to the issue. In which case, we will have to develop that information, and that is why the timetables are somewhat lengthy.

Mr. MILLER. Let me get this clear. Are you going to ask the districts to certify to you whether or not they are in compliance with Reclamation law and with their water service or water delivery contract?

Mr. BEARD. I think we already asked that question. We asked if they are in compliance with Reclamation law on a yearly basis.

Mr. MILLER. And I assume the district might give back to you the answer that, yes, we are. There are the following modifications from the original contract and/or acreage and these modifications were changed were pursuant to a verbal agreement, a wink and a nod, a change in the contract or what have you.

Mr. BEARD. Well, I want to defend the districts in the sense that I am not sure that they may know that in fact they are violating the contract.

Mr. MILLER. Let me show you something in the testimony that we will hear later and from the Idaho Water Users Association. This is a map of modifications within an irrigation district. Very minor and incidental changes and a suggestion on a number of them, and it might be that at one time it was too steep to irrigate, but now with sprinklers, you can irrigate it. You couldn't do it by gravity flow and that sort of thing, but they obviously have had that information and why aren't they presenting that to you?

Mr. BEARD. There is a difference, I think, between specifics and verification. One of the things that we are going to have to do in each individual instance is go out and verify that information is true and accurate.

Mr. MILLER. Shouldn't we start with the premise that what we want is true and accurate information.

Mr. BEARD. Yes. Obviously, we want true and accurate information.

Mr. MILLER. Let's assume good faith here for a minute. Let's assume good faith and the question is, if you asked this irrigation district as to whether or not they were in compliance, they might look at the original acreage, original land classifications and say, well, geez, we are irrigating lands that at one time were considered nonirrigable lands.

For a host of reasons, we think there has been a change in circumstances and we have gone ahead and done this. We put the Bureau on notice or we haven't put the Bureau on notice or we think it is incidental and you want to sit down and talk about it. Another irrigation district might come in with very large tracts of land that are outside their boundary or talk about a contract to sell their water to somebody that is completely outside of their boundary, not a part of the entity, and then you have an ability to sort through and set priorities. But if you have to go out and determine each and every case, we will all be long gone from the face of the earth before that is done.

Mr. BEARD. I didn't mean to characterize it as though that we will go out and start the process all by ourselves. We are going to be doing this with the districts based on information collected under the Reclamation Reform Act enforcement procedures, and other information we have. We are going to be working with the individual districts to examine the information we all have today, and see if it is sufficient. If it isn't, we will determine what information gaps we have.

The individual districts know pretty well what is going on. Once we can explain to them how you are supposed to define which lands are classified and which ones aren't or what the nature of water spreading is, I have a lot of faith that we will be able to work this problem out.

Mr. MILLER. Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

Ms. Fleischman, you relied heavily on average numbers in your report. Did you have any field inspections to check your figures?

Ms. FLEISCHMAN. We relied on data from the Department's Bureau of Reclamation. They obtained that data in some instances, I would expect, from field inspections.

Mr. SMITH. Did you ever check with any irrigation district managers regarding the accuracy of the Bureau of Reclamation records?

Ms. FLEISCHMAN. Mr. Cameron tells me that most of the data or a very great deal of the data in the Bureau that we relied upon was provided originally by the irrigation districts themselves.

Mr. SMITH. I am going to question your lost revenue issue from \$37 million to \$46 million. I have contacted six irrigation districts in Oregon. In one case, you had not scored them having paid \$650,000 more than you gave them credit for. Another district paid over \$400,000. This puts in serious question your numbers. That is the reason I ask you those two questions. Now, can you defend your numbers?

Ms. FLEISCHMAN. Yes, I believe we can.

Mr. SMITH. Well, I don't think you can from just the statement I made, obviously, so we think in Oregon at least—and these are only Oregon numbers—you might have overstated the benefit you claim by 50 percent.

Well, Mr. Beard, do you agree with the numbers from the IG report?

Before you answer that, let me read to you your statement.

Mr. BEARD. Thank you.

Mr. SMITH. It is quite possible that the irrigators who applied saved water to their lands are paying some rate to the district for the water received. It may or may not be the contract rate, thus the irrigator's financial gain may be substantially overstated in the draft.

Mr. BEARD. Uh-huh.

Mr. SMITH. Thank you, now that you have answered that question.

Mr. BEARD. Well, no. I still believe the same way. The Inspector General's report has helped to bring this issue into better focus, but I would say to you that we still don't have an accurate estimate on a project-by-project basis. And we won't have, until we sit down with each individual district and go through the information they have and the information we have.

Mr. SMITH. Well, I am very encouraged by your statement. You obviously understand that this is a very involved situation and stability is a question of survival in the west. And I understood you to say that one shoe cannot fit all feet, but there are some encouraging signs in the Pacific Northwest.

And I think you know about one very great example that is the Umatilla Project which is working. In fact, I think a couple of weeks ago we discovered there are 5,000 salmon in the Umatilla when there were none two years ago, and increasing. But that was a situation whereby the tribes and the irrigators and the contractors sat down and they worked it out to everybody's benefit, and if we are going to pass a bill—which I know you don't want to do—to apply some conjured decision by this committee to apply to everybody in the country. It won't work. You know that and I know it. So I am encouraged by your thought to comply with the law but to seek out individual contracts and to work water spreading out between districts in Idaho and between districts in Oregon and California and other places.

So I want to thank you for what I think is a very judgmental position in this whole area of conflict. You didn't think I would say that, did you?

Mr. BEARD. No, I didn't. I can tell you must be retiring.

Mr. SMITH. I may seek your retirement as well, Mr. Beard.

Mr. BEARD. I may be out of here quicker than you think.

Mr. MILLER. On that sad note, Mr. Dooley.

Mr. DOOLEY. Thank you, Mr. Chairman.

Again, following up on some of Mr. Smith's concerns about the accuracy of some of the numbers that were reported and the extrapolations that were made by the Inspector General as it deals with my part of the country in the Central Valley Project. There is a range from perhaps as much as 2,100 acres up to 10,500 acres. Which even in the scope of the fact that this Central Valley Project serves 2.8 million acres is .04 percent of 1 percent is pretty insignificant, but I would be interested, do we have—can we have—access to how this number was derived?

Ms. FLEISCHMAN. Absolutely.

Mr. DOOLEY. You will be able to provide that to us?

[EDITOR'S NOTE.—See appendix.]

Ms. FLEISCHMAN. It is in the audit report. I would refer you to the audit report itself, to the notes on page 7 and at other places in the report which detail exactly how we calculated. These are not supposed to be absolutely precise numbers with respect to each project but they are very close, we believe.

Mr. DOOLEY. Again, though, in terms of the actual specific in terms of how this number was—I mean, we have a big range here. Do we have more than on page 7.

Ms. FLEISCHMAN. We computed the economic benefits by multiplying full cost rates provided by the Bureau by—

Mr. DOOLEY. I am talking more about the actual acres that you are saying that there are violations.

Ms. FLEISCHMAN. That data we picked up from the Bureau of Reclamation itself.

Mr. DOOLEY. Then, Mr. Beard, can we get that information from the Bureau that can identify those specific lands?

Mr. BEARD. Sure, certainly.

Mr. DOOLEY. The other issue I was interested in is what is the amount of acreage that has been submitted to the Bureau requesting a reclassification?

Ms. FLEISCHMAN. I don't think that we know that right now, but we will look in our work papers for this audit and see if we can find a number that we may have, and if so, we will submit it to you.

[EDITOR'S NOTE.—See appendix.]

Mr. DOOLEY. The reason I think there is some relevance in this question is because if—and I think it was a point in either your testimony or Mr. Beard's—some of the reclassification is being held up because of a lack of staffing and resources by the Department, which I would contend that, to some extent, districts are making a good-faith effort to comply with the law and yet you are accounting for this acreage that might be up for reclassification as being a violation of the law.

I would be interested in knowing how much of that total acreage is submitted for reclassification.

Ms. FLEISCHMAN. Well, if you will note, we are not saying per se that there is a violation of the law by any district. What we are trying to describe is a pervasive problem in lands, particularly in the 24 projects that we observed, surveyed. We are not saying that any of these are particularly a violation of the law itself. There is a problem with water spreading and there may very well be an opportunity to reclassify lands that are being irrigated.

In fact, we suggested that that would be one possibility that the Bureau should take into consideration as it seeks to address the problem. Our point is that there is a problem here and that we are pointing it out to the Bureau of Reclamation and we expect and anticipate that the Bureau will address the problem. That may very well include reclassifying certain lands that are ineligible right now that are receiving water. I have no doubt that that will occur in some cases. As Mr. Beard indicated, there are a multitude of complex situations across the west with respect to ineligible lands re-

ceiving water. It is almost impossible to say you will do X in all cases.

Mr. DOOLEY. And I appreciate those comments. My concern, though, if we are looking at this as a policy body, we need to be able to differentiate between how much of the problem is the result of an inability of the Bureau for lack of resources to deal with the appropriate reclassification and how much of it—of the potential problem which you have identified is a problem resulting from districts trying to circumvent their contract and the law. And I think that is the issue that I think is important in trying to get a scope, some idea just in terms of how much land is involved in the reclassification.

Mr. Beard, I am just interested, if you have a district which has had a practice that the Bureau has known about and in some cases might have given verbal approval to allowing the use of Bureau water that might not have been consistent with the written contract that has occurred over time, in a court of law, what would we anticipate if the Bureau immediately before a contract renewal would try to discontinue that practice if the Bureau had conceded to it for some period of time?

Mr. BEARD. Well, I don't know what would happen in an individual case. What I would say is just because some government official way back when provided verbal approval doesn't authorize violation of the law. As the Chairman mentioned, this came up in the Reclamation Reform Act where we found, as we got into it, a number of contracts or practices that had taken place. And at that point, the Congress decided for whatever reason that there were certain equities and they provided a legislative solution to that problem.

As know, we have to operate within the law as it exists. I would point out there are reasons these provisions need to be enforced and they are grounded in the reasons the laws were enacted in the first place. I mean, we have boundaries of the individual districts and projects because there had to be some identification of who was going to receive benefits.

Irrigability classifications are required because we have, in the past, delivered water to lands that couldn't grow crops. State water rights are required, and they only allow delivery of water if there is a State water right. And there are limitations on the use of agricultural water for M&I purposes. Each individual requirement is there for very logical reason, and we are going to have to go in and look at each one of these water spreading cases individually.

Mr. DOOLEY. From what I gather from your testimony, it appears that the Department of the Bureau has every authority that they need to address most of the concerns that the Inspector General has identified.

Do you see any legislative activity that needs to be considered?

Mr. BEARD. At the present time, no, but I don't want to rule it out. It may well be that we will find an instance that is so unfair, if you will, that we will come back to the Congress with a request. And knowing how the process works, I am sure you will hear about it before I do.

Mr. DOOLEY. One final question. In terms of if you have a district that currently has engaged in some efforts that led to greater

water conservation which is utilizing less water per acre, if we accepted the premise which the IG did in terms of saying that if we enforce the water spreading issue, we would in fact free up a lot of water, do you have any expectations that these districts are going to allow this water if they have a legal contract to it, to leave their boundaries, and what does this do in terms of the incentive for districts to try to employ methods which lead to greater conservation?

Mr. BEARD. Well, I think that is the argument that you will hear today, and we have heard already, and that is, don't penalize us for being efficient. But what I would say to you is, if water is conserved through improved practices, pricing mechanisms or structural changes or whatever, what uses can be made of that conserved water is determined under the contract, under State law, under Federal law and the water right permit. So it goes right back, as my testimony pointed out, to the individual State.

In Oregon, a different thing happens than happens in California or Idaho or Colorado or Nebraska. For each individual project or district, the contract and the laws are all different, and we have to look at each one individually to see what happens. There is no blanket attempt here to penalize people for trying to be efficient.

The Congress has made it very apparent that they want to encourage efficient use of Reclamation water. We are not allowed to deliver water to be used inefficiently. On the other hand, we don't want to penalize people either, so we will have to look at each individual case and try to make a determination.

Mr. MILLER. Mr. DeFazio.

Mr. DEFazio. No questions, Mr. Chairman.

Mr. MILLER. I appreciate the range, Ms. Fleischman, in your report, but at some point I would hope that as you sit down with these issues, we would be able to determine the amount of financial loss that may or may not be occurring, and also whether or not the Bureau has not been responsive to the requirements for reclassification.

I don't think that gives you the right to go ahead and reclassify it on your own by putting water on the land, does it?

Ms. FLEISCHMAN. I think you are absolutely right, Mr. Chairman.

Mr. MILLER. It is like if I don't get the building permit within three days from the city, I am going to put the shopping center in anyway. I don't think the law allows that.

Ms. FLEISCHMAN. Yes. We understand that, no, it does not. I would also add that Mr. Cameron tells me, as we reviewed the Bureau's records, we did not see very many requests for reclassification but we will submit for the record the answer to Mr. Smith's question as to exactly how we calculated the figures on unintentional gain by the Bureau.

We will also submit for the record from our files the numbers of requests for reclassification and the Bureau's response to the extent that we see that. I suspect Mr. Beard will also look at his records for that. But as I say, we don't think we have seen very many anyway.

Mr. MILLER. Well, I appreciate that. And I think that as I look at this issue, the solution sort of lies with the districts, first in com-

ing forward with the information and then, secondly, coming forward with what evidence they have in their possession as to why they do this and whether or not they have some color of law and authority for doing what they are doing, and that is to be resolved individually.

We are not looking at legislation. I don't think you need it, but what I think you need is the districts to come forward in candor and tell you exactly what their irrigation situation, their water usage situation is as of today. And whether that has to be done under penalty of perjury or what have you, we need that information.

And the fact is that the districts have that information, and they ought not to continue to try and hide that from the Bureau, if that is what is going on. In other cases, they have their explanations. They ought to put forth those explanations because either you are in compliance or you are not in compliance with the law and if eventually we get to the situation where compliance becomes so onerous, then we ought to consider changing the law. But until that moment, it is hard for me to see if you are looking at a range of whether it was \$37 to \$46 million in 24 districts over a period of eight years, that is a fair chunk of change.

I don't know how you can continue to deliver an annual benefit to these districts without having them certify to you that they are in compliance with the law and the people that Congress and the Bureau intended to get the benefit are in fact getting the benefits, and people who may be waiting for benefits may not have to continue to wait through the proper administration of the law. That seems to me the fundamental role here for the Bureau to play. If you are going to have to go out and play Sherlock Holmes and gather all of the evidence yourself, this isn't going to work.

Well, thank you very much for your help and your testimony, and we will obviously continue to stay in touch with you on this.

PANEL CONSISTING OF A. REED MARBUT, ADMINISTRATOR, WATER RIGHTS/ADJUDICATION DIVISION, OREGON WATER RESOURCES DIVISION, SALEM, OREGON; ANTONE MINTHORN, CHAIRMAN, GENERAL COUNCIL, CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, PENDLETON, OREGON, ACCOMPANIED BY BECKY HIERS, UMATILLA BASIN PROJECT POLICY ANALYST, CTUIR DEPARTMENT OF NATURAL RESOURCES; AND, LOUIE DICK, JR., MEMBER, BOARD OF TRUSTEES, CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, PENDLETON, OREGON

Mr. MILLER. The next panel will be made up of A. Reed Marbut, who is the Administrator of the Water Rights/Adjudication Division of the State of Oregon; and Antone Minthorn, who is the Chairman of Confederated Tribes of the Umatilla Indian Reservation; and Lewis Dick, Jr., who is a Member of the Board of Trustees of the Confederated Tribes of Umatilla Indian Reservation. And Becky Hiers, I see her accompanying somebody here.

Welcome to the committee. And, again, your statements will put in the record in their entirety. As you can see, the first panel took an hour. If we can do that with each panel, one of the panels is

not going to get to testify. So to the extent to which you can summarize—and we will try to summarize on this side in our part of the bargain—would be appreciated.

Mr. Marbut, we will begin with you.

STATEMENT OF A. REED MARBUT

Mr. MARBUT. Mr. Chairman, Members of the committee. Thank you for the opportunity to address this committee and present testimony on behalf of Oregon's Governor Roberts. And I am honored to share this witness table with distinguished leaders of the Umatilla tribes.

Mr. Chairman, I have submitted written testimony and would ask to be included in the record.

Mr. MILLER. Without objection.

Mr. MARBUT. Mr. Chairman, I was asked by Governor Roberts to serve as a Member of the Commissioner's Pacific Northwest task force on water spreading which has held approximately six meetings since the first of the year. This has been a very educational experience and I have listened to this complex debate for this period of time.

I will not repeat my written testimony that is before you. I would like to highlight what I think are extremely important items in the matter of spreading.

First of all, I think to be realistic, curing spreading or finding saved water will not automatically become instream flows. Actions taken in Washington, D.C. or Boise or Salem, neither will in fact place this water instream if there is a block of water. It is really action at the local river level that will put wet water in the stream. And by that, in the case of Oregon, we mean regulation and administration of water by the water masters in the basin.

And I might point out that in the Umatilla Basin, our water masters and our regional managers have spent long hours into the evenings working with the Umatilla tribes, the legal irrigators, in an attempt to provide maybe we can say 1990 water management based on 1900 water law.

Mr. Chairman, I would like to make just, I think, five points which I think of great importance. Spreading a term of art under the Reclamation concept may not be spreading under a State law concept. And I think it is only an example of the management issues of this decade and into the next century. And I think really the Reclamation and Reclamation programs have struggled to keep abreast of the technology changes, societal needs, really, since 1902.

Management of water in this era must be addressed by cooperative Federal, State, and local effort. The task force was a good example of that beginning and if we do not attempt to address it in a cooperative way, we will find no solutions unless we ask for a judge for those solutions.

All parties—meaning Federal, State, and local—must recognize and respect each other's laws in this matter. The State of Oregon, in its respect for Federal Reclamation law, does require a contract to receive Bureau water as a part of a water right. We would expect that the Bureau of Reclamation and the Federal government would respect State law, the requirement of a water right not only

to distribute water but even for the Bureau to store that water initially.

And if the water is going to be allocated to a different use, Oregon would expect that the Federal government would respect Oregon's transfer laws. We are working right now in the Umatilla on a transfer water, to supply water to essential salmon needs.

Thirdly, allocation and reallocation of water must take into consideration all of the interests in that water, whether it be instream interest, local economies, irrigation investments, or whatever they may be. We feel that the Oregon statutory scheme and the Oregon administrative process is able to recognize all of those interests.

For example, my fourth point is Oregon's instream water right program. Oregon prides itself in being a national leader in this stream flow protection. We have certified instream water rights and have pending before our department instream water rights that, when approved, will protect over 20,000 miles of instream reaches in the State of Oregon.

The State of Oregon has virtually more wild and scenic rivers designated by the United States Government than most other States combined. Oregon has an active instream leasing program which we feel may be an excellent opportunity for coordination with irrigation districts to provide essential instream flows at critical times for fish migration and habitat.

Lastly, Mr. Chairman, Members of the committee, Oregon law is an important issue in this debate. District boundaries are set under Oregon law.

Oregon has recently undertaken and this is partially in response to a question you have asked, Mr. Chairman, about where is information going to come from. Oregon has recently undertaken the major irrigation district remapping program. For the record, it is known as House bill 3111.

This program, under careful guidance with the regional managers throughout the State of Oregon, attempts to bring irrigation use and irrigation practice as it is now practiced into compliance with Oregon water law. The irrigation districts are spending thousands of dollars to entirely remap their districts. I am sure that the Bureau and other interested parties will find these maps when completed to be a very valuable tool in identifying precisely where water is used.

In addition, the Klamath Basin has recently been mapped by the Department as part of the Klamath River adjudication which, unfortunately, is currently sidetracked in a rather extensive Federal litigation which is now before the Ninth Circuit. But this kind of mapping and this kind of on-the-ground analysis may prove very valuable to the Bureau and other interested parties about precisely the nature of irrigation district water use in the State of Oregon.

Mr. Chairman, in the interests of time and to allow the other panel Members time, I will close my remarks with that unless there are questions.

Mr. MILLER. Thank you.

[Prepared statement of Mr. Marbut follows:]

STATE OF OREGON

TESTIMONY

before the

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

Water use Practices on Bureau of Reclamation Project Lands

Tuesday, July 19, 1994

Washington D.C.

Testimony prepared by: A. Reed Marbut, Administrator
Water Rights/Adjudication Division
Oregon Water Resources Division
Salem, Oregon

INTRODUCTION

Mr. Chairman, members of the Subcommittee, thank you for the opportunity to present testimony to the Oversight Subcommittee concerning the water use practices on United States Bureau of Reclamation project lands. I am here today to present testimony for Oregon's Governor Barbara Roberts. I have delivered copies of this written testimony to the Subcommittee staff, and would ask that my written testimony be included in the official record of the hearing.

Oregon is committed to a cooperative federal-state-local partnership in the management of Oregon's river systems for the long-term benefit of the people of Oregon and of the United States. Opportunities for dialogue, such as this hearing, are key to this relationship. It is important to note that Oregon and the Bureau of Reclamation have been able to maintain an excellent working relationship since the times of the first Bureau project in the Klamath Basin.

There are Bureau of Reclamation (Bureau) projects or United States Corps of Army Engineer projects managed by the Bureau in almost every Oregon river basin.

In my testimony today, I would like to describe the work of the Commissioner Beard's Pacific Northwest Water Spreading Task Force, offer an analysis of the relationship between federal reclamation law and state water law - as this relationship bears on the issue of water spreading, and lastly, report on the status of Oregon's in-stream water right and scenic waterway programs.

WATER SPREADING TASK FORCE

In the early 1980s, the Bureau identified water spreading as a significant issue. A task force report on land classification was published in 1983¹, and an ineligible lands task force report was published in 1985.²

On November 24, 1993, the Bureau's Pacific Northwest Regional Director issued a "Draft Plan and Policy for Dealing with Water Spreading and Water Transfer in the Pacific Northwest Region." The stated objective of the Draft Plan was "to eliminate unauthorized use of federally developed water supplies and facilities." This objective was to be achieved "by approving boundary changes and transfers to only those lands eligible to receive project water, by terminating delivery of project water to lands which are ineligible, and by developing and incorporating procedures to avoid future unauthorized water spreading actions." Water spreading was defined as "the unauthorized use of federally developed project water (or facilities) on lands not previously approved by Reclamation for such use."

Commissioner Beard asked the Pacific Northwest Region established a Water Spreading Task Force. Irrigation districts, environmental interest groups, Indian tribes and the States of Washington, Oregon and Idaho were represented on the Spreading Task Force. I have participated in the Task Force as Oregon's representative.

The Task Force met six times between February and June, 1994. At its first meeting Commissioner Dan Beard addressed the Task Force. Commissioner Beard pointed out that the Bureau is "prohibited by law from delivering water illegally." He indicated that the spreading issue could not be addressed unless we "get all the people who are involved in this issue in the room and talk through the problems and alternative solutions."

¹ See Report of the Task Force on Land Classification and Equivalency to The Assistant Commissioner of Planning and Operations (Dec. 5-7, 1983).

² See Report on Data Available and Data Requirements for Analysis of the Ineligible Lands Issue (Feb. 4, 1985.)

Commissioner Beard went on to say "we simply can't turn off the past and destroy rural economies and agricultural production. On the other hand we can't continue to exceed the local water [supplies] for purposes that are not authorized by law and I think we also have to recognize that there are other competing uses for water ... such as salmon restoration and other endangered species act uses."

Commissioner Beard charged the Task Force "to give us your best ideas on how we might approach cataloging the issue and the termination of illegal uses in a way that does not destroy local economies." As the Task Force began discussion, the Pacific Northwest Regional Director asked the Task Force to consider the following Objective Statement:

To provide the Bureau of Reclamation, through constructive discussion, a range of perspectives and information on specific values held by the public for use in policy formulation on water spreading issues.

As a part of the Task Force's charge, Bureau staff requested that the group provide guidance for a process of policy development; the nature, scope and elements of the policy; and recommendations for implementation of the policy. The Task force members felt that the most important first step was to identify the categories of unauthorized water uses. Once these categories were clearly identified, the group could begin to develop options for treatment of each category.

The Task Force identified the following categories of water spreading:

1. Use of water outside project boundaries;
2. Water applied to land outside irrigation district boundaries as those boundaries are described in a Bureau contract;
3. Water use without a Bureau contract, or in violation of a contract;
4. Water used on lands not classified as irrigable; and
5. Water used on lands that do not have a valid state water right.

Water spreading can be one or more of these practices. However, in sum, water spreading is a violation of a contract, a project authorization, land classification requirements or state law.

During the first few Task Force meetings documents and data were provided by the Bureau staff and the Task Force received a federal law briefing from a Bureau attorney and state law briefing from each state's representative. The Task Force members discussed a variety of issues related to spreading categories, options for treatment and allocation or reallocation of project waters.

A number of important collateral issues were discussed, including:

1. If water is "saved" by the elimination of certain spreading practices, how should the "saved" water be reallocated?
2. Is it possible to provide in-stream flow benefits by the reallocation of "saved" water?
3. How is reallocated "saved" water to be administered or regulated?

The Task Force generally agreed that where water use is in fact illegal, steps should be taken to bring the use into compliance with the law, either state or federal, or the use should be discontinued. In addition, the group recognized that a number of spreading cases could be brought within the law without termination of the irrigation. For example, where gravity irrigation practices had originally formed the basis for land classifications but modern irrigation practices have changed water application, reclassification could be considered. Further, where district boundaries were under consideration, NEPA review may identify boundary changes that could protect both the irrigation program and local environmental concerns.

Perhaps the most important collateral matter before the Task Force was the issue of reallocation of water "saved" by termination of unauthorized use of project water. All members recognized that decades of allocation of water to out-of-stream uses has severely depleted natural stream flows. Whether and how treatment of water spreading can be used to provide enhanced in-stream flows was a major topic of discussion.

Before I discuss Oregon's position with regard to the Bureau's management of its projects, the matter of spreading and reallocation of saved water, I would like to briefly discuss the relationship between the reclamation law and state water law. Oregon's commitment to federal-state-local cooperative water management is based upon an understanding and respect of each entity's laws.

RECLAMATION LAW

The history of the development of the West is in large part a history of water. One cannot discuss the settlement of the West and the related federal land laws without an understanding of water law. In general, the rules governing water allocation, distribution and use are framed in state law, with early land allocation framed in a number of federal laws. These laws were intended to facilitate the establishment of independent small family farms. The Homestead Act of 1862³ and the Desert Land Act of 1877⁴ are examples of the land allocation programs enacted by federal law. However, in practice these land laws were often found to be inappropriate to the arid regions of the west. Water became the essential ingredient.

The most significant federal legislation concerning water in the west was the Reclamation Act of 1902.⁵ The basic principle of the 1902 Reclamation Act was that the United States would build irrigation works from the proceeds of public-land sales in the sixteen arid western states.⁶ Water thus provided would be made available to both public and private land.

Since 1902, the Act has undergone significant change. Currently, project water may be provided for power, navigation, flood control, municipal, commercial, industrial, recreation, and fish and wildlife purposes.

Section 8 of the Reclamation Act provides, in part, that:

Nothing in this Act shall be construed as affecting or intended to affect or in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws.... The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.⁷

³ Act of May 20, 1862, ch. 75, 12 Stat. 392, 43 U.S.C. § 161 et seq.

⁴ Act of March 3, 1877, ch. 107, 19 Stat. 377, 43 U.S.C. § 321 et seq.

⁵ Act of June 17, 1902, ch. 1093, 32 Stat. 388, 43 U.S.C. § 372 et seq.

⁶ TEXAS was added as a reclamation state in 1906.

⁷ Section 8, 43 U.S.C. §§ 372, 383.

Section 8 of the Reclamation Act expressly disclaims any intention of displacing state water law except to insure that landowners receive an amount of water consistent with beneficial use.⁸

OREGON WATER LAW

Like most western states, Oregon has an intricate web of water law developed over a period of over one hundred years. This body of law is both complex and confusing. Like reclamation law, the basis of state water law is the appropriation doctrine.

Fortunately, the sections of Oregon's water law which are applicable to this discussion are quite limited. In general, we need only consider Oregon's statutory provisions for the acquisition of water rights, transfer of water rights and the laws pertaining to the formation and administration of irrigation districts.

Under Oregon law, water belongs to the people of the State⁹ and an individual must secure a water right before diversion or use of water may be initiated.¹⁰ Water is appurtenant to the place of its use. The place of use, the nature of the use and the point of diversion may not be changed without an approved transfer.¹¹ Irrigation districts are formed pursuant to state law. The boundaries are established by the local government and may not be altered except as provided under state irrigation district law.¹²

Under Oregon law, a water right is required to withdraw water from a natural river or stream for impoundment in a reservoir.¹³ In addition, a secondary water right is required to apply the stored water to beneficial use.¹⁴ When an individual applies for a water right to use the waters of a reservoir, the applicant

⁸ United States v. Alpine Land & Reservoir Co. (Alpine I), 697 F.2d 851, 1223 (9th Cir.), cert. denied, 464 U.S. 863 (1983).

⁹ Or. Rev. Stat. § 537.110 (1993).

¹⁰ Or. Rev. Stat. § 537.120 (1993).

¹¹ Or. Rev. Stat. § 554.510(2) (1993).

¹² Or. Rev. Stat. Chapter 545 (1993).

¹³ Or. Rev. Stat. § 537.400(1) (1993).

¹⁴ Id.

must show by documentary evidence that an agreement has been entered into which verifies that the applicant has a sufficient interest in the waters of the reservoir to meet the purposes of the water use proposed in the application.¹⁵

The Bureau has applied for and received state water rights for the storage of water in its projects. The Bureau, and in some cases users of project water, have applied for and received secondary water rights for use of project water. Pursuant to ORS 537.400(1), when an individual applies for use of water stored in a Bureau project, the State requires that a Bureau contract be secured before the water right permit may be issued. If the contract lapses or becomes invalid for any reason, water use must terminate.

As noted above, one of the categories of water spreading was "water used on lands that do not have a valid state water right." This category is of vital interest to the State; however, the question of the validity and interpretation of state water rights must be based upon state law. Oregon water law is unique in several aspects, especially as to the provisions governing establishment and administration of irrigation districts. For example, number of Oregon irrigation districts are currently undergoing a remapping program to bring water use mapping up to date.¹⁶

As we work cooperatively toward solutions to the water spreading issue and any reallocation of saved water, we must bear in mind the federal-state legal relationship. No solution will last long if we do not understand and coordinate our actions under both sets of laws.

OREGON IN-STREAM FLOW PROTECTION

I have chosen to address Oregon's water law pertaining to in-stream flow management in a separate portion of this testimony so as to emphasize the importance of this matter to the citizens of Oregon. Oregon is a national leader in the development of programs and laws for protection of in-stream water. With the enactment of the water resource planning statutes in 1955¹⁷ the Oregon legislature created an administrative process to establish minimum stream flows.

In the mid 1980s the Oregon legislature adopted a comprehensive

¹⁵ Id.

¹⁶ Or. Rev. Stat. § 541.325 - .333 (1992).

¹⁷ 1955 Or.Laws, ch. 536 (1993).

in-stream water right code.¹⁸ This in-stream water right program allows the Oregon Departments of Fish and Wildlife, Parks and Recreation, and Environmental Quality to apply for and receive in-stream water rights.¹⁹ These "in-stream" water rights provide a public benefit and are deemed to be beneficial use of water.²⁰ An in-stream water right, once certified, has the same legal status as any other water right.²¹

To date, 504 minimum stream flows have been converted to in-stream water rights protecting flows in over 8,500 miles of Oregon's streams and rivers. In addition, there are 957 in-stream water right applications pending before the Oregon Water Resources Department. Once these applications have been processed, a total of over 20,000 miles of Oregon streams and rivers will have protected in-stream flows levels established.

In 1970, a citizens initiative established the Oregon State Scenic Waterway Program.²² The scenic waterway program allows protection of scenic values in certain designated stream reaches in Oregon. The scenic waterway system originally included 496 free flowing miles of six rivers. Scenic waterway designation now protects 1,100 miles of streams and one 6,672 acre lake.

The most important aspect of Oregon's in-stream water right and scenic waterway programs is that these rights and flows can and are part of the State's water regulatory system. The State's watermaster corps is charged with the regulation of all water rights and water uses in Oregon.²³ Paper in-stream allocation is of no value unless wet water is regulated in favor of the right of record.

18 Or. Rev. Stat. § 537.332 - .360 (1993).

19 Or. Rev. Stat. § 537.336 (1993).

20 Or. Rev. Stat. § 537.332 - .334 (1993).

21 Or. Rev. Stat. § 537.350 (1993).

22 Or. Rev. Stat. § 390.808 et seq. (1993).

23 Or. Rev. Stat. § 540.045 (1993).

CONCLUSION

In closing, I would again like to thank the Chairman for the opportunity to present this testimony. Oregon believes we can address the issues related to water spreading in a cooperative and constructive way. We look forward to working with Bureau staff, environmental interest groups and local and irrigation representatives to secure solutions acceptable to all.

Lastly, with respect to the potential for reallocation of "saved" water to provide in-stream public benefits, the State of Oregon welcomes the Bureau to the discussion of water management and especially to the administration of in-stream flows. Oregon has developed a comprehensive body of water law, including provisions for in-stream flow protection. This law can serve to facilitate appropriate reallocation where possible. However, of more importance, Oregon law can serve to provide protection of such flows once established.

Mr. MILLER. Chairman Minthorn.

STATEMENT OF ANTONE MINTHORN

Mr. MINTHORN. Good morning, Mr. Chairman. My name is Antone Minthorn and I represent the Confederated Tribes of the Umatilla Indian Reservation. And with me here is Rebecca Hiers, the Umatilla project analyst for the tribe's Department of Natural Resources and also Louie Dick, Jr., who is a Member of the board of trustees which is the tribe's governing body.

I am the Chairman of the General Council which is comprised of all voting members of the tribe. As such, I sit on the board of trustees which is the governing body of the tribe. I also am Chairman of the Tribal Water Committee which oversees all issues affecting our treaty water rights. In addition, I represent the affiliated tribes of Northwest Indians where I serve as First Vice President.

Water spreading and other violations of Federal water laws have devastated our culture, religion, and economy. When my ancestors signed the Treaty of 1855 with the United States of America, our tribes were a healthy, happy people with a thriving economy based on the abundant resources of the Pacific Northwest.

In the Treaty of 1855, we reluctantly gave the United States legal title to over 6 million acres of land in what have now become the States of Oregon and Washington. This treaty is part of the foundation upon which the United States was established.

My ancestors understood that we are only borrowing this earth and its resources from our children. When they negotiated the treaty, they were thinking of their grandchildren for the next seven generations and beyond. Without the guarantee from the United States that we would be able to continue fishing for salmon, they would not have signed the treaty.

I am one of the grandchildren that they were thinking of in 1855. Yet today, less than 140 years after the signing of the treaty, the salmon are almost extinct. Some species are already gone forever. Our economic base has been devastated and my people are suffering. My ancestors never gave up the water necessary to maintain our fiduciary.

The United States Supreme Court has recognized this, making it clear that our treaty water rights are superior to all other water rights. Our treaty fisheries include the Umatilla, Grande Ronde, Walla Walla, Imnaha, Tucannon, Powder, Burnt and Malheur watersheds and along the main stem Columbia River. Yet after nearly 140 years, we are still waiting for our treaty water rights to be honored in any of these watersheds. Fish get only the polluted leftovers and often have no river in which to live.

Millions of salmon die for lack of clean, cold water. The rivers in the western United States and the life that depends on them are in a crisis state. Most salmon are killed as juveniles when they are only a few inches long. Adult salmon are unable to find the Umatilla River when they try to return to spawn. The Columbia and Snake River Dams have converted this powerful free-flowing river into a series of stagnant reservoirs. Most of the year's salmon run die as juveniles before they each reach the ocean.

Water spreading has cost all of us a great deal. The Inspector General's audit on water spreading concludes that Umatilla Basin

irrigators have cheated the American taxpayer out of almost half a million dollars by avoiding required repayment for use of Bureau of Reclamation facilities and water. Water spreading has other costs, as well, such as its impacts on the Umatilla Basin Project.

The Umatilla Basin Project has been a national model for addressing the conflict between treaty water rights and non-Indian water use. Congress authorized the project in 1988 to restore flow to the Umatilla River which had been dried up by Reclamation irrigation projects. When complete, the project will have cost taxpayers approximately \$50 million. The project will provide about 39,000 acre feet of water annually for fish to replace the water used by irrigation. The project also protects the Umatilla Basin irrigators from impacts to their water supply when we adjudicate our water rights claim.

It now turns out that the Umatilla Basin irrigators have been taking nearly 34,000 acre feet of water illegally every year. This is approximately 90 percent of the water that the project provides instream. Permitting the illegal use of this water could negate the \$50 million investment made by taxpayers to put water back in the Umatilla River. Add the approximately \$50 million investment by Bonneville Power Administration ratepayers, who pay the pumping cost for the irrigators and the potential loss or waste of taxpayer and ratepayer monies could exceed \$100 million.

Water spreading has also impacted our salmon restoration efforts in the Umatilla Basin. Umatilla River salmon were driven into extinction over 70 years ago by Reclamation irrigation projects. This tribe, working slowly with several Federal agencies and with the Oregon Department of Fish and Wildlife, has successfully reintroduced salmon to this basin. It has truly been a miracle to see Indians and non-Indians fishing here again. We have shown that salmon runs can be restored.

But our restoration efforts are being undermined by inadequate instream flows. When the Westland Irrigation District put in conservation measures just a few years ago, they dried up the return flow which had supplied late summer and fall water for fish. Westland Irrigation District then started selling this water illegally to the Teel Irrigation District.

Because this dried up the river, we have had to capture the salmon and truck them 50 miles or more to where there is water in the river. Trucking puts tremendous stress on the fish and large numbers of them die as a result. This has seriously undermined the Umatilla fish restoration effort and the millions of dollars that this tribe, the Federal Government, and the State of Oregon have invested in restoring salmon here.

The Inspector General's Audit shows that problem is occurring West-wide. We are very concerned because water spreading impacts our treaty rights throughout the entire Columbia-Snake Basin. Low instream flows kill salmon in every tributary in the Basin in the Basin as well as in the mainstem.

At the time of our treaty, 10 to 16 million salmon returned each year to the Columbia Basin. Now, only about 2.5 million salmon return every year, and this year looks like it will be the worst year yet. For two decades, we have been cutting back our tribal harvest until now it is virtually gone.

It is almost impossible to describe in words the pain and suffering this has caused my people. We have been fishermen for thousands of years. It is our life, not just our economy. One hundred and forty years ago, we were a wealthy people. Now, our unemployment rate is sky high. Perhaps, if you look at the economic and social devastation which non-Indian commercial fishermen are beginning to suffer, you will begin to understand what we have been suffering for years.

This tribe developed a water spreading policy last winter that mandates consideration of our treaty rights in resolving this problem. The affiliated tribes of Northwest Indians has adopted a similar policy which is now being reviewed by the National Congress of American Indians. It sets out a process for resolving this issue cooperatively without litigation or new legislation.

We thought that our cooperative approach has succeeded in June when, after months of intensive negotiations, we finalized agreements with the local irrigation districts. We did everything we could to make those agreements work, including making many significant concessions to the irrigators. At the last minute, the irrigators backed out of our agreement. They told the local newspapers that they were afraid that the language they had negotiated with us could set harmful precedents for irrigation throughout the west.

Our agreements would have set a precedent for fair and cooperative resolution of the water spreading issue. That is exactly the kind of precedent that we need. It is truly unfortunate that the irrigation interests have decided that they do not want such a cooperative solution to this problem.

Reclamation is under tremendous pressure to legalize water spreading and to ignore past and future impacts on Indian trust assets. Only three tribes sit on the Reclamations Water Spreading Task Force. So far, despite repeated requests by these three tribes, Reclamation has not even notified any other tribes about the water spreading problem or the policy development process.

Most tribes, like most Americans, do not even know about the existence of this massive illegal practice. Irrigation interests, who are involved in water spreading and know all about efforts to stop it, have attended task force meetings in large numbers. This situation has resulted in unbalanced input into the development of Reclamation's new policy.

In addition, Reclamation has held informational meetings in irrigation communities, but has left out Indian reservations altogether. Now, Reclamation has scheduled hearings for the very same irrigation communities to speak twice on this new policy, while tribes are not being given any opportunity at all. Unfortunately, Reclamation's new draft policy leans heavily towards legalizing water spreading and fails to consider the impacts on fisheries.

It should also be noted that no fisheries agencies, from either the Federal Government or from the States, have been asked for their input into the policy. This is despite clearly expressed concern over the impacts of water spreading on salmon recovery by agencies such as the National Marine Fisheries Service.

To legalize water spreading while continuing to ignore this tribe's legal rights would be inconsistent with the law and it would breach

the United States trust responsibility to uphold the Treaty of 1855 and to protect our tribal resources. Further, it would be a continuation of the institutional racism which has destroyed the once plentiful salmon runs like the buffalo of the Lakota, thus devastating our economy, culture, and religion.

Water spreading must be halted immediately. Our water spreading policy calls for Reclamation to take custody of the water which has been used illegally. Then it should be allocated to meet currently unmet legal requirements such as our treaty rights. If irrigators agree to mitigate past as well as future impacts to our treaty resources, then some of that water may be reallocated to them.

In conclusion, I like to make two requests to your committee. First, we would like you to review the agreements which we negotiated with the Umatilla Basin irrigation districts and give these agreements your support as the preferred method for resolving water spreading in the Umatilla Basin. Second, we would like you to investigate the potential threat to the Umatilla Basin project's fisheries benefits due to illegal water spreading in the Umatilla Basin.

Natural resources in the Pacific Northwest are in peril. This is beginning to create many conflicts. My people have been stewards of land here for thousands of years. At the time of this treaty, these resources were plentiful. We understand this land, but we have been left out of the process for 150 years. We still have time to fix the problems we face, but we need to work together, sovereign to sovereign, and we need to be treated fairly.

Thank you. That is the end of my statement.

Mr. MILLER. Thank you.

[Prepared statement of Mr. Minthorn and attachments follow:]

**TESTIMONY OF CHAIRMAN ANTONE MINTHORN
Confederated Tribes of the Umatilla Indian Reservation
Affiliated Tribes of Northwest Indians**

**SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
Committee on Natural Resources
United States House of Representatives**

**WATER SPREADING HEARING
July 19, 1994**

My name is Antone Minthorn, and I represent the Confederated Tribes of the Umatilla Indian Reservation. I am Chairman of the General Council, which is comprised of all voting members of the Tribe. As such, I sit on the Board of Trustees, which is the governing body of the Tribe. I also am Chairman of the Tribal Water Committee, which oversees all issues affecting our treaty water rights. In addition, I represent the Affiliated Tribes of Northwest Indians where I serve as First Vice President.

Water spreading and other violations of federal water laws have devastated our culture, religion, and economy. When my ancestors signed the Treaty of 1855 with the United States of America, our tribes were a healthy, happy people with a thriving economy based on the abundant resources of the Pacific Northwest.

In the Treaty of 1855, we gave the United States legal title to over six million acres of land in what have now become the States of Oregon and Washington. This Treaty is part of the foundation upon which the United States was established.

My ancestors understood that we are only borrowing this Earth and its resources from our children. When they negotiated the Treaty, they were thinking of their grandchildren for the next seven generations and beyond. Without the guarantee from the
Testimony of Chairman Antone Minthorn - Page 1

United States that we would be able to continue fishing for salmon, they would not have signed the Treaty.

I am one of the grandchildren they were thinking of in 1855. Yet today, less than 140 years after the signing of the Treaty, the salmon are almost extinct. Some species are already gone forever. Our economic base has been devastated, and my people are suffering.

My ancestors never gave up the water necessary to maintain our fishery. The United States Supreme Court has recognized this, making it clear that our treaty water rights are superior to all other water rights. Our treaty fisheries include the Umatilla, Grande Ronde, Walla Walla, Imnaha, Tucannon, Powder, Burnt and Malheur watersheds and along the mainstem Columbia River. Yet, after nearly 140 years, we are still waiting for our treaty water rights to be honored in any of these watersheds. Fish get only the polluted leftovers, and often have no river in which to live.

Millions of salmon die for lack of clean, cold water. The rivers in the Western United States, and the life that depends on them, are in a crisis state. Most salmon are killed as juveniles, when they are only a few inches long. Adult salmon often are unable even to find the Umatilla River when they try to return to spawn. The Columbia and Snake River dams have converted this powerful free-flowing river into a series of stagnant reservoirs. Most of each year's salmon run die as juveniles, before they even reach the ocean.

Water spreading has cost all of us a great deal. The Inspector General's Audit on water spreading concludes that

Testimony of Chairman Antone Minthorn - Page 2

Umatilla Basin irrigators have cheated the American taxpayers out of almost half a million dollars by avoiding required repayment for use of Bureau of Reclamation facilities and water. Water spreading has other costs, as well, such as its impacts on the Umatilla Basin Project.

The Umatilla Basin Project has been a national model for addressing the conflict between treaty water rights and non-Indian water use. Congress authorized the Project in 1988 to restore flows to the Umatilla River, which had been dried up by Reclamation irrigation projects. When complete, the Project will have cost taxpayers approximately \$50 million. The Project will provide about 39,000 acre-feet of water annually for fish to replace the water used by irrigation. The Project also protects the Umatilla Basin irrigators from impacts to their water supply when we adjudicate our water rights claim.

It now turns out that Umatilla Basin irrigators have been taking nearly 34,000 acre-feet of water illegally every year. This is approximately 90% of the water that the Project provides instream. Permitting the illegal use of this water could negate the \$50 million investment made by taxpayers to put water back in the Umatilla River. Add the approximately \$50 million investment by Bonneville Power Administration ratepayers, who pay the pumping costs for the irrigators, and the potential loss or waste of taxpayer and ratepayer monies could exceed \$100 million.

Water spreading has also impacted our salmon restoration efforts in the Umatilla Basin. Umatilla River salmon were driven

into extinction over 70 years ago by Reclamation irrigation projects. This Tribe, working closely with several federal agencies and with the Oregon Department of Fish and Wildlife, has successfully reintroduced salmon to this basin. It has truly been a miracle to see Indians and non-Indians fishing here again. We have shown that salmon runs can be restored.

But our restoration efforts are being undermined by inadequate instream flows. When the Westland Irrigation District put in conservation measures just a few years ago, they dried up the return flows which had supplied late summer and fall water for fish. Westland Irrigation District then started selling this water illegally to the Teel Irrigation District.

Because this dried up the river, we have had to capture the salmon and truck them 50 miles or more back to where there is water in the river. Trucking puts tremendous stress on the fish and large numbers of them die as a result. This has seriously undermined the Umatilla fish restoration effort and the millions of dollars that this Tribe, the federal government and the State of Oregon have invested in restoring salmon here.

The Inspector General's Audit shows that problem is occurring West-wide. We are very concerned because water spreading impacts our treaty rights throughout the entire Columbia-Snake Basin. Low instream flows kill salmon in every tributary in the Basin as well as in the mainstem.

At the time of our Treaty, 10 to 16 million salmon returned each year to the Columbia Basin. Now, only about 2.5 million

salmon return every year, and this year looks like it will be the worst year yet. For two decades, we have been cutting back our tribal harvest until now it is virtually gone.

It is almost impossible to describe in words the pain and suffering this has caused my people. We have been fishermen for thousands of years. It is our life, not just our economy. 140 years ago, we were a wealthy people. Now, our unemployment rate is sky-high. Perhaps, if you look at the economic and social devastation which non-Indian commercial fishermen are beginning to suffer, you will begin to understand what we have been suffering for years.

This Tribe developed a Water Spreading Policy last winter that mandates consideration of our treaty rights in resolving this problem.¹ The Affiliated Tribes of Northwest Indians has adopted a similar policy which is now being reviewed by the National Congress of American Indians.² It sets out a process for resolving this issue cooperatively, without litigation or new legislation.

We thought that our cooperative approach had succeeded in June when, after months of intensive negotiations, we finalized agreements with the local irrigation districts. We did everything we could to make those agreements work, including making many significant concessions to the irrigators. At the last minute, the

¹A copy of our Water Spreading Policy is included as Attachment 1.

²A copy of the Affiliated Tribes of Northwest Indians' resolution on water spreading is included as Attachment 2.

irrigators backed out of our agreement. They told the local newspaper that they were afraid that the language they had negotiated with us could set harmful precedents for irrigation throughout the West.

Our agreements would have set a precedent for fair and cooperative resolution of the water spreading issue. That is exactly the kind of precedent that we need. It is truly unfortunate that the irrigation interests have decided that they do not want such a cooperative solution to this problem.

Reclamation is under tremendous pressure to legalize water spreading and to ignore past and future impacts on Indian Trust Assets. Only three tribes sit on the Reclamation's Water Spreading Task Force. So far, despite repeated requests by these three tribes, Reclamation has not even notified any other tribes about the water spreading problem, or the policy development process.

Most tribes, like most Americans, do not even know about the existence of this massive illegal practice. Irrigation interests, who are involved in water spreading and know all about efforts to stop it, have attended Task Force meetings in large numbers. This situation has resulted in unbalanced input into the development of Reclamation's new policy.

In addition, Reclamation has held informational meetings in irrigation communities, but has left out Indian Reservations altogether. Now, Reclamation has scheduled hearings for the very same irrigation communities to speak twice on this new policy, while tribes are not being given any opportunity at all.

Unfortunately, Reclamation's new draft policy leans heavily towards legalizing water spreading and fails to consider the impacts on fisheries.

It should also be noted that no fisheries agencies, from either the federal government or from the states, have been asked for their input into the policy. This is despite clearly expressed concern over the impacts of water spreading on salmon recovery by agencies such as the National Marine Fisheries Service.³

To legalize water spreading while continuing to ignore this Tribe's legal rights, would be inconsistent with the law, and it would breach the United States' Trust Responsibility to uphold the Treaty of 1855 and to protect our tribal resources. Further, it would be a continuation of the institutional racism which has destroyed the once plentiful salmon runs, like the buffalo of the Lakota, thus devastating our economy, culture and religion.

Water spreading must be halted immediately. Our Water Spreading Policy calls for Reclamation to take custody of the water which has been used illegally. Then, it should be allocated to meet currently unmet legal requirements, such as our treaty rights. If irrigators agree to mitigate past as well as future impacts to our treaty resources, then some of that water may be reallocated to them.

In conclusion, I would like to make two requests to your Committee. First, we would like you to review the agreements which

³A copy of a letter sent to the Bureau of Reclamation from the Division Chief of the National Marine Fisheries Service concerning water spreading in the Umatilla Basin is included as Attachment 3.

we negotiated with the Umatilla Basin irrigation districts and give these agreements your support as the preferred method for resolving water spreading in the Umatilla Basin. Second, we would like you to investigate the potential threat to the Umatilla Basin Project's fisheries benefits due to illegal water spreading in the Umatilla Basin.

Natural resources in the Pacific Northwest are in peril. This is beginning to create many conflicts. My people have been stewards of the land here for thousands of years. At the time of the Treaty, these resources were plentiful. We understand this land, but we have been left out of the process for 140 years. We still have time to fix the problems we face, but we need to work together, sovereign to sovereign, and we need to be treated fairly.

Thank you.



GENERAL COUNCIL
and
BOARD OF TRUSTEES

CONFEDERATED TRIBES
of the
Umatilla Indian Reservation

P.O. Box 638
PENDLETON, OREGON 97801
Area Code 503 Phone 276-3165
FAX 276-3095

CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION

WATER SPREADING POLICY

March 2, 1994

Since time immemorial, our economy, religion and culture have centered around our fishing, hunting and gathering resources in the Columbia-Snake Basin. We gave the United States 6.4 million acres of land in the Treaty of 1855. But we never gave away the water needed by these resources. In the Treaty, the United States promised to protect these resources for us.

Yet our tribal resources, such as salmon, are going extinct because of lack of water. Bureau of Reclamation projects have taken water, which under the Treaty should have been protected for fish, and have given it to irrigators. This violation of the Treaty has devastated our economy and has severely impacted our culture and our ability to practice our religion. After 139 years, we are still waiting for our Treaty water right to be honored.

Not only have our Treaty rights been ignored, but irrigators have been taking additional water illegally. When Indians fish illegally, we are sent to federal prison. When irrigators kill fish by illegally taking water, they are not punished. Instead, we are told by the United States government that we must consider the impacts to the irrigation economy of making them stop their illegal activity.

Our economy, which is protected by Treaty, is being destroyed. Their economy, even when based on illegal water diversions, is given the greatest protection. To legalize water spreading activities while continuing to ignore this Tribe's legal rights, would be inconsistent with the law, would breach the United States' Trust Responsibility to this Tribe and would be a continuation of the institutional racism which has already devastated this Tribe's economy, religion and culture.

Resolution of this problem is possible. It must, however, recognize this Tribe's superior claim to water. It is this Tribe's

Attachment 1

TREATY JUNE 9, 1855 + CAYUSE, UMATILLA AND WALLA WALLA TRIBES

policy that resolution of the water spreading problem must have two objectives. First, it must provide additional water instream in both the tributaries and the mainstems of the Columbia-Snake Basin. Second, it must be viewed as a critical tool for salmon restoration in the Umatilla Basin and in the Columbia-Snake Basin. The water spreading problem must be addressed in the following manner:

1. Water spreading is illegal and must be halted immediately. The Bureau of Reclamation must take custody of all of the water which has been used illegally. Irrigators who wish to legalize past practices must go through the National Environmental Policy Act (NEPA) process to do so. Irrigators must request and begin the NEPA process within one year. Otherwise, the water must be permanently allocated to protect tribal resources.
2. When irrigators request legalization of past practices, they may request that the Bureau of Reclamation make some water available to them until the NEPA process is completed. The Bureau of Reclamation, having taken custody of the water which has been used illegally, may allocate that water among the different users. In doing so, however, tribal resources must be given first priority with other user groups given second priority.
3. When irrigators request legalization of past practices, the following standards must be followed in the NEPA process:
 - a. Past impacts from the illegal activities on tribal resources must be fully mitigated. Mitigation alternatives should include, among others, reallocation of water to instream uses, watershed restoration and financial compensation.
 - b. Any potential future impacts from the legalization of water spreading must be fully mitigated. Mitigation alternatives should include, among others, reallocation of water to instream uses, watershed restoration and financial compensation.
 - c. The analysis of impacts to tribal resources must include local, regional and cumulative impacts. The baseline for determining impacts will be the condition of the resources at the time of the Treaty of 1855.
 - d. Monitoring and enforcement procedures must be established and implemented, including the installation of measuring devices on all irrigation diversions.
 - e. Measures to improve water quality by reducing the impacts of farming practices must be established and implemented.

- f. Comprehensive, state-of-the-art conservation measures must be developed and implemented, with the conserved water reallocated to tribal resources.
- g. Economically unjustifiable uses of the water shall not be permitted. For instance, no water should be provided to grow surplus crops. Irrigators must demonstrate that their proposed use of the water is economically justifiable.
- h. Irrigators must repay the taxpayers for the subsidies illegally received in the past.

Water for salmon and all our treaty resources is a matter of survival for our culture and religion. We are only borrowing these resources from our children. It is our duty and obligation to leave these resources clean, strong and healthy for the next seven generations and beyond to use and enjoy. These resources are a part of us. Destruction of the water and the salmon means destruction of our people.

The United States government has a Trust Responsibility to protect all our treaty resources for us. We recognize that the irrigators who have been water spreading may face economic hardship if forced to comply with the law. We understand what that means. Our tribal economy, culture and religion already have suffered far more than mere hardship. This injustice and deprivation continues today. In spite of this, we have worked successfully with the United States government and with irrigation interests to resolve other conflicts over water. We are willing to try to resolve this issue. However, any resolution to the water spreading problem must be consistent with the law. It must address the past violations of our Treaty rights.

C E R T I F I C A T E

The undersigned, Donald G. Sampson and Rose Mary Narcisse, hereby certify that they are the Chairman and Secretary, respectively, of the Board of Trustees, of the Confederated Tribes of the Umatilla Indian Reservation, that at a duly called and held meeting of said Board at the Board Room of the Tribal Office/Tribal Administration Building, Pendleton, Oregon on March 2, 1994, a quorum of said Board was present and the following Resolution was regularly moved, seconded, and adopted by a vote of 8 to 0, 0 abstaining.

RESOLUTION

WHEREAS, the Board of Trustees is the governing body of the Confederated Tribes of the Umatilla Indian Reservation, Pendleton (Mission), Oregon and by the authority of the 1949 Constitution and By-Laws as adopted on November 4, 1949, AND

WHEREAS, At the January 15, 1994, National Environmental Policy Act Scoping Hearing held on the Reservation, General Council members expressed their feelings about what policy position the Confederated Tribes of the Umatilla Indian Reservation should take concerning water spreading and the request of the local irrigation districts to expand their boundaries;AND

WHEREAS, The Board of Trustees, in consultation with the Tribal Water Committee, the Fish and Wildlife Committee and the Natural Resource Commission, developed a draft Water Spreading Policy based upon the testimony of General Council members;AND

WHEREAS, The General Council reviewed and commented on this draft Water Spread Policy at a specially held General Council Meeting on February 28, 1994;AND

WHEREAS, The comments of General Council have been incorporated into the Water Spreading Policy; AND BE IT FINALLY

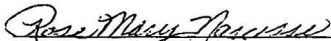
RESOLVED; That the Board of Trustees hereby approves and adopts the attached Water Spreading Policy, AND

that said Resolution has not been modified, amended or repealed and is still in full force and effect.

DATED this 2nd day of March, 1994.


Donald G. Sampson, Chairman
Board of Trustees

ATTEST:


Rose Mary Narcisse, Secretary
Board of Trustees



Affiliated Tribes of Northwest Indians

1994 Mid-Year Conference Pendleton, Oregon

RESOLUTION # 94 - 46

PREAMBLE

We, the members of the Affiliated Tribes of Northwest Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants rights secured under Indian Treaties and benefits to which we are entitled under the laws and constitution of the United States and several states, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the welfare of the Indian people, do hereby establish and submit the following resolution:

WHEREAS, the Affiliated Tribes of Northwest Indians (ATNI) are representatives of and advocates for national, regional, and specific Tribal concerns; and

WHEREAS, the Affiliated Tribes of Northwest Indians is a regional organization comprised of American Indians in the states of Washington, Idaho, Oregon, Montana, Nevada, northern California, and Alaska; and

WHEREAS, the health, safety, welfare, education, economic and employment opportunity, and preservation of cultural and natural resources are primary goals and objectives of Affiliated Tribes of Northwest Indians; and

WHEREAS, since time immemorial, our economy, religion and culture have centered around our fishing, hunting and gathering resources in the Pacific Northwest. We gave the United States millions of acres of land in our treaties. But we never gave away the water needed by these resources. In our treaties, the United States promised to protect these resources for us; and

Attachment 2

825 N.E. 20th Avenue • Suite 310 • Portland, Oregon 97232-2275
Phone: (503) 230-0293 • FAX: (503) 230-0580

WHEREAS, our Tribal resources, such as salmon, are going extinct because of lack of water. Bureau of Reclamation projects have taken water, which under our treaties should have been protected for fish and other treaty resources, and have given it to irrigators. This violation of our treaties has devastated our economy and has severely impacted our culture and our ability to practice our religion. After more than a century, we are still waiting for our treaty water rights to be honored; and

WHEREAS, not only have our treaty water rights been ignored, but non-Indian irrigators have been taking additional water illegally. When Indians fish illegally, we are sent to federal prison. When irrigators kill fish by illegally taking water, they are not punished. Instead, we are told by the United States government that we must consider the impacts to the irrigation economy of making them stop their illegal activity; and

WHEREAS, our economies, which are protected by treaties, are being destroyed, while the non-Indian irrigation economy, even when based on illegal water diversions, is given the greatest protection; and

WHEREAS, water for salmon and all our treaty resources is a matter of survival for our culture and religion. We are only borrowing these resources from our children. It is our duty and obligation to leave these resources clean, strong and healthy for the next seven generations and beyond to use and enjoy. These resources are a part of us. Destruction of the water and the salmon means destruction of our people; and

WHEREAS, the United States government has a Trust Responsibility to protect all our treaty resources for us as so stated by the President of the United States in his Government to Government relations statement April 29, 1994 in Washington D.C. to all Tribal leaders; and

WHEREAS, legalization of water spreading activities while continuing to ignore our Tribes' legal rights, would be inconsistent with the law, would breach the United States' Trust Responsibility to our Tribes and would be a continuation of the institutional racism which has already devastated our Tribal economies, religion and culture; and

WHEREAS, resolution of the water spreading problem is possible. It must, however, recognize our Tribes' superior claim to water; now

THEREFORE BE IT RESOLVED, it is the policy of the Affiliated Tribes of Northwest Indians that resolution of the water spreading problem must have two objectives. First, it must provide additional water instream in both the tributaries and the mainstems of the Columbia-Snake Basin and all other basins in the Pacific Northwest. Second, it must be viewed as a critical tool for salmon restoration in the Pacific Northwest; and

BE IT FURTHER RESOLVED, the water spreading problem must be addressed in the following manner:

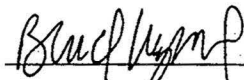
1. Water spreading is illegal and must be halted immediately. The Bureau of Reclamation must take custody of all of the water which has been used illegally. Non-Indian irrigators who wish to legalize past practices must go through the National Environmental Policy Act (NEPA) process to do so. Non-Indian irrigators must request and begin the NEPA process within one year. Otherwise, the water must be permanently allocated to protect Tribal resources.
2. When Non-Indian irrigators request legalization of past practices, they may request that the Bureau of Reclamation make some water available to them until the NEPA process is completed. The Bureau of Reclamation, having taking custody of the water which has been used illegally, may allocate the water among the different users. In doing so, however, Tribal resources must be given first priority with other user groups given second priority.
3. When Non-Indian irrigators request legalization of past practices, the following standards must be followed in the NEPA process:
 - a. Past impacts from the illegal activities on tribal resources must be fully mitigated. Mitigation alternatives should include, among others, reallocation of water to instream uses, watershed restoration and financial compensation.
 - b. Any potential future impacts from the legalization of water spreading must be fully mitigated. Mitigation alternatives should include, among others, reallocation of water to instream uses, watershed restoration and financial compensation.
 - c. The analysis of impacts to tribal resources must include local, regional and cumulative impacts. The baseline for determining impacts will be the condition of the resources at the time of our treaties.
 - d. Monitoring and enforcement procedures must be established and implemented, including the installation of measuring devices on all irrigation diversions.
 - e. Measures to improve water quality by reducing the impacts of farming practices must be established and implemented.

-
- f. Comprehensive, state-of-the-art conservation measures must be developed and implemented, with the conserved water reallocated to Tribal resources.
 - g. Economically unjustifiable uses of the water shall not be permitted. For instance, no water should be provided to grow surplus crops. Irrigators must demonstrate that their proposed use of the water is economically justifiable.
 - h. Non-Indian irrigators must repay the taxpayers for the subsidies illegally received in the past.

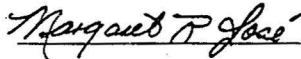
BE IT FINALLY RESOLVED, if the above-described process for resolving this problem is not implemented, then all water which has been used illegally must be reallocated to Tribal resources immediately.

CERTIFICATION

The foregoing resolution was adopted at the 1994 Mid-Year Conference of the Affiliated Tribes of Northwest Indians, held at the Red Lion Inn, Pendleton, Oregon on May 19, 1994 with a quorum present.



Bruce Wynne, President



Margaret Jose', Secretary

ORIGINAL



CONTROL NO. _____

FOLDER ID _____

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
ENVIRONMENTAL & TECHNICAL SERVICES DIVISION
911 NE 11th Avenue, Room 522
PORTLAND, OREGON 97232 BUREAU OF RECLAMATION
503/230-5400 FAX 503/230-5435 OFFICIAL ACTION COPY P/NW03

DEC 20 1993

DEC 20 1993

100	10	12/20
151		
105		
151L		

Mr. John Keys, Director
U.S. Department of Interior
Bureau of Reclamation
Pacific Northwest Division
1150 North Curtis Road
Boise, Idaho 83706-1234

RE: PN-151, Scoping Document on Proposed Boundary Changes for
Irrigation Districts Within The Umatilla Project, Oregon

Dear Mr. Keys:

The National Marine Fisheries Service (NMFS) has reviewed a copy of the National Environmental Policy Act (NEPA) Scoping Document on the Proposed Boundary Changes for Irrigation Districts Within the Umatilla Project in Oregon. We received this document from the Columbia Basin Fish and Wildlife Authority (CBFWA) on November 29, 1993. Although our comments were not directly solicited by the Bureau of Reclamation (BOR), we believe that it is within our statutory authority under NEPA and the Fish and Wildlife Coordination Act to comment at this time.

General Comments

Past agricultural practices in the Columbia and Umatilla Basins, including irrigation withdrawal-induced modifications of historic flows, have resulted in negative impacts that have contributed to the decline of anadromous salmonid stocks. In the Columbia River, these impacts have ranged from changes in water velocity, with resultant impacts on salmonid migration, to induced straying of Umatilla fall chinook salmon into the Snake River (due to extreme low flows in the Umatilla River). Irrigation withdrawals in the Umatilla River are the primary cause of low flow and elevated water temperature, which has resulted in the extirpation of several anadromous fish runs in the Umatilla River.

The Umatilla Basin project, by restoring water to the Umatilla River, was designed to alleviate some of the fishery problems resulting from both authorized legal agricultural withdrawals, and the unauthorized and possible illegal "water spreading" that has occurred within the basin. We are concerned that the action proposed in the scoping document will: 1) authorize present potentially illegal water use in the basin; 2) encourage additional water withdrawal from the Umatilla that does not legally exist at present; 3) preclude the Umatilla project from achieving its Congressionally mandated purpose; 4) preclude the project from meeting the Umatilla Tribal anadromous fish restoration expectations; and 5) set an unacceptable precedent for dealing with the over-allocation of water resources. In short, we believe that this apparent after-the-fact authorization of potentially illegal water use is extremely inappropriate.

Furthermore, to conduct an environmental review in the format of a NEPA Environmental Assessment (EA), the BOR has effectively eliminated public review. We recommend that the environmental review process be conducted through an Environmental Impact Statement (EIS). The EIS should be conducted from the baseline of historical hydrological conditions in the Umatilla River and should evaluate the effects of current legal water use and the effects of the proposed action on anadromous fish stocks in the Columbia, Snake and Umatilla Rivers, as well as the effects of the proposed action on Umatilla River habitat, passage and fish restoration initiatives.

We provide the following specific comments on your November 4, 1993, document.

Alternatives to be Evaluated

In addition to your proposed alternatives: 1) Proposed Boundary Changes, 2) No Action - No Boundary Changes, 3) Alternative/Different Boundary Changes; we recommend an evaluation of water conservation measures. In each of these scenarios, an evaluation of the effects of increased monitoring and enforcement of instream-flow requirements should be provided. The BOR predicates the evaluations with "to avoid any net adverse effects on flows needed for the Umatilla River fishery". We feel that the current practice of "water spreading" has already created an unacceptable level of adverse impact. Therefore, we recommend an evaluation and comparison of the current adverse effects to effects that would result if the legal boundaries of the irrigation districts were enforced.

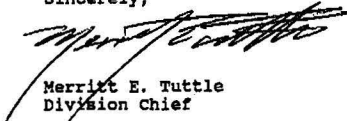
Environmental Issues and Impacts

We agree with the issues and impacts identified by the BOR. Furthermore, we concur with the CBFWA comments sent to you on November 30, 1993; specifically, the concern that the proposed action sets an environmentally damaging precedent for unauthorized water use. We further wish to emphasize CBFWA's recommendations that the EIS discuss the possible changes to other BOR controlled water projects and their cumulative impact on flows and fishes in the Snake and Columbia Rivers and their tributaries.

The proposed action must be consistent with other efforts to protect and restore anadromous fishes throughout the Columbia River Basin. Your proposed action should work in conjunction with the Northwest Power Planning Council's "Columbia River Basin Fish and Wildlife Program" and other plans currently being developed to restore anadromous fish runs.

Thank you for considering our preliminary comments. We hope the BOR will work closely the NMFS and other resource agencies to find a comprehensive solution to the allocation and use of our limited natural resources. We look forward to providing positive information and comments as the EIS is developed. If you have any questions concerning our comments, please contact Dan Avery, of my staff, at (503) 230-5419.

Sincerely,



Merritt E. Tuttle
Division Chief

cc: CBFWA - Hawkes
USFWS - Portland
Umatilla Indian Reservation - Department of Natural
Resources
NMFS - Seattle, GCNW
NPPC - Peter Paquet
BIA - Portland
BPA - Judith A. Johnansen

100-11114
 Resolution No. 94-44

CERTIFICATE

The undersigned, Donald G. Sampson and Rose Mary Narcisse, hereby certify that they are the Chairman and Secretary, respectively, of the Board of Trustees of the Confederated Tribes of the Umatilla Indian Reservation of Oregon, that at a duly called (June 1, 1994), recessed and reconvened meeting of said Board at the Board Room of the Tribal Office/Tribal Administration Building, Pendleton, Oregon (Mission), Oregon on June 3, 1994, a quorum of said Board was present and the following Resolution was regularly moved, seconded and adopted by a vote of 4 to 0, 1 abstaining.

RESOLUTION

WHEREAS, the Board of Trustees is the governing body of the Confederated Tribes of the Umatilla Indian Reservation (CTUIR), Mission, Oregon and by the authority of the 1949 Constitution and By-Laws as approved and adopted on November 4, 1949; AND

WHEREAS, On March 2, 1994, the Board of Trustees adopted the Confederated Tribes of the Umatilla Indian Reservation Water Spreading Policy (Resolution 94-19), AND

WHEREAS, The Tribal Water Committee has negotiated interim agreements consistent with the Water Spreading Policy with the Westland Irrigation District, the Stanfield Irrigation District, the West Extension Irrigation District and WaterWatch, AND BE IT FURTHER

RESOLVED, That the Board of Trustees hereby approves and adopts the attached agreements:

1. MEMORANDUM OF AGREEMENT - WESTLAND IRRIGATION DISTRICT, TEEL IRRIGATION DISTRICT, the CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, and WATERWATCH, Inc., which incorporates by reference the 1994 TEMPORARY CONTRACT BETWEEN THE UNITED STATES OF AMERICA AND THE WESTLAND IRRIGATION DISTRICT;
2. MEMORANDUM OF AGREEMENT - STANFIELD IRRIGATION DISTRICT, the CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, and WATERWATCH, Inc., which incorporates by reference the 1994 TEMPORARY CONTRACT BETWEEN THE UNITED STATES OF AMERICA AND THE STANFIELD IRRIGATION DISTRICT;
3. MEMORANDUM OF AGREEMENT - WEST EXTENSION IRRIGATION DISTRICT, the CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, and WATERWATCH, Inc., which incorporates by reference the 1994 TEMPORARY CONTRACT BETWEEN THE UNITED STATES OF AMERICA AND THE WEST EXTENSION IRRIGATION DISTRICT; AND BE IT FINALLY

RESOLVED, That the Board of Trustees authorizes the Chairman of the Board of Trustees to sign the above described agreements.

AND that said Resolution has not been modified, amended or repealed and is still in full force and effect.

DATED this 3rd day of June, 1994.

A T T E S T:

Donald G. Sampson
 Donald G. Sampson, Chairman
 Chairman

Rose Mary Narcisse
 Rose Mary Narcisse, Secretary
 Board of Trustees

MEMORANDUM OF AGREEMENT

WESTLAND IRRIGATION DISTRICT
 TEEL IRRIGATION DISTRICT
 CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION
 and
 WATERWATCH, Inc.

June 3, 1994

I. Preamble

The Westland Irrigation District (WID) for several years has delivered water from the Umatilla Project to lands outside its federally approved boundaries. The Bureau of Reclamation (Reclamation) calls such practice "water spreading". WID would like to continue these deliveries. WID has requested the approval of Reclamation for a permanent change in their boundaries to allow these deliveries to continue. Reclamation is currently considering this request, and is in the process of analyzing its environmental impacts as required by the National Environmental Policy Act (NEPA). The Department of Natural Resources of the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) is a cooperating agency in this NEPA process. Reclamation must issue a Record of Decision which will permanently resolve the issue of WID's water use. Hereafter, this process shall be referred to as the "NEPA process".

Reclamation may not make its final decision for two or more years. In the meantime, WID and the Teel Irrigation District (TID) seek to continue using Umatilla Project water on the lands outside WID's approved boundaries. CTUIR and WaterWatch, however, seek to provide and protect water needed for anadromous fish in the Umatilla River, in recognition of CTUIR's treaty rights. The parties to this agreement recognize the needs of both agriculture and anadromous fish for water during the interim period before a final decision by Reclamation. The parties have worked together cooperatively in an attempt to meet these needs, and have agreed to support interim deliveries of water for both instream and irrigation uses.

II. Agreement

The parties to this Memorandum of Agreement, WID, TID, CTUIR, and WaterWatch, do hereby agree to the following:

1. Process

- a. WID agrees to waive, in the 1994 TEMPORARY CONTRACT BETWEEN THE UNITED STATES OF AMERICA AND THE WESTLAND IRRIGATION DISTRICT, until completion of the NEPA process for boundary expansion, to the United States any rights, claims or

interests it may have pursuant to its 1949 contract with the United States in all federally developed or delivered water which has been proposed to be used outside of WID's boundaries. This federal water includes 11,052 acre-feet of McKay Reservoir storage space. If WID elects to withdraw its boundary expansion proposal by August 15, 1994, this waiver will terminate on November 1, 1994. Otherwise, the term of the waiver shall be until the issuance of the Record of Decision by Reclamation. Future use of this water shall be governed by the Record of Decision issued by the Bureau of Reclamation. If Reclamation's decision is appealed, the waiver will continue until the decision can no longer be appealed.

- b. CTUIR, WID, TID and WaterWatch jointly will submit this MOA to the Bureau of Reclamation as a proposal. This proposal includes the attached 1994 TEMPORARY CONTRACT BETWEEN THE UNITED STATES OF AMERICA AND THE WESTLAND IRRIGATION DISTRICT, as drafted, to allow WID to irrigate outside of its boundaries in 1994. It also includes an agreement on how the water described in §1.a above, shall be allocated in 1994.
- c. With this agreement, the parties jointly request that Reclamation complete the NEPA evaluation of this proposal and issue WID a temporary contract as quickly as possible. Specifically, the parties will request that Reclamation evaluate this request and issue a temporary contract, if possible, on the basis of a Categorical Exclusion. The parties each agree to support implementation of this agreement and to urge other interested organizations and individuals to support it as well.
- d. This MOA will serve as the foundation for interim agreements until the NEPA process is completed. It will be amended on a yearly basis only if significant new information becomes available. It is the parties' objective to develop new interim agreements on the following timetable:
 - o First negotiation meeting - Middle of November of the year preceding a new agreement
 - o Finalize new agreement - Middle of December of the year preceding a new agreement
 - o Completion of Process to Obtain Bureau of Reclamation approval - End of January of the year in which the new agreement is to be implemented

2. Allocation of Water

- a. Of the water described in §II.1.a above, 6,501 acre-feet shall be allocated to instream flow use by CTUIR in 1994 as

described in §II.2.b and §II.2.c below.

- b. WID and TID agree to support and aid CTUIR, WaterWatch and the United States in the release of 10 percent of the contracted stored water described in the November 18, 1949, contract between the United States and the Westland Irrigation District (Contract number 11r-1550), plus 10 percent of the up to 7,380 acre-feet of McKay reserved stored water rented to WID in past years and 100 percent of the up to 3,549 acre-feet of McKay residual stored water rented to WID in past years for instream use for the benefit of the Umatilla and Snake River fishery.
- c. Reclamation will operate McKay so that the contracted, reserved and residual water will share the same fill priority and any shortages in filling will be shared proportionately, provided however that contracts for McKay water with non-District individuals will be satisfied first in water year 1994.
- d. Water in these spaces may be carried over in the same manner in which irrigation water has been carried over in the past. Accounting for the water accumulating to these spaces will be on an annual accrual basis.
- e. WID and TID may irrigate inside as well as outside of WID's boundaries, in accordance with a temporary contract with Reclamation providing for out-of-boundary deliveries in 1994 or a subsequent year. In no event shall the combined total amount of reserved stored water and §8(a) contracted stored water delivered to out of boundary lands exceed 11,052 acre-feet in 1994. The out of boundary lands receiving this water shall be limited to those lands which may be eligible for inclusion in the NEPA process (those lands irrigated with Umatilla Project water before October 1, 1988). The unused portion of this water may be carried over in the same manner in which irrigation water has been carried over in the past.
- f. WID and TID may apply water only to those lands having a valid permit or water right to use it. Reclamation applied in May, 1994, for a permit to use McKay Reservoir water on lands outside WID's boundaries. CTUIR and WaterWatch shall support issuance of this permit if consistent with the application and with state law.
- g. WID and TID shall provide unconditional support and cooperation in the protection of releases of water from McKay Reservoir for instream flow use for fish purposes including, but not limited to, supporting any changes in or under federal and state law which may be necessary to ensure protection of this water for this use. Such changes include, but are not limited to, acquisition of permanent state primary and secondary water rights from McKay Reservoir for instream flow

augmentation and permanent federal reauthorization (if necessary) of McKay Reservoir for instream flow augmentation. The permanent allocation of McKay Reservoir space among irrigation and instream uses will be determined through the NEPA process. Neither WID nor TID shall take or in any other manner prevent CTUIR from using water released or foregone for instream uses by other Umatilla Basin water right holders.

3. Watershed Restoration Pilot Project

WID, TID and CTUIR will assess the feasibility of establishing a pilot project for the purpose of promoting watershed restoration on the Umatilla River. The Soil Conservation Service's existing programs and other opportunities will be reviewed. The assessment will be completed by August, 1994, and will identify site locations, ownership, a restoration plan, and funding sources. The pilot project will be implemented in 1995.

4. Water Quality Monitoring

WID, TID and CTUIR, in cooperation with the other irrigation districts, the Bureau of Reclamation, the Oregon Department of Environmental Quality, the Oregon Department of Fish and Wildlife, and other involved agencies shall monitor Umatilla River water quality in 1994 and assess the need for further study. Monitoring will include a review of existing water quality data and the sampling for potential agricultural contaminants in irrigation drains and in the Umatilla River. WID and TID, in combination with the Stanfield Irrigation District, the Hermiston Irrigation District and the West Extension Irrigation District, will fund \$10,000 to conduct this monitoring. The allocation of the funding burden will be determined by the districts.

5. Process for Permanent Inclusion of WID's "Omitted Lands"

As described in §II.1.a above, WID will waive any contract rights it may have to the water it has used outside of its boundaries in the past. WID shall also provide to CTUIR evidence which demonstrates that the "omitted lands" (as described in Table 1 of the November 4, 1993, scoping meeting notice for the proposed Umatilla Project irrigation districts) should have been included within the districts originally. Once these two steps have been completed to the satisfaction of CTUIR, the WID, TID and CTUIR will begin to develop another Memorandum of Understanding to submit to the Bureau of Reclamation as a joint proposal to permanently include those "omitted lands" on an expedited process. WaterWatch reserves the right to object to such a proposal.

6. Disclaimers

- a. Each party expressly reserves all its existing rights, remedies, claims and arguments, except as specifically

provided in this Memorandum of Agreement.

- b. Nothing in this Agreement is intended nor shall be construed as affecting or waiving any treaty rights of the CTUIR.

7. Enforcement of the Agreement

Any party to this agreement has the right to seek enforcement of the terms of this agreement in the circuit court of Umatilla or Marion Counties, except that any legal action involving the United States of America must be brought in the Federal District Court of Oregon. This private right of enforcement is in addition to any enforcement authority of the United States of America or the State of Oregon, and is in addition to any other remedy that the parties may have under law. If a lawsuit is filed regarding this agreement, any party to this agreement may intervene, and no party to this agreement will oppose such intervention.

Dated this ____ day of May, 1994.

Chairman, Board of Trustees
Confederated Tribes of the Umatilla Indian Reservation

Chairman, Board of Directors
Westland Irrigation District

Chairman, Board of Directors
Teel Irrigation District

President
WaterWatch, Inc.

JUN 03 '94 03:11PM DIV OF W&P&DL

P.2

DRAFT

DRAFT

5/3/94

Contract No.

UNITED STATES DEPARTMENT OF THE INTERIOR
Bureau of Reclamation
Umatilla Basin Project, Oregon

TEMPORARY CONTRACT BETWEEN THE UNITED STATES OF AMERICA
AND THE WESTLAND IRRIGATION DISTRICT

THIS AGREEMENT, made this ____ day of _____, 1994, pursuant to Reclamation law, particularly Section 9(e) of the Reclamation Project Act of 1939, 53 Stat. 1196; 43 U.S.C. § 485h(e), by and between the UNITED STATES OF AMERICA, hereinafter referred to as the United States, acting through the Bureau of Reclamation, hereinafter referred to as Reclamation, represented by the Regional Director, Pacific Northwest Region, hereinafter referred to as the Contracting Officer, and the WESTLAND IRRIGATION DISTRICT, hereinafter referred to as the District, an irrigation district organized and existing under the laws of the State of Oregon.

WITNESSETH, THAT:

EXPLANATORY RECITALS

WHEREAS, the following statements are made by way of explanation:

1. The United States has constructed the Umatilla Project pursuant to Reclamation Law;
2. The United States and the District entered into a series of contracts, culminating in Amendatory Contract No. 11r-1550, dated November 18, 1949, hereinafter referred to as the 1949 contract, under which the District is provided 30 percent of the stored water available in McKay Reservoir, hereinafter referred to as McKay, for irrigation use within federally recognized District boundaries. Contract at § 8(a).
3. The 1949 contract reserves from permanent disposition not less than 25 percent of the water to be available annually in the reservoir, pending the determination of terms and conditions on which such water will later be made available on a permanent basis. Contract at § 8(b). Contract § 8(b) water has traditionally been referred to as "reserved" stored water. Reclamation has rented up to 7,380 acre-feet of reserved water annually to the District in past years.
4. The 1949 contract provides that, to the extent it is temporarily available, as conclusively determined by the Secretary, additional water from McKay may be delivered to the District. Contract at § 8(c). Project water in excess of § 8(b) "reserved" stored water has traditionally been referred to as "residual"

JUN 03 '94 03:12PM DIV OF WPANDL

P. 3
DRAFT

stored water. The amount of residual water² rented to the District in past years is up to 3,549 acre-feet annually.

5. Reclamation does not recognize any right of the District or its member water users to continued delivery of any McKay reserved or residual water. In Reclamation's view, the District has no right to rely on continued use of McKay reserved and residual water, or on water which the District has used in violation of the 1949 contract with Reclamation or Reclamation Law.

6. The District does not waive any rights or claims to the reserved (§ 8(b) of the 1949 contract) or residual (§ 8(c) of the 1949 contract) water traditionally offered to the District on a yearly basis.

7. Reclamation's 1949 contract with the District requires that project water used in irrigation be delivered exclusively to lands within federally recognized District boundaries and that delivery to out of boundary land may only occur with the written consent of the Secretary or the Contracting Officer. 1949 Contract at § 23 and § 32.

8. In previous years, the District has authorized irrigation service to certain lands outside District boundaries without securing proper approval from the United States. The United States has required the District to stop this practice. The District has submitted a boundary expansion request to Reclamation so that it may provide water service to out of boundary lands. The District has requested an interim agreement with Reclamation that will allow continued service to out of boundary lands while its boundary expansion request is being considered.

NOW, THEREFORE, in consideration of the premises and mutual parties, it is agreed as follows:

WAIVER OF CONTRACT RIGHTS

9. Notwithstanding § 14 of this contract, the District agrees to waive until completion of the National Environmental Policy Act (NEPA) process for boundary expansion to the United States any rights, claims or interest it may have pursuant to its 1949 contract with the United States in all federally developed or delivered water which has been proposed to be used outside of the District's boundaries. If the District elects to withdraw its boundary expansion proposal as provided in § 12(d) of this contract, this waiver will terminate on December 31, 1994. Otherwise, the term of the waiver shall be until the issuance of the Record of Decision by Reclamation. If Reclamation's decision is appealed, the waiver will continue until the decision can no longer be appealed.

JUN 03 '94 03:12PM DIV OF WPANDL

P.4

DRAFT

DISTRICT SUPPORTS INSTREAM USE

10. (a) The District agrees to support and aid the United States in the release of 10 percent of the § 8(a) contracted stored water plus 10 percent of the up to 7,380 acre-feet of McKay reserved stored water rented to the District in past years and 100 percent of the up to 3,549 acre-feet of McKay residual stored water rented to the District in past years for instream use for the benefit of the Umatilla and Snake River fishery.

(b) Reclamation will operate McKay so that the contracted, reserved and residual water will share the same fill priority and any shortages in filling will be shared proportionately, provided however that contracts for McKay water with non-District individuals will be satisfied first in water year 1994.

SERVICE TO LANDS OUTSIDE EXISTING DISTRICT BOUNDARIES

11. (a) The United States agrees to permit temporary delivery during the 1994 irrigation season of a portion of the remaining reserved stored water and § 8(a) contracted water to up to 9,912 acres of irrigable lands outside federally recognized District boundaries, which according to the District, received water from the District prior to October 1, 1988. These lands are described in the November 4, 1993, notice announcing scoping meetings for proposed boundary changes for irrigation districts in the Umatilla Project. The information contained in this document was submitted to Reclamation by the District as part of the District's permanent boundary expansion request.

(b) In addition to the 9,912 acres described above, the United States agrees to permit temporary delivery during the 1994 irrigation season of stored water to up to _____ acres of irrigable lands that may be outside federally recognized District boundaries, which according to the District, received water from the District prior to October 1, 1988. This is described in _____ Reclamation has not yet made a determination as to whether the _____ acres are outside District boundaries and under what circumstances, if any, they would be eligible to receive project water under future contracts, if any.

(c) In no event shall the combined total amount of reserved stored water and § 8(a) contracted stored water delivered to out of boundary lands exceed 11,052 acre-feet in 1994. Deliveries to out of boundary lands shall be at the discretion of the District and in accordance with the terms of this contract.

JUN 03 '94 03:13PM DIV OF WPNDR

P.5
DRAFTPROPOSED BOUNDARY CHANGE SUBJECT TO
NATIONAL ENVIRONMENTAL POLICY ACT

12. (a) Reclamation and the District agree that NEPA compliance will be accomplished prior to entering into any long-term contract for delivery of water. Reclamation must evaluate the proposal of all four Umatilla Project districts in the same NEPA document to determine the cumulative impacts of the boundary change proposal.

(b) Reclamation agrees to provide to the District by July 1, 1994, a schedule for completion and the total estimated District costs, for the NEPA evaluation of the proposed boundary change request of the four districts in the Umatilla Project.

(c) Reclamation agrees to provide to the District by July 1, 1994, its best estimate of new or revised obligations which the District is likely to face if its 1949 contract is amended to authorize irrigation of additional lands.

(d) The District agrees to notify Reclamation by August 15, 1994, by formal resolution if they intend to pursue the proposed boundary change and associated NEPA process and to enter into an agreement with Reclamation by September 13, 1994, implementing a schedule of deliverables and a cost-sharing arrangement for the NEPA process.

PAYMENTS FOR WATER

13. At the time of execution of this contract, the District shall pay \$_____ to the United States for temporary water service to _____ of the _____ acres of lands to which temporary service is authorized by this contract. The \$_____ to be paid equals a rate of \$_____ per acre, plus an estimate of 1994 operation and maintenance (O&M) costs for McKay Reservoir, plus a \$100.00 fee for the preparation of this contract. The sum of \$_____ is to be paid, in addition to any other payments due the United States under the 1949 contract or other contracts. In the event some of the acres are not provided temporary water service by the District, an appropriate refund will be made at the end of the irrigation season. The O&M charge will also be adjusted, if necessary, based on actual O&M costs and 1994 deliveries of McKay water. The District will be issued a refund or a bill as appropriate to cover adjustments for actual 1994 O&M costs.

TERM OF CONTRACT

14. This contract shall become effective on the date first above written and shall continue until December 31, 1994, unless terminated sooner. This contract shall be terminated and service hereunder shall cease at the option of the United States at any time upon failure of the District to abide by any notice, order

JUN 03 '94 03:14PM DIV OF WFANDL

P.6
DRAFT

rule or regulation of the United States or the State of Oregon now or hereafter established. The United States may terminate this contract and service hereunder may cease if this contract or the use of project water or project facilities is challenged in any legal or administrative proceeding by any individual, group, or by the State of Oregon. This contract may be terminated by the United States and water service hereunder may cease if the Oregon Department of Water Resources fails to issue the necessary approvals for instream use of project water.

OREGON DEPARTMENT OF WATER RESOURCES APPROVAL OF DELIVERY OF WATER TO LANDS OUTSIDE EXISTING DISTRICT BOUNDARIES

15. (a) Water delivered under this contract shall comply with State and federal law. Reclamation applied on May 5, 1994, for a permit to irrigate some of the lands involved in this contract. The Oregon Department of Water Resources has given this permit application the number 94-_____. The parties agree to support issuance of the permit as quickly as possible.

(b) The District acknowledges and agrees that Reclamation's application for a permit (No. 94-_____) to irrigate lands outside existing District boundaries does not constitute United States approval for the expansion of federally recognized District boundaries. The permit was applied for under State law in order to deliver water to lands outside existing boundaries on an interim basis or on a permanent basis, if deemed appropriate, upon completion of Reclamation's review of the District's permanent boundary expansion request. The District agrees not to use Reclamation's application for permit No. 94-_____, or the resulting permit, in any legal or administrative proceeding to prove United States approval for permanent boundary expansions.

Disclaimers

16. Reclamation and the District disagree on whether the District's past deliveries to out of boundary lands were legal, and on whether future deliveries would be legal in the absence of this contract or other more permanent authorization by Reclamation. This contract does not affect that underlying dispute, except to settle it until December 31, 1994. This contract is intended only to provide water in 1994 for irrigation of specified out of boundary lands and to facilitate delivery of water for fish flows. Except for contract rights temporarily provided by this contract, this contract creates no new rights or obligations. The parties waive none of their rights, remedies or claims existing prior to this contract. In granting this temporary contract, the United States does not acknowledge or adopt the District's contention that the District had the right to deliver water to out of boundary lands and that water users receiving water on out of boundary lands established a vested right to project water.

JUN 03 '94 03:15PM DIV OF WPAIDL

P.7
DRAFTCOMPLIANCE WITH RECLAMATION LAWS

17. Notwithstanding § 14 of this contract, the parties agree that the delivery of irrigation water or the use of Federal facilities pursuant to this contract is subject to Reclamation law, as amended and supplemented, including, but not limited to, the Reclamation Reform Act of 1982 (RRA) (Public Law 97-293). RRA certification forms will not be required on a District-wide basis from landholders for the 1994 irrigation season. Landholders will be required to complete RRA certification forms prior to delivery of project water in 1995.

NOTICES

18. Any notice, demand, or request authorized or required by this contract shall be deemed to have been given, on behalf of the District, when mailed, postage prepaid, or delivered to the Regional Director, PN Region, Bureau of Reclamation, 1150 N. Curtis Road, Boise, Idaho 83706-1234, and on behalf of the United States, when mailed, postage prepaid, or delivered to the Secretary of the District, Westland Irrigation District, PO Box 416, Stanfield, Oregon 97875-0416, the designation of the addressee or the address may be changed by notice given in the same manner as provided in this article for other notices.

CONTINGENT ON APPROPRIATION OR ALLOTMENT OF FUNDS

19. The expenditure or advance of any money or the performance of any obligation of the United States under this contract shall be contingent upon appropriation or allotment of funds. Absence of appropriation or allotment of funds shall not relieve the District from any obligations under this contract. No liability shall accrue to the United States in case funds are not appropriated or allotted.

OFFICIALS NOT TO BENEFIT

20. No Member of or Delegate to Congress, Resident Commissioner or official of the District shall benefit from this contract other than as a water user or landowner in the same manner as other water users or landowners.

QUALITY OF WATER

21. The operation and maintenance of project facilities shall be performed in such manner as is practicable to maintain the quality of raw water made available through such facilities at the highest level reasonably attainable, as determined by the Contracting Officer. The United States does not warrant the quality of water and is under no obligation to construct or furnish water treatment facilities to maintain or better the quality of water.

JUN 03 '94 03:15PM DIV OF WPANDL

DRAFT

WATER AND AIR POLLUTION CONTROL

22. The District, in carrying out this contract, shall comply with all applicable water and air pollution laws and regulations of the United States and the State of Oregon, and shall obtain all required permits or licenses from the appropriate Federal, State, or local authorities.

CLEAN AIR AND WATER

23. (a) The District agrees as follows:

(1) To comply with all the requirements of Section 114 of the Clean Air Act, as amended (42 U.S.C. 1857, et seq., as amended by Public Law 91-604) and Section 308 of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq., as amended by Public Law 92-500), respectively, relating to inspection, monitoring, entry, reports, and information, as well as other requirements specified in Section 114 and Section 308 of the Air Act and the Water Act, respectively, and all regulations and guidelines issued thereunder before the execution of this contract.

(2) That no portion of the work required by this contract will be performed in a facility listed on the Environmental Protection Agency List of Violating Facilities on the date when this contract was executed unless and until the EPA eliminates the name of such facility or facilities from such listing.

(3) To use its best efforts to comply with clean air standards and clean water standards at the facility where the contract work is being performed.

(4) To insert the substance of the provisions of this article into any nonexempt subcontract, including this paragraph (1)(d).

(b) The terms used in this article have the following meanings:

(1) The term "Air Act" means the Clean Air Act, as amended (42 U.S.C. 1857 et seq., as amended by Public Law 91-604).

(2) The term "Water Act" means Federal Water Pollution Control Act, as amended (33 U.S.C. 1251 et seq., as amended by Public Law 92-500).

(3) The term "clean air standards" means any enforceable rules, regulations, guidelines, standards, limitations, orders, controls, prohibitions, or other requirements which are contained in, issued under, or otherwise adopted pursuant to the Air Act or Executive Order 11738, an applicable implementation plan as described in Section 110(d) of the Clean Air Act (42 U.S.C. 1857c-5(d)), an approved implementation procedure or plan under Section 111(c) or Section 111(d), respectively, of the Air Act (42 U.S.C. 1857c-6(c) or (d)), or an approved implementation procedure under Section 112(d) of the Air Act (42 U.S.C. 1857c-7(d)).

(4) The term "clean water standards" means any

JUN 03 '94 03:16PM DIV OF WFPANDL

DRAFT

enforceable limitation, control, condition, prohibition, standard, or other requirement which is promulgated pursuant to the Water Act or contained in a permit issued to a discharger by the Environmental Protection Agency or by a State under an approved program, as authorized by Section 402 of the Water Act (33 U.S.C. 1342), or by local government to ensure compliance with pretreatment regulations as required by Section 307 of the Water Act (33 U.S.C. 1317).

(5) The term "comply" means compliance with clean air or water standards. Comply shall also mean compliance with a schedule or plan ordered or approved by a court of competent jurisdiction, the Environmental Protection Agency or an air or water pollution control agency in accordance with the requirements of the Air Act or Water Act and regulations issued pursuant thereto.

(6) The term "facility" means any building, plant, installation, structure, mine, vessel or other floating craft, location, or site of operations, owned, leased, or supervised by a contractor or subcontractor, to be utilized in the performance of a contract or subcontract. Where a location or site of operations contains or includes more than one building, plant, installation, or structure, the entire location or site shall be deemed to be a facility except where the Director, Office of Federal Activities, Environmental Protection Agency, determines that independent facilities are collocated in one geographical area.

COMPLIANCE WITH CIVIL RIGHTS LAWS AND REGULATIONS

24. (a) The District shall comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d), Section 504 of the Rehabilitation Act of 1973 (P.L. 93-112, as amended), the Age Discrimination Act of 1975 (42 U.S.C. 6101, et seq.) and any other applicable civil rights laws, as well as with their respective implementing regulations and guidelines imposed by the U.S. Department of the Interior and/or Bureau of Reclamation.

(b) These statutes require that no person in the United States shall, on the grounds of race, color, national origin, handicap, or age, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving financial assistance from the Bureau of Reclamation. By executing this contract, the District agrees to immediately take any measures necessary to implement this obligation, including permitting officials of the United States to inspect premises, programs, and documents.

(c) The District makes this agreement in consideration of and for the purpose of obtaining any and all Federal grants, loans, contracts, property discounts or other Federal financial assistance extended after the date hereof to the District by the Bureau of Reclamation, including installment payments after such date on account of arrangements for Federal financial assistance which were

JUN 03 '94 03:17PM DIV OF WPANDL

P.18
DRAFT

approved before such date. The District recognizes and agrees that such Federal assistance will be extended in reliance on the representations and agreements made in this article, and that the United States reserves the right to seek judicial enforcement thereof.

PRIVACY ACT COMPLIANCE

25. (a) The District shall comply with the Privacy Act of 1974 (5 U.S.C. 522a) (the Act) and the Department of the Interior rules and regulations under the Act (43 CFR 2.45 et seq.) in maintaining landholder acreage certification and reporting records, required to be submitted to the District for compliance with sections 206 and 228 of the Reclamation Reform Act of 1982 (96 Stat. 1266), and pursuant to 43 CFR 426.10.

(b) With respect to the application and administration of the criminal penalty provisions of the Act (5 U.S.C. 552a[i]), the District and the District's employees responsible for maintaining the certification and reporting records referenced in (1) above are considered to be employees of the Department of the Interior. See 5 U.S.C. 522a(m).

(c) The Contracting Officer or a designated representative shall provide the District with current copies of the Interior Department Privacy Act regulations and the Bureau of Reclamation Federal Register Privacy Act System of Records Notice (Acreage Limitation--Interior, Reclamation-31) which govern the maintenance, safeguarding, and disclosure of information contained in the landholders' certification and reporting records.

(d) The Contracting Officer shall designate a full-time employee of the Bureau of Reclamation to be the System Manager who shall be responsible for making decisions on denials pursuant to 43 CFR 2.61 and 2.64, and amendment requests pursuant to 43 CFR 2.72. The District is authorized to grant requests by individuals for access to their own records.

(e) The District shall forward promptly to the System Manager each proposed denial of access under 43 CFR 2.64, and each request for amendment of records filed under 43 CFR 2.71; notify the requester accordingly of such referral; and provide the System Manager with information and records necessary to prepare an appropriate response to the requester. These requirements do not apply to the certification and reporting forms filed pursuant to 43 CFR 426.10, unless the requester elects to cite the Privacy Act as a basis for the request.

