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6-6-1990

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Citation Information
Driver, Bruce C., "Sources of Water II: Federal Water Projects" (1990). *Moving the West's Water to New Uses: Winners and Losers (Summer Conference, June 6-8).*
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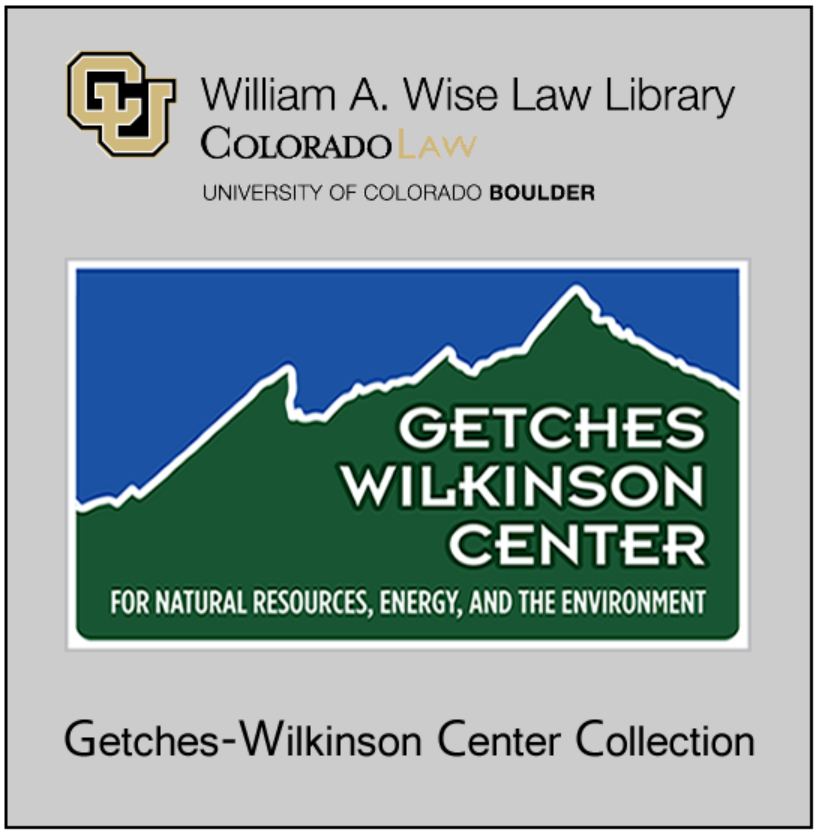

Bruce C. Driver, *Sources of Water II: Federal Water Projects*, *in* MOVING THE WEST'S WATER TO NEW USES: WINNERS AND LOSERS (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1990).

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Sources of Water II: Federal Water Projects

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Moving the West's Water to New Uses:
Winners and Losers

Natural Resources Law Center
University of Colorado School of Law
June 6-8, 1990

Sources of Water II: Federal Water Projects

I. Introduction

A. Summary

Projects in western states financed and constructed by the U.S. Bureau of Reclamation and the U.S. Army Corps of Engineers have the capacity to store over 170,000,000 acre-feet of water. In theory, this water is available for uses different than those to which it is presently committed. The absence of environmentally acceptable means to effect the change of use of a portion of this water restricts its use to meet changing economic conditions and values. In addition, an impressive array of federal and state statutes, permits, compacts, treaties, contracts, operating policies, and political forces constricts the movement of much of the rest of federally stored water to reflect changing economic conditions and values. Nonetheless, federal water can play a significant role in meeting growing and shifting demand for water in the West.

B. General References

1. Wahl, Markets for Federal Water, Subsidies, Property Rights, and the Bureau of Reclamation, Resources for the Future (1989).

2. Reisner and Bates, Overtapped Oasis, Reform or Revolution for Western Water, Island Press (1990).

3. Roos-Collins, "Voluntary Conveyance of the Right to Receive a Water Supply from the United States Bureau of Reclamation", Volume 13 Ecology Law Quarterly, (1987).

4. Driver, "The Effect of Reclamation Law on Voluntary Water Transfers", 33 Rocky Mountain Mineral law Institute, Chapter 26 (1987).