CERTIFICATION OF NONSEGREGATED FACILITIES

26. The District hereby certifies that it does not maintain or provide for its employees any segregated facilities at any of its

JUN 03 '94 03:18PM DIV OF WPRNDL

P.11

DRAFT

establishments, and it does not permit its employees to perform their services at any location, under its control, where segregated facilities are maintained. It certifies further that it will not maintain or provide for its employees any segregated facilities at any of its establishments, and that it will not permit its employees to perform their services at any location, under its control, where segregated facilities are maintained. The District agrees that a breach of this certification is a violation of the Equal Opportunity clause in this contract. As used in this certification, the term "segregated facilities" means any waiting rooms, work areas, rest rooms and wash rooms, restaurants and other eating areas, timeclocks, locker rooms and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing facilities provided for employees which are segregated by explicit directive or are in fact segregated on the basis of race, creed, color, or national origin, because of habit, local custom, or otherwise. The District further agrees that (except where it has obtained identical certifications from proposed subcontractors for specific time periods) it will obtain identical certifications from proposed subcontractors prior to the award of subcontracts exceeding \$10,000 which are not exempt from the provisions of the Equal Opportunity clause; that it will retain such certifications in its files; and that it will forward the following notice to such proposed subcontractors (except where the proposed subcontractors have submitted identical certifications for specific time periods):

NOTICE TO PROSPECTIVE SUBCONTRACTORS
OF REQUIREMENT FOR CERTIFICATIONS
OF NONSEGREGATED FACILITIES

A Certification of Nonsegregated Facilities must be submitted prior to the award of a subcontract exceeding \$10,000 which is not exempt from the provisions of the Equal Opportunity clause. The certification may be submitted either for each subcontract or for all subcontracts during a period (i.e., quarterly, semiannually, or annually). Note: The penalty for making false statements in offers is prescribed in 18 U.S.C. 1001.

JUN 23 '94 03:18PM DIV OF LANDL

P.12

DRAFT

IN WITNESS WHEREOF, the parties hereto have signed their names
the day and year first above written.

UNITED STATES OF AMERICA

By _____
Regional Director
Pacific Northwest Region
Bureau of Reclamation
1150 N. Curtis Road
Boise ID 83706-1234

WESTLAND IRRIGATION DISTRICT

(DISTRICT SEAL)

By _____
Chairman
Board of Directors

ATTEST;

Secretary

JUN 03 '94 03:19PM DIV OF WPAIDL

P.13

DRAFT

STATE OF _____)
 : ss
 County of _____)

On this _____ day of _____, 19____, before me,
 _____, a Notary Public, personally appeared
 _____, known to me to be
 the person whose name is subscribed to the within instrument and
 acknowledged to me that _____ executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my
 official seal as of the day and year first above written.

(SEAL) _____
 Notary Public in and for the
 State of _____
 Residing at: _____

My commission expires:

* * * * *

STATE OF IDAHO)
 : ss
 County of Ada)

On this _____ day of _____, 19____, personally
 appeared before me _____, to me known
 to be the official of the United States of America that executed
 the within and foregoing instrument and acknowledged said
 instrument to be the free and voluntary act and deed of said United
 States, for the uses and purposes therein mentioned, and on oath
 stated that he was authorized to execute said instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my
 official seal as of the day and year first above written.

(SEAL) _____
 Notary Public in and for the
 State of Idaho
 Residing at: _____

My commission expires:

MEMORANDUM OF AGREEMENT

STANFIELD IRRIGATION DISTRICT
CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION
and
WATERWATCH, Inc.

June 3, 1994

I. Preamble

The Stanfield Irrigation District (SID) for several years has delivered water from the Umatilla Project to lands outside its federally approved boundaries. The Bureau of Reclamation (Reclamation) calls such practice "water spreading". SID would like to continue these deliveries. SID has requested the approval of Reclamation for a permanent change in their boundaries to allow these deliveries to continue. Reclamation is currently considering this request, and is in the process of analyzing its environmental impacts as required by the National Environmental Policy Act (NEPA). The Department of Natural Resources of the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) is a cooperating agency in this NEPA process. Reclamation must issue a Record of Decision which will permanently resolve the issue of SID's water use. Hereafter, this process shall be referred to as the "NEPA process".

Reclamation may not make its final decision for two or more years. In the meantime, SID seeks to continue using Umatilla Project water on the lands outside its approved boundaries. CTUIR and WaterWatch, however, seek to provide and protect water needed for anadromous fish in the Umatilla River, in recognition of CTUIR's treaty rights. The parties to this agreement recognize the needs of both agriculture and anadromous fish for water during the interim period before a final decision by Reclamation. The parties have worked together cooperatively in an attempt to meet these needs, and have agreed to support interim deliveries of water for both instream and irrigation uses.

II. Agreement

The parties to this Memorandum of Agreement, SID, CTUIR, and WaterWatch, do hereby agree to the following:

1. Process

- a. SID agrees to waive, in the 1994 TEMPORARY CONTRACT BETWEEN THE UNITED STATES OF AMERICA AND THE STANFIELD IRRIGATION DISTRICT, until completion of the NEPA process for boundary expansion, to the United States any rights, claims or interests it may have pursuant to its 1949 contract with the United States in all federally developed or delivered water

which has been proposed to be used outside of SID's boundaries. This federal water includes 5,274 acre-feet of McKay Reservoir storage space. If SID elects to withdraw its boundary expansion proposal by August 15, 1994, this waiver will terminate on November 1, 1994. Otherwise, the term of the waiver shall be until the issuance of the Record of Decision by Reclamation. Future use of this water shall be governed by the Record of Decision issued by the Bureau of Reclamation. If Reclamation's decision is appealed, the waiver will continue until the decision can no longer be appealed.

- b. CTUIR, SID and WaterWatch jointly will submit this MOA to the Bureau of Reclamation as a proposal. This proposal includes the attached 1994 TEMPORARY CONTRACT BETWEEN THE UNITED STATES OF AMERICA AND THE STANFIELD IRRIGATION DISTRICT, as drafted, to allow SID to irrigate outside of its boundaries in 1994. It also includes an agreement on how the water described in §1.a above, shall be allocated in 1994.
- c. With this agreement, the parties jointly request that Reclamation complete the NEPA evaluation of this proposal and issue SID a temporary contract as quickly as possible. Specifically, the parties will request that Reclamation evaluate this request and issue a temporary contract, if possible, on the basis of a Categorical Exclusion. The parties each agree to support implementation of this agreement and to urge other interested organizations and individuals to support it as well.
- d. This MOA will serve as the foundation for interim agreements until the NEPA process is completed. It will be amended on a yearly basis only if significant new information becomes available. It is the parties' objective to develop new interim agreements on the following timetable:
 - o First negotiation meeting - Middle of November of the year preceding a new agreement
 - o Finalize new agreement - Middle of December of the year preceding a new agreement
 - o Completion of Process to Obtain Bureau of Reclamation approval - End of January of the year in which the new agreement is to be implemented

2. Allocation of Water

- a. Of the water described in §II.1.a above, 4,949 acre-feet shall be allocated to instream flow use by CTUIR in 1994 as described in §II.2.b and §II.2.c below.

- b. SID agrees to support and aid CTUIR, WaterWatch and the United States in the release of 10 percent of the contracted stored water described in the November 18, 1949, contract between the United States and the Stanfield Irrigation District (Contract number 11r-1549), plus 10 percent of the up to 3,690 acre-feet of McKay reserved stored water rented to SID in past years and 100 percent of the up to 2,366 acre-feet of McKay residual stored water rented to SID in past years for instream use for the benefit of the Umatilla and Snake River fishery.
- c. Reclamation will operate McKay so that the contracted, reserved and residual water will share the same fill priority and any shortages in filling will be shared proportionately, provided however that contracts for McKay water with non-District individuals will be satisfied first in water year 1994.
- d. Water in these spaces may be carried over in the same manner in which irrigation water has been carried over in the past. Accounting for the water accumulating to these spaces will be on an annual accrual basis.
- e. SID may irrigate inside as well as outside of its boundaries, in accordance with a temporary contract with Reclamation providing for out-of-boundary deliveries in 1994 or a subsequent year. In no event shall the combined total amount of reserved stored water and §8(a) contracted stored water delivered to out of boundary lands exceed 5,274 acre-feet in 1994. The out of boundary lands receiving this water shall be limited to those lands which may be eligible for inclusion in the NEPA process (those lands irrigated with Umatilla Project water before October 1, 1988). The unused portion of this water may be carried over in the same manner in which irrigation water has been carried over in the past.
- f. SID may apply water only to those lands having a valid permit or water right to use it. Reclamation applied in April, 1992, for a permit to use McKay Reservoir water on lands outside SID's boundaries. CTUIR and WaterWatch shall support issuance of this permit if consistent with the application and with state law.
- g. SID shall provide unconditional support and cooperation in the protection of releases of water from McKay Reservoir for instream flow use for fish purposes including, but not limited to, supporting any changes in or under federal and state law which may be necessary to ensure protection of this water for this use. Such changes include, but are not limited to, acquisition of permanent state primary and secondary water rights from McKay Reservoir for instream flow augmentation and permanent federal reauthorization (if necessary) of McKay Reservoir for instream flow augmentation. The permanent

allocation of McKay Reservoir space among irrigation and instream uses will be determined through the NEPA process. SID shall not take or in any other manner prevent CTUIR from using water released or foregone for instream uses by other Umatilla Basin water right holders.

3. Watershed Restoration Pilot Project

SID and CTUIR will assess the feasibility of establishing a pilot project for the purpose of promoting watershed restoration on the Umatilla River. The Soil Conservation Service's existing programs and other opportunities will be reviewed. The assessment will be completed by August, 1994, and will identify site locations, ownership, a restoration plan, and funding sources. The pilot project will be implemented in 1995.

4. Water Quality Monitoring

SID and CTUIR, in cooperation with the other Districts, the Bureau of Reclamation, the Oregon Department of Environmental Quality, the Oregon Department of Fish and Wildlife, and other involved agencies, will monitor Umatilla River water quality in 1994 and assess the need for further study. Monitoring will include a review of existing water quality data and the sampling for potential agricultural contaminants in irrigation drains and in the Umatilla River. SID, in combination with the Westland Irrigation District, the Teel Irrigation District, the Hermiston Irrigation District and the West Extension Irrigation District, will fund \$10,000 to conduct this monitoring. The allocation of the funding burden will be determined by the districts.

5. Process for Permanent Inclusion of SID's "Omitted Lands"

As described in §II.1.a above, SID will waive any contract rights it may have to the water it has used outside of its boundaries in the past. SID shall also provide to CTUIR evidence which demonstrates that the "omitted lands" (as described in Table 1 of the November 4, 1993, scoping meeting notice for the proposed Umatilla Project irrigation districts) should have been included within the districts originally. Once these two steps have been completed to the satisfaction of CTUIR, both SID and CTUIR will begin to develop another Memorandum of Agreement to submit to the Bureau of Reclamation as a joint proposal to permanently include those "omitted lands" on an expedited process. WaterWatch reserves the right to object to such a proposal.

6. Disclaimers

- a. Each party expressly reserves all its existing rights, remedies, claims and arguments, except as specifically provided in this Memorandum of Agreement.

- b. Nothing in this Agreement is intended nor shall be construed as affecting or waiving any treaty rights of the CTUIR.

7. Enforcement of the Agreement

Any party to this agreement has the right to seek enforcement of the terms of this agreement in the circuit court of Umatilla or Marion Counties, except that any legal action involving the United States of America must be brought in the Federal District Court of Oregon. This private right of enforcement is in addition to any enforcement authority of the United States of America or the State of Oregon, and is in addition to any other remedy that the parties may have under law. If a lawsuit is filed regarding this agreement, any party to this agreement may intervene, and no party to this agreement will oppose such intervention.

Dated this ____ day of March, 1994.

Chairman, Board of Directors
Stanfield Irrigation District

Chairman, Board of Trustees
Confederated Tribes of the
Umatilla Indian Reservation

President
WaterWatch, Inc.

JUN 03 '94 03:19PM DIV OF WPANDL

P. 14

DRAFT

DRAFT
6/3/94
Contract No.

UNITED STATES DEPARTMENT OF THE INTERIOR
Bureau of Reclamation
Umatilla Basin Project, Oregon

TEMPORARY CONTRACT BETWEEN THE UNITED STATES OF AMERICA
AND THE STANFIELD IRRIGATION DISTRICT

THIS AGREEMENT, made this ____ day of _____, 1994, pursuant to Reclamation law, particularly Section 9(e) of the Reclamation Project Act of 1939, 53 Stat. 1196; 43 U.S.C. § 485h(e), by and between the UNITED STATES OF AMERICA, hereinafter referred to as the United States, acting through the Bureau of Reclamation, hereinafter referred to as Reclamation, represented by the Regional Director, Pacific Northwest Region, hereinafter referred to as the Contracting Officer, and the STANFIELD IRRIGATION DISTRICT, hereinafter referred to as the District, an irrigation district organized and existing under the laws of the State of Oregon.

WITNESSETH, THAT:

EXPLANATORY RECITALS

WHEREAS, the following statements are made by way of explanation:

1. The United States has constructed the Umatilla Project pursuant to Reclamation Law;
2. The United States and the District entered into a series of contracts, culminating in Amendatory Contract No. 11r-1549, dated November 18, 1949, hereinafter referred to as the 1949 contract, under which the District is provided 30 percent of the stored water available in McKay Reservoir, hereinafter referred to as McKay, for irrigation use within federally recognized District boundaries. Contract at § 10(a).
3. The 1949 contract reserves from permanent disposition not less than 25 percent of the water to be available annually in the reservoir, pending the determination of terms and conditions on which such water will later be made available on a permanent basis. Contract at § 10(b). Contract § 10(b) water has traditionally been referred to as "reserved" stored water. Reclamation has rented up to 3,690 acre-feet of reserved water annually to the District in past years.
4. The 1949 contract provides that, to the extent it is temporarily available, as conclusively determined by the Secretary, additional water from McKay may be delivered to the District. Contract at § 10(c). Project water in excess of § 10(b) "reserved" stored water has traditionally been referred to as "residual"

JUN 03 '94 03:20PM DIV OF WPNL

DRAFT P.15

stored water. The amount of residual water rented to the District in past years is up to 2,366 acre-feet annually.

5. Reclamation does not recognize any right of the District or its member water users to continued delivery of any McKay reserved or residual water. In Reclamation's view, the District has no right to rely on continued use of McKay reserved and residual water, or on water which the District has used in violation of the 1949 contract with Reclamation or Reclamation Law.

6. The District does not waive any rights or claims to the reserved (§ 10(b) of the 1949 contract) or residual (§ 10(c) of the 1949 contract) water traditionally offered to the District on a yearly basis.

7. Reclamation's 1949 contract with the District requires that project water used in irrigation be delivered exclusively to lands within federally recognized District boundaries and that delivery to out of boundary land may only occur with the written consent of the Secretary or the Contracting Officer. 1949 Contract at § 25 and § 34.

8. In previous years, the District has authorized irrigation service to certain lands outside District boundaries without securing proper approval from the United States. The United States has required the District to stop this practice. The District has submitted a boundary expansion request to Reclamation so that it may provide water service to out of boundary lands. The District has requested an interim agreement with Reclamation that will allow continued service to out of boundary lands while its boundary expansion request is being considered.

NOW, THEREFORE, in consideration of the premises and mutual parties, it is agreed as follows:

WAIVER OF CONTRACT RIGHTS

9. Notwithstanding § 14 of this contract, the District agrees to waive until completion of the National Environmental Policy Act (NEPA) process for boundary expansion to the United States any rights, claims or interest it may have pursuant to its 1949 contract with the United States in all federally developed or delivered water which has been proposed to be used outside of the District's boundaries. If the District elects to withdraw its boundary expansion proposal as provided in § 12(d) of this contract, this waiver will terminate on December 31, 1994. Otherwise, the term of the waiver shall be until the issuance of the Record of Decision by Reclamation. If Reclamation's decision is appealed, the waiver will continue until the decision can no longer be appealed.

DRAFT

DISTRICT SUPPORTS INSTREAM USE

10. (a) The District agrees to support and aid the United States in the release of 10 percent of the § 10(a) contracted stored water plus 10 percent of the up to 3,690 acre-feet of McKay reserved stored water rented to the District in past years and 100 percent of the up to 2,366 acre-feet of McKay residual stored water rented to the District in past years for instream use for the benefit of the Umatilla and Snake River fishery.

(b) Reclamation will operate McKay so that the contracted, reserved and residual water will share the same fill priority and any shortages in filling will be shared proportionately, provided however that contracts for McKay water with non-District individuals will be satisfied first in water year 1994.

SERVICE TO LANDS OUTSIDE EXISTING DISTRICT BOUNDARIES

11. (a) The United States agrees to permit temporary delivery during the 1994 irrigation season of a portion of the remaining reserved stored water and § 10(a) contracted water to up to 3,549 acres of irrigable lands outside federally recognized District boundaries, which according to the District, received water from the District prior to October 1, 1988. These lands are described in the November 4, 1993, notice announcing scoping meetings for proposed boundary changes for irrigation districts in the Umatilla Project. The information contained in this document was submitted to Reclamation by the District as part of the District's permanent boundary expansion request.

(b) In no event shall the combined total amount of reserved stored water and § 10(a) contracted stored water delivered to out of boundary lands exceed 5,274 acre-feet in 1994. Deliveries to out of boundary lands shall be at the discretion of the District and in accordance with the terms of the contract.

PROPOSED BOUNDARY CHANGE SUBJECT TO
NATIONAL ENVIRONMENTAL POLICY ACT

12. (a) Reclamation and the District agree that NEPA compliance will be accomplished prior to entering into any long-term contract for delivery of water. Reclamation must evaluate the proposal of all four Umatilla Project districts in the same NEPA document to determine the cumulative impacts of the boundary change proposal.

(b) Reclamation agrees to provide to the District by July 1, 1994, a schedule for completion and the total estimated District costs, for the NEPA evaluation of the proposed boundary change request of the four districts in the Umatilla Project.

(c) Reclamation agrees to provide to the District by July 1, 1994, its best estimate of new or revised obligations which the

JUN 03 '94 03:21PM DIV OF WPANDL

DRAFT

District is likely to face if its 1949 contract is amended to authorize irrigation of additional lands.

(d) The District agrees to notify Reclamation by August 15, 1994, by formal resolution if they intend to pursue the proposed boundary change and associated NEPA process and to enter into an agreement with Reclamation by September 13, 1994, implementing a schedule of deliverables and a cost-sharing arrangement for the NEPA process.

PAYMENTS FOR WATER

13. At the time of execution of this contract, the District shall pay \$_____ to the United States for temporary water service to _____ of the _____ acres of lands to which temporary service is authorized by this contract. The \$_____ to be paid equals a rate of \$_____ per acre, plus an estimate of 1994 operation and maintenance (O&M) costs for McKay Reservoir, plus a \$100.00 fee for the preparation of this contract. The sum of \$_____ is to be paid, in addition to any other payments due the United States under the 1949 contract or other contracts. In the event some of the acres are not provided temporary water service by the District, an appropriate refund will be made at the end of the irrigation season. The O&M charge will also be adjusted, if necessary, based on actual O&M costs and 1994 deliveries of McKay water. The District will be issued a refund or a bill as appropriate to cover adjustments for actual 1994 O&M costs.

TERM OF CONTRACT

14. This contract shall become effective on the date first above written and shall continue until December 31, 1994, unless terminated sooner. This contract shall be terminated and service hereunder shall cease at the option of the United States at any time upon failure of the District to abide by any notice, order rule or regulation of the United States or the State of Oregon now or hereafter established. The United States may terminate this contract and service hereunder may cease if this contract or the use of project water or project facilities is challenged in any legal or administrative proceeding by any individual, group, or by the State of Oregon. This contract may be terminated by the United States and water service hereunder may cease if the Oregon Department of Water Resources fails to issue the necessary approvals for instream use of project water.

OREGON DEPARTMENT OF WATER RESOURCES APPROVAL OF DELIVERY OF WATER TO LANDS OUTSIDE EXISTING DISTRICT BOUNDARIES

15. (a) Water delivered under this contract shall comply with State and federal law. Reclamation applied on _____ for a permit to irrigate some of the lands involved in this contract.

JUN 03 '94 03:22PM DIV OF WPA/DL

P.18

DRAFT

The Oregon Department of Water Resources has given this permit application the number _____. The parties agree to support issuance of the permit as quickly as possible.

(b) The District acknowledges and agrees that Reclamation's application for a permit (No. _____) to irrigate lands outside existing District boundaries does not constitute United States approval for the expansion of federally recognized District boundaries. The permit was applied for under State law in order to deliver water to lands outside existing boundaries on an interim basis or on a permanent basis, if deemed appropriate, upon completion of Reclamation's review of the District's permanent boundary expansion request. The District agrees not to use Reclamation's application for permit No. _____, or the resulting permit, in any legal or administrative proceeding to prove United States approval for permanent boundary expansions.

Disclaimers

16. Reclamation and the District disagree on whether the District's past deliveries to out of boundary lands were legal, and on whether future deliveries would be legal in the absence of this contract or other more permanent authorization by Reclamation. This contract does not affect that underlying dispute, except to settle it until December 31, 1994. This contract is intended only to provide water in 1994 for irrigation of specified out of boundary lands and to facilitate delivery of water for fish flows. Except for contract rights temporarily provided by this contract, this contract creates no new rights or obligations. The parties waive none of their rights, remedies or claims existing prior to this contract. In granting this temporary contract, the United States does not acknowledge or adopt the District's contention that the District had the right to deliver water to out of boundary lands and that water users receiving water on out of boundary lands established a vested right to project water.

COMPLIANCE WITH RECLAMATION LAWS

17. Notwithstanding § 14 of this contract, the parties agree that the delivery of irrigation water or the use of Federal facilities pursuant to this contract is subject to Reclamation law, as amended and supplemented, including, but not limited to, the Reclamation Reform Act of 1982 (RRA) (Public Law 97-293). RRA certification forms will not be required on a District-wide basis from landholders for the 1994 irrigation season. Landholders will be required to complete RRA certification forms prior to delivery of project water in 1995.

JUN 03 '94 03:23PM DIV OF WPANDL

P.19

DRAFTNOTICES

18. Any notice, demand, or request authorized or required by this contract shall be deemed to have been given, on behalf of the District, when mailed, postage prepaid, or delivered to the Regional Director, PN Region, Bureau of Reclamation, 1150 N. Curtis Road, Boise, Idaho 83706-1234, and on behalf of the United States, when mailed, postage prepaid, or delivered to the Secretary of the District, Stanfield Irrigation District, PO Box 416, Stanfield, Oregon 97875-0416, the designation of the addressee or the address may be changed by notice given in the same manner as provided in this article for other notices.

CONTINGENT ON APPROPRIATION OR ALLOTMENT OF FUNDS

19. The expenditure or advance of any money or the performance of any obligation of the United States under this contract shall be contingent upon appropriation or allotment of funds. Absence of appropriation or allotment of funds shall not relieve the District from any obligations under this contract. No liability shall accrue to the United States in case funds are not appropriated or allotted.

OFFICIALS NOT TO BENEFIT

20. No Member of or Delegate to Congress, Resident Commissioner or official of the District shall benefit from this contract other than as a water user or landowner in the same manner as other water users or landowners.

QUALITY OF WATER

21. The operation and maintenance of project facilities shall be performed in such manner as is practicable to maintain the quality of raw water made available through such facilities at the highest level reasonably attainable, as determined by the Contracting Officer. The United States does not warrant the quality of water and is under no obligation to construct or furnish water treatment facilities to maintain or better the quality of water.

WATER AND AIR POLLUTION CONTROL

22. The District, in carrying out this contract, shall comply with all applicable water and air pollution laws and regulations of the United States and the State of Oregon, and shall obtain all required permits or licenses from the appropriate Federal, State, or local authorities.

JUN 03 '94 03:23PM DIV OF WPA/NDL

P.20

DRAFT

CLEAN AIR AND WATER

23. (a) The District agrees as follows:

(1) To comply with all the requirements of Section 114 of the Clean Air Act, as amended (42 U.S.C. 1857, et seq., as amended by Public Law 91-604) and Section 308 of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq., as amended by Public Law 92-500), respectively, relating to inspection, monitoring, entry, reports, and information, as well as other requirements specified in Section 114 and Section 308 of the Air Act and the Water Act, respectively, and all regulations and guidelines issued thereunder before the execution of this contract.

(2) That no portion of the work required by this contract will be performed in a facility listed on the Environmental Protection Agency List of Violating Facilities on the date when this contract was executed unless and until the EPA eliminates the name of such facility or facilities from such listing.

(3) To use its best efforts to comply with clean air standards and clean water standards at the facility where the contract work is being performed.

(4) To insert the substance of the provisions of this article into any nonexempt subcontract, including this paragraph (1)(d).

(b) The terms used in this article have the following meanings:

(1) The term "Air Act" means the Clean Air Act, as amended (42 U.S.C. 1857 et seq., as amended by Public Law 91-604).

(2) The term "Water Act" means Federal Water Pollution Control Act, as amended (33 U.S.C. 1251 et seq., as amended by Public Law 92-500).

(3) The term "clean air standards" means any enforceable rules, regulations, guidelines, standards, limitations, orders, controls, prohibitions, or other requirements which are contained in, issued under, or otherwise adopted pursuant to the Air Act or Executive Order 11738, an applicable implementation plan as described in Section 110(d) of the Clean Air Act (42 U.S.C. 1857c-5(d)), an approved implementation procedure or plan under Section 111(c) or Section 111(d), respectively, of the Air Act (42 U.S.C. 1857c-6(c) or (d)), or an approved implementation procedure under Section 112(d) of the Air Act (42 U.S.C. 1857c-7(d)).

(4) The term "clean water standards" means any enforceable limitation, control, condition, prohibition, standard, or other requirement which is promulgated pursuant to the Water Act or contained in a permit issued to a discharger by the Environmental Protection Agency or by a State under an approved program, as authorized by Section 402 of the Water Act (33 U.S.C. 1342), or by local government to ensure compliance with pretreatment regulations as required by Section 307 of the Water Act (33 U.S.C. 1317).

JUN 03 '94 03:24PM DIV OF WPAIDL

P.21

DRAFT

(5) The term "comply" means compliance with clean air or water standards. Comply shall also mean compliance with a schedule or plan ordered or approved by a court of competent jurisdiction, the Environmental Protection Agency or an air or water pollution control agency in accordance with the requirements of the Air Act or Water Act and regulations issued pursuant thereto.

(6) The term "facility" means any building, plant, installation, structure, mine, vessel or other floating craft, location, or site of operations, owned, leased, or supervised by a contractor or subcontractor, to be utilized in the performance of a contract or subcontract. Where a location or site of operations contains or includes more than one building, plant, installation, or structure, the entire location or site shall be deemed to be a facility except where the Director, Office of Federal Activities, Environmental Protection Agency, determines that independent facilities are collocated in one geographical area.

COMPLIANCE WITH CIVIL RIGHTS LAWS AND REGULATIONS

24. (a) The District shall comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d), Section 504 of the Rehabilitation Act of 1973 (P.L. 93-112, as amended), the Age Discrimination Act of 1975 (42 U.S.C. 6101, et seq.) and any other applicable civil rights laws, as well as with their respective implementing regulations and guidelines imposed by the U.S. Department of the Interior and/or Bureau of Reclamation.

(b) These statutes require that no person in the United States shall, on the grounds of race, color, national origin, handicap, or age, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving financial assistance from the Bureau of Reclamation. By executing this contract, the District agrees to immediately take any measures necessary to implement this obligation, including permitting officials of the United States to inspect premises, programs, and documents.

(c) The District makes this agreement in consideration of and for the purpose of obtaining any and all Federal grants, loans, contracts, property discounts or other Federal financial assistance extended after the date hereof to the District by the Bureau of Reclamation, including installment payments after such date on account of arrangements for Federal financial assistance which were approved before such date. The District recognizes and agrees that such Federal assistance will be extended in reliance on the representations and agreements made in this article, and that the United States reserves the right to seek judicial enforcement thereof.

JUN 03 '94 03:25PM DIV OF WPANDL

P.22

PRIVACY ACT COMPLIANCE**DRAFT**

25. (a) The District shall comply with the Privacy Act of 1974 (5 U.S.C. 522a) (the Act) and the Department of the Interior rules and regulations under the Act (43 CFR 2.45 et seq.) in maintaining landholder acreage certification and reporting records, required to be submitted to the District for compliance with sections 206 and 228 of the Reclamation Reform Act of 1982 (96 Stat. 1266), and pursuant to 43 CFR 426.10.

(b) With respect to the application and administration of the criminal penalty provisions of the Act (5 U.S.C. 552a(i)), the District and the District's employees responsible for maintaining the certification and reporting records referenced in (1) above are considered to be employees of the Department of the Interior. See 5 U.S.C. 522a(m).

(c) The Contracting Officer or a designated representative shall provide the District with current copies of the Interior Department Privacy Act regulations and the Bureau of Reclamation Federal Register Privacy Act System of Records Notice (Acreage Limitation--Interior, Reclamation-31) which govern the maintenance, safeguarding, and disclosure of information contained in the landholders' certification and reporting records.

(d) The Contracting Officer shall designate a full-time employee of the Bureau of Reclamation to be the System Manager who shall be responsible for making decisions on denials pursuant to 43 CFR 2.61 and 2.64, and amendment requests pursuant to 43 CFR 2.72. The District is authorized to grant requests by individuals for access to their own records.

(e) The District shall forward promptly to the System Manager each proposed denial of access under 43 CFR 2.64, and each request for amendment of records filed under 43 CFR 2.71; notify the requester accordingly of such referral; and provide the System Manager with information and records necessary to prepare an appropriate response to the requester. These requirements do not apply to the certification and reporting forms filed pursuant to 43 CFR 426.10, unless the requester elects to cite the Privacy Act as a basis for the request.

CERTIFICATION OF NONSEGREGATED FACILITIES

26. The District hereby certifies that it does not maintain or provide for its employees any segregated facilities at any of its establishments, and it does not permit its employees to perform their services at any location, under its control, where segregated facilities are maintained. It certifies further that it will not maintain or provide for its employees any segregated facilities at any of its establishments, and that it will not permit its employees to perform their services at any location, under its

JUN 03 '94 03:26PM DIV OF WPA&DL

P.23

DRAFT

control, where segregated facilities are maintained. The District agrees that a breach of this certification is a violation of the Equal Opportunity clause in this contract. As used in this certification, the term "segregated facilities" means any waiting rooms, work areas, rest rooms and wash rooms, restaurants and other eating areas, timeclocks, locker rooms and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing facilities provided for employees which are segregated by explicit directive or are in fact segregated on the basis of race, creed, color, or national origin, because of habit, local custom, or otherwise. The District further agrees that (except where it has obtained identical certifications from proposed subcontractors for specific time periods) it will obtain identical certifications from proposed subcontractors prior to the award of subcontracts exceeding \$10,000 which are not exempt from the provisions of the Equal Opportunity clause; that it will retain such certifications in its files; and that it will forward the following notice to such proposed subcontractors (except where the proposed subcontractors have submitted identical certifications for specific time periods):

NOTICE TO PROSPECTIVE SUBCONTRACTORS
OF REQUIREMENT FOR CERTIFICATIONS
OF NONSEGREGATED FACILITIES

A Certification of Nonsegregated Facilities must be submitted prior to the award of a subcontract exceeding \$10,000 which is not exempt from the provisions of the Equal Opportunity clause. The certification may be submitted either for each subcontract or for all subcontracts during a period (i.e., quarterly, semiannually, or annually). Note: The penalty for making false statements in offers is prescribed in 18 U.S.C. 1001.

JUN 03 '94 03:26PM DIV OF WPA&DL

P.24

DRAFT

IN WITNESS WHEREOF, the parties hereto have signed their names
the day and year first above written.

UNITED STATES OF AMERICA

By _____
Regional Director
Pacific Northwest Region
Bureau of Reclamation
1150 N. Curtis Road
Boise ID 83706-1234

STANFIELD IRRIGATION DISTRICT

(DISTRICT SEAL)

By _____
Chairman
Board of Directors

ATTEST:

Secretary

12

MEMORANDUM OF AGREEMENT

WEST EXTENSION IRRIGATION DISTRICT
CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION
and
WATERWATCH, Inc.

June 3, 1994

I. Preamble

The West Extension Irrigation District (WEID) for several years has delivered water from the Umatilla Project to lands outside its federally approved boundaries. The Bureau of Reclamation (Reclamation) calls such practice "water spreading". WEID would like to continue these deliveries. WEID has requested the approval of Reclamation for a permanent change in their boundaries to allow these deliveries to continue. Reclamation is currently considering this request, and is in the process of analyzing its environmental impacts as required by the National Environmental Policy Act (NEPA). The Department of Natural Resources of the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) is a cooperating agency in this NEPA process. Reclamation must issue a Record of Decision which will permanently resolve the issue of WEID's water use. Hereafter, this process shall be referred to as the "NEPA process".

Reclamation may not make its final decision for two or more years. In the meantime, WEID seeks to continue using Umatilla Project water on the lands outside its approved boundaries. CTUIR and WaterWatch, however, seek to provide and protect water needed for anadromous fish in the Umatilla River, in recognition of CTUIR's treaty rights. The parties to this agreement recognize the needs of both agriculture and anadromous fish for water during the interim period before a final decision by Reclamation. The parties have worked together cooperatively in an attempt to meet these needs, and have agreed to support interim deliveries of water for both instream and irrigation uses.

II. Agreement

The parties to this Memorandum of Agreement, WEID, CTUIR, and WaterWatch, do hereby agree to the following:

1. Process

- a. WEID agrees to waive, in the 1994 TEMPORARY CONTRACT BETWEEN THE UNITED STATES OF AMERICA AND THE WEST EXTENSION IRRIGATION DISTRICT, until completion of the NEPA process for boundary expansion, to the United States any rights, claims or interests it may have pursuant to its 1954 contract with the United States in all federally developed or delivered water

which has been proposed to be used outside of its boundaries. This federal water includes 13,599 acre-feet of Umatilla River flows. If WEID elects to withdraw its boundary expansion proposal by August 15, 1994, this waiver will terminate on November 1, 1994. Otherwise, the term of the waiver shall be until the issuance of the Record of Decision by Reclamation. Future use of this water shall be governed by the Record of Decision issued by the Bureau of Reclamation. If Reclamation's decision is appealed, the waiver will continue until the decision can no longer be appealed.

- b. CTUIR, WEID and WaterWatch jointly will submit this MOA to the Bureau of Reclamation as a proposal. This proposal includes the attached 1994 TEMPORARY CONTRACT BETWEEN THE UNITED STATES OF AMERICA AND THE WEST EXTENSION IRRIGATION DISTRICT, as drafted, to allow WEID to irrigate outside of its boundaries in 1994. It also includes an agreement on how the water described in §1.a above, shall be allocated in 1994.
- c. With this agreement, the parties jointly request that Reclamation complete the NEPA evaluation of this proposal and issue WEID a temporary contract as quickly as possible. Specifically, the parties will request that Reclamation evaluate this request and issue a temporary contract, if possible, on the basis of a Categorical Exclusion. The parties each agree to support implementation of this agreement and to urge other interested organizations and individuals to support it as well.
- d. This MOA will serve as the foundation for interim agreements until the NEPA process is completed. It will be amended on a yearly basis only if significant new information becomes available. It is the parties' objective to develop new interim agreements on the following timetable:
 - o First negotiation meeting - Middle of November of the year preceding a new agreement
 - o Finalize new agreement - Middle of December of the year preceding a new agreement
 - o Completion of Process to Obtain Bureau of Reclamation approval - End of January of the year in which the new agreement is to be implemented

2. Allocation of Water

- a. WEID may use the water described in §II.1.a above to irrigate inside and outside of its boundaries, in accordance with a temporary contract with Reclamation providing for out-of-boundary deliveries in 1994 or a subsequent year. The out-of-district lands receiving this water shall be limited to those

lands which are eligible for inclusion in the NEPA process (those lands irrigated with Umatilla Project water before October 1, 1988).

- b. With Phase I of the Umatilla Basin Project completed, WEID is now able to receive its water from the Columbia River. WEID shall take all of its water from the Columbia River through the exchange throughout the entire irrigation season, except when Umatilla River flows exceed the flows needed for fish, as determined by CTUIR in conjunction with the Oregon Department of Fish and Wildlife. CTUIR and WaterWatch will assist in obtaining an agreement from the Bonneville Power Administration to fund this exchange. Water exchanged by WEID will be used for fish needs by CTUIR.
- c. WEID shall provide unconditional support and cooperation in the protection of releases of water from McKay Reservoir for instream flow use for fish purposes including, but not limited to, supporting any changes in or under federal and state law which may be necessary to ensure protection of this water for this use. Such changes include, but are not limited to, acquisition of permanent state primary and secondary water rights from McKay Reservoir for instream flow augmentation and permanent federal reauthorization (if necessary) of McKay Reservoir for instream flow augmentation. The permanent allocation of McKay Reservoir space among irrigation and instream uses will be determined through the NEPA process. WEID shall not take or in any other manner prevent CTUIR from using water released or foregone for instream uses by other Umatilla Basin water right holders.

3. Watershed Restoration Pilot Project

WEID and CTUIR will assess the feasibility of establishing a pilot project for the purpose of promoting watershed restoration on the Umatilla River. The Soil Conservation Service's existing programs and other opportunities will be reviewed. The assessment will be completed by August, 1994, and will identify site locations, ownership, a restoration plan, and funding sources. The pilot project will be implemented in 1995.

4. Water Quality Monitoring

WEID and CTUIR, in cooperation with the other Districts, the Bureau of Reclamation, the Oregon Department of Environmental Quality, the Oregon Department of Fish and Wildlife, and other involved agencies, will monitor Umatilla River water quality in 1994 and assess the need for further study. Monitoring will include a review of existing water quality data and the sampling for potential agricultural contaminants in irrigation drains and in the Umatilla River. WEID, in combination with the Westland Irrigation District, the Teel Irrigation District, the Stanfield Irrigation

District and the Hermiston Irrigation District, will fund \$10,000 to conduct this monitoring. The allocation of the funding burden will be determined by the districts.

5. Process for Permanent Inclusion of WEID's "Spillway Area Lands"

As described in §II.1.a above, WEID will waive any contract rights it may have to the water it has used outside of its boundaries in the past. WEID shall also provide to CTUIR evidence which demonstrates that the "spillway area lands" (as described in "Repayment Contract between the United States of America and the West Extension Irrigation District" dated July 6, 1954, in Section 11.(b)) should be included within the district. Once these two steps have been completed to the satisfaction of CTUIR, both WEID and CTUIR will begin to develop another Memorandum of Understanding to submit to the Bureau of Reclamation as a joint proposal to permanently include those "spillway area lands" on an expedited process. WaterWatch reserves the right to object to such a proposal.

6. Disclaimers

- a. Each party expressly reserves all its existing rights, remedies, claims and arguments, except as specifically provided in this Memorandum of Agreement.
- b. Nothing in this Agreement is intended nor shall be construed as affecting or waiving any treaty rights of the CTUIR.

7. Enforcement of the Agreement

Any party to this agreement has the right to seek enforcement of the terms of this agreement in the circuit court of Umatilla or Marion Counties, except that any legal action involving the United States of America must be brought in the Federal District Court of Oregon. This private right of enforcement is in addition to any enforcement authority of the United States of America or the State of Oregon, and is in addition to any other remedy that the parties may have under law. If a lawsuit is filed regarding this agreement, any party to this agreement may intervene, and no party to this agreement will oppose such intervention.

Dated this ____ day of May 1994.

Chairman, Board of Directors
West Extension Irrigation
District

Chairman, Board of Trustees
Confederated Tribes of the
Umatilla Indian Reservation

President
WaterWatch, Inc.

DRAFT

DRAFT
6/3/94
Contract No.

UNITED STATES DEPARTMENT OF THE INTERIOR
Bureau of Reclamation
Umatilla Basin Project, Oregon

TEMPORARY CONTRACT BETWEEN THE UNITED STATES OF AMERICA
AND THE WEST EXTENSION IRRIGATION DISTRICT

THIS AGREEMENT, made this ____ day of _____, 1994, pursuant to Reclamation law, particularly Section 9(e) of the Reclamation Project Act of 1939, 53 Stat. 1196; 43 U.S.C. § 485h(e), by and between the UNITED STATES OF AMERICA, hereinafter referred to as the United States, acting through the Bureau of Reclamation, hereinafter referred to as Reclamation, represented by the Regional Director, Pacific Northwest Region, hereinafter referred to as the Contracting Officer, and the WEST EXTENSION IRRIGATION DISTRICT, hereinafter referred to as the District, an irrigation district organized and existing under the laws of the State of Oregon.

WITNESSETH, THAT:

EXPLANATORY RECITALS

WHEREAS, the following statements are made by way of explanation:

1. The United States has constructed the Umatilla Project pursuant to Reclamation Law;
2. The United States and the District entered into a series of contracts, culminating in Repayment Contract No. 14-06-W-68, dated July 6, 1954, hereinafter referred to as the 1954 contract, under which the District operates and maintains irrigation facilities of the Umatilla Project, in accordance with conditions established in the contract;
3. Reclamation's 1954 contract with the District requires that project water used for irrigation be delivered exclusively to lands within federally recognized District boundaries and that delivery to out of boundary land may only occur with the written consent of the Secretary. 1954 Contract at § 11 and § 28.
4. In previous years, the District has authorized irrigation service to certain lands outside District boundaries without securing proper approval from the United States. The United States has required the District to stop this practice. The District has submitted a boundary expansion request to Reclamation so that it may provide water service to out of boundary lands. The District has requested an interim agreement with Reclamation that will allow continued service to out of boundary lands while its boundary expansion request is being considered.

DRAFT

5. Reclamation does not recognize any contract right of the District or vested right of its member water users, to continued water delivery of project water for use on lands out of District boundaries where the Secretary has not provided written consent for out of boundary delivery.

NOW, THEREFORE, in consideration of the premises and mutual parties, it is agreed as follows:

WAIVER OF CONTRACT RIGHTS

6. Notwithstanding § 11 of this contract, the District agrees to waive until completion of the National Environmental Policy Act (NEPA) process for boundary expansion to the United States any rights, claims or interest it may have pursuant to its 1954 contract with the United States in all federally developed or delivered water which has been proposed to be used outside of the District's boundaries. If the District elects to withdraw its boundary expansion proposal as provided in § 9(d) of this contract, this waiver will terminate on December 31, 1994. Otherwise, the term of the waiver shall be until the issuance of the Record of Decision by Reclamation. If Reclamation's decision is appealed, the waiver will continue until the decision can no longer be appealed.

DISTRICT SUPPORTS INSTREAM USE

7. (a) The District agrees to support and aid the United States in the release of any McKay stored water for instream use for the benefit of the Umatilla and Snake River fishery.

(b) With Phase I of the Umatilla Basin Project completed, the District is now able to receive its water from the Columbia River. The District shall take all of its water from the Columbia River through the exchange throughout the entire irrigation season except when Umatilla River flows exceed the flows needed for fish, as determined by the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) in conjunction with the Oregon Department of Fish and Wildlife. The District and Reclamation will cooperate in an effort to obtain an agreement from the Bonneville Power Administration to fund this exchange. The parties understand that the CTUIR are willing to assist in this effort. Water exchanged by the District will be used for fish needs.

SERVICE TO LANDS OUTSIDE EXISTING DISTRICT BOUNDARIES

8. The United States agrees to permit temporary delivery during the 1994 irrigation season of up to 13,559 acre-feet of water under permit No. _____ and certificate No. _____ to up to 3,013 acres of irrigable lands outside federally recognized District boundaries, which according to the District, received water from the District prior to October 1, 1988. These lands are

DRAFT

described in the November 4, 1993, notice announcing scoping meetings for proposed boundary changes for irrigation districts in the Umatilla Project. The information contained in this document was submitted to Reclamation by the District as part of the District's permanent boundary expansion request. Deliveries to out of boundary lands shall be at the discretion of the District and in accordance with the terms of this contract.

PROPOSED BOUNDARY CHANGE SUBJECT TO
NATIONAL ENVIRONMENTAL POLICY ACT

9. (a) Reclamation and the District agree that NEPA compliance will be accomplished prior to entering into any long-term contract for delivery of water. Reclamation must evaluate the proposal of all four Umatilla Project districts in the same NEPA document to determine the cumulative impacts of the boundary change proposal.

(b) Reclamation agrees to provide to the District by July 1, 1994, a schedule for completion and the total estimated District costs, for the NEPA evaluation of the proposed boundary change request of the four districts in the Umatilla Project.

(c) Reclamation agrees to provide to the District by July 1, 1994, its best estimate of new or revised obligations which the District is likely to face if its 1954 contract is amended to authorized irrigation of additional lands.

(d) The District agrees to notify Reclamation by August 15, 1994, by formal resolution if they intend to pursue the proposed boundary change and associated NEPA process and to enter into an agreement with Reclamation by September 13, 1994, implementing a schedule of deliverables and a cost-sharing arrangement for the NEPA process.

PAYMENTS FOR WATER

10. At the time of execution of this contract, the District shall pay \$_____ to the United States for temporary water service to _____ of the 3,013 acres of lands described above. This amount equals \$_____ per acre for each acre outside existing District boundaries to which service is authorized by this contract, plus a \$100.00 fee for the preparation of this contract, and is over and above any other payments due the United States under the 1954 contract or other contracts. In the event some of the acres are not provided temporary water service by the District, an appropriate refund will be made at the end of the irrigation season.

TERM OF CONTRACT

11. This contract shall become effective on the date first above written and shall continue until December 31, 1994, unless

DRAFT

terminated sooner. This contract shall be terminated and service hereunder shall cease at the option of the United States at any time upon failure of the District to abide by any notice, order rule or regulation of the United States or the State of Oregon now or hereafter established. The United States may terminate this contract and service hereunder may cease if this contract or the use of project water or project facilities is challenged in any legal or administrative proceeding by any individual, group, or by the State of Oregon. This contract may be terminated by the United States and water service hereunder may cease if the Oregon Department of Water Resources fails to issue the necessary approvals for instream use of project water.

Disclaimers

12. Reclamation and the District disagree on whether the District's past deliveries to out of boundary lands were legal, and on whether future deliveries would be legal in the absence of this contract or other more permanent authorization by Reclamation. This contract does not affect that underlying dispute, except to settle it until December 31, 1994. This contract is intended only to provide water in 1994 for irrigation of specified out of boundary lands and to facilitate delivery of water for fish flows. Except for contract rights temporarily provided by this contract, this contract creates no new rights or obligations. The parties waive none of their rights, remedies or claims existing prior to this contract. In granting this temporary contract, the United States does not acknowledge or adopt the District's contention that the District had the right to deliver water to out of boundary lands and that water users receiving water on out of boundary lands established a vested right to project water.

COMPLIANCE WITH RECLAMATION LAWS

13. Notwithstanding § 11 of this contract, the parties agree that the delivery of irrigation water or the use of Federal facilities pursuant to this contract is subject to Reclamation law, as amended and supplemented, including, but not limited to, the Reclamation Reform Act of 1982 (RRA) (Public Law 97-293). RRA certification forms will not be required on a District-wide basis from landholders for the 1994 irrigation season. Landholders will be required to complete RRA certification forms prior to delivery of project water in 1995.

NOTICES

14. Any notice, demand, or request authorized or required by this contract shall be deemed to have been given, on behalf of the District, when mailed, postage prepaid, or delivered to the Regional Director, PN Region, Bureau of Reclamation, 1150 N. Curtis Road, Boise, Idaho 83706-1234, and on behalf of the United States, when mailed, postage prepaid, or delivered to the Secretary

DRAFT

of the District, West Extension Irrigation District, PO Box 465, Irrigon, Oregon 97844-0465, the designation of the addressee or the address may be changed by notice given in the same manner as provided in this article for other notices.

CONTINGENT ON APPROPRIATION OR ALLOTMENT OF FUNDS

15. The expenditure or advance of any money or the performance of any obligation of the United States under this contract shall be contingent upon appropriation or allotment of funds. Absence of appropriation or allotment of funds shall not relieve the District from any obligations under this contract. No liability shall accrue to the United States in case funds are not appropriated or allotted.

OFFICIALS NOT TO BENEFIT

16. No Member of or Delegate to Congress, Resident Commissioner or official of the District shall benefit from this contract other than as a water user or landowner in the same manner as other water users or landowners.

QUALITY OF WATER

17. The operation and maintenance of project facilities shall be performed in such manner as is practicable to maintain the quality of raw water made available through such facilities at the highest level reasonably attainable, as determined by the Contracting Officer. The United States does not warrant the quality of water and is under no obligation to construct or furnish water treatment facilities to maintain or better the quality of water.

WATER AND AIR POLLUTION CONTROL

18. The District, in carrying out this contract, shall comply with all applicable water and air pollution laws and regulations of the United States and the State of Oregon, and shall obtain all required permits or licenses from the appropriate Federal, State, or local authorities.

CLEAN AIR AND WATER

19. (a) The District agrees as follows:

(1) To comply with all the requirements of Section 114 of the Clean Air Act, as amended (42 U.S.C. 1857, et seq., as amended by Public Law 91-604) and Section 308 of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq., as amended by Public Law 92-500), respectively, relating to inspection, monitoring, entry, reports, and information, as well as other requirements specified in Section 114 and Section 308 of the Air Act and the Water Act, respectively, and all regulations and guidelines issued thereunder before the execution of this contract.

DRAFT

(2) That no portion of the work required by this contract will be performed in a facility listed on the Environmental Protection Agency List of Violating Facilities on the date when this contract was executed unless and until the EPA eliminates the name of such facility or facilities from such listing.

(3) To use its best efforts to comply with clean air standards and clean water standards at the facility where the contract work is being performed.

(4) To insert the substance of the provisions of this article into any nonexempt subcontract, including this paragraph (1)(d).

(b) The terms used in this article have the following meanings:

(1) The term "Air Act" means the Clean Air Act, as amended (42 U.S.C. 1857 et seq., as amended by Public Law 91-604).

(2) The term "Water Act" means Federal Water Pollution Control Act, as amended (33 U.S.C. 1251 et seq., as amended by Public Law 92-500).

(3) The term "clean air standards" means any enforceable rules, regulations, guidelines, standards, limitations, orders, controls, prohibitions, or other requirements which are contained in, issued under, or otherwise adopted pursuant to the Air Act or Executive Order 11738, an applicable implementation plan as described in Section 110(d) of the Clean Air Act (42 U.S.C. 1857c-5(d)), an approved implementation procedure or plan under Section 111(c) or Section 111(d), respectively, of the Air Act (42 U.S.C. 1857c-6(c) or (d)), or an approved implementation procedure under Section 112(d) of the Air Act (42 U.S.C. 1857c-7(d)).

(4) The term "clean water standards" means any enforceable limitation, control, condition, prohibition, standard, or other requirement which is promulgated pursuant to the Water Act or contained in a permit issued to a discharger by the Environmental Protection Agency or by a State under an approved program, as authorized by Section 402 of the Water Act (33 U.S.C. 1342), or by local government to ensure compliance with pretreatment regulations as required by Section 307 of the Water Act (33 U.S.C. 1317).

(5) The term "comply" means compliance with clean air or water standards. Comply shall also mean compliance with a schedule or plan ordered or approved by a court of competent jurisdiction, the Environmental Protection Agency or an air or water pollution control agency in accordance with the requirements of the Air Act or Water Act and regulations issued pursuant thereto.

(6) The term "facility" means any building, plant, installation, structure, mine, vessel or other floating craft, location, or site of operations, owned, leased, or supervised by a contractor or subcontractor, to be utilized in the performance of a contract or subcontract. Where a location or site of operations contains or includes more than one building, plant, installation,

PAGE 7
DRAFT

or structure, the entire location or site shall be deemed to be a facility except where the Director, Office of Federal Activities, Environmental Protection Agency, determines that independent facilities are collocated in one geographical area.

COMPLIANCE WITH CIVIL RIGHTS LAWS AND REGULATIONS

20. (a) The District shall comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d), Section 504 of the Rehabilitation Act of 1973 (P.L. 93-112, as amended), the Age Discrimination Act of 1975 (42 U.S.C. 6101, et seq.) and any other applicable civil rights laws, as well as with their respective implementing regulations and guidelines imposed by the U.S. Department of the Interior and/or Bureau of Reclamation.

(b) These statutes require that no person in the United States shall, on the grounds of race, color, national origin, handicap, or age, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving financial assistance from the Bureau of Reclamation. By executing this contract, the District agrees to immediately take any measures necessary to implement this obligation, including permitting officials of the United States to inspect premises, programs, and documents.

(c) The District makes this agreement in consideration of and for the purpose of obtaining any and all Federal grants, loans, contracts, property discounts or other Federal financial assistance extended after the date hereof to the District by the Bureau of Reclamation, including installment payments after such date on account of arrangements for Federal financial assistance which were approved before such date. The District recognizes and agrees that such Federal assistance will be extended in reliance on the representations and agreements made in this article, and that the United States reserves the right to seek judicial enforcement thereof.

PRIVACY ACT COMPLIANCE

21. (a) The District shall comply with the Privacy Act of 1974 (5 U.S.C. 522a) (the Act) and the Department of the Interior rules and regulations under the Act (43 CFR 2.45 et seq.) in maintaining landholder acreage certification and reporting records, required to be submitted to the District for compliance with sections 206 and 228 of the Reclamation Reform Act of 1982 (96 Stat. 1266), and pursuant to 43 CFR 426.10.

(b) With respect to the application and administration of the criminal penalty provisions of the Act (5 U.S.C. 552a(i)), the District and the District's employees responsible for maintaining the certification and reporting records referenced in (1) above are considered to be employees of the Department of the Interior. See

DRAFT

5 U.S.C. 522a(m).

(c) The Contracting Officer or a designated representative shall provide the District with current copies of the Interior Department Privacy Act regulations and the Bureau of Reclamation Federal Register Privacy Act System of Records Notice (Acreage Limitation--Interior, Reclamation-31) which govern the maintenance, safeguarding, and disclosure of information contained in the landholders' certification and reporting records.

(d) The Contracting Officer shall designate a full-time employee of the Bureau of Reclamation to be the System Manager who shall be responsible for making decisions on denials pursuant to 43 CFR 2.61 and 2.64, and amendment requests pursuant to 43 CFR 2.72. The District is authorized to grant requests by individuals for access to their own records.

(e) The District shall forward promptly to the System Manager each proposed denial of access under 43 CFR 2.64, and each request for amendment of records filed under 43 CFR 2.71; notify the requester accordingly of such referral; and provide the System Manager with information and records necessary to prepare an appropriate response to the requester. These requirements do not apply to the certification and reporting forms filed pursuant to 43 CFR 426.10, unless the requester elects to cite the Privacy Act as a basis for the request.

CERTIFICATION OF NONSEGREGATED FACILITIES

22. The District hereby certifies that it does not maintain or provide for its employees any segregated facilities at any of its establishments, and it does not permit its employees to perform their services at any location, under its control, where segregated facilities are maintained. It certifies further that it will not maintain or provide for its employees any segregated facilities at any of its establishments, and that it will not permit its employees to perform their services at any location, under its control, where segregated facilities are maintained. The District agrees that a breach of this certification is a violation of the Equal Opportunity clause in this contract. As used in this certification, the term "segregated facilities" means any waiting rooms, work areas, rest rooms and wash rooms, restaurants and other eating areas, timeclocks, locker rooms and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing facilities provided for employees which are segregated by explicit directive or are in fact segregated on the basis of race, creed, color, or national origin, because of habit, local custom, or otherwise. The District further agrees that (except where it has obtained identical certifications from proposed subcontractors for specific time periods) it will obtain identical certifications from proposed subcontractors prior to the award of subcontracts exceeding \$10,000

DRAFT

which are not exempt from the provisions of the Equal Opportunity clause; that it will retain such certifications in its files; and that it will forward the following notice to such proposed subcontractors (except where the proposed subcontractors have submitted identical certifications for specific time periods):

NOTICE TO PROSPECTIVE SUBCONTRACTORS
OF REQUIREMENT FOR CERTIFICATIONS
OF NONSEGREGATED FACILITIES

A Certification of Nonsegregated Facilities must be submitted prior to the award of a subcontract exceeding \$10,000 which is not exempt from the provisions of the Equal Opportunity clause. The certification may be submitted either for each subcontract or for all subcontracts during a period (i.e., quarterly, semiannually, or annually). Note: The penalty for making false statements in offers is prescribed in 18 U.S.C. 1001.

DRAFT

IN WITNESS WHEREOF, the parties hereto have signed their names
the day and year first above written.

UNITED STATES OF AMERICA

By _____
Regional Director
Pacific Northwest Region
Bureau of Reclamation
1150 N. Curtis Road
Boise ID 83706-1234

WEST EXTENSION IRRIGATION DISTRICT

(DISTRICT SEAL)

By _____
Chairman
Board of Directors

ATTEST:

Secretary

DRAFT

STATE OF _____)
 : ss
 County of _____)

On this _____ day of _____, 19____, before me,
 _____, a Notary Public, personally appeared
 _____, known to me to be
 the person whose name is subscribed to the within instrument and
 acknowledged to me that _____ executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my
 official seal as of the day and year first above written.

(SEAL) Notary Public in and for the
 State of _____
 Residing at: _____

My commission expires:

* * * * *

STATE OF IDAHO)
 : ss
 County of Ada)

On this _____ day of _____, 19____, personally
 appeared before me _____, to me known
 to be the official of the United States of America that executed
 the within and foregoing instrument and acknowledged said
 instrument to be the free and voluntary act and deed of said United
 States, for the uses and purposes therein mentioned, and on oath
 stated that he was authorized to execute said instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my
 official seal as of the day and year first above written.

(SEAL) Notary Public in and for the
 State of Idaho
 Residing at: _____

My commission expires:

Mr. MILLER. Mr. Dick, did you have a statement? Mr. Dick.

STATEMENT OF LOUIE DICK, JR.

Mr. DICK. Yes. I am very grateful to be here today to speak to you. You are what we call mayoka—chiefs or leaders.

I have been raised—just only recently I kind of put the Bible down and picked up what we call the kelose kelose—the drum. I carried that for two-thirds of my life and I am learning to be an Indian. That sounds a little strange and different. My borrowed name is Louie Dick. My true religious name is Clayos. That name in the mouth of the Columbia River—that man that carried that name caught salmon there for centuries and centuries. He acted as a group, not an individual. He followed a law. We call it Tum-mun-witt. A Neet Tum-mun-witt. That means creator's life.

I heard it mentioned this morning we have lived for centuries by that one law. We have not changed it. We are to live in harmony with all those other things. And I don't know if you have it in your packet, but it is kind of a different color, and I will try to explain that.

Lakota los Spenotha. It is all one. Na-tee-tite, Ha-ush-witt, Sin-a-witt, Choosh, Tea-chum, Na-tee-tite, Tat-pus, Twquatat. That all lives in one, that is a sacred circle. If it is not—if one of the elements is missing—it ceases to be a sacred circle and we are destroying that circle systematically.

On the outside, you can see that the European mind or the United States of America, your flag, this is your flag and your country now, it is not ours anymore. We are pitiful people. Because you have learned to separate those out, the religion, the dwellings, the sacred air, the speech, the water, the water, the land, the Indian person, dress, food, and light, it has been removed. But yet in an Indian community, they are still the same, they are still one.

When I was a little boy, he was raised up in the Catholic church and I was an altar boy. I was very impressed with what the priest did. He took this water and this small container, and he took an instrument and he put it on the multitude and he put it on a casket and he put it on a dedicated building, and he called it holy water. I was very pleased to hear that and that was a good teaching.

But when I put my bible down and I picked up the drum, they told me—Icca meaning the elders who were teaching—they said the whole battery, anytime there is any water, liquid form, or fog or a snowflake or ice, it is still holy. It is a medicine.

In those documents that you have, you have a picture of a chief with a war bonnet on. His name is Clarence Burke. I heard him speak one time. He said, choosh ha-ush-witt shaki. He said, water is a medicine, so it is true that it is a medicine. One example is the sweat house. If you are not familiar with what one of those are, it is a small spherical thing that sits on the ground, a little hut. And outside, they build a fire and they heat the rocks, and they put it inside for two and/or more people.

And the men go with the men and the women go with the women, and if you are fortunate enough, you have an elder with gray hair who help you in the sweat house. He will put water on the rocks and, of course, it will steam, will come up, and it cleans

your body. And then after a while, you perspire and then you put some water on it and then it enters your nostril and cleans your inside.

Prior to gathering any type of food, salmon included, the gray haired one will tell you how to live, Chick-quo-shunna Tim-ook-ka, this is what you will do. And then he will tell you to gather the food with a good heart and a good mind. So food and water, let me put that in a better way.

Any type of food, if it has an indigenous name from the Indian community, is probably a sacred item. Food like salmon gives us strength and knowledge to learn the way to get from here to the other world. It is not a commodity in which we take, for example, like wheat and grain and sell to our neighbors for a profit.

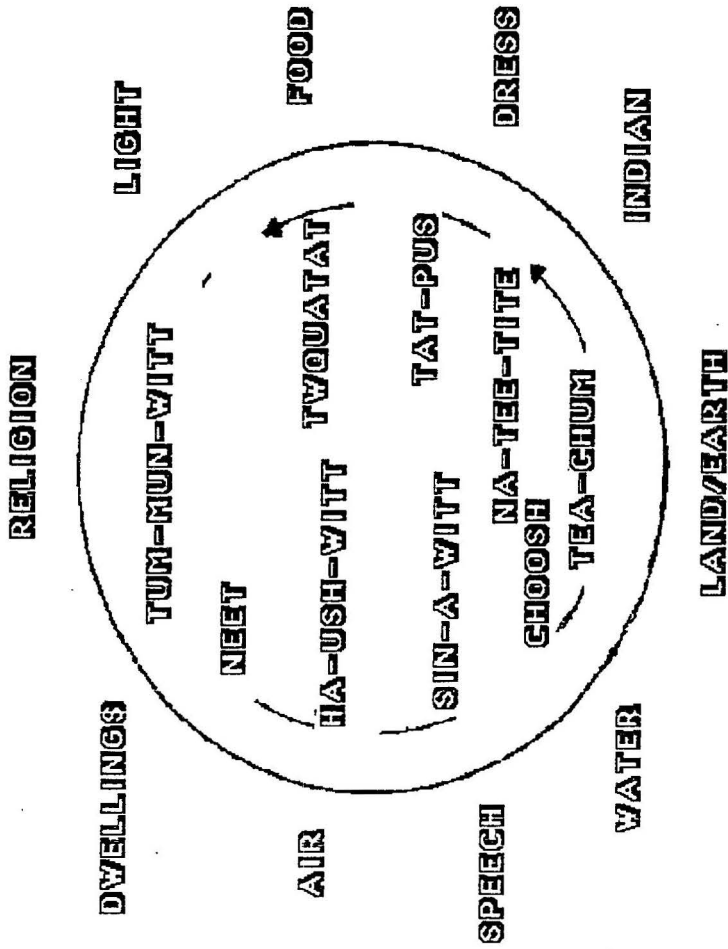
We are taught to give water and food to the elders so that they will teach us how to get from here to the other world. The religious language that I speak about, 60, 70 80 percent of that language is to get from here to the other world. We also—I don't know what you call it, but we have a—I guess it is a ceremony.

Mr. MILLER. Mr. Dick, I am going to ask you to bring this to a conclusion. This is interesting and fascinating, but I have got to wrap this hearing up with these two other panels and I want to get to the core here on the legal issues the tribe has on the water spreading controversy.

You want to summarize or?

Mr. DICK. I summarized.

[Chart submitted by Mr. Dick follows:]



Mr. MILLER. Thank you. Let me ask you, Mr. Minthorn, Chairman Minthorn, you have been involved in the task force, have you not?

Mr. MINTHORN. The Water Spreading Task Force?

Mr. MILLER. Yes.

Mr. MINTHORN. No, I have not. Rebecca Hiers has been representing the tribe.

Mr. MILLER. The tribe has been; is that right, Ms. Hiers?

Ms. HIERS. Yes.

Mr. MILLER. But in your testimony, you raise the issue of whether or not other tribes have been notified and/or involved in this controversy; is that correct?

Ms. HIERS. Yes, that is correct.

Mr. MILLER. So you are not speaking on behalf of your own involvement, you are speaking that others should be included and should be notified as to this; is that correct?

Ms. HIERS. Yes. This was a topic of discussion at the very first task force meeting where the three tribes each raised the issue of other tribes being unaware of this issue at all and completely unaware of the task force process to develop a policy to deal with the problem. There are 14 tribes in the Columbia Basin that are part of the Columbia basin fish and wildlife authority and, more than that, in the affiliated tribes of Northwest Indians, all of which are in the Pacific Northwest region and would be directly impacted by this policy.

At the last task force meeting a few weeks ago, the Bureau of Reclamation said that they still have not notified any other tribe of the issue of water spreading at all, much less of the task force process.

Mr. MILLER. And your involvement is not a proxy for their involvement is what you are saying?

Ms. HIERS. That is correct. And if I could speak, Chairman Minthorn—

Mr. MINTHORN. Go ahead.

Ms. HIERS [continuing]. Tribes are sovereign nations within the Nation of the United States and the Umatilla tribe could not speak for another tribe any more than the State of Florida could speak for the State of Oregon.

Mr. MILLER. I understand that but we have people who represent governors on task forces. We don't have every governor in every State, and I am just trying to determine whether or not representation is adequate or not. Your contention is it isn't. Okay.

Mr. Marbut, in your testimony, you say that it is agreed that where water use is in fact illegal, steps should be taken to bring the use into compliance with the State or Federal law or the use should be discontinued.

And I think that is kind of the point of this hearing and hopefully of the activity that you are engaged with and the Bureau is. It is not really a question of what is going to happen to water if water is recaptured and water is reallocated or not allocated or what have you. I think, first and foremost, the question is whether or not the water is being used in compliance with the law.

Then if it is determined that there is excess water within irrigation districts for the stated purpose, either that purpose can be

amended and water continues to be used in accordance with the contractual relationships, modified contractual relationships and/or you or the State make a determination whether you want to put it back into instream flows or whatever you want to do with it.

But, first and foremost, it seems to me that your testimony and most of the testimony talks now about how you want everybody included in the process, and that is the point I am raising, to make sure all the Indian nations are included in these processes. But when these practices were developed, a lot of them done unilaterally, there weren't a lot of people asking neighbors downstream whether or not it is okay to use more water than we need. Or we irrigate lands that are classified as nonirrigable, that is kind of unilateral arrangement.

So I think the purpose of bringing it back in within the structure of the State and, or I guess in some instances the Federal Government, is that how you want to use water in the future. You don't have to do any of this. Some have suggested this is a way to answer endangered species problems or prevent those problems from taking place.

That is a decision your State is going to have to make, just as California decided, without Federal water, there is no way they can get out of the endangered species box. Now we have a cooperative arrangement going on and we are reallocating water and we are changing the nature in which water is being used in California to try to prevent the onslaught of additional endangered species problems in the Sacramento Delta and elsewhere.

But that is the second part of the story. The first part of the story is to get the system back within the law, and then to decide whether or not you want to modify contracts or modify the law or you stand pat. Do you see this division that I am trying to outline here?

Mr. MARBUT. Mr. Chairman, absolutely, and I agree with your analysis of it. And I think that is the way the task force eventually came to see the issues also. We see the first step as a legal step and it would involve Federal Reclamation law, contract law, State irrigation district law and State water law for allocation of water. Once the practice is in conformance with those, there may or may not be water available and, at that time, the parties need to collectively decide how that water should be allocated or reallocated.

And, again, Oregon is a leader, we value highly the opportunities for conservation and enhancement of stream flows, transfer and leasing.

Mr. MILLER. Thank you.

Mr. SMITH.

Mr. SMITH. Thank you.

Antone, I met with you two weeks ago, something like that, with the council.

Mr. MINTHORN. That is correct, I remember.

Mr. SMITH. And I asked the question directly at that time whether the tribe felt that the Bureau of Reclamation currently was including them in hearings and discussions. I think I made the statement, if they are not, I want to know about it because I would have immediately contacted Mr. Beard. I was told that indeed the Bu-

reau of Reclamation was including tribes in their decision-making process.

Mr. MINTHORN. The Bureau of Reclamation of the Boise Office has been meeting with the Confederated Tribes of the Umatilla on a very consistent basis. We have a good working relationship with that office. But I think when we are talking about the task force and we are talking from a regional perspective and when we talk about the States of Washington and Idaho, there are also tribes that are involved there that may not be adequately represented on the task force.

And on the Washington side, we may be talking about the Yakima Tribe and we may also be talking with the Colvilles. And in Idaho, the State of Idaho, then we would be talking about the Shoshone, Bannock, and Piyute tribes of the Snake River Basin.

Mr. SMITH. So you are speaking about other tribes now, not the Umatilla?

Mr. MINTHORN. Yes, that is in the interior—what are called the Klamath River Basin tribes. And then Rebecca Hiers was mentioning the 14 tribes, and there are 14 tribes within that Columbia Basin.

Mr. SMITH. Right. Thank you.

Ms. Hiers, you are on the task force. Has the Bureau of Reclamation been meeting with you, been calling you for advice? Are they holding secret meetings that you are not invited to?

Ms. HIERS. No. As Chairman Minthorn explained, this tribe works very closely with the Bureau of Reclamation.

Mr. SMITH. You are on the task force which includes the whole group of 14 tribes, I understand; is that right?

Ms. HIERS. No. No. The task force is the task force that the Bureau of Reclamation puts together to assist in development of its water spreading policy.

Mr. SMITH. Well, I am trying to get at the point here, and I didn't understand that the Bureau is working closely with the Umatilla?

Ms. HIERS. Yes, that is correct, although no hearings have been scheduled for this reservation to review the policy which is being developed out of the task force process.

Mr. SMITH. All right. I am pleased to straighten that out for the record.

Mr. Marbut, you testified that saved water will not automatically convert to instream flows. Would you walk us through this process of transfer of water use so that we can more easily understand that statement?

Mr. MARBUT. Mr. Chairman, Representative Smith, I will try to follow through this as logically as I can. The Bureau is currently storing water and the Bureau is holding water rights to store their water. In Oregon, there are two water rights associated with storage. One is the water right to withdraw from the the natural water source and put it in storage. The second water right is a secondary water right to deliver the water from the storage to the pertinent place of use, whether that be irrigation or municipal or whatever. That is Oregon law.

Now, other States may have a different concept, but in Oregon, when a water right is granted to store, it has designated uses and

those uses may include irrigation or municipal, and they may also include fish and wildlife and/or instream uses. The secondary water right is a specific right to pay a portion of that water and use it, describe it as pertinent to a particular use where there is a water right for storage. It does not include a storage for instream flows. That use will need to be added to the storage right in some form in order to allow the Bureau to capture the water in the first place and put it in storage. Then there will need to be a secondary water right to release it from the storage for instream flows if that were the case.

Now, assuming for the sake of this discussion that there was a block of water in the reservoir not allocated to a particular use because it had been stored for use on land, which in fact it cannot be delivered to because of a new contract, outside of projects outside of the district, whatever. Then the Bureau would have stored the water for no use. There would need to be that use added in a secondary for release of that water in order for it to be a water right of record and to be administered and regulated by the local water master, otherwise water released from a reservoir without a water right is simply natural flow and would then be, in effect, out the next head gate to the next junior user.

Mr. SMITH. So that is the reason I assume that you are concerned, as we all are, about the lack of adjudication, especially in the Klamath Basin of existing water.

Mr. MARBUT. That is correct, Representative Smith and Mr. Chairman. There are few basins in Oregon which are not adjudicated and the water rights, in some cases, have not been identified and are not of record. In the case of the Umatilla, that has been adjudicated, that river has been adjudicated and the rights there are of record, and where adjudication has not occurred, it would be essential to have that happen as quickly as possible in order to be able to understand the allocation.

Mr. SMITH. Thank you.

Mr. MILLER. Mr. DeFazio.

Mr. DEFazio. Just one brief question, Mr. Chairman. I know we have to move on, but I am just curious about the statement by the tribe that they had after some, as they say, months of intensive negotiations finalized agreements with local irrigation districts and then they backed out the last moment because of potentially setting harmful precedents.

Can you give me one or two points that where those—what were those potentially harmful precedents? What were the final sticking points which caused the final clams of the negotiations from your perspective.

Mr. MINTHORN. I will have our policy analyst address that, Becky Hiers.

Ms. HIERS. Thank you. Primarily the concern that the irrigation districts had, as I understand it—and this has not been expressed directly to the tribe—but the concern as I understand it is that they would have to mitigate for the impacts both in the past and the future to the tribe's treaty rights, and in doing so, they would have to give up custody—this is pursuant to the tribe's water spreading policy—give up custody to the Bureau of Reclamation of the water that they have used illegally.

Maybe I can clarify that a little bit better. In a nutshell, the tribe's water spreading policy under which these agreements were negotiated calls for immediate halt of water spreading, and to do so without causing irrigators to go out of business, the mechanism is for the Bureau of Reclamation to take custody of that water. Once the Bureau has taken custody, taken control of that water, then the Bureau will allocate it on an interim basis to meet both irrigation needs and other needs such as unmet tribal treaty water rights.

In the meantime, a long-term resolution is also structured in the water spreading and that would be through formal requests by each irrigation district to legalize what practices they want to continue to engage in.

And I would like to note one of the issues that Chairman Miller had brought up earlier is the question of what is going on, and the Bureau of Reclamation not having information about the extent of water spreading.

In the Umatilla Basin, we do know the extent of water spreading because the irrigation districts were cut off and they have made a formal request now to the Bureau of Reclamation to legalize their practices, and part of that request includes a very specific and detailed description of what lands they have been irrigating and how much water they have been providing to those lands. And it was about a third—a half to a third more than we had been told prior to the formal request.

Mr. DEFAZIO. Mr. Marbut, are you familiar with this situation? Would you say that that was a principal concern or stumbling point in these negotiations?

Mr. MARBUT. Representative DeFazio, Mr. Chairman, I was not privy to the details of the agreement. I have been copied on correspondence of the progress of the discussions and I have been advised. We are not invited nor did we attend those negotiations.

A regional manager has advised me to some degree as to the status of those and we have received correspondence as to the progress—now, the assignment of the water to the Bureau, we have questioned from State law perspective. At the time when the local negotiators, the tribe and the districts had arrived at some sort of an agreement, we obviously would want to evaluate that and understand how that could be implemented under Oregon water law.

We have not taken a position on the agreement, the details, and this concept of assignment and then Bureau allocation at all without having it in front of us. It would be very difficult for me to react whether Oregon water law would be able to implement it precisely in the way it has been conceptualized.

Mr. MILLER. Would the gentleman yield?

Mr. DEFAZIO. Certainly.

Mr. SMITH. Thank you, for the record, Mr. Chairman, there has been an allegation here that the Umatilla Basin irrigators have cheated the American taxpayers out of almost half a million dollars by avoiding required repayment for the use of Bureau of Reclamation facilities and water.

My numbers indicate that the—and I would like to ask directly Mr. Beard to look at these numbers—Inspector General claims that

the Umatilla financial benefit is \$466,000. The Umatilla district, however, has paid \$419,000. The balance is \$47,000, not a half a million, so somebody's numbers are skewed here.

And I would ask Mr. Beard, with permission of the Chair, to specifically identify the question regarding the Umatilla Basin itself. Thank you.

Mr. MILLER. He can do that for the record.

Mr. DeFazio.

Mr. DEFazio. No further questions.

Mr. MILLER. Mr. Dooley, any questions?

Mr. DOOLEY. No, sir.

Mr. MILLER. Thank you for your testimony and for your submissions to the committee.

PANEL CONSISTING OF RICHARD L. ERICKSON, MANAGER, EAST COLUMBIA BASIN IRRIGATION DISTRICT, ACCOMPANIED BY RICHARD B. STEVENS, DIRECTOR, QUINCY-COLUMBIA BASIN IRRIGATION DISTRICT, QUINCY, WA, JACK YORGESSEN, DIRECTOR, SOUTH COLUMBIA BASIN IRRIGATION DISTRICT, AND SHANNON McDANIEL, MANAGER, SOUTH COLUMBIA BASIN IRRIGATION DISTRICT; KATHERINE P. RANSEL, CO-DIRECTOR, AMERICAN RIVERS, NORTHWEST REGIONAL OFFICE, SEATTLE, WA; AND, RICK GOVE, WATER CONSERVATION ASSOCIATE, COLUMBIA BASIN INSTITUTE, PORTLAND, OR, ACCOMPANIED BY WILLIAM BEAN, PRESIDENT, COLUMBIA BASIN INSTITUTE

Mr. MILLER. The next panel, we have Mr. Richard Erickson, who is the manager of East Columbia Basin Irrigation District and he will be accompanied by Mr. Stevens, Mr. Yorgesen, and Mr. McDaniel; and Katherine Ransel, who is the Co-Director of the American Rivers' Northwest Regional Office out of Seattle; and Rick Gove, who is the Water Conservation Associate from Columbia Basin Institute in Portland, Oregon. He will be accompanied by William Bean who is the President of the Institute.

Mr. Erickson, we will begin with you and, again, your statement will be made a part of the formal record. And to the extent to which you can summarize and you desire to respond to what you have already heard this morning, you are more than welcome.

Thank you.

STATEMENT OF RICHARD L. ERICKSON

Mr. ERICKSON. Thank you, Mr. Chairman, and Members of the committee for the opportunity to be present today to present information about the Bureau of Reclamation proposed policy on water spreading and how that proposed policy relates to the Columbia Basin Project. Before I start my remarks, I have a map that I think would make the remarks more meaningful that we would like to bring up and show to the Members of the committee. Would that be permissible?

Mr. MILLER. Fine.

Mr. ERICKSON. What you see—

Mr. MILLER. We are going to have to get you a microphone. Reach over the top of the—thank you.

Why don't you describe the map and then Members can look at it.

Mr. ERICKSON. Mr. Chairman, what we have here are two aerial photographs that Mr. McDaniel had taken of the south Umatilla District area late this spring. The overlay is the land class maps for those farm units. The Columbia Basin Project was soil mapped very extensively as the designed farm units.

And what I really want to point out here is the detail to which they went to the various lines represent the boundaries or the designations between the various farm units and Class 1, 2, 3, and 4 receive a water allotment. Class 6 and Highland did not receive a water allotment. Without going into detail, if you will see the pattern of center pivot irrigation on here.

You will see various land class designations under those. Some of these center pivots it is all Class 1, 2, 3, and 4. Some of center pivots have portions of Class 6 or highland that needs them. You will see if you look at this, the little islands and the bubbles and slivers of Class 6 and highland in there would be very hard to avoid by any irrigation method and especially by center pivot irrigation.

What we would like to point out, what we really want to address in our testimony today is the inadvertence or incidental or unavoidable application of water to Class 6 and Highland with in-farm unit boundaries. We think both of the bureaus propose policy and in the IG's report, that the incidental irrigation of Class 6 highland with in-farm boundaries, largely cost identifiers, most of the issue that has been involved, not only for the Columbia Basin Project but also the aquifer project and other areas in Washington.

With your permission, we would like to enter this map in the record and leave it behind. We ask that when the committee gets a chance to look at this in more detail, look at the squiggles and try to look at it in conflict, if you think those people that did that soil mapping, if they really intended for people to farm and irrigate around those lines.

Mr. MILLER. Thank you.

Mr. ERICKSON. The incidental or unavoidable irrigation of classic high and right-of-way lands within farm unit boundaries has been authorized and permitted by the Bureau of Reclamation policy and practice on the Columbia Basin project since the projects as beginning with Bureau of Reclamation operation from 1948 through 1968 and district operation with Bureau of Reclamation oversight from 1969 to present.

Bureau of Reclamation land classification methodology on the Columbia Basin project was intended to establish the repayment with Federal reclamation law, Class 6 lands were so designated because of their inability, standing alone, to support a repayment obligation over the term of the repayment contract.

Land class designation lines often did not follow practical farming or irrigation geometry. Columbia Basin project repayment contracts speak to the delivery of the water allotment to each farm unit, not to specific areas within the farm unit. All plats for Columbia Basin project farm units publicly recorded by the Bureau of Reclamation address boundaries only. Land class is not legally described or publicly recorded.

No Federal statute, rule or policy exists that prohibits the incidental or unavoidable application of water to Class 6, high, and right-of-way lands within farm units. Columbia Basin Project farms have been developed and substantial private investments on the basis that incidental application of water to Class 6, high and right of way lands within farm units is authorized. Any change in this policy and practice needs to be prospective not retroactive. Such changes should also meet NEPA requirements and should not include or consist of unfunded mandates administratively imposed on non-Federal entities by the Bureau of Reclamation.

The presently proposed Bureau of Reclamation policy attempts to administratively impose retroactive changes to established and authorized policies and practices and unfairly mandates that local districts and water users fund the proposed inventory and NEPA review costs. This implements these changes by policy rather than by rule or by law.

Evolving irrigation technology has and will continue to result in beneficial changes in field and farm geometry within farm unit boundaries without any increase in the unit's water allotment. The Columbia Basin project irrigation districts deliver the water allotment to each farm unit's delivery point as required by the repayment contract and Washington State water law. All delivered water is measured and accounted for.

There is no requirement for the districts to manage or account for application of the water allotment on an acre-by-acre land class basis within a farm unit. Such management and accounting would require intensive micromanagement by Federal officials of the on-farm practices of private property owners.

The total acreage of Class 6 and high lands within the Columbia Basin project farm unit boundaries is about 10 percent of that total area. Some fraction of that 10 percent is having water incidentally or unavoidably applied. The Columbia Basin project is operating within the limits of its water right and meeting its repayment obligations, plus paying all operation and maintenance costs.

Quantifying the actual amount of such incidental or unavoidable water application, if possible, will be costly and is unlikely to affect total diversions or repavement. Why commit substantial Federal or local funds to address what in a case of Class 6 and high lands appear to be a fabricated problem.

Mr. Chairman and Members of committee, thank you again for the opportunity to appear here today, and we would be happy to answer any questions or provide additional information if you need it.

[EDITOR'S NOTE.—See Appendix for supplemental testimony submitted by Mr. Erickson.]

Mr. MILLER. Thank you.

[Prepared statement of Mr. Erickson follows:]

Statement of the
EAST COLUMBIA BASIN IRRIGATION DISTRICT
QUINCY-COLUMBIA BASIN IRRIGATION DISTRICT
SOUTH COLUMBIA BASIN IRRIGATION DISTRICT

to the
Subcommittee on Oversight and Investigations
of the Committee on Natural Resources
United States House of Representatives

July 19, 1994

Representing the Columbia Basin Irrigation Districts:

Mr. Richard B. Stevens, Director	Quincy-Columbia Basin Irrigation District
Mr. Roger C. Bailie, Director	South Columbia Basin Irrigation District
Mr. Richard L. Erickson, Manager	East Columbia Basin Irrigation District
Mr. Shannon McDaniel, Manager	South Columbia Basin Irrigation District

EAST COLUMBIA BASIN IRRIGATION DISTRICT

55 North 8th
P.O. Box E

OTHELLO, WASHINGTON 99344

Phone 509 488 9671
Fax 509 488 6433

July 19, 1994

The Honorable George Miller, Chairman
Committee on Natural Resources
United States House of Representatives
1328 Longworth House Office Building
Washington, D.C. 20515

Dear Chairman Miller:

Thank you for the invitation to appear before your Committee to present information about the Bureau of Reclamation's proposed policy on water spreading and how that proposed policy relates to the Columbia Basin Project. That Project has been operated for the past twenty-five years by the East, Quincy and South Columbia Basin Irrigation Districts. All three districts are represented here today and we respectfully request the Committee to carefully consider the following information as it looks into the practice known as water spreading.

The incidental or unavoidable irrigation of class 6, high and right of way lands within farm unit boundaries has been authorized and permitted by Bureau of Reclamation policy and practice on the Columbia Basin Project since the Project's beginning, with Bureau of Reclamation operation from 1948 through 1968 and district operation with Bureau of Reclamation oversight from 1969 to present.

Bureau of Reclamation land classification methodology on the Columbia Basin Project was intended to establish the repayment ability and water allotment for each farm unit. In accordance with federal reclamation law, class 6 lands were so designated because of their inability, standing alone, to support a repayment obligation over the term of the repayment contract. Land class designation lines often did not follow practical farming or irrigation geometry. Columbia Basin Project repayment contracts speak to the delivery of the water allotment to each farm unit, not to specific areas within the farm unit. All plats for Columbia Basin Project farm units publicly recorded by the Bureau of Reclamation address boundaries only. Land class is not legally described or publicly recorded.

No federal statute, rule or policy exists that prohibits the incidental or unavoidable application of water to class 6, high, and right of way lands within farm units.

Columbia Basin Project farms have been developed and substantial private investments made on the basis that incidental application of water to class 6, high and right of way lands within farm units is authorized. Any change in this policy and practice needs to be prospective not retroactive. Such changes should also meet NEPA requirements and should not include or consist of unfunded mandates administratively imposed on nonfederal entities by the Bureau of Reclamation.

The Honorable George Miller, Chairman
July 19, 1994
page 2


The presently proposed Bureau of Reclamation policy attempts to enact administratively imposed, retroactive changes to established and authorized policies and practices and unfairly mandates that local districts and waterusers fund the proposed inventory and NEPA review costs. This effects the changes by policy rather than by rule or by law.

Evolving irrigation technology has and will continue to result in beneficial changes in field and farm geometry within farm unit boundaries without any increase in the unit's water allotment. The Columbia Basin Project irrigation districts deliver the water allotment to each farm unit's delivery point as required by the repayment contract and Washington State water law. All delivered water is measured and accounted for. There is no requirement for the districts to manage or account for application of the water allotment on an acre-by-acre, land class basis within a farm unit. Such management and accounting would require intensive micromanagement by federal officials of the on-farm practices of private property owners.

The total acreage of class 6 and high lands within Columbia Basin Project farm unit boundaries is about 10% of the total area of those units. A fraction of those class 6 and high lands are having water incidentally applied. The Columbia Basin Project is operating within the limits of its water right and meeting its repayment obligations, plus paying all operation and maintenance costs. Quantifying the actual amount of such incidental water application, if possible, will be costly and is unlikely to affect total diversions or repayment. Why commit substantial federal or local funds to address such a fabricated resource crisis?

Again, thank you for the opportunity to present this information. We would be glad to provide additional information or answer questions, either now or at a future date.

Respectfully Submitted on
Behalf of the East, Quincy
and South Columbia Basin
Irrigation Districts,


Richard L. Erickson
Secretary-Manager

RLE:jed

STATEMENT OF KATHERINE P. RANSEL

Mr. MILLER. Ms. Ransel.

Ms. RANSEL. Took me out of order, Mr. Chairman; it surprised me.

Mr. MILLER. Excuse me. I assume the others with you do not have formal statements, they are here to answer questions or to submit additional information; is that correct?

Mr. ERICKSON. Yes, sir.

Mr. MILLER. Thank you.

Ms. RANSEL.

Ms. RANSEL. My name is Katherine Ransel, Mr. Chairman, I am Co-Director of the Northwest Regional Office of American Rivers, American Rivers, is a national conservation organization dedicated to the protection and restoration of North American rivers and their landscapes. I am from the Northwest office and the Northwest office houses the organization's Endangered Salmon project. And the focus of that Endangered Salmon project is the improvement of river conditions for the spawning, rearing and migration of salmon.

We appreciate this opportunity to testify today because of our work, and we want to commend Commissioner Beard for the task force that he has assembled which is made up of a whole host of the stakeholders who are interested in this issue. We have been a member of this task force and it has been very instructive.

From our perspective, these hearings couldn't come at a more auspicious time, and I know you are aware, and it has been mentioned many times this morning and it is no secret, Mr. Smith seemed to think maybe this salmon was a secret agenda in our interest in water spreading, but it is no secret that over 200 species of salmon are now extinct in the Northwest and we have got some 200 more stocks that are in danger of extinction.

As a matter of fact, things have gotten so complex now in listing under the Endangered Species Act that it is very hard to keep track of everything that is going on. I think we have got all Idaho salmon listed, we have got all steelhead under petition for listing in the Pacific Northwest, or just about all of them. Just about all coho are now being sought to be listed under the Endangered Species Act, and there are many more individual stocks as well, so it is hard to even keep track of the listing processes at this time.

And I think as Mr. Minthorn mentioned earlier, while politics may have obscured the debate about how to save the salmon, nobody can really deny that fish need water and they need it in sufficient amounts to complete their life cycle. So hence our interest.

And as you well know, and the committee Members well know, irrigation withdrawals are often diametrically opposed to the needs of salmon life-cycles. They occur at the same time that the salmon need that water and, unfortunately, in many cases, so many of our rivers have over-allocated irrigation interests that they literally run dry in the summertime. So that is why this issue is very important to us. And we think that once we get a grip on this problem, that water spread, water can really make a difference for the fish.

Now, both in the Northwest Power Planning Council's Strategy for Salmon and the Snake River Salmon Recovery Team's Rec-

ommendations to the National Marine Fisheries Service for Snake River Salmon Recovery, there is prominent acknowledgment in both of those recovery documents of the role of irrigation withdrawals and salmon decline, there are prominent recommendations in both for government to end illegal use of water and to reallocate that water to in-stream flows.

One of the problems, of course, and Commissioner Beard has already freely admitted, is that we don't know how big the problem is and we don't know the location and extent of it, and that is something that we have been pounding on throughout the task force. And I think it is worth mentioning that there is no real excuse for it, but there is a reason for it.

Karen Garrison who works for the Natural Resources Defense Council and shares a seat with me on the task force, has just recently been investigating the reporting requirements under the Reclamation Reform Act, and she found that the Bureau lumps "irrigable" and "irrigation" land together on the report. And that makes it impossible to distinguish between land that is authorized for irrigation, which is irrigable land, and the total amount of land that is actually irrigated.

And it is also the case that the definition of "irrigable" in form, doesn't make it clear that that is a classification requirement for the land to be considered as such. So, obviously, the first step in ending water spreading is identifying it.

And as you mentioned earlier, Mr. Chairman, an irrigation district should be required immediately to report this information. There is clear authority under Reclamation laws right now for that and in the future. The Bureau is in the process of revising its reclamation rules right now as we speak. And so obviously as a deterrent to future water spreading, it should amend its reporting requirements to require the kinds of information which will clearly reveal whether and where it is taking place, and put, as you said earlier I believe, put much more responsibility on irrigation districts to verify reports from individual irrigators.

Now, just as a demonstration that this water can make a difference for the kinds of things that the Northwest Power Planning Council and the National Marine Fisheries Service has been calling for, I would like to point out that the Planning Council has called for the Bureau to acquire at least another million-acre feet of additional water from the Snake River Basin, and more, if possible, to aid the endangered listed Idaho salmon stocks in their downstream migration.

The Service has also called for additional water to be acquired by the Bureau. Now, the Bureau this year has about \$2 million, I think it is in the Idaho water bank with standing dry year lease offers, at something like \$6.25 per acre foot, and there have been no takers at all this year.

According to Bureau officials I just talked to last week, it has been unable to lease any water this year and it has yet to acquire any water in fee simple. It does reportedly have one deal underway for about 16,000 acre feet, which it expects to probably go at about \$100 an acre foot.

Now, at the same time, it is unable to purchase or lease water and proposes to spend \$100 per acre foot to acquire it. There are

reportedly thousands of acres receiving unauthorized water in Snake River projects, we don't know how much, but the Bureau has said it is occurring in every project in Idaho.

This is also the case in the lower Columbia. We think that spread water there can help with flows called for under the Endangered Species Act right now that are supposed to be being met. The Service set stream flows this year for the lower Columbia pursuant to the ESA, but not even the bottom end of the sliding scale for flows it has as set for the lower river is being met during this month.

I think those targets are like 160 to 200 kcfs for July, and the most we have gotten in July, it is 150 kcfs, that is well below the lower end of scale. It is predicted they are going to go down lower?

We know that water spreading isn't the entire answer there, obviously, Mr. Chairman. But that Columbia Basin project water comes from Grand Coulee, and the reason that has been reported for these flows not being met, is that the Bureau's is currently refilling Grand Coulee Dam right now. So it is going to have to make some difference. That is a fair amount of water that is reported as spread there. It is something like 50,000 to 63,000 acres.

In the tributaries are the places where you can really see it, as the Umatilla folks have just talked about earlier, and the Yakima Indian Nation isn't here today, and we were sort of hoping that these hearings could be held out in the Northwest so we could get more of the tribes and other folks to come. I got here only because somebody else paid my way for some other purpose. So we would like to invite you to come out to the Northwest so you can talk to more of us out there.

But in the Yakima Basin, we don't have any idea at all how much water is being spread, and the Yakima River is the largest drainage within Washington State. It is home to the State's largest Indian tribe, and after the Snake, it used to be the largest contributor of salmon to the whole Columbia system. So it is quite an important river basin.

However, today it is really on the verge of collapse. This year saw the first ever closure of the steelhead fishery and no one knows or can predict when it may open again. We got a petition for listing of steelhead in there that has been accepted——

Mr. MILLER. I am just going to ask you to summarize and wrap this up.

Ms. RANSEL. I guess the point there is we need to find out real fast.

I would like to point out a couple of things that we are concerned about in the first draft that we have seen of the Bureau's water spreading policy.

The first draft that we have seen so far does not acknowledge that water spreading has environmental impacts, and we think that it has to do that in order to fulfill the mission that the Bureau has said that it is now going to fulfill.

It also identifies a procedure for continuing interim deliveries to contractors, but it has no clear procedure for ensuring that it meets treaty responsibilities and environmental responsibilities in the requirement, and we think that it needs to do both of those things.

The other thing that we would like to point out is that any incidental water-spreading policy that the Bureau develops that is exceptional to the rest of the policy, must be strictly limited and it must apply only to irrigation that really is unavoidable.

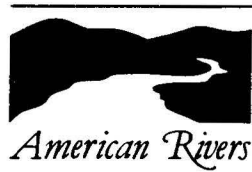
We have to include public involvement and not just in the irrigation districts, and we have to have time lines and an enforcement policy, because right now we think the draft of the policy is very slanted towards negotiated settlements. But this is an intractable problem and we think that they need to have a strong enforcement policy.

So we have a lot of recommendations to make about the policy and we hope that you will consider them in your deliberations on this subject.

Thank you, Mr. Chairman.

Mr. MILLER. Thank you.

[Prepared statement of Ms. Ransel follows:]



TESTIMONY OF KATHERINE P. RANSEL
CO-DIRECTOR
AMERICAN RIVERS' NORTHWEST REGIONAL OFFICE

BEFORE THE SUBCOMMITTEE ON
OVERSIGHT AND INVESTIGATIONS
HOUSE NATURAL RESOURCES COMMITTEE

ON THE SUBJECT OF "WATERSPREADING"

JULY 19, 1994

801 PENNSYLVANIA AVE. S.E.
SUITE 400
WASHINGTON, DC 20003
(202) 547-6900
(202) 543-6142 (FAX)



a member of Earth Share_{SM}

My name is Katherine Ransel. I am an attorney and Co-director of the Northwest Regional Office of American Rivers, a national conservation organization dedicated to the protection and restoration of North American Rivers and their associated watersheds and ecosystems. American Rivers was founded in 1973, and has its national office in Washington, D.C. and two regional offices, one in Seattle, Washington, and one in Phoenix, Arizona. American Rivers fosters watershed and river organizations all over America and is the nation's principal river conservation organization.

The Northwest office of American Rivers, covering the states of Washington, Oregon, and Idaho, houses the organization's Endangered Salmon Project. The focus of our efforts on behalf of endangered northwest salmon is the improvement of in-river conditions for salmon spawning, rearing and migration. The disastrous effects of dams and water diversions and withdrawals are at the center our work.

Because of our concerns, we appreciate this opportunity to address the persistent problem of waterspreading -- that is, the use of Bureau of Reclamation-developed water supplies and project works on lands or for purposes not authorized by law or contract. American Rivers is a member of the Bureau's task force on waterspreading, which Commissioner Beard assembled to seek advice from a broad range of stakeholders on this issue. We commend the Commissioner for opening this discussion to the various stakeholders and to the public at large. And we commend the Commissioner's seriousness of purpose in wanting to put an end to waterspreading in the West.

I have in my office in Seattle a 1985 treatise in Water Law and Policy, entitled Bureau of Reclamation Irrigation Subsidies: Legislative History and Congressional Knowledge. That paper recounts a tangled web of irrigation subsidies over the past Century --- interest exemptions overlaid with ever increasing time lines for principal repayment, overlaid with "ability to pay," adjustments -- subsidies which are compounded by agricultural price supports and government payments to take crops out of production. As a consequence, the western states have some of the most wasteful irrigation practices in the world, the disastrous environmental results of which have been well documented by this Committee in the past and by such noted western authors as Wallace Stegner, Marc Reisner and Charles Wilkinson.

In the midst of all of these subsidies and the well-documented environmental catastrophes which they have engendered -- the Kesterson Wildlife Refuge case standing as the most notorious example -- we find ourselves in at least the second decade of trying to solve the problem of the illegal use of taxpayer subsidized water in the West. We think that it has gone

on much too long and that it must be ended expeditiously. We are thus heartened by these hearings, which we sincerely hope signal the end of illegal water use in the West.

My focus is the tragedy of illegal waterspreading in the context of an industry which is already highly subsidized, and the desperate need for water reallocation to salvage an economic mainstay of the West -- renewable fisheries. Where the need for water to be reallocated to instream uses in the West is critical, illegal use simply cannot be countenanced. The Bureau of Reclamation -- and the states -- have been almost totally remiss in identifying and dealing with the problem, even though they clearly have the tools to do so. Our aim is for the Bureau quickly to adopt procedures to end waterspreading while at the same time resolving cases of waterspreading in a way that fulfills its obligation under federal law to protect and restore fish and wildlife habitat.

Why It is Critical to End Waterspreading

From our perspective, these hearings could not come at a more auspicious time for the resource it is our job to protect. As I am sure you know, the salmon and steelhead runs of the Pacific Northwest are in terrible trouble, with over 200 species already extinct and over 200 more in danger of extinction. The Columbia basin, which encompasses an area as large as France and is the nation's second largest drainage, once was home to the largest wild chinook salmon runs in the world. Now that fishery, with fewer than two (2) percent of its historical wild fish, is on the verge of collapse.

Dams, diversions and water withdrawals in the Columbia system, both for irrigation and hydropower, have wreaked havoc on the life cycle of this once plentiful renewable resource. We now find ourselves in a situation where so many runs of salmon have been petitioned for listing under the Endangered Species Act that it is difficult to keep track of the listing processes. At this juncture, the winter chinook run of the Sacramento River is listed as endangered, and all Idaho salmon have been listed as endangered or threatened; just about all steelhead stocks in the Northwest have been accepted for a status review for listing, as have just about all coho salmon in the Northwest; and mid-Columbia summer chinook salmon (eastern Washington state) are overdue for a listing decision. There are at least three other petitions pending on individual salmon, steelhead and other sea-run stocks in Northwest Rivers to my knowledge.

And it is not just the salmon that are in trouble. It is all aquatic organisms and systems. Indeed, we are losing aquatic organisms at a much higher rate than land-based species. More than one-third of North American's fish species have become rare

or extinct and one fifth of the native fish species of the Western United States are now extinct or endangered.¹ In the West, the situation is particularly acute; in Arizona, for instance, 25 of 30 native fish species are listed as threatened or endangered.²

While politics has obscured the debate over how to save the once great runs of Pacific salmon, there simply is no denying that fish need water in sufficient amounts to complete their various life cycle stages. It does not take a rocket scientist or even a fish biologist to know that salmon need cool, clean, fast-flowing and turbulent streams, with unimpeded access to and from the sea, to survive. Those are the conditions under which they evolved over the millennia to become the great renewable resource they are.

But irrigation withdrawals often coincide with salmon life cycle needs; and their effects are diametrically opposed to those needs. Irrigation diversion dams create slack, warm, water and, if not properly equipped with fish screens and ladders, block or impede fish access to and from the sea. Irrigation return flows are laden with pesticides and fertilizers that are harmful to fish life and reproduction. And, unfortunately, in many cases, our western rivers are so over-allocated to irrigation interests that great stretches of important salmon producing rivers are left virtually or literally completely dry during the irrigation season.

This is why waterspreading is so important to us. The fish need water and we believe that water that is "spread" can make a difference for the fish. We are well aware, Mr. Chairman, that there are other causes of salmon decline in addition to the lack of sufficient water in our Western rivers and streams to support salmon life cycle needs. But it would seem that the least we could ask in the struggle to preserve this cornerstone of the Northwest economy and culture is that irrigators comply with their contracts with the Bureau of Reclamation and that the Bureau of Reclamation comply with its duties under the Endangered Species Act, the Northwest Power Planning Act, and Fish and Wildlife Coordination Act, and other Congressional mandates to protect and enhance fish and wildlife resources and provide those

¹ See, e.g., J. David Allan and Alexander S. Flecker, Biodiversity Conservation in Running Waters, BioScience, Vol. 43, No. 1 (January 1993); Williams, J.E., et al., Fishes of North America endangered, threatened, or of special concern: 1989. Fisheries 14:2-22.

² The New York Times, Science Times, Tuesday, January 26, 1993, C-1, C-7, citing Dr. W.L. Minckley, Arizona State University.

resources equal treatment under the law with other project purposes.

Both in the Northwest Power Planning Council's Strategy for Salmon and in the Snake River Salmon Recovery Team's Recommendations to the National Marine Fisheries Service for Snake River Salmon Recovery, there is prominent acknowledgement of the role of irrigation withdrawals in salmon decline and prominent recommendations in both for government to end the illegal use of water and to reallocate water to instream uses.³ We are thus not alone in the recognition that the illegal use of water must end and this precious resource must be reallocated to instream flow needs in the West.

We see waterspreading as a serious problem not only because of the fate of Pacific salmon, but because of the important legal, policy, environmental, economic, and cultural considerations it raises. These include, in our opinion, respect for law and order in general, and compliance with our treaties and federal and state laws in particular; the fair and wise allocation of public resources; respect for natural values and multiculturalism; the propriety and fairness of legal exemptions and financial subsidies to special interests; and natural resource degradation and thus ultimately, human health as well.

Waterspreading is a paradigm example of a system out of balance and control, a system which has all too willingly served one segment of the economy to the exclusion of others, and where privileges are taken as rights and even then, are abused. We also see the waterspreading problem as an opportunity, however; an opportunity for the Bureau of Reclamation to forge a resolution which itself could serve as a prototype of how to restore balance to ecosystems and economies in the West.

Definition of Waterspreading

Waterspreading is defined by the Bureau of Reclamation as the unauthorized use of Bureau-developed water or project works. Specific examples include the application of project water to lands outside the boundaries of a Bureau project or land inside project boundaries which are ineligible to receive project water. This unauthorized application can occur by illegal diversion; by application of water conserved by improvements in project delivery works or management techniques; or simply because more water was delivered to irrigate authorized lands than was needed

³ Strategy for Salmon, Vol. II, Northwest Power Planning Council, (92-21A), at 74; Snake River Salmon Recovery Team: Final Recommendations to the National Marine Fisheries Service, May, 1994, at V-10-11.

historically even before conservation devices or practices were implemented.

In addition, waterspreading includes the use of project water for purposes other than those specified by contract, such as for industrial or municipal use, when it was authorized by contract only for irrigation use. There are instances when waterspreading has been virtually unavoidable -- such as where an irrigator has switched from a gravity system to center pivot sprinkler systems, and it has been impractical to avoid irrigating ineligible or unauthorized lands.

But make no mistake. Waterspreading is often intentional and driven by a desire to put more land in irrigation than is authorized by law or contract, or to profit by reselling water a district has no legal right to. And it is often accomplished with the aid of government, as I will relate in a minute.

Because the definition of waterspreading includes different kinds of activities, the remedies for such activities may vary. But we believe that all forms of waterspreading should be addressed by the Bureau of Reclamation in its policy initiative -- and as expeditiously as possible.

The Scope of the Problem

We have heard time and again in the task force that the scope of the waterspreading problem is unknown. We have asked the Bureau to share with us all of the information it has on the location and extent of waterspreading. Because many members of the public are involved and interested, we have advised the Bureau to publish, in as an accessible form as possible, all known statistics on waterspreading, on an irrigation district-by-district basis, within Bureau project.

Instead, however, our information is limited, making it difficult to ascertain in particular river basins how great the problem is. So while the Bureau estimated in 1983 that some 662,000 unauthorized acres were receiving Bureau water westwide, and that the Pacific Northwest Region was responsible for about two thirds of that number, and the Mid-Pacific and Upper Missouri Regions were responsible for another 100,000 acres each, there was no analysis of why there such vast differences in the regional experience of waterspreading were reported. Nor were any specific figures by project or by river basin offered in that report.

And while the Northwest Region has estimates for spreading in some projects -- such as for the Columbia Basin project in eastern Washington state, which takes water from the Bureau's Grand Coulee project and where the Bureau has estimated in the

past that between 50 and 63,000 acres are receiving unauthorized water -- the same is not true for other projects and the Bureau acknowledges that its estimates are incomplete and in most cases unverified.

And while there is a reason for that, there is no excuse. Karen Garrison, of the Natural Resources Defense Council's San Francisco office, who shares a seat with me on the task force, has investigated the reporting requirements under the Reclamation Reform Act (RRA) and found that the Bureau lumps "irrigable" and "irrigation" land together on the report, making it impossible to distinguish between land authorized for irrigation (irrigable) and total that is actually irrigated. Moreover, she reports, the Bureau's RRA rules provide only a vague definition of irrigable, which make no mention of the need for land to be classified properly in order to be considered irrigable.

We have thus urged the Bureau immediately to identify all lands and entities that are receiving unauthorized project water or who are using water for unauthorized purposes. The first step in this data collection should be a irrigation district-by-district, self-reporting obligation.

Irrigation Districts should be required to report this information under penalty of perjury pursuant to United States law. Water delivery can be stopped to districts which do not comply. This is inherent in the Bureau's authority as an agency of the sovereign and as a remedy for violation of contract. Indeed, the Bureau already requires such reporting for the acreage limitations of the RRA and there is clear authority under current Reclamation law and regulation to require it.⁴

Self reporting is required of thousands of wastewater dischargers around the country under the Clean Water Act. In fact, it may be the single most important element in the success of the National Pollution Discharge Elimination System or NPDES point source discharge requirements of the Clean Water Act. The privilege of receiving heavily subsidized water deliveries should clearly be dependent on a similar reporting requirements under the Reclamation laws and for much the same reason. The integrity of public resources is at stake. Indeed, companies subject to the NPDES permit program are not receiving the gift of taxpayer subsidized water yet must file such reports; irrigators, on the other hand, are not only heavily subsidized, but have also managed to obtain an exemption in the Clean Water Act for irrigation return flows. Is it too much to ask that they report whether they are complying with their water service contracts?

⁴ 43 U.S.C. 390aa et seq. and 43 CFR 426.1 et seq.

And what about the future? The Bureau is in the process of revising its RRA rules. It is obvious that as a deterrent to future waterspreading, it should amend its reporting requirements to require the kinds of information which will clearly reveal whether and where it is taking place. The Bureau should also place much more responsibility on irrigation districts to verify the information it receives from individuals.

The Effects of the Waterspreading

A significant cause of decline of salmon in the Northwest has been the dewatering and pollution of rivers and streams by irrigation diversions and return flows, much of it under the aegis of the Bureau of Reclamation. Many Northwest rivers have been "over-allocated," and there are sections of rivers which virtually run dry during irrigation season, the season which coincides with salmon's life cycle need to spawn, rear, and migrate. Low flows mean high temperatures and the water that re-enters the river from irrigation return flows is warm and polluted with pesticides and fertilizers, a hostile environment at best for salmon and other aquatic organisms.⁵

In general, these effects are most apparent in the tributaries of the Columbia system, in rivers such as the Umatilla and the Yakima, the Grande Ronde and the Deschutes. But even the mainstem of the once mighty Snake River runs dry in irrigation season due to Bureau-sponsored projects in the upper river. And while to be sure the widening of the Snake and Columbia Rivers into a series of slack water lakes by virtue of hydropower and irrigation dams is one of the great salmon killers, it is also the case that irrigation withdrawals continue to contribute to their decline, even in the mainstem of this system. To demonstrate that the end of waterspreading can make a difference to fish and in fact is costing the government over and above the subsidies we have mentioned above, we note:

Snake River Flows

The Northwest Power Planning Council has called for the Bureau of Reclamation to acquire at least another 1 million acre-feet of additional water from the Snake River Basin, and more if

⁵ See, e.g., Integrated System Plan for Salmon and Steelhead Production in the Columbia River Basin, Columbia Basin Fish and Wildlife Authority (June 1, 1991) (listing low flows and diversions for limiting factors of multiple anadromous stocks in the Snake, Umatilla, and Yakima); State of Washington, 303(d) List for 1994 (submitted to the EPA pursuant to Section 303(d) of the Clean Water Act), for Yakima River and its tributaries (multiple temperature, pesticide and dissolved oxygen violations, among others).

possible, by 1996 to aid endangered Idaho spring and summer migrants.⁶ Additionally, the National Marine Fisheries Service has called for the Bureau to acquire 500,000 acre-feet by the beginning of 1999.⁷

But while the Bureau reportedly has some 2 million dollars in the Idaho water bank with standing dry year lease offers at \$6.25 per acre foot, there have been no takers this year. According to Bureau officials, it has been unable to lease any water this year, and has yet to acquire any water in fee simple. The Bureau does reportedly have one negotiation for 16,000 acre feet underway in the Snake, which it predicts may be completed soon, at \$100 AF.⁸

But at the same time as it is unable to purchase or lease water -- and is proposing to spend \$100 per acre foot to acquire it -- there are reportedly thousands of acres receiving unauthorized water in Snake River projects, the elimination of which could go a long way toward satisfying the Bureau's obligations to increase flows for downstream migrants.

Lower Columbia Flows

This also appears to be the case in the lower river. The National Marine Fisheries Service has set streamflows for the lower Columbia river pursuant to Endangered Species Act requirements. But not even the bottom end of the sliding scale for flows it has set for the lower river -- 160 to 200 kcfs from July 1 to July 31,⁹ was being met during the first two weeks in July because of the Bureau's insistence on refilling Grand Coulee. Indeed, flows have been reduced to 150 kcfs, well below the lowest end of the flow requirements and are predicted to go lower in the next few weeks.¹⁰ We are cognizant that the end of waterspreading is not the entire answer; but it cannot be denied that the 50 to 63,000 acres estimated by the Bureau to be

⁶ See footnote 3, Strategy for Salmon, at 33-34.

⁷ Endangered Species Act (ESA) Section 7 Consultation Regarding 1994-1998 Operation of the Federal Columbia River Power System and Juvenile Transportation Program in 1994-1998, National Marine Fisheries Service, at 7 (March 16, 1994) (hereinafter Biological Opinion).

⁸ Communication with Ken Peede, Assistant Regional Director, Northwest Regional Office, Bureau of Reclamation, July 14, 1994.

⁹ Biological Opinion, supra footnote 7, at 92.

¹⁰ Fish Passage Center Weekly Report #94-17, July 8, 1994; Communication with Fish Passage Center, July 14, 1994.

receiving unauthorized water in the Columbia Basin project, which comes from Grand Coulee, is bound to influence Grand Coulee refill and thus lower river flows.

The Tributaries : The Yakima River Example

Because more work has been done on the Umatilla Basin than probably anywhere else on this subject, it is possible graphically to illustrate the relationship between spread water in that Basin and the needs of salmon. And indeed, others here today have shared or will share that information with the Committee. The findings in that basin demonstrate how critical it is quickly to obtain solid information on the extent and location of waterspreading at all Bureau projects.

The Yakima River Basin in Washington state serves as another example of where waterspreading and the needs of the salmon fishery are in conflict, but where the kinds of data needed to address it have not been collected by the Bureau.

The Yakima River is the largest drainage within Washington state; it is home to the state's largest Indian Tribe, the Yakama Indian Nation, and after the Snake, the Yakima river was the largest contributor of salmon and steelhead to the once great Columbia-Snake watershed, which supported the largest chinook salmon runs in the world.

Today, however, the Yakima's fishery is on the verge of collapse, with its runs being either extinct or fewer than 1% of their historical numbers. The Yakima is one of the most heavily irrigated areas in the United States due to water development projects sponsored by the Bureau. As a consequence, it suffers extremely high water temperatures; the combination of heat and toxic agricultural runoff is often deadly to the Basin's fish.

This year has seen an especially precipitous decline in returning adult steelhead and tragically low counts for spring chinook salmon nests throughout the Basin. Emergency regulations banned all steelhead fishing in the river on January 1, its first-ever early closure. Smolt out-migration is also in sharp decline, having cycled downward from 100,000 in the early 1980s to only some 20,000 last year. Biologists cite low water levels in the river as the chief culprit.

In February of this year, a petition to list the wild summer steelhead run of the Yakima River Basin was filed with the National Marine Fisheries Service; very recently, the Service

determined that there was substantial information indicating that listing may be warranted.¹¹

Rumor has it that water is illegally spread to at least 20,000 acres in the Yakima River Basin -- but it is only rumor that has it. We have not had access to nor have our requests yielded any documents which contain that information. We find this situation extremely frustrating because the Bureau clearly has had the authority to collect such information quickly and efficiently from irrigation districts, and because we have been told that such figures were shared the irrigators several years ago. The Bureau appears to have the "see no evil" approach to government.

It is especially frustrating that this information is not available in the Yakima Basin because the Yakama Indian Nation's treaty rights to water for the fishery are unquantified and thus are the first victim of illegal use and over-allocation, even though their rights are superior in time. It is also frustrating because the Endangered Species Act has been invoked in the Basin and yet there appears to be no movement to resolve the fishery issues.

And there is enough blame to go around. I learned in visiting the Yakima Basin a couple of weeks ago, for instance, that in drought years, ground water wells are authorized by the state of Washington for emergency supplies, which are permitted for that year only. Putting aside whether such emergency measures are needed where there is so much waste in the first place, enforcement being what it is (or I should say, isn't) these wells apparently continue to be used in subsequent years to support perennial crops planted in the "emergency" year until such time as ground water pumping becomes too expensive to justify. It is apparently at that time that Bureau-developed supplies are spread to these crops -- without authorization. There can be no clearer demonstration of the need for both the State and the Bureau to get their houses in order.

Instead, however, the state accuses the Bureau of encouraging waterspreading by the positions it is taking in the Yakima River adjudication,¹² and the state has granted millions of dollars to irrigation interests to upgrade project works, to write conservation plans, to put in pumps, and the like, but has

¹¹ Letter from Rolland A. Schmitten to Dr. Joy Belsky, Oregon Natural Resources Council, of May 20, 1994, announcing that the National Marine Fisheries Service has "determined that your petition presents substantial scientific information indicating that listing may be warranted."

¹² See Attachment hereto.

received nothing in return in the form of instream flows to correct over-allocation of the River.

And while this is poor public policy at best, in the Yakima Basin it also appears to be a violation of state law (specifically, RCW 90.38), which in my opinion requires the state to acquire water rights to correct over-allocation problems in the Basin under these conditions. Instead, however, in the opinion of one knowledgeable Department of Ecology staffer, much of the water saved with state money has probably been illegally spread to unauthorized lands, places or uses.

The situation in the Yakima is not only a tragedy for the fishery -- it is a shame on both governments of vast proportions and one that calls for immediate remedy.

Although we do not know exactly how much water is spread in the Yakima, we do know that the water delivered by the Bureau's projects for instream flows is well below what its own consultants have recommended for fishery flows in the Basin; and far less than flows recommended by the U.S. Fish and Wildlife Service¹³.

And depending on the water duty, we can surmise that the water from 20,000 spread acres could go a long way in satisfying the 2 to 400,000 acre feet which Yakama Indian biologists believe is needed to meet fishery needs in the basin (depending on water year).¹⁴

Remedies to Waterspreading

We see that there are essentially two general approaches to addressing the problem of waterspreading:

(1) Identify unauthorized use and cut-off water deliveries to the entities engaged in unauthorized use; or

(2) Implement a more flexible approach in cases where districts cooperate in meeting Bureau guidelines, which may provide for some expansion of project boundaries or change in project purpose, where environmental impacts are mitigated; past

¹³ See U.S. Department of Interior, Bureau of Reclamation, Initial Flow Recommendations Yakima River Basin Final Report, Parametrix, Inc. (October 1984); Affidavit of Dell Simmons, In Re State of Washington, Department of Ecology v. James J. Acquavella, No. 77-2-01484-5 (Superior Court, State of Washington, Yakima County), filed July 24, 1990, at 10.

¹⁴ Communication with Bob Tuck, biologist for Yakama Indian Nation, July 15, 1994.

degradation is fully addressed; the Bureau's obligations under the Endangered Species Act, the Northwest Power Planning Act, the Fish and Wildlife Coordination Act, and other relevant federal laws are satisfied; repayment obligations are conformed to current law and acreage; and there is a compelling assurance that spreading will not be repeated.

But uppermost in our concerns is that the Bureau institute a strategy to reallocate spread water to instream needs. The Bureau should work with state, federal and tribal fishery agencies to identify instream needs and reallocate spread water to meet its responsibilities under law and treaty.

And of course it must comply with the National Environmental Policy Act and other federal laws to which it is subject, such as the Endangered Species Act, the Fish and Wildlife Coordination Act, and the Northwest Power Planning and Conservation Act, and other laws before it can approve new land for irrigation. These laws include an assessment of cumulative impacts in the affected watershed; needs of endangered and threatened species; and the Bureau's obligation of equal treatment of fish and wildlife at its projects.

The Bureau issued a draft policy on waterspreading to task force members on June 27 of this year. While we believe it is a good start at a policy, our major concerns with it are as follows:

1. Waterspreading has environmental impacts. The policy must clearly acknowledge that waterspreading has exacerbated declines in the health of already stressed environmental and tribal resources, and/or constrained efforts to reverse those declines. It does not do so at this point.

Most important, the policy should reflect the Bureau's new stated mission to move water into new uses with societal and environmental benefits. Reclamation must address this point if it is to ensure that its response to waterspreading produces real environmental gains.

2. The draft policy identifies a procedure for continuing interim deliveries to contractors, but no clear procedure for ensuring it meets its environmental and treaty responsibilities. The Bureau must clarify and assert in the policy its commitment to fulfill its trust responsibility to the tribes. In the past, the failure to quantify water requirements, and the expense of doing so, has hampered efforts to protect water for Indian trust purposes. The draft policy sets up an interim process through which the Bureau can continue delivering water to contractors before a full analysis has been completed. The policy should just as clearly identify a process for fulfilling environmental and trust responsibilities on an interim basis.

3. Any exceptional process for "incidental" waterspreading must not swallow the rule. The policy must ensure that any shortened review given to the reclassification of lands which are incidentally irrigated by center pivot sprinklers or other improvements in irrigation equipment occurs only in the event that there is no net increase in consumptive water use and no adverse environmental impacts as a result. Moreover, any process that might be implemented for so called "incidental" waterspreading should be only for spreading which is for all practical purposes unavoidable.

4. Public involvement should be included. We have submitted to the Bureau a response to its first draft policy which incorporates a process for public involvement, which we believe is crucial for the Bureau to meet its responsibilities as a federal agency with enormous influence over a publicly-owned resource. Without public input, the Bureau will have a very difficult time formulating NEPA information requirements and cost estimates. Moreover, Reclamation must not make final decisions on waterspreading cases without public involvement.

5. Timelines and enforcement. The policy should contain sections on timelines and enforcement. While settlements are normally preferable to enforcement actions, we consider it naive to think this tenacious problem will be solved entirely cooperatively. The first draft of the Bureau's proposed policy says far too little about the Bureau's response to waterspreading in the absence of a negotiated solution. The Bureau must articulate what its procedures will be in the absence of negotiated agreements and should initiate its resolution process not just with cases it thinks it can resolve, but also with one or more intractable cases and be prepared to litigate if necessary.

6. Retroactive repayment. In this vein, the Bureau must retain the option of charging retroactively for waterspreading. It should waive retroactive repayment only as a benefit for those who cooperate, rather than giving away its authority without getting anything for it. It is especially inappropriate to waive retroactive repayment where contractors have already stonewalled the Bureau's efforts to eliminate spreading problems.

7. Inventories. As we have said, we fully support the Bureau's proposal for inventories quickly to gather the information that has been wanting for so long. We also urge the Bureau to take the opportunity of its revision of RRA rules to revise its reporting forms to ensure accurate reporting of waterspreading in the future, subject to penalties for noncompliance and false reporting.



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

P.O. Box 47600 • Olympia, Washington 98504-7600 • (206) 407-6000 • TDD Only (Hearing Impaired) (206) 407-6006

June 21, 1994

Mr. Dan Beard
Commissioner of Reclamation
United States Department of the Interior
1849 C. St. NW
Washington D.C. 20240-9997

Dear Commissioner Beard:

I want to commend the Bureau of Reclamation for the recent actions taken regarding fish flushing flows in the Yakima basin. The Department of Ecology has submitted a brief to the court in support of the Bureau's decision in early May to bypass water to assist the outmigration of salmon and steelhead. I also want to inform you that we are assigning a member of our Yakima regional office staff to work with your Yakima office on water right enforcement matters. We are also cooperating with your agency in seeking a court order requiring the installation of measuring devices on all diversions prior to the 1995 irrigation season.

You were recently visited by Mr. Jay Manning of our state Attorney General's Office regarding the concerns the Department of Ecology has with some recent developments in the Yakima water rights adjudication (Department of Ecology v. Acquavella). I thought it may be helpful if I provided our specific concerns which are outlined in the enclosed issue paper.

Much energy and resources is being expended by the Bureau, the state and other parties on potential solutions to the basin's water problems, including federal enhancement legislation, dry year lease options, trust water rights, and eliminating water spreading. We question whether these efforts can be successful unless the adjudication clearly quantifies water rights and caps the amount of land that can be irrigated under existing rights at no more than the current acreage. However, the court has been handing down a series of decisions in which some irrigation rights in the basin will include heretofore unused quantities of water for heretofore nonirrigated lands. The result will be an inevitable expansion of the irrigated lands of the basin to the considerable disadvantage of existing water rights, Bureau contractors, and fish and wildlife. If the rulings of the court stand, expanded irrigation will create an even bigger flow deficit in a river system that cannot tolerate it and will require an even greater expenditure of taxpayer money to restore instream flows to acceptable levels.

Dan Beard
June 21, 1994
Page 2

Our staff and attorneys have attempted to enlist the assistance of the United States in getting a rational and workable set of rulings from the court. In nearly every case, we have had to stand in the court alone to protest these adverse rulings. The United States has elected to remain silent in most cases (see enclosed issue paper). The court interprets this silence as acceptance. I urge the Bureau reconsider this strategy and join us in seeking reasonable limitations on the water rights to be decreed by the court. We are currently most concerned about the court's proposed allocation of water and acreage to the Yakima-Tieton Irrigation District which we view as excessive. We have filed an exception to the proposed order and request that the United States support our position. Briefs are due to the court by June 27.

Your regional staff have been stressing the need for a close partnership with the Department of Ecology to bring about effective water resource management following the Yakima adjudication. I fully agree and suggest that the best place to start is to work together toward a sensible outcome to the Yakima adjudication.

Thank you for your time. I look forward to your response.

Sincerely,



Mary Riveland
Director

MR:ks
Enclosure

cc: Ed Osann
John Keyes

ISSUE PAPER

ADVERSE RULINGS IN THE YAKIMA ADJUDICATION

The Department of Ecology has serious concerns regarding the direction being taken by the Yakima water rights adjudication. This issue paper discusses some of the trial court's rulings and the ramifications of those rulings.

The court has repeatedly taken the position that the Bureau of Reclamation obtained total control of the Yakima River and its tributaries when it built the Yakima Reclamation Project. The Department of Ecology has objected to this opinion repeatedly but the United States has not.¹ This opinion was first expressed by the court in 1992. Bureau of Reclamation staff have indicated outside the courtroom that comanagement of the basin's water resources by the Bureau and Ecology will be necessary after the adjudication. The reasoning, with which Ecology agrees, is that while the Bureau does control a great deal of the water in the basin, it does not have jurisdiction over natural flow rights not related to the federal project and does not have jurisdiction over the tributaries. There have been numerous opportunities for the United States to express this view before the court but it has remained silent.

From these rulings, the court has held that water rights can be acquired, not by state processes, but through contracts entered into by the Bureau. The Bureau, through its attorney, Charles O'Connell, stated in 1992 during oral argument that contracts cannot establish a water right. However, the court subsequently ruled that contracts do supply the basis for establishing a water right. That ruling has been applied in three different trials on behalf of irrigation districts.² Ecology objected to that ruling in each case but again the Bureau was silent.

From these two rulings, the court has reasoned that because the Bureau controls the river and has entered into contracts, the provisions of those contracts control regardless of whether the water has ever been beneficially used. For example, the trial court has adjudicated to the Kittitas Reclamation District (KRD) a right for 1,296.67 cfs instantaneous flow and 336,000

¹By way of example, the court quantified a right to Pacific Power and Light (PP&L) for a maximum diversion of 450 cfs. However, the court inserted a sentence in the order that allowed for the Bureau to authorize diversions in excess of that quantity when it deemed it appropriate. Ecology objected to that sentence as being beyond the Bureau's authority because PP&L does not have a water delivery contract with the Bureau and its right predates the date the Bureau entered into the basin. The Court responded that the Bureau had total control of the river and could and would control that diversion. Not once did the Bureau address the court on this issue.

²Many more trials have been heard but the court has only issued memorandum opinions on three.

acre-feet per year for irrigation of 59,122.29 acres.³ While the current contract for KRD provides for the delivery of 336,000 acre-feet per year for irrigation, according to Bureau records the highest diversion made by KRD for irrigation (since its contract quantity of 336,000 was set) was 333,150 acre-feet. The average diversion for the periods between 1952 and 1972 was 308,195.71 acre feet per year.

This high quantity of water adjudicated by the court is particularly troubling in that the court has not limited the districts to a specific number of irrigated acres. The trial court, relying upon the contracts, has determined that irrigable acres is the proper standard to apply. It, therefore, gave KRD a water right for 59,122.29 acres somewhere within the boundaries of the district. The boundaries of KRD encompass almost 100,000 acres. Unless the acreage irrigated is tied in some manner to specific lands, it will be impossible to monitor water spreading in the future. This is particularly true when the quantity of water granted by the court is in excess of the current needs.

By way of further example, the court has proposed to give the Yakima-Tieton Irrigation District (YTID) a water right for 347 cfs and 110,700 acre-feet per year for irrigation for the period of April 1 through September 30. However, the most that YTID has ever diverted, according to Bureau records, is 105,000 acre-feet per year. This diversion of 105,000 acre-feet per year was through an open unlined conveyance system, which could be expected to have a 25-40% conveyance loss. That system has been substantially rehabilitated and now has only 2% conveyance loss. Taking the number of shares that are outstanding within the YTID, the quantity of water each share represents, and the 2% conveyance loss, we believe the total volume of water that should have been adjudicated to YTID is 78,700 acre-feet.

In addition, the trial court granted YTID a water right for 27,900 acres. The most that YTID has ever shown to be irrigated is 25,756 acres in 1981. From 1957-1977, the highest irrigated acres reported was 23,976. The trial court did not require YTID to identify the acres to which the water right was appurtenant. As a result of this allocation, the district is likely to try to aggressively expand its acreage under irrigation and will be diverting more water than ever before. This will be to the considerable detriment of junior Bureau contractors and fishery resources.

Ecology has repeatedly objected to the court adjudicating quantities of water without a beneficial use analysis, but the Bureau has not supported our position. In fact, the Bureau in reference to KRD objected that the quantity given by the Court was too small. The Bureau argued that the court erred in failing to give a "flood water" right. Use of flood water by the irrigation districts has historically been authorized by the Bureau as "free" water.⁴ The

³The trial court also adjudicated a right for 70 cfs, 25,000 acre-feet per year for non-consumptive power generation. This right will not be discussed in detail here.

⁴It is questionable under what authority this use has been authorized as it is use of water outside of the irrigation season or in excess of certificated rights.

Bureau is thus apparently claiming control over water for which it does not have a valid state water right. This is inconsistent with federal reclamation law. Appropriation of "flood waters" would be damaging to fishery resources by further diminishing the spring freshet that is critically needed to move juvenile fish out of the system. This position by the Bureau was surprising because KRD has never beneficially used water in excess of its contract and in fact, has not used the full quantity under its contracts.

Ecology has also repeatedly objected to quantification of acreage in water rights using an irrigable standard and has asked the court to base the rights on the actual acreage irrigated. The Bureau has again been silent to the court on this issue. However, in a meeting with John Keyes, Jack Hockberger and others from the regional office, the Bureau advised Ecology that while it would support Ecology on a beneficial use analysis¹, it believed the irrigable standard to be appropriate. Since then the Bureau has not provided any support to Ecology's attempts to convince the court to base its allocations on beneficial use. In any case the Bureau's position does not seem logical; beneficial use is based on the historic application of water to specific lands to which the water right is appurtenant. Lands that are "irrigable" but never before irrigated have no water use at all much less beneficial use. This position by the Bureau is problematic because most of the irrigation districts do not have an irrigable land classification, and of those that do, many are extremely outdated.

Ecology believes that the widespread cultivation of new land will be precipitated by the Court's rulings. The United State's failure to support a beneficial use quantification standard has encouraged the Court under the guise of federal law to reach the rulings it has reached. These rulings will have a serious negative impacts on the Yakima Basin for both junior appropriators (some of which have contracts with the Bureau) and fishery resources. Wasteful practices or unauthorized use of water will not be capable of regulation given the vagueness of the quantification. Conservation measures and transfer of water savings will not be effective as there will never be certainty that "wet water" as opposed to "paper water" is being acquired. The rulings could prevent the Yakima Enhancement Project from accomplishing its main objective: reallocating water needed to restore the basin's fisheries. In essence, there will be little hope for the preservation, much less enhancement of fish life absent the heavy hand of the Endangered Species Act.

These outcomes are obviously not something the state desires, and they should not be something that the Bureau desires under its stated goals of prevention of water spreading, and protection and enhancement of fish. However, the Bureau's silence in the adjudication and assertions regarding flood water have created the appearance to the court that the Bureau supports the court's rulings. This appearance may be partially responsible for the court's rulings. At a minimum, it has not assisted the court in recognizing the broader implications of the rulings.

¹Contrary to the Bureau's representations, it has not supported Ecology on a beneficial use analysis. This meeting took place in 1992. Since that time, the Bureau has remained silent on the issue.

We need the Bureau to reconsider its strategy in the case and to join Ecology is seeking reasonable limitations on the water rights to be decreed by the court. Specifically, the Bureau should:

1. Assert to the trial court that the Yakima River is not a federal river under the exclusive control of the Bureau of Reclamation;
2. Assert to the trial court that a water right is acquired through state processes as provided by section 8 of the Reclamation Act, not through the contracts with the Bureau or the 1945 Consent Decree;
3. Assert to the trial court that under both reclamation law and state law, quantification of water rights must be based upon the amount of water used under a reasonably efficient conveyance system for a specific number of acres historically irrigated, i.e. beneficial use;
4. Withdraw its previous position on flood water as inconsistent with the Reclamation Act and state water law; and
5. Support Ecology's appeals of the court's previous rulings that are detrimental to good future water management.

STATEMENT OF RICK GOVE AND BILL BEAN

Mr. MILLER. Mr. Gove.

Mr. GOVE. Mr. Bean is going to give some opening statements for Columbia Basin Institute, and then I will follow his testimony; is that okay, Mr. Chairman?

Mr. MILLER. As long as it is on point.

Mr. GOVE. Yes, sir.

Mr. BEAN. Mr. Chairman, I am Bill Bean, Columbia Basin Institute.

I think we are tangential to the point today. We are testifying on the basis of an abstract of a study which is in progress on the Columbia Basin project itself. That study set out to determine how much water could constitutionally be conserved on the Columbia Basin project and then what the possibility of its being recaptured for in-stream, for Bonneville Power Administration at Grand Coulee, and also for fishery remediation.

So in a sense, we are providing what will be a brief, snapshot of a project of considerable subsidy and importance in the Pacific Northwest and the way in which the irrigation districts actually perform.

As you know, the Columbia Basin project is a very deeply subsidized Federal project, estimated by the Department of Interior to amount to over \$2 million for a 960-acre farm.

Recently, the Bureau of Reclamation has estimated \$150 million in costs for the installation of 1,900 miles in drains on the project. Annually, the Bonneville Power Administration provides a deep subsidy for the project purchasing power, which amounts to roughly \$25 million a year in terms of Bonneville's regular power wholesale rate at this time.

For that reason, inefficiencies or misuse of water or illegal use of water in the Columbia Basin project has considerable significance to the Bonneville Power Administration, to ratepayers in the region, as well as the fishery interests. That was one of the reasons why we looked at the actual performance of the project.

The good news in terms of conservation is that we found roughly 800,000 to 1 million acre feet of water which could be recaptured in principle from the Columbia Basin projects' annual diversion of 3 million acre feet. That diversion at this time imposes an opportunity cost in terms of hydropower of \$130 million a year on the Pacific Northwest's regional utility base. So any recapture in-stream from that project will have considerable significance.

What the 800,000 to 1 million acre feet means is that about \$50 million in imposed hydropower opportunity costs could be avoided. The bad news is that there is no reason whatsoever to believe that any amount of that water or the hydropower opportunity generating capacity which it represents will be recaptured for the public interest, given the management configuration of the Columbia Basin project at this time.

What has, in fact, happened is the Bureau of Reclamation has acquiesced in the evolution of the irrigation districts, which are autonomous on the Columbia Basin project; they are a profit-seeking entity who are in the business of retailing federally subsidized water.

They do it in a couple of ways: They sell water off the platted irrigation districts, but within the project boundaries, which are almost so extensive with the irrigation districts, they realize the proceeds from those sales of water in order to suppress their actual costs of the members for the water assessments each year. And in 1985, they went to the hydropower generating business on their own with the installation of seven small-head hydropower projects in the project, selling the power to Seattle City Light-Tacoma. In a few years, the district has realized roughly \$6 million each year in proceeds from the sale of the power.

At the same time, when the districts assumed control of the conveyance systems in 1970 from Bureau of Reclamation with the management transfer, they inherited a system of conveyance efficiencies, roughly equivalent to the Nile in Egypt, roughly 70 percent efficiency.

Today, the efficiency is roughly 58 percent. What that means in terms of water is about 400,000 acre feet. So between inefficiencies, which, in fact, account for the surplus which they now sell in the water sales contracts, the conveyance losses which are result of disinvestment in the conveyance maintenance system, and the hydropower maximization by running the maximum amount of water through the system, they are actually in a position of developing a substantial business in retailing a Federal subsidy.

The point in general we want to make about the districts, at least in the Columbia Basin project, is that an acre foot of water on the Columbia Basin project is a bundle of Federally underwritten costs as well as opportunity costs imposed upon the regions hydroelectric power and the fishery. The bundle, in fact, needs to be unpacked for a certain portion of the water.

We have roughly 800,000 to 1 million acre-feet. So for the Bureau at this point on the Columbia Basin project, it seems idle to discuss the possibility of the Class 6 land reclassification, for there will be no return to the Grand Coulee main stem flow.

Mr. Gove's testimony, in fact, explicates that in some detail.

Thank you.

Mr. MILLER. Mr. Gove.

Mr. GOVE. Thank you, Mr. Chairman.

In the institute's investigation of the water conservation potential on the Columbia Basin project, we basically looked at two different areas where such water could be conserved: First, on-farm efficiency; and second, conveyance efficiency.

Regarding on-farm efficiency, we found there had already been significant amounts of water conserved throughout the 1970s and early 1980s from conversions from inefficient irrigation methods such as gravity and real irrigation to sprinkler and center pivot, this accounted for roughly 340,000 acre feet in water conserved through that period.

Regarding additional potential water savings, we analyzed two independent studies conducted on the Columbia Basin project farms, which investigated potential reductions in water requirements which could be brought about by further improvements of on-farm management of water application. Those studies concluded that water requirements could be reduced by 10 percent in the South Irrigation District and 30 percent on the East and Quincy

Irrigation Districts. Applying these percentages to the amount of water delivered to the project, we estimate that roughly 400,000 acre feet could be conserved.

The conveyance efficiency calculation; we looked at the 1969 level of conveyance efficiency, at this point, how much water was lost in the system. The reason we started in 1969, is that was the year that the irrigation districts assumed management of operation and maintenance responsibility from the Bureau of Reclamation.

Since that point, the system has fallen into a state of decline and the increase in water losses attributable to conveyance efficiency is 685,000 acre feet. So it appears that implementation of further on-farm efficiency and by requiring irrigation districts to return conveyance efficiency levels to the level they were at when the district assumed maintenance responsibility, as much as 800,000 to 1 million acre feet could potentially be conserved.

The question to be asked at this point: Can this potentially conserved water be captured for in-stream benefits in the Columbia River? Under the current management structure as created by the 1969 amendment repayment contracts, with transfer of the management, there are three barriers that have been created which will prevent any recapture from occurring:

The first barrier is the incentive of the districts to sell water conserved in the form of water service contracts. Of the previously mentioned 340,000 acre feet conserved throughout the 1970s and early 1980s, 200,000 acre feet of this is now being sold to irrigators outside of platted irrigation blocks. It is being delivered to unplatted lands which are still within district boundaries, but they are not on platted irrigation blocks.

The revenue received from these water service contracts represents 6 percent of irrigation districts income. The increase in acres irrigated under water service contracts since the district took over management's responsibilities was from 8,000 acres in 1972, which is now 53,000 acres. So it is clear that any water that is made available through conservation efforts on the project will be marketed by the districts in the form of water service contracts. The ability to form these contracts was granted to the districts in the 1969 repayment contracts, Article 20.

A second barrier to reducing the conveyance losses of 685,000 acre feet is that in order for this happen, the districts must increase expenditures on maintenance. According to the 1969 contracts, the districts have the responsibility to operate and maintain, and raise the revenue to operate and maintain, which they primarily derive from water assessment charges.

The irrigation districts have the authority to set the prices of the water assessment charges. So in order for the districts to increase expenditures on maintenance, they would have to raise prices of their own members to increase the operation and maintenance budget. And, in fact, what has happened since the takeover, they have decreased the water assessment charges in constant 1989 dollars, from \$30 down to \$20, and the overall expenditures per acre in operation and maintenance have also decreased in 1989 constant dollars, from \$37 down to \$30, and in time period of decreased spending on maintenance, there has also been a decrease in efficiency level on the project.

The third barrier is the small-head hydropower projects, which Mr. Bean mentioned earlier. The districts stand to have a direct benefit when the maximum amount of flows are run through the canals.

The districts now derive a direct profit for every kilowatt hour which these projects produce, which is now 850,000 annually, and as Mr. Bean said, it will be 6 million annually when these projects are amortized by 2006.

Since 1986, the diversions from the Columbia River have drastically increased by over 500,000 acre feet, which only 40,000 acres have been increased in the project's acreage, which at most, would require 160,000 acre feet. So there is roughly 350,000 acre feet in increased diversions in the last 10 years that are unexplainable by increased acreage requirements.

The original legislation of the Columbia Basin project was the Columbia Basin Project Act of 1943. And this act expressly prohibited the delivery of subsidized water to lands which were not platted farm units in designated irrigation blocks.

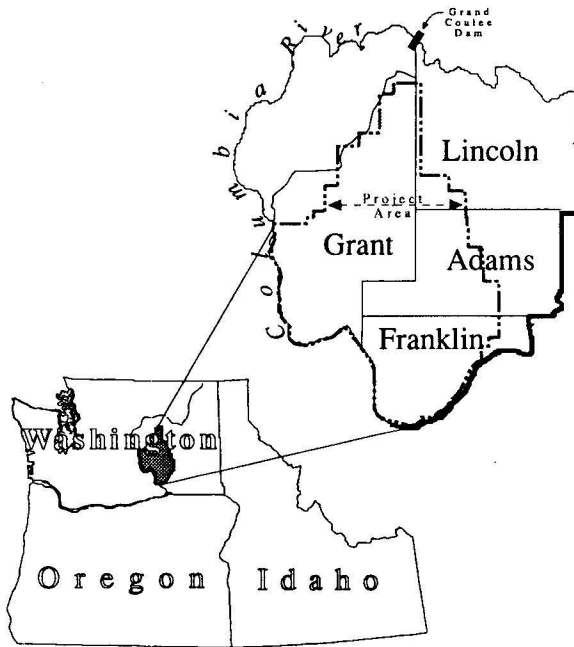
In other words, this section has been repealed by an amendment in 1962, which allows now for the formation of water service contracts to sell water to nonplatted acres outside of irrigation blocks which originally were unauthorized to receive water. That was an act of Congress that did that.

And in 1969, the contracts between the Bureau of Reclamation and the districts for the transfer of management gave the districts the ability to sell this water in water service contracts. So, in essence, allowing the districts to form water service contracts with excess water and to generate hydropower in the canals has converted federally subsidized water into an economic commodity, both in its value in water service contracts and its ability to generate power at the small-head projects.

The sale of this water and this hydropower is utilized as a means of further increasing the subsidy to district members by decreasing water charges and deferring maintenance costs. If these water policies are maintained, regardless of how much water is conserved through efforts of water conservation efforts on the Columbia Basin project, no water will ever be returned to the Columbia River.

Thank you very much.

[Prepared statement of Columbia Basin Institute follows:]

WATER CONSERVATION FOR INSTREAM RECAPTURE**ON THE BUREAU OF RECLAMATION'S COLUMBIA BASIN PROJECT:****OPPORTUNITIES AND OBSTACLES****ABSTRACT**

Submitted to the Subcommittee on Oversight and Investigations
of the House Committee on Natural Resources

July 19, 1994

CBI
COLUMBIA BASIN INSTITUTE

COLUMBIA BASIN INSTITUTE

Based in Portland, the Institute is a regional policy research and advocacy organization focussed on reducing and mitigating the social and environmental costs generated by the unsustainable usage of water and other public resources by the Basin's irrigation-dependent agricultural industries, including the corporate farming, food processing and cattle feeding sectors. The Institute's Board of Directors include representatives of conservation, labor and Latino organizations from Oregon, Washington, and Idaho.

The material presented in this report is abstracted from a forthcoming study funded by the Northwest Area and Bullit Foundations.

P.O. Box 3795 • Portland, Oregon 97208 • (503) 222-6541 • FAX: (503) 222-6436

© CBI 1994

**WATER CONSERVATION FOR INSTREAM RECAPTURE
ON THE BUREAU OF RECLAMATION'S COLUMBIA BASIN PROJECT:
OPPORTUNITIES AND OBSTACLES¹**

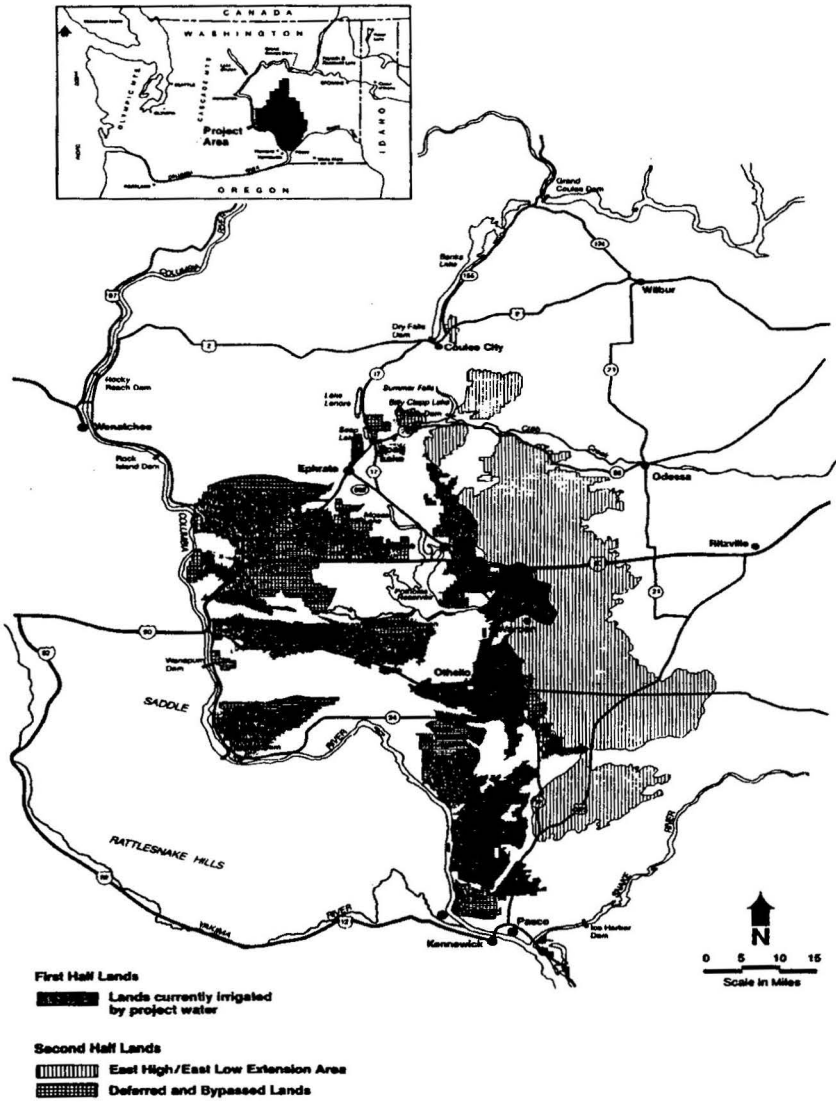
ABSTRACT

I. THE PROJECT

The Columbia Basin Project (CBP), shown in Figure 1, is located in central Washington State. The CBP is one of the nation's largest federally subsidized reclamation projects; originally authorized to irrigate 1,095,000 acres.² However, thus far it has only been developed to irrigate 580,000 acres.³ The remaining 515,000 acres are primarily located in the undeveloped East High area of the project. Three irrigation districts are responsible for operation and maintenance of the project, delivering water to project irrigators and securing repayment of the project's construction costs from project irrigators to the Bureau of Reclamation; they are the Quincy, East and South Columbia Basin Irrigation Districts. Of the CBP's current irrigated acreage, 527,000 acres receive water under repayment contracts which deliver water to platted farm units within designated irrigation blocks. The remaining 53,000 acres receive water under water service contracts.⁴ These are contracts which provide for the delivery of water, not required by the platted farm units within irrigation blocks, to lands either outside of designated irrigation blocks or to lands classified as nonirrigable within irrigation blocks.⁵

The project has a water right from the state of Washington to divert 2.9 million acre-feet (MAF) from the Columbia River at the Grand Coulee Dam.⁶ In 1992, 2.77 MAF were diverted.⁷ This water enters two main delivery canals, the West and East Low canals, and irrigates much of the northern and eastern expanses of the project, primarily the Quincy and East Irrigation Districts. The run-off and seepage from these two northern districts then returns to the Potholes Reservoir joining a delivery of water from the East Low Canal, where it enters the third main canal, the Potholes Canal, on its way to irrigate the remaining southern reaches of the project in the South Irrigation District. In 1992, the total amount of water entering the three main canals was roughly 3.75 MAF, of which only 2.2 MAF were actually delivered to farm turn-outs. Thus for every irrigated acre on the CBP (580,000), 6.5 AF must be delivered to the canal system, of which only 3.79 AF per acre are used for actual irrigation.⁸

Figure 1 - Columbia Basin Project (CBP)



As much as 43 percent of the CBP's acreage is in low value forage and pasture crops that account for over 60 percent of the water consumed on the project.⁹

II. PROJECT SUBSIDIES

A. Construction Costs

The total construction cost of the CBP's irrigation component was \$649 million in 1952 dollars. The amount of this cost to be repaid by project irrigators, in the form of repayment contracts, is \$135,547,844.06, without interest. The Bonneville Power Administration (BPA) is responsible for the balance of the repayment for the irrigation facilities, \$513 million, plus the full repayment of the power facilities at Grand Coulee Dam, another \$1.05 billion, from revenue generated by the sale of power produced at Grand Coulee. The present day value of the irrigation construction costs is \$3.2 billion, of which irrigators had paid as estimated at \$26.6 million in 1986.¹⁰ In 1988 the Department of the Interior estimated the total subsidy for a 960-acre farm on the CBP at \$2.1 million.¹¹

B. Project Pumping Power

There is an annual reservation of 1.2 billion kilowatt hours (kwh) of power at the Grand Coulee Dam available to pump the project's irrigation water, provided at the deeply subsidized rate of .95 mills per kwh.¹² The project uses an average of 960 million kwh per year for which irrigators pay \$912,000 at .95 mills. The value of this power at BPA's wholesale rate of 26.8 mills per kwh is \$25.7 million annually. The revenue collected by the Bureau from the districts for the reserved power contributes to the operation and maintenance costs of the power producing and pumping facilities at Grand Coulee which provide the CBP with water; it does not contribute to foregone BPA power revenues.

C. Drainage Costs

Another subsidy, which was not originally intended when the CBP was conceived, is the Bureau's assumption of the project's drainage costs. In 1962, the Bureau assumed the payment responsibility for a majority of the construction costs for the installation of drainage facilities on the project, a responsibility which originally was intended to be fully repaid by irrigators. In return, the districts agreed to increase their construction cost repayment amount from \$85.00 per acre (the amount set in the original 1945 repayment contract) to \$131.60 per acre to cover the additional costs to the Bureau. As of 1991, the Bureau had spent \$118 million to drain 116,000 acres, with an estimated 37,000 acres remaining which will require drainage at an estimated additional cost of \$61 million.¹³ The total cost of drainage installation will be \$179 million, of which the irrigators will pay \$26.5 million, roughly 15 percent, constituting an additional subsidy of \$152.5 million.

III. HYDROPOWER OPPORTUNITY COSTS OF THE PROJECT

The value of the 2.9 MAF water withdrawn at Grand Coulee for the project, in terms of the price BPA must pay to replace the foregone hydropower with gas-fired thermal power priced at 45 mills per kilowatt hour, is \$90.5 million annually; and to the entire region, \$129 million annually (this second figure includes power generation from five private Mid-Columbia dams).¹³ In terms of anadromous fishery remediation the water has an additional value. Because of the intimate relationship between hydropower generation and irrigation in the Columbia Basin, opportunity costs of this magnitude imposed on other regional interests place special emphasis on the issue of water efficiency on the project.

IV. WATER USE EFFICIENCY LEVELS ON THE PROJECT

The use of water on the CBP is subject to two main types of efficiency standard, on-farm and conveyance.

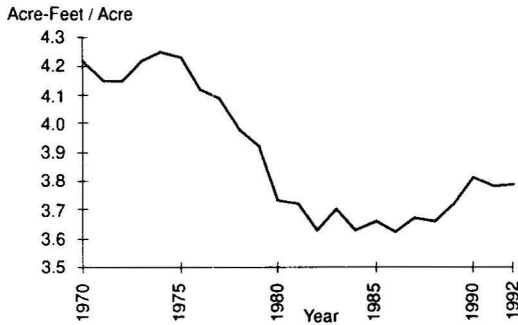
A. On-farm Efficiency

On-farm efficiency standards refer to the amount of water applied to an irrigator's farm versus the amount of water actually required by the crops on the land. The higher the ratio of water actually applied to crops compared to water diverted on-farm, the more efficient a farmer's application of water is considered.¹⁵ Conversions from gravity forms of irrigation, common through the 1960's, to significantly more efficient sprinkler and center pivot forms of irrigation throughout the 1970's and 1980's, have greatly increased on-farm efficiency on the CBP.¹⁶ Figure 2 shows the reduction in on-farm water requirements through this period, falling from 4.2 AF per acre required in the early 1970's to roughly 3.8 acre-feet per acre in 1992. This has created over 344,000 AF of water not required by irrigators under repayment contracts.¹⁷

Two independent studies recently conducted on farms located on the CBP indicate that on-farm water requirements may be further reduced by between 10 percent on the South Irrigation District and 30 percent on the Quincy and East Irrigation Districts, taking into account varying soil types and present practices, by implementing low-cost, scientific scheduling techniques designed to improve on-farm efficiency.¹⁸ Scheduling is a well-known and relatively low-cost method of irrigation water conservation.

Applying these on-farm conservation potentials to the amount of water now applied by irrigators on each of the districts in the CBP yields the conclusion that on-farm water efficiencies could produce as much as 400,000 AF in additional conservation savings on the entire project.

Figure 2 - Farm turnout water delivery per acre, CBP 1970 - 1992 (3 year moving average).



Source: Water Distribution Reports for CBP, U. S. Bureau of Reclamation.
Note: Years shown on graph are final years in each 3 - year period.

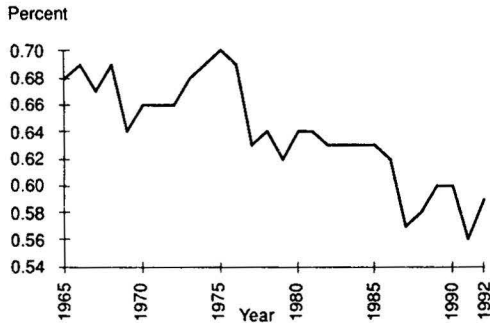
B. Conveyance Efficiency

Another form of efficiency is conveyance efficiency, which refers to the amount of water delivered to the canals of the distribution system versus the amount which is actually delivered to farm turn-outs. Water lost in conveyance is lost to both evaporation and seepage through unlined canals and laterals.

As shown in Figure 3, conveyance efficiency has been in a constant state of decline since the irrigation districts assumed management responsibility of the project in 1969, at which time conveyance efficiency on the project was nearly 70% — roughly equivalent to that in irrigation project conveyance efficiencies on the Nile.¹⁹ This decline in conveyance efficiency since the districts assumed management responsibilities amounts to an additional loss of 685,000 AF over 1970 conveyance loss levels.²⁰

Since the irrigation districts assumed management responsibilities in 1969, there has been a decrease in revenue expended on operation and maintenance. In 1969 \$37 dollars per acre were spent on O&M, by 1989 only \$30 were being spent per acre.²¹ This decrease in expenditures on O&M coincides with the decrease in conveyance efficiency levels. The declining revenue expenditure along with the corresponding declining efficiency levels represent an overall disinvestment by the districts in O&M.²²

One result of this decline in conveyance system maintenance is that the delivery of more water into the distribution canals is required to meet the farm turn-out requirements of the project's irrigators. Therefore, even if the overall water requirement of the project decreases as a result of on-farm water conservation, the amount of water which needs to be diverted from the Columbia River and delivered to the canals to meet the requirement is increasing due to the drop in conveyance efficiency, thus eroding

Figure 3 - Conveyance efficiency of CBP, 1965 - 1992.

Source: Water Distribution Reports for CBP, U. S. Bureau of Reclamation.

any potential savings on-farm conservation may create.

If further improvements in irrigation management were introduced on a project-wide basis on the CBP, and conveyance systems were returned by the districts to levels of efficiency current at the time of their assumption of management responsibilities, it appears that between 800,000 and 1,000,000 AF could be eliminated from the 2.8 MAF currently diverted by the Bureau for irrigation of the project.

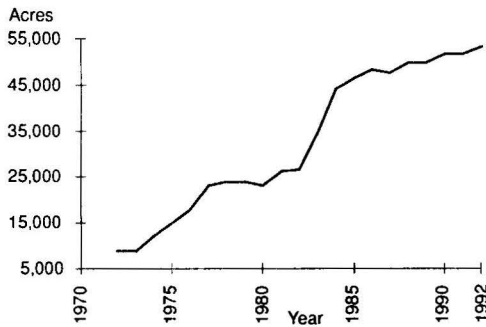
V. BARRIERS TO INSTREAM RECAPTURE OF CONSERVED WATER

Substantial amounts of water have been conserved on-farm over the past 20 years on the project from conversions to more efficient forms of irrigation. Yet no water has returned to the Columbia. Some of this water has been used for the development of roughly 40,000 additional acres in platted farm units within irrigation blocks since 1975.²² The remainder of this conserved water has not been returned to the Columbia River in the form of reduced diversions. Rather, it has been sold by the irrigation districts in the form of water service contracts, to non-platted lands lying outside irrigation blocks.

A. Water Service Contracts

Figure 4 shows the corresponding increase in water service contract acreage during the period when on-farm efficiency improvements made the water available. Water conserved by farmers of platted farm units within irrigation blocks served by repayment contracts becomes available to the irrigation districts to sell in the form of water service contracts. The revenue received from the sale of water by water service contracts is then applied to the operation and maintenance budget of the irrigation district, thus allowing

Figure 4 - Acreage served by Water Service Contracts, CBP 1972 - 1992.



Source: Water Distribution Reports for CBP, U. S. Bureau of Reclamation.

the district to reduce the water assessment charges paid by district member irrigators for water received under repayment contracts.

There are presently 53,252 acres served under water service contracts, up from 8,800 acres in 1972.²⁴ Assuming each acre uses 3.79 acre-feet, the amount of water now delivered to lands served by water service contracts is 201,825 AF compared to 35,992 AF delivered in 1972.²⁵ The 165,833 AF increase represents water which could have been eliminated from the CBP's water requirement if the districts had not the ability to sell this water in water service contracts. Proceeds from sale of water through such contracts now represent as much as 6% of total revenues to the districts. Clearly there is a strong economic incentive for the districts to retain water conserved through on-farm efficiencies for re-sale to non-platted irrigators. And since the East Irrigation District's boundary now encompasses virtually all of the undeveloped acres in the East High remainder of the project area, only structural incapacity will inhibit further sale of conserved water to non-platted irrigators in the eastern and other portions of the project area.

B. Small Head Hydropower Production

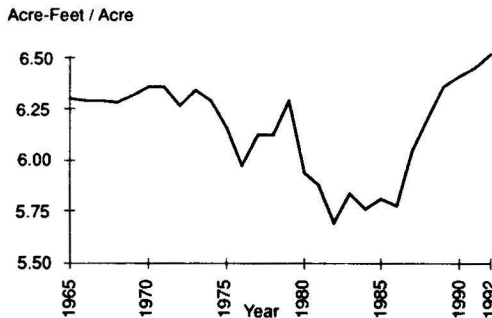
Another barrier to the districts' release of conserved water is the fact that they benefit from small-head hydropower generation when a maximum amount of water is run through the canals of the conveyance system. A significant feature of the contracts negotiated with the Bureau for takeover of management responsibilities by the districts in 1969 was the granting of a right to generate hydropower in the conveyance canals as a secondary, or incidental, benefit of irrigation water movement through the system.²⁶

In 1985, the districts initiated the installation of seven small-head hydropower projects within the canals which distribute water to the CBP. Since 1985, water diverted from the Columbia has increased by an average of 570,000 AF annually.²⁷ There has been a 45,000 acre increase in irrigated acreage over this same time span which would account for a 170,550 AF increase in water requirement at the project's average water requirement of 3.79 AF/acre. Thus, 399,450 AF in increased diversions since 1985 may be directly attributable to the small head plants. This increase in diversion is reflected in Figure 5, which demonstrates that the ratio of acre-feet supplied per acre for the entire project, which was in a steady declining trend throughout the seventies as the sprinkler conversions occurred, takes a sharp upward turn in 1986 — the year after the projects were fully installed. Either the districts are running more water through the canals to maximize hydropower revenues, or in 1985 the conveyance system fell into a precipitous state of decline which demands immediate emergency maintenance action by the districts and the Bureau.

Presently, the districts receive a return of 1.65 mills per kwh for 487,900,000 kwh of power produced at five of these projects, and 2 mills for 28,000,000 kwh of power produced at one, producing over \$850,000 annually in revenue to the districts; the final project is over cost and not producing any profit.²⁸ The utilities receiving the power now pay all the debt service and all the operation and maintenance costs of the projects which is now nearly \$20 million annually, and the districts simply receive profit.²⁹

When these projects are finally amortized (in 1996 for two, and 2005 for the other five) the districts will split the profit evenly with the utilities now purchasing the power, and will average nearly \$6 million in annual income.³⁰ The contracts with the utilities expire in 2021, at which time the districts will receive all profit generated by these projects, averaging near \$12 million annually. It is also interesting to note that the projects produce over 500 million kwh per year, roughly half of the reserved project pumping

Figure 5 - Total system water supply per acre, CBP, 1965 - 1992 (3 year moving average).



Source: Water Distribution Reports for CBP, U. S. Bureau of Reclamation.
Note: Years shown on graph are final years in each 3 - year period.

power — for which the districts pay only .95 mills — used to supply water to the CBP's irrigation system. The districts have no obligation to return any power, water, or profit to BPA.

C. Districts' Incentive to Minimize Water Charges to Members

A third barrier to public recapture of conservable water on the project consists in the fact that the irrigation districts have been delegated the responsibility of operating and maintaining the irrigation facilities and for raising the revenue by which to do so. The districts raise revenue for their operation and maintenance (O&M) budgets primarily through water sales to irrigation district members and recipients of water service contracts, over which the districts have price setting authority.

A strong economic incentive is thus provided the districts — managed by member-irrigators — to minimize water charges to district members in order to maximize district member profits. One of the first acts by the districts upon assumption of management responsibility in 1969 was to reduce members' water assessment charges from \$30 per acre to \$20.³¹ Subsequent merchandising of water and hydropower by the districts, as well as disinvestment in conveyance efficiency maintenance, have further increased revenues to the districts and enabled further minimization of water assessment charges to the member irrigators. The 1968 contracts authorizing takeover by the districts have amounted to a franchise to retail surplus water and conveyance-related hydropower benefits as a means of further increasing members' profits.

VI. SUMMARY

The original legislation authorizing the CBP was the Columbia Basin Project Act of 1943.³² This Act expressly prohibited the delivery of subsidized water to lands which were not platted farm units in designated irrigation blocks. This section was repealed by amendment in 1962, the same amendment which designated the project's drainage costs to be paid by the Bureau, thus allowing the formation of water service contracts to sell water not used by platted farm units to lands not originally authorized to receive such water.³³

In essence, allowing the districts to form water service contracts with excess water and generate hydropower in the canals, has converted federally subsidized water into an economic commodity — both in its value in water service contracts and its ability to generate power at the small head hydro projects — the sale of which is utilized as a means of further increasing subsidy to district members by decreasing water charges and deferring maintenance. The districts' ability to exploit these evolutions in federal policy now impose the following additional hydropower opportunity costs on the region annually:

10

	WATER	BPA	REGION
Water service contracts	201,400 AF	\$6,259,565	\$9,345,478
On-farm inefficiencies	400,000 AF	\$12,474,130	\$17,800,909
Conveyance losses*	685,100 AF	\$21,361,947	\$30,484,058
<hr/>			
Total	1,286,500 AF	\$40,095,642	\$57,630,445
*Attributable to small head	399,450 AF	\$12,456,976	\$17,776,434

END NOTES

- ¹ Rick Gove and William Bean, Authors. Respectively, Conservation Associate and President, Columbia Basin Institute.
- ² Draft Environmental Impact Statement: Continued Development of the Columbia Basin Project, Washington. September 1989.
- ³ Water Distribution Report - 1992, CBP, Bureau of Reclamation.
- ⁴ Water Distribution Reports - 1992.
- ⁵ Columbia Basin Project, Washington, Operation and Maintenance Manual, Appendix II. October 1968.
- ⁶ Certificate of Water Right, State of Washington, Department of Ecology, Certificate Number S3-01622C, 1988.
- ⁷ Water Distribution Reports.
- ⁸ *ibid*
- ⁹ 1991 CBP Crop Report, Bureau of Reclamation.
- ¹⁰ Unpublished CBI study, forthcoming in September 1994.
- ¹¹ Correspondence from the Office of Secretary to the Honorable George Miller, 24 February 1988.
- ¹² This amount of reserved power was doubled in 1968 in the Amendatory, Supplemental, and Replacement Contract Between the United States of America and the South, East and Quincy Irrigation Districts.
- ¹³ Svendsen, Mark and Douglas Vermillion. Irrigation Management Transfer in the Columbia River Basin Project, USA." International Irrigation Management Institute, Sri Lanka. October, 1993.
- ¹⁴ BPA pays differing amounts for thermally produced energy to meet its firm load, ranging from 20 mills to 60 mills. The price of 45 mills is based on Portland General Electric's Least Cost Plan, Exhibit K, which cites this price as the cost of producing its cleanest and most efficient energy by natural gas fired combustible turbines. This is a conservative estimate considering power produced at the Grand Coulee Dam is used by BPA as peaking capacity which may have a higher value than 45 mills.
 The calculation is: 2.9 MAF x Total Dynamic Head (TDH) of 825 ft. head at Grand Coulee Dam (this figure excludes the TDH amounts of the 5 private Mid-Columbia dams, which are 342 ft. head) x .87 kwh (value of one foot of head dropped through the turbines) x 45 mills/kwh (cost of cheapest thermal power produced by natural gas fired combustible turbine cogeneration plants).
- ¹⁵ This hydropower cost must then be reduced by the value of the amount of power produced from return flows to the Columbia River from the CBP at the Wanapum and McNary pools. Based on 1990 BPA return flow data from Technical Appendix - Modified Streamflows: Columbia River and Coastal Basins 1928-1989, 60,454 AF returns annually to Wanapum and 369,000 AF returns annually to McNary. Factoring for returns to Wanapum and McNary, the reduction calculation is as follows: 60,454 AF x TDH of 316 ft. head at Wanapum (The actual TDH at Wanapum is 470, but 154 ft. of head is not producing power for BPA so it is excluded) x .87 kwh x 27 mills/kwh (BPA Priority Firm rate at which this return flow is already producing power); and 369,000 AF x TDH of 316 ft. head at McNary x .87 kwh x 27 mills/kwh.
- ¹⁶ pg. 52, Svendsen & Vermillion, *op cit*.
- ¹⁷ *ibid*. p. 53.
- ¹⁸ Calculated by taking the difference in the amount of water required for the project in 1970 at 4.2 AF/acre for 443,000 acres and the amount required in 1992 at 3.79 AF/acre for 580,000 acres. The data are from the Water Distribution Reports.
- ¹⁹ These results, respectively, are from: Willis, D. "Abatement of Nitrate Leaching Through Water and Fertilizer Scheduling in the Mid-Columbia Basin." Unpublished Columbia Basin Institute report,

12

forthcoming, September 1994. Miller, J.D. Evaluation of the Grant County Irrigation Scheduling Project - 1993 Growing Season and Final Report. Pacific Northwest Laboratory, Richland, Washington, 1994.

19 p. 52, Svendsen, Mark and Douglas Vermillion, op cit.

20 The increase in conveyance losses since 1968: 868,000 AF lost in 1968; 1,553,770 AF lost in 1992; a difference of 685,100 AF.

21 Svendsen & Vermillion, 1993. These values are calculated in constant 1989 dollars.

22 Water Distribution Reports

23 Water Distribution Reports

24 Water Distribution Reports

25 Water Distribution Reports

26 E.g., Section 55 (b), "Amendatory, Supplemental and Replacement Repayment Contract Between the United States of America and the East Columbia Basin Irrigation District," Contract 14-06-100-6419, 18 December, 1968.

27 Water Distribution Reports. The three year average diversion prior to installation of the small head plants was 2,203,763 AF. The average diversion for the years 1990, 1991 and 1992 was 2,775,767 AF.

28 Telephone conversation with Merle Gibbens, Grand Coulee Hydroelectric Authority, June 24, 1994. The Grand Coulee Hydroelectric Authority is the entity which manages the administration of the seven small hydropower projects.

29 The estimate of the Grand Coulee Hydroelectric Authority is that operation and maintenance now costs about 3 mills per kwh and the debt service costs about 43 mills per kwh, based on the amount of power generated by the projects.

30 This calculation assumes the average output from the projects will remain at 515,900,000 kwh, that profit margin will be based on a rate similar to BPA's rate of 26.7 mills, and the operation and maintenance costs of production remain at 3 mills, giving a difference of 23.7 mills, which will be split between the districts and the two utilities.

31 In 1989 dollars. Page 60, Svendsen and Vermillion, op cit.

32 Public Law - Ch 14 - March 10, 1943, 57 Stat. 14.

33 Public Law 87-726 - Oct. 1, 1962, 76 Stat. 676.

Mr. MILLER. Thank you.

Mr. DeFazio.

Mr. DEFAZIO. Thank you, Mr. Chairman.

I have another commitment, so I will have to move along quickly.

I am going to ask the witnesses keep their answers as brief as possible.

This is pretty startling testimony from the Columbia Basin project, so I certainly want to give the people representing the districts an opportunity to respond, but let me see if I grasp it here.

Water is withdrawn from the Columbia River and the cost for pumping is .95 mils per kilowatt hour; is that correct?

Mr. BEAN. That is correct.

Mr. DEFAZIO. So that my local utility, which is a preference customer, has a preference rate around 2.4, I think actually 2.4 cents, which would be 24 mils?

Mr. BEAN. Correct.

Mr. DEFAZIO. So approximately 25 or 30 times the rate that is paid for the withdrawal of the water.

Now, you go on to state that the efficiency of the system since the system itself adopted the O&M, the project conveyance efficiency has dropped off dramatically by, from 70 percent to approximately 62 percent or 61 in there.

Mr. GOVE. It is down to roughly 8 percent.

Mr. DEFAZIO. Eight. I see a little blip up on this graph here, but, okay.

So 58 percent from 70 percent, to 58 percent, and a fewer dollars are expended per acre to assure efficient conveyance since the assumption?

Mr. GOVE. That is correct.

Mr. DEFAZIO. Are these actual dollars?

Mr. GOVE. These are 1989 constant dollars.

Mr. DEFAZIO. In 1969, it was \$37 in 1989 dollars, and in 1989, it was \$30 in 1989 dollars?

Mr. GOVE. Correct.

Mr. DEFAZIO. All right. And then sometime in the mid-80s, some small low-head hydroprojects were installed. Now, at what point—are they early on in the system? Is there much conveyance lost before you reach the low-head hydro, or is it way down in the system somewhere in—

Mr. GOVE. They are located throughout the system. A few of them are right at the top, and there are also a couple down from the South Irrigation District, and there are two, I believe, over in the Quincy Irrigation, so they are spread evenly throughout.

Mr. DEFAZIO. Okay. Because you are essentially alleging that there is motivation on the part of the district to continue to spend less for conveyance efficiency so that they will only withdraw more water, which is withdrawn at the rate of .95 mils—I have trouble with that number—.95 mils per kilowatt hour, and then run through—low head—hydro, which I assume is sold for more than .95 mils per kilowatt hour.

You are essentially alleging sort of an internal contradiction here that argues against efficiency. Is that correct?

Mr. GOVE. Well, there is also the efficiency—if they are benefiting from maximum power running through, if they, let's say that

there is a higher head project up high in the system. If they are maximizing flows through at that point, there is also evidence that they may just be running flows through.

As I said, there is increase in diversions from roughly about 300,000 acre-feet, which you are unaccounted for, we don't know where those are going, that may be what is kicking the efficiency levels.

Mr. DEFAZIO. Sort of the key is this 350,000 acre-feet.

Perhaps, if I turn to the other panel, they can tell us where that is going, where their conveyance efficiencies have dropped, and why given that drop they are investing less. And perhaps addressing some of those concerns that have been raised. Because those are extraordinary concerns, and I think these gentlemen deserve an opportunity to respond, because it certainly argues against any sense of economics I think that this committee holds.

Who would like to be the designated hitter here?

Mr. ERICKSON. I would be pleased to answer these questions.

Mr. DEFAZIO. Sure, could you address them precisely and quickly here.

Mr. ERICKSON. I see about six topics. I will try to hit them.

Mr. DEFAZIO. Well, let's do it in the same order. The withdrawal at .95 mils; given the problems, the revenue problems BPA has, and the fact that we need to encourage both more revenues and water-use efficiency, how do we justify the .95 mils?

Mr. ERICKSON. The .95 mils, is the actual cost of the generation of electricity at Grand Coulee Dam in the left and right powerhouse, plus the cost of getting it to our—

Mr. DEFAZIO. No, wait. But, BPA's wholesale rate is considerably above that for preference customers.

Mr. ERICKSON. BPA's preference rate, though, combines all their generating sources. It combines their transmission costs. Our power use is right at the dam, right at the point of generation, if you were—

Mr. DEFAZIO. I mean, is it something that was guaranteed in the Northwest Power Act or in some other legislation, or is this just a contractual arrangement with BPA?

Mr. ERICKSON. In the Columbia Basin Act, and also in the repayment contracts, the reserve pumping rate that we pay is the cost of production at the left and right powerhouse.

Mr. DEFAZIO. That is in the Columbia—in the act itself?

Mr. ERICKSON. In the act itself. The rate is not in the act, but the concept of using the generation at Grand Coulee Dam for the pumping.

Mr. DEFAZIO. Thank you.

Let's go on to their allegations regarding the O&M, the basically, the adjusted 1989 dollars, the drop off and the conveyance efficiency declines.

Mr. ERICKSON. As far as the O&M, the maintenance cost is, I don't think I agree with that. I think our maintenance costs are continuing to go up.

Mr. DEFAZIO. Could you provide that for the record; the comparison feet of assumption and things like that?

[EDITOR'S NOTE.—See appendix.]

Mr. ERICKSON. I would be glad to. As far as the water service contracts—

Mr. DEFAZIO. Flow, the efficiencies.

Mr. ERICKSON. They are right on the trend on the East Low Canal and the West Canal. I think they are on the numbers, and if they combine the Potholes Canal, that is not true of the entire system.

What has happened is on-farm efficiency has increased, which they pointed out, and we agree with that. In fact, it has been quite dramatic, but in order to respond to the center pivot technology and the irrigation scheduling, all of which save water, we are having to "on and off" our system much more frequently than in the past. We are not losing more in terms of seepage or evaporation on the upper canals, we are having to operate with higher operational waste to keep that on or off—

Mr. DEFAZIO. You are saying there is another flow that has to go by in between watering periods?

Mr. ERICKSON. Yes, sir. But that flow in turn is put in Potholes Reservoir and the Potholes Canal system. You take the whole project as a whole, it is very efficient, although the farmers' increase in efficiency is increasing faster than what we can. In order to accommodate these on-farm efficiencies, we have had to change the operation of project.

Mr. DEFAZIO. What if we scheduled them and therefore withdrew water on a more scheduled basis from the Columbia.

Mr. ERICKSON. That could be a possibility.

Mr. DEFAZIO. We are looking for ways to become more efficient here. BPA is proposing tiered rates for all its customers, and I assume we are going to see possibly a tiered rate—I know they are proposing a summer rate, but they may be looking at a tiered rate for irrigation customers that could encourage that sort of activity.

Mr. ERICKSON. We already have tiered pricing on the Columbia Basin project. I would not want everybody to leave with the wrong impression with the decline on conveyance efficiencies. Our delivery on a per acre basis, have all declined. We are diverting less per acre and delivering less per acre. And the cost of that decline in its actual conveyance efficiency, but overall, we are doing a better job on a per acre basis, both to the farmers and the districts.

Mr. DEFAZIO. Okay.

I go back to you for one last rejoinder. I would like to see this continue, perhaps the Chairman can investigate this a little more, and I really think you ought to respond in some detail to the points that have been raised here in writing.

Yes, sir, go ahead.

Mr. Bean.

Mr. BEAN. Representative DeFazio, I just wanted to make a comment on the explanation for the increase in withdrawal. Center pivot technology was well established by 1985 when the Columbia Basin project—if there were technical requirements that increased flows and thus generated additional withdrawals, that doesn't explain the fact that in 1986, coincident with the installation of the hydro-head projects, the increase in diversion shot up by 300,000 acre feet. Technological requirements didn't change mysteriously in the project in 1986.

Thank you.

Mr. DEFAZIO. Well, I think that would be an additional question.

Mr. ERICKSON. That date also coincidences with the start up of a close to 10-year drought in the Northwest. I think that probably answers more than the small hydro. We do not divert directly to small hydro, it is incidental denigration.

Mr. DEFAZIO. If you could address that in some detail in writing, too.

[EDITOR'S NOTE.—See appendix.]

Mr. DEFAZIO. I apologize to the next panel. I will try to get back. I have another commitment. I will get back as soon as I can.

Thank you, Mr. Chairman.

Mr. MILLER. Thank you.

Mr. Erickson, I couldn't see the map too clearly that you were pointing out, but apparently what you were suggesting is that in the land classifications work that was done, various tracts of land were classified as nonirrigable lands for one reason or another, and those in fact now are irrigable under current practices; is that what you are saying?

Mr. ERICKSON. They are either irrigable or it is unavoidable to farm or irrigate over them because of shape. Both cases are true.

Mr. MILLER. And the land classifications were done for what purpose?

Mr. ERICKSON. To design the farm unit to be sure you had a farm unit that had a viable capacity to make its repayment obligation and also to design the water allotment to make sure there was enough irrigable land Class 1, 2, 3 or 4 within the farm unit boundary you were about to establish to make it an economic success.

Mr. MILLER. And that would determine whether or not the farming unit and/or the irrigation had the ability to meet their repayment requirements; is that correct?

Mr. ERICKSON. Yes, sir. There are areas in the project where the land was predominantly Class 6 or higher. They were not platted in the requirements, they were bypassed.

Mr. MILLER. And that classification stage was used to determine the levels of repayment, the terms of repayment?

Mr. ERICKSON. Yes, sir. It determined the number, which acres in that farm unit that were going to be subject to the repayment obligation.

Mr. MILLER. So now that those lands are being irrigated, what changes have taken place?

Mr. ERICKSON. In terms of?

Mr. MILLER. Well, those lands, if it was originally determined that those lands added up to—is it in your testimony where you say you think maybe it is 10 percent?

Mr. ERICKSON. Yes, sir.

Mr. MILLER. Ten percent of your project; is that right?

Mr. ERICKSON. Within farm unit boundaries, about 10 percent is either Class 6 or high land.

Mr. MILLER. Let's assume just for the sake of discussion that that 10 percent is now being irrigated, you are not being charged for irrigating those lands as part of your ability to repay, it is calculated with that 10 percent in the equation; is it not?

Mr. ERICKSON. That is right. That land does not make a repayment. Those acres specifically do not make repayment because the balance of the acres constituted enough acres to cover the repayment obligation.

Mr. MILLER. Do they change the nature of the ability to pay?

Mr. ERICKSON. They could. In some cases, they don't. In many cases, they are unavoidable. Even though they—

Mr. MILLER. It is not a question of whether they are unavoidable. The questions are, you irrigate them and do you have an economic activity going on on that land now, and you are realizing some income from that property?

You say unavoidably. I assume it is unavoidable not to put the water on it and since you are putting the water on it, you decide to seed it and harvest; is that right?

Mr. ERICKSON. That is right.

Mr. MILLER. So the farm income, I assume, is greater than was anticipated when the contract was entered into?

Mr. ERICKSON. That could be, but that farm unit is still paying its proportionate share of the repayment obligation.

Mr. MILLER. I understand that, but if those 10 acres yield "X" number of dollars in addition your ability to pay, and the schedule of repayment may be different had you calculated those in—if we knew we were going to irrigate a 10 percent greater of a land mass and 10 percent of the land mass would yield "X" number of dollars, and we will have to compute the ability to pay and determine a level of government subsidy, that determination might, in all likelihood, would have been different; would it not?

Mr. ERICKSON. Yes. Retrospectively or retroactively, it would have been.

Mr. MILLER. Not retroactively. You went ahead and irrigated the lands. We gave the water based on a cropping pattern and an irrigation pattern that were set in an agreement and therefore changed unilaterally, but no suggestion was ever made that perhaps that would change the burdens that go with it; right?

Mr. ERICKSON. I am not exactly following the question.

Mr. MILLER. I think you are following it real closely.

Mr. ERICKSON. The point is that, if you look at the pattern of the land class, they did not intend for people to have to avoid that or they wouldn't have made those shapes, and if you—

Mr. MILLER. Well, somebody thought it was to their benefit. I assume if I was the farmer on the land of record at this time, I would not want to be charged against my account lands that I didn't think I could irrigate, lands that I didn't think I was going to get any economic return.

So in the land classification you said, fine, I have got 100 irrigable acres, and I own 150, but 50 is not irrigable, and I don't want to be charged against my ability to repay on my obligation. So we are going to lower the amount over this 40-year period or 50-year period that we are going to repay the Federal Government, because I can only contribute "X" number of dollars, because I only have 100 productive acres; it now turns out that I have 150 productive acres.

Mr. ERICKSON. I don't think that was the motive when they laid out—

Mr. MILLER. It is not a question of motives, it is a question of reality on the land, this isn't about motive. Why would I want to be charged against something that I didn't think was productive. And the Federal Government agreed not to charge you based upon the agreement in the land classification, that this was not productive land through this form of irrigation. Maybe you can dry farm it.

Mr. ERICKSON. You are trying to say that we should—because this land is being irrigated, what you are saying is we should have increased repayment obligations. And—

Mr. MILLER. I am not drawing a conclusion. I am asking whether or not it impacted the initial determination. There is a level of subsidy that was agreed upon over the life of this project. And the length of the subsidy, the amount of the subsidy was determined in theory by the ability of the project to repay. And it is discounted. It is discounted.

And the discount, as I understand it, and correct me if I am wrong, I am sort of working on an amalgamation of irrigation projects across the West. But essentially, it was discounted based upon or one of the factors was the land classification studies that determined whether or not these lands could be put into product, if I have use, and could be realized for the purposes of repayment. So it was decided based upon that "X" number of dollars would be received over a year, because that really reflected the ability to pay.

Is that not fairly accurate as to how the process was done?

Mr. ERICKSON. Yes, and then the number of Class 1, 2, 3 and 4 acres were divided into that to get the per acre return.

Mr. MILLER. Right. Right.

Mr. ERICKSON. Yes, sir.

Mr. MILLER. And the point I am making is that we now have lands that are productive, maybe every bit as productive as Class 1, 2, 3, 4 lands. And we are still stuck with the old mortgage, so to speak.

And one of the questions we are going to into here of the authorities of the Bureau, of the irrigation district, the landowners, one is whether or not to bring that other 10 percent into production, sort of changes the nature of the contract, that the contract is required to be renegotiated.

Or whether, in fact, it is a new contract. I don't know the terms of your contract, so I don't know that. I am just saying it is representing the taxpayers on this side of the dais here. The question is whether or not we are getting a fair return or whether or not you are entitled to have that subsidy continue.

I don't know the conclusion. I don't know the answer to that question. But you are suggesting there is only inadvertent and unavoidable lands that sort of make up this problem, and maybe that is true for your district. But in the IG's audit, it is in excess of 100 and—somewhere between 132,000 and 154,000 acres, discount that by whatever you want, given the discussion earlier today. It is still a lot of acres of land that are now in production from which there is no accounting for in the formulas developed to provide the degree and depth and length of the subsidy.

Mr. ERICKSON. Mr. Chairman, the figure in the IG report, I believe is like 46,000 to 54,000, or 42,000 to 54,000, but whatever it is, those are little bits and pieces scattered through all the farm units. And in order to farm the entire farm unit and get the repayment obligation back to the government, you have to farm the whole thing.

In the process of being able to do this, we are also able to use less water. The decrease in on-farm application and increase in on-farm efficiency that both us and the Columbia Basin Institute have talked of would not be possible if we had to avoid all those little bits and pieces.

So we think it was intended to be irrigated all along, they knew that when they drew up the repayment contract and they established the repayment level. We think we are completing our obligation as originally intended.

Mr. MILLER. I understand that. If I were sitting where you are sitting, I would say that. But those little bits and pieces could add up. They do add up to in excess of 100,000 acres within the audit, 100,000 times something is something. That is how the Federal deficit adds up little bits and pieces.

I just think it is a question that is open to discussion as to whether or not these things in 1990 properly reflect an ability to pay that is accurate in their ability to pay.

Mr. ERICKSON. Well, I have no argument that it is a subject for discussion. It has been discussed vigorously, and in the task force, I am sure, will continue to be discussed. We happen to disagree with the Bureau's position on that. Respectfully, sir, I disagree with your position on it.

Mr. MILLER. Well, that is the purpose of the hearing to determine that. The discussion that went on earlier here on the sale of water, that sale of water outside of your district?

Mr. ERICKSON. I am sorry. I didn't hear you.

Mr. MILLER. The discussion that went on earlier, that is the sale of water outside the boundaries of the district?

Mr. MCDANIEL. I believe they are talking about water service contracts. Those are authorized under our repayment contract.

Those lands are included within the district boundaries and are not within platted block boundaries but are within the boundaries of the district.

Mr. MILLER. But those were authorized—I thought Mr. Gove said those were authorized later by Congress. You went from one set of criteria to another.

Mr. MCDANIEL. The time line that he was discussing there was that in 1943, they weren't authorized. They were authorized, I believe in 1963.

The Bureau of Reclamation was operating the project at that time. They entered into some water service contracts from 1963 to 1969. Our repayment contract allows us to continue to administer those contracts and enter into new contracts under Article 28.

Mr. MILLER. Let me go back again. Those are within the boundaries of the district?

Mr. MCDANIEL. That is correct.

Mr. MILLER. Mr. Erickson, is it your testimony that the only lands that are, quote, "ineligible" lands under the broad discussion

of water spreading, are what you refer to as "unavoidable" or "inadvertent"?

Mr. ERICKSON. Nearly all. We don't know exactly, but nearly all that we are talking about. We have just a handful of incidences where people are outside their farm unit boundaries. It is just almost categorically within farm unit boundaries where there is an identified problem.

Mr. MILLER. Give me an example of the others.

Mr. ERICKSON. Where a circle would walk outside the boundary? In most cases—in order to fit the rest of the boundary, in most cases, the farm units all abut each other so they can't get outside their boundary even if they want to. But on edges of the watch, you will find a circle—

Mr. MILLER. There is not a farm unit arrangement that is totally outside of a district? That goes back to—

Mr. ERICKSON. No, sir.

Mr. MILLER. Mr. Dooley.

Mr. DOOLEY. Thank you, Mr. Chairman.

Following up on some of your questions, when this project was established, not being familiar with it, what was the time frame for the repayment of the capital cost?

Mr. ERICKSON. It is a 50-year contract. Each block, each development block as it came in, its clock starts as it was developed. So we have some blocks that are 40 years old. They are within 10 years of being paid out.

Some of the later blocks are only in about the 10-year time frame right now. They probably have another 40 years to go.

Mr. DOOLEY. Those areas which you sell to the water service, that you sell water to for water service contracts, then where do they pickup in terms of the repayment obligation?

Mr. ERICKSON. They pay a rate equivalent to the platted farm units. It goes into the block fund and they don't have a 50-year time period. Those are term contracts, 10-, 20-year contracts, and they pay the repayment during the term. If they are renewed, they pay again.

I don't know that there is any provision that they would ever stop repaying. I would like to note on those water service contracts also, the authority within our repayment contract, when they gave that authority, there was a cap on how many acres we could have. We are nearly at that. So it is about done.

Mr. DOOLEY. So I guess the point of discussion that the Chairman was getting at was whether or not, if we were going to consider the Class 6 as being productive agricultural areas, that we would have had either a shorter repayment period, is what you are driving at? Is that—that is correct, I guess.

Mr. MILLER. It is either short or the ability to pay is different. It is a different calculation.

Mr. DOOLEY. The figures that the IG report came up with, the 42,000, the 53,000, was submitted to them by the Bureau; what involvement did your districts have in terms of supplying those numbers?

Mr. ERICKSON. We were not asked, and we checked with the project office. Those numbers were generated at the project office. They didn't ask any of the districts.

Mr. DOOLEY. So I guess it would be possible to go back through all the plats and you could, again, calculate that, those lands that were Class 6 or higher; is that correct?

Mr. ERICKSON. Well, we know that there is, roughly, 65,000 acres of Class 6 in high land. To go out and establish how much of that is being irrigated, would require an aerial survey of the entire project. You do some of it from the ground but typically it would take an aerial survey to do it.

Mr. DOOLEY. The issue I guess, in terms of, if I was a farmer in your district—I mean, if we are talking about the equitable allocations of the cost of this district—or the repayment, is there any internal discussions on those areas which are now benefiting by irrigating Class 6 lands?

How are they contributing to the repayment in a way that is considered fair to other people that might have higher—lesser proportions of Class 6 lands? Do I make sense there?

Mr. ERICKSON. Are you asking, are we considering—

Mr. DOOLEY. Because of new technology, I now can make some Class 6 lands be as productive as Class 3 lands, and yet is my repayment obligation though different because I am now producing commodities off of Class 6 lands?

Mr. ERICKSON. No. The repayment obligation is attached to each farm unit in terms of the water allotment.

Mr. DOOLEY. So it is tied to the water allotment then?

Mr. ERICKSON. The repayment is tied to the water allotment. The O&M charge and water use is tied to the water.

Mr. DOOLEY. And so then if they are, in fact, irrigating Class 6 lands, they are making a contribution on par with Class 1, 2, 3, 4, whatever to the repayment?

Mr. ERICKSON. No, sir. They are making—they are paying for the water, the O&M component for the water, which also includes the O&M for the Bureau of Grand Coulee Dam, but they are not making a repayment as such on the original construction costs of the irrigation system.

Mr. DOOLEY. So the repayment of the construction is not tied to the acre foot charge? What is it tied to?

Mr. ERICKSON. The repayment is tied to the number of Class 1, 2, 3 and 4 acres in each unit. A Class 1, 2, 3 and 4, each has a different repayment level. You add that up. That is the annual repayment for that unit. Those acres also generate the given water allotment for that unit.

I would point out—

Mr. DOOLEY. And that is the issue, then, is that you receive a water allotment based on your Class 1, 2, 3 and 4 acres?

Mr. ERICKSON. Yes.

Mr. DOOLEY. And so if you choose to irrigate Class 6 lands, you are doing so with a water allotment that you are giving for the classes lower than 6?

Mr. ERICKSON. Yes, sir, but you also have—you either have to—you either then are going to forego some of the Class 1, 2, 3 and 4, or you have got to make that work for the whole thing.

I would point out that there is no forgiveness. If you are a farmhouse or your dairy happens to be on Class 3 land, there is no forgiveness of that repayment either. It is paid regardless.

Mr. DOOLEY. Yes, okay. I follow you now.

Is it basically that—as a district manager, if you were to try to adopt what some of the other people on the panel have stated, which is that some of these, the water that is currently being used on Class 6 lands should be allocated to greater in-stream flows, what are you in effect going to have to be doing on individual units, then, is basically reducing the allotment that is being provided for Class 1, 2, 3 and 4 soils?

Mr. ERICKSON. Well, to stay within the same allotment, if you were going to give an allotment to Class 6, that is how you would have to go do it. If you were going to forego irrigating Class 6, you would probably turn to some other technology and probably end up using more water. But you are right, you would have to re-average the water allotment, which is, in effect, what happens when they do that. It happens automatically as they operate it that way.

Mr. DOOLEY. Ms. Ransel, looking at the maps, if you do agree with the water district that this is a situation which is resulting in the irrigation of Class 6 lands, which we have identified as water spreading, what type of technology or methodology do you think could be incorporated to allow for the irrigation of the lands less than Class 6 that would result in some water savings?

What I am saying is, how do we irrigate this property and not irrigate Class 6 lands that can save water, or is there a way?

Ms. RANSEL. You know, it is certainly not the point of anything that I testified to, and I don't exactly know what the point of the question is, Mr. Dooley.

Mr. DOOLEY. The point is, is that we are saying that there is going to be an increase—if we dealt with this water spreading, if we didn't allow the utilization of water on Class 6 lands, is that we would, in fact, gain significant quantities of water.

I want to know, how do you irrigate these plats and these sections in a manner—and not irrigate Class 6 lands which are going to generate additional water?

Ms. RANSEL. Well, I don't think that is necessarily the point we were making. The point we were trying to make is that if new land is going to be put into irrigation or into production, that that is subject to a whole host of laws before you can do that sort of thing, and those laws include the Endangered Species Act, you would have to agree, and treaties with Indian tribes, so that before you made a decision to go ahead and irrigate more land, you would have to take those into consideration.

Mr. DOOLEY. Then you are contending that it is against the law for farmers within this district to irrigate Class 6 lands?

Ms. RANSEL. Well, as it stands right now, it is, that is right, and there may be some changes to take account of things that are truly unavoidable, and also, as the Chairman was trying to point out, it should also reflect ability to pay that may be different, and so forth.

And we have, in the task force, addressed the incidental or unavoidable, I think is probably a better word for it, situation, and I don't, you know, know precisely if this is one or not, but the fact is that in the task force, we have addressed that and said that there may indeed be some abbreviated way to deal with that situation. But we have also said that in that event, we want to make

sure that it is truly incidental, it is truly unavoidable and that somehow that doesn't swallow the rule, and that other laws that need to be complied with are complied with.

Mr. DOOLEY. Mr. Erickson, how much of the Class 6 land that is currently being irrigated would not meet the definition of being incidental or unavoidable?

Mr. ERICKSON. I am a little hesitant to make numerical estimates because we really don't know. There is about 65,000 acres of it within farm units. The IG report says up to three-fourths, by their numbers, as being irrigated.

My personal estimate, that is closer to someplace between a fourth and a half. How much of that is is unavoidable or how much could be avoided, I am just not sure.

I think the majority of what is being irrigated, though, is out in the middle of fields, surrounded or closely adjacent to irrigatable land, and by the shape of the overall unit and the overall field, to do it practically, whether farming or irrigation, whatever, it has to be irrigated.

Mr. DOOLEY. One last question is, you stated in your testimony that the incidental or unavoidable irrigation Class 6 high and right-of-way of lands within the farm unit boundaries has been authorized and permitted by the Bureau of Reclamation policy. This seems to be counter to some of the other statements that have been made. That has been—

Mr. ERICKSON. Both back in the days of Bureau of Reclamation operation and the days of district operation, we have numerous letters, communications from the Bureau, advising the district, advising farmers about going ahead and irrigating Class 6 land. It had to do with when, on request for reclassification, sometimes they did a request for reclassification. Sometimes they said you have sufficient water allotment, we are not going to reclassify it, just go ahead. We think there is enough right in there to constitute a policy.

Mr. MILLER. Let me go back to this point again. I hope I am not overstaying it here, but this issue of ability to repay and the repayment affects more than just you or the district. It, obviously, affects the Federal Treasury since we have forgone a level of payment that we might have been able to receive or could receive in the future if we understood the full capacity of these lands now, given water usage patterns and/or technology changes that have taken place, which are sort of one in the same.

It, obviously, affects also how the apportionment of these projects are paid for when we allocate the responsibility between power users and irrigators, because what you don't pay for, we load on to power users and we load on to the Treasury, and that is sort of a three-party agreement. And if people had been able to in a somewhat unilateral fashion change their arrangement, I think it is incumbent upon us to ask how does that affect the other parties to that agreement? How does that affect the taxpayer and how does that affect the power users?

Because I am sure there are some people who wish they would have been able to lower their power rates, to the extent to which this district or other districts or throughout the systems, are inte-

grated into that rate that they charge. So it is not an idle question and it is not a question without ramifications.

You keep responding, Mr. Erickson, that you are meeting your obligations. You just sort of rearranged it internally but you still meet your assigned payment and, in fact, you have, and that is quite correct. But it does not answer the question about what is the impact and is that impact, when we talk about equities, as we did earlier this morning, about how that cuts as to what is happening to other parties to this arrangement.

You understand the reason for raising the point?

Mr. ERICKSON. I understand the reasoning.

Mr. MILLER. Because, you know, we shift now and again, I expect that the Northwest already does it. But it is going to look like some of the situations we have in California, where we are trying to get into fish and wildlife mitigation and, of course, that always talks about dollars and water in sort of the same breath, and how you allocate those out. And whether or not your district has the greater ability to pay for some of that mitigation or not depends on then what happens to the other parties, to the State taxpayers, the Federal taxpayers, and to power users.

And, in our case in California, we tried to provide some assessment on water users that we thought they could afford to pay and we also put some assessment on power users, what we thought they could do, and then the Federal Government and the State governments are picking up an additional share of that.

So an accurate picture of the irrigation patterns and the economic viability of these districts is very important to these future considerations, too. This isn't just about going back and trying to correct the past, but we need this information so we can make a determination about what people's capabilities are or are not in the future as we get further and further into a number of the environmental issues that are raised, not just by us, but by obviously people who reside in Oregon and Washington who believe that these are multifaceted projects.

Mr. ERICKSON. I understand.

With our repayment contract, there are provisions that allow the reclassification to Class 6 and high land into an irrigatable category and that has been used in the past. The problem you run into addressing this,—and when that happens, and that comes into a repayment category. The problem is we are limited by our State water right to the number of acres. We are limited by our repayment contract to a total number of repayment acres.

We are going to have to adjust everything if you were to adjust that. And one of the points of the task force has been that they are not going to increase water allotments. They are not going to increase acreage levels or acreage entitlements on account of this, and we are saying that we are okay within the acres we have, within the water we have, we are okay now.

Mr. MILLER. You are okay, but it is not an accurate picture of your situation. It is simply not an accurate picture of your situation, that may be the view of the task force, but that may not end up being the view of us.

I would prefer to stay out of this, but if at some point down the road people are going to start submitting bills here for fish and

wildlife and habitat mitigation to the Federal Treasury, there is obviously going to be a question that is asked, and I appreciate they may not want to change it around, but it does not accurately reflect the current situation.

You are happy with your acres as classified. You are happy with your repayment contract, and properly so, but the fact is, if the contract—and maybe you were just trying to avoid coming to a new contract or substantial rewriting of the contract, but the fact is, you are irrigating more acres than the contract allows you to irrigate.

Mr. ERICKSON. We don't know that. I would submit, Mr. Chairman—

Mr. MILLER. Well, did the contract speak to classified lands? I don't know your contract either, so I shouldn't make a statement. But does your contract speak to classified lands?

Mr. ERICKSON. It speaks of delivery of water to the farm unit. It does speak to total number of acres of classified lands in terms of repayment, but in terms of exceeding our acres, I think that—you know, somewhere, a maximum of 10 percent within the farm units could be, if all the Class 6 would be, it could be, but in fairness, you would have to look at the same thing, how much of the Class 1, 2, 3 and 4 is not being irrigated at the same time.

So I think things are shifting around, but in the total picture, I would submit they were a percent or two over, and everybody is going to spend a lot of time looking at that and everything that is going to change is going to change by a percent or two. I just don't see the benefit.