5. Western Water: Tuning the System, Western Governors' Association (1986).

II. U.S. Bureau of Reclamation

A. Introduction

1. The bureau in brief: an agency of the U.S. Department of the Interior charged with the construction and operation of water reservoirs and associated facilities in the western states. Originally directed to supply water to irrigate western arid lands as an instrument of social policy, the bureau now supplies water for municipal and industrial purposes, operates hydroelectric generating capacity and provides flatwater recreation.

2. Resources: The Bureau has constructed about 103 million acre-feet of active reservoir capacity in the West of which it operates about 87 million acre-feet. The rest has been turned over to contractors to operate. From this capacity the bureau provides about 27 million acre-feet annually for irrigation uses and about 3 milion acre-feet for municipal and industrial uses. The great majority of the water stored in bureau-constructed storage reservoirs is already allocated for use by contract, statute, compact and treaty. This presentation addresses only the reallocation of water provided by the bureau, primarily for

irrigation uses. It does not address the allocation of "unmarketed" water or reallocation of water used by the bureau, itself, for hydroelectric power generation or other instream uses to other uses.

3. Authorities: The heart of the bureau's authority is the Reclamation Act of 1902 which, among other things: created a fund for the construction of irrigation works, including storage reservoirs; authorized the Secretary of the Interior to construct such works; and provided that the Secretary proceed in conformity with the laws of the states and territories in carrying out the provisions of the act. Other important generic statutes that bear on the reallocation of water provided by the bureau include: the Miscellaneous Water Supply Act of 1920, 43 U.S.C. 521 (1982); the Reclamation Project Act (1939), 43 U.S.C. 485 et seq. (1982); the Water Supply Act of 1958, 43 U.S.C. 390b (1982); the Reclamation Reform Act (1982), 43 U.S.C. 390cc. Finally, most bureau projects have been expressly authorized by Congress in legislation that often contains provisions affecting the reallocation of the water provided.

B. Reallocation of water provided by the Bureau

1. There are two ways by which water provided by the bureau for agricultural use might be reallocated: administrative reallocation or voluntary reallocation through transfers of entitlements to use the water and other means. Since water provided by the bureau for irrigation use is supplied by contract, administrative reallocation is difficult legally, at least until contracts run out. Voluntary reallocation of water should be easier to accomplish legally, but there are problems.

2. The nature of a contract right to receive water from the bureau: Does a contractor or grower have anything to transfer voluntarily? "Yes": U.S. v. Nevada, 463 U.S. 110 (1983) holds that the beneficial interest in water rights held by the U.S. for use within the Newlands project resides in the owners of the land. "No" or "Not much": Nevada is limited to Newlands and similar projects and, thus, typically, all a contractor has is a contract right to receive water for use on a particular parcel of land. Does the nature of the

entitlement vary from project to project?

3. Impediments: The following is a list of impediments in reclamation law to voluntary transfers of entitlements to use water provided by the bureau. These impediments can often be overcome without recourse to Congress if there is a consensus that a particular transfer should occur. If the consensus does not exist, they can be stumbling blocks:

a. Absence of explicit policy on transfers in reclamation law.

b. Confusion regarding whether federal or state law governs certain aspects of transfers: See California v. U.S., 483 U.S. 645 (1978).

c. Permissible project water uses: the Miscellaneous Water Supply Act of 1920 and Reclamation Project Act (1939), supra, provide authority for the use of water by a transferee that is inconsistent with project-authorized uses. Example of the purchase by the City of Casper, Wyoming, of conserved water from the Kendrick Project. But these authorities are not clear.

d. Project boundaries: the Miscellaneous Water Supply Act of 1920 may provide some authority for water to be transfered across a

congressionally authorized service area boundary, but the authority is, again, unclear.

e. Appurtenancy: Section 8 of the Reclamation Act of 1902 provides that water supplied by the bureau under the authority of this act shall be used appurtenant to the land. 43 U.S.C. 372. What does this provision mean? Has it been implicitly repealed by later enactments? See El Paso County Water Improvement District v. El Paso, 133 F. Supp 894 (Texas), (1955).

f. Beneficial use: Similarly, section 8 of the Reclamation Act of 1902 requires that "beneficial use shall be the basis, the measure, and the limit of the right...." 43 U.S.C. 372. Does this create federal common law or is this simply a reference to state law provisions? See U.S. v. Alpine Land and Reservoir Company, 697 F. 2d 851 (1983).

g. Title to project works: even when a project is repaid, title to project works remains with the federal government. Is this necessary? Does this impede transfers?