Mr. MILLER. Well, the benefit depends on which end of the telescope you are looking at here, but the benefit may be substantially widespread. If this problem grows and we are looking at not 100,000 acres or 130,000 acres, but we are looking at several 100,000 acres westwide—and again, that goes to the ability to pay, that goes to what power users pay or don't pay, you start to see how the equation changes. It changes rather substantially.

And I don't know whether these figures will turn out to be accurate or not, but if I told you that I had a leak in the boat of \$50 million over eight years period of time, you would probably say to me as a taxpayer, why the hell don't you do your job and plug the leak. But those are revenues forgone that may grow to be a larger number, it may be a smaller number.

We don't know yet, and that is the point. We don't know.

And whether or not you have more Class 1 lands under your barns and your houses and your roadways, and Class 6 lands, and it is a wash, it is a wash. But I think the fact is that the question has got to be asked because we need an accurate picture when we are going around assessing people's obligations for future needs.

Whether or not that water ever ends up back in the stream, ends up on the Indian nations or ends up anywhere else is somewhat of a separate issue, because we don't know whether this whole process will yield any water. But that is not what this is about, because the other flip side of this is even if the water stayed exactly where it is, used in exactly the manner you want, the question is would it yield the Treasury some additional payment?

Would it yield the power users shouldering the other part of the burden, a different burden? And how does it affect our ability to

deal with fish and wildlife down the road and how is that going to be apportioned?

I mean, that is the equation that this committee has got to take a look at. Any further questions by—

Mr. Dooley.

Mr. DOOLEY. Just one real quickly.

How long are your contracts currently? Are they 40 years?

Mr. ERICKSON. Fifty.

Mr. DOOLEY. They are 50 years.

Mr. ERICKSON. Fifty-year repayment contract.

Mr. DOOLEY. So you don't have to renew again until—what triggers a renewal or a renegotiation, anything?

Mr. ERICKSON. There is no renewal in there. When the repayment is complete, the contract simply goes on with no further payment obligation, but all the terms of the contract remain in effect.

Mr. DOOLEY. All right, thank you.

Mr. MILLER. Well, that is assuming that there has been no material alteration of the underlying contract.

Mr. STEVENS. Mr. Chairman?

Mr. MILLER. Yes.

Mr. STEVENS. Can I say something? It sounds here like this is—the farmers are just a ratchet taking it in and not putting it out, but that is not the case in these irrigation districts. The irrigation district themselves replaced miles of ditch over the years since the 1950's to conserve water.

The farmers themselves have replaced miles and miles of ditch every year in the irrigation district, and all those properties are turned over to the United States. The farmer spends money and gives it back to the United States and the irrigation district, too, and I don't have any number over the last 40 years, but I am sure we spent in the millions.

Mr. MILLER. What are you turning over to the United States?

Mr. STEVENS. The pipelines. We put in pipelines for open ditches to conserve water. Some ditches, let's say, waste four foot of water in a half a mile. Farmer goes in, puts in a pipeline, because he goes over the right-of-way and, in a sense, water spreads but he saves four feet of water that stays in the river. There is an indication—

Mr. MILLER. Isn't that your obligation?

Mr. STEVENS. The farmer's obligation? The farmer goes out and buys his pipeline and then he gives the pipeline to the United States. They own it.

Mr. MILLER. In our State, we have a constitutional provision that says you can't waste water. So I don't know. That is kind of your responsibility.

Mr. STEVENS. What I am saying here, sir, is that the project was built and the project was wasting water. That is the way the project is. That is why the inefficiencies, and the efficiency ratings these gentleman are quoting from the Columbia Institute are where they are at. This is not a pipe system. It is an open canal. Between Billy Clap Lake and the verification headwaters, it loses something like three hundred-second feet that goes in the ground. While the water is lost, but it goes into the ground, sir, gets into the groundwater table. Is it actually lost or is it doing some other good?

And they have also indicated here that we should do something more on O&M. We spend an awful lot of money on O&M in the districts, but if we go out and spend a lot of O&M in some of these places, we are going to dry up wetlands, and then we run into a different problem. We are kind of in a Catch-22. If we do it, we are in trouble. If we don't, we are in trouble.

Mr. MILLER. Thank you.

Mr. DeFazio.

Mr. DEFAZIO. Well, just on that point, Mr. Chairman—and the water—I understand about recharge of groundwater in certain areas. That is a real concern, particularly where withdrawals are being made, and in other areas, not so much of a concern, but it is lost for fish.

I am certain the gentleman lives in the Northwest and is aware that we are going to some extraordinary lengths to try and perpetuate salmon on the Columbia at extreme costs to VPA ratepayers, and to say, well, the water is not lost because it goes in the ground, well, it happens particular in these drought years, the critical need is in the river, not the ground. We will have to wait for rain to recharge the ground. That has got to be a concern. And that comes back to my initial question.

Maybe I can phrase it more as a question than a comment, which is, this 570,000-acre foot increase. Now, again, the other gentleman answered the question by saying that it was due mostly to the drought and somewhat to do with efficiencies and scheduling problems, and did state that, in fact, we probably could do a better job of scheduling in terms of flows so that we wouldn't be flowing a bunch of water by in case someone was going to make a withdrawal at a certain time of day, but instead schedule those things and the flows could vary with time of day or people scheduling for major withdrawals.

But I am wondering how much that accounts for—I mean, are we saying that most of this 570,000 is being applied and that we have gone to a much higher average per acre of acre feet, something well over four; or what?

Mr. ERICKSON. Twenty-five years ago when the districts took over the operation, the on-farm use averaged—for the project as a whole averaged between four and four-and-a-half acre feet per year. Today that average is between three and three-and-a-half acre feet per acre, about an acre foot per acre improvement.

The per acre diversions have also declined but not as fast as the on-farm. So that is why you see the slopes of those improvements are different. And the thing that is causing it is—our operational scenario in the canals is causing us to carry more water to accommodate those on-farm systems, but both diversions and deliveries are improving.

The increase in gross diversions is related to additional acres that have come in during the 1980's due to water service contracts, and also related to the diversions in the 1980's and into the 1990's because of the drought conditions. Just about all but about 2 years of the last 10 years have been above-average use years just because of the weather pattern, but even if you look at those years compared to 25 years ago, they are better.

On our district, we estimate on the on-farm use, the combination of on-farm use and improved diversions is somewhere between 100,000 to 150,000 acre feet per year, that if it was 25 years ago, we would need that much more per year right now to operate than what we do.

So we think the combination of what the district has done, what most of the farmers have done is helping fish; that it is leaving water in the river that would have had to have been withdrawn if those improvements hadn't been made. I am not saying there can't be more improvements.

Mr. DEFAZIO. Right, but back to the testimony we were trying to rebut earlier, the CBI testimony, where they say the acreage increase is 45,000 acres. Do you agree with that?

It says during the time span since 1985, there has been a 45,000 acre increase in irrigated acreage and then they apply a per-acre figure to that to try and figure out what has happened with the 570.

Mr. ERICKSON. I am not familiar with the project. In my district, I figure it has been about 14,000 acres.

Mr. DEFAZIO. Okay. Well, that would be useful for the record to see if there are more acres than the 45. But if we use their figure of 45, and you talked about three, three-and-a-half acre feet per acre, they are talking about 3.79, which I guess would seem to be a fairly conservative figure and perhaps meet the sort of higher evaporation, hotter, dryer condition kinds we are in, that 3.79, and they still say that only accounts for about a quarter of the 570,000.

Mr. ERICKSON. I can't answer that.

Mr. DEFAZIO. I guess an uncharitable person would say, since you are making money on the hydro, that you don't have a strong incentive to decrease flows even if you could. I mean, you are making money on what is generated off two of the, as I understand it, two of the—one project gets 1.65 mils per kilowatt hour for 487,900,000 kilowatt hours produced at five of the projects. Is that accurate?

Mr. ERICKSON. Yes, it is.

Mr. DEFAZIO. And 2 mils for 28 million produced at one, which produces over \$850,000 annually in revenue to the districts. What do you do with that revenue?

Mr. ERICKSON. The majority of that revenue goes into system improvements. The purpose for building those power plants was when the debt service is done is about the time we are going to need some major rehab, and the reason was, we did not expect the Bureau of Reclamation to be around to rehab us at that time, or be around in the rehab business. The intention was to have revenues available for rehab.

Mr. DEFAZIO. Right. But there is a principle we talk about a lot, it is called "maintenance of effort." We get into it a lot around here.

I guess if I look at the increase of \$850,000 in income off those projects and I look at the per-acre investment in the system maintenance in 1989 adjusted dollars, it would appear that what is being required of individuals is substantially less than what was required in 1969. So I assume that accrues to the individual members of the district as opposed to any greater benefit.

So if you are paying \$30 per acre in 1989 dollars today and in 1969 you were paying \$37, and you are applying another \$850,000 of profits to it, I don't know how much below you get below the \$30, but it seems like something, a couple of bucks maybe, or a buck. I don't know.

But the point is, I really want to get at this issue because I think that they have aimed a dagger at you here that is—you have got to do a more effective job of defending yourselves. I mean, the issue that there is a large increase in a flow which happens to coincide, yes, with drought, but also to coincide with low-head hydro production, which also coincides with profits, which also coincides with a continuing trend of lower per-acre investments, that is an awfully powerful argument that I think region-wide is going to be looked at a little bit skeptically since I am not a benefiting district, nor are the majority of my colleagues in the Northwest in benefiting districts, other than our consumption of the food product, but that comes in terms of the costs of production. But the issue is, we are paying the subsidy, whether it is fixed by statute or otherwise, providing the pumping for the additional water at less than 1 cent per kilowatt hour which is then generating power which is sold for a profit. Now, that is a deal most of us would like to have.

So, I think, again I am going to ask that you look carefully at the allegations that are made here and account for these discrepancies, the 570,000, and account for that, and, you know, begin to refute these things. Because it is very damaging. I don't know the bona fides of this organization, but I mean, this is pretty well documented and footnoted. Your answers have not gone to the heart of some of their arguments.

So I would suggest that they provide that to the committee, Mr. Chairman, if that would be appropriate.

Mr. MILLER. Without objection.

[See appendix supplemental testimony.]

Mr. DEFazio. Thank you.

Mr. ERICKSON. We would be happy to. We are not diverting water for low-head hydro production, but we didn't realize that was on the agenda today and we—

Mr. DEFazio. I didn't either until I read this issue. I mean, this was pretty shocking to read, and to hear the testimony. So I mean, you know, I am dealing with it the same way you are, which is, boy, these are some real questions here that need to be answered.

Thank you, Mr. Chairman.

Mr. MILLER. Thank you very much for your help in this matter to all the Members of the panel.

The Chair would like to make a unanimous consent request that the testimony of the Idaho Rivers United be put into the record and that the Department of Ecology for the State of Washington also be made part of the record, if there is no objection.

[EDITOR'S NOTE.—See appendix.]

PANEL CONSISTING OF GAIL L. ACHTERMAN, OREGON WATER RESOURCES CONGRESS, SALEM, OR; REED BENSON, COORDINATOR, WATERWATCH OF OREGON, PORTLAND, OR; AND, SHERL L. CHAPMAN, EXECUTIVE DIRECTOR, IDAHO WATER USERS ASSOCIATION, INC., BOISE, ID

Mr. MILLER. The final panel will be Gail Achterman, who is with the Oregon Water Resources Congress out of Salem, Oregon; Reed Benson is a coordinator of WaterWatch of Oregon, of Portland, Oregon; and Sherl Chapman, who is the Executive Director of the Idaho Water Users Association.

Welcome to the committee.

And again, I am going to ask that you summarize and try not to be redundant if you can, because we are running out of time and I am simply going to have to leave you all here. You can stay as long as you want, but we are turning out the lights, but we look forward to your testimony.

Ms. Achterman, we will begin with you.

STATEMENT OF GAIL L. ACHTERMAN

Ms. ACHTERMAN. Mr. Chairman, members of the committee, thank you for the invitation to be here today speaking on behalf of Oregon Water Resources Congress.

My testimony, I believe, is available and has been submitted for the record, and I am simply going to skip the bulk of the written testimony and focus on some critical points that have come up in today's presentation.

The Oregon Water Resources Congress is committed to working with the Bureau of Reclamation to address and resolve water spreading problems. We appreciate the characterization and recognition on the part of the committee of the nature of the problem and that there are really two different issues: One is, what is the nature and extent of the contract breach or statutory violation? And once you have determined that, what do you do about it to remedy the situation in the wide variety of cases that you have in the West?

I think that my written testimony makes four points: First, and it is a point that has been made by others today, we really need to define what the problem is and distinguish between situations where there truly is a statutory violation, a breach of a project authorization by Congress, and situations where there is a breach of a contract provision that was not mandated by law. And I think the remedy that is available and appropriate in those two different situations is quite different and we need to recognize that.

Second, we believe that it is important to solve water spreading problems on a case-by-case basis. You have to look at the project authorization. You have to look at the project boundaries, you have to look at the contract provisions.

It is expensive and time consuming, but case by case is the only way to do it. The Oregon Water Resources Congress is concerned that if the Bureau is going to use the Pacific Northwest Task Force effort as the basis for a nationwide policy, and if that policy is then going to be applied nationwide, the effort is beginning to look an awful lot like rulemaking, and if we are going to have rulemaking, let's do rulemaking.

If we are going to have case-by-case resolution of contract disputes, let's have case-by-case resolution of contract disputes. But if it is going to be a nationwide policy, rulemaking needs to be followed.

Third, we need to look at fairness to individual landowners. I think that we sometimes think about the contracts as being with the irrigation districts and forget that the beneficial holder of the water right under State law and Federal law is the individual landowners. And many of the individual landowners involved in these cases, even if they had gone to excruciating efforts of investigation when they bought their farms, never would have had a clue that there was a problem on their land classification, on the boundary of the district, or any of these other factors.

And I think that is the situation we find, in many instances, in Oregon, and we need to assure fairness and we need to assure that the record of contract interpretation when we are truly talking about contract term interpretation done by the Bureau of Reclamation over many, many years is upheld.

Finally, I think we need to make sure that we follow the State transfer procedures, if we are going to have change of uses, and recognize that whatever the solutions are, they have got to be developed in a context that if water reallocations are going to occur, State law procedures are going to have to be followed.

The Oregon Water Resources Congress supports the Inspector General's recommendation that we need to assess the problem. We also really want to underscore the need for a solicitor's opinion. We think that members of the task force in the Northwest have asked for some written guidance on what the legal framework is for the Bureau to address these problems from the very beginning. It was requested by virtually all participants in the task force. The Inspector General recommends it.

We think it is much needed and will really help facilitate a discussion of how to proceed from here, and we support the Inspector General's recommendation that we need to have a schedule for curing the problem and the Commissioner's statements that this is going to take some time to sort out.

The one additional point that I want to make that was not addressed in my written testimony is your concern, Mr. Chairman, that why can't the district simply provide and report on this information about where are there unclassified lands, where are they irrigating out of boundaries? I can tell you, at least from experience on the ground in Oregon, that it has been difficult to determine what classifications the Bureau has done and what classifications the Bureau thinks apply.

The Oregon Water Resources Congress, about over four years ago, went to the Bureau and said there seems to be a problem on classifications, can we work with you to get all the reclassifications done in Oregon? We got those reclassifications done for the districts with certificated water rights, yet here again, the Inspector General, even though those reclassifications were all approved by the Bureau in 1983, the Inspector General's report does not reflect those reclassifications. It took a lot of work to do that.

We thought it was an important way to get ahead of the curve in solving this problem. And yet in every one of those districts we

found a lot of confusion by the Bureau itself as well as the districts on what the status of the classification was.

In another instance, we had quite a bit of confusion and have continuing confusion on what the boundary of an irrigation district is. The Bureau of Reclamation seems to think that the boundary is a different boundary than the local circuit court records and local government records indicate. And so if you ask these districts: Are you irrigating any lands outside your boundary? Their idea of what their boundary is may be different from the Bureau's idea of what their boundary is.

If you ask a district: Are you irrigating on any lands that haven't been classified by the Bureau? Again, there may be a very legitimate misunderstanding between the district and the Bureau as to what classification has been done.

Again, we believe that it is extremely important to address the problems posed by irrigation of ineligible lands. But as we work on the solution, we urge the Bureau and we urge Congress to recognize that the problems are complex, they need to be addressed case by case, and that solutions have to be implemented in full accordance with State water law and provide fairness to individual farmers who may have benefited from these practices and paid what they thought was their contractual obligation in accordance with the terms of the existing written contract and have no idea that there really is a problem.

The one final point I would like to make is the assumption of much of the prior discussion is that there has been a net increase in irrigated acres in particular districts because of water spreading practices. In many instances, in the Oregon districts, this isn't the case.

And I want to use just one example, an example where a freeway went right through the middle of an irrigation district, and what happened in many instances there, is that the farmers who had the land that is now under the freeway, the water rights for those lands were transferred to other lands, acre-for-acre transfer, went through the whole formal State water right transfer procedure, no net increase in irrigated acres, exactly the same amount of land irrigated, payments have been made under those repayment contracts for that amount of land, and—but the land that the water rights were transferred to outside the district boundaries, the Bureau-approved district boundaries, not outside the congressionally authorized project boundaries.

The district, in that instance, has requested the boundary change. They have gone through the State boundary change process, but in these situations where there is irrigation outside the approved district boundaries, it doesn't necessarily mean that there is any net increase in the total amount of irrigated acres under the terms of the repayment contract.

That is all I have to say, and I will turn it over to the next witness.

[Prepared statement of Ms. Achterman and Legal Issues Outline follow:]



**OREGON
WATER
RESOURCES
CONGRESS**

727 Center St. NE, Suite 107

Salem, OR 97301-3821

(503) 363-0121

FAX (503) 371-4926

**TESTIMONY OF
GAIL L. ACHTERMAN
ON BEHALF OF THE
OREGON WATER RESOURCES CONGRESS
BEFORE THE
HOUSE ENERGY AND NATURAL RESOURCES
COMMITTEE - OVERSIGHT SUBCOMMITTEE
JULY 19, 1994**

Mr. Chairman and members of the Committee, thank you for the opportunity to testify before you on the issue of water spreading in Bureau of Reclamation ("Bureau") projects. I am here today on behalf of the Oregon Water Resources Congress ("OWRC") representing irrigation districts and farmers throughout Oregon. OWRC has been a leader in addressing and resolving land classification issues in all Oregon Reclamation districts and is an active participant in the Bureau's Pacific Northwest Water Spreading Task Force.

OWRC is committed to cooperating with the Bureau and other interested parties to stop truly illegal use of federal project water. We are also committed to settling any contract compliance disputes between the Bureau and any districts. But OWRC agrees with your recent floor statement, Mr. Chairman, that today there is not even an accepted definition of water spreading and the scope of the problem will not be known for quite some time. Congressional Record p. H4412 (June 14, 1994).

Defining the Problem

Defining water spreading as the "unauthorized use of federally developed project facilities or water supplies on lands not approved by Reclamation for such use" confuses both the issue and possible solutions. No one can develop or agree upon how to solve water spreading problems without knowing the precise nature of the alleged contract breach or statutory violation. Only Congress can "cure" water spreading if water is being used for unauthorized purposes or outside statutorily authorized project boundaries. In contrast, most of the water spreading situations identified to date involve contract administration and interpretation problems related to completing land classifications and boundary change approvals. These problems should be fixed administratively by the Bureau.

Reclamation projects operate under thousands of separate contracts authorized by hundreds of Congressional statutes. The project authorizations and contracts vary tremendously. Some contracts do not contain a requirement that the Secretary of the Interior consent to changes in district boundaries. Other contracts qualify the boundary change requirement by stating that "no substantial changes" shall be made in the District without the written consent of the United States (Tumalo Irrigation District Contract, Article 28). The range of approved project water uses is also wide.

Accurately determining whether or not a breach of contract or a violation of project authorizing legislation has occurred is difficult and time consuming. For example, it took

the irrigation districts in the Umatilla Basin months of effort to review farm by farm the out-of-boundary water deliveries in order to determine why and how they occurred. In many cases, the water rights were transferred out of the district following formal state water rights transfer procedures. There was no increase in irrigated acreage. In others, the lands are within the exterior district boundary, described in the Bureau's own water right permit, yet outside of what Bureau records show the boundary to be.

Irrigation districts throughout Oregon, in the Oregon cooperative pilot reclassification project, spent an average of \$200,000 per district to have all of the lands within the district reclassified by the Bureau. Again, the project took months of work.

Until the nature and extent of water spreading is defined in the context of specific contract breaches or statutory violations, it is impossible to develop or agree upon fair solutions. Clear legal advice and guidance also is needed. OWRC and other task force members have asked for a written Solicitor's Opinion addressing the many legal questions posed by water spreading. Our outline of these questions is attached to my testimony. We need answers to these questions before any strategy for solving water spreading problems can be implemented.

Case-by-Case Solutions Are Needed

Because of the numerous contracts, project authorizations, and lengthy histories of contract performance

and interpretation, remedying water spreading problems will require case-by-case solutions. The Bureau identified water spreading, particularly failure to perform land classifications, as a significant issue as early as 1983. A major task force report on land classification was published in December 1983. The Bureau recognizes that irrigation of technically ineligible lands occurs throughout the west and in many cases actions or inactions of the Bureau contributed to the problem. See "Report on Data Available and Data Requirements for Analysis of the Ineligible Lands Issue" by the Ineligible Lands Task Force (February 4, 1985). In fact, the Department of the Interior characterized irrigation of unclassified, nonirrigable or noncontracted lands as "a longstanding practice throughout the Bureau" in 1985.

The fact that the Bureau had a major role in creating the problem does not mean that solving it should continue to be ignored. Nonetheless, solutions will have to be tailored not only to specific project authorizations and contracts, but also to the Bureau's course of action over many years. In Oregon, irrigation districts seeking Bureau approval of boundary change requests were told as late as 1989 that rather than requesting approval of individual boundary changes for inclusions and exclusions, approval of the State Water Resources Department final proof survey maps, when they were completed, would suffice for approval of all prior inclusions and exclusions made by the district. The state process often takes years. Should districts who followed the Bureau's instructions and

delayed submitting parcel by parcel boundary change requests now be penalized?

The Regional Director advised at least one irrigation district in writing that "the total repayment required from the District will not be increased" unless the service area ended up exceeding a specified acreage. Should the Bureau now be able to insist on contract repricing as a condition of approving boundary changes?

OWRC believes careful review and analysis of these issues and past Bureau representations and authorizations in individual cases must be considered before any conditions can or should be imposed on resolving alleged breaches.

The draft water spreading policy now under consideration by the Pacific Northwest Task Force and the Bureau's apparent intent to use the Pacific Northwest policy as the basis for west-wide resolution of all water spreading problems greatly concerns OWRC. If the Bureau chooses to adopt a uniform policy for solving all alleged cases of water spreading (with predetermined settlement conditions), rather than following a case-by-case approach, the Bureau should follow formal rulemaking procedures and prepare a programmatic environmental impact statement to analyze any proposed rules. Actions in any individual dispute should be delayed until rules are in place, rather than applying a national policy on a case-by-case basis without the benefit of rulemaking.

Fairness is Critical

Water spreading problems occur in most instances because of the individual initiative of landowners to improve their irrigation practices. Often technically ineligible lands are irrigated as a result of water conservation projects financed by the U.S. Department of Agriculture or the Bureau of Reclamation itself, such as where fields have been converted from gravity flow irrigation to sprinklers or where canals have been replaced by pressurized pipes. Buyers of these irrigated farms have no way of knowing that portions of their fields were not classified or that the Bureau had never approved a boundary change made by the local irrigation district. They bought the farm and they have paid the bills for the water they received from the district. The district in turn has paid the Bureau. Any policy which penalizes unsuspecting landowners with no notice that any problem exists by drying up their farm land or forcing them to reduce their water use is simply unacceptable.

Individual farmers and irrigation districts have long relied on assurances given to them by the Bureau regarding how to administer the contracts and the extent of authorized uses. In the past, when districts expressed fears that contract provisions were unclear or that the Bureau or Congress might be arbitrary in setting contract prices, the courts and Congress dismissed their worries. Then Representative Albert Gore, Sr., in 1947 addressed district trepidations stating:

"I cannot conceive of a government that would spend \$384 million building one of the great reclamation-irrigation projects of the world and suddenly because

some evil agent of Government had gotten into a bureau, turning its back upon a people who had been benefited by it and who in turn had greatly benefited the nation by production of foodstuffs and wealth. I just do not conceive of the United States as being that kind ***."

Hearings before the Subcommittee of the House Committee on Appropriations on the Interior Department Appropriations Bill for 1948, 80th Congress, 1st Session, 737. The Supreme Court agreed in Ivanhoe Irrigation District v. McCracken, 357 US 275 (1958), stating "[I]t seems farfetched to foresee the Federal Government 'turning its back upon a people who had been benefited by it' (citing then Senator Gore) and allowing their lands to revert to desert. The prospect is too improbable to figure in our decision." Times may change, but fundamental principals of fairness and reliance do not.

State Law Requirements Must Be Met

Those most anxious to solve the water spreading problem apparently operate on the assumption that water now delivered to ineligible lands might be reallocated to other purposes, such as instream flows. This is simply an unfounded assumption in many western states. Curtailment of irrigation to lands currently ineligible for irrigation use, by itself, will not result in any water being reallocated to instream uses. In many irrigation districts, current water right holders are not receiving the full duty of water to which they are entitled. These lands within district boundaries and long classified as irrigable are entitled to receive their full delivery of duty, particularly when projects have been

irrigation purposes. The water now going to ineligible lands would be delivered in many states to other farmers within the irrigation district. This is certainly the case in Oregon.

The Bureau's water rights are established under state water law. State laws throughout the western United States require a water right holder to apply for a change of use before an irrigation water right can be changed to an instream flow right. This requires approval of a transfer application by the State Water Resources Department or a State Engineer. In many western states, such changes cannot be made unless the state finds that the change in use will cause no injury to existing water users. If the ineligible lands have state water rights (and most do) and the Bureau proposes to transfer those water rights to instream uses, the owner of the ineligible lands could block the Bureau's change in use application.

The Bureau has repeatedly stated its intention to comply with state law in implementing any solutions to water spreading problems. Congress and the courts require the Bureau to follow state water law. Irrigation districts and farmers may well be willing to cooperate in such transfers and water reallocations if their ability to continue farming is protected. If, however, a policy is adopted and implemented which ignores the beneficial interests of individual farmers in the state water rights appurtenant to their land, it cannot be implemented successfully.

The Oregon Water Resources Congress agrees that contract compliance is important. OWRC led the nation in a

model reclassification project to assure that all districts in Oregon did have properly classified lands. The Bureau approved these reclassifications in 1993. OWRC also agrees that it is critically important to stop flagrant intentional instances of water theft from federal facilities and unlawful expansion of irrigated acres without payment to the federal government. But the water spreading problem has developed over many decades. The problem needs to be evaluated and defined on a case-by-case basis considering project authorizations, contract provisions, and years of Bureau contract administration. Water spreading solutions must be implemented in full accordance with state water law and will require fairness to individual farmers who have long benefited from and paid for federal project water used on their lands.

Thank you for the opportunity to speak today. The Oregon Water Resources Congress and I look forward to working with you on the development of a fair solution to water spreading problems in Oregon and throughout the west.

OREGON WATER RESOURCES CONGRESS
LEGAL ISSUES OUTLINE
WATER SPREADING TASK FORCE

1. Nature of Problem.

Given the definition of water spreading developed by the task force, how does each type of water spreading fail to comply with applicable laws or contracts?

Note: Confusion about the nature of water spreading and how it arguably violates laws or contracts has caused misunderstandings in task force discussions. No one can develop or agree upon how to solve the water spreading problem without knowing the nature of the different types of alleged violations. We believe each type of water spreading should be described clearly followed by an explanation of the nature of the alleged violation. Examples are:

- a. Use outside project boundaries that violates project authorization legislation.
- b. Use outside district boundary that does not violate project authorization legislation but that is a breach of contract for failure to obtain prior Bureau of Reclamation (BOR) approval.
- c. Use within a district boundary on unclassified land that violates the statutory requirement that lands receiving project water be classified as irrigable.
- d. Use on lands without a state water right that violates state law.
- e. Use for purposes not allowed in contract that is a breach of contract and possible violation of state water law.

Other categories of water spreading have been identified and should be addressed.

2. Past BOR Practices and Legal Analysis.

Once the nature of the problem is specifically identified several issues arise regarding past BOR practices in administering various contract provisions and past Solicitor's Office opinions on the law applicable to various water spreading practices. Specific questions include:

- a. What actions has the Bureau historically taken to approve or consent to changes in an irrigation district's boundaries or to deliveries of water outside those boundaries? How have those actions been evidenced historically (by letter to the district, by memorandum to the file, or by some other method)?
 - b. What standards and criteria has the BOR historically applied when reviewing and approving requests for inclusion or exclusion of land from irrigation district boundaries?
 - c. What is the legal basis for the standard BOR contract provision requiring approval of boundary changes?
 - d. Given the various contract terms and provisions regarding boundary changes, land classification, and authorized use of project water, what is the extent of the Bureau's discretion in approving requests for boundary changes, changes in use, land reclassification or other matters?
 - e. What is the purpose of the land classification requirement in the statutes and in specific contracts?
3. Procedures for Correction of Compliance Problems.
- Assuming that water spreading is occurring in violation of applicable laws or contracts, it is next necessary to address the legal requirements the Bureau must meet in correcting the problem. Legal questions associated with this issue include:
- a. What National Environmental Policy Act requirements must be met?
 - b. Is consultation under Section 7 of the Endangered Species Act necessary?
 - c. How does the Fish and Wildlife Coordination Act apply?
 - d. What notice, if any, must be provided to affected irrigation districts and farmers of the nature of the violation?
 - e. Do any other consultation or procedural requirements exist?
4. Authority to Renegotiate Contract

or Otherwise Condition Approval.

Assuming that the Bureau decides to correct any past compliance problem and meets all of the procedural requirements for doing so, additional questions arise regarding the Bureau's authority to renegotiate contract terms or otherwise condition approval of boundary changes or land reclassifications. Specific questions include:

- a. Can the Bureau impose conditions on any approval of a boundary change request, assignment request or reclassification? If so, what is the legal basis for this asserted authority.
- b. Does the Bureau consider a request for inclusion of additional lands or a request for classification of lands within project boundaries to be a request for additional benefits under the Reclamation Reform Act even if no additional water is used?
- c. Does the Bureau believe a new contract is needed with the district to provide water to new lands included within district boundaries, or does the Bureau believe an amendment to the existing contract is required?
- d. What is the legal basis for requiring any mitigation as a condition of approving boundary changes or reclassifying lands?
- e. What is the nature and extent of the BOR's obligation to assume that any reallocation of project water will not impair the efficiency of the project? Be detrimental to project irrigation service? Not impair the rights of any prior appropriator?
- f. Is public notice and opportunity for comment required before any proposed contract amendment?

5. Nature of Remedies.

Assuming that there has been a failure to comply with applicable laws or contracts, the nature of remedies available to the Bureau for breach of the contract or violation of the statute must be addressed. Legal issues include:

- a. Does the Bureau believe it has the authority to impose retroactive charges for water used on ineligible lands if the district delivering the water used no more water than it was contractually allowed to and paid for the full amount of water used?

- b. What authority does the Bureau have to reallocate water withheld from irrigation districts to correct water spreading to other uses? Would the Bureau be required to comply with state law requirements regarding changes in the nature of use and place of use? What if the instream use to which the water is reallocated is not an authorized project purpose.
 - c. If a contract requires an irrigation district to obtain the Bureau's approval before changing its boundaries or delivering water outside its boundaries, what does the Bureau believe its remedies to be if the irrigation district acts without obtaining such approval? Does the Bureau believe that it can enjoin deliveries to these lands even if the landowners are capable of and have made all payments to the district for the water? Does the Bureau believe that it can enjoin such deliveries without showing irreparable harm arising from a breach of the contract by the irrigation district? Because any damages caused by such breach of contract could be recovered in an action at law, does the Bureau have an injunctive remedy for breach of contract?
 - d. If unproductive lands are excluded from a project, does a landowner have a right to restore them under 43 USC § 423? Is the BOR required to offer any water used on such lands to other water users on the project pursuant to a preference right or on a rental basis?
 - e. Is the approval of the affected irrigation district required under 43 USC § 521 before surplus water can be provided for any nonirrigation purpose?
 - f. Can a contract be amended unilaterally by the BOR without the contract holder requesting an amendment? 43 USC § 423d.
6. Available Defenses.
- Assuming that there has been a failure to comply with applicable laws or contracts and the Bureau decides to correct the problem, what defenses are available to irrigation districts and other water users to resist any Bureau requested contract modifications or mitigation measures? Legal issues arising here include:
- a. If the Bureau accepted full repayment of contract obligations by a particular land owner for lands

lying outside the boundaries of an irrigation district, is the Bureau deemed to have approved the out of boundary delivery?

- b. If the Bureau had written or public notice of a transfer application or water right application for delivery of project water to lands outside the boundary of a district or to unclassified lands, is the Bureau deemed to have given its consent to the delivery of water to those lands?



**OREGON
WATER
RESOURCES
CONGRESS**

727 Center St. NE, Suite 107 ■ Salem, OR 97301-3821 ■ (503) 363-0121 ■ FAX (503) 371-4926

July 19, 1994

**RE: RESPONSE TO INSPECTOR GENERAL'S REPORT REGARDING
 "WATER USE PRACTICES ON BUREAU OF RECLAMATION PROJECTS"**

BAKER VALLEY IRRIGATION DISTRICT

The IG's report identifies 13,000 acres as water spreading. Reclamation reclassified the lands in 1988, but a final report has not yet been written.

The additional acres were approved by Reclamation for supplemental, interruptible irrigation from stored water, following the development of Phillips Lake Reservoir. An August 1989 letter from Reclamation to the State of Oregon Water Resources Department stated that "We (Reclamation) have collaborated with the District to enable the District to provide water service to additional lands from Phillips Lake when water is available in excess of the needs of the original service area. We are aware of, and have no objection to, the District's water right application for these additional lands."

A request for boundary changes has been in place since 1982, 14 years ago. A total of 3,900 acres outside the district boundaries are to be added to the district as agreed earlier by Reclamation. The district feels it has responded in good faith to all of the requests made by Reclamation, but to date the district has been unable to reach closure on the situation, leaving water users at risk for almost 14 years since the supplemental acreage was accommodated by Reclamation. The district has considerable documentation of communications relevant to Reclamation assertions.

OWYHEE IRRIGATION PROJECT

The IG's report indicates that there is 4,299 acres of water spreading within the project, 3,722 acres within the Owyhee Irrigation District and 577 acres within the Ridgeview Irrigation District. These numbers correspond to reclassified lands identified in the district's June 1993 reclassification report.

The Owyhee Project has authorization to provide water for 124,000 acres. This includes Idaho and Oregon lands, divided among a number of projects. The Owyhee I.D. is part of this project, irrigating 67,083 acres. The project records do not divide the water use among the districts within the project, but allocate a total sum of acres to be irrigated within the full project. That limitation has not been reached.

The district requested a boundary change for approximately 150 acres in 1989. It was verbally approved, but documentation has not been completed. The remainder of the reclassified lands are within the existing boundaries. The district has state water rights for project lands irrigated.



**OREGON
WATER
RESOURCES
CONGRESS**

727 Center St. NE, Suite 107

Salem, OR 97301-3821

(503) 363-0121

FAX (503) 371-4926

Oregon Remapping & Reclassification Project

OWRC is a national leader on reclassification

The Oregon Water Resources Congress led the nation in a model reclassification project to assure all irrigation districts in Oregon had properly classified lands.

House Bill 3111 was passed by the Oregon Legislature in 1993 to allow districts, at their cost, to remap their water rights and provide that record to the Oregon Water Resources Department to update water right records and to bring current thousands of transfers in the Department's backlog.

Districts each spent on average \$200,000 on this project in technical services, reclassification procedure costs and staff time. The districts in almost every case hired a fly-over of their irrigated lands. Then an engineer transposed water rights onto tax lot maps. Finally, a script of all of the legal descriptions was prepared to support individual section maps.

Early in the process, districts with federal water interests paid special attention to reclassify Class 6 lands to upgrade them to categories that qualify for inclusion in federal water project boundaries.

In coordination with the Commissioner of the Bureau of Reclamation, OWRC set up an **Oregon Demonstration Project** to complete the reclassification project. A retired Reclamation technician assisted OWRC and coordinated directly with the Bureau.

Boundary change requests have been pending from two to 14 years. Special legislation was required to be passed in Oregon in 1993 to accommodate long delays in federal approval of requested boundary changes.

VALE IRRIGATION DISTRICT

The IG's report identifies 2,906 acres of water spreading. This is the number of acres identified in the June 1993 reclassification report prepared for the district.

The project area consists of about 35,000 acres. The district currently serves 34,993 acres, within its limitation, with approved state water rights.

The Reclamation contract for the Vale Project stipulates the district "may, for purposes of assessments and matters of its own internal administration, make adjustments in the irrigable area from time to time, so long as the total irrigable acreage does not exceed the maximum irrigable area provided in the contract" (contract article 13).

In 1964, additional storage was provided by the district's construction of a dam at Bully Creek Reservoir, in cooperation with Reclamation. This project provided for additional irrigation of 2,993 acres. These acres are interspersed within the project lands, scattered over original farm units. There are only 35 acres outside the district boundary, for which the district has requested approval for inclusion.

CRESCENT LAKE DAM - TUMALO IRRIGATION DISTRICT

The IG's report describes 1,485 acres of water spreading. These are the same acres identified in the completed reclassification report of June 1993.

The original district boundaries cover more than 45,000 acres, but only 8,260 acres are currently irrigated within a service area of 25,000 acres, limited by available water supply.

District Boundaries: The district has not requested a boundary change as its records indicate that all of the lands served by the district are within the existing boundaries. All irrigated lands have approved state water rights.

The district has several sources of water supply. A 1954 Reclamation contract for rehab of Crescent Lake Dam would limit the identification of water spreading to only those district lands receiving supplemental rights from the reservoir. The delivery system rehab of the mid 1960s, is an R & B (rehabilitation and betterment) loan which would not relate to the water spreading issue. The district needs to identify which reclassified lands are subject to the two different contracts, one based on federal title and the other a loan on the district owned system.

DESCHUTES PROJECT - NORTH UNIT IRRIGATION DISTRICT

The IG's report indicates 9,840 acres of water spreading. A total of 1,040 acres of land was reclassified, according to the June 1993 report. A 1982 Reclamation report identifies approximately 8,800 acres of [report language cited] "typical water spreading--the district pumps Crooked River Project return flows from the Crooked River to supplement supplies from the Deschutes Project storage reservoirs." These lands have been irrigated for 25 years, with substantial investment on the part of water users to reclaim the arid lands.

The amount indicated in the IG's report includes the 8,800 acres from Crooked River plus the 1,040 reclassified acres. The reclassified lands were those related to the Crooked River division and are therefore double counted.

There are no water rights served outside the district boundaries. All lands irrigated have state approved water rights.

UMATILLA PROJECT: WEST EXTENSION, STANFIELD, WESTLAND, AND HERMISTON IRRIGATION DISTRICTS

The IG's report identifies 17,565 acres of water spreading. This figure results from the June 1993 reclassification documents for each district and from the scoping documents prepared by Reclamation in 1993. The full explanation of the acreage involved is provided on the attached table from the Bureau's scoping notice. The classification report identifies 16,821.3 acres as reclassified. The Umatilla Project includes 4 irrigation districts.

Section 208 of the Umatilla Basin Project Act of October 28, 1988, provided that the boundaries of the Umatilla Project Irrigation districts may be modified, upon approval of the Secretary of the Interior, to include such lands that received irrigation water service from those districts prior to October 1, 1988. This acreage was included in all the calculations of acreage available for the water rights exchange with the districts to provide for instream flows.

A signed agreement among the Umatilla Tribes, the districts, WaterWatch of Oregon and Reclamation negotiated in order to obtain the key state water right to implement the 1988 Act commits the Bureau to continue water deliveries to the out of boundary lands while the districts complete the boundary change procedure.

All lands irrigated are within the original Umatilla Project boundaries. Approximately 2,500 acres of irrigable land in one district have been relocated due to the construction of the John Day Dam and the resulting pool. Water rights and irrigable lands in various districts were transferred under formal state procedures when an interstate freeway displaced the original lands.

TABLE 1. PROPOSED INCLUSION OF LANDS INTO IRRIGATION DISTRICT BOUNDARIES
UMATILLA PROJECT, OREGON

[approximate irrigated acres and acre-feet (ac-ft) of Federal project water diverted]

CATEGORIES OF IRRIGATED LANDS PETITIONED FOR INCLUSION IN PROJECT BOUNDARIES	STANFIELD IRRIGATION DISTRICT		WESTLAND IRRIGATION DISTRICT		WEST EXTENSION IRRIGATION DISTRICT		HERMISTON IRRIGATION DISTRICT		TOTALS	
	acres	ac-ft	acres	ac-ft	acres	ac-ft	acres	ac-ft	Total acres	Total ac-ft
CATEGORY I	148	561	332	963					480	1,524
CATEGORY II	167	633	991	2,874	478	2,151	1,091	3,927	2,727	9,585
CATEGORY III			8,589	7,215	39	176			8,628	7,391
CATEGORY IV	3,234	4,080			2,496	11,232			5,730	15,312
Totals by Districts	3,549	5,274	9,912	11,052	3,013	13,559	1,091	3,927	17,565	33,812

DEFINITIONS OF LAND CATEGORIES

Category I Lands--Lands with primary (decreed or permitted) and secondary (McKay Reservoir, permit 7600) water rights which are being assessed but which the districts report were inadvertently omitted from the district boundaries.

Category II Lands--Lands outside the district boundaries to which water rights were transferred, pursuant to Oregon law, from lands which were included within the district boundaries.

Category III Lands--Lands which have water delivery contracts with the irrigation districts and which lie outside the district boundaries.

Category IV Lands--Lands not included in the district boundaries but are being irrigated with water rights obtained subsequent to signing the most recent Bureau of Reclamation contract.

STATEMENT OF REED BENSON

Mr. MILLER. Mr. Benson.

Mr. BENSON. Thank you, Mr. Chairman, Mr. DeFazio.

My name is Reed Benson and I coordinate the Umatilla Basin project for WaterWatch of Oregon. WaterWatch is a nonprofit environmental group that works at the State and Federal levels to protect in-stream flows throughout Oregon. WaterWatch has worked extensively on the issue of water spreading for several years and we are very pleased to have the opportunity to testify before this committee.

We have a written statement that we have provided for the record.

WaterWatch first learned about water spreading in the Umatilla River Basin of Northeastern Oregon. Earlier today, you heard a pretty solid history of Umatilla Basin water spreading and attempts to resolve it from Chairman Minthorn of the Confederated Tribes of the Umatilla Indian Reservation, so I won't provide a lot more details about the Umatilla, but I do wish to make a couple of points to distinguish it from what has been said earlier today.

First of all, the kinds of water spreading that has been happening in the Umatilla are very different from the sort of incidental Class 6 within-boundaries sorts of actions that have led to water spreading in the Columbia Basin Project. These are, by and large, movements of water outside of Federally approved district boundaries contrary to specific provisions in the irrigation district contracts.

Second, there are a number of ways that this has happened. Gail has outlined some of the more benign of those ways.

There have also been some considerably less benign ways in which water spreading has taken place, including the situation where one district took water that had been conserved through some changes in their irrigation technology, took that conserved water and sold it to an irrigation district that had neither a State water right nor a Federal contract to take it, and that sale was made in spite of a specific provision in that district's contract prohibiting that kind of sale. So there are a wide range of ways that this kind of activity has taken place.

WaterWatch got involved in the Umatilla Basin because we got concerned that illegal water use was going to undercut the Umatilla Project exchange that Chairman Minthorn talked about, and prevent the restoration of in-stream flows in the Umatilla. That is why we blew the whistle on water spreading in the Umatilla Basin and demanded that Reclamation enforce the law. I will say a little bit more later on the Umatilla.

Looking more broadly at water spreading, why is it a problem? If you set aside the repayment issues that were discussed at length on the previous panel, we would really identify three things:

First of all, it is not legal. It violates Federal contracts, Federal reclamation law, project authorizing legislation, and/or State law. WaterWatch believes that those who use water, a public resource, should have to play by the rules, and that the State and Federal water resource management agencies should enforce those rules. That is fundamental.

Second, water spreading can adversely affect the quality, quantity and timing of irrigation return flows. We all like to think of water conservation as being a good thing, but when conserved water is spread to additional lands for irrigation, the result can hurt stream flows.

Moreover, since Reclamation must assess the potential for toxic or hazardous return flows as it classifies lands for irrigation, the use of water on unauthorized lands raises the risk of major water quality problems such as occurred at Kesterson National Wildlife Refuge. This was talked about in the IG report but not mentioned earlier today.

Third, illegal water use is intolerable given the current state of western rivers and fisheries. In the Pacific northwest, Salmon and steelhead are seriously in decline, along with many species of resident fish. Fish need plenty plenty of high-quality water for spawning, migration, rearing and just plain survival. Some or all of the illegally spread water can be kept in-stream; it could improve some vital habitat for salmon and other imperiled fish. The Interior Department IG report suggests that.

The draft Snake River Salmon Recovery Plan recommended that the Bureau investigate water spreading in the Snake Basin. The National Marine Fisheries has expressed real strong concern over the Umatilla Basin district's proposed boundary expansion.

It is important to note, however, that stopping water spreading won't automatically improve stream flows. Illegal water use must stop, but in addition, water that has been illegally used must be dedicated to in-stream uses.

WaterWatch believes that a contractor who has used water in violation of the terms of the contract or law should lose their rights to that water. Reclamation should take control of that water, re-allocate it to meet in-stream needs where they exist and ensure that water is legally protected in-stream.

Our written statement provides more details on WaterWatch's suggested approach.

Obviously, not everyone sees water spreading as we do. That is one reason why we have tried to approach the issue by dealing directly and constructively with irrigators and other interested parties. We encourage the Bureau to set up a broad-based task force in the Northwest to look at water spreading, and we have been an active participant on that task force.

We hope it will help the Bureau approach water spreading in a way that not only complies with the law, but also meets the needs of all the key interests who care about this issue.

WaterWatch has also worked hard to negotiate solutions to our disputes in the Umatilla Basin. We have been talking with the Confederated Tribes, the irrigation districts, the Bureau and sometimes the State. It hasn't been easy, but we did enter into signed agreements in 1992 and reached agreement in principle in water use in 1994, which again, Chairman Minthorn talked about this morning. Unfortunately, we weren't able to close this year's deal, but I hope anyway that we are all committed to keep talking.

To its credit, the Bureau has finally decided that it needs to do something about water spreading in the Umatilla Basin, regardless of what the other parties are able to come up with. The Bureau has

taken some very important positions in the Umatilla, and I will mention just four points real quickly:

First, it is stated that lands not covered by contracts cannot receive project water, and last year, it ordered one district to stop delivering water to unauthorized lands.

Second, and this is very important, the Bureau has said that the districts cannot rely on continued deliveries of water they have used in violation of their contracts.

Third, it has told the districts that they must prepare a full Environmental Impact Statement before they can expand their boundaries.

Fourth, Reclamation has said that in boundary expansion process, it will give primary consideration to ensuring that fish needs are met.

If Reclamation takes those positions and makes them stick, not just in the Umatilla but westwide, then it will really show that it has evolved from the Bureau of Dams. If it can enforce its laws in contracts and provide benefits for in-stream flows, Reclamation will show that it has become an agency which can manage the waters of the West for the benefit of the public.

Thank you.

[Prepared statement of Mr. Benson follows:]

STATEMENT OF WATERWATCH OF OREGON
BEFORE THE U.S. HOUSE NATURAL RESOURCES COMMITTEE
OVERSIGHT AND INVESTIGATIONS SUBCOMMITTEE

HEARING ON RECLAMATION PROJECT WATER SPREADING

JULY 19, 1994

WaterWatch of Oregon is pleased to offer testimony to this subcommittee on the subject of water spreading--the use of federal project water on lands, or for purposes, not authorized by the Bureau of Reclamation. WaterWatch is a nonprofit environmental group which works at the state and federal levels to restore and protect streamflows throughout Oregon.

Water spreading is a major issue in the Pacific Northwest. A 1983 Bureau report estimated that water was being spread on about 440,000 acres in the region. Even that estimate may be low, however, since no one really knows how big the problem is. The Bureau simply has not done much to uncover illegal water use, and has done even less to stop it.

Reclamation officials at both the regional and national levels are finally getting serious about ending water spreading. The Bureau faces heated opposition, however, from irrigators and others who defend the status quo. Any actions the Bureau takes to address water spreading will be very contentious.

In the Northwest, however, the water spreading debate is taking place within an even larger controversy. Throughout the region, fish populations are in extreme peril. Many stocks of salmon and other anadromous fish are either listed under the Endangered Species Act or are being considered for listing. Resident fish, from trout to suckers, are also in serious decline. The crash of these fisheries has been devastating to the communities that depend on them, from fishing towns on the coast to Indian Nations east of the Cascades.

The significance of the Northwest's salmon and steelhead runs, however, extends far beyond economics. These fish were the basis of the local indigenous culture, and in many ways these fish remain the defining feature of the region. Still, they are vanishing. Virtually everyone seems to agree that we should take swift and serious action to save and restore the fish. The question is, what can be done?

We must begin by recognizing that fish need water. The point may seem obvious, but it seems to be generally ignored. Recently, however, two Oregon studies have confirmed the importance of streamflows for anadromous fish. The Confederated Tribes of the Umatilla Indian Reservation and the Center for the Study of the Environment (CSE) both have established a strong positive relationship between river flows and returns of anadromous fish two to four years later. These separate studies involving two different rivers and two different species both show that as streamflows go, so go fish. CSE director Daniel Botkin was recently quoted in the *Oregonian* as saying that the clear lesson of his study "is do everything you can to raise minimum flows."

It is in this context that we consider large-scale spreading of Reclamation project water in the Northwest. WaterWatch and other environmentalists believe that the Bureau should consider the illegally used water as a potential source of streamflows badly needed for fish. The draft recovery plan for the listed stocks of Snake River salmon took the same position: "The BOR should correct undocumented or illegal water diversions in the Snake River Basin. This should include an investigation of unauthorized uses of water such as 'water spreading'."

WaterWatch commends the Chairman and the subcommittee on holding hearings on this important issue. We offer the following views on the water spreading problem and the

difficulties Reclamation will face in solving it. We also suggest a set of principles Reclamation should follow in ending water spreading and providing public benefits in western rivers.

What is water spreading and how has it happened?

Water spreading is the use of Reclamation project water on lands not authorized by the Bureau for such use. Project water is water developed under a federal irrigation project, or diverted or delivered through facilities built by Reclamation. Lands may be unauthorized to receive water because of (1) limitations of the legislation authorizing the federal project, (2) requirements of the water user's contract with the Bureau, (3) the statutory requirement that lands be classified by the Bureau as irrigable, or (4) requirements of state water law. The application of federal water contrary to one or more of these restrictions is water spreading.

To put it simply and broadly, water spreading has happened because irrigators have applied water to lands not authorized to receive it, and Reclamation has not enforced the requirements of federal statutes and contracts. Each individual case of water spreading, however, has its own cause(s). A recent Commissioner of Reclamation described some of the practices that have resulted in water spreading:

Frequently, projects formulated for gravity flood irrigation from open unlined ditches have been converted over time to lined ditches, pipe laterals, and water-saving sprinkler technologies. Thus, conserved water becomes available to serve additional lands on the fringes of the project or within project and district boundaries. The application of such conserved water and uncontrolled waste water to ineligible lands is sometimes a knowledgeable, willful violation of Stated [sic] water rights, project authorizations, and water service or repayment contracts.

In other cases, water has been spread to lands classified as unirrigable which are adjacent to or surrounded by irrigable land.

Why is water spreading problematic?

As described above, water spreading violates federal contracts, federal statutes, state water law, or some combination of the three. It is not simply a legal problem, however. It also may harm both the federal treasury and the environment.

Repayment problems. By applying water to unauthorized lands, water users may pay less money to the Bureau than they rightly owe. Reclamation repayment contracts require water users to repay the federal government's costs of construction, operations and maintenance in regular installments. Since the 1939 Reclamation Project Act, the amount of these installments has been tied to water users' ability to pay. Many repayment contracts specifically link these annual installments to a particular irrigated acreage within the contracting district. Where users apply water to additional lands without the Bureau's approval, their payments may be smaller than they should be. If the Bureau were to approve irrigation of new lands, it could change the basis of repayment so as to increase the annual installments and reduce the amount lost to the government on zero-interest loans.

Reclamation has recognized that it is losing money because of water spreading, but it has never estimated the extent of the loss. Reclamation official Phillip Doe, however, offered a ballpark figure in 1992 during his whistle-blowing Congressional testimony:

If we may assume that 1,000,000 acres are receiving water illegally because of the lack of a proper contract, then we can also come, through other calculations, to some approximation of the dollar value of the abuse. For instance, assume that each acre, on average, carries a water duty or need of 3 acre-feet and that the water, on average, carries a price tag of \$5 per acre-foot. Under these assumptions, the American public is losing \$15 million a year in recoverable costs, all as a result of the deliberate dithering of the managing federal agency.

Environmental problems. Water spreading also raises two distinct environmental issues. The first relates to the effect of individual cases of water spreading: an irrigator who spreads water may alter the quantity, quality and timing of return flows to the detriment of local streams and rivers. The second issue arises from the cumulative effects of water spreading on the rivers and streams of the West.

Individual cases of water spreading may harm the environment by diminishing the quantity of irrigation return flows. If an irrigator takes measures that reduce her seepage losses, and then uses the water saved to irrigate more land, her consumption will increase and return flows will decrease. If she moves water from lands near a river to lands much more distant, return flows to the river could be diminished or significantly delayed. In other words, water conservation measures that lead to water spreading can actually harm streamflows.

The use of water on unauthorized lands also may contribute to impaired water quality. Irrigation has created water quality problems in many parts of the West (most notably Kesterson National Wildlife Refuge) because return flows carry salts, heavy metals and other contaminants. When the Bureau classifies a parcel of land, it determines whether irrigation of that parcel will cause such problems. Thus, when an irrigator spreads water to unclassified lands, she increases the risk that return flows from those lands will adversely affect surface and ground water quality.

The major environmental controversy over water spreading, however, involves its cumulative effects on the rivers of the West. As explained above, project water is being used illegally on vast areas of land at a time when many salmonid fish stocks are sliding toward extinction in the Northwest, due in part to low flows in rivers and streams. The collapse of

these stocks has had particularly severe effects on Native American tribes, whose economy, culture and religion center around salmon. These circumstances have led Northwest environmentalists and tribal representatives to call for an end to water spreading and a reallocation of illegally used water. If this unlawfully used water could be kept instream, Western rivers would have better fish and wildlife habitat, recreational opportunities, and water quality.

What has Reclamation done about water spreading Westwide?

Reclamation recognized in a 1983 report that federal water was being spread to over 660,000 acres Westwide. For unexplained reasons, however, the report stated that land classification work needed to remedy water spreading would be a low priority, and would not be completed within five years.

Reclamation then formed an informal "Ineligible Lands Task Force" led by the Pacific Northwest Region. This group issued a brief report in 1985, primarily emphasizing the need to collect more and better information on water spreading before proceeding to solve the problem. The report also identified "incentives for taking positive action to address the 'water spreading' issues," options for solving the problem, and constraints to implementing these options. Later that year, Reclamation opted to dissolve the task force and delegate the water spreading problem to the regional offices. "Because of the complexity and magnitude of the problem," wrote Acting Commissioner Robert Olson, "we are taking a long-range approach to resolution."

Long range, indeed. Today, Reclamation can claim only limited progress in addressing a few scattered cases of water use on ineligible lands. It has issued guidelines for processing

water users' requests to approve new lands for irrigation; these guidelines set forth requirements for compliance with NEPA and other federal laws. Reclamation is now processing its first expansion proposal (that of the Umatilla Basin irrigation districts, described below) under these guidelines. But the Bureau's water spreading problem--conservatively estimated at two-thirds of a million acres in 1983--has not yet been dented.

The Bureau now seems determined to change that. It has assembled a task force in the Pacific Northwest to provide public input on how to approach water spreading. The Water Spreading Task Force includes representatives of environmental groups, irrigation interests, Native American Tribes and state governments, as well as Reclamation officials. Commissioner Beard spoke to the task force in its first meeting, and he made it very clear that Reclamation would end water spreading. "You should know that there is no doubt . . . that we have to comply with the law, that we will comply with the law, and that we will solve this problem one way or the other."

A Case Study: Water spreading and streamflows in the Umatilla River Basin

The Bureau is beginning to comply with the law in the Umatilla Basin of northeastern Oregon, where the conflict between water spreading and instream water needs has been heated. Low flows and fish passage problems in the Umatilla, due largely to irrigation diversions, have virtually wiped out formerly abundant stocks of salmon and steelhead. The State of Oregon has recognized that in the Umatilla Basin, "Low streamflows are the chief limiting factor to salmonid production. Low streamflows impede and block fish migration, increase water temperatures, and contribute to reduced habitat and competition from warm water fish species."

The Confederated Tribes of the Umatilla Indian Reservation have reserved fishing rights under their 1855 treaty with the United States. Early in the 20th century, however, the Bureau built the Umatilla Project to provide irrigation water to local farmlands, and the fish soon disappeared. In 1988, Congress authorized a massive exchange project, funded by federal and Bonneville Power Administration dollars, which utilizes Columbia River water to restore flows needed to fulfill the treaty fishing rights of the Confederated Tribes while preserving the local agricultural base.

Four irrigation districts have contracts with the Bureau under the Umatilla Project, and they have spread water to approximately 17,000 acres of land outside their boundaries. These districts have now asked Reclamation to approve changes to their boundaries to reflect their actual water use, which would effectively legalize their current water spreading. As of this writing, the Bureau is at the "scoping" stage of analyzing the districts' request under the National Environmental Policy Act. But the National Marine Fisheries Service--the agency with primary responsibility for anadromous fish--has already taken a dim view of the proposal:

We are concerned that the action proposed in the scoping document will: 1) authorize present potentially illegal water use in the basin; 2) encourage additional water withdrawal from the Umatilla that does not legally exist at present; 3) preclude the Umatilla project from achieving its Congressionally mandated purpose; 4) preclude the project from meeting the Umatilla Tribal anadromous fish restoration expectations; and 5) set an unacceptable precedent for dealing with the over-allocation of water resources. In short, we believe that this apparent after-the-fact authorization of potentially illegal water use is extremely inappropriate.

Water spreading has created intense controversy in the Umatilla Basin. WaterWatch blew the whistle on illegal water use in the Basin, and for years we have fought for better enforcement of the law and improved streamflows in the Umatilla River. The Confederated Tribes seek restoration of the river and its fishery, based on their senior treaty rights. The

irrigation districts defend their historic practices and seek to maintain their existing irrigated acreage. These parties have often tangled, but have also made a serious effort to resolve differences through negotiations. It hasn't been easy, but WaterWatch believes this constructive approach can lead to solutions which benefit everyone.

Reclamation has recognized, however, that it must take action even if the parties cannot agree. The Bureau has established some important precedent in dealing with water spreading in the Umatilla Basin. First, it has stated that lands not covered by contracts cannot receive project water, and it has ordered one district to stop delivering water to unauthorized lands. Second, Reclamation has taken the position that the districts cannot rely on continued deliveries of water they have used in violation of their contracts. Third, it has told the districts that they must prepare a full Environmental Impact Statement before their request for boundary expansion can be approved. Finally, it has stated that if the districts proceed with boundary expansion, the Bureau will give primary consideration to ensuring that fishery needs are met. We commend these recent actions by Reclamation, and urge it to apply these precedents as it addresses water spreading beyond the Umatilla Basin.

Ending water spreading and restoring streamflows

WaterWatch has strongly urged Reclamation to take actions which not only end water spreading, but also benefit the public interest in the waters of the West by improving instream flows. The Bureau has vowed to do the first, but said little about the second. Reclamation will face opposition at every stage, however, and it will need to resolve a number of difficult legal and policy issues.

Legal issues. Many of the legal issues surrounding unauthorized water use have never been decided. The Bureau has no regulations regarding water spreading or contract enforcement. In addition, since contract enforcement seems to have been a low priority for most of Reclamation's history, little directly relevant case law exists. Thus, while Reclamation statutes and cases give the Bureau considerable authority and latitude, they provide few definitive answers to the legal questions surrounding water spreading.

One matter seems fairly clear: Reclamation has the power and the responsibility to enforce legal and contractual requirements. The Bureau has traditionally taken care of its irrigation constituency, and it has not enforced those rules--such as the former residency requirement and 160-acre limitation--which irrigators disliked. The courts have found nonetheless that Reclamation generally retains its sovereign authority, and carries a continuing duty to enforce laws it has long ignored. As one court said in a case involving the Bureau, "Inaction based on previous inaction cannot be elevated into an administrative determination to which the courts should defer."

Stopping all deliveries to unauthorized lands would obviously end water spreading. But that action would not, by itself, do much to restore streamflows. Many Western rivers are already overappropriated, with current users not getting all the water they want. If deliveries to unauthorized lands are stopped, irrigators with Reclamation contracts may simply apply more water to those lands eligible to receive it. If these irrigators' diversions are reduced, others may take the water for irrigation, either under new Reclamation contracts or under existing state-law water rights. Thus, stopping water spreading--unless further changes are made--may merely scramble irrigation patterns, leaving rivers as dry as ever.

If the Bureau seeks to translate water spreading into streamflow restoration, it must take at least four distinct steps. First, it must terminate existing unauthorized deliveries—that is, it must end the status quo. Second, it must assume control of water that has been illegally used. Third, it must designate all or part of that water for instream uses. Finally, it must take steps to protect instream water from diversion for out-of-stream uses. Each of these actions raises legal issues that are beyond the scope of this testimony, but we have provided some analysis of these issues to the staff of this committee.

Policy issues. Even if Reclamation had unfettered discretion in addressing water spreading, it nonetheless would face difficult policy choices. The Bureau must balance the competing interests of several constituencies in seeking water spreading solutions. Reclamation's traditional clientele, irrigated agriculture, would like to resolve legal problems in a way that preserves the status quo as much as possible. U.S. taxpayers—a constituency that the Bureau has long ignored—would benefit from increased payments to the Treasury by those who have spread project water. Tribes and environmentalists now have the Bureau's ear for the first time, and they seek reallocation of illegally used water for instream purposes.

If Reclamation were to cut off all existing deliveries of water to unauthorized lands, but take no further action, none of these interests would be satisfied. Irrigated acreage would shrink, no additional revenue would flow to the Treasury, and environmental benefits would be uncertain. This option might meet legal requirements, but it would produce few winners.

For this reason, WaterWatch and other environmentalists have argued for an approach which would allow water spreading to be legalized under certain conditions, but would also provide for instream flows and for greater payments to the Treasury. Such an approach would

face several obstacles, but it could provide benefits for many parties interested in water spreading.

We are trying to make this approach work in the Umatilla Basin. WaterWatch has been involved in negotiations with the Confederated Tribes, the irrigation districts, and the Bureau in an effort to resolve disputes over water use in the Basin. Earlier this year, the parties reached an agreement in principle that would provide short-term water for both agriculture and anadromous fish during the time that Reclamation considers the districts' boundary expansion proposal. In general, the agreement in principle requires each district to provide and protect Umatilla River flows needed for fish, and to waive their rights to the quantity of water they have used illegally. In return, the districts have the possibility of obtaining temporary contracts from the Bureau to allow the irrigation of lands outside their boundaries. All parties retain their rights to seek a different solution in the long run. Unfortunately, this agreement has not been finalized, and future negotiations are uncertain.

An environmental approach to water spreading

WaterWatch believes that Reclamation should address water spreading under the following principles:

A. *Water spreading is illegal and cannot continue.* Reclamation must determine where ineligible lands are receiving water under federal contracts. It then must notify all water spreaders that the practice is illegal and that they must cease deliveries to ineligible lands by a date certain unless the Bureau approves these lands for irrigation. Reclamation must receive a formal expansion request before it can consider approving new lands for irrigation. The Bureau should also impose controls, such as periodic contract audits, to prevent future water spreading.

B. *Reclamation must assess environmental impacts before approving new lands for irrigation.* Reclamation must comply with NEPA in considering expansion requests, and must seek input from all affected interests and meet all requirements for public notice and participation. All expansion requests require at least an Environmental Assessment, and major requests (those exceeding a few thousand acres) will need a full Environmental Impact Statement. The entity requesting expansion must provide all funding for the necessary environmental studies. No request in a river basin may be approved until Reclamation has considered the cumulative impacts of water spreading in that basin.

C. *Reclamation must determine the amount of historic illegal water use.* Reclamation must determine the amount of water which has been diverted annually for application on ineligible lands. That quantity of water may no longer be diverted under the Reclamation contract, even for use on eligible lands. Thus, a person who violated a Reclamation contract by water spreading loses his right to take as much water as he illegally applied.

D. *Reclamation should reallocate illegally used water to benefit the public.* Reclamation should reallocate illegally used water where it has authority to do so. Where flows are insufficient to support public values in a natural waterway, Reclamation should reallocate illegally used water diverted from that waterway to the extent necessary to provide sufficient streamflows. Public values include fish and wildlife (including threatened and endangered species) habitat, water quality and recreation. Reclamation must take all actions necessary under federal and state law to ensure that water reallocated for public values is legally protected instream. Illegally used water may be reallocated for out-of-stream uses only if legally protected instream flows are sufficient to support public values. In reallocating water among competing

out-of-stream uses, Reclamation should maximize public benefits.

E. *Reclamation may approve new lands for irrigation under certain conditions.* Reclamation may approve requests to irrigate new lands under a contract, but total diversions under the amended contract must not exceed historic diversions for use on eligible lands. In addition, any adverse environmental impacts of a change must be fully mitigated. Reclamation should condition approvals on the implementation of specific water conservation measures by the requesting person. Reclamation must adjust repayment obligations to reflect the irrigation of new lands. Finally, water may be applied only to lands with state-law water rights.

Conclusion

WaterWatch commends Reclamation for turning its attention to the long-neglected issue of water spreading. Its job will not be easy, but as Commissioner Beard has said, the Bureau must comply with the law.

We also believe it must meet other responsibilities. These include Reclamation's responsibilities to the national public it has so often ignored, to the Indian Tribes it must serve as trustee, and to the rivers it has forever altered. In addressing water spreading, the Bureau has both a duty and an opportunity. We urge Reclamation to do all it can to make a wrong thing right.

STATEMENT OF SHERL L. CHAPMAN

Mr. MILLER. Mr. Chapman.

Mr. CHAPMAN. Mr. Chairman, Representative DeFazio, thank you for inviting me here today.

My name is Sherl Chapman, I am Executive Director of the Idaho Water Users, which is an association of irrigation districts and canal companies in Idaho.

Let me say at the outset, and it has always been our position, that we do not support willful and flagrant violations of the law or the Bureau of Reclamation irrigation district contracts. We have stated that in the task forces we have been involved with, and many of our irrigation districts have taken steps in Idaho to curtail the use of water illegally.

However, as Gail has pointed out, many of the irrigation districts have very vague contracts. The provisions are somewhat permissive, hard to interpret, and in many cases, they have relied on the Bureau assertions and direction from the Bureau and Bureau employees in order to do some of the things that they have done.

In many cases, again as Gail pointed out, the boundaries are very confused. For example, we have one irrigation district in Idaho whose project authorization tells them that they can irrigate 57,000 acres in four counties. And that is it. There is no metes and bounds, there is no legal description or anything else. So to try to define what is water spreading in that area is very difficult.

As you pointed out earlier, Mr. Chairman, I included a map within my testimony showing a number of steep and rough areas, right-of-ways for canals, and so forth, and pointed out in my testimony that much of this is now irrigated. My purpose for providing you with that map is to demonstrate the complexity of the issue and the need to try to solve this on a case-by-case basis. In that particular irrigation district, their contract allows them to go in and irrigate those lands and so they are not violating the provisions of their contracts but, in many cases, this could be interpreted as water spreading.

They have buried many of these canals and laterals. They have leveled some of these lands and much of it is just covered by a sprinkler system. Some of this may or may not be justifiable in other districts, but at the same time, it shows and demonstrates the complexity and difficulty of handling this particular situation.

With regard to the data collection from the—for the IG's report, I have been in this business 21 years now and so I was able to go back and talk to many of the Bureau employees both active and retired that were involved in the original 1983 and 1985 Bureau reports as well as the IG's report, and have listened to the testimony today. The Bureau employees that I talked to and the irrigation district managers I talked to that were involved in those issues that provided the data ultimately for the IG's report, tell me that they were directed to provide an office estimate of what they thought were watershed lands within their district or in that area.

They were specifically directed not to go into the field because the Bureau did not want to spend that amount of time in collecting that data. I think that demonstrates the softness of the figures, and I believe that the public as well as the irrigators deserve better

accuracy and not speculation, because I think the figures are inflated.

You have heard a lot of discussion here about reallocating water for environmental purposes. This is a contractual dispute and it should be settled as such. If in the resolution of that dispute water is freed up and it could be made available for environmental purposes through State laws and through a willing process, then so be it. That is fair.

The Federal Government has not had the authority, at least in Idaho, or in most of the areas, I believe, to reallocate that water unilaterally, and they would be remiss if they tried to do that. Additionally, the water saved will either be held as carryover, at least in Idaho, or it will go to the next junior appropriator.

Looking at the IG report, if you just assume those figures are accurate and you immediately curtail all of that water, curtail all of those deliveries you are talking about 46,000 acre feet of water in the Snake River Basin. That is in a system that delivers 36 million acre feet at its mouth each year, so that is less than a 10th of a percent of water that would be left in that river, if you just curtailed all of those acres and left that water in the river.

But that will not happen. That will not resolve environmental issues and it will not save salmon.

Again, the Bureau has to accept some of the responsibility for what has happened. You have heard discussions this morning of oral agreements and oral direction. Many of irrigation districts have much correspondence directing them to go ahead and do certain projects and do certain things. That is in writing.

They relied on their government. They relied on those assertions to do what they did. And for that suddenly to become evil is inappropriate and is unfair. Certainly, many issues need to be resolved but they need to be resolved on a cooperative basis.

We believe that the Bureau is on the right track in its process of looking at the problem, if there is a major problem, doing an inventory, getting some accurate data, discussing the issues, and then resolving it. But we will not support, assuming the total financial burden of inventory in this analysis, and we will not allow the Bureau to just unilaterally reallocate water. We just can't buy into that.

I am willing, my association is willing and our irrigation districts are willing to work with the Bureau on a cooperative and a friendly basis. If not, if we were unwilling to do that, I wouldn't have spent many hours on an airplane, many hours on the latest two task forces in another effort to try to help the Bureau resolve this problem.

Mr. Chairman, I would like to conclude with just one other statement. We have heard a lot of discussion this morning about the Federal subsidy and the Federal Government picking up the tab for these irrigators. The IG's report has some numbers quantified, speculative as they may be. We have to remember those acres are producing food and fiber for our Nation and certainly the farmers that are irrigating that land receives some financial benefit, but the economy of the United States also receives benefit. Those subsidies go both ways.

Right now in Idaho, the Idaho taxpayers are picking up an \$8 million price tag for the Federal Government because they refuse to pay for their fair share of filing fees for our Snake River Basin adjudication. Also, it was interesting on the same page of the paper that had the article on the water spreading issue in Idaho, yesterday was a news release that there is \$1.8 billion in welfare fraud and abuse last year.

I would hope that the Congress would look at these priorities and attack the worst priorities and/or the highest priorities and the worst cases first.

Thank you.

[Prepared statement of Mr. Chapman follows:]

Idaho Water Users Association, Inc.



PRESIDENT
1ST VICE PRESIDENT
2ND VICE PRESIDENT
EXECUTIVE DIRECTOR

Vernon E. Case
James Bright
Terrell Sorensen
Sheri L. Chapman

410 SOUTH ORCHARD, SUITE 144
BOISE, IDAHO 83705
208-344-6690 - OFFICE
208-344-2744 - FAX

LYNN TOMINAGA
Water Policy Analyst
DEWITT MOSS
NWRA Director

DIRECTORS

LELAND E. CLARK
Aukon - District 1
RONALD CARLSON
Firth - District 2
TERRELL SORESENSEN
American Falls - District 3
GAYLE FISCHING
Burley - District 4
DAN SHEWMAKER
Kimberly - District 5
DICK MARSHALL
Jerome - District 6
CLYDE HUTTON
Homedale - District 7
GOLDEN KEETCH
Montpelier - District 8
MITCHELL SORESENSEN
Moore - District 9
RICHARD ONEIDA
Shoshone - District 10
VERNON E. CASE
Wilder - District 11
HENRY WEICK
Boise - District 12
DENNIS LAUMEY
Caldwell - District 13
HELEN BYRNS
Payerette - District 14
DON SATCHWELL
Post Falls - District 15
HAROLD MOHLMAN
Rupert - District 16
HOWARD CONRAD
Mortue - District 17
BILL TAYLOR
Idaho Falls - District 18

DIRECTORS-AT-LARGE

JAMES BRIGHT
Mortue
BRUCE MACPHEE
Rupert

ASSOCIATE DIRECTORS

SHIRLEY LINDSTROM
Boise
JIM WILHITE
Boise

COMMITTEE CHAIRMEN

TED DIEHL
Legislative
JAMES BRIGHT
Resolutions
VIRGIL TEMPLE
Education
CHARLES CONNER, JR.
Water Quality
ROY ORR
Nominating & Awards
CHARLENE ORR
Rural/Urban Affairs
DON SATCHWELL
Municipal

TESTIMONY OF SHERI L. CHAPMAN, EXECUTIVE DIRECTOR IDAHO WATER USERS ASSOCIATION, INC. BEFORE THE HOUSE NATURAL RESOURCES COMMITTEE OVERSIGHT AND INVESTIGATIONS SUBCOMMITTEE ON THE ISSUE OF WATER SPREADING JULY 19, 1994

Mr. Chairman, Members of the Subcommittee:

My name is Sheri L. Chapman and I have been the Executive Director of the Idaho Water Users Association for the past 21 years. The Idaho Water Users Association is a non-profit, educational association composed of over 180 irrigation districts and canal companies in the State of Idaho. We represent approximately 2/3 of the irrigated acreage in Idaho and nearly all of the acreage irrigated under reclamation projects. I am also the Chairman of the Water Spreading Subcommittee of the Reclamation Reform Act Committee of the National Water Resources Association. I want to thank you for the invitation to testify before you today on this issue and will focus my testimony, in particular, on the State of Idaho but also as any potential policy or resolution of the water spreading issue relates to much of the rest of the western United States.

The Bureau of Reclamation has defined water spreading as the unauthorized use of project water on ineligible lands. This is a rather simplistic statement and generalizes the issue of water spreading much more than it deserves to be. While many have the perception that water spreading is the outright illegal use of water on lands never considered for irrigation by Congress, this is just simply not the case. While there may be acts of outright piracy or illegal diversions in some cases, water spreading for the most part has resulted from honest efforts to improve irrigation efficiency and crop production through the use of better technology and better farming practices.

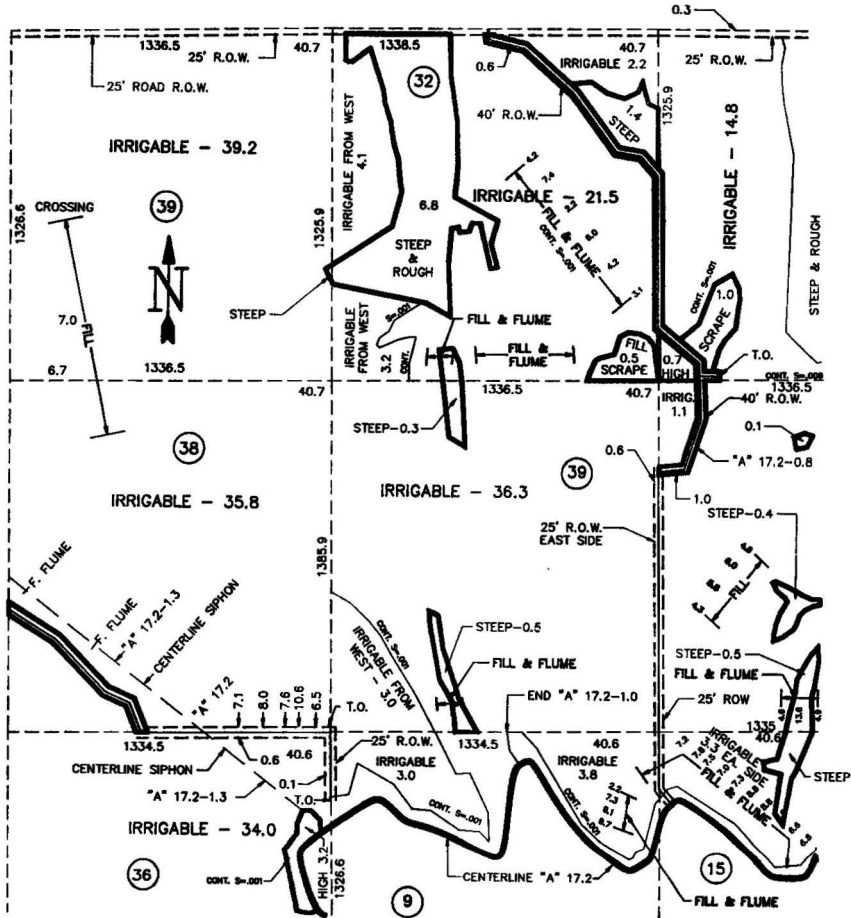
Couched in these terms, one needs to evaluate the water spreading issue in its true context. Water spreading may occur through agreements between irrigation districts or projects and farmers who wish to use water on an annual basis for lands not previously classified as irrigable or perhaps outside an irrigation district which, in some cases, is permitted by contract. Water spreading also can occur as a willful and flagrant violation by an individual farmer of the contract between an irrigation district and the Bureau of Reclamation. In those cases, at least in Idaho, when such activity becomes known, the district moves to terminate

TESTIMONY OF THE IDAHO WATER USERS ASSOCIATION
JULY 19, 1994
PAGE 2

that activity because obviously it affects the water supply of the rest of the water users within the project. However, water spreading usually occurs incidentally through improvements in irrigation systems, farming techniques or conservation programs.

I've included a copy of a portion of an irrigation district project plat map in my testimony for your review as an illustration of what has actually occurred in most cases. As you can see from the illustration, there are many tracts of ground outlined in red. These are lands that were initially unclassified or classified as unirrigable when the project was developed. Most of these lands are classified ineligible to receive irrigation water because they are either steep or rough or slightly higher than the rest of the ground around them which prohibited them from being served by gravity irrigation techniques. With the advent of sprinkler systems, major land leveling programs, quite often sponsored by the Soil Conservation Service of the U.S. Department of Agriculture and financed by Farm Home Administration, or efforts to conserve water through piping of laterals and canals, these lands have now become subject to irrigation and produce food for our nation rather than lying idle. The areas outlined in red include steep and rough lands, high lands and lateral rights-of-way. In this particular case, the lands outlined in red are nearly all now irrigated, but according to the Bureau's definition are water spread lands and thus somehow become ineligible to receive water because of this allegedly evil and insidious practice. We consider this type of water spreading incidental and argue that it should be authorized for a number of reasons that follow simple common sense and logic. As you can easily see, any policy that would seek to eliminate these lands from being irrigated could not be administered. Looking at the figure, you can see many of the ineligible lands are less than one acre, are irregular in shape and defy administration if a policy was adopted to curtail application of water to these lands. Additionally, as you will note, these lands are generally surrounded by irrigated lands that have produced crops for years. Why now should these lands no longer be irrigated and produce food?

The issue of water spreading has been one of discussion with the Bureau of Reclamation since the early 1980's. A report was prepared in 1983 and again in 1985 by the Bureau of Reclamation and now we have just seen released a report by the Inspector General's office all purporting to reflect acreages considered to be water spread lands. These numbers, in our view, are tremendously inflated and inaccurate. In order to understand our challenge to these numbers, one has to understand how they were developed in the first place. I've been working with irrigation districts in Idaho since before any of these studies were conducted. I have contacted irrigation district managers, ex-Bureau of Reclamation employees and others involved in the development of these so-called studies in an effort to determine the methodology used for their development. In the case of the 1983 and 85 studies, Bureau of Reclamation officials were requested to **estimate** the number of acres they thought might be involved in their



TESTIMONY OF THE IDAHO WATER USERS ASSOCIATION
JULY 19, 1994
PAGE 4

particular region. These officials then reviewed data within the agency and then contacted a few irrigation district managers requesting that they provide an "office estimate" of the ineligible land that might be receiving water within their district. They were specifically told not to spend the time and effort to do a field survey. Upon receipt of a few office estimates, the Bureau then developed percentages from those few estimates and applied them region wide. Because of this obvious lack of professional approach, I have personally checked some of the acreages discussed in the 1985 report as being water spread with the effected districts. Black Canyon Irrigation District is reported in the 1985 report to have about 6,500 acres of water spread lands. A cursory review by the irrigation district manager indicates that number may be closer to 2,000 acres (less than 5%) than 6,500 acres. All of this appears to be incidental water spreading which most irrigation districts believe is authorized by their contract and certainly appropriate in the context of efficiency and water conservation. A & B Irrigation District in central Idaho is reported to have approximately 7,000 acres of water spread lands mostly under Class VI classification. These lands were part of the original authorization but were designated as small tracts originally unirrigated in the project but with a contractual provision that allowed the irrigation district board to initiate irrigation at any time if felt appropriate.

It is our understanding that the Inspector General's report has incorporated most of these acreage figures into their report without further verification. During a recent meeting with nearly all of the irrigation district managers in the State of Idaho, I specifically asked them whether or not they had been contacted by the Inspector General's office in it's study of the water spreading issue. No irrigation district manager in Idaho has yet been found that was contacted by the IG's office on this issue. Therefore, one can only conclude that the IG's report is as worthless as the 1983 and 85 reports on this issue. If there are to be charges by either the Bureau of Reclamation or Congress that there is a significant water spreading problem, then the farmers, irrigation districts and the public deserve to have accurate information and not speculation.

Assuming that the Bureau of Reclamation feels it necessary to address this issue in detail and that Congress deems it necessary to resolve the few problems that truly exist, both the Bureau and Congress must realize that the issue can only be resolved through careful evaluation of individual project authorizations and irrigation district contracts. While I'm sure that the Bureau and Congress would like nothing better than to adopt a simple, generic approach to this issue, it will be impossible. Individual project authorizations and contracts vary widely within regions and obviously to those who understand the reclamation program the spaceholder contracts in the Pacific Northwest are completely different from the water service contracts in the southwest. To assume the same approach can be used west wide on this issue is illogical and will create

TESTIMONY OF THE IDAHO WATER USERS ASSOCIATION
 JULY 19, 1994
 PAGE 5

hardship for Congress, for the Bureau and for water users. Additionally, environmental group and tribal interests have tried to link the resolution of the water spreading issue to satisfaction of environmental needs and Endangered Species Act recovery plans. If there is, in fact, a problem of water spreading in some areas, that issue needs to be resolved. However, one should not try to link accomplishment of environmental goals with this issue. Water spreading is a contractual dispute between the Bureau of Reclamation and individual projects or irrigation districts. Environmental goals may need to be met in many areas but to assume that somehow these goals can be achieved through resolution of water spreading problems is inaccurate and misleading to the public. If there are major water spreading problems that can be found and through resolution of those problems some water is freed up, there may be some environmental benefits. However, any environmental benefit achieved must be consistent with the irrigation district contracts, the state water resource goals and state water law.

It is important to note and all parties involved in this issue must understand that curtailment of water spreading in the western United States will not result in significant water being made available for instream flows. First of all, we believe the acreage estimated to be water spread acres is grossly overstated and without firm basis. Second, individual contracts, particularly spaceholder contracts, between irrigation districts and the Bureau of Reclamation dictate that water supplies not applied in any given year may be used as carryover as a hedge against the water supply for the next year. In the Pacific Northwest, this carryover is the only thing that has allowed agriculture to survive during the recent seven year drought. Third, water saved through the curtailment of water spreading does not belong to the federal government or the Bureau of Reclamation. It belongs to the respective states and is administrable only under state law according to the Reclamation Act. If water supplies are enhanced through curtailment of water spreading and the Bureau seeks to reallocate that water to environmental purposes, they must follow the state process which, at least in the northwest, entails an application for change in the nature of use with opportunity for any water user or citizen in the state to protest the change and that the Bureau must prove there is no injury to any other water right holder. This process can be particularly burdensome to the Bureau of Reclamation if the resolution of this issue is not done on a friendly, cooperative basis. As an example, the Bureau of Reclamation sought to change the nature of use of over 400,000 acre feet of water in Idaho a few years ago for environmental purposes. Because there was an absence of a friendly, cooperative effort on this issue, 632 protests were lodged against the change in nature of use. Because of the number of protests and the potential length of time for resolution, the Bureau and water users sat down, agreed on a process and resolved the issue in a cooperative manner. I use this as an example only because I want to make it clear that if a strong arm approach is mounted against water users on this issue, there will be widespread administrative and legal resistance and effectively nothing will get done, which is not to either the water users or the Bureau's benefit.

TESTIMONY OF THE IDAHO WATER USERS ASSOCIATION
JULY 19, 1994
PAGE 6

A part of the concern that has been expressed to me, and I carry to you, regarding resolution of this issue is the fact that there has been significant Bureau of Reclamation complicity in water spreading. While I fully understand the commitment of the present Commissioner to resolve this issue satisfactorily, he must realize that most of the water spreading, particularly incidental water spreading that is in place today, is because the Bureau has not only looked the other way in many cases but has actively encouraged water spreading and water conservation over the past 30 to 50 years. Many irrigation districts have significant written documentation of encouragement by the Bureau of Reclamation on certain technological and conservation improvements which they have relied upon as authority to do what they have done. Without Bureau encouragement, hundreds of canals and laterals would still be open ditches losing significant water through transmission and evaporation as opposed to being buried pipelines which has stretched the water supply and created efficiencies far above the original projects. Additionally, the Bureau, the Soil Conservation Service, Farm Home Administration and many other federal agencies have encouraged irrigators to level land, to put in sprinkler systems, to develop steep and erodible hillsides with cover crops in an effort to improve water quality, minimize erosion, increase productivity and minimize water loss. Irrigators implementing these improvements thought they were being good citizens and were relying on the assurances and direction of their government. However, it appears that in 1992 this practice has become something evil and they have become criminals. That is patently unfair and unreasonable.

Early this year the Bureau of Reclamation established a task force in the Pacific Northwest Region and solicited input from water users, tribal interests, environmentalists and state agencies in an effort to develop a set of guidelines for implementation of a water spreading policy. I am a member of that task force representing the State of Idaho and I must say the process has been extremely interesting to say the least. The task force has provided sufficient input to the Bureau of Reclamation to allow the Bureau to develop a draft policy which was submitted to us for consideration and discussion late in June. During the task force deliberations and comments beginning in January, all of the interested parties at the table requested the Inspector General's report which was released yesterday. We were never given even a draft copy of the report and because of that are essentially unable to respond in writing to what that report may say. It is our feeling that we were intentionally precluded from the material in the report because of its inaccuracy and to eliminate our ability to demonstrate the IG's lack of verification of the acreage figures in the report prior to issuance of the final policy by the Bureau and perhaps this hearing. We feel that this is unfair and puts us at a distinct disadvantage in providing you as a Subcommittee more accurate information reflective of the actual water spreading issue. Be that as it may, the Bureau has indicated that the draft policy is in significant revision and we will have an opportunity to review it and provide input in

TESTIMONY OF THE IDAHO WATER USERS ASSOCIATION
JULY 19, 1994
PAGE 7

August of this year. I must tell you that the draft policy was, in many cases, unacceptable to the water user community because it placed all of the financial burden for efforts to resolve any water spreading problems totally on irrigation districts. We will not accept the financial responsibility for proving that we have not violated a contract. We believe that if the Bureau of Reclamation believes that we have violated our contracts with them, it is up to them to make that proof just as they would have to in any other contract dispute. We are not guilty until proven innocent, we are innocent until proven guilty. We do agree, however, that a process of inventory, analysis and negotiation is probably the best process to lay the issue to rest, once and for all, and are willing to work with the Bureau on a cooperative and friendly basis in accomplishing those goals.

As I indicated earlier, our water users do not condone violation of the law or abrogation of contracts on either side. We are willing to cooperate with the Bureau of Reclamation in resolving this issue on a cooperative and friendly basis and will work with both state and federal agencies and the Congress to resolve inappropriate use of water while at the same time legitimatizing uses that have resulted in increased productivity, efficiency of water use and water conservation. We will not accept total responsibility for water spreading, the financial burden of proving we have not violated our contracts and the presumption that the federal government somehow has the authority to reallocate irrigation water to some other purpose outside state law provisions and processes. The Bureau of Reclamation has not demonstrated its legal authority to initiate many of its proposals on this issue and we believe that it is necessary for the Solicitor's office to carefully analyze the responsibilities, liabilities and authorities of the Bureau before implementing any plan. Additionally, it appears to us that the efforts of the Bureau on this issue may require rule making rather than policy development and we will analyze that issue in the context of the final policy proposed by the current administration.

This issue is of great importance to all water users in the western United States. It is our belief that many perceive resolution of this issue as one which will allow reallocation of significant quantities of water to other purposes in the west. We believe that perception to be false, stimulated by a lack of understanding of the Reclamation Act, state water law and enhanced by inaccurate studies and reports prepared by the Bureau and the Inspector General's office. We would urge you as Congressional representatives to monitor the process initiated by the Bureau of Reclamation and to support the friendly, cooperative resolution of this issue with irrigation districts west wide. To force confrontation through a restrictive and burdensome policy or rule will only polarize the entities involved in this issue and perpetuate confrontation for many years into the future. We don't believe that that is in anyone's interest and pledge our willingness to cooperate with the Bureau and Congress in a reasonable manner.

TESTIMONY OF THE IDAHO WATER USERS ASSOCIATION
JULY 19, 1994
PAGE 8

Again, thank you for the opportunity to testify and we in the Idaho Water Users Association stand ready to work with you and the Bureau in the future.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Sheri L. Chapman". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Sheri L. Chapman
Executive Director

SLC:kje

Mr. MILLER. We don't expect welfare fraud and abuse out of our farmers and our irrigation districts and public entities that are created by the State.

What we expect is an accurate accounting of what is or is not taking place within that irrigation district and then how we can apply that to the allocation of Federal resources and whether or not we can continue to justify that activity. And as people's circumstances have changed, whether they are on welfare or whether they are in irrigation and their ability for self-sufficiency is greater or their ability to conduct that activity is greater than it was originally determined and, in some cases, if that is done unilaterally, the taxpayer is entitled to a review of that. That is all the same process.

We do it in social welfare. We do it in agricultural programs. And in this committee, we do it in reclamation programs. The taxpayer is entitled to that review.

You get it?

Mr. CHAPMAN. I understand what you are saying.

I think you also have to realize that in Idaho at least, that the irrigation projects were designed to pay back a certain portion of the irrigation part of that. The project, for example, may have some \$20 million, \$30 million component for irrigation. In Idaho, the projects pay back 100 percent of that, not some portion of that.

There are very few projects in Idaho that are even partially subsidized, other than the extent of low interest or zero interest loans.

Mr. MILLER. Other than the extent of low interest?

Mr. CHAPMAN. That is right.

Mr. MILLER. Most people spend their whole life looking for low interest.

Mr. CHAPMAN. That is a decision Congress made.

Mr. MILLER. I understand, but Congress made that based upon a set of circumstances that existed at the time. And the contracts were entered into based upon a set of circumstances.

If those circumstances have now changed to the extent that no longer is a decent bargain, we have a right to ask the question whether that should be renegotiated or whether that contract has been so materially changed. We engaged in a certain level of subsidy to agricultural production. In some areas throughout the West, that has now become municipal and industrial use, but we are still providing water at agricultural rates.

Do we have an obligation to continue to ask the taxpayer to do that or can that municipal and industrial use pick up the price that other municipal and industrial uses do in other cases?

Mr. CHAPMAN. I agree. M&I ought to pay the M&I rate. We don't have that problem in Idaho.

Mr. MILLER. That is the point. This isn't about your problem. This is about a series of circumstances that have changed throughout the West and we have already acknowledged throughout this hearing that each and every irrigation district apparently is unique and different, but the fundamental question is whether or not they are operating within the law and whether or not they are in compliance with the law, because that was the bargain that was struck, that is how they would be operated when we gave them 40 years and 50 years of low interest.

Okay.

Mr. CHAPMAN. I don't disagree.

Mr. MILLER. Nobody gets to go out in the world and do that. When you go to the bank, they don't guarantee you that fixed rate through those periods of time. So let's understand what is at issue here and that is the question of compliance.

It is not about whether that water will be used in-stream, it is not about whether that water will be given away or sent somewhere else. That is not the issue. The issue is how is the water now being used on the land and whether or not that is in compliance with the law and the contracts.

If the Bureau has been engaged in activities that undermined the contract and they don't come to us with clean hands, that can also be dealt with. But the Bureau does not have the authority to operate outside of the law nor do the irrigation districts.

Mr. CHAPMAN. And I think that was—

Mr. MILLER. You cannot delegate to others illegal activities.

Mr. CHAPMAN. Right. I think that was the thrust of my testimony. We don't condone willful and flagrant violation.

The point is that many of these issues are very unclear. Many of the contract provisions are vague and, in many cases, irrigation districts and the farmers within those districts have relied on the assertions of the Federal Government personnel they thought had the authority to tell them to do certain things.

Mr. MILLER. I understand that.

Mr. CHAPMAN. They have done that. And all I am saying is that we ought to approach this in a reasonable and equitable manner.

If there are violations of the law, they need to be dealt with. No question about it. And we are willing to do that. It is just that we don't think that there ought to be a blanket heavy-handed approach to curtail all of this so-called "water spreading."

Mr. MILLER. So far, nobody has suggested that. Not the Commissioner, not Mr. Smith, not Mr. Miller, not Mr. Dooley, not Mr. DeFazio, and none of the witnesses. Everybody just said this has got to be stopped, recognizing the differences within the districts.

Who suggested the heavy-handed approach?

Mr. CHAPMAN. The heavy-handed approaches we have seen are the suggestions initially occurred as we began the task force discussions. At this point, I would agree, you have not nor has the Commissioner. I was encouraged to hear the Commissioner's testimony today because we did not have that feeling in the past. And I am certainly glad to hear his testimony. And as I say, we are willing to work with the Commissioner and the Bureau to resolve this issue.

Mr. MILLER. All right. You know, I find it interesting in your testimony that you talked about the cost of doing this and the previous witness talked about unfunded mandates or something which is interesting for somebody who is reaping the benefits of a subsidy, but you know it is going—you have a rebuttal for each and every thing you feel is unfair. I don't know why we just continue the process and you decide where you think you are in compliance, where contracts are vague, and submit that to the Bureau.

I mean, I got to believe you know what is going on in your irrigation district. And so you know if lands there are irrigated, because

we were told to irrigate 57,000 acres in four States, we are either irrigating 57,000 in four States or 67,000 acres or 27,000 acres in four States, right? Right?

Mr. CHAPMAN. Some of the districts may know that, I don't know if they know that or not. Districts are very large, you look at the map, you can't identify which 10th of an acre is irrigated or not. It is an expensive process. It can be done but it is an expensive process, as Oregon found out.

Mr. MILLER. That is interesting that you don't know. I mean, I find that you went through this elaborate classification process, you went through this elaborate process of determining all of this when you set up the district, and now it has all become vague and not quite quantifiable when somebody is asking for an accounting.

Mr. CHAPMAN. Well, as I understand it, the classification process probably occurred in most of the districts 30, 40, 50 years ago, and there are not many of those folks that are still there. Oregon has gone through a recent classification process but Idaho has not. We are undergoing that in our Snake River Basin adjudication at this point but that won't be done for some time.

Mr. MILLER. Well, in the spirit of this hearing and what the Commissioner and some of the others have testified, we expect this to be a cooperative arrangement. If you think the IG is way off base, then I think you come forward and show us where that is the case, and it may very well be the case and as we look at this across the West, but I don't think that all of the figures are answered by the notion of inadvertent and unavoidable irrigation.

In fact, I think there are deliberate decisions that have been made to use water contrary to the law and to the contract. And that cannot continue to be tolerated when we know how competitive water is in the West. And to be able to foreclose other priorities and other users who are waiting and have been waiting maybe for 30 or 40 years, because we know the history of these projects, based upon unilateral actions, I don't think can be very well condoned within the citizens of your own State. I don't know how that can be condoned.

These were people that supported these projects on the theory that water would be available to them. That water has never materialized, yet the districts that have it are using it in a different fashion and in a fashion that may have released it down not just in-stream in terms of fish and wildlife but to other irrigators that thought they had a right to use it downstream. That is fundamental equations of irrigation projects.

Well, thank you very much for your testimony and for your help with this hearing. With that, the committee stands adjourned.

[Whereupon, at 1:51 p.m., the subcommittee was adjourned.]

APPENDIX

JULY 19, 1994

ADDITIONAL MATERIAL SUBMITTED FOR THE HEARING RECORD

STATEMENT OF CONGRESSMAN DOUG BEREUTER
TO THE NATURAL RESOURCES SUBCOMMITTEE ON
OVERSIGHT AND INVESTIGATIONS
JULY 19, 1994

Chairman Miller, Congressman Smith, and members of the Subcommittee: I would like to begin by expressing my serious concerns about the process by which the so-called "water spreading" issue is receiving consideration. It is particularly troubling that many of the individuals and organizations who will be most affected by this proposed change have not been adequately involved in the process. It is also my understanding that requests by interested parties for legal responses have not answered in a timely manner.

I also find it troubling that the Inspector General's report on water spreading in the Pacific Northwest, which had been expected early in the year, was not issued until the day before the hearing on this matter. This delay, of course, means that many interested parties were not able to review the findings prior to the hearing. It also allows insufficient time to review the results and formulate responses.

Even more troubling is the course this proposed policy change appears to be taking. Although the focus is currently on the Pacific Northwest, it appears likely that any changes will be implemented to include all 17 states where the Bureau of Reclamation provides water to farmers. Too often I have seen disastrous attempts to force inflexible, one-size-fits-all solutions on states and regions which have their own unique situations. Without consideration of significant differences, farmers in Nebraska may be forced to live by the same rules as farmers in Oregon. I believe that these situations require case-by-case consideration.

It is essential that farmers and other reclamation contractors are treated fairly and equitably throughout this process. Public hearings and other forums for receiving comments must be initiated throughout the affected areas so that all interested parties may express their concerns. Before any changes are made, those who will be affected must be informed and actively involved in the process. I also believe that any further consideration of this issues must be based on data that is accurate and up-to-date.

OPENING STATEMENT
of
THE HONORABLE JAY DICKY
Fourth district - Arkansas
Before the
Oversight and Investigations Subcommittee
Regarding
Hearing on Reclamation Project "Water Spreading" Issue
July 19, 1994

Mr. Chairman, thanks for holding this oversight hearing today regarding the problem of apparent illegal use of Reclamation project water in several western states.

Not being from a western Reclamation state, I look forward to learning more about this issue regarding irrigated agriculture and use federal project water. My understanding is the issue involves the improper use of water from federally financed Bureau of Reclamation project dams and related water transmission facilities. Such improper use of federal Reclamation project water apparently includes use on non-irrigable farmlands, agriculture lands outside an established irrigation district, and lands that do not have a state water right, among other inappropriate uses.

I understand the issue was the subject of an investigation by the Department of the Interior Inspector General (IG) and that the Commissioner of Reclamation has indicated general agreement with the need to better address the problem and his intent to follow through with the IG recommendations to correct whatever water spreading problems may exist.

I look forward to reviewing the testimony.

###



**U.S. Department of the Interior
Office of Inspector General**

AUDIT REPORT

**IRRIGATION OF INELIGIBLE LANDS,
BUREAU OF RECLAMATION**

**REPORT NO. 94-I-930
JULY 1994**

This report may not be disclosed to anyone other than
the auditee except by the Assistant Inspector General
for Administration, Office of Inspector General,
U.S. Department of the Interior,
Washington, D.C. 20240



United States Department of the Interior

OFFICE OF INSPECTOR GENERAL
Headquarters Audits
1550 Wilson Boulevard
Suite 401
Arlington, VA 22209

JUL 11 1994

Memorandum

To: Assistant Secretary for Water and Science

From: Acting Assistant Inspector General for Audits

Subject: Final Audit Report on the Irrigation of Ineligible Lands, Bureau of Reclamation (No. 94-I-930)

This report presents the results of our audit of the Bureau of Reclamation's water resource management and research activities. The audit objective was to determine whether the Bureau was ensuring that Federal project water was used to irrigate only lands determined to be eligible to receive Federal project water under Reclamation law.

We found that Federal project water from at least 24 projects in eight states had been used to irrigate lands that were ineligible to receive water under Reclamation law. As a result, Federal project water that could have been used to help alleviate environmental needs, such as the restoration of protected species, or to meet other competing needs was instead used to irrigate ineligible lands. In addition, the Federal Government provided unintended financial benefits of between \$37 million and \$46 million because the water users did not pay the full cost of supplying the water used to irrigate ineligible lands.

To correct the problems noted, we recommended that the Bureau (1) establish a schedule for identifying and a plan for addressing each instance where Federal project water has been used to irrigate ineligible lands, including terminating water deliveries; (2) request a legal opinion from the Office of the Solicitor to determine whether the Bureau has the authority to assess charges in the future whenever Federal project water is used to irrigate ineligible lands and, if the authority does not exist, propose legislation that will provide the authority; and (3) develop and implement a policy and procedures to assess appropriate Federal charges for unauthorized water deliveries when authority has been established.

In its June 23, 1994, response (Appendix 3) to the draft report, the Bureau generally concurred with all three recommendations and provided sufficient information regarding its planned actions for us to consider the recommendations resolved but not implemented. The Bureau also included additional comments, which we have incorporated into this report as appropriate.

Based on the response, the three recommendations are considered resolved but not implemented. Accordingly, they will be referred to the Assistant Secretary - Policy, Management and Budget for tracking of implementation (Appendix 4).

The legislation, as amended, creating the Office of Inspector General requires semiannual reporting to the Congress on all audit reports issued, the monetary impact of audit findings (Appendix 1), actions taken to implement audit recommendations, and identification of each significant recommendation on which corrective action has not been taken.



Marvin Pierce

cc: Commissioner - Bureau of Reclamation
Department Audit Coordination Officer



United States Department of the Interior

OFFICE OF INSPECTOR GENERAL
Washington, D.C. 20240

JUL 13 1994

MEMORANDUM

TO: The Secretary

FROM: Acting Inspector General

SUBJECT SUMMARY: Final Audit Report for Your Information - "Irrigation of Ineligible Lands, Bureau of Reclamation" (No. 94-I-930)

DISCUSSION: We concluded that the Bureau of Reclamation had not taken actions necessary to ensure that Federal project water was used to irrigate only lands determined to be suitable for irrigation and eligible to receive water under Federal law. As a result, lands the Bureau identified as ineligible to receive Federal water were being irrigated from at least 24 projects in eight states despite the existence of other competing needs for water. In this regard, we found that the majority of the water delivered to ineligible lands could have been used to enhance stream flows for declining fisheries or to reduce potentially toxic irrigation drainage. In addition, those who irrigated ineligible lands from 1984 through 1992 received unintended financial benefits of between \$37 million and \$46 million because they did not pay the Government's full cost of providing the water as defined by the Congress in the Reclamation Reform Act of 1982.

We recommended that the Bureau establish a schedule for identifying and a plan for addressing each instance of Federal water deliveries to ineligible lands, including termination of deliveries. We also recommended that the Bureau assess Federal charges whenever Federal project water is used to irrigate ineligible lands in the future. Because of conflicting viewpoints within the Department as to whether the Bureau has the authority to assess such charges, we recommended that the Bureau seek a formal opinion from the Office of the Solicitor and, if necessary, propose legislation that would provide the authority. Based on the Bureau's response to our draft report, we considered the recommendations resolved but not implemented.

Joyce N. Fleischman

Attachment

Prepared by: Marvin Pierce
Extension: 208-4252

INTRODUCTION

BACKGROUND

The Bureau of Reclamation was created by the Congress in 1902 primarily to reclaim the arid lands of the West through irrigation and to stimulate the settlement and economic development of the region. Since 1902, the Bureau has built a sizable infrastructure of water resource projects, including several hundred dams, canals, and related project facilities, throughout the 17 western states. Bureau projects range in size and scope from small, single-purpose facilities, which provide irrigation water service, to large, multipurpose projects, which provide irrigation water service, municipal and industrial water supply, hydroelectric power generation, fish and wildlife management, recreation, and flood control.

In 1987, the Bureau acknowledged in its "Assessment '87" that it had largely achieved its original mission of reclaiming the arid West. Over the next few years, the Bureau concluded that (1) the era of constructing large Federally financed water projects was coming to a close, (2) future opportunities for developing additional water supplies were extremely limited, and (3) the conservation of water and protection of the environment had become major public concerns. In 1992, the Bureau formally adopted a new mission to manage, develop, and protect water and related resources in an environmentally and economically sound manner in the interest of the American public. On November 1, 1993, the Bureau's Commissioner issued a memorandum announcing changes that would be made to complete the Bureau's transition from a water resources development agency to a water resources management agency.

A key element of the Bureau's new mission is an increased emphasis on management and conservation of existing water supplies. The Bureau believes that a vigorous water conservation program can help alleviate controversy over the allocation of water supplies among different purposes, such as irrigation, municipal and industrial supply, and the environment. However, some irrigators have used conserved or surplus water to irrigate additional lands that are ineligible to receive water from Federal projects rather than relinquish their rights to such water.

Under Reclamation law,¹ the Bureau is required to evaluate project lands for irrigation suitability and to formally classify the lands as either irrigable or nonirrigable. Lands classified as nonirrigable, as well as lands that have not been classified, are not eligible to receive water from Federal projects. Lands that are outside boundaries established for Federal irrigation projects or that are outside irrigation district boundaries are also ineligible to receive Federal water under Reclamation law or contractual agreements.

¹Legislative provisions relating to land classification are contained in the Reclamation Act of 1902, the Second Deficiency Appropriation Act for 1924 (Fact Finders' Act), the Omnibus Adjustment Act of 1926, the Reclamation Project Act of 1939, the Interior Department Appropriation Acts for 1953 and 1954, the Reclamation Reform Act of 1982, and the Garrison Diversion Unit Reformulation Act of 1986.

OBJECTIVE AND SCOPE

The original objective of the audit was to determine whether the Bureau was (1) developing innovative structural and nonstructural solutions to water resource needs and (2) ensuring that existing water contractors developed and implemented effective water conservation measures. We revised the audit objective based on our preliminary survey work because Department of the Interior and Bureau policy changes involving water management and conservation were in the early stages of implementation. Our revised objective was to determine whether the Bureau was ensuring that Reclamation project water was used to irrigate only lands determined to be eligible to receive water under Reclamation law. The audit covered water deliveries primarily during the period 1984 through 1992.

This performance audit was conducted from May 1993 through January 1994. We visited or contacted the Bureau's headquarters office in Washington, D.C.; the Denver Office in Denver, Colorado; the Mid-Pacific Region in Sacramento, California; the Pacific Northwest Region in Boise, Idaho; the Upper Colorado Region in Salt Lake City, Utah; the Lower Colorado Region in Boulder City, Nevada; and the Great Plains Region in Billings, Montana. To accomplish our objective, we interviewed officials from the Bureau and the Department's Office of the Solicitor and reviewed laws, legislative history, regulations, Congressional hearings, Bureau policy and procedure manuals, correspondence, and legal opinions concerning water resource management and related subjects.

The audit was made in accordance with the "Government Auditing Standards," issued by the Comptroller General of the United States. Accordingly, we included such tests of records and other auditing procedures that were considered necessary under the circumstances. As part of our audit, we evaluated the system of internal controls associated with the irrigation of ineligible lands. We found weaknesses in the Bureau's identification of ineligible lands and enforcement of Reclamation laws prohibiting the irrigation of ineligible lands. The weaknesses and recommended corrective actions are discussed in the Finding and Recommendations section of this report.

We also reviewed the Department's Annual Statement and Report, required by the Federal Managers' Financial Integrity Act, for fiscal years 1990 through 1992 to determine whether any reported weaknesses were within the objective and scope of our audit. We determined that none of the reported weaknesses were directly related to the objective or scope of our audit. We also reviewed a 1985 internal control review performed by the Bureau entitled "Irrigation of Ineligible Land (Water Spreading)" and a related vulnerability assessment. The Bureau concluded that irrigation of ineligible lands was a long-standing high risk issue for which monitoring and prevention policies appeared to be inadequate. The Bureau also cited a risk of loss of Federal revenue and several Federal liability risks associated with the problem, such as the delivery of water for unauthorized irrigation use in competition with environmental needs. We found that the Bureau had not performed a followup review and that essentially the same conditions existed at the time of our audit.

PRIOR AUDIT COVERAGE

During the past 5 years, neither the Office of Inspector General nor the General Accounting Office has issued any reports concerning either the Bureau's water resource management and research activities or the irrigation of ineligible lands.

FINDING AND RECOMMENDATIONS

IRRIGATION OF INELIGIBLE LANDS

The Bureau of Reclamation did not ensure that Federal project water from at least 24 projects in eight states was used to irrigate only eligible lands, as intended under Reclamation law. This situation occurred because the Bureau had not given sufficient priority to identifying and resolving instances of Federal water being delivered to ineligible lands. As a result, Federal project water that could have been used to help alleviate environmental problems or to meet other competing needs was instead used to irrigate ineligible lands. In addition, the Federal Government provided unintended financial benefits of between \$37 million and \$46 million because the water users did not pay the full cost of supplying the water used to irrigate ineligible lands.

Bureau Enforcement Efforts

According to an April 1, 1992, letter from the Commissioner to the Interior and Insular Affairs Committee, House of Representatives, the irrigation of ineligible lands has been a gradual process that has occurred over many years. As disclosed by Bureau documents,² the irrigation of ineligible lands was occurring in the 1950s or 1960s on at least 7 (Umatilla, Baker, Uncompahgre, Michaud Flats, Columbia Basin, Central Valley, and Vale) of 24 projects (Appendix 2) identified by the Bureau as irrigating ineligible acreage. Also, according to a Bureau crop schedule for 1965 and 1966, approximately 36,000 acres of lands classified as nonirrigable in two of the Bureau's regions were being irrigated with Federal project water. Over time, Federal project irrigators have converted from gravity flood irrigation to water-saving technologies, such as sprinkler or center-pivot systems. However, irrigators have frequently used the water conserved by such improvements to irrigate additional lands that, under Reclamation law, were ineligible to receive Reclamation water. Despite recognition of this problem, the Bureau has not taken sufficient actions to preclude the situation from recurring. This past history of nonenforcement has made it more difficult for the Bureau to resolve current instances where ineligible lands are irrigated from Reclamation project facilities.

In 1983, the Bureau, through its efforts to administer the Reclamation Reform Act of 1982 (Public Law 97-293), found that a substantial amount of ineligible land was

²These documents include an October 22, 1959, memorandum from the Assistant Regional Director, Boise, Idaho, to the Commissioner; an April 20, 1965, memorandum from the Assistant Regional Director, Boise, Idaho, to the Commissioner; a November 26, 1965, travel report submitted to the Chief Engineer, Denver Federal Center; a March 30, 1966, memorandum from the Agricultural Engineer, Boise, Idaho, to the Regional Director, Boise, Idaho; a January 16, 1969, memorandum from the Acting Assistant Commissioner to the Regional Directors; and a November 24, 1981, letter from the Baker Valley Irrigation District to the Bureau of Reclamation, Boise, Idaho.

receiving water service from Reclamation projects.³ Starting in 1985, the Bureau initiated efforts to address the problem of ineligible lands being irrigated. In a May 17, 1985, memorandum, the Acting Commissioner directed the Bureau's regional offices to establish a schedule for identifying units of ineligible land and the reasons for their ineligibility. The memorandum also directed that the regions establish schedules for resolution of each unit of ineligible land. According to the Chief, Contracts and Repayment Division, however, the effort had not received a high priority subsequent to the Bureau's reorganization in 1988. Consequently, at the time of our audit, the Bureau had not completed the actions necessary to reclassify lands from an ineligible to an eligible status and/or had not directed that unauthorized water deliveries be terminated on 21 of the 24 projects that we reviewed. According to the Bureau's response to our draft report, one of the major reasons that land classification or reclassification has not been accomplished in a more timely manner relates directly to budgeting and staffing requirements. The Bureau further stated that the significant costs associated with accomplishing this work on lands, some of which have been irrigated for more than 50 years, suggests that an abbreviated review could be appropriate for classification in some circumstances.

In recent years, the Bureau has attempted to resolve instances of water being delivered to ineligible lands through a variety of legislative and administrative means. As permitted under Reclamation law,⁴ the Bureau has performed reclassification of lands previously classified as nonirrigable, sought project or district boundary changes, pursued legislative amendments, or directed some water districts to discontinue water service to the ineligible lands. In some cases, according to the Bureau's response to our draft report, it may not be possible to avoid irrigating small tracts of irregularly shaped lands that are not initially eligible for irrigation but that are located within the boundaries of an authorized area and that may subsequently become eligible for Reclamation water. In addition, lands originally classified as nonirrigable may be made productive over time by gradually making improvements (such as removing rocks, leveling the land, and installing surface or subsurface drains) that are too expensive to accomplish initially. However, the Bureau has encountered significant problems because some of the ineligible lands have been under agricultural production for a number of years. For example:

- Four water districts within the Umatilla Project in Oregon challenged written directives issued by the Bureau to terminate irrigation service to 17,565 acres of ineligible lands after the 1992 irrigation season. In a June 1, 1993, letter to the Bureau, an attorney representing the four water districts stated that the irrigation of the ineligible lands was "a practice that has persisted for decades" and that "abruptly cutting off water to thousands of acres of historically irrigated lands will certainly have a significant

³This is discussed in a February 27, 1992, memorandum from the Deputy Commissioner to the Regional Directors.

⁴Section 8 of the Reclamation Act of 1939 authorizes the Bureau to reclassify lands only upon request by a water user organization. The water users must pay one-half of the cost of the reclassification, and the same lands cannot be reclassified more frequently than once every 5 years. In addition, there is no guarantee that a reclassification will change the lands' classification status from nonirrigable to irrigable.

adverse effect on growing crops, prime farmland and wetlands." The four districts continued to deliver water to these lands during the 1993 irrigation season, although two of the districts reportedly did stop irrigating near the end of the season.

- Thirteen thousand acres of ineligible land irrigated from the Baker Project in Oregon were so marginally productive that the Bureau's Pacific Northwest Region proposed to deviate from Reclamation policy requiring the lands to be classified. An October 31, 1986, memorandum from the Region to the Commissioner stated that a classification study "would find the lands to be unsuitable for irrigation by Reclamation standards." The memorandum further stated that the irrigation of these ineligible lands was "a continuation of what has occurred for generations in the Baker Valley" and that "we frankly see no other means to deal with this situation productively."

The Bureau has also identified state laws and project legislation as other obstacles to transferring conserved water from irrigation to other unmet needs, such as increased instream flows for fisheries, environmental protection and restoration, and municipal and industrial water supplies for the Nation's urban areas. To illustrate, a basic tenet of water law in the western states is the "prior appropriation doctrine," which gives the first party to appropriate the water a priority right to that water. If the water is not used, the first appropriator can lose the right to the water. In addition, water rights are an integral part of property valuation in the West; farmland without water rights has little market value. As such, a water right holder, such as an irrigator, would have no economic incentive to give up conserved water and the associated water rights without compensation for both the loss of crop value and land devaluation.

Unauthorized Water Deliveries

In response to an inquiry from a Congressional committee in 1992, the Bureau reported instances in each of its five regions where ineligible lands were receiving Federal water. However, the location and extent of the unauthorized deliveries had not been fully determined on a Bureauwide basis. For example, the Bureau's Pacific Northwest and Great Plains Regions had both identified instances of deliveries to ineligible lands, but the acreage had not been quantified in all instances. In addition, the Bureau's Great Plains and Mid-Pacific⁵ Regions each had over 1 million acres of project lands that either were never classified or were not adequately classified in accordance with Bureau standards. Based on Bureau estimates, up to 429,000 acre-feet⁶ of water was delivered each year to an estimated 154,000 acres of ineligible lands during 1984 through 1992 (see Appendix 2).

⁵The Mid-Pacific Region was in the process of classifying an additional 500,000 acres and planned to have all lands in the Region classified by 1998. The Great Plains Region, however, had not established a timetable for completing its land classifications and could not provide us with any estimates of acreage associated with water deliveries to ineligible lands that had been identified.

⁶An acre-foot of water is the quantity required to cover 1 acre of land to a depth of 1 foot. It is equal to approximately 326,000 gallons, or 43,560 cubic feet.

Reimbursement for Unauthorized Water Deliveries

The Reclamation Reform Act of 1982 currently requires irrigators to pay full-cost water rates for lands that are not eligible to receive subsidized water because of acreage limitations.⁷ A March 8, 1988, opinion of the Deputy Associate Solicitor, Energy and Resources, states:

By defining 'full cost' in the RRA [Reclamation Reform Act], Congress has established what it believes the government's interest in irrigation water to be worth. Thus, full cost as defined by Congress in the RRA is one excellent measure of the value of the government's property interest.

According to the Assistant Solicitor, Branch of Water and Power, Division of Energy and Resources, the full-cost rate could be applied to Federal water supplied to nonirrigable lands (the most common type of ineligible land) and potentially to other types of ineligible land, including land outside project boundaries and land outside district boundaries. The applicability of the full-cost rate to land outside project boundaries and land outside district boundaries could depend on specific legal factors such as the language of the project's authorizing legislation and contract terms. The Assistant Commissioner for Resources Management, however, said that he believed the Bureau did not have the authority to assess charges for water delivered to ineligible lands. Accordingly, we believe that the Bureau should consult with the Office of the Solicitor to clarify or determine (1) how the Bureau should address each instance of unauthorized water delivery, including terminating water delivery to these lands or seeking legal restitution when they cannot be converted to an eligible status through land reclassification or other actions; (2) whether the Bureau has the authority to assess charges when Federal project water is used in the future to irrigate ineligible lands; and (3) whether portions of irregular tracts that are classified as nonirrigable can be administratively reclassified as irrigable.

Using the Bureau's full-cost rates to estimate the value of the water used to irrigate ineligible lands on the 24 projects listed in Appendix 2, we determined that from 1984 to 1992 irrigators received additional financial benefits⁸ of about \$37 million to \$46 million which were not contemplated under Reclamation law or Bureau contracts for the delivery of water.

⁷The Reclamation Reform Act of 1982 (Public Law 97-293) requires irrigators to pay "full cost" as defined in Section 202(3) of the Act for water delivered to landholdings in excess of a defined acreage, typically 960 acres. The full-cost rate includes interest accruing from the date of enactment of the Act (October 12, 1982).

⁸We computed the economic benefits by multiplying full-cost rates provided by the Bureau by the number of acres or acre-feet as appropriate for each of the years that unauthorized water deliveries were identified between 1984 and 1992. (The benefit calculations are further explained in notes 2 and 3 of Appendix 2.)

Impacts of Unauthorized Water Deliveries

Based on discussions with Bureau personnel, we found that other critical or competing water needs did exist on each of the 24 projects where irrigation of ineligible lands had occurred. For example:

- Water from the Columbia Basin Project in the State of Washington was delivered to an estimated 42,000 to 53,000 acres of ineligible lands that could have been used to provide increased stream flows for salmon migration. This migration need was particularly critical because at least three species of salmon had been listed for protection under the Endangered Species Act of 1973 (Public Law 93-205). The problem had become so acute that the Bureau, in June 1993, notified each irrigation district served by the Project that no water could be used for additional irrigation acreage until it was determined how river wildlife was affected by the Project. The Bureau hoped to complete the study prior to the 1994 irrigation season. Also, according to the Bureau's response to our draft report, in January 1994, it adopted a policy of not taking action on new requests for water unless they met certain criteria "such as not increasing the amount of water to be used or having a positive or 'no net effect' on flows in the Colombia River system." However, no action was taken to terminate water deliveries to the 42,000 to 53,000 acres of ineligible lands.

- Irrigation water was delivered to 12,884 acres of ineligible land within the Uncompahgre Project in Colorado. The U.S. Geological Survey reported that irrigation drainage return flows from the Project were carrying "substantial" quantities of selenium, which can have harmful effects on fish and wildlife and human health. According to the Bureau's response to our draft report, "no harmful effects have been observed in the Uncompahgre Project due largely to the local hydrology and the flushing nature of the system. In 1983, concentrated levels of selenium carried by irrigation drainage caused high rates of deformity, mortality, and reproductive failure among aquatic water fowl at Kesterson National Wildlife Refuge in California. This finding resulted in a concerted effort to identify other potential sites where this situation might occur. The Uncompahgre Project is one of the sites that DOI subsequently identified as having a high potential for irrigation drainage-induced contamination problems." During our audit, however, we noted that the Department has not completed the studies necessary to quantify any adverse effects of the potential irrigation drainage-induced contamination problems that it had identified earlier.

According to Bureau officials and our review of Bureau records, about 75 percent of the water delivered to ineligible lands associated with the 24 projects could have been used to provide additional stream flows for protected species or to reduce potentially toxic irrigation drainage flows as allowed under state law. The remaining 25 percent could have been used to help meet additional requirements for Indian fisheries, Indian water rights, or municipal and industrial water supplies.

Recommendations

We recommend that the Commissioner of the Bureau of Reclamation direct appropriate Bureau officials to:

1. Establish a schedule for identifying the extent to which ineligible land is receiving Federal irrigation water and develop a plan, including terminating deliveries, for addressing each instance of unauthorized water delivery.
2. Request a formal opinion from the Office of the Solicitor as to whether the Bureau has the authority to assess Federal charges in the future whenever water is used to irrigate ineligible lands. If the Bureau does not have the authority, the Commissioner should seek legislation that will provide the authority.
3. Implement a policy and procedures to assess charges for Federal project water that has been used to irrigate ineligible lands when authority has been established. The policy should be designed to facilitate the prospective recovery of appropriate Federal charges and should include a provision for notifying all districts that any water delivered to ineligible lands beyond the effective date of the policy would be assessed for these charges.

Bureau of Reclamation Response

The June 23, 1994, response (Appendix 4) from the Commissioner, Bureau of Reclamation, concurred with all three recommendations.

Recommendation 1. The Bureau said that it would implement the recommendation by establishing a schedule, by region, for evaluating individual districts to determine the extent to which ineligible lands are receiving Reclamation irrigation water. The Bureau said it plans to complete this action by September 30, 1994. The Bureau said that it would then perform and document the evaluations of the individual districts by March 31, 1996, and develop plans to address the resolution of instances of unauthorized water deliveries by September 30, 1997. The Bureau identified the Director, Program Analysis Office, as the official responsible for these actions.

Recommendation 2. The Bureau said that it would request a formal opinion from the Office of the Solicitor regarding the Bureau's authority to assess Federal charges in the future whenever water is used to irrigate ineligible lands. The response further stated that if the Solicitor determines that the Bureau does not have such authority, the Bureau would seek legislation that will provide the authority. The Bureau said that the Commissioner would request, by September 30, 1994, the Solicitor's opinion. The Bureau further stated that if necessary, a target date for proposing the legislation would be established once the Solicitor had provided the opinion.

Recommendation 3. The Bureau said that it would implement a policy and procedures for assessing prospective charges for water delivered to ineligible lands in the

future once its authority is established and would notify the districts, as discussed in our recommendation. The Bureau said that the Commissioner is responsible for implementation and that the target date for implementation would be "1 year after the [Bureau's] authority outlined in Recommendation 2 is established."

Other Comments. The Bureau said that our audit "overlooked" the Bureau's 1993 efforts to improve administration of the Reclamation Reform Act of 1982 as it was applicable to the delivery of water to ineligible lands. According to the Bureau, these efforts resulted in a draft policy that the Bureau anticipated would be implemented during the next several months. Regarding the Columbia Basin Project, the Bureau stated that the report should be changed to disclose that 40,000 to 50,000 acres of Class 6 lands, which are irrigated using sprinkler technology, would be eligible for water delivery under the Bureau's current land classification standards. The Bureau also disagreed with our comments on the Uncompahgre Project and suggested that the comments be revised.

Office of Inspector General Comments

The Bureau's response was sufficient for us to consider all three recommendations resolved but not implemented (Appendix 4). Accordingly, the recommendations will be referred to the Assistant Secretary for Policy, Management and Budget for tracking of implementation.

Regarding the Bureau's other comments, the Bureau's efforts in 1993 to improve administration of the Reclamation Reform Act of 1982 as it applies to the delivery of water to ineligible lands did not address the types of ineligible lands discussed in this report. Specifically, our audit addressed nonirrigable land and land outside district or project boundaries, while the Bureau's efforts involved land that was not certified under the Act. In addition, we did not discuss uncertified land in the report because this issue was included within the scope of two of our previous audits on Reclamation Reform Act activities.⁹

Regarding the 40,000 to 50,000 acres of land in the Columbia River Project that would be reclassified as eligible for water delivery under current Bureau land classification standards, the Bureau did not present any evidence to support its position. Under current Bureau standards, the reclassification of Bureau lands is a complex process involving factors such as soil suitability, topography, drainage, compliance with the National Environmental Policy Act, and the acreage limitation requirements of the Reclamation Reform Act. To our knowledge, the Bureau had not completed an evaluation of these factors for the 40,000 to 50,000 acres of ineligible land in the Columbia Basin Project. Therefore, we could not verify that these lands would be eligible under current Bureau land classification standards.

⁹"Excess Land Sales Policies and Land Use Conversion Issues, Bureau of Reclamation" (No. 91-I-222), dated December 17, 1990 and "Reclamation Reform Act Enforcement Activities, Bureau of Reclamation" (No. 91-I-929), dated June 20, 1991.

Regarding the Uncompahgre Project, we revised the discussion as appropriate based on the Department of the Interior's National Irrigation Water Quality Program reconnaissance report,¹⁰ which confirmed the presence of substantial quantities of selenium and other toxic substances, and on the Bureau's suggested revision.

¹⁰"Reconnaissance Investigation of Water Quality, Bottom Sediment, and Biota Association with Irrigation Drainage in the Gunnison and Uncompahgre River Basins and at Sweitzer Lake, West-Central Colorado, 1988-89" (No. 91-4103), dated 1991. Prepared by Water Resources Investigations, U.S. Geological Survey.

CLASSIFICATION OF MONETARY AMOUNTS

<u>Finding</u>	<u>Funds To Be Put To Better Use</u>
Irrigation of Ineligible Lands	\$37 Million - \$46 Million*

*This represents our estimate of the value of water delivered to ineligible lands between 1984 and 1992. It consists of capital and interest costs computed using full-cost rates as defined by Section 202(3) of the Reclamation Reform Act of 1982 (Public Law 97-293) (see also Appendix 2).

SUMMARY OF INELIGIBLE LANDS IRRIGATED
BETWEEN 1984 AND 1992

Project Name	Location	Acreage ¹		Annual Acre-Feet ²		Financial Benefits ³	Other Potential Uses ⁴	
Baker	Oregon	13,000		32,500		\$ 2,451,150	Protected Species	
Boise	Idaho	6,500		16,250		855,855	Protected Species	
Bostwick Park	Colorado	110		281		67,760	Protected Species	
Boulder Canyon	California	2,500		11,625		402,600	Indian Water Rights, Municipal and Industrial	
Cachuma	California	150-	750	420-	2,100	\$ 1,153,533-	1,769,950	Municipal and Industrial
Central Valley ⁵	California	2,100-	10,500	5,880-	29,400	3,156,227-	4,799,060	Protected Species, Drainage Reduction
Chief Joseph Dam	Washington		360		900		244,656	Protected Species
Columbia Basin ⁶	Washington	42,000-	53,000	105,000-	132,500	23,029,330-	29,060,822	Protected Species, Drainage Reduction
Crescent Lake Dam	Oregon		1,485		3,712		21,114	Indian Fisheries
Deschutes	Oregon		9,840		24,600		1,041,462	Indian Fisheries
Gila ⁷	Arizona		2,000		11,920		501,920	Drainage Reduction, Municipal and Industrial
Hammond	New Mexico		360		1,570		364,417	Protected Species
Michaud Flats	Idaho		600		1,500		162,810	Protected Species
Minidoka	Idaho		7,000		17,500		672,210	Protected Species, Municipal and Industrial
Newlands ⁶	Nevada	150-	750	420-	2,100	2,745-	4,163	Protected Species, Drainage Reduction
Orland	California	150-	750	420-	2,100	3,347-	5,093	Municipal and Industrial
Owyhee	Idaho/ Oregon		4,299		10,748		344,754	Protected Species
Paonia	Colorado		3,932		16,829		979,029	Protected Species, Municipal and Industrial
Solano	California	150-	750	420-	2,100	123,745-	188,923	Municipal and Industrial
Umatilla	Oregon		17,565		43,913		466,341	Indian Fisheries
Uncompahgre ^{6,8}	Colorado		12,884		51,536		467,303	Protected Species, Drainage Reduction
Vale ⁶	Oregon		2,906		7,265		219,690	Protected Species, Drainage Reduction
Ventura River	California	150-	750	420-	2,100	153,916-	234,540	Municipal and Industrial
Yakima	Washington		1,600		4,000		544,176	Indian Water Rights
Total		131,791-	154,191	369,629-	429,049	\$37,430,090-	\$45,869,798	

Notes on following pages.

NOTES

¹Reported acreage was provided by Bureau of Reclamation personnel. The reported acreage consist primarily of Bureau estimates, although actual acreage measurements were used when available.

²We estimated the acre-feet by multiplying the number of acres by conversion factors provided by Bureau personnel. The conversion factors ranged from 2.50 acre-feet per acre to 5.96 acre-feet per acre.

³Irrigators of ineligible lands received unintended financial benefits because they made little or no payment for the use of Government facilities to store and deliver water to ineligible lands. Under Reclamation law, water users are required to repay the Government for an assigned portion of the capital costs of constructing water project facilities. Payment is made annually under contract based on stipulated acreage or quantities of water. However, irrigators charged for water based on the number of acres have not been assessed for the additional acres of ineligible lands they have irrigated. Similarly, irrigators charged on a quantity basis have, on average, paid only for their assigned operation and maintenance costs and have made little or no contribution toward capital repayment for water used to irrigate ineligible lands. Irrigators of ineligible lands have also received an additional unintended financial benefit because they have paid no interest on the capital costs financed by the Government.

We computed the financial benefits to the irrigators on an incremental basis, recognizing that some irrigators were assessed rates for water delivered to ineligible lands. However, as previously indicated, the capital repayment and interest included in these rates were negligible. Accordingly, we computed the financial benefits by multiplying full-cost rates provided by the Bureau by the number of acres or acre-feet as appropriate for each of the years that unauthorized water deliveries were identified between 1984 and 1992. In a few instances where full-cost rates were not available, we computed the valuation using only a capital component provided by the Bureau. Full-cost rates as defined by Section 202(3) of the Reclamation Reform Act of 1982 (P.L. 97-293) consist of a capital component and an interest component and are determined for each district within a project.

⁴We identified the other potential uses for water applied to ineligible lands from our review and discussions with Bureau staff as follows:

Protected Species - Water needed to maintain minimum stream flows for fish and wildlife species that were listed as threatened or endangered under the Endangered Species Act of 1973.

Indian Water Rights - Water needed to settle the adjudication of Indian water right claims.

Municipal and Industrial - Water needed to satisfy unmet urban demands.

Drainage Reduction - Reduction in the quantity of water applied to agricultural lands to reduce potentially toxic irrigation drainage return flows.

Indian Fisheries - Water needed to increase stream flows to rejuvenate historical fish populations for traditional Indian use.

⁵The Central Valley Project is the site of Kesterson National Wildlife Refuge, where in 1983 the discovery of high rates of deformity, mortality, and reproductive failure among aquatic birds brought the irrigation drainage problem to national attention. Since 1983, the Department of the Interior has expended over \$50 million to clean up toxic elements carried by irrigation drainage water into the Refuge and to study ways to remedy the drainage problem within the Central Valley. One of the key recommendations that emerged from the studies was to reduce the amount of irrigation water through on-farm improvements, thereby reducing the quantity of drainage flows.

⁶These projects were identified by the Department of the Interior's National Irrigation Water Quality Program as having a high potential for irrigation-induced contamination problems. The Program was established by the Department in the aftermath of the Kesterson problem (see note 5) to identify and evaluate agricultural drainage-related problems throughout the western United States.

⁷Measures to reduce irrigation drainage within the Gila Project's Wellton-Mohawk Irrigation and Drainage District have not been as effective as planned, which may hamper the Bureau's efforts to comply with a 1973 water quality agreement between the United States and Mexico. To protect the quality of water flowing into Mexico from the Colorado River, the Bureau constructed a large desalting plant and spent \$45 million on measures to reduce the amount of irrigation drainage water flowing into the River from Wellton-Mohawk. However, between 1986 and 1991, the quantity of drainage water from Wellton-Mohawk had actually increased from 119,000 acre-feet to 147,000 acre-feet, which greatly exceeded the planned 108,000 acre-feet that the desalting plant was designed to accommodate. In June 1992, the Bureau reported to the Congress that it planned to investigate the cause of the increased drainage and explore a program of additional irrigation efficiency measures.

⁸The project's operating agency, the Uncompahgre Valley Water Users' Association, was authorized under a 1948 contract with the Bureau to irrigate nonirrigable lands not to exceed 20 percent of the irrigable area within Association boundaries. As a result of the Reclamation Reform Act of 1982, however, the Bureau determined that the irrigation of nonirrigable lands under the contract was contrary to Reclamation law. In 1990, the Bureau recommended that the Association agree to request reclassification of the nonirrigable lands. At the time of our audit, the Bureau was awaiting the Association's identification of the lands to be reclassified, and no formal request for reclassification had been made.



United States Department of the Interior

BUREAU OF RECLAMATION
Washington, D.C. 20240

IN REPLY REFER TO:

D-1200

JUN 23 1994

MEMORANDUM

To: Office of Inspector General
Attention: Assistant Inspector General for Audits

From: Daniel P. Beard
Commissioner

Subject: Draft Audit Report on "Water Resource Management and Research Activities, Bureau of Reclamation" (W-IN-BOR-005-93))

The Bureau of Reclamation (Reclamation) offers the following comments in response to the recommendations in the subject report. Additional comments on the text of the report are attached.

Recommendation 1

Establish a schedule for identifying the extent to which ineligible land is receiving Federal irrigation water and develop a plan, including terminating deliveries, for addressing each instance of unauthorized water delivery.

Response

Concur. Responding to this recommendation requires several distinct actions. The first is to establish a schedule, by region, which delineates when individual districts will be evaluated to determine the extent to which ineligible lands are receiving Reclamation irrigation water. Next, an evaluation of all district lands, including documentation of specific findings, will be completed. Once this evaluation has been completed, plans will be developed by water district to address the resolution of specific instances of unauthorized water deliveries. These plans, where appropriate, will include the termination of unauthorized water deliveries.

The responsible official for the overall effort is the Director, Program Analysis Office. The schedules will be developed by September 30, 1994. The evaluations and documentations will be completed by March 31, 1996. The plans, addressing the resolution of instances of unauthorized water deliveries, will be developed by September 30, 1997.

2

Recommendation 2

Request a formal opinion from the Office of the Solicitor as to whether the Bureau has the authority to assess Federal charges in the future whenever water is used to irrigate ineligible lands. If the Bureau does not have the authority, the Commissioner should seek legislation that will provide the authority.

Response

Concur. Reclamation will request a formal opinion from the Office of the Solicitor regarding Reclamation's authority to assess Federal charges in the future whenever water is used to irrigate ineligible lands. If Reclamation does not have the authority, the Commissioner will seek legislation that will provide the authority.

The responsible official is the Commissioner. The target date for requesting the opinion is September 30, 1994. If the Solicitor's office determines that the Commissioner does not have the authority in question, a target date to seek legislative authority will be established.

Recommendation 3

Implement a policy and procedures to assess charges for Federal project water that has been used to irrigate ineligible lands when authority has been established. The policy should be designed to facilitate the prospective recovery of appropriate Federal charges and should include a provision for notifying all districts that any water delivered to ineligible lands beyond the effective date of the policy would be assessed for these charges.

Response

Concur. Reclamation will implement a policy and procedures for assessing prospective charges regarding the irrigation of ineligible lands. The policy will address the notification of districts as cited by the recommendation.

The responsible official is the Commissioner. The target date for implementation of this policy is 1 year after the authority outlined in Recommendation 2 is established.

If you have any questions or require additional information, please contact Luis Maez at (303) 236-3289, extension 245.

Attachment

cc: Assistant Secretary - Water and Science
Attention: Margaret Carpenter

Water Resource Management and Research
Activities (W-IN-BOR-005-93)

Additional comments compiled by the Program Analysis staff
from comments throughout Reclamation.

GENERAL COMMENTS

The title of the report does not convey its subject or its content and could be misleading to the reader. The audit was conducted on water spreading, rather than water resources management and research, and it is our view that the report should be retitled to convey that fact.

Through the movement of sentences and paragraphs, the purpose of the report has been clarified. The "Background" section and the "Objective and Scope" section have been improved significantly, setting the stage for the presentation of the audit findings. However, some of the findings are lacking the depth to permit the general reader to understand the full ramifications of the situation being described. For example, without sufficient knowledge of the specifics of water law, a reader could conclude from the narrative of the report that water made available by the termination of water spreading could be used for literally any other purpose, including those having an environmental emphasis. In fact, making water available for such purposes through this process may not be possible under existing law in a number of the States in the West. Several other examples are noted in the specific comments below.

Reclamation abides by State water right policies and laws, which often include definitions of what is beneficial use. These laws often vary significantly from state to state. Reclamation also develops and operates its projects in accordance with the specific provisions of Congressional authorizations for individual projects. In some instances, these authorizations result in differences with existing State policies and laws.

Compounding these variations and differences, prior appropriation doctrine gives a higher priority water right to those who use it first; this is often another factor influencing the Federal Government's efforts to participate in redefining uses for the "saved" water. The report has very limited treatment of these water rights issues.

Finally, we believe that the OIG overlooked a Reclamation effort in 1993 which focused upon the need for improvements in the administration and management of the Reclamation Reform Act of 1982 (RRA). As a result of the 1993 effort, Reclamation has under review a draft policy on the application of RRA when deliveries of water to ineligible lands are discovered. It is

anticipated that this policy will be implemented during the next several months.

SPECIFIC COMMENTS

Page 3, Objective and Scope section: It would be helpful if this section included a statement that indicates the period covered by this audit. Our reading of the entire draft suggests that this period is from 1984 through 1992.

Page 6, Bureau Enforcement Efforts section: One of the major reasons that land classification or reclassification has not been accomplished in a more timely manner relates directly to budgetary and staffing requirements. The significant costs associated with accomplishing this work on lands, some of which have been irrigated for more than 50 years (thus demonstrating their irrigable\arable nature), suggests that an abbreviated review could be appropriate for classification in some circumstances. Reclamation is devoting attention to this matter as part of its efforts to implement its Blueprint for Reform.

Page 8, 1st full paragraph: Reclamation methods and procedures for land classification allow the combination of small tracts, frequently considered as nonarable, with arable land areas when the irrigation methods employed make it difficult to avoid irrigating the small tracts. Frequently in this situation, the overall productivity and economics for the total land area being irrigated may be somewhat reduced; nonetheless, the results are that these small tracts become eligible for irrigation with Reclamation water. This paragraph could be rewritten to account for this situation.

Page 11, footnote 7: Add a new sentence to the end of this footnote: "The Act does not contemplate deliveries to ineligible lands."

Page 12, footnote 8: The important message contained in this footnote would be better served if it were made a part of the report in the first full paragraph on this page.

Page 13, first incomplete sentence: We question the use of the term "economic benefit" in this sentence. It is our belief that this sentence is illustrating a financial benefit to the irrigators based upon the assumption that they are not paying for the water, particularly the "full cost" rate. To evaluate economic benefits would entail, among other things, consideration of the added production of food and fiber made available to the nation from these lands and the increased value of the lands being irrigated. In other words, as defined in the Principles and Guidelines, the National Economic Development benefits are a net addition to the output of goods and services of the nation.

The term "economic benefit," as used in this report, does not reflect this situation.

Page 13, first bullet: The first sentence should be concluded with a period after the word "lands" in the second line. Then the following should be inserted: "It should be noted that forty to fifty thousand acres of this estimate are class 6 lands which are being irrigated because of the advent of sprinkler technology, and would be eligible for water delivery under current land classification standards. Without this irrigation, water"... Delete the word "that" and continue with the rest of the original sentence, "could have been used..."

Also in that paragraph, we suggest that the last three sentences be replaced with the following: "The threatened inability of the Columbia River system to meet the 1993 flow targets and to satisfactorily address Endangered Species Act (ESA) related issues raised concerns about increased diversion demands for new irrigation requests. In response to these concerns, the Bureau began a review of existing programs and policies and their relationship to new diversion demands. On June 1, 1993, the Bureau formally announced a suspension of its approval of new irrigation water requests pending completion of its review. In January 1994, the Bureau adopted a policy of not taking action on new requests unless they met certain criteria such as not increasing the amount of water to be used or having a positive or "no net effect" on flows in the Columbia River system." This policy will continue in effect until it can be substantiated that new requests are in compliance with current ESA and NEPA requirements and/or are consistent with region-wide actions to help restore anadromous fish stocks.

Page 14, first bullet: We disagree with the inferences drawn from the combination of independent facts cited by this section. We suggest the paragraph be replaced with the following: "Irrigation water was delivered to 12,884 acres of ineligible land within the Uncompahgre Project in Colorado. The U.S. Geological Survey reported that irrigation drainage return flows from the Project and from other sources including private irrigation systems are carrying "substantial" quantities of selenium which can have harmful effects on fish and wildlife and on human health. No harmful effects have been observed in the Uncompahgre Project due largely to the local hydrology and the flushing nature of the system. In 1983, concentrated levels of selenium carried by irrigation drainage caused high rates of deformity, mortality, and reproductive failure among aquatic water fowl at Kesterson National Wildlife Refuge in California. This finding resulted in a concerted effort to identify other potential sites where this situation might occur. The Uncompahgre Project is one of the sites that DOI subsequently identified as having a high potential for irrigation drainage-induced contamination problems."

Page 14, last paragraph: At the end of the first sentence, replace the period with a comma and add the phrase "assuming that no obstacles exist under current State law." With regard to the 75 percent of the water delivered to ineligible lands, it should also be noted that, in most instances, all of the project water is under contract, and the contract provided the district the use of all that water as long as that district meets all the provisions of the contract.

Reclamation is also presently developing a comprehensive policy addressing water transfers. This policy will likely affect some of the water spreading situations described in this report.

Page 16, Appendix 1: The figures of \$37 million to \$46 million shown in Appendix 1 represent the range of totals reached in the calculations undertaken in Appendix 2. In our previous comment regarding page 13 of this draft, we suggest that this figure, as calculated by the OIG, is illustrative of a financial benefit to the irrigator, based upon the assumption that such irrigators are not paying for the water, particularly the "full cost" rate.

The financial gains accruing to the irrigators should be calculated based upon the incremental cost between actual rates paid and the "full cost" rate each district has. It is quite possible that the irrigators who apply "saved" water to their lands are paying some rate to the District for the water received; it may or may not be the contract rate. Thus, the irrigators' financial gain may be substantially overstated in this draft report.

Page 17, Appendix 2: We wish to reiterate our comment provided on the preliminary draft regarding this tabulation. The first column of the table, which lists the project name, gives the impression that "full cost" is determined on a project basis. Many of these projects have several districts; most of these districts have different "full cost" rates. The example previously cited is the Chief Joseph Dam Project, which has six districts contracting with the Federal Government for water. These districts have "full cost" rates ranging from about \$75 per acre to nearly \$900 per acre, a 12-fold difference. Even though the acreage is not large, this situation is illustrative of the difficulties an uninformed reader would have in trying to understand these computations. In our view, more explanation is needed regarding the procedures used by the OIG staff.

STATUS OF AUDIT REPORT RECOMMENDATIONS

<u>Finding/Recommendation Reference</u>	<u>Status</u>	<u>Action Required</u>
1, 2, and 3	Resolved; not implemented	No further response to the Office of Inspector General is required. The recommendations will be referred to the Assistant Secretary for Policy, Management and Budget for tracking of implementation.



United States Department of the Interior

OFFICE OF INSPECTOR GENERAL
Washington, D.C. 20240

JUL 21 1994

Honorable George Miller
Chairman, Subcommittee on Oversight
and Investigations
Committee on Natural Resources
House of Representatives
Washington, D.C., 20510

Dear Mr. Chairman:

This letter provides information requested by the Subcommittee on Oversight and Investigations during its July 19, 1994, hearing on water use practices on Bureau of Reclamation projects. Specifically, the Subcommittee requested (1) details of our computations for the monetary amounts included in Appendix 2 of our July 1994 report "Irrigation of Ineligible Lands, Bureau of Reclamation" (No. 94-I-930) and (2) a listing of land reclassifications requested by water districts that had not been completed by the Bureau.

Our report concluded that the Federal Government provided unintended financial benefits of between \$37 million and \$46 million to water users because the water users did not pay the full cost of supplying water used to irrigate ineligible lands. As indicated in Appendix 2, we computed the monetary amounts using full-cost rates and acreage and acre-feet estimates provided by Bureau personnel. We did not confirm the Bureau's estimates with any of the affected water districts. However, some of this information was derived from documentation provided to the Bureau by water districts, and we discussed the details of our computations with cognizant Bureau personnel during our audit (Details of our computations for the monetary amounts included in Appendix 2 are provided in Enclosure 1 to this letter.)

Those districts that, at the time of our audit, had requested land reclassifications which had not been completed by the Bureau are listed in Enclosure 2. For purposes of our computations, we considered these lands to be ineligible because the Bureau had not taken final action on the requests and the districts had not paid capital and related interest costs associated with water supplied to these lands during the period 1984 through 1992.

If you need additional information on this matter, please contact Mr. Marvin Pierce,
Acting Assistant Inspector General for Audits, at (202) 208-4252.

Sincerely,

A handwritten signature in black ink, reading "Joyce N. Fleischman". The signature is written in a cursive style with a large, looped "J" and a long, sweeping "S" for "Fleischman".

Joyce N. Fleischman
Acting Inspector General

Enclosures (2)

**SUMMARY OF INELIGIBLE LANDS IRRIGATED
BETWEEN 1984 AND 1992**

PROJECT NAME	STATE	ACREAGE	CONVERSION FACTOR 1/	ANNUAL ACRE-FEET	FULL COST RATE 2/	INELIGIBLE DELIVERIES PERIOD	NO. OF YEARS	VALUATION AT FULL COST
Baker	OR	13,000	2.50	32,500	\$20.95	84-92	9	\$2,451,150
Boise	ID	6,500	2.50	16,250	14.63	84-92	9	855,855
Boatwick Park	CO	110	2.55	281	88.00	86-92	7	67,760
Boulder Canyon	CA	2,500	4.65	11,625	20.13	85-92	8	402,600
Cachuma	CA	150 - 750	5/	N/A	102.94 - 218.53	34/	9	1,153,533 - 1,769,950
Central Valley	CA	2,100 - 10,500	5/	N/A	20.33 - 24.34	34/	9	3,156,227 - 4,799,060
Chief Joseph Dam	WA	360	2.50	900	75.51	84-92	9	244,656
Columbia Basin	WA	42,000 - 53,000	5/	105,000 - 132,500	51.85 - 76.59	4/	9	23,029,330 - 29,060,822
Crescent Lake Dam	OR	1,485	2.50	3,712	1.58	84-92	9	21,114
Deachutes	OR	9,840	2.50	24,600	11.76	84-92	9	1,041,462
Gila	AZ	2,000	5.96	11,920	31.37	85-92	8	\$501,920
Hammond	NM	360	4.36	1,570	144.61	86-92	7	364,417
Michaud Flats	ID	600	2.50	1,500	30.15	84-92	9	162,810
Minidoka	ID	7,000	2.50	17,500	10.67	84-92	9	672,210
Newlands	NV	150 - 750	5/	420 - 2,100	0.60 - 1.30	4/	9	2,745 - 4,163
Oriand	CA	150 - 750	5/	420 - 2,100	0.97	84-92	9	3,347 - 5,093
Owyhee	ID/OR	4,299	2.50	10,748	8.85 - 8.92	4/	9	344,754
Peonia	CO	3,932	4.28	16,829	35.57	84-90	7	979,029
Solano	CA	150 - 750	5/	420 - 2,100	6.00 - 21.77	34/	9	123,745 - 188,923
Umatilla	OR	17,565	2.50	43,913	1.60 - 3.37	4/	9	466,341
Uncompahgre	CO	12,884	4.00	51,536	4.03	84-92	9	467,303
Vale	OR	2,906	2.50	7,265	8.40	84-92	9	219,690

Enclosure 1

PROJECT NAME	STATE	ACREAGE	CONVERSION FACTOR 1/	ANNUAL ACRE-FEET	FULL COST RATE 2/	INELIGIBLE DELIVERIES PERIOD	NO. OF YEARS	VALUATION AT FULL COST		
Ventura River	CA	150 - 750	5/	2.80	420 - 2,100	31.54 - 63.53	4/	84-92	9	153,916 - 234,540
Yakima	WA	1,600	2.50	4,000	37.79	84-92	9	544,176		
Total		131,791 - 154,191		369,629 - 429,049				\$37,430,090 - \$45,869,798		

Notes:

- 1/ Average numbers of acre-feet of water applied to each acre of land.
- 2/ Full-cost rates are per acre unless noted otherwise (see Note 3). Full-cost rates are defined by Section 202(c) of the Reclamation Reform Act of 1982 (PL 97-293) and consist of a capital component and an interest component and are determined for each district within a project.
- 3/ Full-cost rate per acre-foot of water.
- 4/ Range in full-cost rate due to more than one district located within the project, with each district having its own full-cost rates.
- 5/ The Bureau provided the Office of Inspector General a range of estimated ineligible lands irrigated. Acreage having a range will also result in a range in the annual acre-feet column.

**BUREAU OF RECLAMATION
LAND RECLASSIFICATIONS IN PROGRESS
AS OF AUGUST 1993**

<u>PROJECT NAME</u>	<u>DISTRICT NAME</u>	<u>NUMBER OF ACRES</u>
Baker	Baker Valley Irrigation District	4,400
Boulder Canyon	Coachella Valley Water District	2,500
Crescent Lake Dam	Tumalo Irrigation District	1,485 1/
Deschutes	North Unit Irrigation District	1,040 1/
Owyhee	Owyhee Irrigation District	3,722 1/
	Riogeview Irrigation District	577 1/
Vale	Vale Oregon Irrigation District	2,906 1/
Ventura River	Casitas Municipal Water District	1,903
Yakima	Kennewick Irrigation District	<u>1,035</u>
	Total	<u>19,568</u>

Note:

1/ Reclassification was initiated as part of a land exchange program established under Oregon Statute H.B. 3111.

COLUMBIA BASIN INSTITUTE

Supplemental Statement

to the
Subcommittee on Oversight and Investigations
of the Committee on Natural Resources
United States House of Representatives

December 5, 1994

December 5, 1994

The Honorable George Miller, Chairman
Committee on Natural Resources
United States House of Representatives
1328 Longworth Building
Washington, D.C. 20515

Dear Chairman Miller:

This letter is in response to the Supplemental Statement of the Columbia Basin Irrigation Districts, submitted on July 29, 1994 by Mr. Richard L. Erickson, Secretary-Manager, East Columbia Basin Irrigation District. Mr. Erickson's supplemental statement was in response to testimony submitted by the Columbia Basin Institute (CBI) at the July 19, 1994 hearing on Water Use Practices on Bureau of Reclamation Projects, in which allegations were made of mismanagement of the Columbia Basin Project's (CBP) water resource by the three Columbia Basin Irrigation Districts. Thank you for the opportunity to again supplement the hearing record.

Mr Erickson's supplemental statement provides an explanation for increases in water diversions from the Columbia River which, as revealed in CBI's testimony, have increased by 570,000 acre-feet since 1985, the same year the Irrigation Districts installed seven low-head hydropower projects within the irrigation canals of the CBP.

Response to CBID's Supplemental Statement

Mr. Erickson's statement contains many arguments against CBI's general allegation that annually, since 1985, there are 400,000 acre-feet of water diversions unaccounted for.

First, in the third paragraph on page 2 of the irrigation district's supplemental statement, Mr. Erickson states that CBI, in its testimony, mistakenly claims the CBP's acreage increased by only 45,000 acres since 1968. Mr. Erickson then offers a figure which he claims to be the actual amount of acreage increase since 1968, 168,888 acres.

To begin, the 45,000 acre increase cited by CBI, as is clearly stated in the testimony, refers to the increased acreage between 1985 and 1992, not 1968 and 1992. Furthermore, according to BuRec Water Distribution Reports (WDR), the increase in acreage between 1968 and 1992 was 126,757 acres, not 168,888 acres.

The context of this number in CBI's testimony was to show that the increase in diversion between 1985 and 1992 (570,000 acre-feet)

The Honorable George Miller
December 5, 1994
Page 2

could not be entirely explained as necessary irrigation water to supply the increased acreage (45,000 acres) on the CBP over the same time period, 1985 to 1992. CBI then provided the 1992 WDR figure for the average amount of water necessary to irrigate one acre on the project, 3.79 acre-feet per acre. Thus, the testimony read, for 45,000 acres supplied with 3.79 acre-feet per acre, only 170,000 acre-feet of water was necessary to meet this increase in acreage. This compared to the 570,000 acre-feet increase in water diversion left approximately 400,000 acre-feet of the increased diversion unexplained in terms of its necessity to irrigate CBP acres.

Mr. Erickson then states "the difference between 45,000 acres and the 168,888 acres developed since 1968 accounts for the allegedly unexplained diversion of 400,000 acre-feet when total project deliveries are taken into consideration." Mr. Erickson here states that this difference in acreage "accounts" for the unexplained diversion increases since 1985. However, as was just explained, this difference in fact provides no explanation for increased diversions because Mr. Erickson has erroneously read CBI's testimony. Therefore, Mr. Erickson's explanation which allegedly "accounts" for the diversion increases, actually accounts for nothing.

In the same paragraph, Mr. Erickson goes on to state that the acre foot diversion per acre in 1968 was 4.24 acre-feet per acre, and in 1992 was 4.18 acre-feet per acre, and "practically speaking, the relative efficiencies are the same." Apparently this figure is given to accompany the acreage increase of 168,888 acres since 1968, which if calculated, reveals that over 700,000 acre-feet of water was necessary to irrigate the increased acreage since 1968. Thus, an attempt to justify the 570,000 acre-feet diversion figure provided by CBI.

In figure 2 of CBI's testimony, which is based on BuRec WDR data, CBI presents different numbers than Mr. Erickson. Particularly, the BuRec's WDR indicates that water deliveries in 1968 were on average 4.2 acre-feet per acre, similar to Mr. Erickson's number. However, the WDR clearly shows that the deliveries per acre dropped to 3.6 acre-feet per acre in the mid-eighties and inched slightly upward to 3.7 acre-feet per acre in the early nineties.

As previously stated, acreage only increased by 45,000 acres between 1985 and 1992, not 168,888 acres, and these acres only use 3.79 acre-feet per acre, not 4.182 acre-feet per acre. Therefore, the explanation that the increase in acreage accounts for the increase in diversion is completely lacking merit.

In the fourth paragraph on this page, Mr. Erickson provides 3 reasons for increased diversions since 1985, which CBI has

The Honorable George Miller
 December 5, 1994
 Page 3

reproduced:

1. Increased acreage;
2. 250,000 acre-feet direct feed to adjust for the increased acreage; and
3. Decreased return flows from:
 - a. efficiency improvements;
 - b. drought; and
 - c. resupply to Potholes due to groundwater storage decreasing return flows to the Potholes Reservoir.

There is no discernable difference between explanations 1 and 2. To state that increased acreage has caused increased diversions must assume that the diversions are necessary to irrigate the increased acreage. Therefore, explanation 2 which lists separately that there has been a 250,000 increase in the direct feed to adjust for increased acreage, is simply stating the same cause twice.

CBI has already documented, with BuRec Water Distribution Reports, that the increase in acreage from 1984 to 1992 was only 45,000 acres, which at 3.79 acre-feet per acre, the BuRec WDR figure for water use in 1992, could only account for 170,000 acre-feet of the 570,000 acre-feet diversion. The districts give no documentation for the 250,000 acre-feet figure, which suggests that the 45,000 acres of increased farmland on the CBP is using over 5 acre-feet per acre, which even contradicts Mr. Erickson's inaccurate claim of 4.182 acre-feet per acre. Even if the 250,000 acre-feet figure were accurate, it still leaves 320,000 acre-feet of increased diversions unaccounted for.

Mr. Erickson states decreased return flows as the third reason for increased diversions, giving three additional factors which contribute to the decrease. Efficiency improvements on farm have occurred since the late 1960's, with the bulk of sprinkler conversions occurring between 1970 and 1979. From 1967 to 1991, the amount of sprinkler irrigation on the CBP increased from forty percent (40%) to seventy one percent (71%), an increase of thirty one percent (31%).¹ Two thirds of this increase occurred by 1979, when sprinkler irrigation was at sixty percent (60%). Diversions,

between 1970 and 1985 remained at a stable rate of roughly 2.1 million acre-feet per year. If efficiency improvements are a reason for decreased return flow triggering increased diversions since 1985, why did diversions prior to 1985 remain relatively constant? The districts provide no explanation for this. Thus it is highly unlikely that efficiency improvements are a factor in the diversion increases since 1985. Furthermore, if any impact on

¹ "Special Report: Columbia Basin Project Irrigation Efficiency and Return Flow Analysis," Bureau of Reclamation, 1991

The Honorable George Miller
 December 5, 1994
 Page 4

return flows was caused by efficiency improvements, it was most likely negated by the decrease in actual deliveries to farm turnouts which resulted from the efficiency improvements.

To better demonstrate the egregious increase in diversions since 1985, CBI has compared the diversions during the time period of 1968 to 1984 -- which begins prior to the takeover of operation and maintenance by the irrigation districts and ends the year before installation of the low-head hydropower units in the project's canals -- with the time period of 1984 to 1992 -- following the installation of the low-head generators to the present. Over the first sixteen year period, the increase in average annual water diversions from the Columbia increased by only 76,627 acre-feet.² During that same time period, the average amount of acreage of the project increased by 88,615 acres.³ During the time period between 1984 and 1992, the average annual diversion increased by 570,000 acre-feet,⁴ while the increase in acreage over this period was only 45,183 acres.⁵

There were large scale conversions of irrigating systems, from primitive flood and rill methods to more efficient sprinkler methods, during the first 16 year period, with the majority of the conversions occurring from 1970 to 1979. This accounts for the stability of diversions during this period. However, the districts in their supplemental response want the Subcommittee to believe that these efficiency improvements have all of a sudden caused a dramatic increase in diversions.

Mr. Erickson criticizes CBI's testimony because it does not compare efficiencies of the CBP to those existent prior to district takeover. Making this comparison increases the necessity for a legitimate explanation of why the diversions have so rapidly increased since 1985, adding further support to the allegations suggested by CBI, that the increase is either due to illegal diversions to increase hydropower kick-back revenues, or the

² The average diversion for the years 1966, 1967, and 1968 was 2,127,137 acre-feet, in years 1982, 1983, and 1984, the average diversion was 2,203,763 acre-feet.

³ There was an average of 443,691 acres in 1966, 1967, and 1968, and 532,266 acres in 1982, 1983, and 1984.

⁴ There was an average diversion of 2,203,763 acre-feet in 1982-84, and an average diversion of 2,775,767 acre-feet for years 1990, 1991, and 1992.

⁵ Acres under irrigation averaged 532,266 acres in 1982-84 and 577,449 acres in 1990-92.

The Honorable George Miller
 December 5, 1994
 Page 5

conveyance system has fallen into a precipitous state of decline.

Regarding the second factor of drought, between the years of 1980 and 1993, according to National Weather Service records for the Columbia Basin, only four years were below the average precipitation, 1985, 1987, 1988 and 1992. And, these four years were no less than eighty four percent (84%) of a normal year's precipitation.⁶ This may have had a small contribution to decreased return flows but hardly enough to constitute 400,000 acre-feet in increased diversions.

The third claim states that return flow has decreased to the Potholes Reservoir due to water being used for artificial groundwater storage in the Quincy Black Sands area located west of Potholes Reservoir. This is offered as a factor for increased diversions to resupply the reservoir because apparently it has experienced decreased return flows from the Quincy Black Sands area. Irrigation of the Quincy Black Sands area has been occurring since the mid-1960's, and the irrigated acreage of that area has not drastically increases in the last decade.

The amount of land receiving irrigation water in 1980 was 30,785 acres. This gradually increased to 35,309 acres in 1990: a net increase of less than 5,000 acres over the decade. The acreage in this area in 1985 was 34,695, and Mr. Erickson's figure of 37,450 acres, presumably is from 1993. This gives an increase of 2,755 acres during the period of dramatic diversion increases, which at 3.79 acre-feet per acre accounts for 10,441 acre-feet.

After review of the supplemental statement, a generous accounting of the explanations provided by Mr. Erickson may substantiate 20,000 acre-feet of water legitimately used by the irrigation districts since 1985 out of the 400,000 acre-feet originally testified to by CBI as unexplained. This still leaves 380,000 acre-feet unexplained. If this is all the irrigation districts have to offer as an explanation for the increase of 380,000 acre-feet in diversions from the Columbia River in the last eight years, it clearly warrants further attention from the Subcommittee on Oversight and Investigation. Considering the hydropower value of this water, over \$17 million annually to the region, as well as its value to the region for salmon recovery efforts, perhaps further investigation into what appear to be wasteful or even illegal water use practices on the CBP is warranted by the General Accounting Office or the Congressional Research Service.

Thank you for this opportunity to provide an additional supplement to the record.

⁶ Clearing Up, Volume No. 647, Page 4, November 7, 1994.

The Honorable George Miller
December 5, 1994
Page 6

Respectfully Submitted on Behalf of the Columbia Basin Institute,

A handwritten signature in black ink, appearing to read "Rick Gove", with a long horizontal flourish extending to the right.

Rick Gove
Conservation Associate

**SUPPLEMENTAL TESTIMONY OF CHAIRMAN ANTONE MINTHORN
Confederated Tribes of the Umatilla Indian Reservation
Affiliated Tribes of Northwest Indians**

**SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
Committee on Natural Resources
United States House of Representatives**

August 2, 1994

I appreciate your invitation to present testimony at the July 19, 1994 Hearing on Water Spreading. One of the primary questions the federal government is struggling with is how to fix this problem. The Confederated Tribes of the Umatilla Indian Reservation have been immersed in exploring solutions to water spreading for over three years. We have developed a policy based on our experience which is workable and is fair.

There are three basic options for resolution. One, all of the water used illegally by irrigators simply would be "legalized". Two, all of the water used illegally would be allocated to meet other existing legal requirements which are currently unmet, such as treaty reserved water rights and Endangered Species Act needs. The third option would be to split the illegally used water between irrigation and unmet legal water requirements.

Irrigation interests are pushing very hard for the first option. This is unacceptable. This illegal activity already has impacted the property rights of others. Our Indian Trust Assets have been impacted. The federal government cannot approve any solution which fails to address past and future impacts of water spreading to our treaty rights. The federal government has a legal Trust Responsibility to protect our treaty resources. This legal responsibility supersedes any policy, and in fact must guide any policy.

The Bureau of Reclamation's negligence in allowing water spreading to impact our treaty resources creates a special responsibility for the federal government to see that these impacts are fully mitigated. This responsibility far outweighs the federal government's responsibility to ease the impacts of compliance with the law on irrigators. No matter how much the irrigation interests' public relations firms try to portray irrigators as innocent victims, the fact remains that they have profited from these illegal activities. They profited from taking our treaty-guaranteed resources.

We have not pursued, however, the second option of taking all illegally used water to partially meet our treaty rights. This option would require not only mitigation for the impacts of water spreading, but would require that all illegally used water be

allocated to meet our treaty guaranteed rights. Both the federal government and the states are required under law to protect our treaty rights. Our treaty reserved water rights have been ignored for over a century. The base of our economy, salmon, are going extinct as a result. Water is needed right now or the impacts to our Indian Trust Assets will be disastrous.

It is the third option which we have advocated. This approach gives irrigators the opportunity to take responsibility for their illegal actions and to contribute positively to the solution. If they refuse to work cooperatively to resolve this problem and continue to ignore contract and legal requirements, then the second option would be appropriate. If irrigation interests refuse an opportunity to legalize their activities in a manner which compensates for their impacts on the property rights of others, then a cooperative approach will not succeed. Under those circumstance, all of the illegally used water should be allocated to meet our treaty rights and other legal requirements. Prosecution under available civil and criminal laws would be appropriate as well.

Our Water Spreading Policy was included as an attachment to the testimony I presented at the Hearing. I have attached here a copy of our comments to the Bureau of Reclamation concerning their draft Water Spreading Policy.

There is a workable and fair solution to water spreading. For this solution to work, both the federal government and the irrigation interests must take full responsibility for having created this water spreading problem. The federal government and the irrigation interests must also take full responsibility for the consequences of water spreading on the property rights of others.



CONFEDERATED TRIBES
of the

Umatilla Indian Reservation

P.O. Box 638

PENDLETON, OREGON 97801

Area code 503 Phone 276-3165 FAX 276-3095

GENERAL COUNCIL
and
BOARD OF TRUSTEES

Water Committee

July 29, 1994

Mr. Walt Fite
Assistant Regional Director
Bureau of Reclamation
1150 N. Curtis Road
Boise, ID 83706-1234

Re: The Bureau of Reclamation's Draft Water Spreading Policy

Dear Walt,

On behalf of the Tribal Water Committee, I would like to make some recommendations about the Bureau of Reclamation's July 7, 1994, draft Water Spreading Policy. I apologize for the delay in sending you our comments. This is a very important issue to this Tribe, and we felt that a thorough assessment of the draft policy was far more important than getting comments to you immediately.

First of all, I want to say that this draft policy is a positive step in the right direction. But it needs to be strengthened. If the policy were finalized without some significant changes from the July 7, 1994, draft, it might contain nice words and intentions, but it quite likely would not achieve its intended objectives.

In general, the policy must recognize that water spreading has already impacted the rights and property of others, including Indian Trust Assets. These past impacts must be fully compensated for in any resolution of the problem.

In addition, the process for resolving water spreading needs to be restructured so that water spreading is halted immediately. As we have shown in the Umatilla Basin by following this Tribe's Water Spreading Policy, water spreading can be halted immediately while still protecting irrigators from being cut-off. The process needs to have specific goals, deadlines and enforcement provisions to ensure that it will be implemented effectively.

CTUIR Comments on BOR's Draft Water Spreading Policy - Page 1

TREATY JUNE 9, 1855 + CAYUSE, UMATILLA AND WALLA WALLA TRIBES

The following are specific comments to the policy. New or modified language is both in bold and underlined.

1. Introduction

- a. This paragraph states that the policy is "part of the Region's approach" to resolving the water spreading problem. What is the other part? All approaches should be at least incorporated by reference in this policy.
- b. The policy must acknowledge that this illegal water use is occurring against the backdrop of drastically inadequate instream flows in the Pacific Northwest. It is well documented that low instream flows are killing salmon which are protected under numerous treaties and which have and continue to be listed under the Endangered Species Act.

The policy does not mention a comprehensive programmatic National Environmental Policy Act (NEPA) analysis of the cumulative impacts of water spreading. This needs to be included. While water spreading certainly does have local impacts on the environment and on Indian Trust Assets, the largest impact may well be the cumulative effects. Any solution to water spreading which does not fully take into account cumulative impacts will be inadequate.

In addition, the policy must state that resolution of the water spreading problem will be consistent with other existing laws which also affect water management.

The following language should be inserted after "water not authorized by law or contract.":

"Inadequate instream flows and poor water quality have played a major role in the severe decline of salmon in the Pacific Northwest. The Bureau of Reclamation shall initiate a programmatic National Environmental Policy Act (NEPA) analysis to determine the past and future cumulative impacts on the environment, on treaty rights and on other property rights and economic interests caused by water spreading and by any efforts to resolve this problem. Each initiative undertaken to resolve a water spreading case must be consistent with the recommendations from this programmatic NEPA analysis. In addition, all solutions to water spreading must be consistent with Indian treaty rights, Columbia-Snake Basin salmon recovery efforts, federal law, state law, and overall water resource management goals."

2. Categories of Water Spreading

- a. The last sentence should be moved to Section 5 - Process for

CTUIR Comments on BOR's Draft Water Spreading Policy - Page 2

Resolution of Water Spreading; Subsection c - Permanent Resolution; 3rd paragraph, #(2). This is described below under the discussion of the draft policy's Section 5.

3. Indian Trust Assets and Treaty Rights

- a. Indian Trust Assets and the federal government's Trust Responsibility to tribes both need to be defined. This section should begin with the following definitions, excerpted from Reclamation's Indian Trust Assets Policy:

"The United States has a Trust Responsibility to protect and maintain rights reserved by or granted to American Indian tribes or Indian individuals by treaties, statutes, and executive orders. Indian Trust Assets are legal interests in property held in trust by the United States for Indian tribes or individuals, or property that the United States is otherwise charged by law to protect. Indian Trust Assets include, among others, fishing and hunting rights, water rights and instream flows."

- b. Indian Trust Assets have already been impacted by non-Indian illegal water use. Any resolution to water spreading must compensate for past impacts of water spreading on Indian Trust Assets. This is especially true because of Reclamation's role in allowing this practice to occur in the past. Reclamation has a special responsibility to ensure that the impacts to Indian Trust Assets caused by Reclamation's negligence in allowing water spreading in the past are fully compensated. The following modifications should be made:

"Water spreading and the resolution of water spreading cases may have and may continue to affect Indian Trust Assets and treaty rights. Reclamation has a shared Trust Responsibility with other Federal agencies to protect treaty rights and Indian Trust Assets. Reclamation shall consult with Tribes whose Indian Trust Assets and treaty rights may have been affected by water spreading or which may be affected by resolution of water spreading. Further, protection of Indian Trust Assets and treaty rights through evaluation of potential impacts is a part of Reclamation's National Environmental Policy Act (NEPA) compliance process."

- c. Reclamation does not have the authority to abrogate or to allow "taking" of any Tribe's Indian Trust Assets or other treaty rights. Thus, resolutions to water spreading must mitigate past impacts and cannot allow any net adverse impacts to these assets. This responsibility of Reclamation needs to be clearly spelled out in the policy. The following language should be added:

"Reclamation shall not approve any proposed solution to water spreading that would cause a net adverse effect on Indian Trust Assets or treaty rights, or that would fail to fully compensate the affected Indian Tribes or individuals for past impacts of water spreading activities to their Indian Trust Assets or treaty rights."

4. Incidental Application of Water

- a. This section should be stricken. There is no need for this exception. Reclamation already has a process for reclassification of lands. This process includes NEPA compliance. In cases where the degree of water spreading has been minor, and the impacts on others has been minimal, the NEPA process already allows for a fast-track process. These cases could be resolved through an Environmental Assessment or even a Categorical Exclusion process to obtain the needed Finding of No Significant Impact.

Creation of this exception creates an opportunity for abuse. No exceptions which allow for side-stepping a full assessment of the impacts of the particular type of water spreading should be allowed. Creation of this exception may violate Reclamation law and NEPA. Minor cases of water spreading can be dealt with quickly and fairly under existing Reclamation and NEPA procedures.

5. Process for Resolution of Water Spreading

- a. As discussed in Section 3, all resolutions must be consistent with Reclamation's duty to protect Indian Trust Assets and treaty rights. Accordingly, the following modifications should be made to the second paragraph:

"The resolution of water spreading cases, other than denial of water, is subject to the National Environmental Policy Act (NEPA) which requires the analysis and disclosure of the environmental, economic and Indian Trust Asset impacts of the proposed action. Additionally, any proposal, may be subject to Indian treaty rights, the Endangered Species Act, Clean Water Act, Fish and Wildlife Coordination Act, Archeological Resources Protection Act, and other federal laws."

5.a. Identification of Specific Instances of Water Spreading

- a. Here, the intent of inventorying violations of federal contracts and law and requiring compliance is good. The process as described, however, has so many holes that it is not likely to be implemented. This is the meat of the policy, and it must be enforceable.

- b. Postponement of halting of water spreading until completion of both an inventory of water spreading and verification of the inventory creates two problems in particular.

First, this process shifts the burden of proof onto Reclamation of discovering the illegal actions, proving them, and then enforcing them. Irrigators already have an existing affirmative duty to comply with the law and with their contracts.

Often, irrigation districts are the only ones who have the complete records of their water use. In Oregon, at least, irrigation districts are established under state law, and have the authority and duty to monitor and enforce state and federal water laws within their districts. In addition, under Oregon law, an irrigator must have a valid federal contract to be considered in compliance with state water law. Shifting the burden of proving illegal water use onto Reclamation is unnecessary.

Second, this creates an unnecessary delay in enforcement. Water spreading is illegal, and should be halted immediately.

Not only do irrigation districts have a duty to comply with their contracts and with federal law, but often under state law they have been delegated the duty to enforce state and federal laws within their districts. Districts have been on notice of the water spreading problem at least since Reclamation began its Water Spreading Task Force process in February of this year. The federal government, tribes, states and environmental groups have tried to work this issue out cooperatively rather than seeking prosecution for these illegal activities. This approach is appropriate so that irrigators can be given the opportunity to take responsibility for their illegal actions and to contribute positively to the solution. If they do not work cooperatively to resolve this problem and continue to ignore contract and legal requirements, then prosecution is appropriate.

In the Umatilla Basin, irrigators have been on notice since 1991. In November, 1991, Reclamation gave them notice that water spreading activities would be enforced against beginning in 1993. In December, 1991, the irrigation districts here entered into negotiations with this Tribe, Reclamation, the Bonneville Power Administration, state agencies and several environmental groups to develop a framework for resolving water spreading. We engaged in lengthy negotiations with the irrigation districts here to allow them to legally irrigate outside of their boundaries in 1994. After first agreeing in principal and then finalizing the agreement language, the Umatilla districts decided to reject this opportunity to irrigate those lands legally. If any irrigator in the

Umatilla Basin is irrigating outside of their boundary this year, they should be prosecuted for doing so.

- c. The proposed inventory process, in itself, is a good idea. This should be a second step, however, after notifying irrigators that they must cease and desist all illegal and unauthorized activities immediately. The inventory should be used to confirm compliance. There is no need to wait until an inventory is completed to require compliance with the law. That obligation already exists.

If irrigators have to fund an inventory that will then be used against them to cut off their water spreading, what incentive is there for them to initiate or complete such an inventory? What incentive do they have to encourage a fully accurate accounting of their water spreading activities?

This Tribe's Water Spreading Policy, in contrast, is workable. It has already been used in the Umatilla Basin with good results. Also, it is consistent with the law.

Water spreading should be halted immediately. Fish are dying from lack of water right now throughout the Columbia-Snake Basin. These fish as well as the illegally used water are tribal assets. This year's Spring Chinook adult returns were the worst ever. They were half of the previous all-time worst record. Low instream flows are largely responsible. In the Umatilla Basin, adult survival is directly linked to instream flow conditions as smolts. See Attachment.

Reclamation should make it clear that Reclamation, not the irrigators, controls the water which has been used illegally in the past. If irrigators want to legalize their past activities and use any of that water again, then they may formally request the appropriate process to do so. As part of their request, the irrigators must specify what lands they wish to irrigate and with how much water. Thus, they have the incentive to supply an accurate inventory of their water spreading activities.

This is exactly what our Water Spreading Policy calls for, and it is exactly what has occurred in the Umatilla Basin. In fact, the Umatilla Basin is the only basin in the country in which Reclamation knows how much water spreading has been occurring and where.

This is the only practical way to approach this problem. It stops the illegal activities immediately. It protects irrigators from financial impacts by allowing them to request legalization of their activities. It also requires mitigation for the impacts of water spreading on the property rights of others. It also has advantages that Reclamation's draft

policy does not have.

First, it is consistent with the law. Instead of continuing to allow water spreading for some indeterminate length of time, it is halted now. Reclamation's draft policy would allow irrigators to delay enforcement indefinitely. Under the draft policy, enforcement would not begin until after completion of the inventory. But completion of the inventory is in the hands of the irrigators. The draft policy has no deadlines, nor any enforcement mechanisms to, in fact, make the irrigators complete the inventory.

Second, an immediate halt to water spreading would keep the burden of complying with the law on the irrigators, where it belongs. Delaying notification to irrigators that they must comply with existing laws and contracts would unnecessarily postpone enforcement of those laws. Such a delay is not legally justifiable.

Third, an immediate halt to water spreading would create an incentive for irrigators to inventory their water spreading activities. Reclamation's proposed process in its draft policy would create a disincentive for irrigators to provide this information. Under the draft policy's process, the inventory would be used against irrigators, rather than for them as in our Water Spreading Policy.

Finally, due process is fully satisfied under this Tribe's approach. This process allows irrigators the opportunity to legalize their activities through the mechanisms which they should have followed in the first place. In fact, it gives them even greater advantages than other farmers who have not engaged in water spreading. Western rivers are already severely overappropriated, resulting in severe impacts to other economies. Because of this, the Northwest Power Planning Council has asked the States of Oregon, Washington, Idaho and Montana to not issue new water rights until salmon needs have been met.

The policy must make clear, however, that this water spreading policy will not be used to expand irrigation. Limitations on eligibility must be spelled out clearly in Reclamation's policy. We are seeing attempted abuse of the water spreading resolution process here in the Umatilla Basin. Here, irrigators have severely depleted the groundwater, causing water levels to drop several hundred feet in some areas. Having used up the groundwater, some irrigators are trying to get Reclamation water in replacement. To do so, they are claiming that they have been water spreading on lands previously irrigated with groundwater. In other words, they are attempting to not only legalize its water spreading, but to put even more acres under federal project irrigation.

- d. Reclamation can no longer place itself at the mercy of irrigators to know how much water spreading is going on. Having the irrigators prepare inventories is a good idea. It is not a replacement for Reclamation's responsibility to develop this information itself.

The Reclamation Reform Act requires users of federal water to furnish a certificate that they are in compliance with federal requirements to use that water. The reporting form is developed by the Secretary of the Interior. Right now, Reclamation is revising those reporting forms. Reclamation must revise the Reclamation Reform Act reporting forms so that they will give Reclamation the information necessary to identify all water spreading which is occurring.

This information can be used to verify inventories prepared by contractors. When contractors refuse to prepare inventories, it can be used in place of an inventory.

- e. Subsection 5.a. should be modified as follows:

"5.a. Immediate Halt of All Water Spreading

Reclamation shall notify all contractors of federal water in the Pacific Northwest Region that all water spreading activities must cease and desist immediately. Such notice shall be given by September 1, 1994. Notice shall include a copy of this Water Spreading Policy which defines water spreading. The notice also shall explicitly state that Reclamation regulates the usage of this federally developed water and that the contractors who have engaged in water spreading have no right to rely on continued use of water which they have used in violation of their contracts with Reclamation or of Reclamation law.

5.b. Process for Permanent Legalization of Past Water Uses

Contractors who wish to legalize past water spreading practices must formally request Reclamation to consider approval of the application of project water to the lands or uses in question. As part of this request, the contractor shall provide Reclamation with an inventory identifying the extent and nature of the water spreading which has occurred. Contractors must make this request and provide the inventory by September 1, 1995.

Otherwise, Reclamation shall permanently allocate the water which has been used illegally to meet other unmet legal requirements, such as treaty reserved water rights or Endangered Species Act needs. If a contractor does not prepare an adequate inventory, Reclamation shall use the information obtained from the new Reclamation Reform Act reporting forms to identify the water used illegally for allocation to other uses.

i. Water Spreading Inventory

The inventory described above shall identify the extent and nature of the categories of water spreading for each contractor who contracts with Reclamation. The inventory shall be completed under the guidance of Reclamation's Area Manager and shall be funded by the contractor. Where reasonable, the Area Manager may direct a single inventory that covers multiple contractors.

ii. Inventory Verification and Compliance Confirmation

The Area Manager shall evaluate the inventory for accuracy. Upon verification of the inventory, the Area Manager shall use the inventory to confirm contractor compliance with the applicable contracts and laws. If the contractor disagrees with the findings of the Area Manager, the contractor may request, pursuant to procedures implemented under this policy, that the Regional Director review the Area Manager's findings. The Regional Director's conclusions will be final for the Department of the Interior. Violations of contracts or laws which occur after Reclamation's September 1, 1994, cease and desist notice shall be prosecuted under applicable civil and criminal laws.

iii. Compliance with NEPA

Upon verification of the inventory, the Area Manager shall provide the contractor with a detailed description of the information that the contractor will need to supply to comply with NEPA to resolve the water spreading problem. At that time, the Area Manager shall also provide the contractor with an estimate of the NEPA compliance costs that the contractor must fund. Within 60 days of receipt of this information, the contractor shall commit, in writing, to fund the analysis of the environmental impacts to be performed under NEPA. Otherwise, Reclamation shall permanently allocate the water which has been used illegally to meet other unmet legal requirements, such as treaty reserved water rights or Endangered Species Act needs.

iv. Formal Agreement

If the contractor decides to make a formal request, a formal agreement shall be entered into between the contractor and Reclamation that details the process to be followed in reaching a final solution including funding, time schedules and deliverables by each party. Reclamation shall consult with all Indian tribes whose Indian Trust Assets may be affected at the earliest reasonable time in the decisionmaking process. The interested parties, including water users, the environmental community, and the general public will be

invited to comment on the agreement.

v. Permanent Resolution

In most instances, a negotiated resolution, memorialized in contract, would be favored over mandated resolution because negotiated resolutions are more likely to encourage creative approaches to maximizing the range of beneficial uses to which available water may be put. For example, a negotiated resolution may provide for such things as watershed restoration, institution of water conservation practices, allocation of water to fulfill the United States' treaty obligations to Indian Tribes, allocation of water to identified environmental needs, and legitimization of some previously unauthorized uses.

Solutions included in the negotiated agreement will be formulated using input from thorough public discussion of all pertinent issues and information and alternatives generated by the NEPA process. Deference shall be given to superseding federal laws and policies such as fulfillment of treaty obligations to Indian Tribes and the protection of endangered and threatened species.

Reclamation shall consult with potentially affected Indian Tribes on possible impacts to Indian Trust Assets and appropriate mitigation measures at the earliest reasonable time in the decisionmaking process. Reclamation also shall consult with potentially affected Indian organizations or individuals, and with the Bureau of Indian Affairs, the Office of American Indian Trust, the Solicitor's Office, Reclamation's Native American Affairs Office and the Regional Native American Affairs coordinator.

Solutions shall include a final disposition of the water in question that is consistent with state law, federal law, federal reserved and appropriative water rights, and Indian treaty rights. Reclamation must take all actions necessary under federal and state law to ensure water allocated for public values is legally protected.

vi. Conditions on Legalization of Past Practices

Reclamation will approve delivery of project water to lands that were formerly receiving water without authorization only under certain conditions. These conditions include, but are not limited to:

- (1) The lands and uses will come under a contract.
- (2) Total net diversions by the district cannot exceed historic levels. In no case will the total number of

acres irrigated exceed the number approved by contract or project authorizations.

- (3) Only those lands which have been irrigated in violation of federal contracts or laws for five or more consecutive years within the last fifteen years prior to February 1, 1994, are eligible for permanent approval of project waters. The burden of demonstrating such use is on the contractor.
- (4) The total rate and duty approved for any parcel of land shall not exceed the maximum rate and duty applied to that parcel prior to February 1, 1994. The burden of demonstrating past rate and duty is on the contractor.
- (5) Past impacts from the illegal activities on tribal resources must be fully mitigated. Mitigation alternatives should include, among others, reallocation of water to instream uses, watershed restoration and financial compensation.
- (6) Any potential future impacts from the legalization of water spreading must be fully mitigated. Mitigation alternatives should include, among others, reallocation of water to instream uses, watershed restoration and financial compensation.
- (7) The analysis of impacts to tribal resources must include local, regional and cumulative impacts. The baseline for determining impacts shall be the condition of the resources at the time of the applicable treaties.
- (8) Adverse environmental impacts shall be fully eliminated or fully mitigated.
- (9) Monitoring and enforcement procedures must be established and implemented, including the installation of measuring devices on all irrigation diversions.
- (10) Measures to improve water quality by reducing the impacts of farming and other practices must be established and implemented.
- (11) Comprehensive, state-of-the-art conservation measures must be developed and implemented, with the conserved water allocated to tribal resources.
- (12) Economically unjustifiable uses of the water shall not be permitted. For instance, no water should be provided to grow surplus crops. Irrigators must demonstrate that their proposed use of the water is economically justifiable.

(13) Irrigators must repay the taxpayers for the subsidies illegally received in the past.

(14) Repayment obligations will be adjusted to reflect the new lands.

(15) Water may only be applied to land with state-issued water rights or Federal reserved or appropriative water rights.

5.c. Process for Interim Legalization of Past Practices

The agreement described above may allow for one-year interim water delivery contracts to all or a portion of the ineligible lands or uses if appropriate mitigation, curtailment, or other measures are adopted to meet environmental and other concerns identified by the Area Manager. Any interim delivery contract is subject to NEPA compliance. Reclamation shall consult with all Indian tribes whose Indian Trust Assets may be affected at the earliest reasonable time in the decisionmaking process.

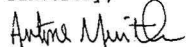
6. Cost Recovery

The last sentence in the second paragraph must be stricken. Refusal to capture the costs of past illegal water spreading would violate the United States' Trust Responsibility to Indian Tribes. Illegal irrigation has economically benefitted irrigators at the cost of this and other Tribes' economies. The federal government allowed this activity to occur over many years, violating its Trust Responsibility to Tribes to protect our treaty resources. Irrigators who irrigated illegally must take responsibility for the impacts they have caused to the property rights of others.

We appreciate your consideration of our suggestions. We have put a considerable amount of effort into developing fair solutions to this problem over the last several years. We believe that our experience offers guidance to others who are still relatively new to this problem.

Key to resolution is for both the Bureau of Reclamation and the irrigators who have engaged in water spreading to acknowledge their wrong-doing and to take responsibility for fixing this problem. We commend you on your efforts to do so, and we expect the same efforts from the irrigation interests.

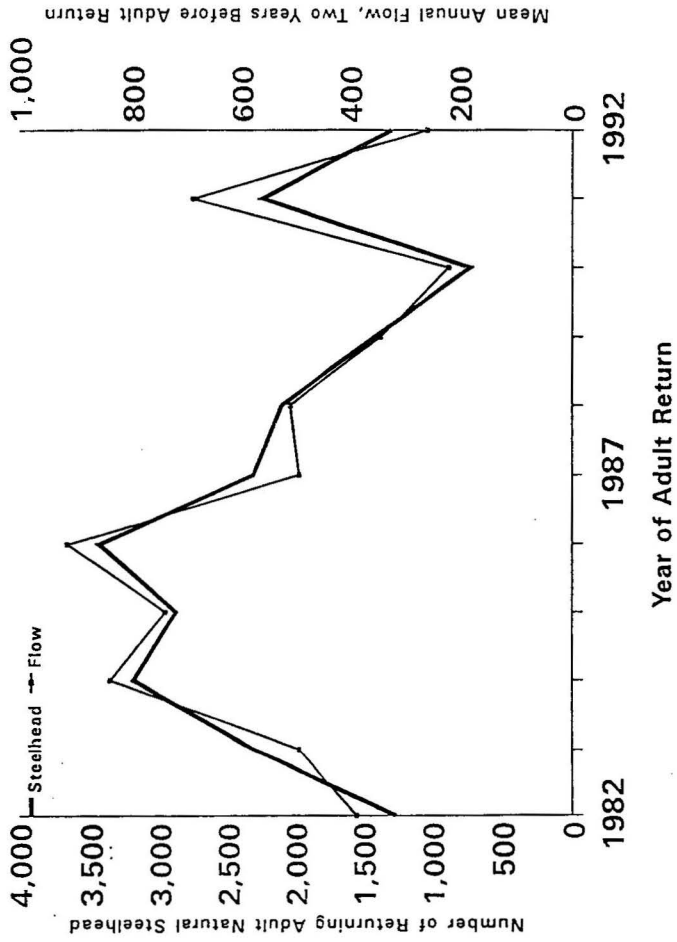
Sincerely,



Antone Minthorn
Chairman, Tribal Water Committee

cc: Bureau of Reclamation Commissioner, Dan Beard
Senator Mark Hatfield
Senator Daniel Inouye
Senator Ben Nighthorse Campbell
Representative George Miller
Bureau of Indian Affairs
National Marine Fisheries Service
United States Fish and Wildlife Service
Affiliated Tribes of Northwest Indians - All Member Tribes
Columbia River Intertribal Fish Commission
Columbia Basin Fish and Wildlife Authority
National Congress of American Indians

Natural Steelhead Returns and Mean Annual Flow
at Umatilla Gage, River Mile 2.1
Two Years Before Adult Return



SUPPLEMENTAL TESTIMONY

CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION

Submitted by Daniel W. Hester

Tribal Attorney

Confederated Tribes of the Umatilla Indian Reservation

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

COMMITTEE ON NATURAL RESOURCES

UNITED STATES HOUSE OF REPRESENTATIVES

WATER SPREADING HEARING

JULY 19, 1994

Mr. Chairman, my name is Daniel Hester and I serve as the Tribal Attorney to the Confederated Tribes of the Umatilla Indian Reservation ("CTUIR"). On behalf of the Tribes, I appreciate this opportunity to provide testimony on the Bureau of Reclamation Water Spreading Policy. While water spreading has significance throughout the western United States, my comments will focus on the impacts of water spreading in the Umatilla Basin which is of the most direct and immediate concern to the CTUIR.¹ In many ways, the problems caused by, and the Tribal treaty interests impacted by, water spreading are clearly reflected in the Umatilla Basin. In addition, the Inspector General recently reported that the Umatilla Project ranks second among all Bureau of Reclamation ("BOR") Projects for violating federal reclamation laws.²

The Umatilla Project, built by BOR in the 1920's, had a devastating effect on the CTUIR and its treaty rights from the outset. The Project, while beneficial to the downstream non-Indian agricultural community in the Umatilla Basin, destroyed the anadromous fishery in the Umatilla River (except steelhead) and, along with it, much of the economy and culture of the CTUIR. And, while the snowpack that is the source of water for the Umatilla Project lies largely within the boundaries of the Umatilla Indian Reservation, as does McKay Reservoir which is the principal storage facility for the Project, no Tribal lands are served by the Project. In other words, the CTUIR has suffered all the damage caused by the Umatilla Project but has received none of its

¹ Water spreading in the Mid-Columbia and Upper Snake Rivers also directly impacts the CTUIR because this illegal water use further limits flows needed by salmon stocks listed as threatened or endangered under the Endangered Species Act. The CTUIR has just been informed by the National Marine Fisheries Service that a jeopardy opinion will be issued to prevent the CTUIR and other Columbia River Tribes from conducting their commercial fishing season for fall chinook - the only remaining Tribal commercial salmon season. According to NMFS, the Tribal Chinook harvest will result in 70 fewer Snake River fall chinook reaching the spawning grounds. However, NMFS also expressly acknowledges that "interdam" loss accounts for 44% of the mortality to returning Snake River chinook resulting in the death of over 300 of this year's returning wild chinook. "Discussion Paper Regarding 1994 Fall Season Fisheries Conducted Under the Columbia River Fish Management Plan," National Marine Fisheries Service, Northwest Region, July 29, 1994, page 16. The lack of flows in the Snake and Columbia Rivers, and the resulting high temperatures, are primary causes of this unacceptably high loss of listed stocks.

² Audit Report, "Irrigation of Ineligible Lands, Bureau of Reclamation," Report No. 94-I-930, July 1994, U.S. Department of the Interior Office of Inspector General, Appendix 2. The Inspector General found that 24 projects in 8 states are violating federal law by dispersing irrigation water to ineligible lands. The Inspector General concluded that the majority of the water delivered to ineligible lands could have been used to enhance stream flows for declining fisheries. The Umatilla Project ranked second among 24 projects in amount of acreage illegally irrigated.

benefit. The illegal use of Project water by irrigation districts involved in water spreading further exacerbates this damage. It is a breach of the Federal Government's legal obligation to uphold the CTUIR Treaty of 1855 as well as the Federal Government's fiduciary duty to the Tribe which includes the protection of treaty rights and resources reserved by the Tribes.

On June 9, 1855, the Umatilla, Walla Walla and Cayuse Tribes entered into the Treaty of 1855, 12 Stat. 945, with the United States which established the Umatilla Indian Reservation. The treaty reserved to the Tribes the exclusive right to fish within the Reservation as well as the right to fish at usual and accustomed sites on the Columbia River and its tributaries.³ As a result of these treaty reserved fishing rights, a water right for instream flow sufficient to support this treaty fishery also arises. Federal courts have long recognized that where a treaty demonstrates that a principal purpose for the establishment of an Indian reservation was for fishing and other subsistence activities, the treaty included a reservation of a water right for non-consumptive, instream flows needed for the exercise of that fishing right. Colville v. Walton, 647 F.2d 42 (9th Cir. 1981); United States v. Adair, 723 F.2d 1394 (9th Cir. 1983). The courts have also concluded that the priority date for these treaty fishery instream flows is time immemorial. United States v. Adair, *supra*, 723 F.2d at 1414. And, while the CTUIR reserved water rights have yet to be quantified, that is no bar to the protection of the instream flows necessary to support the tribal treaty fishing rights. See, Confederated Salish & Kootenai v. Flathead Irrigation Dist., 616 F.Supp 1292 (D.C.Mont. 1985).

Since construction of Three Mile Dam and other diversions associated with the Umatilla Project, the water flows in the Umatilla River have been too low to support salmon runs. In several months of the year the river virtually dries up. The Project has caused low or nonexistent flows that result in insufficient "attraction flows" for returning salmon to find their way back into the Umatilla River to spawn. Without these essential attraction flows, returning Umatilla River salmon "stray," sometimes into the Snake River, which is a source of concern to National Marine Fisheries Service in their efforts to recover listed Snake River stocks.⁴

³ Article I of the CTUIR Treaty states as follows: "Provided, also, that the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians, and that all other usual and accustomed stations in common with citizens of the United States, and of erecting suitable buildings for curing the same; . . ."

⁴ In NMFS Discussion Paper on the 1994 Fall Season Fisheries under the Columbia River Fish Management Plan dated July 29, 1994, the agency complained about the impacts to listed Snake River stocks allegedly caused by "non-Snake River hatchery-original strays (primarily from the Umatilla River)". *Id.* pg. 16.

It has now come to light in an audit performed by the Inspector General of the Department of the Interior that approximately 17,565 additional acres of ineligible lands are being irrigated in the Umatilla Project in violation of the Reclamation contracts and federal law. This amounts to 43,913 acre-feet of water per year being illegally diverted from the Umatilla River to meet irrigation needs while instream flows get lower and lower. As disclosed in the Inspector General's report, such unauthorized diversions have been occurring in the Umatilla Project for 40 years. This practice, called water spreading, could more accurately be called water stealing.

Water spreading is the illegal use of water from federal Reclamation projects on lands not eligible to be irrigated by Project water. It is the unlawful diversion of water for irrigation uses that otherwise could have remained in stream to satisfy other water needs including Indian treaty fishing rights. In fact, the quantity of water illegally diverted by Umatilla Project irrigators is about the same as the quantity of water to be left in the Umatilla River by the Umatilla Basin Project which involves an exchange of Columbia River water to restore salmon to the Umatilla River while satisfying irrigation demands. The Umatilla Basin Project will cost the American taxpayer over \$40 million and yet produces no Umatilla River flows in key salmon passage periods in the late summer and early fall. Thus, the Umatilla Project which destroyed the CTUIR treaty reserved fishing right in the Umatilla River, is exacerbated by water spreading by Project irrigators which has jeopardized the rebuilding of an anadromous fishery in the Umatilla and complicates recovery of listed Snake River stocks.

Water spreading is illegal because it violates Reclamation contracts and Reclamation law (43 U.S.C. 371 et seq.). The contracts clearly delineate the lands within the project on which water can be used. When water is applied to lands outside of project boundaries or non-irrigable lands within project boundaries, the contract and Reclamation law is violated. Irrigators have no rights to water except that used within the terms of their contract. So they have no right to the water being used on ineligible lands, despite long use and the lack of Bureau of Reclamation enforcement of the law.

Forty years of wrong has not created a right on the part of the irrigators, but it has caused extensive harm to the CTUIR. The Bureau of Reclamation must admit to the immensity of this wrong. Allowing water spreading to persist for forty years is more than negligence--it is breach of trust. As the Bureau has admitted, it has a trust obligation to Indian tribes. Dan Beard, Bureau of Reclamation Commissioner, signed the Indian Trust Asset Policy on July 2, 1993. In this Policy, BOR included in its definition of Indian trust assets tribal fishing rights, water rights and instream flows. The Policy acknowledges that the United States, and the Bureau of Reclamation as a federal agency, "has a trust responsibility to protect and maintain rights reserved by or

granted to Indian tribes. . . by treaties. . . This trust responsibility requires that all federal agencies, including Reclamation, take reasonable actions necessary to protect trust assets." The adverse impact of water spreading in the Umatilla Basin to the treaty reserved fishing and water rights of the CTUIR clearly indicates that any BOR action which permits the continuation of the illegal use of Reclamation water will violate the Bureau's Indian Trust Asset Policy. The 1855 Treaty guarantees to the CTUIR a right to fish on the Umatilla River, which right is directly threatened by water spreading practices. By BOR's failure to monitor and enforce their contracts in the Umatilla Project, it has breached the trust responsibility of the United States to the CTUIR.