h. Ownership of water rights: The bureau holds the water rights for some of its projects. Will this impede transfers? Is it necessary after a project has been repaid?

i. Secretarial approval of transfers: Bureau contracts typically require contractors to obtain the approval of the Secretary of the Interior prior to making a transfer of an entitlement to receive water. While there are legitimate reasons for this provision, will this authority be abused? Is it necessary after project repayment is complete?

j. Policy on profits: Some bureau contracts prohibit a contractor from keeping any of the "profit" from a transfer of water provided by the bureau. At least one bureau region--the Mid-Pacific--implements an informal policy denying contractors a share of such profits. With subsidized water and contractors that are behind in repayment obligations, the equity justification for this policy is clear, but the policy is a major disincentive to transfers.

k. Reclamation Reform Act: Section 203(a)(2) of the Reclamation Reform Act of 1982, 43 U.S.C. 390cc, provides that contractors amending their contracts to receive a "supplemental or additional" benefit, commence paying full O&M costs and full cost pricing on land held individually in excess of

960 acres. Bureau contracts typically require amendment to permit a transfer to occur. If the transfer is for more than on an annual basis, it will likely be construed to constitute a covered "benefit". This will discourage transfers designed to provide water for more than one year.

1. Especially in states in which no entity is empowered to purchase or hold water rights for instream flows, the general requirement that the bureau at least not lose money when a change is made in the use of the water it provides may impede transfers to instream flow uses.

C. Policy initiatives to clarify the rules of reallocation

1. Western Governors' Association Working Group recommendations: In 1986 WGA formed a water efficiency working group to look into barriers to voluntary reallocation of water in the west, in particular, of water provided by the bureau. The group concluded that the Interior Department should issue a policy statement to facilitate voluntary transfers of water provided by the bureau and should make a

comprehensive review of the effect of reclamation policy on voluntary reallocation. Western state governors adopted these recommendations in a unanimously supported resolution in 1987.

2. In 1987 the Department of the Interior issued "Assessment '87" in which new directions for the bureau were announced. Among other things, the Department announced that it acknowledged that the bureau's mission in reclaiming the arid west had been largely completed and that the bureau would move into new areas, such as environmental protection and promotion of project and water use efficiency.

3. In December, 1988, the Department issued the water marketing policy statement that had been requested by the governors. See Appendix A, "Principles Governing Voluntary Water Transactions That Involve or Affect Facilities Owned or Operated by the Department of the Interior". This statement indicates that the Department will facilitate voluntary transactions involving water supplied by the bureau under certain conditions. The statement was welcomed by those who wanted the Department to adress water transfers generically.

However, the statement stopped short of endorsing voluntary transfers as a means to meet shifting needs. And the language of the statement is so broad and vague as to offer an entity little guidance as to how the bureau would react to a specific proposal to transfer water.

4. A few months later, the bureau disseminated "Voluntary Water Transactions Criteria and Guidance" (provided as part of Appendix A) to "assist in the implementation" of the 1988 policy statement. This document contains the following positions:

a. Conflicts with state policies affecting transfers will be resolved on an ad hoc basis, but, generally, state law "should be the primary mechanism for protecting sellers/lessors of water as well as third parties."

b. No additional guidance is given how the Department will respond to transfer proposals involving uses unauthorized in legislation or use of project water outside of authorized project boundaries.

c. The bureau will explore transfers as alternatives to new storage facilities if these

facilities imply federal financial support.

d. The Department, acting as a trustee for the Indian tribes, will look into the use of tribal water where such use would assist local users in resolving water resource management problems.

e. The fact that subsidies were used to provide federal water is not a barrier to a water transaction. "On the other hand DOI should seek the most appropriate source for water to be transferred, exchanged, leased or sold without regard to presently available supplies from federal water projects." (?)

f. The financial terms of a transaction do not conern DOI.

g. M&i transferees will pay an m&i project rate, but only prospectively.

h. The federal government can be made no less financially well-off by a transfer to a non-reimburseable function such as fish preservation.

i. DOI will avoid burdening water transactions with disincentives, including, explicitly, by charging a percentage of any "profit" a transferor might make on a transaction.

These positions go part of the way towards resolving DOI policy on bureau-provided water transfers.