The BOR must develop and implement its Water Spreading Policy so as to mitigate the damages to the CTUIR. The BOR must order all water spreading to cease immediately and require that the water illegally spread be brought back under BOR control. Allowing continuing water spreading while irrigation districts apply to legitimize these diversions would reward unlawful practices and result in further damage to CTUIR efforts to restore the salmon fishery in the Umatilla River. Further, BOR cannot allow renewed irrigation of those unauthorized acres until it has determined that the instream water rights of the CTUIR have been satisfied.

The CTUIR opposes those portions of the BOR's draft Water Spreading Policy which allow the irrigators to perform an Inventory and prepare a Request for Approval with NEPA compliance prior to being told to shut down their illegal irrigation. First, no such inventory of illegal water spreading is needed in the Umatilla Basin, as this inventory has already been taken. Furthermore, it will be in the irrigators' best interest to slow down those processes as much as possible so that the illegal irrigation can continue. Instead, the illegal water spreading must be shut down immediately and until such time as BOR can conduct a NEPA study on any request to expand irrigation district boundaries.

The CTUIR recommends the following steps be included in the BOR Water Spreading Policy:

1. Immediate halt to all water spreading. The BOR should notify all irrigators/contractors that all water spreading must cease and desist as of September 1, 1994. Specifically, it should reject continued spreading until NEPA compliance is completed.
2. Monitor diversions. The BOR must perform sufficient field monitoring so that it can determine that irrigators/contractors have made a good faith effort to comply with the cease and desist order.
3. Request for approval. BOR should require Irrigators/contractors to prepare applications for contract amendments if they seek to expand their district boundaries or for approval to

irrigate previously ineligible lands for submission to and action by BOR.

4. Prepare inventory. BOR should oversee the preparation by the Irrigators/contractors of an inventory of new lands for which they are requesting authority to irrigate.

5. Report to Committee on Monitoring Results. The BOR should provide annual reports to this Committee on the lands included in the BOR inventory of new lands for which applications to irrigate have been filed, on BOR's efforts to halt water spreading practices on the number of applications received to amend contracts to authorize the irrigation of previously ineligible lands as well as the status of BOR action on these applications.

6. NEPA compliance. Irrigators/contractors and the BOR enter into agreements for contractors to fund NEPA compliance. Where BOR concludes that any application to expand, and therefore use additional Reclamation Project water, will adversely impact a treaty reserved right, an EIS should be required.

It is time for the BOR to recognize and implement their Indian Trust Assets Policy and fiduciary obligation to protect the treaty rights of the CTUIR and other similarly situated tribes. The development of BOR's Water Spreading Policy is an important step in that direction. I appreciate the opportunity to comment on this important Policy.

**Supplemental Statement
of the
EAST COLUMBIA BASIN IRRIGATION DISTRICT
QUINCY-COLUMBIA BASIN IRRIGATION DISTRICT
SOUTH COLUMBIA BASIN IRRIGATION DISTRICT**

**to the
Subcommittee on Oversight and Investigations
of the Committee on Natural Resources
United States House of Representatives**

July 29, 1994

Representing the Columbia Basin Irrigation Districts:

**Mr. Richard L. Erickson, Secretary-Manager
East Columbia Basin Irrigation District**

July 29, 1994

The Honorable George Miller, Chairman
Committee on Natural Resources
United States House of Representatives
1328 Longworth House Office Building
Washington, D.C. 20515

Dear Chairman Miller:

Thank you for the opportunity to supplement the record of the hearing on Water Use Practices on Bureau of Reclamation Projects held by the Subcommittee on Oversight and Investigations on July 19, 1994. The Columbia Basin Irrigation Districts' response addresses the questions raised primarily by Representative Peter DeFazio regarding the testimony of Columbia Basin Institute.

The most controversial figure which emerged from the testimony of Rick Gove of Columbia Basin Institute was that there had been an increase in diversion from the Columbia River of 570,000 acre feet since seven low head hydropower projects were installed on the Project's water distribution canals in 1985. Mr. Gove testified that the increase in diversions can only partially be attributable to increased acreage on the Project because only 45,000 acres have been added to the Project which, at most, accounts for 170,000 acre feet of the increase, leaving nearly 400,000 acre feet unexplained. CBI suggested that either the Districts are running more water through the canals to maximize hydropower revenues, or in 1985 the conveyance system fell into a precipitous state of decline which demands immediate emergency maintenance action by the Districts and the Bureau of Reclamation.

RESPONSE:

1. Irrigation Diversions:

The Columbia Basin Project water supply (other than for Blocks 2 and 3) is pumped at the Grand Coulee Dam to Banks Lake where it is transported to the Quincy-Columbia Basin Irrigation District, the East Columbia Basin Irrigation District and the South Columbia Basin Irrigation District. This is accomplished by approximately 6,000 miles of canal and lateral systems. The water leaves Banks Lake through the Main Canal. The water then is divided at the bifurcation into the West Canal and East Low Canal Systems. Irrigation return flow from the areas served by these canals largely finds its way to Potholes Reservoir. Water stored in Potholes

The Honorable George Miller, Chairman
July 28, 1994
Page 2

Reservoir is delivered to the southern part of the Project through the Potholes and Wahluke Canals. Recently, the return flow from the upper portion of the Project has not been sufficient to meet the demands of the Potholes Canal service area. Additional feedwater must be delivered to Potholes Reservoir, usually through the East Low Canal.

The irrigated acreage has been expanding since the Districts took over the operation and maintenance of Project transferred works in 1969. An accepted method to compare water use efficiency over time is to compare Project acre-feet diversions per acre. CBI's report does not compare former Bureau operations with the Districts' operations in terms of overall project-wide acre-feet per acre efficiencies. In order to determine the credibility of CBI's allegations, the Subcommittee should compare the factual situation in 1968 when the Bureau was operating a relatively new project irrigation conveyance system with the Districts' operations in 1992 to determine whether water diversions were accounted for and whether the irrigation conveyance system that is now more than forty years old is in a precipitous state of decline.

The table, attached as Appendix A and entitled "Comparison of 1992 to 1968 Data" demonstrates that the increase in acreage since 1968 is not 45,000 but 168,888 acres. The difference between 45,000 acres and the 168,888 acres developed since 1968 accounts for the allegedly unexplained diversion of 400,000 acre feet when total Project deliveries are taken into consideration. The acre foot diversion per acre in 1968 when the Bureau operated the system was 4.240 acre-feet per acre. The acre foot diversion per acre under the Districts' operation in 1992 was 4.182 acre-feet per acre. Practically speaking, the relative efficiencies are the same.

The increase in diversion since 1985 is attributable to increased acreage, to an annual direct feed of approximately 250,000 acre feet of the irrigation water supply to adjust for additional acreage and to return flow decreases. This decrease adds to the feed requirement and results from the three compounding effects of (1) improvements of on farm efficiency, (2) persistent drought conditions during much of this period, and (3) to the resupply annually of Project reservoir and artificial groundwater storage contracted by the Bureau as a source of supply for approximately 37,450 acres of water service contracts the Bureau has issued pursuant to Section 9(e) of the 1939 Reclamation Act.

Contrary to the suggestion of CBI, the 400,000 acre feet is directly attributable to the irrigation of Project lands and not to efforts to maximize power production for the low head hydropower projects. Contrary to the further suggestion by CBI that the 400,000 acre feet may be the result of a precipitous decline in maintenance of the Projects' conveyance system, reviews by the Bureau's Denver office based on the same data reviewed by CBI, demonstrate an overall average Project conveyance efficiency of 86% (1975-1990) which is extremely high by Bureau standards. This efficiency results from the tremendous reuse capability of the Project. Information about water supply and water use on the Columbia Basin Project can easily be misinterpreted. For example, the project water supply can be presented two ways: (1) As the sum of the supplies

The Honorable George Miller, Chairman
 July 28, 1994
 Page 3

of the individual irrigation districts (3,600,000 acre-feet annually) or (2) the actual Project diversions from the Columbia River (2,700,000 acre-feet annually). This apparent paradox illustrates, not only an area of potential misunderstanding, but the tremendous reuse capability of the project. The significant difference in these two supply figures generally represents West and East Low Canal service area return flows being recaptured to provide the majority of the supply for the Potholes Canal service area.

The reuse of irrigation returns is the key to why the Columbia Basin Project turns out to be one of the more efficient open conveyance irrigation projects ever constructed by the Bureau.

CBI, in support of its theory that the conveyance system is in a precipitous state of decline, argues that water assessment charges since the Districts assumed management responsibility in 1969 have been reduced. The Subcommittee should compare the operation and maintenance costs in 1968 when the Bureau was operating Project diversion and conveyance facilities with the Districts' operations and maintenance costs in 1992 to determine whether the Districts are in fact spending less on the operation and maintenance of the Projects' diversion and conveyance facilities. The table attached as Appendix A demonstrates that operation and maintenance costs incurred by the Districts and their water users have increased by more than 500% since 1968. Such expenditures have had a significant impact on maintaining high Project diversion and conveyance facilities efficiencies.

It should also be noted by the Subcommittee that CBI makes its assessment comparisons on a per acre basis. The extent of the 6000 miles of facilities being operated and maintained today is nearly the same as in 1968 while irrigated acreage has substantially increased resulting in the allocation of the total costs across a larger acreage base. This economy of scale enables the water users to maintain their farming operations within affordable irrigation district assessments. Total cost of the Bureau's operation and maintenance in 1968 compared to the total costs of the Districts' operation and maintenance in 1992 should assist the Subcommittee in determining whether the Districts are spending less as alleged by CBI on maintenance of the Project's diversion and conveyance facilities.

2. Power Production and Issuance of Water Service Contracts:

As part of its summary, CBI alleges that the repayment contract between the United States and the Districts permitting them to enter into water service contracts with excess water, coupled with the Districts' ability to generate power at its small head hydro projects, costs the region the annual sum of \$27,121,912.00. Inasmuch as the irrigation facilities had been constructed and were not being utilized for power production, this allegation is incomprehensible and cannot be substantiated.

The Honorable George Miller, Chairman
July 28, 1994
Page 4

It should be noted that construction and operation of any substantial federal reclamation project results in a certain amount of surplus water made available through Project operations. This fact was recognized by Congress in its enactment of Section 9(e) of the 1939 Reclamation Act which authorized the issuance of water service contracts. The Districts, which are created for the express purpose of delivering water for irrigation purposes, acted in strict accordance with Congressional intent and policy.

The Bureau of Reclamation, in its required approval of the construction by the Columbia Basin Project irrigation districts of their low head hydro projects, specifically provided that irrigation water could not be diverted exclusively for the production of power. The Bureau of Reclamation remains in control of the Project's water supply and delivers to the Districts only the amount of water required for the irrigation of Project lands. At no time has the Bureau of Reclamation ever contended that Project water was being exclusively diverted for the production of power by the Districts' low head hydro projects. The diversion of water by the Districts over and above that needed for irrigation is legally restricted and is a physical impossibility.

As to the generation of power by the Districts, the Bureau of Reclamation, which had the first right to construct the low head projects, opted not to do so and the Districts therefore, with the consent of the Bureau of Reclamation, constructed the projects at their cost and expense and presently generate approximately 150 megawatts annually for regional use.

The CBI complains that the Districts, in their construction and operation of their low head hydro projects, receive only profit and have no obligation to return any power, water or profit to the BPA. It is again appropriate to note that the Bureau of Reclamation had the prior right to construct the low head hydro projects and opted not to do so. The Districts thereupon, at their risk and expense of approximately \$160,000,000.00, proceeded with the construction of the low head projects. The projects were built without cost or expense to the United States. While the CBI may complain of the Districts' generation of power, it is suggested that the recipients of the power are appreciative of the Districts' efforts to produce the power that would not have otherwise been generated.

The CBI further complains that the Districts receive 1.65 mills per Kwh for most of the power produced at their low head hydro projects but that the Districts only pay .95 mills to the U.S. for primary pumping at Grand Coulee Dam. The rate that the Districts pay for their primary power for irrigation generated at Grand Coulee Dam was contractually set forth in the repayment contracts between the United States and the Districts pursuant to the federal 1939 Reclamation Act. Power for the construction and operation and maintenance of the Project irrigation system is produced at the Left and Right power plants at Grand Coulee Dam. These power plants also generate power for other uses including commercial power. The Districts pay their full proportionate share of the costs of power production from the Left and Right power plants. As

The Honorable George Miller, Chairman
July 28, 1994
Page 5

those costs increase, the Districts pay and will continue to pay their proportionate share of the increased costs.

The incentive that the Districts receive for the power generated at their low head hydro plants is utilized for the ever-increasing annual costs of operation and maintenance of the irrigation system and for system improvements. The Project irrigation facilities were constructed over forty years ago and the directors and managers of the Districts are keenly aware of the increasing costs of operating and maintaining the aging system and the need to develop appropriate sources of revenues to enable its water users to maintain their farming operations within affordable irrigation district assessments.

While the criticism of CBI as to the issuance of water service contracts and the generation of low head power appears to be directed at the Districts, inasmuch as the Districts' activities in those respects were in strict accordance with federal law and policy, could it be that, in reality, the CBI is taking Congress to task?

Thank you for the opportunity to supplement the record with this information. We would be glad to provide additional information or answer questions, either now or at a future date.

Respectfully Submitted on Behalf
of the East, Quincy, and South
Columbia Basin Irrigation Districts



Richard L. Erickson
Secretary-Manager

APPENDIX A:

COMPARISON OF 1992 TO 1968 DATA

Description	1992	1968	Ratio 1992/1968
Irrigated Acreage (Ac)	662,122 ⁽¹⁾	493,234 ⁽²⁾	1.342
Banks Lake ⁽³⁾ Diversion A.F.	2,768,910	2,091,220	1.324
A.F. per Ac. Diversion	4.182	4.240	0.986
O&M Costs \$ (actual)	21,376,016	3,943,523 ⁽²⁾	5.421

⁽¹⁾ Includes district irrigated acres (629,680) and U.S. water service contracts affecting Project return flows (37,450) less Blocks 2 and 3 (5008)

⁽²⁾ From 1968 Project History, CBP, prepared by Bureau of Reclamation

⁽³⁾ Water Distribution Reports 1992 & 1968, CBP, Bureau of Reclamation

TESTIMONY OF TOM MYRUM
COORDINATOR, UMATILLA BASIN IRRIGATION DISTRICTS
BEFORE THE HOUSE SUB-COMMITTEE ON OVERSIGHT
HEARING ON THE BUREAU OF RECLAMATION'S
PROPOSED WATER SPREADING POLICY
JULY 19, 1994

Good Morning, My name is Tom Myrum. I am the Coordinator of the Umatilla Basin Irrigation Districts, located in Umatilla and Morrow Counties, Oregon. I would like to begin by thanking the Committee on Natural Resources for inviting me to present testimony on the Bureau of Reclamation's Draft Water Spreading Policy. The four irrigation districts I will speak on behalf of are the Hermiston Irrigation District, Stanfield Irrigation District, West Extension Irrigation District, and Westland Irrigation District. These four districts are contained within the Umatilla Project which was authorized in 1905 under the 1902 Reclamation Act. Most of the present facilities were constructed between 1906 and 1927.

I have worked for the Umatilla Basin Irrigation Districts for the past 9 months. In that time I have worked closely with the local Indian Tribes, the Bureau of Reclamation and the Oregon Water Resources Department on various water issues. There has been no more divisive water issue in the Umatilla Basin than this issue of "Water Spreading." I hope that my testimony will give this committee a clear view of some specific examples of what is called waterspreading.

A common misconception fostered by the use of the term "waterspreading" is that more water is being used than irrigation districts have a right to use. This is not the case. The districts are not using more water than their state water rights allow. The districts are not applying federal water to any acres that were not intended by the Bureau of Reclamation when they first envisioned the Umatilla Project.

There are instances of what the Bureau of Reclamation has called waterspreading in our districts which have arisen as a result of government action and population increases. Urbanization of lands within districts has forced transfers of water rights to lands outside of District boundaries but within Project boundaries. The construction of two freeways through former agricultural lands made it necessary to move those water rights to other lands. Without these lands the economic viability of the districts would be threatened.

The construction of the John Day Dam on the Columbia River caused the created the John Day pool. This pool of water covered over large tracts of the West Extension Irrigation District land. The water rights for these lands were transferred to higher ground. This forced relocation could not have escaped the notice

of the Bureau of Reclamation, yet it is just now being called waterspreading. The relocation of irrigation water was purely an act of survival. The Bureau of Reclamation or the Army Corps of Engineers should accept responsibility for this instance of waterspreading and bear the cost of rectifying the problem. The proposed Pacific Northwest Water Spreading Policy does not anticipate nor provide an adequate solution to this type of waterspreading. In that respect the policy needs reconsideration.

One common example of what is called waterspreading in the Umatilla Basin involves simple omissions of lands from district boundaries due to improperly drawn Bureau of Reclamation maps. This type of error is evident by the fact that these lands are described on Bureau water rights permits filed by the Bureau in 1927. These lands have paid assessments which have been applied to the districts' debt, in some cases, since the formation of the irrigation district. These lands face the prospect of having their water deliveries discontinued after 70 to 90 years of paying assessments for the right to receive water. Such glaring omissions from district boundaries should not even be defined as waterspreading nor should the district be forced to pay for the cost of including them within its boundaries. The draft waterspreading policy does not adequately address this situation.

Another example of a Bureau omission leading to waterspreading can be found in the Hermiston Irrigation District. The Hermiston Agricultural Experiment Farm was relocated by the Bureau of Reclamation to lands outside of the Hermiston Irrigation District boundaries. Additionally, the Bureau promised the Experiment Station free water for the duration of its existence. Now, the Bureau is calling this waterspreading because the lands are outside of district boundaries. If this is waterspreading then we know who is to blame for it being spread. The Hermiston Irrigation District should not be required to foot the bill for the boundary change necessary to bring the Experiment farm inside the District when it was the Bureau that promoted its move outside the district.

The Bureau's draft policy fails to recognize that "waterspreading" does not lend itself to a simple definition. Instead, instances of waterspreading have stories unique to their situation. This means that waterspreading should be dealt with on a case by case basis with due consideration given to the circumstances involved.

The Umatilla Basin Districts have worked with the Bureau of Reclamation for the past several years to reach a reasonable and equitable solution to the instances of waterspreading described above. We have engaged in mediation of disputes, negotiations over water, begun the NEPA process for inclusion of lands, and signed agreements to provide for interim water deliveries and

instream flows for fish. We have done all of these things and yet we sit in no better position than any other district about to be engaged in the process outlined in the policy.

The Hermiston and Stanfield Irrigation Districts have agreements signed by the Bureau's Pacific Northwest Division Regional Director requiring the Bureau to offer the District's contracts for water deliveries while the NEPA boundary inclusion petition is being processed. The Bureau has yet to present a contract which reflects the intent of the interim water agreements. By cooperating early we're now being asked to agree to interim contract terms which reflect the Bureau's new long term goals. Cooperation has not reaped the rewards promised by the Bureau's draft policy. Without true incentives for irrigation districts to cooperate this draft policy offers no real solution to waterspreading.

Many of the irrigators in the Umatilla Basin are considered to be the most efficient water users in the world. Oddly, the Bureau's draft policy provides a severe financial disincentive for improved irrigation efficiency while at the same time warns irrigators that they must conserve water or suffer the consequences. The Bureau's policy should provide incentives not punishment for efficient use of water.

It appears that one goal of the proposed waterspreading policy is to price irrigated agriculture out of the water market. Not only must the District bear a substantial portion of the cost of an environmental study it must also pay for a study to inventory the extent of "waterspreading" by the District. Districts may be forced to renegotiate existing contracts and also engage in extensive conservation projects. On top of all of that, the Districts will be forced to employ attorneys and additional staff to manage the intricacies of the Bureau's proposed solution to waterspreading and to protect the District's existing water rights.

The four irrigation districts of the Umatilla Basin have petitioned the Bureau of Reclamation for inclusion of their out of boundary lands. No more water is being used today than has been traditionally used by the Districts. Because of those facts the Districts believe that the cost of an environmental study on the effects of a boundary change would not be cost effective. However, as the political rhetoric over "waterspreading" has skyrocketed so has the scope and cost of the environmental studies. The Bureau now says it will cost at least \$900,000 and the Districts will have to pay over \$500,000. There is no reason that this obvious waste of funds should be shouldered by the Districts. The Bureau's waterspreading policy should not require across the board environmental studies when they may not be needed in all instances.

The Bureau's waterspreading policy must have the flexibility to tailor a solution to meet the specific needs of the basin in which it is enforced. The draft policy simply does not provide sufficient opportunity to tailor solutions to meet the unique circumstance of each instance of waterspreading. It may be impossible to draft a policy which addresses each individual case, but a clear commitment to equity and even-handedness might go a long way toward calming the fears of the average farmer. From the farmers' perspective the Bureau of Reclamation has been a full partner in creating the problem. The Bureau needs to accept its fair share of the blame for water spreading. We are looking for a common sense approach to this issue. One which seeks practical solutions not political gain.

One shining example of a practical solution to a difficult problem is the Umatilla Basin Project. The Umatilla Basin Project is a Bureau of Reclamation pumping project which exchanges Umatilla River flows and stored water for a small portion of the vast Columbia River flows. This exchange of water is critical to the vitality of two economies; the local agricultural based economy and the local tribal fisheries economy. The unique geography of the region combined with the determination and foresight of local leaders has made this project a reality. The Bureau's waterspreading policy, as drafted, could force nearly 17,000 acres of irrigated lands in the Umatilla Basin out of production. The loss of water for exchange will have a negative effect on the projected benefits to anadromous fisheries.

If the lands are not included in the districts boundaries, substantial quantities of water will no longer be available for exchange. The water applied to those acres will not stay in the river, instead they will be available for appropriation by junior water right holders who are not under the control of the Bureau of Reclamation. The draft policy must be written so as not to undermine solutions already in place.

The primary goal of the Bureau's waterspreading policy should be to resolve some of the needs for instream flow restoration without impairing the existing irrigation based agricultural economy. The Umatilla Basin Project stands as an example of how local water needs are best solved by cooperation of local interests. This policy must recognize the value of such approach and actively encourage it.

The Bureau's proposed waterspreading policy takes a strong arm approach to very delicate issues of water management. Improper force applied in the wrong way could upset a fine balance, thus doing more harm than good. This policy potentially threatens some of our productive farm land without providing benefits elsewhere. This sudden shift of priorities will cause the desert to reclaim lands made green and fertile because of the efforts of farmers and the water provided by the old Bureau of Reclamation. The "New Reclamation" appears to have entered a new era, the era of "Reverse-Reclamation," because for all of its supposed progressive policies, in reality, the Bureau is taking a giant step backwards.

Tom Myrum, Coordinator
Umatilla Basin Irrigation Districts
P.O. Box 1260
Hermiston, OR 97838



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

P.O. Box 47600 • Olympia, Washington 98504-7600 • (206) 407-6000 • TDD Only (Hearing Impaired) (206) 407-6006

July 18, 1994

The Honorable George Miller, Chairman
House Natural Resources Committee
U.S. House of Representatives
1324 Longworth
Washington D.C.

Dear Chairman Miller:

The Department of Ecology submits the following testimony regarding the issue of water spreading, the subject of your July 19 hearing in Washington D.C.. I request that these comments be entered in the record of the hearing.

The Department of Ecology is the water resource management agency as well as the environmental protection agency for the state. Washington has been an active participant in the Water Spreading Task Force, organized by the Bureau of Reclamation, Pacific Northwest Region. A representative of Governor Lowry's office has been the state's representative on the task force.

The department commends the Bureau for this effort and for the impartial manner in which the Bureau staff have carried out the difficult task of developing a policy on water spreading. The Bureau staff assigned to this project have done an outstanding job of reducing the gulf between the agricultural community on one side and environmental interests and tribes on the other side.

We think the draft policy which was presented at the last meeting of the Task Force represents the fundamentally correct approach to this difficult problem. We very much appreciate that the draft policy recognizes the necessity to respond to state law requirements as well as to prescriptions of federal law. In Washington state, spreading water beyond the acreage allowed under a water right is in most instances illegal. The Department of Ecology has challenged attempts by water right holders to spread water and has won on appeal in every case including a case that went to the State Supreme Court.

We also commend the draft policy for recognizing that specific district-by-district information is lacking and for calling for such information to be provided by project beneficiaries. The task force learned during its deliberations that it is possible for irrigation districts to collect

The Honorable George Miller

Page 2

July 18, 1994

and provide this information (primarily mapping) and that the cost is not punitive. It has been done already in Oregon under state-law requirements.

While we think it is the primary responsibility of the irrigation districts to document where the water is going on the district, it is important that the Bureau and the states provide technical assistance to the extent possible. We think every district should have geographic information system (GIS) capability so that periodically updated maps and other forms of information could be easily generated regarding the lands receiving irrigation water. Periodic reporting should be required so that spreading does not again get out of control. The Bureau office in Yakima has been working with the Roza Irrigation District and the Department of Ecology on a GIS mapping project relating to water spreading. Similar efforts have occurred in Oregon. GIS would also be a valuable management tool for the districts for other purposes.

We agree that some instances of spreading relate to the unavoidable and incidental irrigation of class 6 lands by modern irrigation techniques. While we think that legalizing this form of spreading may be possible and in many cases is desirable, we remain concerned that total irrigated acreage of a district not exceed the limits on the state water right. In our state, most irrigation water rights, including those held by or related to Bureau projects have a maximum acreage that may be irrigated in a given year. Irrigated acreage may also be limited by the Bureau contract or by Congressional authorization.

It is our experience that if the acreage is not firmly capped, additional lands tend to be brought under production, in some cases with high value perennial crops, thus creating additional demands in water short years. In basins where water is chronically short, this exacerbates the problem of supplying water to legally irrigated lands and retaining sufficient water in streams for environmental needs. This is certainly the case in the Yakima basin in our state where every year lately has been a drought. In locations like the Yakima basin, any water savings need to be dedicated to stream flow restoration and to firming up supplies for existing irrigation rights as is contemplated in Congressman Inslee's bill (H-1690) now before your committee.

We are concerned that not all irrigation of class 6 land may necessarily be incidental. to irrigating irrigable land classes. This form of spreading should receive no special consideration.

The Honorable George Miller
Page 3
July 18, 1994

The more problematic form of spreading is irrigating land outside the district or project boundaries. Although our staffing is limited, we have been making an effort in the Yakima basin to identify lands where this is occurring and to bring enforcement action against it. We are finding that aerial photo interpretation is a valuable tool for identifying problem areas that can then be investigated on the ground.

Irrigation of additional acreage at this time is inconsistent with efforts in the Pacific Northwest to recover diminished salmon and steelhead runs. When three Snake River salmon runs were listed under the Endangered Species Act in 1992, Washington took the unprecedented step of withdrawing the Columbia and Snake Rivers from further appropriation. Oregon and Idaho have similar restrictions on issuing new water rights.

Tolerance of water spreading would be inconsistent with salmon recovery goals and programs. In most cases, the first priority for water that is saved by conservation should be improved streamflows. Unlike many other states, Washington has the legal tools to transfer conserved water to instream purposes without loss of priority date. Our legislature passed laws in 1989 and '92 that allows the Department of Ecology to acquire "trust water rights" for public benefit. These laws encourage us to work with the federal government to accomplish this objective.

Some interests argue that unless spreading is allowed there is no incentive for water users to conserve. In Washington, our courts have prohibited water spreading. Furthermore, the State Supreme Court has ruled that water users are obligated to operate reasonably efficient water systems without waste of water. They are responsible for proper maintenance and upgrading of water systems as a matter of law.

In conclusion, we find much to commend in the efforts of the Bureau of Reclamation to date to rectify the problem of water spreading on Bureau projects. We look forward to continued cooperative efforts with the Bureau to identify and address water spreading in our state. We urge the Congress to provide the Bureau with the resources necessary to implement the new policy.

Thank you for the opportunity to provide the views of the Department of Ecology.

Sincerely,



Mary Riveland
Director

Testimony of Idaho Rivers United for the Hearing Record

Water Spreading Hearings, July 19, 1994

**Presented to Chairman George Miller,
House Committee on Natural Resources**

Idaho Rivers United is a statewide river conservation group with over 1200 members and 20 member groups. We represent the public interest throughout Idaho regarding water quantity and quality. Our mission is to preserve, protect and enhance Idaho's waters. We work closely with state and federal management agencies using education and cooperative efforts.

Our members are keenly interested in the issue of water spreading. Why are they interested? One reason is endangered salmon. In the past four years only eight sockeye salmon have returned to Idaho's Redfish Lake in the Sawtooth Mountains. This year only 3,116 spring Chinook returned to Idaho waters. The ten-year average is 20,000 spring Chinook. Estimates for returning summer Chinook are 375 fish, down from an average of 2,860 over the last ten years. The declining salmon runs are the most obvious symptom of Idaho's once-thriving waterways. The salmon runs are so low because of man-made change to formerly free-flowing rivers.

Idaho possesses a bounty of Bureau of Reclamation projects up and down the Snake River plain. From Palisades Reservoir in Wyoming to American Falls, the Minidoka Project, Boise Project and Owyhee Project on the Idaho/Oregon border, waters of the state have been diverted from rivers and streams. Groundwater is pumped by Reclamation's Minidoka Project providing irrigation water to the A and B Irrigation District near Rupert, Idaho. The greening of the Snake River Plain has benefitted

Idaho's agricultural economy tremendously. It has provided for a way of life we all enjoy. Unfortunately, this irrigation development using federally developed water supplies has not been a benign venture.

Unauthorized uses of Bureau projects and water contributes to the dewatering of our streams and the overdrafting of our groundwater supplies. The A and B Irrigation District has already been identified by the Bureau as illegally spreading water to unauthorized acreage.

Of particular concern, however, is the issue of M & I use in the rapidly urbanizing area of Boise. Idaho Rivers United requested PNW Director John Keys to conduct a study to cite land parcels under a half-acre receiving water for lawn irrigation and the amount of acreage no longer in production or simply paved over.

Much of the farmland in the Boise Project has been subdivided for homesites under a half acre or paved over for shopping malls and other development. Even though the new landowners of these properties are assessed for their share of water, few petition out of the district. In many instances, it is physically impossible to receive the water because irrigation laterals or ditches have been removed.

We believe irrigation districts routinely sell this water to district farmers as overage, particularly during drought years. This "stacking" of water may occur year after year, with in-district farmers buying overage. Idaho Rivers United views this as unauthorized use under the concept of water spreading. Although it occurs within the existing district boundaries, the number of acres available for irrigation appear to be less than that which was authorized. The amount of water being used by each viable farm unit is greater than the amount they are legally allowed under a state water right or under a Bureau contract.

The Idaho Department of Water Resources has estimated--using state agricultural statistics, ASCS crop reports, SCS information and aerial photography--that as much as 25 to 30 percent of the Treasure Valley's agricultural lands have come out of production. Although not all of these lands are irrigated by Reclamation project water (the valley has several small private ditch and canal companies), it is reasonable to assume that up to 25 percent of Bureau acreage may no longer be eligible to receive project water.

As a member of the task force convened by the Bureau to develop a policy, this particular issue comes to mind. Much of the west is urbanizing into areas previously serviced by Bureau project water. The task force sought to develop a flexible policy that addresses the diversity of water spreading activities and can be applied on a project by project basis.

Idaho Rivers United believes several key points should be included to address water spreading:

1. Water spreading has adversely affected Indian Trust assets and treaty rights in many western states. Reclamation must fulfill its responsibilities to tribes as it mitigates impacts of water spreading cases. Reclamation will need to make interim allocations of water in order to preserve fishing rights, even where those fishing rights have not yet been quantified.
2. Water spreading has contributed to the dewatering of many streams in the West. Reclamation must place a high priority on providing adequate flows that protect fish and wildlife values, riparian areas, and the ecological integrity of riverine environments.

3. Reclamation must "hold" any water recouped from water spreading until appropriate NEPA or other analysis is completed to determine alternatives for its disposal. Reclamation should NOT merely allocate water to the next senior appropriator. This is in keeping with Reclamation reforms which seek to strike a balance between historic uses such as irrigation and power generation vs. newer uses such as instream flows for fish, wildlife, recreation and water quality. Reasonable municipal uses in urbanizing areas should also be considered. The Bureau will then establish priority of water disposition, ensuring federal project authorizations, contracts and environmental laws are met. Any proposal should be subject to Endangered Species Act, Northwest Power Planning Act, Clean Water Act, and other environmental laws.

4. Economic impacts to local communities should not prevent implementation of water spreading remedies. Reclamation should, however, be sensitive to these impacts and make reasonable attempts to minimize those impacts. This might include researching alternative industries and economic bases to help communities make the transition. It should be noted, however, that agricultural water spreading has already led to adverse impacts on other economies such as fishing, water based recreation and tribal trust assets..

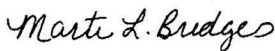
5. Concrete timelines must be developed to end water spreading. A phased in process over three to five years may be appropriate. An inventory to identify the extent and nature of various categories of water spreading must be completed under the guidance of Reclamation. In cases where a contractor/irrigation district comes forward within a specified time, the inventory should be funded jointly by Reclamation and the contractor, each contributing 50% of the cost. Where a contractor/district is identified and that party does not willingly come forward within a specified grace period after being notified, the contractor/district should

bear the total cost, including any analysis of environmental impacts to be performed under NEPA.

6. In situations where acreage expansions have occurred, mere cessation of irrigation to those acres is not adequate. O & M costs must be assessed as well as avoided costs. Mitigation measures must be adhered to at the offender's expense. In no case should the total number of acres irrigated exceed the number approved by contract or project authorizations.

7. In cases of unauthorized M & I or "water stacking" in urbanizing areas, a complete inventory of all water uses must occur. Reclamation must immediately cease delivery to any acreage identified as "water stacked." That water will be held in storage and deducted from the contractor/district account. After careful analysis of competing uses, using applicable environmental laws, congressional authorizations and statutory authorities, Reclamation will reallocate that water to other public uses in keeping with Reclamation reforms.

Formal agreements and permanent resolutions will be key to successfully ending water spreading and preventing its occurrence in the future. Idaho Rivers United is hopeful that this congressional committee working with Reclamation and the Task Force can resolve the water spreading issue in a timely and equitable manner that preserves, protects and enhances the integrity of river resources. Thank you for the opportunity to comment.



Marti L. Bridges

Water Policy Director

Idaho Rivers United

103d Congress }
2d Session }

COMMITTEE PRINT NO. 7

BPA AT A CROSSROADS

MAJORITY STAFF REPORT
OF THE
TASK FORCE ON
BONNEVILLE POWER ADMINISTRATION
OF THE
COMMITTEE ON NATURAL RESOURCES
OF THE
U.S. HOUSE OF REPRESENTATIVES
ONE HUNDRED THIRD CONGRESS
SECOND SESSION



MAY 1994

Printed for the use of the Committee on Natural Resources
George Miller, Chairman

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1994

79-568

addition, this reasoning leads to the contradictory result noted by Chairman DeFazio,

We have got to barge salmon because there are not enough flows and then we do not have flows because we have got barges. It is hard for people to understand, mere mortals like me and I think some of the farmers: it is a little counter-intuitive.¹⁰²

2. Corps of Engineers

The Corps of Engineers, not BPA, took the lead in developing the 1994–1998 river operation plan currently under consultation with NMFS. The Corps is also the lead agency for two long-term studies, the System Operation Review (SOR), and the System Configuration Study.

The System Configuration Study will evaluate various changes in the Columbia River system that might require new construction by the Corps. These include the *Strategy for Salmon*'s recommended drawdowns of the John Day reservoir below minimum irrigation pool and drawdowns of the lower Snake River reservoirs below minimum operating pool. The Corps' timetable for this analysis requires ten years before drawdown tests on the lower Snake are complete, salmon survival is analyzed, and a decision is made. A "Phase I" report on the study is scheduled for completion in spring of 1994, with drawdown testing in 1996.¹⁰³ The System Configuration Study also includes the possible construction of new salmon collection facilities to aid in barging smolts. As discussed above, the Corps has accelerated studies on the John Day drawdown, anticipating that the modifications might be completed as early as 1999.

The SOR, which incorporates some of the study questions recommended in the *Strategy for Salmon*,¹⁰⁴ is a separate study of hydropower operations in the Columbia River hydropower system taking into account the needs of the salmon. The SOR will produce an environmental impact statement (EIS) with options for new procedures to set hydropower operations, as well as new terms for the Pacific Northwest Coordination Agreement (PNCA), which expires in 1998.¹⁰⁵ The PNCA is a contract that determines how hydropower operations will be coordinated among Federal and non-Federal entities to guarantee, among other things, that the power production terms of the Columbia River Treaty with Canada are met.

3. Bureau of Reclamation

Despite the Council's recommendation that the Federal agencies explore alternatives for increasing water quantities available for salmon in the Columbia basin,¹⁰⁶ non-power-producing reservoirs of the Bureau of

¹⁰² Ibid., p. 153.

¹⁰³ Ibid., p. 293 (supplemental information included in testimony of Maj. Gen. Ernest J. Harrell).

¹⁰⁴ *Strategy for Salmon*, section 3.6D, Vol. II, p. 34.

¹⁰⁵ Hearing Part III, pp. 159-160 (prepared statement of Maj. Gen. Ernest J. Harrell).

¹⁰⁶ *Strategy for Salmon*, section 3.6C, Volume II, pp. 33-34.

Reclamation have been excluded from the SOR studies. BuRec Assistant Regional Director Kenneth Pedde asserted that incorporating these BuRec reservoirs into the study could delay the outcome of the SOR by 3-4 years, although the possible availability of BuRec water has been modeled using a hypothetical 15th reservoir in the studies.¹⁰⁷ The Corps also has mentioned that salmon needs would be protected as non-power uses which take priority under the terms of the PNCA.

BuRec's major role in the Columbia River system is to store and divert water for irrigation, but its Grand Coulee and Hungry Horse Dams also produce hydropower sold through BPA. BuRec has played a substantial role in obtaining additional water for salmon flows. The agency is working on model water conservation programs in the Grande Ronde River basin and the Yakima River basin. Unfortunately, water conservation efforts are to some extent undercut by BPA's prices for irrigation pumping power. In addition, as discussed in section D below, illegal water use and limitations of State water law have limited BuRec's effectiveness.

D. WATER LAW LIMITATIONS

Acquiring additional water to assist in moving juvenile salmon downstream is a major theme of the *Strategy for Salmon*, as well as NMFS's biological opinions under the ESA. BuRec has been able to assist in this effort because not all BuRec water has been contracted for, and significant water conservation savings can be obtained from BuRec customers in the Northwest. One area in which BuRec has directly moved to carry out the *Strategy's* recommendations is in developing new conservation demonstration projects providing Federal money toward improved water conservation in the region.

However, BuRec's efforts to obtain water in the Snake River basin for out-of-state use have been stymied somewhat by restrictions in Idaho water law.¹⁰⁸ In addition, illegal "water spreading"—applications of irrigation water outside project boundaries or on land deemed unsuitable for irrigation—has prevented some conserved water from returning to the river system.

Idaho State law makes it very difficult to provide permanent protection for water used for fish. The Idaho Natural Resources Board may obtain permanent water rights for instream flows, or an existing water user may transfer its water to instream use, but several further standards constrain water that will flow out of the State. These standards make it virtually impossible to protect such water; a 1991 BuRec attempt to change the nature of use of its existing storage water rights to instream flow rights for salmon recovery encountered more than 650 letters of protest to the State water board.

Annual water rentals through Idaho water banks can provide water for salmon from year-to-year. Again, State law makes it difficult to obtain such rentals, and water bank rules discourage users from transferring water to

¹⁰⁷ Hearing Part III, pp. 590-591 (testimony of Mr. Kenneth R. Pedde).

¹⁰⁸ Water conservation measures in the 1980s reduced irrigation diversions by 800,000 acre-feet, but none of that water was transferred to flows for fish. Hearing Part III, p. 578 (prepared statement of Ms. Garrison).

instream use.¹⁰⁹ The State legislature passed a special three-year exemption for BuRec to provide out-of-state flows from rented water through January 1, 1995.¹¹⁰ This law requires only that the flows be part of an overall augmentation plan, and that other parties make a proportional contribution to salmon restoration. The BPA decision to offset Snake River flows by reducing flows from the Upper Columbia in 1992 led to allegations that BuRec's flows violated the provisions of the three-year exemption law.

On top of the State disincentives to transfer water to instream flows, Federal involvement in irrigation often undercuts BuRec's efforts to obtain water for salmon flows. BPA's reduced rate for irrigation pumping (discussed above on page 21) lowers the cost of irrigating and thus provides a disincentive to water conservation. In addition, BuRec has known for years that irrigation districts have illegally applied water to lands lying outside the approved scope of the Reclamation projects, yet has only recently convened a task force to address this practice. And BuRec has in the past been quite lax in enforcing the water conservation requirements of the Reclamation Reform Act of 1982, although new water conservation regulations are currently being drafted. As the region continues to look for ways to provide fish flows in the rivers, reform of these Federal policies could supply some of the-needed water.

E. AGENCY SATISFACTION OF INDIAN TRUST RESPONSIBILITY

The Indian tribes of the Pacific Northwest region are among those most concerned with salmon recovery activities due to their historic dependence on salmon fisheries and their treaty rights to continued access to those fisheries. Since the Federal Government has a general trust responsibility to the tribes in addition to these specific treaty obligations, the Federal agencies must take tribal concerns into account in decisionmaking regarding the salmon. Unfortunately, the tribes have found the agencies' decision processes unresponsive and have remained some of the most vocal critics of BPA and other Federal entities in the Northwest. A petition by the Shoshone-Bannock Tribes led to the listing of the threatened and endangered stocks in the Snake River.

The tribes' criticism of salmon recovery efforts begins with the *Strategy for Salmon*. The Yakama Tribe has sued the Council over the adequacy of the plan, arguing that it meets the requirements of politics but not those of science.¹¹¹ Both the Columbia River Inter-Tribal Fish Commission and the Shoshone-Bannock Tribes told the task force that tribal concerns were inadequately addressed because of lack of tribal membership on or an inter-governmental relationship with the Council.¹¹² (Even NMFS supported adding tribal representation to the Council, which would require amending the Northwest Power Act.¹¹³)

¹⁰⁹ Ibid., p. 579 (prepared statement of Ms. Garrison).

¹¹⁰ Idaho Code § 42-1763A.

¹¹¹ Hearing Part III, p. 288 (testimony of Mr. Anthony Van Pelt).

¹¹² Ibid., pp. 602 (additional material submitted by Mr. Lionel Q. Boyer), 657, and 660 (additional material submitted by CRITFC).

¹¹³ Hearing Part III, p. 283 (prepared statement of J. Gary Smith).

In addition, the tribes have been highly critical of Federal agency efforts to restore salmon stocks, particularly the efforts of BPA. They feel they have been left out of important decisionmaking processes, even where the *Strategy for Salmon* mandates their involvement.¹¹⁴ They expressed doubt that the agencies managing Columbia basin resources were even aware of the existence of their trust responsibility to the tribes.¹¹⁵

The lack of attention to tribal concerns is unfortunate also because Indian water rights could contribute to the solution to the problem of protecting water flows for fish. The Nez Perce Tribe has intervened in an Idaho State court adjudication of water rights on the Snake River, claiming a right to the water necessary to sustain salmon to meet their treaty fishing rights, with a mid-1800s priority date set by the treaties. If upheld by the court, this claim could provide the legal basis for maintaining adequate flows for Snake River stock.

F. FISH AND WILDLIFE PROGRAMS IN THE COMPETITIVENESS PROJECT

BPA has proposed tying fish and wildlife program spending to the agency's fiscal success.¹¹⁶ One stated purpose is to give fish-protection advocates some stake in BPA's financial well-being. BPA also hopes to gain greater planning certainty by setting a "floor" for fish and wildlife expenditures that would only be exceeded during periods in which BPA is financially successful.

Since BPA's actual outlays for fish and wildlife expenses and capital outlays amounted to \$82.5 million in 1993,¹¹⁷ the potential for real savings through "incentivization" of the fish and wildlife program is probably small. In addition, BPA's statutory fish and wildlife responsibilities do not somehow evaporate during bad water years or other financially difficult periods.

G. FINDINGS AND RECOMMENDATIONS

- The Northwest must unite behind a single vision for salmon recovery if the purposes of the Northwest Power Act are to be achieved. To the extent a regional consensus on salmon recovery exists, it is represented by the Council's *Strategy for Salmon*. The *Strategy* is a comprehensive plan for rebuilding healthy and genetically diverse anadromous fish populations throughout the basin. It is aimed not only at recovering listed stocks and making future listings unnecessary, but also at producing harvestable numbers of fish for both Indian and non-Indian harvesters. The *Strategy for Salmon* was developed within the region with strong public participation.

¹¹⁴ Ibid., p. 289 (testimony of Mr. Anthony Van Pelt), pp. 597-598 (additional material submitted by Mr. Lionel Q. Boyer).

¹¹⁵ Ibid., p. 604 (additional material submitted by Mr. Lionel Q. Boyer), p. 662 (additional material submitted by CRITFC).

¹¹⁶ Hearing Part III, pp. 20-21 (testimony of Mr. Randall W. Hardy). Also see Final Draft Strategic Marketing Plan, February 1994 at p. 48.

¹¹⁷ About one-half of BPA's estimated \$300 million fish and wildlife budget consists of "losses" attributed to foregone power sales and resulting power purchases; see Hearing Part III, p. 29 (testimony of Mr. Randall W. Hardy).

- ▶ There has been considerable interest in the actions proposed to recover Snake River salmon stocks listed under the Endangered Species Act. However, the focus on listed stocks could detract from the fundamental purposes of the Northwest Power Act and the *Strategy for Salmon*, which seek basin-wide recovery of all affected fish and wildlife populations. Whatever the outcome of NMFS's ongoing efforts to protect and recover threatened and endangered species under the Endangered Species Act, those efforts should not compromise the implementation of an overall regional plan under the authority of the Council.

Notwithstanding the measures proposed in any future ESA recovery plan or biological opinion governing operation of the Columbia River system, BPA and other Federal agencies continue to bear a responsibility to implement the *Strategy*. The *Strategy for Salmon* should not be delayed while ESA recovery plans are developed or NMFS's biological opinions are litigated. NMFS should work closely with the Council to ensure that its proposed actions are consistent with the *Strategy for Salmon*.

On the other hand, the four States in the region should avoid undermining the regional consensus as they pursue their own parochial interests. The Council has been and should continue to be the forum for resolving regional conflicts.

- ▶ The *Strategy for Salmon* has suffered from uneven implementation and uncertain funding, with some significant actions falling well behind schedule. One theme sounded by many witnesses was the need for accountability for fish and wildlife mitigation measures.¹¹⁸

The rebuilding targets called for in the *Strategy for Salmon* are the standard that must be used to evaluate salmon recovery efforts. It will be difficult, if not impossible, to judge the effectiveness of individual actions taken under the *Strategy* until these objectives are determined. State and tribal fish managers, working with the Council, should quickly complete the development of rebuilding targets for individual naturally spawning salmon runs within the Columbia basin.

- ▶ The causes of salmon decline are numerous, although the development of the Columbia basin's hydroelectric system almost certainly represents the single most significant human-caused source of salmon mortality. Intuition as well as the available science argue that juvenile salmon need greater flows and river velocities during the migration period than those that prevail when the system is operated to maximize hydroelectric generation.

Though a considerable degree of scientific uncertainty exists, it is imperative that the region act quickly and prudently to improve downstream passage conditions relying on the best available science. To that end, the *Strategy for Salmon* calls for both immediate and longer-term measures to decrease downstream travel times through a combination of increased storage for flows and reservoir drawdowns. Without pre-judging the outcome of the Lower Granite Dam test now being designed and fully understanding the difficulty of designing and

¹¹⁸ For example, see Hearing Part III, p. 44 (testimony of Mr. Randall W. Hardy) or p. 457 (testimony of Mr. Al Wright).

conducting a meaningful experiment under minimally controllable circumstances, the Corps should move aggressively to design and conduct a meaningful biological test. The decline of Snake River salmon stocks represents a biological emergency that demands prompt action. Sufficient staff and funding should be allocated to ensure that this effort proceeds in a timely manner.

- ▶ The Corps is proceeding at what can only be described as a glacial pace in its efforts to evaluate and design measures to mitigate operation of John Day reservoir at minimum operating pool. The Corps should begin design work on the necessary modifications immediately, using the money specifically appropriated for that purpose. Congress should provide the funding and direction necessary to expedite implementation of a John Day drawdown to minimum operating pool while providing full mitigation to affected irrigators.

- ▶ As part of its effort to remain competitive, BPA should negotiate an agreement transferring its fish and wildlife functions to one or more fish and wildlife agencies. Such an agreement must be conditioned on thorough monitoring and evaluation of results, tied to specific rebuilding targets, as well as a commitment on the part of the implementing entity to fully carry out the Council's *Strategy for Salmon*. BPA, in turn, would reasonably expect that such an agreement would hold the implementing agency or agencies accountable for results, perhaps through the use of independent audits, and provide a significant degree of planning certainty over a specific period of time.

Administrator Hardy, in his testimony before the task force, indicated a willingness, if not an eagerness, to begin discussions toward a lump sum transfer of many of its fish and wildlife responsibilities. However, no such discussions have commenced between BPA, any other Federal entities, and the Council.

- ▶ Another common theme heard during the task force's deliberations was the lack of coordination between Federal agencies, State fish and wildlife managers, and tribes. Since the demise of the Northwest River Basins Commission in 1981, there has been no single entity responsible for developing a comprehensive basin plan and coordinating the implementation of that plan.

During the task force's September 24, 1993 hearing, the creation of a new regional entity responsible for basin planning and implementation was discussed. There may be merit in such an approach as long as the new planning effort: (1) incorporates existing plans and processes; (2) is not used as a pretext for delay in the implementation of the *Strategy for Salmon*; (3) provides for full public participation; and (4) produces binding agreements that commit the participants to undertake the recommended measures.

Alternatively, NMFS, working with the Council, BPA, and other Federal, State, tribal, and private interests, could seek to develop a basin-wide conservation plan, using the *Strategy for Salmon* as a framework. Such a plan should include rebuilding objectives and a timetable for implementation, as well as a strong monitoring and adaptive management component. A basin-wide conservation plan, if fully implemented, could provide justification for the Secretary of Commerce to use his authority under §4(b) of the ESA to defer further ESA listings pending evaluation of the effectiveness of actions taken under the plan.

- ▶ The Federal agencies and the States should continue their efforts to reform water law so that conserved water may be dedicated to instream flows. The same logic that counts lost-generation opportunities caused by increased fish flows as lost revenues would consider water purchases for instream flows as an energy resource acquisition cost, not a fish and wildlife program cost. BPA should consider making this conceptual leap. Federal policies that discourage water conservation should be reformed. BPA should develop alternatives to its present practice of discounting power for irrigation uses, including new power-pricing methodologies that provide incentives for water conservation.
- ▶ BPA and the State of Oregon should begin negotiations on a long-term resident fish and wildlife trust agreement. In the interest of equity, BPA should consider an interim funding agreement with the State of Oregon, similar to its agreement with the State of Washington.
- ▶ Federal efforts to restore salmon stocks have not always given sufficient deference to the Federal trust responsibility to Indian tribes in the region or to Indian treaty rights. The Federal agencies should redouble their efforts to involve the Indian tribes at all levels of decisionmaking on management of the Federal water system. Impacts on traditional hunting and fishing rights should be an essential part of the analysis of all Federal activities. In addition, Federal agencies, the Council, and the States should recognize the tribes' status as separate governments within the Northwest region.
- ▶ In the interest of open government, as well as greater public understanding of the tradeoffs inherent in balancing scientific uncertainty against social and economic interests, the National Marine Fisheries Service and other Federal agencies should explore options aimed at opening Endangered Species Act consultations to public scrutiny, if not public participation.
- ▶ Though there may be some merit in allowing BPA a greater degree of flexibility in determining its fish and wildlife program spending levels (or "incentivizing" its fish and wildlife program, as proposed in the Final Draft Marketing Plan), it must be recognized that in the final analysis BPA is not a utility; it is a public agency with a mandate from the public. The Northwest Power Act's conservation and fish and wildlife mandates are at the very core of BPA's mission. They distinguish BPA as a steward of the Columbia River's fish and energy resources and as a power supplier committed to providing affordable energy to the people of the region at the lowest long-term cost. Fulfilling that mission more effectively and efficiently should be the primary aim of BPA's Competitiveness Project.

Columbia Basin Institute

CBI

WATER CONSERVATION FOR INSTREAM RECAPTURE ON THE BUREAU OF RECLAMATION'S COLUMBIA BASIN PROJECT: OPPORTUNITIES AND OBSTACLES

ABSTRACT

The Columbia Basin Project in central Washington is one of the nation's largest federally subsidized reclamation projects. The project was originally authorized to irrigate 1,029,000 acres, but thus far has only been built out to irrigate 580,000 acres, the remaining 450,000 acres are primarily located in the undeveloped east high area of the project. Three irrigation districts are responsible for delivering water to project irrigators and for securing repayment of the project's construction costs from project irrigators to the Bureau of Reclamation; they are the Quincy, East and South Columbia Basin Irrigation Districts. Of the CBP's current irrigated acreage, 527,000 acres receive water under repayment contracts which deliver water to platted farm units within designated irrigation blocks, the remaining 53,000 acres receive water under water service contracts, which deliver water, not required by platted farm units within irrigation blocks, to lands either outside of designated irrigation blocks or lands classified as unirrigable within irrigation blocks.

The project has a water right from the state of Washington to divert 2.8 million acre/feet (MAF) from the Columbia River at the Grand Coulee Dam; in 1992, 2.77 MAF were diverted. This water enters two main delivery canals and irrigates much of the northern and eastern expanses of the project. Then as much as 80 percent of it returns to the Potholes reservoir in the form of run-off and canal seepage, where it enters the third main canal on way to irrigate the remaining southern reaches of the project. In 1992, the total amount of water entering the three main canals was roughly 3.75 MAF, of which only 2.2 MAF actually reached farm turn-outs, thus for every irrigated acre on the CBP (580,000), 6.5 AF must be delivered to the canal system, of which only 3.8 AF per acre are used for actual irrigation.

As much as 43 percent of the CBP's acreage is in low value forage and pasture crops which consume over 50 percent of the CBP's water.

SUBSIDIES

The total construction cost to date of the CBP's irrigation component is \$649 million. The amount of this cost to be repaid by project irrigators, in the form of repayment contracts, is \$135,547,844.06, without interest. The Bonneville Power Administration (BPA) is responsible for the balance of the

repayment for the irrigation facilities plus the full repayment of the power facilities at Grand Coulee Dam, another \$1.05 billion, from revenue generated by the sale of power produced at Grand Coulee. The present day value of the irrigation construction costs is \$3.2 billion, of which irrigators have paid \$26.6 million [Steve, there is a subsidy here in terms of the lost time value of money due to the deferral of payments by the irrigators and also from the ballooning payments in 40 to 60 years from BPA, which have very little present value. We are presently working with an Ag economist from Berkeley to try to figure it out, hopefully we will have it by next week]

The annual reservation of 1.2 billion kilowatt hours (kwh) of power at the Grand Coulee Dam available to pump the project's irrigation water is provided for the highly subsidized cost of .95 mills per kwh, which up until 1990 was .5 mills per kwh. The project uses an average of 960 million kwh per year for which irrigators pay \$912,000 at .95 mills. The cost of this power at BPA's wholesale rate of 27 mills per kwh is \$26 million annually.

Another subsidy, which was not originally intended when the CBP was conceived, is the Bureau's assumption of drainage costs. In 1961, the districts requested the Bureau to assume the responsibility for the drainage costs to which the Bureau agreed. In return, the districts agreed to increase the repayment amount from \$85.00 per acre (the amount set in the original 1945 repayment contract) to \$131.60 per acre to cover additional costs to the Bureau. The increase in payment would generate an additional \$26.5 million if the repayments from the 580,000 built out acres were immediately recognized. As of 1991, the Bureau had spent \$118 million to drain 116,000 acres, with an estimated 37,000 acres left which will require drainage at an estimated cost of \$61 million. Thus, the total cost of drainage installation will be \$179 million, of which the irrigators will pay \$26.5 million, roughly 15 percent, giving an additional subsidy of \$152.5 million.

COSTS

The value of the 2.8 MAF water withdrawal at Grand Coulee, in lost hydropower revenue to BPA, is \$87 million annually, and to the entire region, \$124.5 million annually (this second figure includes power generation from five private Mid-Columbia dams). In terms of salmon remediation, this water also has a value, of which there is presently no method to accurately calculate. However, considering that the value of water spilled by BPA to aid in salmon recovery is always given in terms of its hydropower value, it is logical to infer that the salmon remediation value of water is at least the same as the hydropower value.

The use of water on the CBP is subject to two different types of efficiencies. First, tertiary efficiency, or on-farm efficiency, refers to the amount of water applied to an irrigator's farm versus the amount of water actually required by the crops on the land. The higher the ratio of water required compared to water actually used, the more efficient a farmer's application of water is

considered. Conversions from gravity forms of irrigation, common through the 1960's, to significantly more efficient sprinkler and center pivot forms of irrigation throughout the 1970's and 1980's, have greatly increased the tertiary efficiency of the CBP. This has created an abundance of water not required by irrigators under repayment contracts and has allowed for the development of about 100,000 platted farm units within irrigation blocks. However, much of the water conserved through the introduction of efficient irrigation methods has not been returned to the Columbia River in the form of reduced diversions, rather, it has been sold by the irrigation districts in the form of water service contracts.

The second form of efficiency is conveyance efficiency, which refers to the amount of water delivered to the canals the distribution system versus the amount which is actually delivered to farm turn-outs. Water lost in conveyance is lost to both evaporation and seepage through unlined canals and laterals.

This level of efficiency has been in a constant state of decline since the irrigation districts assumed management responsibility of the project in 1969, falling from a level of 70 percent, down to nearly 58 percent in 1992. The result of this decline with respect to water conservation is that it takes the delivery of more and more water into the distribution canals to meet the farm turn-out requirements of the project's irrigators. Therefore, even if the overall water requirement is decreasing, the amount of water which needs to be delivered to the canals to meet the requirement is increasing due to the drop in conveyance efficiency, thus eliminating any savings conservation may have caused.

Results reported in this paper from studies conducted on actual farms located on the CBP, indicate that on-farm water requirements may be reduced by between 11 percent and 30 percent, depending on soil types and present practices, by simply implementing low-cost, scientific scheduling techniques designed to improve tertiary efficiency. Applying these percentages to the amount of water now used on the CBP, we estimate that water requirements could be reduced by 437,700 AF. Also, an examination of the increase in water lost through conveyance inefficiencies, shows that over 600,000 AF may be eliminated from canal deliveries, resulting in 353,000 decrease in diversion from the Columbia River, if the irrigation districts were merely required to return canal conveyance efficiency levels to that which they were at when the districts assumed responsibility for their maintenance in 1969. The hydropower value of this potential 790,000 AF of conserved water to BPA is \$24.6 million annually, and to the region is \$35.1 annually.

BARRIERS

There has been much water conserved over the past 20 years from conversions to more efficient forms of irrigation, yet no water has returned to the Columbia. We demonstrate in this paper how further efficiency improvements could potentially provide water which could be recaptured in the Columbia. However, for the same reasons which have kept the water conserved over the last 20 years from being

recaptured, even if the ideas we present in this paper are implemented, no water will be recaptured due to the barriers which have been incorporated into the management structure of the CBP.

These barriers are in the form of irresistible economic incentives available to the irrigation districts, the managing entities of the CBP, to create income streams from conserved water in order to hold the water assessment costs of district members to a minimum. For example, any water which is conserved by farmers of platted farm units within irrigation blocks served by repayment contracts, becomes available to the irrigation districts to sell in the form of water service contracts. The revenue received from the sale of water by water service contracts is then applied to the operation and maintenance budget of the irrigation district, thus allowing the district to reduce the water assessment charge, paid by the district member irrigators served by repayment contracts, while maintaining its budget.

Another barrier to the districts incorporating water conservation is the fact that they benefit greatly when a maximum amount of water is run through the canals of the conveyance system. In 1985, the districts installed seven small head hydropower projects within the canals which distribute water to the CBP. Since 1985, water deliveries to the three main distribution canals have increased by roughly 500,000 AF, with no corresponding increase in irrigated acreage or cropping patterns which would justify this drastic increase in water. This can mean one or two things, either the there is more water being run through the canals to maximize hydropower revenues, or the system has fallen into a drastic state of decline which demands immediate emergency maintenance action by the districts and the Bureau.

Presently, the districts receive a return of 1.65 mills per kwh for power produced at five of these projects, and 2 mills for power produced at one, producing over \$850,000 annually in revenue to the districts; the final project is over cost and not producing any profit. The utilities receiving the power now pay all the debt service and all the operation and maintenance costs of the projects, the districts simply receive profit. When these projects are finally amortized (1996 for two, and 2005 for five) the districts will split the profit evenly with the utilities now purchasing the power, and will average nearly \$6 million annually. The contracts with the utilities expire in 2021, at which time the districts will receive all profit generated by these projects, averaging near \$12 million annually. It is also interesting to note that the projects produce over 500 million kwh per year, roughly half of the reserved power, for which the districts pay only .95 mills, used to supply water to the system, yet the districts have no obligation to return any power or profit to BPA.

A third barrier is that the irrigation districts have the responsibility of maintaining the system and for raising the revenue by which to do so. The districts raise revenue by adding charges onto the contractual water agreements with irrigators; in

water assessment charges with platted farm unit irrigators, excess water charges for platted farm unit irrigators and water service contracts with non-platted farm unit irrigators. Considering the irrigation districts boards are comprised of irrigation district members, there is an obvious incentive here to minimize water charges to district members in order to maximize district member profits, thus keeping operation and maintenance budgets at a bare minimum, compromising the maintenance and condition of the system.

Clearly there is a level of creative management which is to be expected from such entities in order to hold their costs down. However, there is also a level when the scope of this management responsibility becomes too broad and the temptation to mismanage becomes too great, as it possibly has, so that the entity responsible for efficiency and maintenance at the cost of its own profit, becomes incapable of making effective decisions between the two. In this case the mismanagement is affecting a resource, water, which is provided at an extremely high public cost, and which now is a resource for which there is an increasingly greater public interest and value in the region.

The original legislation authorizing the CBP was the Columbia Basin Project Act of 1943. This Act expressly forbid the delivery of subsidized water to lands which were not platted farm units in designated irrigation blocks. This section was repealed by an amendment in 1962, the same amendment which designated the project's drainage costs to be paid by the Bureau, thus authorizing the formation of water service contracts to sell water not used by platted farm units to lands not originally authorized to receive such water.

There are currently 53,000 acres in water service contracts. If this water were sold at the full cost (\$54 - \$72 per acre) instead of the subsidized cost (\$2 per acre), the actual value of this water in terms of repayments to the Bureau for construction costs of the project would be between \$2.9 million and \$3.8 million as opposed to the \$106,000 it currently produces. In essence, allowing the districts to form water service contracts with excess water has converted federally subsidized water into an economic commodity, both in its value in water service contracts and its ability to generate power at the small head hydro projects, the sale of which is utilized as a means of further increasing subsidy to district members by decreasing water charges and deferring maintenance.

There is also the hydropower value of this water if it was not available for sale in water service contracts and was recaptured in the Columbia River. Assuming 53,000 acres consumes an average of 3.8 AF/acre, over 200,000 AF of water is delivered to these acres. The hydropower value of this water to BPA is \$6.2 million, and \$8.9 million to the region. This is a conservative estimate considering the level of conveyance efficiency requires 6.5 AF/acre to be delivered to the conveyance canals to supply 3.8 AF/acre, using this calculation, 344,500 AF are required to be delivered to canals for these water service contract acres. The hydropower value of

this water is \$10.7 million to BPA and \$15.3 million to the region.

As we demonstrate, the ability of the districts to sell this water and their ability to generate profit from maximum canal delivery will forever prevent any water which is conserved through tertiary or conveyance efficiencies from being recaptured to benefit instream uses. Upon examining the public interest in returning this publicly subsidized water to the Columbia River for the benefit of other valuable instream public uses, we see that the ability of the irrigation districts to form water service contracts and use this water as an economic commodity, made legal by the 1962 amendments to the CBP Act of 1943, is the barrier to public recapture of water on the CBP.



**"WATER SPREADING" IS THE UNAUTHORIZED USE OF
FEDERALLY DEVELOPED PROJECT WATER SUPPLIES OR
FACILITIES ON LANDS NOT PREVIOUSLY APPROVED BY
RECLAMATION FOR SUCH USE.**

Water Spreading occurs when land receives project water under the following circumstances:

- project water is applied to lands that lie outside Irrigation District boundaries or outside Federal project boundaries;
- project water is applied to lands not classified by Reclamation as eligible to receive project water or on lands classified as non-irrigable (class 6);
- the nature or place of project water use has been changed in violation of contract provisions, project authorizations or without Reclamation's approval;
- project water is applied on lands that do not possess the appropriate state water right or permit;
- any combination of factors that cause the number of acres irrigated to exceed the number authorized for project service.

June 1994

**U.S. BUREAU OF RECLAMATION
DEPARTMENT OF THE INTERIOR**

WATER SPREADING



June 1994

WATER SPREADING:

**THE UNAUTHORIZED USE OF
FEDERALLY DEVELOPED PROJECT
WATER OR FACILITIES ON LANDS
NOT PREVIOUSLY APPROVED BY
RECLAMATION FOR SUCH USE.**

CRITERIA

**WATER SPREADING OCCURS WHEN
LAND RECEIVES PROJECT WATER
UNDER THE FOLLOWING
CIRCUMSTANCES:**

- ▶ **LAND IS OUTSIDE DISTRICT
BOUNDARIES**

- ▶ **THERE IS NO WATER RIGHT**

- ▶ **LAND IS NOT CLASSIFIED
OR IS CLASSIFIED AS
NON-IRRIGABLE**

- ▶ **NONCOMPLIANCE WITH
CONTRACT PROVISIONS**

STANDARD CONTRACT LANGUAGE

**"WHILE THIS CONTRACT IS IN
EFFECT, NO CHANGE MAY BE MADE
IN THE DISTRICT, EITHER BY
INCLUSION OR EXCLUSION OF
LANDS....."**

WATER SPREADING POLICY REVIEW GROUP

- ▶ **AGRICULTURAL INTERESTS**
- ▶ **ENVIRONMENTAL INTERESTS**
- ▶ **NATIVE AMERICAN INTERESTS**
- ▶ **STATES OF IDAHO, OREGON, AND WASHINGTON**
- ▶ **BUREAU OF RECLAMATION**



DEVELOP RECOMMENDATIONS

POLICY FORMULATION BY RECLAMATION

POLICY IMPLEMENTATION BY RECLAMATION

June 1994

Questions and Answers -- Water Spreading

Q: What is "Water Spreading?"

A: A practice commonly referred to as "Water Spreading" is the unauthorized use of Federally developed project water supplies or facilities on lands not previously approved by Reclamation for such use. Water Spreading is illegal or unauthorized and the Bureau of Reclamation plans to eliminate the practice.

Q: How does Water Spreading occur?

A: Water Spreading occurs under the following circumstances:

- project water is applied to lands that lie outside Federally established district or project boundaries;
- project water is applied to lands not classified by Reclamation as eligible to receive project water or on lands classified as non-irrigable (class 6);
- the nature or place of project water use has been changed in violation of contract provisions, project authorizations or without Reclamation's approval;
- project water is applied on lands that do not possess the appropriate state water right where such water right is necessary;
- any combination of factors that causes the number of acres irrigated to exceed the number authorized for project service.

Q: How is the Bureau of Reclamation going to eliminate Water Spreading?

A: We are currently formulating policy to eliminate Water Spreading practices.

Q: How big is the problem?

A: While we do not have exact figures of acres or acre-feet involved in current water spreading practices, we have figures from studies in 1983 and 1993 which indicate the problem is widespread throughout the west.

In the Columbia and Snake River Basins, it is estimated that between 110,000 - 131,000 acres of ineligible land in 18 districts received project water in 1993. The amount of water used consumptively by crops averages about 2.5 acre-feet

per acre and consumptive use could be reduced by 250,000 acre-feet annually in the Snake and Columbia River Basins.

Q: How will the policy affect me?

A: If you are in compliance with your district's contract and do not fall under the criteria listed above, the policy will likely not impact you.

If you meet any of the above criteria, you can expect to be impacted by the policy. Impacts will vary depending on individual situations. For example, if you are using water without a water right, you will need to obtain a water right or discontinue that use. If you are putting project water on land outside the project boundary or service area, you will likely be prohibited from doing so in the future.

Q: What does the process of formulating policy include?

A: The first step is development of a public involvement program to help us gather information from those that are likely to be affected by the Water Spreading Policy. Second, we draft a policy and gather public comment on the draft. Third, the draft policy is then revised to reflect public comment when possible. And forth, the policy is finalized and implemented.

Q: What does the public involvement program include?

A: The first part of the public involvement program is the Water Spreading Task Force which has been meeting since January to discuss issues and identify factors the policy might consider. They are also helping us to identify solutions, strategies and identify a way to eliminate water spreading.

The second part of the public involvement program are public meetings. We are holding two series of public meetings on the Water Spreading issue. In June and early July we will hold informational meetings for the purpose of discussing the issue and answering questions. In mid and late July, we will hold meetings to receive public comment on the draft policy.

Q: Who is on the task force?

The Task Force is made up of people from Idaho, Oregon, and Washington representing agricultural interests, environmental interests, State governments and three Tribes:

Agriculture

Jan Boettcher
Oregon Water Resources
Congress

Sheri Chapman
Idaho Water Users Association

Merle Gibbens
Washington State Water
Resources Association

Environment

Marti Bridges
Idaho Rivers United

Jeff Curtis
WaterWatch of Oregon

Katharine Ransel/Karen Garrison
American Rivers/NRDC

Tribes

Becky Hiers
Confederated Tribes of the
Umatilla Indian Reservation

Shawn Roberstson
Shoshone-Bannock Tribes

Bob Tuck
Yakima Indian Nation

States

Reed Marbut
Oregon Water Resources Department

Russ Lehman
State of Washington

Norm Young
Idaho Water Resources Department

Bureau of Reclamation

Walt Fite
Terry Lynott

- Q: Will I be able to comment on the draft policy and if so, how?
- A: Yes, the draft policy will be sent out to all interested parties in the Pacific Northwest for review and comment. The public meetings in mid and late July are for the purpose of public comment on the draft policy (the schedule for public comment meetings is attached). You may attend the meeting in your area and comment at that time, send your written comments to our Regional Office in Boise, or both.
- Q: What happens after the public comment meetings?
- A: Reclamation will study the comments we receive on the draft policy and consider them for inclusion in the final policy.
- Q: What are Indian Trust Assets?
- A: Indian Trust Assets are legal interests in property granted by treaties to Indian tribes and held in trust by the United States. Indian Trust Assets include lands, minerals, hunting, and fishing rights as well as water rights.
- Q: How do Indian Trust Assets affect Water Spreading?
- A: Reclamation has a shared responsibility with other Federal agencies to protect treaty rights and assets of Indian tribes. The Bureau of Indian Affairs has the primary responsibility for Indian trust assets but each Federal agency, including the Bureau of Reclamation, is required to take all reasonable actions necessary to protect trust assets.
- We are also required to evaluate policy impacts on Indian Trust Assets when a significant Federal action is proposed and actively elicit input from Tribes whose trust assets may be effected by policy.
- Q: How does the National Environmental Policy Act (NEPA) affect Water Spreading?
- A: All major federal actions are subject to the National Environmental Policy Act. NEPA provides for public participation, identification of reasonable alternatives, and disclosure of environmental impacts resulting from each alternative. The NEPA process assists decision-makers in making informed and better decisions.

**Meeting Schedule for Public Comment on
Draft Water Spreading Policy**

Idaho

July 12	Caldwell, ID	Albertson College Ballroom
July 13	Burley, ID	Burley Inn
July 14	Idaho Falls, ID	Shilo Inn

Oregon

July 20	Bend, OR	Riverhouse
July 21	Medford, OR	Holiday Inn

Washington

July 26	Moses Lake, WA	Big Bend Community College
July 27	Yakima, WA	Holiday Inn
July 28	Kennewick, WA	Cavannahs

June 1994

"WATER SPREADING" IS THE UNAUTHORIZED USE OF FEDERALLY DEVELOPED PROJECT WATER SUPPLIES OR FACILITIES ON LANDS NOT PREVIOUSLY APPROVED BY RECLAMATION FOR SUCH USE.

WATER SPREADING OCCURS WHEN LAND RECEIVES PROJECT WATER UNDER THE FOLLOWING CIRCUMSTANCES:

- **PROJECT WATER IS APPLIED TO LANDS THAT LIE OUTSIDE FEDERALLY ESTABLISHED DISTRICT OR PROJECT BOUNDARIES;**
- **PROJECT WATER IS APPLIED TO LANDS NOT CLASSIFIED BY RECLAMATION AS ELIGIBLE TO RECEIVE PROJECT WATER OR ON LANDS CLASSIFIED AS NON-IRRIGABLE (CLASS 6);**
- **THE NATURE OR PLACE OF PROJECT WATER USE HAS BEEN CHANGED IN VIOLATION OF CONTRACT PROVISIONS, PROJECT AUTHORIZATIONS OR WITHOUT RECLAMATION'S APPROVAL;**
- **PROJECT WATER IS APPLIED ON LANDS THAT DO NOT POSSESS A STATE WATER RIGHT WHERE SUCH WATER RIGHT IS NECESSARY;**
- **ANY COMBINATION OF FACTORS THAT CAUSES THE NUMBER OF ACRES IRRIGATED TO EXCEED THE NUMBER CERTIFIED IRRIGABLE AND AUTHORIZED FOR PROJECT SERVICE.**

Questions and Answers – Water Spreading

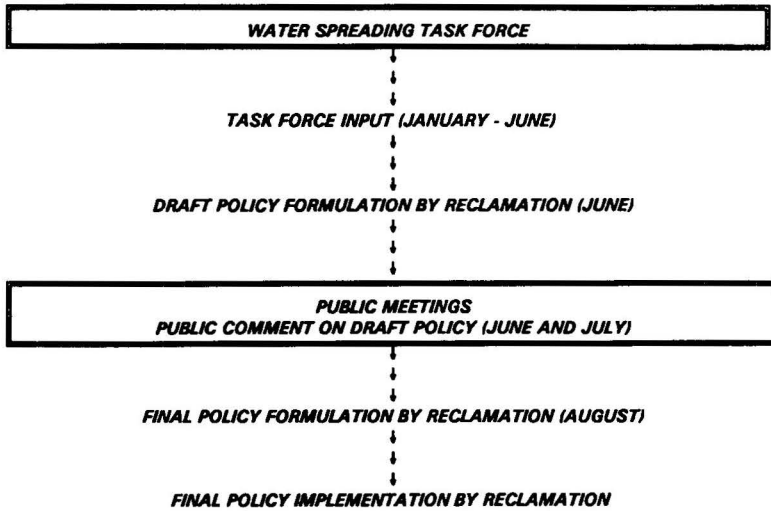
Q: What is "Water Spreading?"

A: A practice commonly referred to as "Water Spreading" is the unauthorized use of Federally developed project water supplies or facilities on lands not previously approved by Reclamation for such use. Water Spreading is illegal or unauthorized and the Bureau of Reclamation plans to eliminate the practice.

Q: How does Water Spreading occur?

A: Water Spreading occurs under the following circumstances:

- project water is applied to lands that lie outside Federally established district or project boundaries;
- project water is applied to lands not classified by Reclamation as eligible to receive project water or on lands classified as non-irrigable (class 6);
- the nature or place of project water use has been changed in violation of contract provisions, project authorizations or without Reclamation's approval;
- project water is applied on lands that do not possess the appropriate state water right where such water right is necessary;
- any combination of factors that causes the number of acres irrigated to exceed the number authorized for project service.

POLICY DEVELOPMENT THROUGH PUBLIC INVOLVEMENT

Water Watch
O F O R E G O N

Umatilla Basin Report

Prepared by

Anne Perrault

POSITION OF WATERWATCH

This Report has been researched and prepared under the direction of WaterWatch of Oregon, Incorporated. WaterWatch is a nonprofit public interest organization committed to full enforcement of Oregon's water laws and to reform of those laws to protect instream uses.

The Report takes a close look at recent developments in managing surface water resources in the Umatilla River basin. The federally-funded Umatilla Basin Project is the centerpiece of current management efforts in the basin. WaterWatch supports the Project as the streamflow and fishery restoration project it is intended to be.

The Umatilla is a showcase for both the state's worst failures and most promising successes in managing its water resources. The failures are many and severe. One of the biggest failures can be found in the state's water right permitting process. Although designed by statute to give due weight to protecting natural resource values in the permitting process, it has actually operated to remove nearly all the water and all the fish from the river. Furthermore, efforts to solve this problem are limping. The new federal project intended to restore Umatilla flows is being administered by a federal agency whose actions are at cross purposes to objectives of the federal project. The agency is designing and implementing a project to use Columbia River water to restore Umatilla River flows to the minimums needed for the fishery, but at the same time facilitating the irrigation of more land with water saved through conservation improvements – an action that actually will reduce streamflows. As a further example of failure, both state and federal water agencies in the region turn a blind eye to their enforcement responsibilities. Irrigators use more water than they are entitled to per acre of land; they sell and transfer water contrary to state law; and they use water on land in violation of federal contracts. The agencies watch and document these practices, but they do not enforce the law.

The Umatilla also has stunning examples of the best water management practices. Perhaps the best example is one district that more than doubled its efficiency of water use by investing in readily available conveyance technology. Its improvements are a model for improved efficiencies which will, as a practical matter, eventually be implemented throughout this arid region. Water conservation on the scale achieved by this district promises to be a significant new source of water on a regional basis in future years.

The issues discussed in this report are not unique to the Umatilla, but are common to all arid lands of eastern Oregon. In the Umatilla, however, the problems have become more severe than in other areas. The solutions have correspondingly been more rapidly implemented due to the severity of the problems; the significant interests of the Tribes in the basin; and the presence of the federal government as both a contributor to the problem and a funder of remedies.

The Umatilla has some crystal ball qualities for the future of public water management in Oregon. In this sense, what is happening in the Umatilla is worth close scrutiny by

all. WaterWatch hopes this Report is read and understood by all in this spirit.

WaterWatch wishes to restate and emphasize its support for the Umatilla Basin Project. Authorized and funded as a fishery restoration project, it has begun to stray from its original course and has become a vehicle for enhancing irrigation. The project should be put back on track to achieve its fishery objectives, it should be fully funded and supported consistent with its fishery objectives, and it should be implemented as promptly as possible so that its benefits will accrue to the resource, the Tribes, and the public at large.

I. SUMMARY

The Umatilla River is a major tributary to the Columbia River in northeast Oregon. The river once had abundant salmon and steelhead runs, valued highly by the Confederated Tribes of the Umatilla Indian Reservation (CTUIR). In terms of fishery losses, the Umatilla is one of the hardest hit tributaries in the Columbia River system. Fish populations were diminished with the growth of irrigation in the early 1900's. Since then, summer steelhead populations have declined dramatically, and spring and fall chinook and coho runs have ended.

In the 1970's and 1980's public entities began to focus their attention more seriously on the scale of the problem and possible solutions. The centerpiece of the recovery program for the Umatilla is the federally-funded Umatilla Basin Project. This project is administered through the Bureau of Reclamation and its purpose is to restore river flows needed for the fishery by using Columbia River water to replace some existing irrigation diversions of Umatilla River water. Feasibility and environmental impact studies for the Project are complete, and federal funding for implementation has begun to flow.

Despite this major federal intrusion, the path to a regional solution for the fishery is neither straight nor certain. While there is nearly universal recognition of the practices causing the fishery problem, and widespread support for the infusion of federal funding, facilities, and Columbia River water to try to improve the fishery, the agency practices that have created or aggravated the problem over the decades are still evident.

Old habits die hard, even in this time of environmental enlightenment and federal subsidies to remedy past sins. This Report looks at the Umatilla Basin Project and its fishery restoration objectives, in the context of continuing practices of state and federal agencies and local districts that are contrary to the objectives of the Project to restore river flows and fishery resources.

The Report describes the 1984 approval by the Water Resources Director of a major new diversion from the Umatilla River during months of critical water shortages -- an approval made by the Director without a public hearing; over the objections or protests of fishery agencies, the Tribes, and others; and contrary to his staff's recommendation for referral to the agency's policy-making body.

The Report describes the successful efforts of the Westland Irrigation District (WID) to upgrade its system with available conveyance technology, an improvement that boosted efficiency by about 110%. This is a success story that needs to be repeated throughout eastern Oregon.

What happened with the water conserved by WID's improvements exemplifies old habits at their worst. Through the individual efforts of the districts, the Water Resources Department (WRD), and BOR, the substantial amounts of conserved waters have been kept out of the river where they legally belong. WID sells the conserved waters to irrigators in another district, Teel Irrigation District (TID). Although the WRD found that this transfer of water is contrary to state water law, it has taken no action to enforce the law and end the transfer, despite its obligation to administer and enforce water rights laws.

For its part, BOR allows that portion of the "conserved" water originating in its McKay Reservoir to be applied to TID lands contrary to its contracts with its purchasers and contrary to the terms of its own state water permit for storage of the water. Instead of working to ensure the conserved waters are returned to the Umatilla, consistent with the objectives of the Umatilla Basin Project, BOR is working to legitimize the transfer for irrigation on TID lands.

As for the Umatilla flows, which have been shortchanged by the illegal transfers to TID, BOR's response has been to upsize the facilities and flows of the Project; that is, to spend more funds on facilities to pump more water to replace water missing from the Umatilla. As a result, the cost of the Umatilla Basin Project has risen considerably.

Citations are made throughout this Report to Attachments documenting this Report. The Attachments have been compiled and bound separately from this Report.

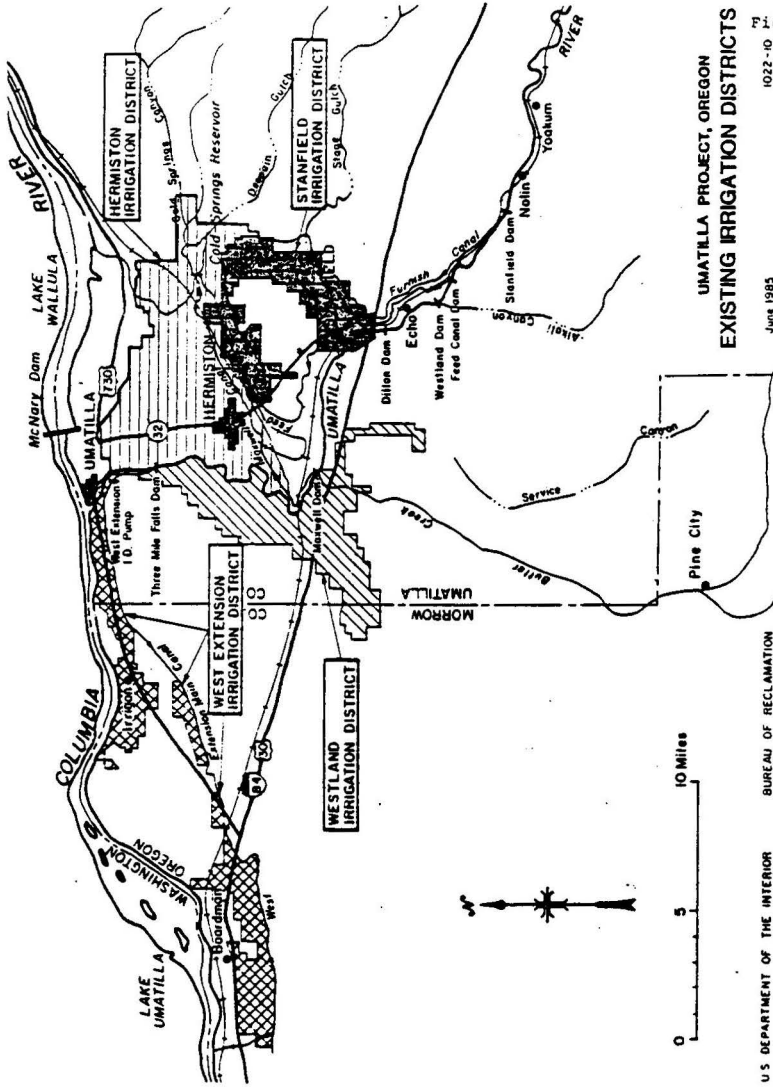
Three Figures orienting the reader to the Umatilla area follow immediately. Figure 1 is a BOR map that shows the principal irrigation districts discussed in this Report with the exception of TID. Figure 2 shows the location of TID to the south of WID. Figure 3 shows the Umatilla River area from Echo to the mouth, along with the canals and diversion facilities.

II. HISTORY OF THE UMATILLA RIVER

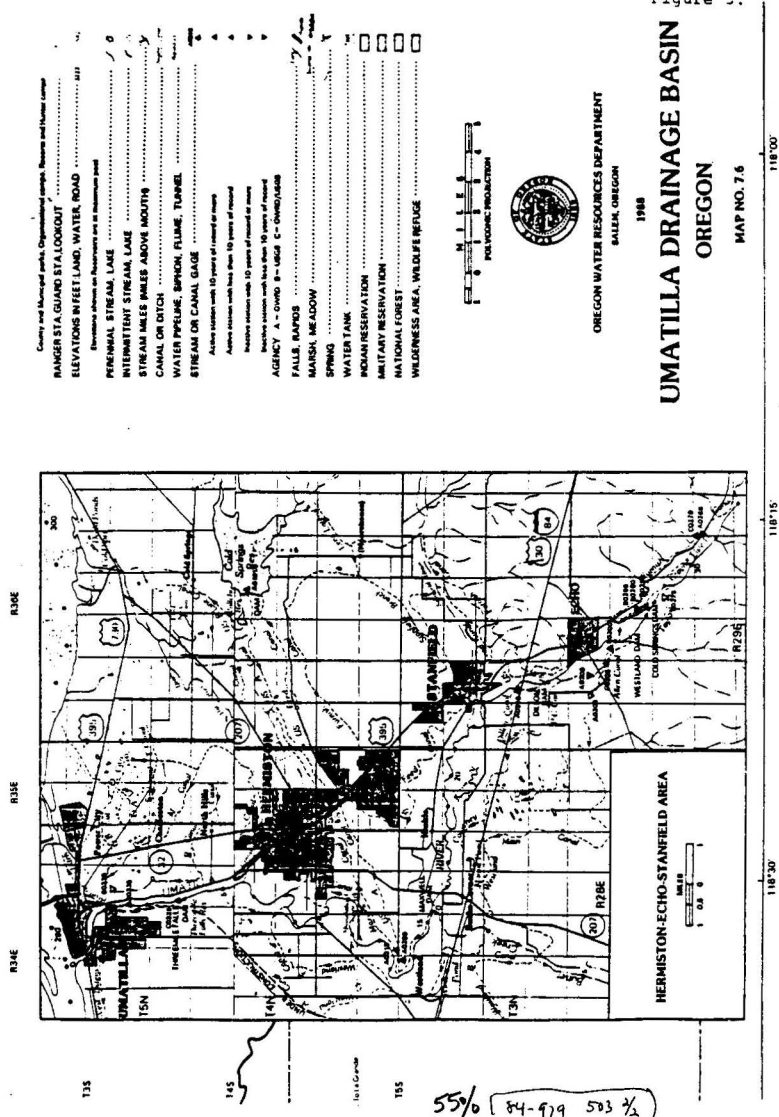
The Umatilla River is a major tributary to the Columbia River in northeast Oregon. The mainstream Umatilla extends 89 miles from its mouth to the confluence with its north and south fork tributaries. (Attachment 1, Map of the Umatilla Basin).

In 1855, CTUIR ceded over 6,000 square miles of land in the Umatilla Basin to the United States in exchange for a promise of protection of their fishing and hunting rights within the reservation, the right to fish and hunt at all "usual and accustomed" sites outside the reservation, and assistance in developing a viable reservation economy.

Until the 1855 treaty, and for a short period thereafter, the Umatilla River flowed







continuously through the Umatilla Basin, faithfully providing a means for migration, spawning, and rearing of fish, habitat for wildlife, a source of spiritual renewal and food for Native Americans, and recreation opportunities for many.

The Reclamation Act of 1902, however, opened the door to construction of BOR projects designed to manipulate the Umatilla River for irrigation. By the 1940's, the diversion of Umatilla River flows for irrigation was taking its toll on the river and its fishery resource. Unable to migrate and spawn due to low flows and high water temperatures, many species of fish disappeared from the Umatilla. The Steering Committee of the Umatilla Basin Project succinctly described the connection between the federal water projects, the expansion of irrigation, and the demise of the fishery:

At the time of the treaty, and until the early years of this century, there were substantial runs of salmon and steelhead in the Umatilla River within the reservation as well as in the Columbia River and its other tributaries where the Indian normally fished. Subsequent to the treaty date, virtually all the seasonal water in the Umatilla River was allocated under state law to other uses, primarily irrigation. To facilitate irrigation, the Bureau of Reclamation (BR) assisted in the construction and operation of several water distribution systems within the Umatilla Basin. Thus we have an agency of the U.S. Government and the State of Oregon becoming parties to subversion of guaranteed Indian treaty rights. The fish problem was compounded with construction of the many dams in the Northwest which are now recognized as a major factor in the demise of historic fish runs. The results are that there is now only a token run of native steelhead left in the Umatilla River, and the Indians' economic, social, and cultural life is severely impacted.

(Attachment 2, Umatilla Basin Steering Committee Update, August, 1986).

BOR is equally direct in describing the effect of water control and irrigation projects on the fishery in its environmental analysis in support of the Project:

These developments, and dam construction on the Columbia River, have reduced Umatilla River fish runs to a mere fraction of what they once were, and many of the "usual and accustomed" indian fisheries throughout the Columbia River Basin have been depleted.

(Attachment 3, BOR, Umatilla Basin Project Planning Report, Draft Environmental Impact Statement (1986)(DEIS)).

The fishery resource in the Umatilla is not lost, however. The Oregon Department of Fish and Wildlife (ODFW) states that despite the adverse impact of diversions, the

headwaters of the Umatilla still provide extensive habitat for steelhead spawning and rearing . . . The main river serves as a critical steelhead migration corridor between its headwaters and the Columbia River. The steelhead run is a recreation resource within the Umatilla Basin.

Steelhead anglers fish the Umatilla River below Mission (about mile 61) each winter and spring. Their catch in 1979 was 524 fish, which was second only to the Deschutes (3,364) among Eastern Oregon's Columbia River tributaries * * * *

(Attachment 4, Documents in support of minimum streamflows on the Umatilla, prepared by ODFW (1981)).

III. PUBLIC INVESTMENTS IN THE UMATILLA RIVER

In response to the long standing damage inflicted on the river's resources, state, federal, and local public entities have made substantial investments in recent decades to reestablish anadromous fish runs. ODFW work has included screening of diversions, removal of passage obstructions, stocking, and requesting minimum streamflows. ODFW described its work in 1981 during its advocacy of a minimum streamflow.

Management of the steelhead run in the Umatilla is a major activity of the Department of Fish and Wildlife. For many years, the Department has worked to achieve screening protection for juvenile steelhead at irrigation diversions, and to obtain adult passage at diversion dams and other obstructions. In any year when flows become too depleted to transport juveniles safely downstream, we collect them at diversion points and haul them downstream by truck to release in the Columbia River. In recent years, over 100,000 steelhead smolts were salvaged by Department efforts.

(See Attachment 4, ODFW comments in support of minimum streamflows (1981)). In cooperation with CTUIR, ODFW in 1982 began releasing juvenile salmonids in the Umatilla River. As a result of actions initiated by ODFW in 1983, minimum streamflow levels were established on the Umatilla River in 1985.

The Northwest Power Planning Council (NWPPC) adopted the Columbia River Basin Fish and Wildlife Program in 1982, which effectively caused the Bonneville Power Administration (BPA) to actively participate in restoring fish resources throughout the Columbia Basin. This program authorized the construction of rearing, hatchery, passage, and habitat improvements on the Umatilla River. Improvements are projected to cost in excess of \$20 million. (Attachment 5, Umatilla Basin Project Summary Papers).

In its Final Environmental Impact Statement for the Umatilla Basin Project (FEIS), BOR summarized the extensive and varied public expenditures to restore the fishery in the Umatilla basin:

Approximately \$21,000,000 of fishery facilities, identified in the basinwide program has been approved for non-Federal funding under the Pacific Northwest Power Planning and Conservation Act of 1980 (Power Act of 1980). To date, \$7 million of these funds have been expended, and additional projects totalling \$8 million are in final design stages. * * * * In addition to the funding provided through the Northwest Power Planning

Council's Fish and Wildlife Program, ODFW is spending an estimated \$200,000 annually to fund hatchery outplantings in the basin. WID is spending about \$3,000 annually for fishery studies, and anadromous fish are benefitting from the district no longer diverting floodwaters for irrigation use, which costs the district about \$18,000 annually in lost revenue. Private non-Indian landowners have donated land for fish propagation facilities. The State of Oregon is also funding the operating costs of the Umatilla Basin Project Steering Committee which amounts to about \$25,000 annually. The estimated equivalent value of expenditures to date under the council's Fish and Wildlife Program and current State and local entity costs is \$844,400.

(Attachment 6, FEIS).

Momentum for federal help to correct fishery problems in the Umatilla gathered steam rapidly in the early 1980's when CTUIR and ODFW successfully urged Congress to direct BOR to develop a plan "that would enhance the basin fishery and help resolve water conflicts." (See Attachment 3, DEIS). In 1982, at the request of BOR, the Umatilla Basin Project Steering Committee was established to assist in developing this plan.

IV. THE UMATILLA BASIN PROJECT

The essential objective of the Umatilla Basin Project is to replace irrigation diversions from the Umatilla River with Columbia river water, thereby leaving natural flow in the Umatilla to serve the fishery needs. The Project will pump water from various locations in the Columbia River, one location in Cold Springs Reservoir, and one location in the Umatilla River to different irrigation facilities in the basin. Certain irrigators presently diverting Umatilla water will forego those diversions in exchange for Columbia River water.

Details of the Umatilla Basin Project can be found in the FEIS. The types of facilities and their uses can be summarized as follows:

Three new pumping plants on the Columbia River, one new pumping plant at Cold Springs Reservoir, and one new pumping plant on the Umatilla River at Cottonwood Bend will facilitate the exchange and enhance streamflows in critical passage areas. Automated flow monitoring stations are to be installed at key locations to insure that streamflow and passage enhancement goals are met. Construction of fish passage and protective facilities are also part of the project plans.(Attachment 7, Umatilla Basin Project, Initial Workplan, May 1989).

The capital cost of the project will exceed \$43 million. Annual power costs for pumping are estimated to be \$673,400. Annual operating, maintenance, replacement, and wheeling costs are estimated to be \$402,700. Federal and State agencies will share the costs, although most of the capital costs will be nonreimbursable Federal costs. Most of

the project's fish passage and protection facilities (to cost about \$3.8 million) will be funded under the Pacific Northwest Power Planning and Conservation Act. (See Attachment 6, FEIS). BPA will provide for project power needed to effect the water exchange,

consistent with provisions of the Columbia River Basin Fish and Wildlife Program established pursuant to the Pacific Northwest Power Planning and Conservation Act * * * * The cost of power shall be credited to fishery restoration goals of the Columbia River Basin Fish and Wildlife Program.

(Attachment 8, P.L. 100-557, Title II, Umatilla Basin Project Act (1988)).

BOR estimates that regional Federal power users will share about 39% of the project operating costs allocated to non-Indians or 26% of total project costs. (See Attachment 6, FEIS). A more complete analysis of Project costs appears in Attachment 9.

The Umatilla Basin Project is to be implemented in two stages. Phase I focuses on the lower reach of the Umatilla River from the West Extension Irrigation District (WEID) diversion point, at Three Mile Falls Dam, to the mouth of the Umatilla River. It involves an exchange of Columbia River water for Umatilla River water normally diverted by WEID irrigators. Permit 50748, to pump 150 cubic feet per second (cfs) of water from the Columbia River for Phase I, has been approved by WRD. Construction of Phase I facilities has not begun yet. Interim pumping from the Columbia River, using existing WEID pumping facilities, has occurred since 1985. However, because funds for this purpose were not authorized until 1988 it appears that pumping occurring from 1985 to 1988 to facilitate the exchange may have been unauthorized. Phase II focuses on the stretch of river from river mile 28.2, just above the Westland Diversion point, to the mouth of the Umatilla. This involves an exchange of Columbia River water for Umatilla River water normally diverted for use in Hermiston Irrigation District (HID) and storage in McKay Reservoir. BOR's application to pump 240 cfs from the Columbia River for Phase II has not yet been approved. Congress recently authorized the expenditure of \$4 million for Phase II implementation. (Attachment 10, Phase I Permit; See also Attachment 7, Initial Project Workplan, May 1989).

While the federal initiative for a project to restore the river flows was gathering steam, WRD, the state agency that approves water uses, continued in a "business-as-usual" fashion to authorize more diversions of water from the Umatilla for irrigation. Such approvals for new appropriations undermined the effectiveness of the Project. The most significant new water permits were issued to Prior and Brown in 1984. Director Young of WRD issued these permits over the strenuous protests of federal and state fishery agencies, the Tribes, and even his own staff.

V. THE PRIOR/BROWN PERMITS

The Applications: In 1981 Chester Prior and Don Brown applied to WRD to appropriate 88 and 50 cfs of water, respectively, from the Umatilla River to be applied

to land located in TID. TID is located southwest of WID. (Attachment 11, WRD Applications 62038 and 62173; TID is shown on Attachment 12, Map).

These applications reflect a significant portion of the mainstem flow. The permits eventually issued to Prior/Brown allowed diversion through June 15 of each year. The average flow of the Umatilla (from 1920 to 1988) at the Yoakum gage (about 10 miles above the Westland diversion) in the months of May and June is about 1,050 cfs and 480 cfs, respectively. (Attachment 13).

Despite objections and requests for hearings by fishery agencies and the Tribes, the severely over-appropriated condition of the Umatilla River, and the intensive ongoing efforts of federal and state agencies to alleviate streamflow problems, both applications were approved administratively in 1984 by WRD Director Young, without referral to the Water Policy Review Board (WPRB) for a public hearing and determination whether the uses would be in the public interest.

Objections of Federal Fishery Agency (NMFS): The National Marine Fisheries Service of the U.S. Department of Commerce (NMFS) stated the case simply:

There is a potential for serious damage to the already depressed fish population in the Umatilla River if water diversion is allowed during the seasonal migrations of anadromous fish. * * * * The granting of unconditioned permits to divert water from the river could significantly hinder the various programs aimed at improving the anadromous fish resources.

(Attachment 14, Ltr. from Dale Evans, NMFS, to James Saxon, WRD Director, Jan. 26, 1982).