5. In recent documents prepared by the Department, it stresses its commitment to water conservation as an instrumental means of dealing with the drought. See "Conservation and Drought Preparedness", 1990. In these documents the Department calls for legislation that would create permanent authority to "facilitate water transfers or institute a water market to serve users beyond the existing service area and authorized project functions." "Conservation and Drought Preparedness", p. 3.

D. A review of transfers involving water provided by the bureau

The following is anecdotal evidence of transfer activity involving water provided by the bureau. Richard Wahl, Larry MacDonnell, and Teresa Rice assisted in collecting this information.

1. Wyoming

a. Agreement between the Casper-Alcova Irrigation District and the City of Casper, 1982. Under this agreement the City pays the District $150,000 per year to produce 7,000

acre-feet per year of water salvaged from leaky irrigation distribution facilities. The City also has paid off the remaining debt owed by the District to the federal government associated with the Kendrick Project. Municipal use is not an authorized use of project water, but the bureau permitted this transfer under the Reclamation Project Act of 1939, supra, which specifies that water may be shifted from irrigation to other purposes providing that to do so would not "impair the efficiency of the project for irrigation purposes." 43 U.S.C. 485 h(c). No such impairment exists because the salvaged water was not being beneficially used by the District.

b. Bureau/Goshen Irrigation dispute. The bureau insists that the District sign a contract with the Secretary of the Interior for use of "surplus" water from the Kendrick project. Refusing to execute such a contract, Goshen insists that it is simply borrowing water from the Casper-Alcova Irrigation District that the district cannot use under its contract with the Secretary.

2. Utah

a. Emery County Project transfers. Utah Power and Light purchased entitlements to use water developed for irrigation use for powerplant cooling purposes. Castle Valley Special Service District uses water provided for irrigation for municipal outdoor use. Castle Valley pays for water at m&i rate.

b. Strawberry Valley Project. City of Spainish Forks proposes a change in the way it delivers project water. Rules regarding this change are not certain: Will the bureau approve the change?

c. Provo River Project transfers. Several transfers from irrigation to municipal use as well as a major exchange are facilitated by acquisition of shares of the Provo River Water User's Association or members thereof.

3. Colorado: Colorado-Big Thompson project shares are freely traded to effect transfer of water use from irrigation to m&i use within the contractor's service area. There is no cap on "profits" from these trades imposed by the bureau.

4. New Mexico:

a. San Juan Chama Project transfers. The City of Albuquerque leases water it is entitled

to use for m&i purposes from the project to the New Mexico Department of Natural Resources. The water is used by the DNR to maintain a recreational pool behind Elephant Butte Reservoir on the Rio Grande River. The City also is attempting to lease project water to winegrowers. The bureau asserts that acreage limitations should apply to the winegrowers use of this water. Should they apply, given that the City is paying the bureau for the water at m&i rates?

b. Rio Grande Project transfers. Under the authority of the Miscellaneous Water Supply Act of 1920, the bureau approved an initial transfer of entitlements to use water from the project from users to the City of El Paso. The act establishes three conditions for the supply of water from a project irrigation system for other purposes: (1) the approval of the appropriate water user's association be obtained; (2) there is no other practicable source of water; (3) water for the other purpose may not be furnished if it would be "detrimental" to the water service for the irrigation project.... 43 U.S.C. 521. In 1988 a similar agreement was entered into by the

City, El Paso County Water Improvement District No. 1 and the El Paso County Lower Valley Water District Authority. This time, the bureau raised doubts about the transfer: 16 months of discussion ensued. However, within 30 days of a visit to the area of the Assistant Secretary of the Interior for Water and Science and the Commissioner of Reclamation, the bureau approved the agreement and the transfer was effectuated.

5. Arizona

a. The bureau has facilitated the reallocation of water from non-Indian irrigation uses to satisfy tribal water settlements and to achieve the delivery of water to Mexico consistent with salinity requirements.

b. At present there is little demand for transfer of water provided by the Central Arizona Project because there is unmarketed water available from the project. However, if municipal use continues to grow, the demand for CAP water transfers will likely develop. CAP contracts, however, require that any profits occasioned by a transfer be applied to reduce the repayment obligation of the contractor--the

Central Arizona Water Conservation District.

6. Nevada: There is a market for water provided for irrigation within the Newlands Project. For example, water is about to move from irrigation to wildlife preservation in Stillwater Marsh. It appears that there is no cap on revenues that may be earned from project water transfers.

7. Idaho: The bureau has facilitated two water banks in the state, permitting water authorized for irrigation use to be used in power production and other uses. A restrictive ceiling on the price that may be charged for use of water in the banks has been established.

8. California (other than the Central Valley Project): The Imperial Irrigation District/Metropolitan Water District transfer. Under an agreement entered into between the IID and MWD in December, 1988, MWD is paying the IID for the costs of permanently conserving 100,000 acre-feet of water, to be available to MWD annually for thirty five years from the date of completion or initial operation of the last conservation project. MWD also agreed to make a one-time payment of $23 million to IID to defray "indirect costs." The water to be

conserved pursuant to the agreement originates in the Colorado River and, thus, is subject to the control of the Secretary of the Interior under the "Law of the River". As such, the position of the Secretary regarding the transfer was a matter of great interest. Essentially, the Secretary kept his distance from the bargaining positions of each party, while indicating that he would not stand in the way of the transfer if it could be worked out.

F. Transfers involving water provided by the Central Valley Project

1. The project in brief. The CVP is the bureau's largest project. It is administered from the bureau's Mid-Pacific Region office in Sacramento and through five field fivision offices. Although developed primarily for irrigation, the project also provides flood control, navigation, electric power, m&i and recreational water use benefits. The Secretary of the Interior has executed 40-year water service contracts to supply about 8 million acre-feet per annum to 270 contractors from one end of California's Central Valley to the other. Somewhat less than this amount is

delivered in an average year. About 220 of the contractors are organizations of farmers or the farmers themselves. The remainder are mainly m&i users. Contract rates for most agricultural contractors have proven to be inadequate to cover O&M costs of the project, not to mention to recoup capital costs. Under provisions of P.L. 99-546, the project must be paid off by 2030. The project may have as much as 1.5 million acre-feet of yield not yet under contract.

2. Tensions under which the CVP operates relating to reallocation.

a. Many Californians now perceive that water allocation occasioned by the project has done great damage to fish and wildlife resources in the Valley and in the Delta area east of San Francisco. There is pressure on the bureau to find additional water for fish and wildlife from within existing project resources.

b. Continuing robust growth in m&i demand for water in southern California (combined with the area's loss of Colorado River water to Arizona as the CAP is completed) and around San Franciso has many looking at CVP irrigation

water supplies as a source of water to meet the demand. Urban interest in CVP water is heightened by the current drought.

c. Conditions within the Valley are evolving as well. Some agricultural water districts are water-short under their contract allocations from the bureau while others appear to have water they might spare.

d. The west side of the San Joaquin Valley has a significant drainage problem: Salt build-up is reducing crop productivity and concentration of toxics threatens wildlife. Water conservation, encouraged by the gains to be reaped through reallocation of the conserved water, appears to be a significant part of the solution.

3. Transfer activity involving CVP water.

a. Transfers between CVP contractors. Transfers among CVP contractors, are common. During the period 1981-1988, more than 3 million acre-feet was transfered between CVP contractors. See "Transfers Within the Cenral Valley Project System", Brian Gray, unpublished manuscript. Nearly all the transfers were between agricultural contractors in the same field division. Bureau policy controls these

transfers as follows: the transfers are for no more than the current water delivery year; no profit on the transfer is permitted; there is no transfer of the contract entitlement to receive water, only of the place of delivery. Transfers between agricultural and m&i contractors are very rare. These informal transfers provide a way for water to move where it is most needed among agricultural users, but the restrictions surrounding them probably prevent the development of a larger market.

b. Transfer of CVP water to non-CVP contractors. While many such transfers have been discussed--particularly those that would effectuate the movement of water from the Valley to expanding urban areas outside of the Valley--only one such transfer is in the works. This is the proposed Exchange Agreement between the Arvin-Edison Water Storage District (a Class 1-water short CVP contractor) and the Metropolitan Water District of Southern California. This transfer is an exchange of State Water Project water for CVP water. During relatively wet years, MWD would deliver to A-E up to 135,000 acre-feet per annum of its entitlement to SWP water. The water would be

spread on A-E ground for later retrieval for use by A-E growers in dry years. During these dry years, A-E would make about 100,000 acre-feet available to the MWD from A-E's entitlement to CVP water. The exchange would involve the movement of CVP water to the MWD's service area, but would not result in any less water available to A-E.