Protests of State Fishery Agency (ODFW): ODFW requested conditioning to protect the fishery and referral of the decision to the WPRB.¹ ODFW's letter stated:

Your letter * * * * in regards to these applications did not clearly indicate whether your review and action on them would result in appropriate conditions of use to protect anadromous fish runs of the Umatilla. If that cannot be assured, I request that you refer the applications to the Water Policy Review Board for this purpose.

¹ Conditioning out-of-season appropriation permits to protect the fishery is WRD policy. A WRD memo states, "All applications for out-of-season water use are subject to review and possible protest by any interested individual or agency. The Water Resources Director must consider all other uses of water that may be affected by an out-of-season use in his determination of whether or not to grant such a permit. For example, all existing year-round water uses and minimum streamflows would have to be met before any beneficial out-of-season irrigation water would be available for appropriation." (Attachment 15).

(Attachment 16, Ltr. from John Donaldson, Dir. ODFW, to Jim Sexson, WRD Director, March 8, 1982).

Protests of Other Irrigators: Other irrigators formally protested the applications. WEID, a downstream user, was concerned about impacts of further appropriations upon its water supply. It stated that the flow of the Umatilla River "is not at all times sufficient to provide the water sought to be appropriated." (Attachment 17, WEID Protest).

Protest of the Tribes: Perhaps because it had the most at stake in the WRD's business-as-usual approach to approving new diversions, CTUIR was the most vociferous in its protests. The Tribe's opposition to the permits is described in a 1984 letter to Director Young that formally protested issuance of the applications:

The applicants propose to divert water from the Umatilla River which is already severely over appropriated. The Confederated Tribes on numerous occasions have expressed concern to your department and the Water Policy Review Board about the appalling over appropriation of the Umatilla River. * * * The department now proposes to compound the Umatilla River's serious and growing water supply problems by issuing the requested permits for further diversions. By this letter the Confederated Tribes join in formal protest against the issuance of permits * * * .

(Attachment 18, Ltr. Elwood Patawa, CTUIR, to James Sexson, WRD, February 1, 1982).

The WRD denied tribe protests, informing the CTUIR:

The Confederated Tribes' objections appear to be based on the grounds that the proposed uses of water would be prejudicial to the interest of the public, including the Confederated Tribes. * * * The use of water from the Umatilla River for irrigation as proposed by Applications 62038 and 62173 conforms to the adopted policy program. Your letter has not been accepted and filed as a formal protest because the issues raised by the letter are not within my jurisdiction to determine.

(Attachment 19).

A subsequent WRD letter informed the CTUIR that the appropriate forum to air their grievances with regard to the Prior/Brown permits was the hearing on the establishment of minimum streamflows for the Umatilla River.

(Attachment 20, March 19, 1984 ltr. Young to Patawa)

WRD's denial of tribal protests drew threats of litigation from the tribe:

For the past two years the Tribe has made it clear to the Water Resources Department and water users in the Umatilla Basin that further appropriations of water from the Umatilla River sanctioned by the State of

Oregon would be considered a violation of the Tribe's treaty reserved rights to water and fish. The Tribe has filed three protests to the issuance by the state of permits to appropriate water from the Umatilla River (Chester Prior, #62038; Don Brown, #62173, and Ivon Cook, #65267). The department denied all three protests stating that the Tribe's objections appeared to be based on public policy grounds, and not based on grounds the department felt was within its jurisdiction to determine. As the Water Resources Department is aware, the Umatilla River is severely over-appropriated. Current appropriation of water from the Umatilla river interferes with the Tribe's treaty reserved right to use water from the Umatilla Basin either for consumptive purposes or for fishery-related purposes. The issuance of additional permits to withdraw water from the river would aggravate the situation further. A delicate balance exists between the Tribe and the State relating to water use and management in the Umatilla Basin. Extensive progress has been made over the past two years by the Tribe, the Oregon Department of Fish and Wildlife, and several federal agencies regarding longterm resolution of the water conflicts existing between the Tribe and the State of Oregon. It would be appropriate for the Water Resources Department to take a more active interest in resolving these conflicts in order to prevent major litigation detrimental to everyone concerned. * * * * The Tribe is hopeful that by working cooperatively on a longterm solution to the water conflicts in the Umatilla Basin, the Tribe will not be compelled to enforce its treaty water rights in Federal Court.

(Attachment 21, Ltr., CTUIR to WRD, January 24, 1984)

Advice of WRD Staff: Even WRD staff expressed concern about the issuance of these permits. A WRD memo states:

These two applications add up to 144 cfs from the Umatilla for irrigation of 9300 acres. The Umatilla is nearly fully appropriated. Water would be available only for a short period of flood flow during the average year, and in some years perhaps none at all. * * * I think there may be valid reason for the Director to deny these applications (water right) or strictly limit them.

(Attachment 22, Memorandum, Chris Wheeler, WRD, to Bud Bartels, Larry Jebousek, WRD, August 19, 1981).

The WRD Staff's specific recommendation to refer the applications to WPRB for a public interest determination was ignored by the director. The memo stated:

Before the matters can be settled and the applications approved with the necessary conditions or rejected if justified, the following procedures are recommended. * * * * Refer Applications 62032 and 62173 to the WPRB [to determine if they are clearly not in the public interest].

(Attachment 23, Memo from Larry Jebousek, WRD, to James Sexson, WRD Director, March 22, 1982).

Issuance of Permits: In the face of the above objections based on the severely over-appropriated condition of the Umatilla, and the requests for a public hearing, WRD Director Young in June 1984 issued permits numbered 48450 and 48968. The permits were issued for "out-of-season" appropriations, from November 15 to June 15. Despite their "out-of-season" label, three-and-one-half months of each appropriation period overlaps with the "normal season" appropriation period, which extends from March 1 to October 31. The permits were issued without a public interest determination before the WPRB and with minimal conditioning to protect the fishery. (Attachment 24, Permits 48450, 48968)

VI. WESTLAND IRRIGATION DISTRICT: CONSERVATION, SALE AND TRANSFER OF UMATILLA WATER

WRD's business-as-usual approach to approving new Umatilla diversions was not the only public activity undermining the effectiveness of federal momentum to restore water for the fishery. Westland Irrigation District (WID) initiated a water conservation program in the early 1980's. An otherwise innovative and laudable program for the parched Umatilla basin, neither fish nor junior appropriators of the Umatilla have seen the waters conserved because WID illegally sells the conserved waters to irrigators in TID. It is likely that WID's conservation and sale programs have actually left the Umatilla with less water than it had before the conservation program. Before conservation started, the Umatilla at least received WID's irrigation return flows. After conservation and sale, the Umatilla receives no return flows from the WID diversion.

As discussed in subsequent sections, WID's illegal sale and transfer of water to TID lands occurs under the watchful eyes of WRD and BOR. WRD has stated the activity violates state water laws, but it has not acted to enforce state law, halt the sale and transfer, and restore the water to the Umatilla. BOR's response to the activity has been even more accommodating. It has increased the size of the Umatilla Basin Project, (using public funds), to replace the Umatilla flows illegally sold and transferred with more water from the Columbia.

A. Description of Westland Irrigation District (WID).

WID lies west of Hermiston in the Umatilla Basin (see Figure 1 above). The district's primary water source is the Umatilla River, which flows along much of the district's eastern boundary. WID diverts water at Westland Dam and Canal located at about river mile 28. WID has primary water rights for 4.5 acre feet/acre of Umatilla River water to irrigate a maximum of 7,024 acres (165.145 cfs). WID derives most of the remainder of its water from McKay Reservoir located six miles south of Pendleton.

Water rights to McKay Reservoir are owned by BOR, pursuant to Permit 7400.² (Attachment 29, Review of Umatilla Project Operations). In addition to owning a water right for this water, parties who wish to use McKay Reservoir water must contract with BOR.

B. WID's Successful Conservation Measures

While plans were being formulated for the Umatilla Basin Project in 1983, WID began implementing "conservation measures" – measures designed to use diverted water more efficiently. WID's efforts were described by the Umatilla Basin Project Steering Committee as follows:

The Westland Irrigation District serves 6,500 acres southwest of Hermiston, Oregon. An unlined canal fed 2,600 of these acres, and seepage was so severe that 80 second/feet of water at the intake provided only 50 second/feet to irrigators. Four years ago, construction of Interstate 82 required relocation of this canal and the district decided to use this as an opportunity to make improvements. With a combination of their own funds, a Soil Conservation Service Grant, A Farm Home Administration loan, and Highway Department relocation funds, they lined the canal, put all the laterals from the canal in pipe, and pressurized the system to each user's property.

(Attachment 30, Ltr. from Umatilla Basin Steering Committee to the Legislature in support of S.B. 24, February 19, 1987). Additionally, the system was computerized, irrigators were encouraged to convert from flood irrigating to sprinkler and drip

² BOR holds Permit 7400 (priority date 7/1/24), which allows the diversion, at McKay Dam, of 73,800 acre-feet of water (when available) to fill the reservoir for use on 48,376.95 acres of land described in the permit. Of this total, 67,800 acre-feet are allocated to irrigation and 6,000 acre-feet to flood control. According to Dave Duncan of BOR, most of the water allocated to flood control is being used to improve instream flows and provide additional water for irrigation purposes.

Although Permit 7400 was originally issued to supplement irrigation on lands already having a partial water right, the decision was made in the 1940's and early 1950's to allow newer filings on the Umatilla River to be supplemented with McKay Reservoir water if the users contract with BOR. (Attachment 25, Ltr. from WRD to William Porfily, WID Manager, October 1, 1984). BOR has contracted with approximately 66 individuals and entities for McKay water (Attachment 26).

WID land is described in BOR Permit 7400. (Attachment 27, Abstract of Permit 7400, front page). WID has a long term contract with BOR for a supplemental water supply from McKay storage, entitling WID to 22,140 acre-feet. An additional 7,380 acre-feet are reserved for WID under annual rental agreements. (Attachment 28, WID contract with BOR).

irrigation systems, and measuring devices were installed on each pump.

The results of the conservation efforts were nothing short of dramatic. WID's program is a conservation success story that demonstrates the tremendous amount of water that can be salvaged and put to new uses merely by eliminating the waste in inefficient systems. According to WID Manager William Porfily, until the mid-1980's irrigators in WID were using between 8 to 10 acre-feet of water to irrigate crops that require 3 acre-feet of water. Prior to the conservation measures, approximately 220 cfs of water were diverted to irrigate 8,400 acres. With conservation measures in place, only 180 cfs were used to irrigate 14,400 acres. These estimates indicate that 6,000 additional acres were irrigated with 40 cfs less water. (Anne Perrault conversation with William Porfily, WID Manager, Stanfield, OR, August 1990).

The effectiveness of the conservation can be viewed in terms of the utility of each cfs of water. Before conservation, each cfs diverted into the system was sufficient for about 38 acres of land. With improvements in place, the same cubic foot irrigated 80 acres. That amounts to a 110% increase in efficiency. The same amount of water diverted now does more than twice the work.³

C. Sale of Conserved Water for Lands in Teel Irrigation District (TID).

WID Manager Porfily estimates that "conserved" water amounts to about 24,000 acre-feet: 12,000 acre-feet conserved during the time water is diverted directly from the Umatilla River, and 12,000 acre-feet during the time McKay Reservoir water is used. (AP conversation with William Porfily, WID Manager, Stanfield, OR, August, 1990).

District's Estimate of Conserved Water Sold: WID has sold, and continues to sell, the bulk of its "conserved" water to individual TID irrigators. Porfily estimates the amount of conserved water sold to TID at 12,000 acre-feet. TID is located southwest of WID and significantly farther from the Umatilla River. As a result, according to the WRD, none of the water applied to land in TID returns to the Umatilla River. (AP conversation with Tony Justus, WRD Hydrologist, Pendleton, OR, August 1990).

Porfily states that the remainder of the water conserved (about 12,000 acre-feet) is sold to irrigators within WID. Benefits to WID irrigators from these conservation measures and sales include:

³ The success of WID conservation efforts carries an important message for state and federal agencies, tribes, utilities and others with a stake in solving the conflicts between fish, power, navigation and agricultural uses of Columbia River water. If WID's experience is at all indicative of the potential for water savings among other irrigators using traditional, but similarly crude conveyance systems, it would seem that water consumed by these users could be reduced by at least half with similar investment in modern infrastructure. The water saved would be available for other uses, including reducing the economic impacts that now seem inevitable to protecting threatened or endangered Columbia River species.

- Twenty-two additional days in the irrigation season;
- 6,000 additional acres irrigated within WID; and
- Greater time flexibility for irrigators due to the pressurized, computerized water delivery system.

(AP conversation with William Porfily, WID Manager, Stanfield, OR, August 1990).

Porfily's estimate that 12,000 acre-feet of conserved water is being sold and transferred out of the District may be low. Examination of the underlying contracts indicates the total quantity being sold may be closer to 15,000 acre-feet, as described below.

WID Contracts for Sale of Conserved McKay Water: Contracts between WID and individual TID irrigators confirm that approximately 6,000 acre-feet of "conserved" McKay water are being sold outside of WID boundaries. These contracts indicate that 5,016 acres of land in TID receive one acre-foot/acre of "conserved" McKay water, while an additional 716 acres of land (described in two separate contracts) receive two acre-feet/acre of "conserved" McKay water.⁴ BOR has described this sale arrangement as follows: "WID is leasing approximately 6,000 acre-feet annually to irrigators outside the district to cover debt service on the district's conservation improvements." (Attachment 32, Umatilla Basin Summary, 1989).

WID Contracts for Sale of Umatilla Water: Contracts for sale of conserved Umatilla water provide for 1.5 acre-feet of flow/acre under contract.⁵ As noted above, 5,012 acres are under contract, and 716 of these acres are under two contracts. Therefore, about 6,000 acres of TID land are entitled to 1.5 acre-feet/acre. This amounts to about 9,000 acre feet of Umatilla water diverted to TID lands.

The analysis of contracts⁶ indicates total sales of about 15,000 acre-feet of conserved

⁴ The standard language in these sale contracts states: "In those years that the District [WID] begins the irrigation season with a full supply of McKay water, the Contractor [Purchaser in TID] shall be entitled to one acre foot of McKay water per acre contracted herein." (Attachment 31, WID contracts with TID individuals).

⁵ The contracts for sale typically state: "All acreage awarded limited water can receive a flood water (natural flow Umatilla River) allocation equal to a full Westland water right. It is the Limited Water user's [Purchaser in TID] responsibility to request flood water and use it when it is available." (See Attachment 31, Contracts).

⁶ Due to their bulk, only one of the individual contracts for sale of conserved Umatilla and McKay water has been included with the Attachments. Attachment 31 is a typical contract. Table 1, which appears at the end of this Report, summarizes information from the compiled individual contracts. For each TID member who has contracted with the WID to purchase its conserved water, the Table shows the number

water outside of WID boundaries. This conserved water, which legally should remain in the Umatilla where it would benefit junior appropriators or instream uses, is now lost to the Umatilla because it is transferred to TID lands from which there is no return flow to the Umatilla.

Water Rights for Use of Conserved Water Sold in TID: TID irrigators using conserved water purchased from WID must do so under the authority of a state water permit. A number of permits are alleged to be the basis of this use.

Most TID land receives conserved water under Permits numbered 25920 and 25924. These permits describe water rights of TID and have priority dates of April 22, 1955, and June 27, 1958, respectively. Each of these permits describes the Umatilla River as a primary source and McKay Reservoir as a supplemental source of water.⁷ (See Attachment 33).

Some TID land receives conserved water under Permits numbered 48450 and 48968 (the Prior/Brown permits described in Part V., above), which were issued in 1984 and which hold priority dates from 1981.⁸ The permits describe the water source as the Umatilla

of acres involved, the sections of land where the water is used, and the Permit number under which the conserved water is alleged to be used.

⁷ Permit 25920 provides, in part:

The source of the proposed appropriation is Umatilla River, a tributary of Columbia. * * * * The amount of water which the applicant intends to apply to beneficial use is 60 cfs plus all available supplemental water from McKay Creek Reservoir.

Permit 25924 provides, in part:

The source of the proposed appropriation is Umatilla River, a tributary of Columbia River. * * * * The amount of water which the applicant intends to apply to beneficial use is 30 cfs plus added supplemental water from McKay Creek Reservoir. (Attachment 33, Permits 25920, 25924).

⁸ These permits state, in part:

This permit is issued * * * for the use of the waters of Umatilla River, a tributary of Columbia River, for the purpose of irrigation and supplemental irrigation of (3,524.3 acres - Permit 48450; 2089.04 acres - Permit 48968). The use allowed herein may be made anytime between November 15 and June 15 of each year that water can be put to beneficial use by irrigation. * * * the priority of the right dates from (August 3, 1981 - Permit 48450; August 10, 1981 - Permit 48968). The permits are limited to a diversion of not to exceed 1.5 acre-feet per acre for each acre irrigated during the period from November 15 to the last day of

River. (See Attachment 24).

These four permits, taken together, are referred to as the Prior/Brown/Teel (PBT) permits in the Bureau's Environmental Impact Statement (EIS) documents. As discussed elsewhere, the water WID conserved and sold and transferred to these permit holders is unlawful. It is this transfer of conserved water that BOR is attempting to offset by expanding the scope of the Umatilla Basin Project. An expanded BOR project is needed because the sale and transfer of the conserved water takes another incremental bite out of the Umatilla flows.

D. Impact of WID's Sale and Transfer on Umatilla Flows.

The diminishment of flow in the Umatilla attributable to WID's illegal sale and transfer is easy to grasp conceptually. Lost to the river is the following:

- All of the conserved water used within TID. WID should not divert conserved water from the Umatilla. The water legally should remain in the river for use by downstream junior appropriators or for instream uses, and
- Agricultural return flows of conserved water sold and transferred to TID. As noted above, there are no return flows to the Umatilla from irrigation of lands in TID where conserved water transferred outside WID is used.

Getting an empirical grasp on changes in actual flows is much more difficult. It is an issue that requires detailed analysis that is beyond the scope of this Report. Available data, however, indicate the situation in the Umatilla has worsened appreciably during the period that WID has conducted its sale and transfer of water.

Flow data provided by WRD and United States Geological Survey (USGS) indicate that, compared to historical average flows, flows beyond the WID diversion point have been reduced significantly since the initiation of WID's water marketing to TID. (Attachment 34).

Some of these changes may simply be attributed to reduced rainfall and less overall water availability: at the Yoakum Gage - the nearest upstream gage to the WID diversion (at river mile 38, about 10 miles upstream from the WID diversion) - average annual flows during the 1986-1989 period were approximately 8% less than historical average annual flows from 1928 to 1988.

Although this may reflect reduced overall water availability in the Umatilla River, it

February of each year, provided further that the right allowed herein, together with the amount secured under any other right existing for the same lands shall not exceed 4.5 acre-feet for each acre irrigated in any one year. (See Attachment 24, Permits).

does not indicate the amount of water in the Umatilla River at the WID diversion point. The two major diversions between the Yoakum gage and the WID diversion - the Feed Canal and the Furnish Canal - both reduced their diversions during the 1986-1989 period an undetermined amount more than the historical average diversions.

While the amount of water that reached the WID diversion point may be unclear, the reduced flows beyond the WID diversion are significant and they clearly cannot be written off as mere drought conditions.

After implementation of conservation measures, WID required at least 24,000 acre-feet less water than before to meet its previously satisfied water right needs. WID diversions actually increased, however, from 1986 to 1989. Average annual diversions were 9% greater than historical average annual WID diversions (1920/21-1985). (See Attachment 34).

While WID was diverting more water from 1986 to 1989, downstream irrigation districts similarly relying on the Umatilla River for their irrigation needs were diverting less. Average annual diversions into Dillon Canal for Stanfield Irrigation District (SID) were 30% less than the historical annual average (1921-1985). Average annual diversions into Maxwell Canal for HID were 23% less than the historical annual average (1921-1985). Average annual diversions into West Division Main Canal at Three Mile Falls Dam for WEID were 49% less than the historic annual average diversion (1920/21-1985). (See Attachment 34).

SID's and HID's reduced diversions reflect reduced needs. WEID's reduced diversions are not based on reduced needs: most of the water left instream by WEID is replaced with water pumped from the Columbia River into the WEID irrigation delivery system, pursuant to Umatilla Basin Project interim plans. In addition to the Columbia River water "exchanged" for Umatilla River water, WEID pumps additional water from the Columbia River to meet its irrigation needs. As noted above, pumping from the Columbia River to improve streamflows and meet WEID needs has been occurring since 1985 - the year WID began selling conserved water to TID. Because costs associated with pumping from the Columbia River are so exorbitant, WEID has exercised this option only one other time - the drought year of 1978. WEID has spent more than \$100,000 paying for Columbia River pumped in excess of "exchange" pumping needs. (AP conversation with WEID manager, Jerry Franke, April, 1991).

Although the reduction in diversions at HID, SID, and WEID should produce a corresponding increase in flows at the mouth of the Umatilla River, data indicate that average annual flows at the mouth were about 4% less than the historical annual average. Furthermore, had WEID not been able to rely on Columbia River pumping to meet their needs, flows at the Umatilla Gage would have been much less than indicated. Unfortunately, the pumping from 1985 to 1988 has not been documented well. Pursuant to requests from NWPPC, WRD documented "exchange" pumping from the Columbia River in 1989 and 1990. This report does not indicate how much more Columbia River water was pumped to meet WEID needs. Costs incurred by WEID indicate this amount may be substantial.

(Attachment 35, WRD report).

E. BOR's Response to WID's Sale and Transfer: Expansion of Umatilla Basin Project

Although it is clear from the WID sale contracts discussed above that water use under the PBT permits and WID's sale of conserved water are inextricably related, BOR treats these as two separate issues and treats them differently. BOR correctly states that diversion and use under the PBT permits will be deleterious to the fishery, but it also accommodates and encourages the sale and transfer of the conserved WID water for use on TID lands. BOR has, in fact, upsized the Project to boost river flows below the WID diversion – flows that BOR admits are reduced by increased WID diversions and sale and transfer of water to TID lands.

BOR's response to the problem is reflected in changes between the DEIS and FEIS for the Project. The 1986 DEIS assumed no use under the PBT permits. The "present diversions," which BOR superimposed on the "average flow conditions for the period 1935-1978" to evaluate water supply and determine the needed project size, did not include the PBT permits. (Attachment 36, DEIS). BOR premises the size of the Project (that is, how much Columbia River water needs to be pumped into various locations in the irrigation system) on the fact that the PBT permits were not being fully exercised for lack of water. The DEIS states:

Three irrigation permits issued by the Oregon Water Resources Department are not included in the Recommended Plan water supply evaluation because they are not being fully exercised. The permits are commonly referred to as the Prior/Brown/Teel permits.

(Attachment 37, Accomplishments Section of the DEIS).

The DEIS did, however, comment on the significance of the PBT permits and the severe difficulties these rights would cause for the river if they were fully exercised. The DEIS states:

A preliminary evaluation of the effects of exercising these [PBT] permits on present Umatilla River flows and flow accomplishments of the Recommended Plan is discussed in Attachment M. The evaluation shows that if the permits were fully exercised, an already critical existing flow situation would be worsened and flow accomplishments of the Recommended Plan would be reduced.

(See Attachment 37, Accomplishments Section of the DEIS; Attachment 38, DEIS Attachment M). A BOR staff memorandum reached the same dismal conclusion about

the PBT permits.⁹ Essentially, the DEIS and BOR staff recognized what federal and state fishery agencies and the Tribes told WRD Director Young before he issued the Prior/Brown permits in 1984 over their objections and without a hearing – that is, exercising the PBT permits would seriously impact Umatilla flows and the fishery.

The starting assumptions were much different by the time the FEIS was filed in February 1988. By then the PBT permits had been exercised to such a greater extent with WID conserved water that BOR felt compelled to include these diversions in the new operation study. The FEIS stated that "PBT diversions are included in the operation study at their anticipated diversion amounts." (Attachment 40, FEIS).

BOR's operation study conducted after the DEIS and prior to the FEIS showed the following changes from the assumptions in the DEIS:

- * Storage water availability was reduced 20,000 acre-feet due to reduced storage space and increased minimum pool requirements,
- * Diversion needs were reduced 33,400 acre-feet due to more efficient use of water by various districts. The reductions were: SID (3,000 acre-feet); HID - from diversions other than Maxwell - (8,700 acre-feet); Maxwell (5,600); WEID (16,160),
- * Groundwater recharge needs for County Line Water Improvement District (CLWID) were reduced by an undetermined amount. These needs were previously calculated based on maximum rates rather than actual use,
- * WID diversion demand was increased 7,700 acre-feet, and,
- * PBT diversion needs of 25,500 acre-feet should be included in the water supply evaluation.

(Attachment 41).

In the above list of operational changes, the reduced water availability associated with reduced storage space appears to be more than offset by the reduced diversion needs of SID, HID, WEID, Maxwell, and CLWID. The only other significant changes in diversions included in the FEIS are 25,500 acre-feet diversion for the PBT permits and the 7,700 acre-feet increase for WID.
(See Attachment 41).

⁹ "The use of these additional diversions could have serious effects on the Umatilla Project by further reducing or totally depleting the recommended minimum fish flows in the Umatilla River near Echo during certain critical months."

(Attachment 39, Ltr. from L.R. Voelkel, BOR, to files, June 11, 1985).

The project facilities needed to accommodate the increased WID diversion and new PBT permits – that is, the facilities needed to “improve flows past the WID diversions” - will cost more than \$4 million in construction costs and an undetermined amount in annual operating costs. (Attachment 42, FEIS). Specific project upgrades needed to maintain the minimum flows as a result of the PBT use and increased WID diversions include the following:

- A new pumping station added to meet target flows from Three Mile Falls Diversion Dam to the mouth of the Umatilla River. Pumping requirements to meet the target flows increased from 100 cfs to 140 cfs, and this required a new pump, not just enlargement of the existing plant as proposed in the DEIS,¹⁰ and
- A new pumping station added to meet target flows from the WID Diversion Dam downstream to Cottonwood Bend. The new pumping station will feed 30 cfs to the WID system near Cottonwood Bend during critical periods, thus allowing a like amount of river water to bypass the WID diversion and remain in the river to Cottonwood Bend.¹¹

¹⁰ The FEIS states:

Revised hydrologic operation studies done since the PR/DEIS show that 140 cfs will be needed to meet target flows below Three Mile Falls Diversion Dam. Therefore, the water exchange facility has been resized to provide a flow of up to 140 cfs (an annual average of about 9,700 acre-feet), rather than the 100 cfs shown in the PR/DEIS. * * * * It has been determined that a new pumping plant will be needed rather than enlarging the existing plant as shown in the PR/DEIS. Annual power requirements and operating costs have been revised to reflect changes in the operation studies.

(Attachment 43, FEIS).

¹¹ The FEIS states:

Revised operation studies show the need for additional fish flows in the reach of the Umatilla River from Westland Diversion Dam to Cottonwood Bend. An additional pumping plant has been added on the Umatilla River at Cottonwood Bend to meet this need. * * * * The small plant would pump from the Umatilla River into the Westland Irrigation District (WID) distribution system. The pumping plant would be located about 3 miles south-west of Hermiston. The pumping plant would have a capacity of 30 cfs and would lift water about 50 feet through an 1,100-foot discharge line. * * * * The pumping plant intake would be screened to protect against fish loss. The pump would allow reduction in the amount of water diverted at Westland Diversion Dam. The district would bypass flows during critical periods when fish flows would otherwise not be met at Echo,

BOR acknowledges that use under the PBT permits impacted the Umatilla Basin Project proposal. The FEIS states:

Flow shortage occurrences are shown to increase in June in the revised operations model. This, in part, is a consequence of including the PBT water permit diversions in the operation. June is a high irrigation demand month throughout the Umatilla basin. Using the new model, the Recommended Plan shows shortages during the months of June in the 38-year period of record as follows: 84 percent at Echo (compared to 66 percent in the PR/DEIS), and 71 percent at Umatilla (compared to 50% in the PR/DEIS).

(Attachment 44, FEIS).

The reduced diversion demands at several major diversions, (SID, HID, Maxwell, and CLWID), together with the reduced storage capacity of Cold Springs Reservoir, means that total pumping demand from the Columbia River pumping plant was reduced in the final project design.¹² The reduced costs here offset the increased operating costs associated with the two new pumping plants.

Even though BOR has upsized the Project to accommodate the PBT permits and increased WID diversions, the Project may still fall short of meeting target flows in the river. Several factors support this possibility. First, BOR has not considered the reduction in return flows now associated with transfer of water for use on TID lands. BOR has taken into account the fact that water formerly used by WID are now being used on TID lands through the sale and transfer contracts, but it has not accounted for the missing return flows. In the FEIS, BOR superimposed "the present level of irrigation diversions" - including the PBT permits - on "average flow conditions for the period 1947-1984."

(Attachment 46).

and the bypassed diversions would be replaced to the district lands from the Cottonwood Bend pump.

(See Attachment 43, FEIS).

¹² The FEIS states:

Average annual pumping requirements have been reduced from the PR/DES estimate by 4,285 acre-feet. This results primarily from the reduction in irrigation diversions in the revised operation study. Most of the pumping reduction is associated with the Columbia River pumping plant. Enlargement of the WEID pumping plant to 140 ft³/s and addition of the Cottonwood Bend pumping plant are reflected in the revised annual requirement.

(Attachment 45, FEIS).

Second, BOR's determination (in the FEIS) that WEID's irrigation needs have been reduced by 16,160 acre-feet seems inconsistent with WEID's actual demand from 1985 to 1989. As noted above, since 1985 WEID has needed to pump water from the Columbia River to satisfy its needs.

VII. LEGALITY OF ACTIONS OF AGENCIES AND DISTRICTS

- A. **WID's sale of conserved McKay storage water outside the district violates its contract with BOR. BOR has worked to legitimize this breach of contract by attempting to expand the boundaries of WID to allow use of the water for irrigation at the expense of Umatilla streamflows.**

WID's contract to use storage water from BOR's McKay Reservoir states: "In no event, however, shall the District transfer or sell water made available under this contract for use on land not within the boundaries of the District." (See Attachment 28, BOR contract with WID).

Instead of enforcing the contract and preventing the transfer, BOR has actively sought to accommodate WID's sale of conserved water in response to WID requests for such help. In one such request to BOR, WID summarized the situation and asked for the contract to be changed.

The District has a contract with the Bureau for storage in McKay. That contract has been in place for many years and it allows the District to receive water stored in McKay which water is then used by the District. The last sentence in the contract prohibits the District from transferring water, made available through the contract, to land outside the boundaries of the District. It is this sentence that requires some action to be taken by the Bureau. All that is needed is for the Bureau to consent to a modification of the contract to allow the District to deliver McKay stored water outside of its boundaries. * * * The land located outside of the boundaries has a water right appurtenant to it. The water right is from both the Umatilla River and McKay Reservoir. However, that land does not have access to a storage contract. The District is simply asking that it be allowed to allocate some of its McKay storage to the land which already has a water right from McKay Reservoir.

(Attachment 47, Ltr. WID attorney, Robert O'Rourke to BOR, Stessman, July 7, 1987).

In connection with its efforts to legitimize the illegal use of McKay storage water, BOR attempted to delay the scheduled final proof survey of Permit 7400 until after modification of the WID contract. By so doing, BOR hoped that acreage outside the district receiving conserved water might be described in the certificate as being entitled to water under the water right. (Attachment 48, Correspondence referencing Permit 7400 Extension request). The mechanism for delaying the certification was BOR's application to WRD for an extension of time in which to fully perfect its water use

under the permit. (Attachment 49, BOR Application for Extension).

BOR's application for the extension of time includes a description of WID's conservation measures and its sales and transfer of conserved water outside district boundaries. (See Attachment 49, Application).

Documents prepared by Charles Norris, Chairman of the Umatilla Basin Groundwater Task Force, recognize the importance of extending BOR's McKay Reservoir permit to include TID lands being irrigated with WID's conserved water:

If the survey and certification proceed on the basis of the current permit provisions, we believe the additional lands sought to be served will not be considered and that part of the McKay allocation will be lost.

(Attachment 50, Memorandum). The Task Force was hoping to formally "replace" the groundwater supply with McKay storage water, even though TID's water right for McKay water is for supplemental use only.

WRD granted BOR's requested extension to perfect its water right under Permit 7400, thereby delaying the certification process. WRD objected, however, to expanding WID boundaries through modification of Permit 7400. As an alternative, WRD suggested that BOR rely on TID Permits numbered 25920 and 25924, which already describe the irrigated lands BOR hoped to legitimize through the WID contract amendments.¹³

BOR continued to pursue the WID boundary expansion strategy. It prepared a draft report on the expansion for inclusion in the DEIS. WRD reacted sharply to the expansion proposal in the draft report. WRD reminded BOR that the Umatilla Basin project was a fisheries enhancement project and that BOR's proposal would compromise the objectives of the Project by reducing streamflows. WRD reminded BOR that, although WID had been selling its conserved water for use on TID lands, such sale is illegal. Conserved waters must stay in the river to augment streamflows unless and until another water right is issued for its use. WRD challenged BOR's conclusion that the impacts of the expansion on the Tribes would be minimal, and it called for a closer analysis of what the actual impacts on flows are of using WID's conserved water on TID

¹³ WRD's extension approval stated:

Permit No. 7400 cannot be used for the expansion sought by Westland Irrigation District, but there are other permits which may accommodate that plan. Teel Irrigation District has active permits numbered 25920 and 25924 which includes the additional acreage if you wish to issue contracts for that area again or amend existing contracts. My assumption is that you do not intend to contract for additional storage until the study is complete.

(Attachment 51, Ltr. from Wm. Young, WRD Director, to Bill Lloyd, BOR, January 10, 1986).

land.¹⁴

¹⁴ The WRD's response stated:

We have reviewed the report describing the proposed expansion of Westland Irrigation District and have serious concerns about adding the proposal to the fishery enhancement plan of the Umatilla Basin Project Planning Report and Draft Environmental Statement. The Water Resources Commission has supported the Umatilla Basin Project objectives for streamflow enhancement by establishing minimum streamflows for the Umatilla River and prohibiting additional appropriations during a three year period to complete the planning effort. The effects the district expansion proposal may have on the stream enhancement efforts are a major concern. The report appears to indicate that with a few relatively inexpensive improvements in the delivery system much of the McKay Reservoir stored water would be saved. The allocation of saved water then becomes the main issue. * * * * Under current Oregon Water Law, conserved water cannot be applied to new lands without acquiring a new water right. Reducing use within the legal duty of water would normally be considered elimination of waste, rather than conservation. While this sale of water may have occurred, it is not a legal action. * * * * Regardless of the discussions between the irrigation districts there is no provision in Oregon law for a water user to have any legal claim to conserved water or to its future distribution. * * * * If Westland Irrigation District wants to provide some of their storage to Teel Irrigation District, the Bureau must approve and amend the contract." The Westland Irrigation District proposal to apply stored water to lands not currently under contract would have an impact on the Water Resources Commission's actions and the Bureau of Reclamation fishery enhancement objectives. We recognize the economic importance of irrigated agriculture to Umatilla County and the state, but greater priority needs to be given to instream uses than in the past. * * * * The Water Resources Department would like to be in position to wholeheartedly endorse the Umatilla Basin Project Planning Report. It will be difficult to do so if a proposal is included that seems to circumvent a Water Resources Commission policy position and, in fact, would violate a present state law; therefore, we recommend that this proposal not be made part of the Umatilla Basin Project Planning Report.

WRD comments attached to this letter further stated:

"Regardless of the discussions between the irrigation districts there is no provision in Oregon law for a water user to have any legal claim to conserved water or to its future distribution. * * * * It is still unclear how the expansion proposal relates to the exercise of these permits. * * * * As has been stated, Oregon law does not provide for such an expansion but if it did, the main effect on instream flow and fishery enhancement appears to be a reduction in return flows to satisfy downstream users and fishery needs. Such an action would prejudice any water rights issued subsequent to permit 7400 as well as the minimum streamflow. An

WRD was not alone in criticizing BOR's boundary expansion proposal as a mechanism to legitimize use of the conserved water under the PBT permits at the expense of the Umatilla Basin Project's objective to restore streamflows. NMFS objected as well. It questioned the continued validity of the PBT permits under which the conserved water would be used in BOR's expansion proposal. It viewed BOR's proposal as an effort to turn more water to irrigation at the expense of streamflow at critical times for fish passage. It reminded BOR that the Project was primarily a fishery enhancement project. And it recommended against the expansion without full analysis of the impacts.¹⁵

The Tribe's comments were in the same vein. The Tribe challenged the validity of the TID permits alleged to authorize the use of conserved waters for irrigation, believing these permits to be unperfected at least in part. The tribe also challenged BOR's

estimate should be made of the difference in the amount of consumptive use and return flow if McKay water is applied to the Prior, Brown and Teel I.D. lands. *
* * * The conclusion that there would be "no appreciable net impacts" to the tribes is not well documented."

(Attachment 52, Ltr. WRD, Young to Larry Vinsonhaler, BOR, January 28, 1986).

¹⁵ NMFS told BOR:

We believe the subject document overemphasizes the importance of the water withdrawal permits issued to the Teel Irrigation District (TID), as well as those presently held by Mr. Prior and Mr. Brown. To our knowledge, none of these permits have been perfected through use for beneficial purposes, into valid water "rights". The document uses the terms "permit" and "right" interchangeable which is not correct. It is our belief that all of these permits could be challenged and rendered invalid through lack of use. This is a course of action that we may pursue with the Oregon Department of Fish and Wildlife (ODFW) and/or the Oregon Water Resources Department (OWRD). * * * * The original purpose of the Bureau's Umatilla Basin Plan was to improve habitat for anadromous fish. We have no objection to making reasonable changes in irrigation system operation as part of the project. However, expansion of the present system and additional withdrawals during times identified as critical for fish passage and spawning should not be allowed to proceed without a full analysis of impacts and alternatives.

(Attachment 53).

apparent irrigation objectives in this fishery project.¹⁶

The chorus of criticism aimed at BOR's efforts to turn a fishery project into an irrigation project apparently found its mark. BOR described WID conservation measures in the DEIS, but it did not include the boundary expansion proposal:

Because of the need to address other critical streamflow and irrigation issues in the basin without delay, further discussion of the Westland Irrigation District expansion proposal and evaluation of its potential effects on the Recommended Plan are not being incorporated into the current Planning Report/Draft Environmental Statement.

(Attachment 55, DEIS).

However, BOR continued efforts to accommodate WID sales and transfer of conserved water. WID sought an interim agreement for using the conserved waters on lands outside the district.¹⁷ In April 1987, BOR drafted a Letter of Intent to facilitate sales of the conserved water. The BOR letter recognizes WID wishes to sell its conserved water for use outside the district; it resolves that BOR will attempt to get necessary clearances to allow WID to market this water for a period of five years outside the district; and it resolves to amend WID's contract with BOR to allow use of the water on these lands

¹⁶ The comments of CTUIR stated:

It would be useful here and throughout the report to have better perspective on the Teel permits. This discussion implies that 1955 and 1958 permits for a total of 90 cubic feet per second were not utilized until 1977 and only to the extent of about 30 cfs. Subsequently in the report, however, these permits appear to be treated as water rights. It would be most useful to know to what extent these permits - which reportedly include reference to any storage that may ever become available in McKay Reservoir - were perfected into water rights within the period required under state law. Also, some perspective on the legality of selling water outside the WID district boundary would be useful. * * * We believe that Bureau's in-depth consideration and apparent promotion of this proposal has created some unnecessary delay. * * * Our understanding from the start was that increased irrigation would not be part of the Umatilla Basin Project.

(Attachment 54).

¹⁷ Minutes of the WID Board of Director's meeting of June 17, 1986 state: "John Keys encouraged the District to use an interim agreement to get water on the lands involved." (Attachment 56, WID BOD minutes).

under the authority of the TID permits.¹⁸ The text of the Letter of Intent clearly indicates BOR knew the sale of conserved water was directly tied to the PBT permits – permits which, if satisfied, would adversely impact BOR's Umatilla Basin Project by diminishing flows in the Umatilla.

WRD again responded with skepticism to the Letter of Intent. It questioned the legality and impacts of spreading the conserved water to irrigate other lands.¹⁹ Unfortunately, BOR has continued in its tenacious commitment to legitimize irrigation use of the conserved waters. In its recent "Review of Umatilla Project Operations (Nov. 1989)," BOR states, "Reclamation is continuing to pursue resolution of this issue through actions necessary to officially recognize lands served outside district boundaries." (See Attachment 32, Review of Umatilla Project Operations, November 1989).

¹⁸ The BOR Letter of Intent states, in part:

Whereas, WID has implemented the first phase of a conservation program and plans to implement further conservation measures, which will result in reduced demands for McKay Reservoir water and now desires to make conservation use of the "saved" water to lands outside of the present district boundaries; * * * * Whereas, it is desirable that Reclamation, WID, and ODWR enter into this LETTER OF INTENT setting forth actions to be pursued by the signatories for the beneficial use of conserved McKay Reservoir storage water * * * * Reclamation will: Pursue securing appropriate clearances and environmental compliance that would allow it to execute a 5-year water service contract among Reclamation, WID and ODWR (OWRD) beginning in the 1987 water year and terminating with the 1991 water year * * * * Establish contract provisions which would allow WID to market up to 7,380 acre-feet of water from McKay Reservoir as it may be available from WID's "reserved" space to serve lands outside the district boundary under Permits #25924 and #25920.

(Attachment 57, Letter of Intent).

¹⁹ The WRD stated:

We are most concerned about the impacts of this proposal on other water users in the basin. We assume that changing the point of diversion and place of use could reduce return flow and impact water availability to West Extension Irrigation District. Since West Extension is also listed as a beneficiary of stored water in McKay, we would be interested in your assessment of the impacts of spreading "conserved water" to other lands. We are assessing our own responsibility to protect the other water users right to both stored and natural flows in the Umatilla Basin.

(Attachment 58)

BOR's apparent contradictory positions on further Umatilla appropriations were aptly characterized in a question posed by the WRD Director to a BOR representative in 1985 in connection with WRD's proposed withdrawal of the Umatilla from further appropriation:

You have joined others requesting withdrawing the Umatilla River from further appropriations to enhance anadromous fish runs. How does this request to include thousands of additional acres square with that position?

(Attachment 59, Ltr. from Wm. Young, WRD Director, to Lloyd, BOR, Sept. 16, 1985). BOR's conflicting position on the larger regional issues might be similarly characterized in a question:

How can BOR's efforts to accommodate sales of WID's conserved water and its transfer to irrigate lands outside WID at the expense of critical Umatilla streamflows be reconciled with BOR's \$43 million dollar capital investment and approximately one million dollar annual investment in the Umatilla Basin Project -- a project designed to restore streamflows?

It is a question still begging for an answer.

- B. BOR's support for the sale and transfer of WID's conserved water appears contrary to its mandate under the federal legislation authorizing the Umatilla Basin Project.**

The Umatilla Basin Project is authorized by the Umatilla Basin Project Act, Public Law 100-557, Title II. (See Attachment 8). Section 203 of the Act requires that:

Project facilities and features authorized by this title shall be integrated and coordinated, from an operational standpoint, into existing features of the Umatilla Project, and shall be operated in a manner consistent with Federal reclamation laws and water rights established pursuant to State law including the contract rights of water users.

BOR's statutory mandate, therefore, is to design and operate the Umatilla Project consistent with federal reclamation laws, contracts for federal water, and state water laws. Its actions promise to fall short of the mark. As discussed above, the expanded project facilities and pumping proposed in the FEIS are in direct response to the PBT permits and WID diversions. Water used under the PBT permits and WID diversions involves, in substantial part, "conserved" water sold to and transferred to TID landowners in violation of state and federal laws. Section A above describes how use of conserved water from McKay Reservoir on lands not specified in BOR contracts is contrary to federal law. This section describes violations of state water law and other applicable federal law involved in these practices.

1. **Diversion of conserved water by WID violates its permit which allows only beneficial use without waste.**

The WRD Director has told BOR that water conserved by WID through investment in efficiency improvements cannot be diverted for use without further permitting by WRD.

Under current Oregon Water Law, conserved water cannot be applied to new lands without acquiring a new water right. Reducing use within the legal duty of water would normally be considered elimination of waste, rather than conservation.

In attachments to this letter, the WRD Director further states:

While this sale of water may have occurred, it is not a legal action. * * *
Regardless of the discussions between the irrigation districts there is no provision in Oregon law for a water user to have any legal claim to conserved water or to its future distribution.

(See Attachment 52, Ltr. from Wm. Young, WRD Director, to Larry Vinsonhaler, BOR, January 28, 1986.).

2. **Transfer of WID conserved water for use on TID lands violates state statutes limiting the place of use.**

Oregon water law is equally clear and direct on this point. A water right attaches to particular land, and no part of it may be transferred for use on other land unless an application for such transfer is filed and approved. ORS 540.510 to 540.520. Although in its contracts with TID landowners, WID is attempting to position itself as a mere purveyor of water - delivering McKay water pursuant to TID water rights - this position is tenuous. WID is more than just a purveyor: it is WID, not TID, that has a contract with BOR for McKay water. When WID delivers this water to TID it is essentially transferring previously used WID water for use on new lands. This action falls within the purview of the transfer statutes, and, therefore, by failing to apply for a transfer WID has acted illegally.

3. **The TID permits alleged to be the legal basis for using conserved WID water on TID lands may have been forfeited in whole or in part.**

WID's conserved, sold, and transferred water now used on TID land is used in part on the strength of two TID permits (Nos. 25920 and 25924) that date from the 1950's. As noted above, both CTUIR and NMFS have alleged these permits have been forfeited in

whole or in part for nonuse.²⁰ Perfected water rights are forfeited for nonuse for the statutory period of five years. ORS 540.610. The extent to which TID was exercising its primary rights to Umatilla River water under these permits has yet to be determined. However, TID's supplemental rights to McKay Reservoir water have not legally been exercised since TID's contract with BOR was revoked in the 1960. (Attachment 60). BOR's facilitation and accommodation of water used under forfeited water rights is no less legally offensive than its supporting use of water illegally transferred.

4. **BOR violates the terms of its own state water permit by allowing use of its storage water outside lands authorized in the permit.**

BOR's state water permit (No.7400) is subject to the place of use restriction like any other water right. ORS 540.510. Of all TID land receiving conserved water from McKay Reservoir, only 862 acres are described in Permit 7400 as land upon which McKay water may be applied. (Attachment 61, Ltr. William Porfily, WID, to WRD, Nov. 11, 1985). This problem is recognized in the WID contracts for sale as a problem which must be overcome. The contracts state:

The water right of the Bureau for McKay water is in permit status. In the future the State will conduct a final proof procedure after which a certificate of water right will be issued. It is the hope of the parties that Contractor's land will be recognized in the proceeding and in the certificate of water right as being a proper place for the use of McKay water. The parties will cooperate with each other toward that goal but neither party guarantees to the other that that will happen.

(See Attachment 31, WID contracts with TID individuals).

It is unclear whether the districts will successfully expand the location for water use in the BOR permit through the certification process. Until this time, the BOR permit is being exercised in violation of its terms and state law.

5. **BOR has acted contrary to the purposes of the authorizing legislation for the Umatilla Basin Project by turning a project intended to restore the fishery into a project also used to promote irrigation at the expense of instream flows for the fishery.**

Section 202 of BOR's authorizing legislation for the project describes the Project's purpose as "mitigating losses to anadromous fishery resources and continuing water service to * * * Irrigation Districts." (See Attachment 8, P.L. 100-557, Title II). BOR's

²⁰ As noted by CTUIR in correspondence quoted more fully above: "This discussion implies that 1955 and 1958 permits for a total of 90 cubic feet per second were not utilized until 1977 and only to the extent of about 30 cfs." (See Attachment 54). The NMFS also stated: "It is our belief that all of these permits could be challenged and rendered invalid through lack of use." (See Attachment 53).

statements track this objective. Both the DEIS and the FEIS describe the project as one "to restore salmon and steelhead runs in the Umatilla River."

BOR's actions, however, with the active or passive cooperation of the WRD and WID, undermine and are contrary to the statutory purpose. Between the time the DEIS was published in 1985 and the time the FEIS was published in 1988, water service to irrigators had increased by at least 24,000 acre-feet of water due to the sale of WID's water. The sale of at least 12,000 acre-feet of this water from BOR storage for use outside district boundaries has increased the projected cost of the Project by millions of dollars.

BOR's authorizing legislation gives the agency a broad mandate to identify opportunities to conserve water for the benefit of the fishery, and it also provides federal funding to implement these objectives.²¹ Rather than following this legislative directive to mitigate losses to the anadromous fishery resources with the resources provided by the Act, BOR instead is encouraging and accommodating more irrigation with the attendant impacts on

²¹ Section 213 of the Act directs BOR to "review the current operation of the existing Umatilla Project for the purpose of identifying opportunities to further mitigate losses to anadromous fishery resources."

Sections 209 and 212 of the Act provides funding to mitigate losses to the fishery. Section 209 states:

The Secretary is authorized to acquire from willing parties land, water rights, or interests therein for benefit of fishery resources consistent with the purpose of this title. * * * There is hereby authorized to be appropriated not more than \$1,000,000 to accomplish the purposes of this section.

Section 212 states:

For purposes of encouraging water conservation and improvements to water supply systems of the irrigation districts participating in the project authorized by this title, Stanfield and Westland Irrigation Districts shall be eligible to receive financial assistance, in an amount not to exceed \$2,000,000 each, as deemed appropriate by the Secretary, under provisions of the Rehabilitation and Betterment Act of October 7, 1949 (63 Stat. 724), as amended.

(See Attachment 8)

The initial legislative draft of PL 100-557, S.1613 (1987), provided an unspecified amount of financial assistance for these purposes. (Attachment 62, S.1613).

streamflow and resulting risks to the anadromous fishery resources.²²

6. WRD has aggravated the fishery problem in the Umatilla by failing to enforce against ongoing transfers of water that it recognizes are contrary to state law, with the result that Umatilla flows are reduced.

As the discussion above shows, WRD has stated in writing that WID's transfer of its substantial amounts of conserved water to TID lands is contrary to law and that conserved waters should stay in the river until otherwise allocated by law. The agency suffers paralysis when it comes to enforcing the law in the Umatilla, however. In so doing, it has abdicated its responsibility to enforce the water laws it administers.²³

The effect of its inaction is that water that would otherwise remain in the river continues to be used for irrigation; the most significant consequence of this is the diminishment of river flows during critical periods. By reducing the flows in the river, WRD's failure to enforce also adversely increases the costs of and adversely impacts the programs of NWPPC, BPA, ODFW, CTUIR, and the Department itself, which are aimed at rehabilitating the Umatilla River and restoring the anadromous fish runs.

WRD's failure to enforce water law applicable to the basin is not limited to allowing illegal sale and transfer of WID's conserved water. It has failed to enforce the rate and duty of water throughout the basin. BOR has documented that several districts use water in quantities that exceed the established duty of water.²⁴ Water used in excess of the duty of water is illegal use. The quantity of such use throughout the basin is probably significant. So long as such excess use from the Umatilla continues, the streamflow will be reduced accordingly. Such reductions either must be replaced at

²² The connection between irrigating more land and adverse impacts on streamflow and the fishery is clear to BOR, which admits in the 1989 BOR Summary: "Resolution of project water delivery outside the district boundaries on the Umatilla Project could result in additional water to be used for fishery purposes." (Attachment 63, Summary).

²³ The WRD's duty to enforce the water laws is set out in general terms in ORS 540.045(1), which states:

Each watermaster shall: (a) regulate the distribution of water among the various users of water from any natural surface or ground water supply in accordance with the user's existing water rights of record in the office of the Water Resources Director.

²⁴ For example, in the "Review of Umatilla Project Operations" the BOR finds, "A discrepancy between SID's (Stanfield Irrigation District) assessed acreage (10,000 acres) and that reported in the crop program and crop census reports (about 6,000 acres) is primarily attributable to lands served outside the district." and "The acreage associated with the supplemental water rights for the WID appear to be in excess of need when compared with the acreage within the authorized boundary." (Attachment 64).

public expense, such as through the Umatilla Basin Project, or the river and the fishery resource (and the interests they serve) will suffer further adverse affect.

Finally, although it may not be categorized as an illegal action, the WRD Director's approval, in 1984, of the Prior/Brown permits to appropriate from the Umatilla deserves mention as a most puzzling action at a critical time. The Director authorized a significant new withdrawal from the river during regular and out-of-season months, including months of critical flow. The approval was made over the objections of federal and state fishery agencies, and over the formal protests of the Tribes and other irrigators. Although even WRD staff joined in the requests for referral of the decision to the WPRB, the Director approved the new use with no public hearing on whether the use would be in the public interest. Coming as it did in the middle of the Umatilla Project Feasibility study, and amidst a chorus of objections, the Director's undocumented determination that no substantial public interest issue was at stake in the application and that no public hearing was warranted would seem indefensible at best. His approval of these diversion rights became one more overappropriation of the resource, the costs of which must now be born by the public at large, whether through public subsidy of remedial action through an expanded Umatilla Basin Project or by further deterioration of the river and fishery resource.

**MAKING A WRONG THING RIGHT:
Ending the "spread" of Reclamation project water**

by Reed D. Benson
and Kimberley J. Priestley
WaterWatch of Oregon

In the Pacific Northwest, especially east of the Cascade Range, water is a limited and precious resource. Diversions of water for out-of-stream uses regularly dry up certain reaches of many rivers and streams. Such diversions provide water for municipalities, for industrial users, and for farmers who irrigate millions of acres in Idaho, Oregon and Washington. They also harm fish and wildlife (including threatened and endangered salmon stocks), impair recreational uses, and degrade water quality in affected waterways.

Water law is primarily state law, and all the Western states regulate water use under some form of the Prior Appropriation Doctrine.¹ Federal law also governs much of this water use, however, because the Bureau of Reclamation has developed irrigation projects and facilities throughout the West.² The Bureau of Reclamation (Reclamation or the Bureau) supplies water to irrigators under various types of contracts. Irrigators with Bureau contracts must use water in accordance with those contracts, federal reclamation laws, and water rights obtained under state law.

Contracts, reclamation laws and water rights all impose requirements and restrictions on water use. For example, they require that water be used for a certain purpose, and limit the quantity that may be diverted. They also limit the place of use, often by specifying the lands on which water may be applied.

These restrictions are often violated. Throughout the West, federal water is being used to irrigate lands that have no legal right to receive it. Irrigators who apply water to these lands violate their contracts with Reclamation, and may also break federal or state law. These

¹Under the Prior Appropriation Doctrine, a person acquires a legal right to use water by diverting it from its natural course and putting it to "beneficial use." The older a water right, the higher its priority. When water is scarce, users with senior rights get all the available water, and none is left for those with junior rights, or for instream uses. See J. Sax, R. Abrams and B. Thompson, Legal Control of Water Resources, at 137-8 (2d ed. 1991).

²"The program managed by Reclamation delivers irrigation water to approximately 137,000 landholders through contracts with 585 water districts. These water users farm over 10 million acres in the 17 Western States that are served by Reclamation." U.S. Bureau of Reclamation, The Reclamation Reform Act of 1982 Annual Report to the Congress, at 11 (February 1991). This program has been developed under the authority of various federal reclamation laws, codified at 43 U.S.C. § 371 et seq.

irrigators are engaged in "water spreading."

Reclamation has known for many years that water spreading is a significant problem, especially in the Pacific Northwest. For the most part, however, the Bureau has done little or nothing to uncover water spreading, let alone stop it. Reclamation can only guess at the full extent of water spreading across the West--certainly several hundred thousand acres, perhaps a lot more.³

Today, water spreading is receiving unprecedented attention both outside and inside the federal government. As stocks of salmonid fishes continue to decline, due in part to insufficient flows in the Columbia and Snake Rivers and their tributaries, environmentalists contend that eliminating water spreading could improve flows.⁴ Native American tribes argue that illegal water use further impairs their unmet treaty rights.⁵ The draft recovery plan for the threatened and endangered Snake River salmon urges Reclamation to take action on illegal water use, including water spreading.⁶ The Inspector General of the U.S. Interior Department is investigating water spreading, and is expected to issue a report in the summer of 1994.⁷

Irrigators view water spreading quite differently. They argue that unauthorized lands are often irrigated with water that has been "saved" as a result of legitimate conservation measures. Many irrigators claim to have relied in good faith on the approval, or at least the acquiescence, of Bureau of Reclamation officials. And they warn of severe economic effects if currently irrigated lands lose their water supply.⁸

The existence and history of water spreading, as explained in this article, certainly reflect the Bureau's institutional attitude. Over its history, the Bureau has cared more about building dams and satisfying irrigators than it has about protecting the environment or the interests of

³See *infra*, "How large is the water spreading problem?".

⁴See, e.g., letter from WaterWatch of Oregon to Dan Beard, Commissioner of Reclamation, December 17, 1993.

⁵Water Spreading Policy, Confederated Tribes of the Umatilla Indian Reservation, March 2, 1994.

⁶Draft Snake River Salmon Recovery Plan Recommendations, prepared for peer review by the Snake River Salmon Recovery Team, October 1993, p. VIII-9.

⁷Remarks of Terry Lynott, U.S. Bureau of Reclamation, at a meeting of the Bureau's Water Spreading Task Force in Boise, Idaho, April 13, 1994.

⁸Water Spreading a "Sleeping Giant", Capital Press (Salem, Oregon), February 4, 1994, at 22, col. 5.

U.S. taxpayers.⁹ Reclamation provided cheap water but failed to enforce legal requirements, which led to widespread unauthorized water use (and, in some cases, insufficient payments) by irrigators who came to expect a pliant Bureau. Now it must clean up the resulting mess.

Today, Reclamation is belatedly coming to grips with water spreading. In doing so, it will need to comply with federal environmental and reclamation laws, as well as state water laws. The Bureau will also have some discretion to set policy, and it will face many difficult choices because of the conflicting demands on scarce Western water. Reclamation must address endangered species concerns, protect tribal trust assets, and respond to environmentalists who seek water for long-neglected instream values. At the same time, it must consider the interests of irrigators, local communities and others who rely on federal water.

This article examines what water spreading is, how it came about and how the Bureau has dealt with it thus far. It then identifies and briefly discusses some of the tough issues of law and policy that Reclamation will face in responding to water spreading.

I. A WATER SPREADING PRIMER AND BRIEF HISTORY

A. What is water spreading?

Water spreading is the use of federal water on lands not authorized by the Bureau for such use.¹⁰ Federal water is water developed under a federal irrigation project,¹¹ or diverted or delivered through federally built facilities.¹² Lands may be unauthorized to receive water because of (1) provisions of the legislation authorizing the federal project, (2) provisions of the water user's contract with the Bureau, (3) the requirement that lands be classified by the Bureau as irrigable, or (4) requirements of state water law. The application of federal water contrary to one or more of these restrictions is water spreading.

Reclamation projects are authorized by acts of Congress. Project authorizing legislation may restrict water use in a number of ways. It may confine water use to lands in a certain

⁹For a lengthy and critical history of the Bureau and the Reclamation program, see M. Reisner, *Cadillac Desert* (1986).

¹⁰Reclamation defines water spreading as "the unauthorized use of federally developed project water or facilities on lands not previously approved by Reclamation for such use." U.S. Bureau of Reclamation, "Water Spreading" (unpublished and undated material handed out at a meeting of the Water Spreading Task Force in Portland, Oregon, March 3, 1994).

¹¹43 U.S.C. § 371(d).

¹²Some irrigators have repayment contracts with the Bureau because they use federally-built facilities to divert or deliver their water, even though it is not "project water".

location¹³, or may impose a total limit on irrigated acreage¹⁴. Users who spread water may violate these restrictions; applying water to excessive acreage may be the most egregious type of water spreading. Authorizing legislation may also provide water only for irrigation purposes,¹⁵ so that use of water by cities or industries would be contrary to law. Reclamation has acknowledged that unauthorized municipal and industrial (M&I) use meets its definition of "water spreading."¹⁶

Reclamation contracts¹⁷ impose additional limits on where water may be applied. Most repayment contracts provide for delivery of water within an irrigation district, and nearly all of these contracts contain a provision much like the following: "While this contract is in effect, no change shall be made in the district, either by inclusion or exclusion of lands, except with the consent of the [U.S. Interior] Secretary evidenced in writing."¹⁸ Some also specify an

¹³See, e.g., Act of August 6, 1956, 70 Stat. 1059 (providing water for approximately ten thousand acres of land in Blaine County, Idaho).

¹⁴Project authorizing legislation typically lists, as one purpose of the project, the irrigation of an approximate acreage. See, e.g., Act of May 28, 1970, Pub. L. 91-270, 84 Stat. 273 (authorizing the Merlin Division of the Rogue River Basin Project, Oregon for irrigation of approximately 9300 acres).

¹⁵See, e.g., Act of September 16, 1959, Pub. L. 86-276, 73 Stat. 561.

¹⁶Remarks of Walt Fite, Assistant Regional Director, Pacific Northwest Region, at a meeting of the Bureau's Water Spreading Task Force in Portland, Oregon (May 25, 1994). This article focuses on agricultural water spreading, but unauthorized M&I use is a major concern in many areas. See letter from Rep. Peter A. DeFazio to Daniel P. Beard, Commissioner of Reclamation (October 12, 1993); Idaho Rivers United Position Paper on Bureau of Reclamation Water Spreading, May 16, 1994.

¹⁷Reclamation officials say that the Bureau supplies water under two main types of contracts: water service contracts, under which Reclamation provides water to users on a pay-as-you-go basis; and repayment contracts, under which water users regularly pay the Bureau a specified portion of the cost of building, maintaining and operating project facilities. Repayment contracts predominate in the Bureau's Pacific Northwest Region. Repayment contracts may obligate the Bureau to deliver a certain quantity of water (if available) to the user, or they may reserve for the user a certain amount of space in a project reservoir. Remarks of Max Van Den Berg, U.S. Bureau of Reclamation, at a meeting of the Bureau's Water Spreading Task Force in Portland, Oregon, March 3, 1994.

¹⁸Id. See, e.g., repayment contract of the Arnold Irrigation District, Deschutes Project, Oregon, 1948 (paragraph 30). These provisions sometimes prohibit "substantial" changes in the district without the consent of the Secretary. See, e.g., Repayment contract of the Baker Valley Irrigation District, Baker Project, Oregon, 1965 (paragraph 32).

irrigable acreage on which repayment is calculated,¹⁹ or contain specific provisions on "excess" lands²⁰ and land classification.²¹ Other contracts contain specific limits on service to "new" lands.²² Finally, some explicitly prohibit districts from selling or transferring water under the contract for use on lands outside the district.²³ Water spreading may violate these and other contract strictures.

Federal law also requires that land receiving federal project water be classified as "irrigable."²⁴ Essentially, Reclamation must assess project lands to ensure that they can be productively and profitably irrigated over the long term.²⁵ In addition, since 1986, Reclamation's land classification review must include an assessment of the potential for toxic or saline seepage from the irrigation of lands being classified.²⁶ Lands outside project boundaries, or outside of a contracting irrigation district, are generally unclassified. Even inside these boundaries, lands may be receiving water even though they are classified as "unirrigable".²⁷ Irrigation of these lands is water spreading.²⁸

¹⁹See, e.g., repayment contract of the West Extension Irrigation District, Umatilla Project, Oregon, 1954 (paragraph 11).

²⁰Reclamation law imposes limits on the amount of land which a single owner can have irrigated with project water. To the extent that an owner has more land than these limits allow, she has "excess lands." The Reclamation Reform Act of 1982 rewrote the law on excess lands. 43 U.S.C. § 390aa *et seq.*

²¹See, e.g., Repayment contract of Baker Valley Irrigation District, Baker Project, Oregon, 1965 (paragraph 15 on classification, paragraph 22 on excess lands).

²²See, e.g., Contract of Island Irrigation Company, Minidoka and Palisades Projects, Idaho, 1952 (paragraph 28).

²³See, e.g., repayment contract of the Westland Irrigation District, Umatilla Project, Oregon, 1949 (paragraph 32).

²⁴This legal requirement dates back to the Fact Finders Act of 1924, Ch. 4, 43 Stat. 672. Other statutes providing for land classification include the Reclamation Project Act of 1939, 53 Stat. 1187, and the Reclamation Reform Act of 1982, 96 Stat. 1265. Report of the Task Force on Land Classification and Equivalency, U.S. Bureau of Reclamation, 1983, pp. 3-4.

²⁵43 USC § 462.

²⁶43 U.S.C. § 390a, as amended by Pub. L. 99-294, 100 Stat. 426 (1986).

²⁷These lands may have been classified many years ago, and the classification is based on conditions existing at that time. Thus, if a certain field was irrigated using gravity flows, a high spot in the center of the field might be classified unirrigable. Other lands might be deemed

Spreading water may also violate state law if water is applied to lands without water rights.²⁹ Some users have moved water without the benefit of either a state water right or the required approval of the Bureau.³⁰ Others have the water rights needed for their land, either because they transferred existing rights or obtained new ones, but have never sought or received Reclamation's consent.³¹

State legislatures in the Northwest have attempted to legalize, on favorable terms, many past changes in irrigation water use that otherwise would violate state law. Oregon has allowed districts to seek "remapping," so that a district's water right will reflect its actual--rather than legally authorized--use of water.³² In Idaho's massive Snake River Basin Adjudication (SRBA), statutes provide for retroactive approval of certain unauthorized changes which have already

unirrigable because, at the time of classification, they had steep slopes, drainage problems, etc. As explained below, such lands have often come under irrigation because of changes in irrigation technology or "improvements" to the land.

²⁹A recent House Appropriations Committee report, however, attempts to exclude from the definition of "water spreading" the irrigation of certain lands in Washington's Columbia Basin Project which are not classified as irrigable. H. Rep. No. 533, 103d Cong., 2d Sess. 61 (1994). Congressman George Miller, Chairman of the House Natural Resources Committee, attacked this language in a statement on the House floor on June 14, 1994. [CITE TO CONGRESSIONAL RECORD.]

²⁹Applying water in violation of federal contracts may also violate state law. Oregon, for example, requires irrigation districts to comply with their Bureau contracts. Or. Rev. Stat. § 545.062(4).

³⁰Letter from Dennis B. Underwood, then Commissioner of Reclamation, to Congressman George Miller (April 1, 1992), page 4.

³¹Other changes in water use may result in violations of state law, even though they are not "water spreading". In some river basins, irrigated farms are giving way to housing developments. The water formerly used to grow crops on these lands, however, has sometimes been shifted to other farms which are already receiving a full supply of irrigation water. The result may be excessive water use on the remaining farms. Idaho Rivers United has dubbed this practice "water stacking." Water stacking may violate state laws such as those prohibiting the waste of water, e.g., Or. Rev. Stat. § 540.720.

³²District remapping petitions are to be approved if the district meets certain procedural requirements, and if the changes in the petition will not injure existing water rights. In addition, if federal approval is required for the proposed changes--as it would be if a district's reclamation contract required Bureau approval before the district could change its boundaries--the federal approval must be given before the state will finally approve the petition. Or. Rev. Stat. § 541.325 *et seq.* (as revised 1993).

occurred.³³

B. How has water spreading developed?

To put it simply and broadly, water spreading has happened because irrigators have applied water to lands not authorized to receive it, and Reclamation has not enforced the requirements of federal statutes and contracts. Each individual case of water spreading, however, has its own cause(s). A recent Commissioner of Reclamation described some of the practices that have resulted in water spreading:

Frequently, projects formulated for gravity flood irrigation from open unlined ditches have been converted over time to lined ditches, pipe laterals, and water-saving sprinkler technologies. Thus, conserved water becomes available to serve additional lands on the fringes of the project or within project and district boundaries. The application of such conserved water and uncontrolled waste water to ineligible lands is sometimes a knowledgeable, willful violation of Stated [sic] water rights, project authorizations, and water service or repayment contracts.³⁴

In other cases, water has been spread to lands classified as unirrigable which are adjacent to or surrounded by irrigable land.³⁵

Many irrigators place the entire blame on the Bureau. Some claim to have made changes in reliance on the approval, or at least the knowing acquiescence, of Bureau officials. They also argue that, until recently, the Bureau had no established process for considering requests to

³³Idaho Code §§ 1425, 1426 (1994). These sections replaced former Idaho Code sections 1416A and 1416, respectively, which were held unconstitutionally vague. *In re SRBA*, Case No. 39576 (Fifth Judicial District Court, Idaho) (Memorandum Decision and Order on Basin-Wide Issue No. 1, February 4, 1994).

³⁴Letter from Dennis B. Underwood, then Commissioner of Reclamation, to Congressman George Miller (April 1, 1992), page 4.

³⁵Former Reclamation Commissioner Underwood described how these "unirrigable" lands came to be irrigated: "[L]and originally classified as nonirrigable (class 6) may be surrounded by irrigable land or occupy a corner or side of a field. Land classification included economic criteria, and lands may be classified as class 6 because of the cost of developing such lands exceeds limits defined in economic studies at the time of project authorization. Such class 6 lands can often be made productive over time because a water user has the means to slowly, but persistently, develop the land into a productive resource. Activities such as leveling, removing rocks, installing drains (surface or subsurface) can be too expensive for a water user to accomplish initially, but are often accomplished over time." *Id.*

expand irrigation district boundaries.³⁶ These criticisms ring somewhat hollow, since water users certainly benefited from Reclamation's failure to enforce the law.

C. How large is the water spreading problem?

The Bureau first attempted to quantify the water spreading problem in 1983, during a review of its backlog of land classification work. A report noted that some unclassified lands "have been irrigated either through water service contracting procedures, or through spreading of water delivered for service to irrigable lands onto adjoining or nearby tracts of unclassified (nonproject) lands."³⁷ The report estimated that 662,000 acres of such lands were receiving water Westwide. The Pacific Northwest Region reported two-thirds of this acreage. The Mid-Pacific and Upper Missouri Regions each reported about 100,000 acres, while the other four regions reported less than ten thousand acres each.³⁸ The report made no attempt to explain such dramatic inter-regional differences. The report estimated that nearly four million acres of land Westwide needed some classification work.³⁹

Eleven years after that report, Reclamation seems to have made little progress in determining where, and how much, water spreading has occurred.⁴⁰ In the recent words of a Bureau official, "The numbers in those reports are very, very questionable We really don't know what the extent of the problem is."⁴¹

This lack of information on water spreading persists even though Reclamation has broad statutory authority to require water users to keep and submit records. Under the Reclamation

³⁶Changes to Irrigation Districts Looming, Hermiston, Ore. Herald, November 16, 1993, at 1, col. 3.

³⁷Report of the Task Force on Land Classification and Equivalency, *supra*, pp. 10-11.

³⁸*Id.*, appended material. Since that report, Reclamation has consolidated its seven regions into five. The Great Plains Region now includes the former Upper Missouri, Lower Missouri and Southwest regions.

³⁹*Id.*

⁴⁰It may be, however, that the Bureau knows more about water spreading than it has cared to admit. A 1985 "Blue Envelope" (confidential) memo from a Reclamation official in Denver challenged the notion that the Bureau doesn't know which districts have spread water. "While I am sure that this is sometimes the case (particularly in situations where acreages are small), I feel that the major instances . . . are not unknown to either the districts nor to ourselves." Memorandum from Richard Piper to Ineligible Lands Task Group Chairman (January 10, 1985).

⁴¹Remarks of Max Van Den Berg, Bureau of Reclamation, to a meeting of the Bureau's Water Spreading Task Force, Portland, Oregon, March 3, 1994.

Reform Act of 1982 (RRA), the Bureau can require such recordkeeping and reporting as it "deems reasonably necessary to implement . . . Federal reclamation law."⁴² Reclamation, however, has not used this authority to gain information on water spreading.⁴³

D. Why is water spreading problematic?

As described above, water spreading violates federal contracts, federal statutes, state water law, or some combination of the three. It is not simply a legal problem, however. It also may harm both the public fisc and the environment.

1. **Repayment problems.** By applying water to unauthorized lands, water users may pay less money to the Bureau than they rightly owe. Reclamation repayment contracts require water users to repay the federal government's costs of construction, operations and maintenance in regular installments. Since the 1939 Reclamation Project Act, the amount of these installments has been tied to water users' ability to pay.⁴⁴ Many repayment contracts specifically tie these annual installments to a particular irrigated acreage within the contracting district.⁴⁵ Where users apply water to additional lands without the Bureau's approval, their payments may be smaller than they should be. If the Bureau were to approve irrigation of new lands, it could change the basis of repayment so as to increase the annual installments and reduce the amount lost to the government on zero-interest loans.⁴⁶

⁴²43 U.S.C. § 390zz. Reclamation's reporting regulations are codified at 43 CFR § 426.10.

⁴³"It was originally thought that the certification and reporting requirements of the Reclamation Reform Act would provide sufficient documentation to [identify] ineligible lands However, upon review of the returned RRA forms it became apparent that the the information provided by the districts will not quantify the problem nor will it provide a basis for corrective action. At best the forms only serve as an indicator of some districts which have had changes in irrigation acreages." Ineligible Lands Task Force [Bureau of Reclamation], Report on Data Available and Data Requirements for Analysis of the Ineligible Lands Issue, February 4, 1985, p. 1.

⁴⁴53 Stat. 1187, Sec. 1; 43 USC § 485 *et seq.*

⁴⁵See Repayment contract of Vale Oregon Irrigation District, 1949 (paragraph 13).

⁴⁶Where Reclamation amends repayment contracts to allow deliveries to out-of-district lands, it could also increase returns to the federal treasury by raising the amount charged for *all* water used by the district. This approach would be consistent with the Reclamation Reform Act, the provisions of which apply to all contracts made or amended after the RRA's enactment. 43 U.S.C. § 390cc(a). Districts faced with this prospect, however, may choose to stop irrigating these lands rather than have their existing Bureau contracts amended.

Reclamation has recognized that it is losing money because of water spreading,⁴⁷ but it has never estimated the extent of the loss. Reclamation official Phillip Doe, however, offered a ballpark figure in 1992 during his whistle-blowing testimony before a Congressional subcommittee:

If we may assume that 1,000,000 acres are receiving water illegally because of the lack of a proper contract, then we can also come, through other calculations, to some approximation of the dollar value of the abuse. For instance, assume that each acre, on average, carries a water duty or need of 3 acre-feet and that the water, on average, carries a price tag of \$5 per acre-foot. Under these assumptions, the American public is losing \$15 million a year in recoverable costs, all as a result of the deliberate dithering of the managing federal agency.⁴⁸

2. Environmental problems. Water spreading also raises two distinct environmental problems. The first relates to the effect of individual cases of water spreading. An irrigator who spreads water may alter the quantity, quality and timing of return flows to the detriment of local streams and rivers. The second problem arises from the cumulative effects of water spreading on the rivers and streams of the West. Federal water is being used illegally to irrigate at least hundreds of thousands of acres Westwide, at a time when many rivers and streams have too little water to support instream uses adequately. If this unlawfully used water could be kept instream, Western rivers would have better fish and wildlife habitat, recreational opportunities, and water quality.

Individual cases of water spreading may harm the environment by diminishing the quantity of irrigation return flows.⁴⁹ If an irrigator takes measures that reduce her seepage

⁴⁷A 1985 Bureau task force report lists four "incentives for taking positive action to address the 'water spreading' issues," one of which is:

Potential for Gain of Additional Revenue—Where water conservation measures have led to acceptable application of water to additional lands, reformulation and reauthorization of projects could bring about a reallocation of costs to the additional land that would either accelerate repayment or reduce subsidies to the irrigation function through contract renegotiation.

Ineligible Lands Task Force, *supra* at 3.

⁴⁸Examine the Undermining of an Effective Civil Service: Hearing before the Subcommittee on the Civil Service of the Committee on Post Office and Civil Service, House of Representatives, 102d Cong., 2d sess. 171 (1992).

⁴⁹When water is diverted from a river or stream for irrigation, not all is consumed by the crop. Water leaks out of unlined irrigation canals and seeps below the root zone of irrigated fields. Water "lost" to seepage actually returns to ground water, and often returns to the river

losses, and then uses the water saved to irrigate more land, her consumption will increase and return flows will decrease. If she moves water from lands near a river to lands much more distant, return flows to the river could be diminished or significantly delayed.

The use of water on unauthorized lands also may contribute to impaired water quality. Irrigation has created water quality problems in many parts of the West because return flows carry salts, heavy metals and other contaminants.⁵⁰ When the Bureau classifies a parcel of land, it determines whether irrigation of that parcel will cause such problems.⁵¹ Thus, when an irrigator spreads water to unclassified lands, she increases the risk that return flows from those lands will adversely affect surface and ground water quality.

The major environmental controversy over water spreading, however, involves its cumulative effects on the rivers of the West. Federal water is being used illegally on vast areas of land at a time when many salmonid fish stocks are sliding toward extinction in the Northwest, due in part to low flows in rivers and streams.⁵² Recognizing this, the draft recovery plan for the threatened and endangered Snake River salmon stocks recommended: "The [Bureau] should correct undocumented or illegal water diversions in the Snake River Basin. This should include an investigation of unauthorized uses of water such as 'water spreading'."⁵³

While the Snake River salmon have received the most attention, fish stocks throughout the Northwest have been destroyed or decimated.⁵⁴ Insufficient streamflows are at least partially responsible in many areas. Under these circumstances, environmentalists have called

or stream from which it was diverted. The amount of time needed for seepage losses to return to the river is a function of several factors, such as distance and soil type.

⁵⁰This problem received national attention in the 1980s when large numbers of dying and deformed waterfowl were discovered at the Kesterson National Wildlife Refuge in California. The birds were victims of toxic selenium leached from irrigated fields. The Kesterson tragedy, however, is only one example of the water quality problems resulting from irrigation in the West. See D. Worster, *Rivers of Empire*, at 317-324 (1985).

⁵¹43 U.S.C. § 390a.

⁵²The Northwest Power Planning Council has called for an additional one million acre-feet of water to aid salmon migration in the Snake, and recommended better enforcement of water rights as one means of providing flows. *Strategy for Salmon*, Volume I, at 21 and 38 (1992).

⁵³*Draft Snake River Salmon Recovery Plan Recommendations*, prepared for peer review by Snake River Salmon Recovery Team, October 1993, p. VIII-9.

⁵⁴See Nelson, Williams and Lichatowich, *Pacific Salmon at the Crossroads: Stocks at Risk from California, Oregon, Idaho and Washington*, Fisheries, Vol. 16, No. 2, March-April 1991, at 4.

on the Bureau to respond to water spreading in a way that benefits streamflows, fish, and other public values in rivers.⁵⁵

E. A Case Study: Water spreading and streamflows in the Umatilla River Basin

The conflict between water spreading and instream water needs is being played out in the Umatilla River Basin in northeastern Oregon. Low flows and fish passage problems in the Umatilla due largely to irrigation diversions have virtually wiped out formerly abundant stocks of salmon and steelhead. The State of Oregon has recognized that improved streamflows are needed if the fish are to be restored.⁵⁶

The Confederated Tribes of the Umatilla Indian Reservation have reserved fishing rights under their 1855 treaty with the United States.⁵⁷ Early in the 20th century, however, the Bureau built the Umatilla Project to provide irrigation water to local farmlands, and the fish soon disappeared. In 1988, Congress authorized the Umatilla Basin Project, an exchange which utilizes Columbia River water to restore flows needed to fulfill the treaty fishing rights of the Confederated Tribes while preserving the local agricultural base.⁵⁸

Four irrigation districts have contracts with the Bureau under the Umatilla Project, and they have spread water to approximately 17,000 acres of land outside their boundaries.⁵⁹ These

⁵⁵See, e.g., Idaho Rivers United Position Paper on Bureau of Reclamation Water Spreading, May 16, 1994; Waterspreading - Tentative Framework for Solutions, American Rivers Northwest Regional Office, May 23, 1994; Memorandum from WaterWatch of Oregon to Walt Fite, Bureau of Reclamation, May 16, 1994 (all these documents were delivered at a meeting of the Bureau's Water Spreading Task Force in Portland, Oregon, May 25, 1994); letter from Karen Garrison (Natural Resources Defense Council) to John W. Keys III, Regional Director, Bureau of Reclamation, November 30, 1993.

⁵⁶"Low streamflows are the chief limiting factor to salmonid production. Low streamflows impede and block fish migration, increase water temperatures, and contribute to reduced habitat and competition from warm water fish species." Oregon Water Resources Commission, Oregon Water Plan, June 24, 1988, Umatilla Basin Section, p. 19.

⁵⁷Treaty with the Walla Walla, Cayuse and Umatilla Tribes, June 9, 1855, 12 Stat. 945.

⁵⁸Umatilla Basin Project Act, Pub. L. No. 100-557, Title II, 102 Stat. 2791 (1988). The environmental impact statement for this project explains the conditions that made it necessary, including the conflict between the Tribes' treaty rights and irrigation water use under the Umatilla Project. U.S. Bureau of Reclamation, "Umatilla Basin Project, Oregon, Planning Report," at 2-3, February 12, 1988.

⁵⁹Bureau of Reclamation, Pacific Northwest Region, "Proposed Boundary Changes for the Umatilla Project, Oregon" (scoping meeting announcement), November 1993.

districts have now asked Reclamation to approve changes to their boundaries to reflect their actual water use, which would effectively legalize their current water spreading. As of this writing, the Bureau is at the "scoping" stage of analyzing the districts' request under the National Environmental Policy Act.⁶⁰ But the National Marine Fisheries Service--the agency with primary responsibility for anadromous fish--has already taken a dim view of the proposal:

We are concerned that the action proposed in the scoping document will: 1) authorize present potentially illegal water use in the basin; 2) encourage additional water withdrawal from the Umatilla that does not legally exist at present; 3) preclude the Umatilla project from achieving its Congressionally mandated purpose; 4) preclude the project from meeting the Umatilla Tribal anadromous fish restoration expectations; and 5) set an unacceptable precedent for dealing with the over-allocation of water resources. In short, we believe that this apparent after-the-fact authorization of potentially illegal water use is extremely inappropriate.⁶¹

Water spreading has created intense controversy in the Umatilla Basin. The Confederated Tribes, irrigators, environmentalists, local business interests, and several government agencies have played important roles. Some issues have been settled through negotiations, while others have landed in court. Most are unresolved and are likely to remain so for years.⁶²

F. What has Reclamation done about water spreading?

As explained above, Reclamation recognized in a 1983 report that federal water was being spread to over 660,000 acres Westwide. For unexplained reasons, however, the report stated that classification work on these lands would be a low priority, and would not be completed within five years.⁶³

Reclamation then formed an informal "Ineligible Lands Task Force" led by the Pacific Northwest Region. This group issued a brief report in 1985, primarily emphasizing the need to collect more and better information on water spreading before proceeding to solve the

⁶⁰40 CFR § 1501.7.

⁶¹Letter from Merritt E. Tuttle to John Keys (December 1993), page 2.

⁶²A full history of the Umatilla Basin controversy is not possible in this article. The issues have been well chronicled in the Pendleton *East Oregonian*. Relevant stories from that newspaper include "Seeking a water rights truce," November 15, 1993, at 1; "Farmers fear loss of water," November 24, 1993, at 1; "Tribes wary of 'water spreading'," December 6, 1993, at 1; "Tribes take irrigators to task over water issues," January 17, 1994, at 3; "Compromise urged in water dispute," April 7, 1994, at 1; "'No saints' found in water dispute, Ladd says," May 20, 1994, at 3.

⁶³Report of the Task Force on Land Classification and Equivalency, *supra* at 10-11 (1983).

problem.⁶⁴ The report also identified "incentives for taking positive action to address the 'water spreading' issues,"⁶⁵ options for solving the problem,⁶⁶ and constraints to implementing these options.⁶⁷ Later that year, Reclamation opted to dissolve the task force and delegate the water spreading problem to the regional offices. "Because of the complexity and magnitude of the problem," wrote Acting Commissioner Robert Olson, "we are taking a long-range approach to resolution."⁶⁸

Long range, indeed. Today, Reclamation can claim only limited progress in addressing a few scattered cases of water use on ineligible lands.⁶⁹ It has issued guidelines for processing water users' requests to approve new lands for irrigation; these guidelines set forth requirements for compliance with NEPA and other federal laws.⁷⁰ Reclamation is now processing its first expansion proposal (that of the Umatilla Basin irrigation districts) under these guidelines. But the Bureau's water spreading problem--conservatively estimated at two-thirds of a million acres in 1983--has not yet been dented.

⁶⁴Ineligible Lands Task Force, *supra*, p. 1.

⁶⁵The four listed "incentives" were: (1) "compliance with reclamation law"; (2) "potential for gain of additional revenue"; (3) "reduce the likelihood of legal action"; and (4) "establishment of defensible water rights and firm water supplies". *Id.*, p. 3.

⁶⁶The listed "solution options to the ineligible lands problem" were: (1) "bring ineligible lands under existing contracts without opening contract provisions for the old lands"; (2) "obtain legislation giving authority to legitimize lands. . . ."; (3) "take no action or only selected action"; (4) "take legal steps to eliminate water service"; (5) "write water service contracts to cover the ineligible lands"; and (6) "advise districts of the problem and defer resolution to them". *Id.*, p. 8.

⁶⁷The report identified the following factors as limiting Reclamation's options: (1) "current policy requires opening up existing repayment contracts if the service area is expanded"; (2) "congressional authorization usually limits service to a specific number of acres in a specific location"; (3) "state water right considerations could be very difficult"; and (4) "conflicting demands for water (fish and wildlife, NEPA, power, etc.) could preclude legitimizing the use of the water for irrigation." *Id.*, pp. 8-9.

⁶⁸Memorandum from Acting Commissioner Robert Olson to seven Reclamation regional directors, May 17, 1985.

⁶⁹Letter from Dennis B. Underwood to Congressman George Miller, *supra*.

⁷⁰"Guidelines for Processing Requests for Inclusions, Exclusions, Water Transfers and Related Actions," Bureau of Reclamation, Pacific Northwest Region, Boise, Idaho, March 15, 1993.

Reclamation now seems determined to act. It has assembled a new task force in the Pacific Northwest to provide public input on how to approach water spreading.⁷¹ The Water Spreading Task Force includes representatives of environmental groups, irrigation interests, Native American Tribes and state governments, as well as Reclamation officials. Reclamation Commissioner Daniel P. Beard spoke to the task force in its first meeting, and asked the group for its input on how to address the concerns of the various interest groups. He made it clear, however, that Reclamation would end water spreading. "You should know that there is no doubt . . . that we have to comply with the law, that we will comply with the law, and that we will solve this problem one way or the other."⁷²

II. RESPONDING TO WATER SPREADING--LEGAL ISSUES

It will be extremely difficult for the Bureau to craft a satisfactory solution to water spreading. Part of the challenge is that Western water issues tend to be highly contentious and polarized--perhaps even more so than, say, grazing or mining. Beyond the politics, however, Reclamation will need to resolve some genuinely tough legal questions if its response to water spreading is to benefit Western streamflows.

Many of these legal issues have never been decided. The Bureau has no regulations regarding water spreading or contract enforcement. In addition, since contract enforcement seems to have been a low priority for most of Reclamation's history, little directly relevant case law exists. Thus, while Reclamation statutes⁷³ and cases⁷⁴ give the Bureau considerable authority and latitude, they provide few definitive answers to the legal questions surrounding water spreading.

These questions would be simpler (though still not easy) if Reclamation only had to choose between shutting off illegal water use or allowing such use to continue. Stopping all deliveries to unauthorized lands would obviously end water spreading. But that action would not, by itself, do much to restore streamflows. Many Western rivers are already overappropriated, with current users not getting all the water they want. If deliveries to unauthorized lands are stopped, irrigators with Reclamation contracts may simply apply more water to those lands eligible to receive it. If these irrigators' diversions are reduced, others may

⁷¹"Task Force on Unauthorized Use of Water to Meet," United States Department of the Interior News Release, February 4, 1994.

⁷²Commissioner Beard's Remarks to the Water Spreading Task Force Meeting (conference call), February 8, 1994, p. 3.

⁷³See, e.g., 43 U.S.C. 373; 43 U.S.C. § 390ww(c).

⁷⁴See *United States v. Quincy-Columbia Basin Irrigation District*, 649 F. Supp. 487 (E.D. Wash. 1986); *Madera Irrigation District v. Hancock*, 985 F.2d 1397 (9th Cir. 1993); *U.S. v. Alpine Land and Reservoir Co.*, 887 F.2d 207, 212 (9th Cir. 1989).

take the water for irrigation, either under new Reclamation contracts (issued to those who would like to get project water now, but can't) or under existing state-law water rights. Thus, stopping water spreading--unless further changes are made--may merely scramble irrigation patterns, leaving rivers as dry as ever.

If the Bureau seeks to translate water spreading into streamflow restoration, it must take at least four distinct steps. First, it must terminate existing unauthorized deliveries--that is, it must end the status quo. Second, it must assume control of water that has been illegally used. Third, it must designate all or part of that water for instream uses. Finally, it must take steps to protect instream water from diversion for out-of-stream uses. Questions exist as to whether Reclamation can and should take these actions.

A. Can the Bureau stop existing water spreading?

As noted, water spreading arises when irrigators violate the terms of their water allocation contracts with the Bureau, fail to adhere to requirements of federal statutes, and/or violate state law. As the federal agency in charge of the federal reclamation program, the Bureau has the responsibility to enforce contractual and legal requirements.⁷⁵

Reclamation's chronic failure to take this responsibility seriously has left it with a major water spreading problem, and will complicate its attempts to solve that problem. The Bureau has no regulations applicable to water spreading, having chosen in 1985 to approach the problem on a case-by-case basis.⁷⁶ In addition, little reported precedent exists to clarify the Bureau's contract enforcement authorities and remedies. Nonetheless, Reclamation does seem to have options for stopping water spreading.

First, the Bureau could promulgate regulations regarding use of water on unauthorized lands. The Secretary has clear statutory authority "to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying out the provisions of [the Reclamation] Act into full force and effect."⁷⁷ In addition, most reclamation

⁷⁵See Yellen v. Hickel, 352 F. Supp. 1300, 1317-18 (D. D.C. 1972), reversed on other grounds, 559 F.2d 509 (9th Cir. 1977).

⁷⁶"The unique character of the situations of which we have knowledge supports the case-by-case approach, and suggests that generalized guideline development would be time consuming and an inefficient use of resources." Memorandum from Acting Commissioner Robert Olson to Regional Directors, May 17, 1985, page 2.

⁷⁷ 43 USC § 373. See also, 43 U.S.C. § 390ww(c).

contracts recognize the Bureau's authority to adopt regulations.⁷⁸ Thus, Reclamation may establish and enforce regulations which apply even to contracts that predate those regulations.⁷⁹ The Bureau could clarify several issues by writing regulations to address water spreading.

Second, the Bureau could simply direct its contractors to stop illegal deliveries. The Bureau successfully took such an action in 1993, when it ordered a Umatilla Basin irrigation district to cease delivering water to another district that did not have a Bureau contract for the water.⁸⁰

Third, since water users are violating their federal contracts, Reclamation could resort to remedies for contract breach. One obvious remedy would be the cessation of water deliveries to unauthorized lands. In one reported case, certain Washington irrigation districts conceded that Reclamation could require them to withhold water deliveries to users who failed to comply with legal requirements.⁸¹

As noted, many irrigators claim to have spread water in reliance upon the assurances (or

⁷⁸See, e.g., repayment contract of the Vail Oregon Irrigation District, Vail Project, Oregon, 1949 (paragraph 47: "The Secretary reserves the right, as far as the purport thereof may be consistent with the provisions of this contract, to make rules and regulations, and to add to and modify them, as may be deemed necessary to carry out the true intent and meaning of the law and of this contract")

⁷⁹Reclamation promulgated regulations in 1983 requiring water users to report certain information. 43 C.F.R. § 426.10. These regulations were upheld as a valid exercise of the Bureau's authority under both the 1982 Reclamation Reform Act and the 1902 Reclamation Act. United States v. Quincy-Columbia Irrigation District, 649 F. Supp. 487 (E.D. Wash 1986).

⁸⁰Letter from John W. Keys III to William I. Porfily, Westland Irrigation District, July 16, 1993.

⁸¹The districts argued that certain regulations were invalid or were inapplicable to them because of their contracts with the Bureau. The districts, however,

conceded that if the court found that the Secretary had the authority to issue the regulations and that the regulations were enforceable under the contracts, the district would be obliged not to supply water to offending individuals. [The districts' counsel] further stated, however, that if the court so ruled, the districts would attempt to give notice and hold a hearing prior to terminating any delivery. In light of the severe consequences of depriving irrigation water in the arid land of Eastern Washington, the court notes that such an approach is desirable and encourages governmental cooperation in that procedure.

United States v. Quincy-Columbia Basin Irrigation District, 649 F. Supp. at 492.

at least the acquiescence) of Bureau officials. Thus, they may raise a variety of defenses against the Bureau in the nature of estoppel. The cases make it clear, however, that Reclamation will rarely be bound by its past inaction and erroneous statements of the law. In a case involving the 160-acre limitation of Reclamation law, the Ninth Circuit held that the limitation remained applicable despite both a legal opinion and Bureau practice to the contrary:

It is true that, in practice, the Department of the Interior did not enforce the 160-acre limitation on lands in the Imperial Irrigation District. This inaction was based at first upon the Wilbur letter which was itself an informal opinion that is legally incorrect and that does not even deal with the reclamation statute at issue in this case. Sometime thereafter, the Department of the Interior abandoned justifying its inaction on the analysis contained in the Wilbur letter but instead decided against nonenforcement of the 160-acre limitation because it had not been enforced before. Inaction based on previous inaction cannot be elevated into an administrative determination to which the courts should defer.

United States v. Imperial Irrigation District, 559 F.2d 509, 540 (9th Cir. 1977), reversed on other grounds, Bryant v. Yellen, 447 U.S. 352 (1980). See also, Peterson v. U.S. Department of Interior, 899 F.2d 799, 810-13 (9th Cir. 1990), cert. denied, 498 U.S. 1003 (1990); Yellen v. Hickel, 352 F. Supp. 1300 (S.D. Cal. 1972), vacated on other grounds, 559 F.2d 509 (9th Cir. 1977).

The Bureau seems to have the authority to stop water use on ineligible lands, but the water may remain in the hands of those who spread it. Thus, the next step in restoring streamflows is for Reclamation to gain control of illegally used water.

B. Can the Bureau secure control over illegally used water?

Curbing water delivery to unauthorized lands is only the first step in getting water instream. The Bureau must also identify the amount of water illegally spread and gain control of it. Irrigators, however, may claim a continuing right to the water.

In the Umatilla Basin controversy, Reclamation has stated that irrigators have no right to continue receiving water which they have spread. "[I]n the Bureau's view, the districts have no right to rely on continued use of . . . water which the districts have used in violation of their contracts with Reclamation . . ."⁸² At this point, however, the Bureau has taken no action regarding the water spread by the Umatilla districts.

Here again, Reclamation could clarify its authority, and its process, for gaining control of illegally used water by promulgating regulations. Such regulations might specify that a

⁸²See Letter from John W. Keys III, Regional Director, Bureau of Reclamation to Don Sampson, Chairman, Confederated Tribes of the Umatilla Indian Reservation, and four irrigation district board chairmen, May 25, 1994.

contractor who uses project water on unauthorized lands may not continue to receive the quantity of water so applied. Reclamation may base such a measure on its power to set terms and conditions for the use of project water.⁸³ As the courts have recognized, even when the government has entered into a contract, it retains its sovereign authority unless surrendered in unmistakable terms.⁸⁴ As noted, the Secretary is authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper to carry out reclamation law.⁸⁵

Moreover, the Bureau may resort to its remedies for breach of contract. Scant case law exists regarding the Bureau's remedies for breach of water supply contracts. In one case, irrigation districts acknowledged that the Bureau could order them to cease deliveries to water users who did not comply with Reclamation regulations.⁸⁶ In a case involving the sale of excess lands under the Reclamation Reform Act, a dissenting judge suggested that the government might have several options if the districts breached their contracts: "[O]ne could argue that the Secretary could sell the excess lands himself, or stop delivering water, or even, perhaps, refuse to deliver water unless a higher price was paid."⁸⁷ Presumably, Reclamation could pursue any common law remedy for contract breach, including rescission.

In addition, irrigators may agree to cede control over illegally used water under certain circumstances. Umatilla Basin irrigators have sought temporary Bureau contracts to allow them to irrigate lands outside their boundaries, but they have been asked to waive their contract rights

⁸³As the Ninth Circuit has recognized, project water

would not exist but for the fact that it has been developed by the United States. It is not there for the taking (by the landowner subject to state law), but for the giving by the United States. The terms upon which it can be put to use, and the manner in which rights to continued use can be acquired, are for the United States to fix. If such rights are subject to becoming vested beyond the power of the United States to take without compensation, such vesting can only occur on terms fixed by the United States.

Israel v. Morton, 549 F.2d 128, 132-33 (9th Cir. 1977). See also, Kittitas Reclamation District v. Sunnyside Valley Irrigation District, 626 F.2d 95 (9th Cir. 1980), cert. denied, 449 U.S. 1079 (1981).

⁸⁴Peterson v. U.S. Department of the Interior, 899 F.2d at 807, and cases cited therein.

⁸⁵43 USC § 373.

⁸⁶United States v. Quincy-Columbia Basin Irrigation District, 649 F. Supp. 487 (E.D. Wash. 1986).

⁸⁷Barcellos and Wolfson v. Westlands Water District, 899 F.2d 814, 829 (9th Cir. 1990), cert. denied, 498 U.S. 998 (1990) (Fernandez, J., dissenting).

to illegally used water as one condition of receiving those contracts.⁸⁸ Reclamation has stated that "it is appropriate for the Districts to assign custody to Reclamation for all Federal project water that is delivered to out-of-boundary lands for the period from now until completion of the NEPA process on the boundary expansion request and issuance of a Record of Decision (ROD) by the Regional Director."⁸⁹ In May of 1994, the Umatilla districts agreed in principle to such an assignment.⁹⁰ Thus, some water users may agree to cede control over spread water as a condition of boundary expansion, or if Reclamation would otherwise seek contract rescission or money damages for past water spreading.

Finally, the Bureau might assert that illegally spread water has been forfeited. Some Bureau contracts stipulate that if water is not used within a certain period of years, it is forfeited.⁹¹ Thus, the Bureau may argue that water use in violation of contract provisions is tantamount to nonuse, and that the contractor has therefore forfeited this "unused" water.

If the Bureau is able to gain control of illegally spread water, it would then need to reallocate the secured water from irrigation to instream uses in order to ensure instream benefits.

C. Once secured, can the Bureau reallocate water to instream uses?

In general, water from a reclamation project must be used for purposes listed in the legislation authorizing that particular project. Older legislation tends to limit uses of Reclamation project water to irrigation, hydropower and flood control. In recent years, however, Congress has authorized many projects for fish and wildlife purposes. In the newer projects, this language is part of the original authorizing legislation.⁹² For the older projects, Congress is reauthorizing projects on an individual basis to include uses such as fish and

⁸⁸The water spreading policy of the Confederated Tribes of the Umatilla Indian Reservation, *supra* note 5, calls on the Bureau to "take custody of all the water which has been used illegally."