4. Impediments to the transfer of CVP water: In general.

a. Bureau policy. Generally: The bureau appears to fear a loss of control over the use of water provided by the project and, as such, is concerned about water transfer proposals. If there is to be long-term reallocation of water, the bureau prefers to effectuate it administratively and through contracts rather than through voluntary reallocation by contractors. Nonetheless, the bureau does not appear to oppose those transfer proposals where there is consensus and where the Valley will not suffer a net loss of water. Specifically: Impediments exist to transfers for periods lasting beyond current water delivery years. Among the principal ones: No profits on transfers allowed; no transfers yet for more

than one season; Reclamation Reform Act provisions which trigger higher rates for long-term transfers.

b. Other impediments. Most bureau contractors appear to be wary of at least major, long-term transfers of water outside the Valley. There is a kind of "cultural" resistance to these transfers--bureau policy reflects this resistance. But many seem to wish that the bureau would relax its "inflexible" policies that discourage transfers, at least to encourage innovative schemes, including those that involve conserved water.

5. Disincentives to water conservation in bureau policy. No one knows how much water might be conserved by growers in the Valley without reducing net income or without affecting return flow-dependent users or drying up remaining wetlands. Estimates on the west side of the San Joaquin Valley range all the way from a few thousand acre-feet per annum to over 500,000 acre-feet. Whatever water could be conserved might be transfered for use on other agricultural land or for m&i use in the Valley or elsewhere. And water conservation on

the west side of the San Joaquin Valley would make a major contribution to solving the agricultural drainage problem. But bureau policies discourage water conservation by contractors and growers. The main problems are:

a. Water not used by contractors by the end of the water year cannot be carried over to the next water year. This encourages growers to put the water on the land whether it is really needed or not.

b. For some contractors, take or pay provisions require payment for water whether used or not.

c. No profit on sales of conserved water. In fact, a contractor saving water derives no benefit from conservation other than where it can avoid the cost of the water, which, for many CVP contractors, is minimal compared with SWP contractors. Permitting retention of profits on the sale or lease of conserved water is the best and safest place for the Region to drop its policy against profits.

d. A "use it or lose" philosophy that seems to pervade bureau water use policy in the Valley. Acknowledging that a district can get

by with less water may threaten contract entitlements.

e. The "rules of the road" regarding how the bureau will react to proposals to transfer conserved water are not spelled out.

Bureau policy is by no means the sole impediment to aggressive water conservation in the Valley, but a rethinking and modification of CVP policies to encourage conservation where it would develop water that is now wasted would help immeasurably.

G. Conclusions regarding Bureau water reallocation

1. Voluntary transfers of water provided by the bureau occur sporadically.

2. However, notwithstanding the issuance of the Water Marketing Policy Statement in 1988 and the Criteria and Guidelines several months thereafter, the rules regarding these transfers lack clarity and are poorly understood. Some key problems:

a. What is the policy of the bureau on profits from transfers? It appears to vary from project to project, region to region.

b. What are the rules regarding use of water for uses not contemplated in authorizing

legislation? For uses outside a project service area?

c. What is the new administration's policy on water transfers and water conservation? Is it the policy implemented in the Mid-Pacific Region? In another region where policy is different? As stated in recent publications, cited above? Something else?

III. The U.S. Army Corps of Engineers

A. Introduction

1.The agency in brief. The U.S. Army Corps of Engineers (COE) is an agency of the Department of the Army. Among other things, it is authorized to construct and operate water storage impoundments primarily for the purposes of flood control, navigation and hydroelectricity generation, although the COE has built and operates facilities that provide water for m&i, fish and wildlife conservation, recreation and even irrigation uses.

2. Resources. The COE operates a large amount of storage in the West. Its three large reservoirs on the Upper Missouri River Basin (Fort Peck, Garrison and Oahe) have a capacity

of close to 50,000,000 acre-feet. In the Pacific Northwest the COE operates about 11,000,000 acre-feet of capacity. In general, the COE has a significant water storage presence in western states with the exception of Utah, Nevada and Wyoming. However, much of its storage capacity is not near expanding metropolitan areas.

3. The COE's basic authority respecting storage facilities is contained in the Flood Control Act of 1944, 33 U.S.C. 701. Among other things, the act authorizes the Secretary of the Army to construct and operate storage facilities for flood control and navigational purposes. Other enactments authorize the construction of capacity by the COE for other purposes.