⁸⁹Letter from John W. Keys III to Don Sampson and Thomas G. Myrum, April 15, 1994, page 2.

⁹⁰Irrigation District Tribes Reach Water Agreement, *Pendleton East Oregonian*, May 3, 1994, at 3. More recently, the Bureau has stated that an assignment is unnecessary because the districts have no right to rely on continued deliveries of spread water. Letter from Keys to Sampson *et al.*, May 25, 1994, *supra*.

⁹¹*See, e.g.*, repayment contract of the Stanfield Irrigation District, Umatilla Project, Oregon, 1950 (paragraph 10(e): "[S]hould the District fail to use any portion of said water for a period of three (3) consecutive years . . . the United States may provide for permanent delivery to others of the unused water in event of such nonuse . . .").

⁹²*See, e.g.*, Reclamation Project Authorization Act of 1972, Pub. L. 92-514, 86 Stat. 964.

wildlife.⁹³ Congress could facilitate the allocation of water to instream uses through legislation establishing fish and wildlife purposes for all Bureau projects.

The Bureau may have trouble reallocating water from agricultural purposes for instream uses on federal projects not authorized for fish and wildlife or recreation. Such reallocation may be necessary, however, to comply with other requirements of federal law. The Endangered Species Act, the Northwest Power Act and the federal government's Native American trust responsibility are three such requirements.⁹⁴

The Endangered Species Act (ESA) places an affirmative duty upon the Bureau to protect listed species by mandating that federal agencies "use . . . all methods which are necessary to bring any endangered . . . or threatened species to the point at which" the protections of the Act "are no longer necessary."⁹⁵ The ESA grants authority to issue regulations to provide for conservation and prohibit the taking of listed species.⁹⁶ It further mandates that federal agencies shall develop and implement recovery plans.⁹⁷ These mandates may require the Bureau to make water available instream where needed for the survival of listed species.⁹⁸ The Bureau has recognized this responsibility in operating the Stampede Dam and Reservoir for endangered fish in Pyramid Lake, rather than selling the stored water for municipal and industrial uses. The Ninth Circuit held that "the ESA supports the Secretary's decision to give priority to the fish until such time as they no longer need ESA's protection."⁹⁹ Given the growing number of aquatic species that are being listed throughout the West, the ESA will

⁹³See, e.g., Reclamation Authorization Act of 1975, Title I (reauthorizing the Polecat Bench area of the Pick-Sloan Project), Pub. L. 94-228, 90 Stat. 205.

⁹⁴Other potentially applicable statutes include the Fish and Wildlife Coordination Act (15 USC § 661 et seq.) and the Clean Water Act (33 USC § 1251 et seq.). In addition, the public trust doctrine may affect decisions regarding the allocation of federal water. The public trust doctrine mandates that the state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust resources. While this doctrine has thus far applied only to state allocation of water resources, the doctrine may also apply to water use decisions of the federal government. See generally, Wilkinson, The Public Trust Doctrine in Public Land Law, 14 U.C.D. L. Rev. 269 (1980).

⁹⁵ 16 U.S.C. § 1536(a)(1)-(2), 1532(3).

⁹⁶ 16 USCA § 1533(d), § 1538(a)(1)(B).

⁹⁷ 16 USCA § 1533(f).

⁹⁸ 16 USC § 1636 (a)(2) (1988).

⁹⁹Carson-Truckee Water Conservancy District v. Clark, 741 F.2d 257, 262 (9th Cir. 1984), cert. denied, 470 U.S. 1083 (1985).

increasingly dictate the use of federal water.

The Northwest Power Act¹⁰⁰ affects Reclamation projects which generate hydropower in the Pacific Northwest. The Bureau must operate and manage these projects

consistent with the purposes of this Act and other applicable laws, to adequately protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, affected by such projects or facilities in a manner that provides equitable treatment for such fish and wildlife with the other purposes for which such system and facilities are managed and operated.

16 U.S.C. § 839b(h)(11)(A). Reclamation also must take into account the program adopted by the Northwest Power Planning Council in managing and operating these projects.¹⁰¹

The federal government also has an affirmative responsibility to protect the trust assets of Native Americans.¹⁰² The Bureau, specifically, has a Indian Trust Asset Policy which requires that Reclamation carry out its activities in a manner which protects Indian Trust Assets and avoids adverse impacts.¹⁰³ This trust responsibility may obligate the Bureau to reallocate water instream to protect the aquatic resources Native Americans depend upon for cultural, spiritual, and economic survival.¹⁰⁴ Because the Bureau's Trust Asset Policy is new and untested, however, its effects are uncertain.

The Bureau can expect legal challenges if it attempts to reallocate water from traditional uses to instream uses, but it may defend such actions on several grounds. First, Reclamation

¹⁰⁰The Act's full name is the Pacific Northwest Electric Power Planning and Conservation Act. 16 U.S.C. § 839 *et seq.*

¹⁰¹16 U.S.C. § 839b(h)(11)(A)(ii). The Northwest Power Planning Council published its Strategy for Salmon in October 1992.

¹⁰² Trust assets include, among others: fish, mammals, birds, reptiles and amphibians, insects, plants, water quality and quantity, water rights, fishing sites, access to hunting and gathering areas, and cultural resources. Letter from Confederated Tribes of the Umatilla Indian Reservation to Rusty Schuster, Bureau of Reclamation on Reclamation Reform Act Environmental Impact Statement Scoping, February 14, 1994 at page 4.

¹⁰³ U.S. Bureau of Reclamation National Environmental Policy Act (NEPA) Handbook Procedures to Implement Indian Trust Asset Policy, November 29, 1993.

¹⁰⁴Federal courts recognized the Bureau's tribal trust responsibility in the dispute over water from the Stampede Reservoir. Carson-Truckee Water Conservancy District v. Watt, 549 F. Supp. 704, 712-13 (D. Nev. 1982); Carson-Truckee Water Conservancy District v. Clark, 741 F.2d 257, 260 n. 1 (9th Cir. 1984), *cert. denied*, 470 U.S. 1083 (1985).

has the power to fix the terms for the use of project water¹⁰⁵, as well as "wide discretion . . . over water management under the 1902 Reclamation Act."¹⁰⁶ Second, most Bureau contracts specifically provide that the U.S. will be held harmless for any water shortage arising from "prior or superior claims" or "other causes,"¹⁰⁷ and this contract language may insulate the Bureau where it reallocates water instream to satisfy ESA requirements or other legal mandates. Third, the federal government—even where it has entered into a contract—retains its sovereign power "unless surrendered in unmistakable terms," and federal contracts must be construed so as to avoid foreclosing the exercise of sovereign authority.¹⁰⁸

State law may inhibit Bureau efforts to reallocate water for instream uses. Bureau projects must have state water rights,¹⁰⁹ and these rights limit the purposes for which water may be stored and used. At present, few projects can be expected to have the water rights needed to provide water instream. Reclamation will generally need to seek state approval to store and release water for instream purposes,¹¹⁰ which could pose a major obstacle in many Western states.

Even if the Bureau succeeds in reallocating spread water, it still must provide legal protection for that water against out-of-stream diversions. However, state laws may inhibit protection of federal water for instream uses.

D. Can the Bureau legally protect instream flows once they are so designated?

State laws governing the establishment and protection of instream flows may pose the greatest barrier to the Bureau. With few exceptions, state law governs the distribution and allocation of water resources, including the protection of instream flows. The Bureau must comply with both the form and substance of state water law unless it conflicts with

¹⁰⁵Israel v. Morton, 549 F.2d 128, 132-33 (9th Cir. 1977). See also, Kittitas Reclamation District v. Sunnyside Valey Irrigation District, 626 F.2d 95 (9th Cir. 1980).

¹⁰⁶Westlands Water District v. U.S. Department of the Interior, 805 F. Supp. 1503, 1507 (E.D. Cal. 1992). The court based this statement on 43 U.S.C. § 373, which gives the Secretary power to "perform any and all acts" necessary and proper for carrying out Reclamation law.

¹⁰⁷See, e.g., Repayment contract of the Arnold Irrigation District, Deschutes Project, Oregon, paragraph 22 (1948).

¹⁰⁸Peterson v. U.S. Department of the Interior, 899 F.2d at 807, and cases cited therein; Madera Irrigation District v. Hancock, 985 F.2d 1397, 1401 (9th Cir. 1993).

¹⁰⁹California v. United States, 438 U.S. 645 (1978).

¹¹⁰Some Ninth Circuit cases, however, have questioned whether Reclamation needs to comply with state laws governing dam operations—"the opening of dam gates for the release of water"—as opposed to laws relating to the impoundment and distribution of water. NRDC v. Patterson, 791 F. Supp. 1425, 1433 (E.D. Cal. 1992), citing U.S. v. California Water Resources Control Board, 694 F.2d 1171 (9th Cir. 1982).

Congressional directives.¹¹¹ State laws generally take a restrictive view of the purposes for which instream flows may be established.¹¹² Thus, state laws may limit the Bureau's ability to make water available instream.

The federal government has been granted an instream flow water right not associated with a diversion of water in only three states--Nevada, Arizona, and Alaska.¹¹³ In most or all Western states, the state government plays the key role in establishing and protecting instream rights.¹¹⁴ Thus, while the Bureau may be able to use federal water to establish instream flows, state cooperation may be crucial.

Here again, the ESA could mandate instream flows which state law might not otherwise provide. The ESA has been held to require limits on water withdrawals to protect listed species, even in the absence of state agency action.¹¹⁵ Moreover, while the Act calls for federal cooperation with state and local water resource agencies to resolve endangered species concerns, the ESA does not give way to state water rights.¹¹⁶ Thus, where listed species need water to survive, the ESA may mandate reallocation and protection of federal water for instream purposes despite limiting provisions of federal and state law.

In sum, it seems that new regulations may be the Bureau's best choice in responding to water spreading. They could clarify the Bureau's authority and its process for halting deliveries to unauthorized lands, for gaining control of illegally used water, and for reallocating and protecting water for instream uses. Such regulations would provide opportunities for public involvement in both the formulation and implementation of the Bureau's water spreading policy. In addition, regulations would ensure a measure of consistency in the Bureau's response to a Westwide problem. While regulations might not resolve every water spreading issue--particularly those involving state law--they could go a long way towards answering a number of unsettled legal questions.

¹¹¹California v. United States, 438 U.S. 645 (1978).

¹¹² Lawrence J. MacDonnell, Teresa A. Rice, The Federal Role in In-Place Water Protection in Instream Flow Protection in the West, Natural Resources Law Center, University of Colorado School of Law (1993) at 5-17.

¹¹³ Id. at 5-17.

¹¹⁴ Id. at 1-4 to 1-7.

¹¹⁵Sierra Club v. Interior Department, 36 E.R.C. 1533 (W.D. Tex. 1993). The court ordered the State of Texas and the Interior Department to take action to protect listed species jeopardized by water withdrawals from the Edwards Aquifer.

¹¹⁶ See generally, Michael C. Blumm, Unconventional Waters: The Quiet Revolution in Federal and Tribal Minimum Streamflows, 19 Ecology Law Quarterly 445, 465-466 (1992); citing United States v. Glenn-Colusa Irrigation Dist., 788 F.Supp. 1126, 1134 (E.D. Cal 1992) (§ 1531(c)(2)) "does not require, however, that state water rights should prevail over the restrictions set forth in the [ESA]. Such an interpretation would render the [ESA] a nullity."

III. RESPONDING TO WATER SPREADING--POLICY CONSIDERATIONS

A. Alternative approaches to water spreading

Even if Reclamation had unfettered discretion in addressing water spreading, it nonetheless would face difficult policy choices. The Bureau must balance the competing interests of several constituencies in seeking water spreading solutions. Reclamation's traditional clientele, irrigated agriculture, would like to resolve legal problems in a way that preserves the status quo as much as possible.¹¹⁷ U.S. taxpayers--a constituency that the Bureau has long ignored--would benefit from increased payments to the Treasury by those who have spread project water. Tribes and environmentalists now have the Bureau's ear for the first time, and they seek reallocation of illegally used water for instream purposes.¹¹⁸

If Reclamation were to cut off all existing deliveries of water to unauthorized lands, but take no further action, none of these interests would be satisfied. Irrigated acreage would shrink, no additional revenue would flow to the Treasury, and environmental benefits would be uncertain. This option might meet legal requirements, but it would produce few winners.

For this reason, environmentalists have argued for an approach which would allow water spreading to be legalized under certain conditions, but would also provide for instream flows and for greater payments to the Treasury.¹¹⁹ Such an approach would face several obstacles, but it could provide benefits for many parties interested in water spreading.

WaterWatch of Oregon, one of the environmental groups represented on the Water Spreading Task Force,¹²⁰ has suggested that Reclamation address water spreading under the following principles:¹²¹

A. *Water spreading is illegal and cannot continue.* Reclamation must determine where ineligible lands are receiving water under federal contracts. It then must notify all water spreaders that the practice is illegal and that they must cease deliveries to ineligible lands by a

¹¹⁷See "The Issue of Water Spreading--Prepared by Agricultural Representatives of the Water Spreading Task Force," delivered at a meeting of the Task Force in Portland, Oregon, May 25, 1994.

¹¹⁸See Confederated Tribes of the Umatilla Indian Reservation Water Spreading Policy, March 2, 1994; Idaho Rivers United Position Paper on Bureau of Reclamation Water Spreading, May 16, 1994.

¹¹⁹See Memorandum from WaterWatch of Oregon to Walt Fite, Bureau of Reclamation, May 16, 1994; "Waterspreading - Tentative Framework for Solutions," American Rivers Northwest Regional Office. Both documents were delivered at a meeting of the Water Spreading Task Force in Portland, Oregon, May 25, 1994.

¹²⁰See above, "What has Reclamation done about water spreading?"

¹²¹Memorandum from WaterWatch of Oregon to Walt Fite, Bureau of Reclamation, May 16, 1994.

date certain unless the Bureau approves these lands for irrigation. Reclamation must receive a formal expansion request before it can consider approving new lands for irrigation. The Bureau should also impose controls, such as periodic contract audits, to prevent future water spreading.

B. Reclamation must assess environmental impacts before approving new lands for irrigation. Reclamation must comply with NEPA in considering expansion requests, and must seek input from all affected interests and meet all requirements for public notice and participation. All expansion requests require at least an Environmental Assessment, and major requests (those exceeding a few thousand acres) will need a full Environmental Impact Statement. The entity requesting expansion must provide all funding for the necessary environmental studies. No request in a river basin may be approved until Reclamation has considered the cumulative impacts of water spreading in that basin.

C. Reclamation must determine the amount of historic illegal water use. Reclamation must determine the amount of water which has been diverted annually for application on ineligible lands. That quantity of water may no longer be diverted under the Reclamation contract, even for use on eligible lands. Thus, a person who violated a Reclamation contract by water spreading loses his right to take as much water as he illegally applied.

D. Reclamation should reallocate illegally used water to benefit the public. Reclamation should reallocate illegally used water where it has authority to do so. Where flows are insufficient to support public values in a natural waterway, Reclamation should reallocate illegally used water diverted from that waterway to the extent necessary to provide sufficient streamflows. Public values include fish and wildlife (including threatened and endangered species) habitat, water quality and recreation. Reclamation must take all actions necessary under federal and state law to ensure that water reallocated for public values is legally protected instream. Illegally used water may be reallocated for out-of-stream uses only if legally protected instream flows are sufficient to support public values. In reallocating water among competing out-of-stream uses, Reclamation should maximize public benefits.

E. Reclamation may approve new lands for irrigation under certain conditions. Reclamation may approve requests to irrigate new lands under a contract, but total diversions under the amended contract must not exceed historic diversions for use on eligible lands. In addition, any adverse environmental impacts of a change must be fully mitigated. Reclamation should condition approvals on the implementation of specific water conservation measures by the requesting person. Reclamation must adjust repayment obligations to reflect the irrigation of new lands. Finally, water may be applied only to lands with state-law water rights.

B. Specific policy issues relating to water spreading

Even after Reclamation decides on a general approach to water spreading, it will need to resolve a large number of policy issues. A detailed discussion of these issues is beyond the scope of this article. The following list, however, should give the reader some idea of the variety and difficulty of the policy questions the Bureau must answer.

- *Should Reclamation seek damages or other compensation from districts that choose simply to stop illegal deliveries rather than pursuing boundary expansion?* An irrigation district which has delivered water to unauthorized lands may opt to terminate such

deliveries rather than seek Bureau approval to irrigate those lands. The Bureau has established a process for dealing with a boundary expansion requests¹²², but has not yet said what it will do regarding past water spreading by a district that has come into compliance with its contract. If Reclamation chooses to ignore past water spreading while creating significant disincentives for districts to seek approval of service to previously unauthorized lands,¹²³ it could encourage districts to terminate service to unauthorized lands and increase the likelihood that formerly irrigated lands will lose their water supply.

- *Should Reclamation allow interim water deliveries to ineligible lands while it considers a request to approve irrigation on those lands?* This issue has created controversy in Oregon's Umatilla River Basin, where four irrigation districts requested approval for boundary expansion in 1993 (see above). As of this writing, the question is unresolved.
- *Should Reclamation consider extenuating circumstances, such as past statements by Bureau officials purporting to condone delivery of water to ineligible lands, in responding to individual cases of water spreading?* Many irrigators claim to have applied water to ineligible lands after relying on the assurances of Bureau officials. While these assurances are not likely to be legally binding, they may affect Reclamation's treatment of individual water spreaders.
- *If Reclamation has discretion to reallocate illegally used water to different uses or users, what criteria should it use in deciding whether and how to reallocate?* Reclamation must consider a variety of legal, environmental and economic factors in determining the disposition of illegally used water. It also must decide whether certain types of water spreading—such as those which violate only the land classification requirement—should be treated differently from the others.
- *If federal or state law prevents federal water from being legally protected instream, can streamflows be restored in other ways?* As explained above, the laws of many Western states may prevent the Bureau from acquiring instream flow rights. If state governments and other interested parties are interested in cooperating, however, creative solutions should be feasible.
- *What should be done to mitigate the economic impacts of stopping water spreading?* Irrigators and local communities are concerned about the economic effects of terminating irrigation of ineligible lands. Reclamation should consider whether its response to water spreading can be "phased in", thereby reducing some economic dislocation.

¹²²Bureau of Reclamation, Pacific Northwest Region, Guidelines for Processing Requests for Inclusions, Exclusions, Water Transfers and Related Actions, March 15, 1993.

¹²³Districts may be discouraged by the cost of environmental reviews required by NEPA, and by the prospect of having their existing contracts revised. Such contract revisions might allow irrigation of formerly unauthorized lands, but increase repayment obligations for all district lands.

- *What types of measures should be required to mitigate the environmental impacts of approving an expansion request?* If Reclamation approves water users' requests to approve ineligible lands for irrigation, it should ensure that these approvals do not further impair streamflows. In the Umatilla Basin, all the interested parties agreed that the Bureau would "approve no boundary expansion that would cause a net adverse effect on flows needed for the [Umatilla River salmonid] fishery."¹²⁴
- *What repayment obligations should apply to past water spreading and future boundary expansions?* The Bureau has recognized that it loses money when water is applied to unauthorized lands. If Reclamation approves a district's request to serve those lands, it may seek increased payments from that district, even for the irrigation of lands which have always been authorized. In addition, Reclamation may choose to pursue back payments for past illegal water use.

CONCLUSION

The Bureau of Reclamation is finally turning its attention to the long-neglected issue of water spreading, but it faces a daunting task. Reclamation lacks good information on where, and how much, water spreading is occurring throughout the West. In addition, the Bureau's authority to stop existing water spreading, to take control of illegally used water, and to reallocate and protect that water instream is not as clear as it should be. Finally, the Bureau must resolve many difficult policy issues if its approach to water spreading is to succeed.

The Bureau's response to water spreading has major implications for all users of Western water, and for Reclamation itself. The modern Bureau is struggling to adopt a more balanced approach to water resources, and has stated that it "will facilitate changes from current to new uses of water in accordance with state law when such changes increase benefits to society and the environment."¹²⁵ In addressing water spreading, Reclamation can attempt to preserve the status quo and protect its traditional constituencies. On the other hand, the Bureau may seek to provide more water for instream uses and greater returns for taxpayers. The choices it makes will indicate whether the Bureau is ready to manage the waters of the West in the public interest.

¹²⁴Memorandum of Agreement (Bureau of Reclamation), paragraph 3, February 27, 1992.

¹²⁵This statement is the first "organizational principle" listed in the "Blueprint for Reform," U.S. Bureau of Reclamation, November 1, 1993, p. 1.

EAST COLUMBIA BASIN IRRIGATION DISTRICT

55 North 8th
P.O. Box E

OTHELLO, WASHINGTON 99344

Phone 509 488 9671
Fax 509 488 6433

June 7, 1994

The Honorable George Miller, Chairman
House Natural Resources Committee
United States House of Representatives
Washington, D.C. 20515

Attn: Mr. Steve Lanich
FAX (202) 225-3509

Dear Mr. Chairman:

It is our understanding that your Committee will be holding a hearing on the issue of water spreading on federal reclamation projects on July 19, 1994. The three Columbia Basin Irrigation Districts - East, South and Quincy request the opportunity to speak at this hearing.

The majority of the information we wish to present to your Committee relates to the incidental irrigation of class 6, right-of-way and other unclassified lands within established farm unit, development block and district boundaries within the Columbia Basin Project. This is a complicated issue and can't adequately be explained in a letter but it can be generally stated that most of this incidental irrigation has resulted from improved technology and management of both on-farm irrigation systems and Project conveyance facilities. Because of this modernization, the geometry of pre-project land classification maps and farm unit layouts often doesn't fit present conditions. This situation is not unique to the Columbia Basin Project.

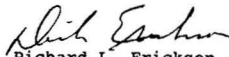
Many of the water spreading solutions being proposed by USBR and other interest groups include requirements to return to those original farm layouts. The incidental irrigation of these lands has not changed the conditions that caused their original inferior classification but to now ban such irrigation may eliminate the use of modern irrigation technology such as center pivot sprinklers on many Columbia Basin farms and could set back already achieved water conservation improvements.

The Honorable George Miller
June 7, 1994
Page Two

We think this information would be valuable to your Committee's study of the water spreading issue. If granted the opportunity to speak, we'd appreciate a 10-15 minute time period, if possible, because the information is best presented using a few maps and aerial photos. We'd also like the opportunity for all three districts to share in this presentation. The presentation will also include some graphical and statistical data demonstrating the water conservation benefits being achieved because of this modernization.

Thank you for your consideration.

Sincerely,


Richard L. Erickson
Secretary-Manager

RLE:rp

cc: Pat Ormsby - Speaker Foley's Office



Westlands Water District

3130 North Fresno Street, P.O. Box 8058, Fresno, California 93703-8058, (209) 224-1523, FAX: (209) 224-1580

MEMORANDUM

TO: Fred Hatfield

DATE: June 29, 1994

FROM: James Ganulin, General Counsel Assistant General Manager

SUBJECT: Lands Within Westlands Water District Outside the State Permitted Place of Use

This is to follow up on our discussion with respect to, and your request for additional information concerning, the 47,000 acres of land within Westlands Water District which are a portion of the lands subject to a pending State Water Resources Control Board (SWRCB) place of use permit request. Hopefully, this will clarify the situation for you, as well as others who may be interested.

At the outset, it is important to distinguish between the authorized service area under federal Reclamation law and the place of use permitted under state law. With respect to the authorized service area of the Central Valley Project (CVP) under federal law, the Barcellos Judgment (Barcellos and Wolfson, Inc., et al., vs. Westlands Water District, et al., and Westlands Water District, et al., vs. United States of America, et al., (Nos. CV-79-106-EDP and CV-F-81-245-EDP, respectively, in the United States District Court of the Eastern District of California) states that all of Westlands Water District is within the authorized service area of the CVP. (Attached is a copy of relevant portions of the Judgment with respect to that issue.) The Bureau of Reclamation's delivery of water to this area prior to and after the Judgment indicates its understanding that those lands are within the authorized service area. This is consistent with the Interior Solicitor's Opinion No. M-36901 (Supp. 1), dated June 17, 1986, which concludes that the matter of the overall size of the federal San Luis Unit service area (including Westlands) did not involve a purely legal question; rather the Congress accorded reasonable administrative discretion to the Secretary of the Interior with regard to this issue. Accordingly, the Solicitor rescinded a contrary 1978 opinion.

Board of Directors: C.A. Dingle *President* • Kendall W. Gardner *Vice President* • Ross Borba, Jr. • Frank Coelho, Jr.
Donald Devine • Daniel D. Errotabere • Thomas R. Hurlbutt • James F. Schmiederer • Louis B. Souza • General Manager: Jerald R. Butcher

Memo to Fred Hatfield from JG
Page 2
June 29, 1994

Turning to the issue of the place of use permitted by the SWRCB, Bureau representatives have indicated that for many years the Department of the Interior had concluded that compliance with the place of use requirements of the applicable state law was not required because the federal law with respect to the authorized place of use was controlling. However, in 1978, in California vs. United States, 438 U.S. 645 (1978), the United States Supreme Court, in a case dealing with the New Melones unit of the CVP, stated that the SWRCB could impose terms and conditions on water rights permits issued to the United States, so long as those terms and conditions were not inconsistent with the Congressional authorization of the CVP. The Bureau of Reclamation ultimately concluded that under Section 8 of the Reclamation Act of 1902 concerning the United States' conformity with state law pertaining to the control, appropriation, use, or distribution of water, it should ask the SWRCB to conform its permitted place of use for the CVP to the federally authorized service area, particularly those areas, such as the 47,000 acres of land within Westlands, which have historically received water from the Project.

In 1985 the Bureau of Reclamation filed an Application for Consolidated/Expanded Place of Use with the SWRCB. The Application requests that the CVP permits be revised to include within the place of use those areas of the Project within the authorized service area under federal law. Parenthically, it should be noted that this application covers numerous blocks of land totalling about 310,000 acres throughout the CVP which is within the federally authorized service area of the CVP, but is technically outside of the authorized place of use under state law. The 47,000 acres within Westlands is a part of that total acreage.

It is my understanding that because of concerns with respect to the scope of the environmental documentation required for approval of the Application and funding questions, it took a few years to get the environmental review process off the ground, so to speak. However, I now understand that the engineering and environmental consulting firm of CH2M Hill, which is doing the environmental documentation for the Bureau of Reclamation, but under the direction of the SWRCB, should have the environmental work completed by the end of this year.

I've been advised that it is the Bureau of Reclamation's intent to resolve this issue as soon as practicable so that the permitted place of use under state law is compatible with the authorized service

Memo to Fred Hatfield from JG
Page 3
June 29, 1994

area under federal law. It is my understanding that the expectation is that when the environmental documentation is complete and the State Board reviews the matter it will, in all likelihood, approve the expansion of the Application for Consolidated/Expanded Place of Use to include those districts currently served by the CVP. This, by definition, would include all of Westlands.

Should you or others with whom you discuss this matter desire further information concerning the SWRCB issue, please do not hesitate to call John Renning, (916) 978-5246, or John Budd, (916) 978-4919, of the Bureau of Reclamation's Sacramento Office, or me.

Attachment

cc: John Budd (w/attachment)
John Renning (w/attachment)

0943L

ENTERED

DEC 30 1986

CLERK, U. S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BY _____ DEPUTY CLERK

JAN 1 1987
FILED
CLERK, U. S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIAUNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

10 BARCELLOS AND WOLFSEN, INC., et) No. CV 79-106-EDP
11 al.,)

12 Plaintiffs,)

JUDGMENT

13 v.)

14 WESTLANDS WATER DISTRICT, et)
15 al.,)

16 Defendants.)

17 WESTLANDS WATER DISTRICT,)

18 Counterclaimant and)
19 Cross-Claimant,)

20 v.)

21 BARCELLOS AND WOLFSEN, INC., et)
22 al.,)23 Counterclaim and)
24 Cross-Claim)
25 Defendants.)26 BARCELLOS AND WOLFSEN, INC., et)
27 al.,)28 Counterclaimants and)
Cross-Claimants,)

v.)

...and successors, and each other party to the extent
 2 such party owns, or uses water on, land in Area 2B;

3 1.5. "1939 Act": The Reclamation Project Act of August
 4 4, 1939, 53 Stat. 1187;

5 1.6. "1960 Act": The Act of June 3, 1960, 74 Stat.
 6 156, authorizing the San Luis Unit of the Central Valley Project,
 7 as supplemented by the Act of June 15, 1977, 91 Stat. 225;

8 1.7. "1963 Contract": Contract number 14-06-200-495,
 9 dated June 5, 1963, entered into between the United States and
 10 the Original Westlands District, as supplemented by a memorandum
 11 dated February 15, 1979, both of which are attached hereto as
 12 Exhibit A;

13 1.8. "1965 Contract": Contract number 14-06-200-2020A,
 14 dated April 1, 1965, entered into between the United States and
 15 the Original Westlands District, attached hereto as Exhibit B;

16 1.9. "1982 Act": The Reclamation Reform Act of October
 17 12, 1982, 96 Stat. 1261;

18 1.10. "Area 1A": The area of the Original Westlands
 19 District within the proposed initial service area of the San Luis
 20 Unit of the Central Valley Project, as depicted on Plate 1 in the
 21 report of the U.S. Bureau of Reclamation entitled "A Report on
 22 the Feasibility of Water Supply Development, San Luis Unit,
 23 Central Valley Project, California," dated May 1955, and trans-
 24 mitted to the Congress on December 17, 1956;

25 1.11. "Area 1B": The area of the Original Westlands
 26 District outside said proposed initial service area;

27 1.12. "Area 2A": The area of the Former Westplains
 28 District within said proposed initial service area;

WESTLANDS WATER DIST 2032241560
The area of the Former Westplains

District outside said proposed initial service area;

1.14. "Area I": All the lands in the Original
Westlands District;

1.15. "Area II": All the lands in the Former
Westplains District;

1.16. "Bookkeeping Account Period": The period of
time covering June 30 through December 31, 1978, all of the years
1979, 1982, 1983, 1984, 1985, 1986 and the year 1987 through the
end of the month in which this Judgment is entered;

1.17. "Cost Effective": In connection with Drainage
Service Facilities, has reasonable costs in relation to the
quantity of subsurface agricultural drainage water transported,
treated or disposed of thereby; and, in connection with Drainage
Reduction Programs, has reasonable costs in relation to the
quantity of subsurface agricultural drainage water reduced
thereby;

1.18. "Costs of Construction": Costs of design,
preparation of plans and specifications, acquisition of real and
personal property, and actual construction, excluding administra-
tive, indirect and overhead costs;

1.19. "Discretionary Provisions of 1982 Act": Sections
203-208 of the 1982 Act;

1.20. "District": The Westlands Water District;

1.21. "Drain": The work which is referred to as the
"San Luis interceptor drain" in Section 1 of the 1960 Act and
defined as the "interceptor drain" in Article 1(d) of the 1963
Contract and which between March 13, 1968, and February 4, 1975,

1 payment obligations. The amount collected shall be deposited
2 into and become part of the Overpayment Refund Account estab-
3 lished by Paragraph 8.4 above.

4 9.6. The net credits in the water users' bookkeeping
5 accounts shall be refunded as provided in Paragraphs 9.6.1
6 through 9.6.3 below.

7 9.6.1. The total amount of money released to the
8 District from the Existing Trust Fund under Paragraph 8.1 above,
9 less the amount paid for court costs and attorneys' fees and
10 expenses as provided in Paragraph 19 below, shall be apportioned
11 among and paid to all the water users having net credits in
12 proportion to their net credits.

13 9.6.2. When the required money has been deposited
14 in the Overpayment Refund Account under Paragraphs 8.4 and 9.5
15 above, the money therein shall be apportioned among and paid by
16 the District as soon as practicable to all the water users having
17 net credits in proportion to their net credits. Upon such
18 payments being completed, said net credits shall be deemed fully
19 refunded.

20 9.6.3. If the District is unable to locate a
21 particular water user to refund the net credit to which such
22 water user is entitled, the amount due such water user shall be
23 used as determined by the District.

24
25 10. Service Area - Area 1B and 2B Rights.
26

27 10.1. Area 1B, in addition to Area 1A, is within the
28 authorized service area of the Central Valley Project, including

1 the San Luis Unit and Delta Mendota Canal, and is entitled to the
2 same water supply and the same rights pertaining thereto as Area
3 1A.

4 10.2. Area 2B, in addition to Area 2A, is within the
5 authorized service area of the Central Valley Project, including
6 the San Luis Unit and Delta Mendota Canal, and is entitled to the
7 same water supply and the same rights pertaining thereto as Area
8 2A.

9 10.3. Areas adjacent to Area 1B or Area 2B which in the
10 past have been annexed to the District with the consent of the
11 United States are within the authorized service area of the
12 Central Valley Project, including the San Luis Unit and Delta
13 Mendota Canal.

14
15 11. Improvement Districts and Future Contracts.
16

17 11.1. The District shall initiate proceedings to form
18 an improvement district encompassing all of Area 2A and Area 2B
19 plus lands annexed to the District after June 29, 1965, for the
20 purpose, among other things, of contracting with the United
21 States for water service to serve solely the lands therein. The
22 District also may initiate proceedings to form one or more
23 improvement districts encompassing all or certain portions of the
24 same territory described in the preceding sentence for the
25 purpose, among other things, of contracting with the United
26 States for construction of water distribution facilities or
27 collector drainage facilities to serve the lands therein.
28



July 12, 1994

Mr. Walt Fite
Bureau of Reclamation
Pacific Northwest Region
1150 North Curtis Road
Boise, Idaho 83706-1234

Re: June 24, 1994, Draft Bureau of Reclamation Water Spreading Policy

Dear Mr. Fite:

A Columbia Basin Fish and Wildlife Authority (CBFWA) representative has attended all of the Water Spreading Task Force meetings that have been held in Portland, Oregon. CBFWA is a regional association of the Columbia Basin's Fish and Wildlife managers, comprising two federal and four state agencies and twelve Indian tribes. This organization enables the agencies and tribes to work in concert with the Northwest Power Planning Council (Council) to attain restoration of fish and wildlife resources in the Columbia Basin. CBFWA will brief each of its Members and coordinate with the Council and the Pacific Fisheries Management Council-Habitat Committee on the water spreading issue.

The Bureau of Reclamation (Bureau) has had exclusive authority over obscure matters such as district contracts, project boundaries, land classification, and authorized uses of Bureau project water. While the Bureau even seems uncertain of the magnitude of the problem, fisheries managers have been left completely out of the loop on day to day management decisions in this area. The impact of water spreading, which began long before a National Environmental Policy Act analysis was required, has been cumulative and there has been little political motivation to solve the problem. From our position of not having examined Bureau records to compare to actual irrigation on the ground, it is difficult to draw conclusions. However, low flow problems and the resulting impacts of extensive irrigation diversion are well known and occur in many drainages. If the Bureau's Umatilla Project is typical of other projects the problem is quite serious.

At the June 29, 1994, Task Force meeting, the Bureau introduced a draft policy to address the problem of water spreading. This sixth meeting, which began to address solutions, was very productive. In general, we agree with the changes recommended by the Indian tribal and environmental group Task Force members, of which you have a record. However, we wish to reiterate a few points.

2501 S.W. First Avenue
Suite 200
Portland, Oregon 97201

PHONE 503 / 326-7031
FAX 503 / 326-7033
BBS 503 / 326-7792

COORDINATING AND PROMOTING EFFECTIVE PROTECTION AND RESTORATION
OF FISH, WILDLIFE AND THEIR HABITAT IN THE COLUMBIA RIVER BASIN

1. We are concerned that the Bureau may not be meeting the Federal government's obligations to consult with each of the Northwest Indian tribes potentially affected by water spreading. There are nine Indian tribes in the Columbia River Basin, other than the Yakama, Shoshone-Bannock, and Umatilla, which are on the Task Force. Not only may the "resolution of water spreading" affect Indian Trust Assets (ITAs) and treaty rights, the act of water spreading has affected ITAs.
2. The draft policy is open to criticism because it does not explain the environmental and economic consequences of water spreading, such as reduced instream flows, and impacted fisheries, water quality, Bureau project payment, etc. For example, in the Umatilla Basin, several flow enhancement and fisheries restoration projects are being implemented at great cost to tax-payers and electric utility rate-payers to ameliorate adverse conditions as a result of irrigation withdrawals. The irrigation community attending the Task Force meetings clearly do not understand the magnitude of the problem or the connection between water spreading and adverse impacts to other sectors of the economy.

The draft policy needs to clearly articulate that water has become an increasingly scarce commodity in the arid west and that the irrigation community is not the Bureau's only constituent. "(W)e must find the balance between competing water uses that will maintain healthy aquatic ecosystems while meeting the needs of increased water demand."¹ The Bureau's policy should state that water currently unauthorized would be reallocated to maximize public benefit. The policy should address the Federal responsibility to protect and restore instream flows and to sustain tribal treaty rights, water quality, and ecosystem health.


3. As pointed out by all members of the Task Force, the draft policy needs considerable reorganization and was too vague on many issues. A time table should articulate the length of time that would be allowed for implementation of the inventory, permanent resolution, and cost recovery phases. Additionally, penalties for delay of the time table should be described. Districts or individual water users should not continue to benefit from water spreading, by being uncooperative. Resolution of this matter in the least bureaucratic and protracted manner would be to everyone's advantage. However, we do not envision implementation of the policy as simply an opportunity to remap, and update records to reflect unrecorded transfers, etc. We agree with section 5 of the draft; the resolution of water spreading cases must be subject to the National Environmental Policy Act, Clean Water Act, Endangered Species Act, Fish and Wildlife Coordination Act, etc.

¹Beard, D.P. 1994. Bureau of Reclamation revamps efforts to help fish. Fisheries, 19(7): 6-7.

4. The Bureau clearly has the authority to enforce its current contracts with water users, to assess appropriate project payments, and to implement a water spreading policy. While it may not always be appropriate to capture costs, we believe that the proposed statement (section 6, paragraph 2): "There will not be any attempt to retroactively capture costs of illegal water spreading known to occur prior to implementation of this policy." is too broad. We recommend that all currently known cases involving water spreading be aggressively pursued and that appropriate costs be assigned accordingly.
5. The "Incidental Application of Water" section (4), needs to be moved to the resolution section. "Incidental" needs to be more clearly defined.
6. The Columbia River and its tributaries support important commercial, recreational, and tribal fisheries in several states. Bureau contracts have a profound effect on mitigation efforts to restore fish populations throughout the Basin. We believe that the Bureau would benefit from holding public hearings in areas where communities and individuals are directly affected by fisheries impacted as a result of the unauthorized use of Bureau water. We recommend that public hearings on the water spreading issue be held on Indian reservations and at locations convenient for coastal communities.
7. We recommend that there be tribal and fishery resource agency oversight at all phases of Bureau water spreading policy implementation.

We look forward to providing further comments as the Bureau's water spreading policy is developed. Questions concerning our comments should be directed to Clayton Hawkes, of my staff, at (503) 326-7031.

Sincerely,



John R. Donaldson, Ph.D.
Executive Director

cc: CBFWA Members & AHHWG
John Marsh, NPPC
Stephen Phillips, PSMFC
Barbara Scott-Brier, DOI Regional Solicitor's Office
Duane Mecham, Washington Solicitor's Office

f:\w\tpbc\ahhwg\water.spd



WASHINGTON STATE DEPARTMENT OF
Natural Resources

JENNIFER M. BELCHER
Commissioner of Public Lands
KALEEN COTTINGHAM
Supervisor

July 15, 1994

Mr. Walt Fite, Assistant Director, Technical Services
Pacific Northwest Region
Bureau of Reclamation
1150 North Curtis Road
Boise, Idaho 83706-1234

RE: WATER SPREADING TASK FORCE ISSUES

Dear Mr. Fite:

Russ Lehman provided the Water Spreading Task Force members with a state of Washington position paper, dated May 23, 1994, which summarizes a regulatory perspective. I, as Supervisor of the state's Department of Natural Resources (DNR), want to furnish additional comments.

DNR's responsibility includes the management of the federal endowment of trust lands that were granted at the time of statehood. The trust portfolio includes some 10,900 acres of irrigated farm land whose water is provided by the Bureau of Reclamation.

Private farmers lease these lands from DNR, which are among the most productive and valuable agricultural lands within the state.

Of this acreage, approximately 500 acres potentially fall into the second category listed in the draft Water Spreading Policy document dated 7/24/94. These acres are on Class VI soils. As you know, this classification system is antiquated and does not match current irrigation technology.

Additionally, about 6,300 acres (of the 10,900) are irrigated by various special water delivery contracts. These acres are being farmed by private individuals because representations were made that irrigation water could be used on these lands.

These acres all have state water rights; are being used for orchard, vineyard, and row crop production; and represent about \$20 million in leasehold interest value.

I am not suggesting that the environment be compromised for the sake of commodity production. On the contrary, DNR leads the nation in many aspects of ecosystem management. This is a result of our strong commitment to including intrinsic environmental values in our management decisions.

Mr. Walt Fite
July 5, 1994
Page 2

As you are probably aware, one of the water issues our state is wrestling with is irrigation induced artificial wetlands. As irrigation district delivery systems are retro-fitted with liners and covers, and as technology improvements permit highly efficient water usage, some of the state's most valuable wetlands are drying up. Balancing in-stream habitat needs with artificial wetland habitat needs is an ongoing policy issue for us.

DNR is very supportive of federal policy that terminates water pirating. Also, delivery to lands outside of established district boundaries, as well as delivery to acres not possessing a state water right should be halted.

Given the small percentage of the project's overall water allotment that incidental usage (Class VI lands and special delivery contracts) represents, the marginal benefits that would seemingly accrue to in-stream habitat by discontinuing the irrigation of these lands, and the relative large economic impact to the agricultural industry, DNR requests that these acres be grandfathered into formal legitimacy, so long as a district has not exceeded its acre-feet allotment.

One of the reasons, afterall, that we are able to have this discussion is because conservation measures and new technology have created a component of the acre-feet allotment that is above what was anticipated to be needed for the designated farm units.

These grandfathered acres should begin paying their pro rata share of water charges (beginning now as opposed to attempting to recover past fees), but it seems equitable that this occur at existing rates.

I also submit that any needed inventory costs be borne at least partially by the Bureau of Reclamation. The majority of the irrigated acres under discussion, as you know, are wet because contracts were issued by districts in good faith, believing that the Bureau had approved the usage.

Please contact me if you have any questions regarding this request.

Sincerely,

Kaleen Cottingham
Supervisor

c: Jennifer Belcher, Commissioner of Public Lands
Russ Lehman, Governor's Office



July 29, 1994

Representative George Miller, Chair
Committee on Natural Resources
U.S. House of Representatives
1328 Longworth House Office Building
Washington, D.C. 20515

Re: WATER SPREADING HEARING

Dear Representative Miller:

A Columbia Basin Fish and Wildlife Authority (CBFWA) representative attended many of Bureau of Reclamation's (Bureau) Water Spreading Task Force meetings. CBFWA is a regional association of the Columbia Basin's fish and wildlife managers, comprising two federal and four state agencies and twelve Indian tribes. This organization enables the agencies and tribes to work in concert with the Northwest Power Planning Council to attain restoration of fish and wildlife resources in the Columbia Basin. CBFWA's comments on the Bureau's June 24, 1994, Draft Water Spreading Policy are enclosed.

In the Columbia River Basin, three Snake River salmon species, Snake River spring/summer chinook salmon, Snake River fall chinook salmon and Snake River sockeye salmon are listed under the Endangered Species Act (ESA). The National Marine Fisheries Service (NMFS) has received petitions to list most other salmon and steelhead stocks in the Basin. Additionally, some resident fish and wildlife species are also a growing concern as potential ESA candidate species. Williams *et al.* recognized 25, 6, 5, and 4 native freshwater fish species as endangered, threatened, or of special concern in Oregon, Montana, Idaho, and Washington, respectively¹. Major causes of decline for these fish species include physical habitat loss, habitat degradation, and habitat alteration².

2501 S.W. First Avenue
Suite 200
Portland, Oregon 97201

PHONE 503 / 326-7031
FAX 503 / 326-7033
BBS 503 / 326-7792

COORDINATING AND PROMOTING EFFECTIVE PROTECTION AND RESTORATION
OF FISH, WILDLIFE AND THEIR HABITAT IN THE COLUMBIA RIVER BASIN

The Bureau has had exclusive authority over obscure matters such as district contracts, project boundaries, land classification, and authorized uses of Bureau project water. While the Bureau even seems uncertain of the magnitude of the problem of water spreading, federal, state, and tribal fisheries managers have been left completely uninformed on day to day management decisions in this area. The impact of water spreading, which began long before an National Environmental Policy Act analysis was required, has been cumulative and there has been little political motivation to solve the problem. From our position of not having Bureau records to examine to compare to actual irrigation on the ground, it is difficult to show direct linkages between water spreading and fisheries problems. However, low flow problems and the resulting impacts of extensive irrigation diversion are well known and occur in many drainages where Bureau projects exist. We believe that this information is pertinent to the House Committee on Natural Resources' investigation of the water spreading issue.

Umatilla River Basin

Irrigation, the largest user of surface and ground water in the basin, frequently dewateres the lower 32 miles of the Umatilla River. Cumulative water rights and irrigation demands exceed available streamflow throughout the basin. These depletions contribute to elevated summer river temperatures exceeding the upper lethal temperatures for anadromous salmonids. During the irrigation season, the dewatered reach blocks emigrant juveniles salmon and late arriving adults in the late spring and early arriving adults in the fall. Hatchery produced Umatilla River fall chinook salmon often fail to detect the Umatilla River as they migrate upstream and stray into Snake River spawning areas. Straying of non-indigenous fish stocks may have genetic consequences for Snake River fall chinook salmon, which are listed as threatened pursuant to the ESA³.

Once abundant, several anadromous fish species, including spring chinook, fall chinook, summer steelhead, and coho, were virtually exterminated from the Umatilla River Basin. Northwest electric utility rate-payers and tax-payers are attempting to overcome the effect of depleted stream flow on Umatilla River anadromous fish through an elaborate program of hatchery supplementation, truck and haul around dewatered reaches, and a pumping system to replace Umatilla River water with Columbia River water. Juvenile bypass screens, adult passage facilities and juvenile and adult capturing and hauling facilities to facilitate fish passage past irrigation diversions and seasonally dewatered reaches of the lower mainstem cost many millions to construct and operate.

The Bureau's Umatilla Project is a relatively small Bureau project compared to other projects in the Columbia River Basin. If the Umatilla Project is at all typical of other projects, the magnitude of water spreading is quite serious. A pumping project to exchange 39,000 acre-feet of Columbia River water for Umatilla River water costing \$40+ million⁴ will barely

makeup for the approximately 34,000 acre-feet of unauthorized or illegal water spreading in the basin⁵. In addition to construction costs, power costs are to be provided in perpetuity by Bonneville Power Administration⁶. Low stream flow will continue to be the chief limiting factor to anadromous fish production in the basin despite these recent restoration efforts⁷.

Yakima River Basin

Inadequate stream flow is also a major limiting factor to anadromous fish production in the Yakima River Basin. Instream flows are rarely sufficient anywhere in the basin, and may be catastrophically low for fish production in drought years. With return flows from extensive irrigation comprising up to 80 percent of the summer time flow water quality in the lower reaches is considered fair to poor. Water temperature, nutrient loading, suspended sediments, fecal bacteria, as well as pesticide contamination are problems for fish in the lower Yakima River⁸.

Instream flows in many tributaries are impacted by irrigation withdrawals more severely than the mainstem Yakima River. By late spring, many lower tributary reaches are virtually dewatered. The main river suffers from lack of water primarily after the irrigation season ends, when releases are cut back dramatically to refill the reservoirs. However, instream flows can become critically low on the mainstem even during the irrigation season, especially below diversion dams. Fish passage facilities, supplementation projects, and necessary studies, to ameliorate low flows in the Yakima River Basin have cost electric utility rate payers many millions of dollars⁹. On May 20, 1994, NMFS indicated that it will consider a petition pursuant to the ESA to list steelhead trout in the Columbia River Basin, including Yakima River steelhead trout.

Snake River Basin

The Snake River basin comprises 42 percent of the area of the Columbia River basin, but contributes roughly 20 percent of the annual flow of the Columbia river. The Snake River basin is relatively water-short compared to the rest of the basin, and Snake River flows are more variable. Above Hells Canyon, the current annual flow of the Snake River is roughly 12 million- acre-feet (MAF) and is highly regulated by the numerous storage reservoirs, including American Falls, Minidoka, Palisades, Anderson Ranch, Arrowrock, Island Park, Lucky Peak, Ririe, Owyhee, Cascade, Deadwood, and Brownlee. In the absence of upstream irrigation depletions, the flow at Hells Canyon would be closer to 18 MAF¹⁰.

In the Columbia River Basin, irrigation development is greatest in the Snake River and is the major user of water, with irrigated land increasing to 4.5 million acres (1980) as a result of Bureau irrigation projects¹¹. We suspect that water spreading may be substantial at Bureau projects in the Snake River Basin. Between 1977 and 1987, furrow and border irrigation fell from 92 to 58 percent of acreage and sprinkler irrigation increased from 8 to 42 percent. Conversion to more efficient irrigation techniques and more efficient use of existing techniques led to an estimated improvement in overall efficiency from 27 to 52 percent and a

decline in farm deliveries from 5.86 to 3.19 acre-feet per acre¹². In 1987, an Idaho Department of Water Resources survey determined Upper Snake River Basin irrigator attitudes towards conserved water. With conserved water, nearly all irrigators would prefer to irrigate more land, rent conserved water to some other agricultural user, or save the water for an emergency. Only three percent would prefer to sell water they conserve and no interest was expressed in giving it to non-agricultural use. Additionally, 26 percent of those interviewed believe there were no constraints to their making use of conserved water. Given that the cost of water is very low relative to other inputs used in raising crops (less than 4 cents per acre-foot delivered to the largest Upper Snake River water district in 1975), it is not surprising that irrigators expressed a low interest in selling conserved water¹³.

The upper storage and diversion system fully regulate the river in the driest one-fifth of all years. During dry years little flow passes Milner Dam. Fish and wildlife resources, recreation, and all other water uses are often limited. Flow is insufficient to dilute point and non-point pollution sources on the river during the summer-fall period. River water temperature is elevated and nutrient rich sediments speed the growth of aquatic plants, which further slow water velocity. Pursuant to Section 301 of the Clean Water Act, the Middle-Snake River is water quality limited due to: low flows as a result of irrigation withdrawals, irrigation return flows, and other uses. Therefore, on this reach of the Snake River there is a moratorium on expansion or development of uses, such as municipal, aquaculture, irrigation, hydroelectric power, etc., subject to Total Maximum Daily Load (TMDL) determination¹⁴.

Aquatic species in each Snake River reach are affected by Bureau Snake River storage and irrigation operations. Adequate flows are needed to protect Snake River fall chinook salmon spawning habitat, which are threatened pursuant to the Endangered Species Act (ESA). The current Federal Energy Regulatory Commission license for the Hells Canyon Hydroelectric Project (no. 1971) stipulates minimum flows of not less than 5,000 below Hells Canyon Dam and not less than 13,000 below Lyon's Point downstream of the Salmon River to meet navigation needs. This minimum flow requirement has been shown to be inadequate to meet Snake River fall chinook salmon flow needs¹⁵.

Other juvenile salmon and steelhead produced in the remaining accessible Snake River habitat below Hells Canyon Dam, including Snake River spring/summer chinook salmon and Snake River sockeye salmon, which are listed under the ESA as threatened and endangered, respectively, suffer high rates of mortality trying to migrate downstream past eight Federal dams and reservoirs on the lower Snake and Columbia rivers. A large proportion of the seaward migrating smolts perish in the slow moving water behind these Federal dams, where they lose the urge to migrate and succumb to predators, disease, and high water temperatures¹⁶. The Detailed Fishery Operating Plan¹⁷ recommends the increased use of Brownlee Reservoir to meet juvenile and anadromous fish migration needs. It also recommends that water supplies be found and provided from the middle and upper Snake River between April 15 and September 30.

In addition to anadromous species, many resident species are also at risk because of the Snake River's transformation from primarily free-flowing, cold-water lotic system to a slow moving, intermittently-impounded system, which has resulted in less suitable habitat for native flora and fauna. Under the ESA, the Bliss Rapids snail is listed as threatened. Four other snails are listed as endangered, the Snake River physa, Banbury Springs lanx or limpet, Utah valvata snail, and Idaho springsnail¹⁸. Three additional molluscs and one fish taxon are candidates for ESA-listing (the California floater, Columbia pebblesnail, shortface lanx, and Shoshone sculpin). As a result of substantial habitat loss due to low flows and impoundments, the Shoshone sculpin and white sturgeon are on Idaho's sensitive species list. Idaho Department of Fish and Game has a catch-and-release policy for Snake River sturgeon, allowing no harvest to occur¹⁹.

In the Swan Falls-Brownlee reach instream flows are currently inadequate to protect Deer Flat National Wildlife Refuge island integrity, cottonwoods, and slough habitat. Current minimum flow adversely affects recreational fishing. Low flows increase water temperatures and reduce rearing habitat for all species. White sturgeon spawning area and smallmouth bass habitat are decreased and catfish predation is increased²⁰.

Deschutes River Projects

As a result of irrigation practices, instream flows are often insufficient in several reaches of the upper Deschutes River Basin, including upstream and downstream of Bend, Oregon, and on several tributaries at various times of the year. Streamflows in most of the upper Deschutes River Basin are controlled by the influence of reservoir regulations and irrigation diversions at Bend. Downstream of Bend, water diversions have resulted in extremely low water conditions in the summer and lower than average flows in the winter. Fluctuating flows from Wickiup Reservoir have decimated the trout population by causing massive bank erosion, increasing stream silt loads and thus covering gravel spawning grounds. Water regulation in the upper Deschutes River has been identified as a major factor in the degradation and loss of fish resources and riparian habitat and accelerating bank erosion^{21 22}

Several of the irrigation districts near Bend have become increasingly urbanized, resulting in the conversion of lands from agriculture to municipal, residential, and industrial uses²³. Some districts have largely become ranchettes or hobby farms. It is questionable whether these operations meet the intent of a commercial farm enterprise and, therefore, may be receiving water outside of Bureau contract authorization.

Columbia Basin Project

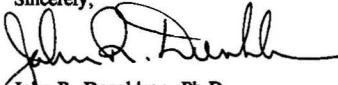
The Inspector General's report on water spreading indicates that the Bureau's Columbia Basin Project (CBP), Washington, delivers water to an estimated 42,000 to 53,000 acres of ineligible land²⁴. The Columbia Basin Institute's (CBI) testimony to the House Committee on Natural Resources illustrates the irrigation community's ability to exploit federal policy. In 1969, the irrigation districts assumed management responsibility for the project and were

allowed to operate small-head hydropower projects within the conveyance canals. Although on-farm efficiency increased substantially with conversion to sprinkler over the last 20 years, no water has returned to the Columbia River. More water has been run through the irrigation canals, as a result of conveyance losses and/or to maximize hydropower revenues for the districts. CBI states that, in 1992, roughly 3.75 MAF were diverted into the canal system and only 2.2 MAF were actually delivered to farm turn-outs. Thus for every irrigated acre on the CBP, 6.5 acre-feet must be delivered to the canal system, of which only 3.79 acre-feet per acre are used for actual irrigation. With improvements in irrigation management and adequate conveyance system maintenance, up to 1.0 MAF could be eliminated from the 2.8 MAF currently diverted by the Bureau for irrigation of the project²⁵.

A major goal of the Northwest Power Planning Council is to increase flows in the Snake and Columbia rivers during the seaward migration of salmon and steelhead²⁶. Cumulatively, unauthorized or illegally used water from the Columbia Basin Project, as well as that from the Bureau's Snake River, Yakima, Umatilla, and Deschutes river projects may be significant relative to the amounts that are currently sought for flow augmentation. CBFWA strongly supports the Bureau's efforts to resolve water spreading problems and seeks reallocation of illegally used water for instream purposes.

We look forward to providing further comments as the Bureau's water spreading policy is developed and assisting in any way possible. Questions concerning our testimony should be directed to Clayton Hawkes, of my staff, at (503) 326-7031.

Sincerely,



John R. Donaldson, Ph.D.
Executive Director

f:\w\active\water2.apd
f:\w\clayton\habitat\water2.apd

Enclosure

cc: CBFWA Members & AHHWG
Walt Fite, USBR-Boise
John Marsh, NPPC
Stephen Phillips, PSMFC
Barbara Scott-Brier, DOI Regional Solicitor's Office
Duane Mecham, Washington Solicitor's Office

1. Williams, J.E., J.E. Johnson, D.A. Henrickson, S. Contreras-Balderas, J.D. Williams, M. Navarro-Mendoza, D.E. McAllister, and J.E. Deacon. 1989. Fishes of North America endangered, threatened, or of special concern: 1989. Fisheries (Bethesda) 14(6):2-20.

2. Warren, M.L. and B.M. Burr. 1994. Status of freshwater fishes of the United States: Overview of imperiled fauna. Fisheries (Bethesda) 19(1):6-19.
3. Northwest Power Planning Council. 1990. Umatilla River Subbasin Salmon and Steelhead Production Plan.
4. Umatilla River Subbasin Plan. 1990.
5. U.S. Bureau of Reclamation. 1993. Scoping meetings for proposed boundary changes for irrigation districts in the Umatilla Project, Oregon. Requests by four Umatilla Project irrigation districts to change boundaries to allow water to be applied outside of those identified in their Bureau contracts.
6. Northwest Power Planning Council. 1993. Strategy for Salmon.
7. Umatilla River Subbasin Plan. 1990.
8. Northwest Power Planning Council. 1990. Yakima River Subbasin Salmon and Steelhead Production Plan.
9. U.S. Bureau of Reclamation. 1990. Fish passage and protective facilities, phase II, Yakima River Basin, Washington. Planning Report to Bonneville Power Administration.
10. Hydrosphere Resource Consultants. 1991. Water supplies to promote juvenile anadromous fish migration in the Snake River Basin. A report to the National Marine Fisheries Service.
11. Northwest Power Planning Council. 1986. Compilation of information on salmon and steelhead losses in the Columbia River Basin.
12. Hydrosphere Resource Consultants. 1991.
13. Idaho Department of Water Resources. 1978. "A Program to Promote Irrigation Conservation in Idaho." Improved Water Use Efficiency Project #535 by John Hammond.
14. Idaho Water Resources Board. 1993. Comprehensive State Water Plan, Snake River: Milner Dam to King Hill.
15. U.S. Fish and Wildlife Service. 1976. Assessment of effects of altered stream flow characteristics on fish and wildlife. Part A: Rocky Mountain and Pacific Northwest. Pacific Northwest Region case histories. Contract No. 14-16-0009-956.
16. Northwest Power Planning Council. 1994. Columbia River Basin Fish and Wildlife Program Overview.
17. Columbia Basin Fish and Wildlife Authority. 1993. Detailed fishery operating plan with 1994 operating criteria. Prepared by the Indian Tribes and the State and Federal Fish and Wildlife Agencies.

18. U.S. Fish and Wildlife Service. December 24, 1992. 57 Federal Register 59244 (appendix C).
19. U.S. Fish and Wildlife Service. 1994. Draft recovery plan for the Snake River aquatic species in South Central Idaho.
20. U.S. Fish and Wildlife Service. 1991. Upper Snake River Basin Storage Optimization Study, Idaho-Wyoming. Final planning aid report on fish and wildlife resources.
21. U.S. Fish and Wildlife Service. 1991. Upper Deschutes River Basin - Fish and Wildlife Problems and Needs. Memorandum from Portland Field Office to Bureau of Reclamation-Denver.
22. Deschutes County/City of Bend. 1986. Deschutes County/City of Bend River Study.
23. Personal communication, Ted Fies, Regional Fisheries Biologist, Oregon Department of Fish and Wildlife.
24. U.S. Department of the Interior Office of the Inspector General. July 1994. Audit Report: Irrigation of ineligible lands, Bureau of Reclamation. Report No. 94-I-930.
25. Columbia Basin Institute. July 19, 1994. Water Conservation for Instream Recapture on the Bureau of Reclamation's Columbia Basin Project: Opportunities and Obstacles. Submitted to the Subcommittee on Oversight and Investigations of the House Committee on Natural Resources.
26. Northwest Power Planning Council. 1993. Strategy for Salmon.

JAY INSLEE
4TH DISTRICT WASHINGTON
1431 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON DC 20515-4704
(202) 225-5818 FAX (202) 226-1137
TDD (202) 226-2904

COMMITTEES
COMMITTEE ON AGRICULTURE
COMMITTEE ON SCIENCE
SPACE AND TECHNOLOGY



CONGRESS OF THE UNITED STATES

HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515-4704

August 22, 1994

DISTRICT OFFICES
In State toll-free 1-800-759-1817

YAKIMA
701 NORTH FIRST STREET
SUITE B
YAKIMA, WA 98901-2295
(509) 452-3743

TRICITIES
3311 WEST CLEARWATER
SUITE 105
KIRKLAND, WA 98336-2710
(509) 783-0310

WENATCHEE
112 NORTH MISSION STREET
WENATCHEE, WA 98801-2229
(509) 662-4294

The Honorable George Miller
Chairman
Committee on Natural Resources
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I am writing to ask that as the Natural Resources Committee considers the issue of water spreading, you do not take action for the immediate future. As you know, the U.S. Bureau of Reclamation is in the process of examining this issue and had intended to issue a policy by this point in time. The Bureau has chosen, however, to delay doing so in order to examine the issue more thoroughly.

I believe this delay is justified due to the complexity of the issues involved. I would appreciate it very much if you would also hold off on any action until after the Bureau of Reclamation has contemplated its full examination and has had a chance to consider fully the consequences of any actions.

I believe action at this time would not serve the best interests of our natural resources or of the farmers who depend on irrigation for their livelihoods.

Thank you for your consideration of my views on this issue. I appreciate your dedication to natural resource issues and to the interests of the farmers of Washington State. I look forward to working with you in the future.

Very truly yours,

Jay Inslee
Member of Congress

GEORGE MILLER, CALIFORNIA, CHAIRMAN
 PHILIP R. SHARP, INDIANA
 EDWARD J. MARLEY, MASSACHUSETTS
 ALBERT J. MURPHY, PENNSYLVANIA
 RICK JOE RAHALL, E. WEST VIRGINIA
 BRUCE J. VENTO, MINNESOTA
 PAT WILLIAMS, MONTANA
 BOB W. LUGO, VIRGIN ISLANDS
 SAM GEJDEHSON, CONNECTICUT
 RICHARD K. LEHMAN, CALIFORNIA
 BILL RICHARDSON, NEW MEXICO
 PETER A. DEFAZIO, OREGON
 ENI F. H. FALCONOVA, AMERICAN SAMOA
 TIM JOHNSON, SOUTH DAKOTA
 LARRY LUNDGREN, IDAHO
 NEL ABERCROMBIE, HAWAII
 CALVIN M. DODDLEY, CALIFORNIA
 CARLOS ROMERO-BARCELO, PUERTO RICO
 SARAH BRIDGES, ARIZONA
 KAMRI SHEPHERD, UTAH
 NATHAN DEAL, GEORGIA
 MAURICE D. HURCHEY, NEW YORK
 ROBERT A. UNDERWOOD, GUAM
 SAM FARR, CALIFORNIA
 LAMÉ EVANS, ILLINOIS
 PETER T. MINK, HAWAII
 THOMAS J. BARTLOW, KENTUCKY
 THOMAS M. BARNETT, WISCONSIN

U.S. House of Representatives
Committee on
Natural Resources
 Washington, DC 20515-6201

August 23, 1994

DON YOUNG, ALASKA
 RANKING REPUBLICAN MEMBER
 JAMES V. HANSEN, UTAH
 BARBARA F. VUCANOVICH, NEVADA
 ELTON GALLEGLY, CALIFORNIA
 ROBERT F. SMITH, OREGON
 CRAIG THOMAS, WYOMING
 JOHN J. DUNCAN JR., TENNESSEE
 JOEL HEFLEY, COLORADO
 JOHN T. DODDLE, CALIFORNIA
 WAYNE ALLARD, COLORADO
 RICHARD H. BAKER, LOUISIANA
 BEN CALVERT, CALIFORNIA
 SCOTT MCMINN, COLORADO
 RICHARD W. POMEROY, CALIFORNIA
 JAY O'NEAL, ARIZONA

JOHN LAWRENCE
 STAFF DIRECTOR
 STANLEY SCOVILLE
 GENERAL COUNSEL
 DANIEL VAL DESH
 REPUBLICAN STAFF DIRECTOR

The Honorable Jay Insee
 U.S. House of Representatives
 Washington, D.C. 20515

Dear Jay: 

Thank you for your recent letter regarding water spreading.

As you know, the Subcommittee on Oversight and Investigations held a hearing on this subject last month. Witnesses at the hearing included the Acting Inspector General of the Department of the Interior, the Commissioner of the Bureau of Reclamation, and other witnesses representing local irrigation districts, environmentalists, and water users.

This was an *oversight* hearing, intended to provide the Committee with background information on the water spreading issue. The hearing raised many important questions, and I expect to receive recommendations from the Commissioner regarding his plans to eliminate abuses and violations of Reclamation law. I also expect to receive more information from the Bureau of Reclamation regarding the scope of this problem, and more detailed documentation of known instances of water spreading.

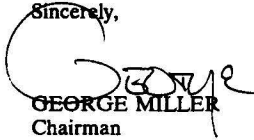
As you probably know, the Commissioner of Reclamation already has legal authority to correct many of the water spreading abuses discussed at the hearing. I do not anticipate that this Committee will consider any legislation specific to water spreading problems before the end of this Congress. I assure you that I will work closely with you and others if

The Honorable Jay Inslee
August 23, 1994
Page 2

information submitted to this Committee suggests that legislation is appropriate sometime in the future.

Please let me know if you have further questions.

Sincerely,



GEORGE MILLER
Chairman

CLORGE MILLER, CALIFORNIA, CHAIRMAN
 R. LIP. IDAHO
 EDWARD J. MARLEY, MASSACHUSETTS
 ALVIN J. MURPHY, PENNSYLVANIA
 JACK JOE NARALL, WEST VIRGINIA
 BRUCE F. VENTRO, MINNESOTA
 PAT WILLIAMS, MONTANA
 DON W. LUDWIG, VIRGIN ISLANDS
 SAM GLENN, CONNECTICUT
 RICHARD H. LEVINSON, CALIFORNIA
 BILL RICHARDSON, NEW MEXICO
 PETER A. DIAMOND, OREGON
 BOB F. FALCONER, AMERICAN SAMOA
 TIM JOHNSON, SOUTH DAKOTA
 LARRY LARSON, IDAHO
 NED ANDERSON, HAWAII
 CALVIN H. DODDLEY, CALIFORNIA
 CARLOS RODRIGUEZ, PUERTO RICO
 KARAN ENGLISH, ARIZONA
 KAREN SHEPHERD, UTAH
 NATHAN DEAR, GEORGIA
 MAURICE G. HINCHY, NEW YORK
 ROBERT A. UNDERWOOD, GUAM
 SAM FARR, CALIFORNIA
 LANE EVANS, ILLINOIS
 PATTY T. BIRN, HAWAII
 THOMAS J. BARLOW, KENTUCKY
 THOMAS H. BARNETT, WISCONSIN

U.S. House of Representatives
Committee on
Natural Resources
 Washington, DC 20515-6201

DOE YOUNG, ALASKA
 BARRIE REPUBLICAN MEMBER
 JAMES V. HENDER, UTAH
 BARBARA F. HUGHES, NEVADA
 RYAN GALLAGHER, CALIFORNIA
 ROBERT F. BENTLEY, OREGON
 CRAIG THOMAS, WYOMING
 JOHN J. BUNCA, AL. TENNESSEE
 JOEL HENLEY, COLORADO
 JOHN T. DOBUTTE, CALIFORNIA
 WAYNE ALLARD, COLORADO
 RICHARD H. BAKER, LOUISIANA
 KEN CALVERT, CALIFORNIA
 SCOTT MESSER, COLORADO
 RICHARD W. PERDUE, CALIFORNIA
 JAY DICKET, ARIZONA

JOHN LAWRENCE
 STAFF DIRECTOR
 EDWARD MELTZER
 GENERAL COUNSEL
 DANIEL VAL EREN
 REPUBLICAN STAFF DIRECTOR

October 12, 1993

The Honorable Daniel P. Beard
 Commissioner
 Bureau of Reclamation
 Department of the Interior
 18th and C Streets, N.W.
 Washington, D.C. 20240

Dear Commissioner Beard:

The Committee on Natural Resources Task Force on the Bonneville Power Administration has been reviewing the implementation of the Northwest Power Planning Council's Strategy for Salmon and associated salmon recovery issues in the Columbia River Basin. One issue that has arisen in our review is the question of "water spreading" on lands irrigated with Bureau of Reclamation water in the Pacific Northwest. It appears that lands outside project boundaries are being irrigated with Reclamation water from many Reclamation projects in the Northwest, and that in some cases urban areas are receiving water from projects originally authorized and developed for agricultural use.

Testimony received by the BPA Task Force raised the issue of water spreading as an extremely serious impediment to providing necessary flows for salmon passage in the Columbia River system. The loss of water from irrigating additional lands was perhaps the only issue over which the Task Force heard no dispute in our recent hearing in Boise, Idaho. The testimony of the Idaho Water Users Association argues that "the only way 'new' water can be obtained . . . is by taking irrigated land out of production." Others dispute whether water can also be obtained through other means, such as water conservation. But it is clear from this testimony that taking land out of production frees up water, and conversely bringing unauthorized lands into production uses water that could be used for instream flows.

The practice of water spreading in the Northwest must stop. Please provide this Task Force with an outline of the steps you plan to take to halt this practice. In addition, please provide any estimates that may have been made regarding the amount of water that might be saved through stopping water spreading and instituting aggressive water conservation on each of the projects in the Columbia and Snake River Basins.

October 12, 1993
Page 2

The further issue of converting water contracted for agricultural use to municipal and industrial use should also be explored by the Bureau. Do the current legislative authority and contractual terms provide a mechanism for the Bureau to charge higher rates on these projects for water converted to municipal and industrial purposes? Please provide any estimates that may have been made regarding the acreage of land and acre-feet of water converted to urban use on the Bureau projects in the Columbia and Snake River Basins, and acre-feet of water that might be conserved through M&I water pricing in these areas.

Thank you for your attention to this request. The BPA Task Force looks forward to working with you to conserve water in the Pacific Northwest and bring project operations into compliance with Reclamation law.

Sincerely,



PETER A. DeFALIO
Chairman
Task Force on the
Bonneville Power Administration

cc: Congressman Bob Smith

Water spreading stirs controversy

Ag reps on policy task force fear some in group seek change beyond initial charge

By MITCHELL TREBON

Come from the West

EPHRATA, Wash. — Agricultural representatives on a Northwest federal water spreading task force are concerned that instream interests are advocating changes that overstep state law and interfere with existing federal contracts.

Although the U.S. Bureau of Reclamation water spreading task force is only advisory, the tone of the early discussions alarmed agricultural representatives from Washington, Oregon and Idaho enough to call a meeting of irrigation interests from the other 14 western

states with BOR project water. That meeting was held Monday in Lake Tahoe, Nev.

Water spreading is generally defined as unauthorized use of federal project water on land not previously authorized by BOR for such use. In many cases water spreading was done through proper channels and with task BOR approval.

The Northwest task force is comprised of diverse water interests, including tribes, irrigators, environmentalists and state and federal officials.

They are making recommendations for the bureau's water spreading policy, expected out in draft form next month. Re-

commendations from a previous task force were thrown out by BOR Director Dan Beard, because he felt all interests weren't represented.

In a position statement, the three agricultural representatives — Merle Gibbons of Washington, Jan Boettcher of Oregon and Sherl Chapman of Idaho — expressed concern "that some task force members have gone far beyond the initial charge."

They've moved into areas that affect state law, reclamation law, national policy and other issues have no direct bearing on applying water to land.

Two misconceptions have arisen during the task force meetings, according to the statement. The first is that

construction of a federal project creates "federal water" that can be used for instream flows and to meet tribal claims.

Second is the belief that the task force can recommend water reallocation policies.

Gibbons, who works for the Grand Coulee Hydroelectric Authority, said the water is held under state water rights, and reallocations can only be

made under state law.

Water

(Continued from Page 1)

made with the agreement of the state and the approval of project water users.

Boettcher believes many of the potential conflicts will be smoothed out as the task force continues to meet and the policy is ironed out.

"Some of this is very technical, and there are some things people don't understand," she said. "This is an educational process for everyone."

Gibbons said much of the bureau's policy will depend upon how water spreading is ultimately defined. Many of the changes were made in good faith, he said, to improve efficiency or increase production.

Some task force members also want irrigators to pay more — market value — if water spreading is allowed to continue. There's also talk of requiring mitigation for past and future impacts.

"If it's a willful and flagrant violation, I think the agricultural community is saying that should be curtailed," Gibbons said. "But on the other hand we need to protect people's investments and our rural economies."

Boettcher said irrigation officials from other western states were surprised to hear the direction some of the task

force discussions have taken.

The Northwest is the first region to undergo water spreading deliberations. During a strategy session they talked about how other western states can plug into the BOR's policy development.

"They feel they're not having an appropriate role in this process," Boettcher said, upon returning from Lake Tahoe.

Walt Fite, district regional director with the BOR, says he understands their concerns. But he believes the bureau-wide policy developed from the Northwest discussion will encompass most of the issues in other states.

"I think it will be broad enough that it would only take minor changes to include any other concerns," Fite said.

Gibbons says the potential for litigation exists. "When you look at the makeup of the committee politically, it would appear the public interest is for instream flows," he said.

No irrigation district will hand over its water willingly, he said. "Some people I've talked to say their public forum may have to be the courts."

Boettcher hopes that's not the case. "That's the last place we want to go," she said. "I would hope the situation would be resolved short of litigation."

AP 07-11-94 02:02 AMT
BC-Water Spreading, 460

Irrigators Concerned About Bureau of Reclamation Policy
TWIN FALLS, Idaho (AP) Irrigators call it conservation and making more efficient use of water. The Bureau of Reclamation calls it unauthorized and illegal.

However it's labeled, ``water spreading'' is causing confusion and concern among irrigators along the Snake and Columbia river basins.

``More than confusion, there's concern the Bureau of Reclamation is going to take part of their water supply and convert it to other uses,'' said Sherl Chapman, director of the Idaho Water Users Association.

Chapman is on a Bureau of Reclamation task force formed earlier this year to help the agency shape its policy on water spreading.

Walt Fite, the bureau's assistant regional director in Boise and chairman of the task force, said farmers should be patient and trust that the agency will keep their concerns in mind.

``It's not our intent to drive people out of business,'' Fite said.

The bureau defines water spreading as the ``unauthorized use of federally developed project water supplies or facilities on lands not previously approved by Reclamation for such use.''

But it remains unclear who will be affected by the policy being developed to eliminate the practice or exactly what constitutes an unauthorized use, Chapman said.

A draft policy document scheduled for release during the past week was supposed to answer some of those questions, Fite said. But heated meetings with Idaho and Washington farmers last month and feedback from Chapman and other task force members have prompted the agency to delay the release by at least a month while it surveys the criticism.

Despite the bureau's reassurances, Virgil Temple, manager of the A&B Irrigation District in Burley, said the crackdown on water spreading is a serious threat to Magic Valley irrigators.

``We're very concerned that the federal government is telling us what lands we can water and what we can't,'' Temple said.

Using the agency's definition, a farmer who replaced a gravity-flow irrigation system with a more efficient center pivot system is guilty of water spreading, he said.

If the more even distribution of a center pivot system allows a farmer to water five extra acres in a field that irrigation did not previously reach, Temple said, he is spreading water even though the same amount is used.

Fite said farmers spreading water that way have nothing to fear from his agency, but other cases of water spreading may result in the loss of water from Bureau of Reclamation facilities.

He said that might include an irrigation district piping water outside its boundaries and applying it to other cropland.

Columbia Basin water users worry about policy change

◆ Dispute over water spreading comes to a head

By Marlene Gause

For Dick Erickson, yesterday's Congressional hearing on water spreading gave mixed signals on what the federal Bureau of Reclamation or Congress will do.

The manager of the East Columbia Basin Irrigation District testified in front of an oversight subcommittee of the House Energy and Natural Resources Committee.

Erickson said water Reclamation Director Daniel Beard said the issue could be resolved, but he said he could be wrong. Erickson said he was "cautiously optimistic" about the outcome.

"Congressmen Miller made clear he thought many of the Western irrigation districts got one good deal from the government in being with," Erickson said. He asked Miller to focus his questions on solving the water spreading problem only through increased export water contracts.

Erickson said Beard appeared to think the issue could be solved —

even though no details were presented. Erickson said he had a "constructive" meeting with Beard after the hearing.

The results of the hearing will mean a new draft policy which could be released just prior to a series of public hearings scheduled next month. Erickson said it appeared as if a final policy could be obtained by October.

Tim Ahern, press secretary for the committee, said the oversight hearings are a regular practice for Congress.

He said it was "contingent" as to whether the report was released just prior to the previously scheduled hearing.

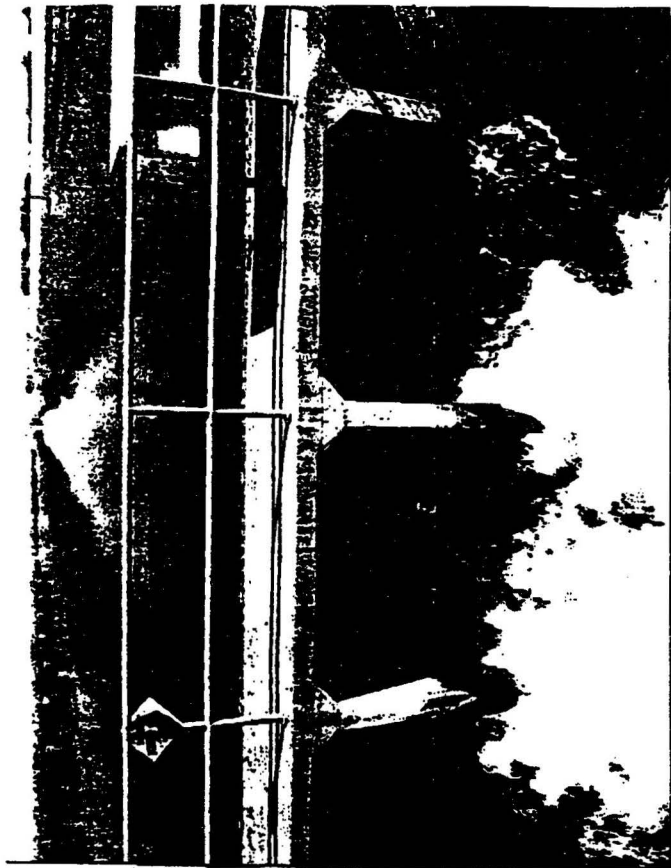
Ahern said both federal water and private directives are being considered in formulating the new policy.

No new hearings are scheduled but Ahern said a new draft policy could be released as early as next week.

Erickson said his testimony focused on benefits of existing policy.

"We don't really think any action is needed at all," Erickson said. "The Bureau should just make a declaration to that effect."

Please see "Water" on page 3



Dave Nichols/Columbia Basin Irrigation

Use of Bureau of Reclamation water has come under question recently as a water spreading policy is being formulated. A recent inspector's general report found the Columbia Basin Irrigation District wastes more water than any other in the country.

Water: The national political winds are changing

From front page

The bureau says water spreading occurs when there is unauthorized use of water from federal projects like the one that irrigates the Columbia Basin. It includes using project water on lands not classified as eligible to receive it, like Class 6 land.

"We think the incidental irrigation of Class 6 land within the Columbia Basin Project is already authorized and permitted within our contract," Erickson said. Water allotments are provided to whole farm units without requirements to account for it by acre or land class, he said.

He said he displayed maps to show how complicated land classification boundaries have become for sewer center pivot irrigation systems. He said the maps showed how difficult it would be to farm around soil map lines.

The current draft of the bureau policy calls for an end to water spreading. Erickson noted the policy also could require farmers to bear the cost of a mapping project to find out how much is being irrigated and pay for an expensive environmental compliance process.

"It's like having to pay to decide whether you're innocent, and it's not fair to water users as a whole," Erickson said.

He said water spreading was a "money issue."

Committee chairman Miller, according to Erickson, said Class 6 land wasn't a benefit originally intended when the project was laid out. Miller said if it had been foreseen then more money would have been charged, according to Erickson.

On average, a farmer in the Basins District Erickson pays \$30 per acre for water per year. Under a full cost option in the draft policy, that could go up to \$80 per acre, although Erickson notes no cost figures have been formally presented.

He deflected questions whether legal action would be necessary. He said it would merely drag out the problem.

"This thing should be able to be worked out administratively," he said.

Read Franklin, an aid for Rep. Jay Inslee, D-Selah, there were no ser-

Bureau of Reclamation holds meetings

A new draft policy from the federal Bureau of Reclamation on water spreading will be considered in a second round of public hearings. The new policy is expected to be released just prior to the start of the series of hearings but could be released as early as next week.

The following is a list of hearing dates, locations and times:

- ◆ Aug. 9, Big Bend Community College Wallenstein Theater, 11 a.m. to 5 p.m. and 6 to 10 p.m.
- ◆ Aug. 10, Yakima, Holiday Inn, located on Ninth Street, 5 to 10 p.m.
- ◆ Aug. 11, Kennewick High School, 11 a.m. to 5 p.m. and 6 to 10 p.m.
- ◆ Aug. 16, Redmond, Ore., Deschutes County Fairgrounds, Howard Mayfield Building, 5 to 10 p.m.
- ◆ Aug. 17, Medford, Ore., Holiday Inn, 5 to 10 p.m.
- ◆ Aug. 23, Idaho Falls, Shilo Inn, 5 to 10 p.m.
- ◆ Aug. 24, Burley, Idaho, Burley Inn, 5 to 10 p.m.
- ◆ Aug. 25, Caldwell, Idaho, Jewett Auditorium at Albion College, 11 a.m. to 5 p.m., and 6 to 10 p.m.

Irrigation District to hold meetings

Farmers plan to discuss the water spreading issue with irrigation district officials in the coming weeks. Oregon water users have also hired a firm to help lobby the government on the policy.

Dick Erickson, manager of the East Columbia Basin Irrigation District, said a series of three informational meetings for farmers are scheduled.

For more information, contact the district office at 488-9671. The meeting dates and times include:

- ◆ Aug. 2, Warrenton, 7 to 9 p.m., location to be announced.
- ◆ Aug. 3, Moses Lake, Chief Moses Junior High School cafeteria, 7 to 9 p.m.
- ◆ Aug. 4, Othello, 7 to 9 p.m., location to be announced.

"People need to address the pros and cons of the policy as to how it affects their farming," Erickson said. "People will need to be more specific on how it affects them personally."

He said people will have to be more specific than a previous round of meetings that started late last month in Moses Lake. At that meeting, more than 750 farmers were on hand to express their frustrations.

Erickson noted federal officials said everyone who signed in at that meeting and included an address will receive the new policy in the mail.

Erickson — who testified at yesterday's Congressional subcommittee hearing on water spreading — isn't the only one trying to make a difference with the policy.

The Oregon Water Resources Congress has hired a public relations firm of Conkling Plakos and McCormick of Portland.

process is evident locally.

Leroy Allison, member of the Grant County Board of Commissioners and a farmer himself, said it's a matter of the government wanting more money.

"We're using less (water) than we're supposed to use putting it on more than they thought we could cover," he said. "I'm just in awe of what the Bureau of Reclamation direction is."

Allison operates a farm irrigated with project water. He said over the last 18 years he has only reached the limit twice for water he is allowed to use and complained there was no incentive to use less water.

He said he was frustrated. "It's my tax dollar waging a war against me," he said.

There could be more bad news for irrigators. Erickson said a Portland-based group, Columbia Basin Institute, presented a study accusing irrigation districts of inefficient operation and receiving subsidies.

"We were unprepared for the Columbia Basin Institute accusations," Erickson said. He said irrigation districts will prepare a response to the study but noted in the Columbia Basin less water is being used to irrigate more land.

He said the districts are entitled to divert up to 3.1 million acre feet of water from the Columbia River but an average of 2.6 million acre feet is actually being taken. Erickson, manager of the district since 1983, described the water spreading policy as the "most aggressive" he's seen in efforts to get water or more money.

prises in what he heard at the hearing. Inslee did not attend the meeting, but Franklin said Inslee was "actively working" to get the Bureau to include irrigation districts in government deliberations.

"There is a concern they have not done that sufficiently," Franklin said.

He said Inslee's position is that the government should not "come after farmers" about irrigation of Class 6 land, "especially since this is

the result of improved systems with better conservation."

Franklin said Inslee might not have to submit legislation on the issue. Franklin said the Bureau may be able to deal with the matter administratively.

Frustration with the policy and

The Denver Post

July 26, 1994

U.S. wrongly diverted water to Western farms

Ineligible acres irrigated 8 years

By Adriel Bettelheim

Denver Post Washington Bureau

WASHINGTON — Shoddy record-keeping and weak oversight led the federal government to distribute up to \$45 million of irrigation water to Western farmers who weren't eligible to receive it, according to a government audit.

The U.S. Department of Interior's inspector general found stream flows from the Uncompahgre Project in western Colorado and other delivery systems were used between 1984 to 1993 to irrigate more than 154,000 acres of land that didn't meet federal guidelines.

The findings illustrate the practice of "water spreading," in which below-cost water makes its way to more commercial users than intended. Government officials blame the practice for a host of environmental problems, as well

as persistent financial losses.

However, the Interior Department's Bureau of Reclamation doesn't have the authority to recover the losses except through lawsuits.

The Bureau of Reclamation feeds the water through dams and delivery systems spanning 17 Western states. Use of the water is supposed to be restricted by the amount of eligible land and by the amount of available water.

However, the audit found those rules are frequently ignored. Water makes its way to land either deemed too arid or located outside boundaries established for federal irrigation projects. Auditors said the bureau "had not given sufficient priority to identifying and resolving (the problem)," adding losses from at least two dozen water projects ranged from \$27 million to \$48 million.

At the Uncompahgre Project near Montrose, 12,884 acres of ineligible farmland received below-cost water from the Gunnison River valued at \$467,303. Auditors

said the extra irrigation contributed to increasing runoff of naturally occurring selenium, an element blamed for deaths of ducks and other water fowl in California.

Water delivered to ineligible land also hampered efforts to revive several species of endangered fish, including the squawfish, humpback chub and razorback sucker, according to the audit.

Investigators found similar situations in seven other Western states.

Auditors said water from the Columbia Basin Project in Washington state was delivered to up to 53,000 acres of ineligible lands when it could have been used to increase stream flows for salmon migration.

The Montrose-based Uncompahgre Valley Water Users' Association — representing area growers of fruit, alfalfa and hay — is in the process of identifying lands that can be reclassified to receive water from the Colorado project. Officials couldn't be reached for comment yesterday.

NATIONAL

Excess Water Use in West Kicks Up Dust

Intricate system for distributing precious water resource stirs hot political debate

By Brad Knickerbocker

Staff writer of The Christian Science Monitor

THE latest battle in the US West over water involves the charge that irrigators in eight Western states have been illegally "spreading" water to hundreds of thousands of unauthorized acres, at a cost of tens of millions of dollars to taxpayers.

There are 24 water projects in this region that were developed by the United States Bureau of Reclamation (BuRec). Federal legislation in 1902 created the BuRec specifically to construct dams, canals, and other facilities to help "green" 17 Western states for farmers and ranchers.

"The history of the development of the West is in large part a history of water," says A. Reed Marbut, an Oregon state administrator who helps settle water disputes. Half of these 24 projects and about two-thirds of the acreage are in the Columbia River Basin states of Oregon, Washington, and Idaho.

Although BuRec officials agree with these recent charges, by the Interior Department's inspector general, of excessive water use, solving the problem is not as simple as turning off a spigot or charging the irrigators - the farmers and ranchers - more for the



FISH LADDER: Migrating salmon navigate up a man-made fish stream past the Dalles Dam on the Columbia River. Water levels have dropped for the yearly fish migration as farmers divert more water to irrigate crops.

water they use

At issue is what Mr. Marbut calls "an intricate web of water law ... both complex and confusing." This web includes the "doctrine of prior appropriation," which means users who first tapped into a supply have first rights to the water. The web also includes state water rights, protected under provisions of the 1902 legislation that created

BuRec. At a congressional hearing July 19, Rep. Michael Crapo (R) of Idaho warned of "federal intrusion into Idaho's sovereignty over its water." He said: "I am deeply

concerned that the present administration and some in Congress are setting the stage for ignoring long-established statutory provisions concerning state water rights and state water contracts."

The freshman lawmaker was speaking to the House Natural Resources subcommittee on oversight and investigations, hearing testimony on the "water spreading" problem.

Conservative Westerners like Mr. Crapo see the water issue as part of an overall effort by the Clinton administration to strengthen environmental protection through the Endangered Species Act, the Clean Water Act, wilderness legislation, wetlands policy, and the reform of grazing and mining law — all at a cost to resource-based industries on which many Western communities traditionally have relied.

Although such broad environmental reforms have been slow in coming, there does seem to be a critical mass of key political players favoring change. These include Secretary of the Interior Bruce Babbitt and Commissioners of Reclamation Daniel Beard. Mr. Beard is a former top aide to Rep. George Miller (D) of California, who is chairman of the powerful House Committee on Natural Resources.

For nearly 20 years Congressman Miller has led the fight to modernize and reform federal water law, which goes back to the 1902 act that was designed to support small farmers. Today, though, farming is done on a much larger scale.

Part of the problem reformers face is BuRec's own history. "Most of the water-spreading ... is because the Bureau has not only looked the other way in many cases, but has actively encouraged water spreading ... over the past 30 to 50 years," says Shert Chapman, executive director of the Idaho Water Users Association, which represents 180 irrigation districts and canal companies.

The result may have been an expansion of pastures and crop lands, critics say, but the environmental results of excessive water diversions have been disastrous, they add. "Salmon and steelhead runs of the Pacific Northwest are

in terrible trouble, with over 200 species already extinct and over 200 more in danger of extinction," said Katherine Ransel, co-director of the environmental group American Rivers' regional office in Seattle. "And it is not just the salmon that are in trouble. It is all aquatic organisms and systems."

Others point to the polluting impact of irrigation runoff on surface and ground water. "Irrigation has created water-quality problems in many parts of the West because return flows carry salts, heavy metals, and other contaminants," says Reed Benson, a former Environmental Protection Agency lawyer who now watch-

dogs the Bureau of Reclamation's Umatilla Basin Project for the environmental group Water-Watch of Oregon.

Native Americans, too, have a keen interest in the impact commercial irrigation has had on streams and rivers providing habitat to migrating fish. "Fish get only the polluted leftovers, and often have no river in which to live," said Antone Minthorn, chairman of the Confederated Tribes of the Umatilla Indian Reservation in northeastern Oregon. "Water spreading and other violations of federal water laws have devastated our culture, religion, and economy."

Citing the Treaty of 1855 between Indians and the federal government, Mr. Minthorn said: "After nearly 140 years, we are still waiting for our treaty water rights to be honored in any of these watersheds." The treaty gave the US title to 6.4 million acres in Oregon and Washington, while Indians supposedly retained water and fishing rights.

The BuRec has taken initial steps toward solving the water spreading problem. Earlier this year, commissioner Beard set up a task force including irrigators, environmentalists, Native Americans, and state water officials to begin to look at the big picture. Everyone involved acknowledges that a problem this complicated



and this long in the making will take some time to unravel.

Long-entrenched economic and political interests are ready for a legal fight, says Sheri Chapman of the Idaho Water Users Association.

just as adamant that change will occur. Speaking to water-spreading task force members earlier this year he said, "You should know that there is no doubt... that we have to comply with the law, that we will comply with the [water-spreading] law, and that we will solve this problem one way or the other."

[illegible]

AP 08-06-94 03:12 PMT

AM-Babbitt-Water,300

Babbitt Says Congress Is Likely To Act on Water Abuse

TOPPENISH, Wash. (AP) Congress likely will take action on unauthorized use of federal irrigation water, Interior Secretary Bruce Babbitt says.

Babbitt said the Bureau of Reclamation is trying to crack down on unauthorized "water spreading," but "I suspect that Congress will be involved at some point on this. I can't predict what kind of legislation will come out of this, but several committees have signaled a high degree of interest in the subject."

Water spreading involves farmers using new technologies to irrigate land that wasn't considered useable when the Bureau of Reclamation first approved their water allocations, as well as using more water in some cases.

Babbitt was in this southcentral Washington town Friday after helping Yakama Indian Nation firefighters on the front lines of a wildfire burning on the reservation. As Interior secretary, Babbitt heads the federal Bureau of Land Management, as well as Reclamation.

Several Eastern Washington irrigators testified on water spreading two weeks ago before the House Natural Resources Committee.

Irrigators in the Columbia Basin last month were put at the top of a list of alleged water-rights abusers by the federal Inspector General's office. The office recommended that the Bureau of Reclamation find out whether it has the authority to collect money lost to the government because of water spreading.

The Inspector General said if the bureau does not have the authority, Congress should pass legislation giving it the power to require water spreaders to pay.

Babbitt said it's in farmers' best interests to abide by irrigation laws.

"Irrigation is here to stay," he said. "The important thing is to work toward efficient use of the water, and in accordance with bureau rules."

THE OREGONIAN, THURSDAY, SEPTEMBER 29, 1994

Reclamation Bureau halts irrigation action

■ The agency says it's delaying a crackdown on water spreading to try to reconcile differences on how the law is being interpreted

From staff and wire reports

Northwest farmers have received a reprieve from the U.S. Bureau of Reclamation, which has delayed cracking down on farmers who use federal irrigation water on unauthorized land.

But they're already bracing for the agency's next move.

Bureau officials agreed this week not to implement a policy that would have charged farmers the full cost for water used on land that the agency considered unauthorized. The practice is known as water spreading.

"There's politics being played in Washington, D.C., about this issue," said Shannon McDaniel, manager of the South Columbia Basin Irrigation District in Pasco, Wash. "We still haven't found out what the law is we're breaking. We just get a lot of fingers pointed at us."

Last month, the agency issued a letter to irrigation districts warning them it would be focusing on the policy under the auspices of the Reclamation Reform Act of 1982.

"It seemed like a back-door approach to address the water spreading issue," McDaniel said.

However, the decision to postpone the crackdown does not affect the bureau's move against a Herndon area water district for passing water to neighbors against an explicit ban this summer. Dan Beard, commissioner of the Bureau of Reclamation, will refer the case of Westland Irriga-

tion District to the Department of Justice next month.

In some cases, water spreading means a farmer who has a parcel of land with water rights uses that water on land outside an irrigation district that does not have water rights.

Other times, the land in question is in the center of a parcel of land and was once classified as impossible to irrigate because of topography or other reasons.

The bureau has been focusing on water spreading in the Columbia Basin, although the issue is considered a problem throughout the Pacific Northwest.

The agency's decision to delay the policy is "an attempt to reconcile some sorts of water spreading and an attempt to ... gain compliance for others," said Brian Person, superintendent of the bureau's Yakima office.

"Many of these projects are old enough that land was classified when there wasn't present-day technology," Person said. "Land (with a certain) soil type might have been irrigable but if it had hills or knolls on it, (so) the old flood or furrow type irrigation couldn't get water to it, it was classified as nonirrigable."

McDaniel believes bureau officials should consider the effectiveness of new technology since the land was classified in the 1930s and '40s.

"They want to penalize you for being efficient," McDaniel said.

Oct. 12, 1994

Tri-City Herald

Water spreaders

Reclamation threatens Umatilla Basin offenders

By CARRIE SCHAFER
Herald Staff Writer

Irrigators in Umatilla County may face federal prosecution over certain irrigation practices while Kennerwick homeowners may not have to pay considerably higher rates for irrigation water, a top U.S. Bureau of Reclamation official said Tuesday.

The U.S. Department of Justice has asked for water records and other information from several Hermiston-area irrigation districts, which the bureau claims tolerate

some of the worst examples of "water spreading" in the Pacific Northwest.

Water spreading is defined as the unauthorized use of federal water — watering land not considered irrigable or irrigating land outside district boundaries. It also involves using water for urban uses but still paying the lower agricultural rate because the lands were not reclassified after development.

"The Umatilla Basin will be the test case for water spreading. It is definitely on the front burner," John Keyes, the bureau's re-



gional director in Boise, told a group of irrigators Tuesday. "The Justice Department has asked for these water records, they've discussed prosecution," he said.

Keyes was one of several speakers at a two-day water symposium at the F. Ross Lyon Inn.

About 250 people from Mid-Columbia farming, government and economic inte-

Water

Continued from Page A1

"But they knew in 1981, because we told them."

A bureau inspector general's report issued in July said the Umatilla River Basin used 43,000 acre-feet more of water per year than it was authorized, costing taxpayers \$500,000.

An acre-foot is enough water to cover an acre 1 foot deep.

If Hermiston irrigation districts end up in federal court over the issue, the government will ask either that the districts pay back the so-called financial benefits they received from the practice or give the water back, Keyes said.

Despite the violation, Keyes admitted water spreading got out of hand because the bureau and irrigation districts let it.

"Too many people turned their heads to a problem for too long," he added.

The bureau believes the Umatilla Basin has more serious water

spreading problems than the federal Columbia Basin and Yakima River projects.

Water spreading in these projects primarily involves irrigating lands that were designated as unirrigable because they could not be served by gravity-fed irrigation. These areas became irrigable when center pivot irrigation became commonplace.

"We think those are easy situations to take care of," Keyes told the group, suggesting the land either be reclassified to represent the change or to make such use legal through congressional authorization.

Farmers will see a water spreading policy for the West issued within the next six months, Keyes explained.

In a related water-spreading matter, the Kennerwick Irrigation District believes owners of 13,700 residential parcels may not have to pay higher water rates.

Earlier this summer, the KID feared some homeowners would have to pay higher rates in areas that were still being assessed under agricultural rates.

Typically, the bureau charges rates five to six times higher for urban use than for agricultural uses, Keyes said Tuesday.

The KID board, set up during the symposium and was told higher rates only would apply if the contracts did not include urban use.

Interim KID Manager Chuck Garner said Tuesday the district has the proof it needs. Its state water permit — issued in 1981 — allows for urban and on-farm uses. "Although the KID's contract with the bureau doesn't specifically list urban use, it's implied in several notations," Garner said. In fact, water was being delivered to urban areas when the contracts were signed, he added.

"We think we're in really good shape," Garner said. "We think that we have the evidence that the bureau allowed this type of use."

Despite some reassurances to Columbia Basin farmers, the process has still made irrigators weary of the bureau's motives, said Shannon McDonald, manager of the Pasco-based South Columbia Basin Irrigation District.

"I have a different definition of water spreading than the bureau does," McDonald half-joked. "It's a bureaucratic way of moving water by rhetoric, conjecture, and the misguided interpretation of public law."

ISBN 0-16-046383-1



9 780160 463839

90000