B. <u>The nature of water stored behind COE facilities</u>

1. Most of the water is stored for flood control, navigation and hydroelectricity generation purposes. The water provided for these purposes is not allocated to entities by contract or otherwise. No one appears to hold an underlying equitable or other right to the water that they may voluntarily transfer to

other uses. Thus, reallocation of this water to different uses would most likely have to be effectuated administratively.

C. Administrative authorities to market or reallocate water

1. COE facilities contain space committed to water for m&i uses. Several million acre-feet per annum are supplied to m&i users, most of it outside the West. There remain about 950,000 acre-feet of COE storage capacity allocated to m&i uses but which has not yet been marketed for these uses. Most of this capacity is in Oklahoma. Some is in Texas. One facility is in Oregon.

2. Both the Flood Control Act of 1944 and the Water Supply Act of 1958 authorize the COE to reallocate water stored behind COE dams.

a. Section 6 of the Flood Control Act authorizes the Secretary of the Army to make contracts for domestic and industrial uses of "surplus" water in COE reservoirs, provided that no such contract shall "adversely affect then existing lawful uses of such water." 33 U.S.C. 706.

b. Section 301(b) of the Water Supply Act

of 1958 provides that storage may be included in any reservoir constructed by the COE or bureau "for present or anticipated future demand or need for municipal or industrial water...." 43 U.S.C. 390b. This appears to be authority to modify an existing reservoir to supply m&i needs. However, section 301(d) provides that if any modification of an existing project would "seriously affect the purposes for which the project was authorized...or...would involve major structural or operational changes", the COE must return to Congress for authority to make such modification. 43 U.S.C. 390b.

The COE appears to interpret these authorities broadly to enable the agency to contemplate reallocation of water on an ad hoc basis, if conditions warrant it.

D. The ETSI Pipeline litigation

1. In its opinion in ETSI Pipeline Project v. Missouri, ___ U.S. ___ (1988), the U.S. Supreme Court clarified the roles of the Secretary of the Interior and Secretary of the Army in the marketing of water from COE projects constructed under the authority of the Flood

Control Act of 1944.

2. Facts: ETSI Pipeline Project (ETSI) had entered into a 40 year contract with the Secretary of the Interior for the withdrawal of up to 20,000 acre-feet per annum from Lake Oahe in South Dakota for purposes of transporting coal by slurry from Wyoming to the southeastern U.S. Only problem was that Lake Oahe had been constructed and was being operated by the COE. Missouri, Iowa and Nebraska sued to enjoin performance of the contract.

3. Law: Two provisions of the Flood Control Act enable the Secretary of the Interior to exercise authority at Army reservoirs. Section 5 authorizes him to transmit and dispose of electric energy from Army reservoirs, but only when that energy is, in the opinion of the Army Secretary, not required for the operation of such projects. And section 8 enables the Interior Secretary to recommend to the Secretary of the Army that an Army reservoir be used for irrigation purposes and to construct irrigation works if the Secretary of the Army determines that the reservoir may be used for such purpose. Otherwise, the Flood Control Act is silent on Interior Secretary authority

respecting COE reservoirs.

4. Holding: "The language of the (Flood Control Act) is plain in every respect, and the conclusion is unavoidable that if the Interior Secretary wishes to remove water from an Army reservoir for any purpose, the approval of the Army Secretary must be secured." ___ U.S. at ___.

5. Implications: Unless the Army Secretary agrees, the Interior Secretary cannot effectuate a reallocation of water stored behind COE facilities constructed under the authority of the Flood Control Act of 1944.

IV. U.S. Soil Conservation Service

A. The Soil Conservation Service is an agency of the U.S. Department of Agriculture. Under the authority of the Small Watershed Protection Act of 1954, P.L. 83-566, the SCS has constructed hundreds of small flood control facilities and a few irrigation impoundments in small drainages unreached by bureau and COE programs.

B. Is water from these facilities available for reallocation to other uses?

1. Most of the facilities are very small and all, by law, have less than 25,000 acre-feet of storage capacity.

2. Most of the facilities have no water stored in them--their capacity is "dry storage", available for local flood flows. Thus, there is little or no "firm" water to reallocate.

3. Where there is water to reallocate--in particular where water is stored for irrigation purposes--there appear to be no federal legal impediments to reallocation. Title to these facilities is in the local operator.

4. If a local operator wanted to change the purpose of an SCS facility from flood control to some consumptive use purpose, the change would have to be carried out consistently with the O&M agreement executed by the SCS and the local operator.

V. Conclusions:

A. Federal water projects contain copious quantities of water that, in theory, might be reallocated to meet growing and shifting demands for water.

B. Voluntary reallocation by holders of entitlements

to use water provided by the bureau holds promise in meeting some of these demands. However, complicated and unclear policies still stand as an unnecessary barrier to this reallocation. A signal from the Department that it continues to seek to facilitate voluntary reallocation would help. So would a continuation of the effort already begun to clarify and lend uniformity to the rules governing these proposals. In particular, the bureau could lend substance to its present rhetorical commitment to water conservation by (1) undertaking a review of the effect of its contract and other policies on incentives to conserve water among its contractors and (2) by following up this review by careful policy changes designed to encourage water conservation by contractors and their members.

C. Water stored behind COE facilities can play a role in meeting shifting and growing demands for water in the West. For the most part, however, the water will have to be reallocated administratively. How much water is available in what locations is not clear.

APPENDIX A

December 16, 1988

DEPARTMENT OF THE INTERIOR

PRINCIPLES GOVERNING VOLUNTARY WATER TRANSACTIONS
THAT INVOLVE OR AFFECT FACILITIES
OWNED OR OPERATED BY THE DEPARTMENT OF THE INTERIOR

PREAMBLE:

Transactions that involve water rights and supplies are occurring pursuant to State law with increasing frequency in the Nation, particularly in the Western United States. Such transactions include direct sale of water rights; lease of water rights; dry-year options on water rights; sale of land with associated water rights; and conservation investments with subsequent assignment of conserved water.

The Federal Government, as owner of a significant portion of the Nation's water storage and conveyance facilities, can assist State, Tribal, and local authorities in meeting local or regional water needs by improving or facilitating the improvement of management practices with respect to existing water supplies. Exchanges in type, location or priority of use that are accomplished according to State law can allow water to be used more efficiently to meet changing water demands, and also can protect and enhance the Federal investment in existing facilities. In addition, water exchanges can serve to improve many local and Indian reservation economies.

DOI's interest in voluntary water transactions proposed by others derives from an expectation that, to an increasing degree, DOI will be asked to approve, facilitate, or otherwise accommodate such transactions that involve or affect facilities owned or operated by its agencies. The DOI also wishes to be responsive to the July 7, 1987, resolution of the Western Governors' Association, which was reaffirmed at the Association's July 12, 1988, meeting, that the DOI "develop and issue a policy to facilitate water transfers which involve water and/or facilities provided by the Bureau of Reclamation."

The following principles are intended to afford maximum flexibility to State, Tribal, and local entities to arrive at mutually agreeable solutions to their water resource problems and demands. At the same time, these principles are intended to be clear as to the legal, contractual, and regulatory concerns that DOI must consider in its evaluation of proposed transactions.

For the purpose of this statement of principles, all proposed transactions must be between willing parties to the transaction and must be in accordance with applicable State and Federal law. Presentation of a proposal by one party, seeking Federal support or action against other parties, will not be considered in the absence of substantial support for the proposal among affected non-Federal parties.

December 16, 1988

VOLUNTARY WATER TRANSACTION PRINCIPLES

1. Primacy in water allocation and management decisions rests principally with the States. Voluntary water transactions under this policy must be in accordance with applicable State and Federal laws.

2. The Department of the Interior (DOI) will become involved in facilitating a proposed voluntary water transaction only when it can be accomplished without diminution of service to those parties otherwise being served by such Federal resources, and when:

   (a) there is an existing Federal contractual or other legal obligation associated with the water supply; or

   (b) there is an existing water right held by the Federal government that may be affected by the transaction; or

   (c) it is proposed to use Federally-owned storage or conveyance capacity to facilitate the transaction; or

   (d) the proposed transaction will affect Federal project operations; and

   (e) the appropriate State, Tribal, or other non-Federal political authorities or subdivisions request DOI's active involvement.

3. DOI will participate in or approve transactions when there are no adverse third-party consequences, or when such third-party consequences will be heard and adjudicated in appropriate State forums, or when such consequences will be mitigated to the satisfaction of the affected parties.

4. As a general rule, DOI's role will be to facilitate transactions that are in accordance with applicable State and Federal law and proposed by others. In doing so, DOI will consider the positions of the affected State, Tribal, and local authorities. DOI will not suggest a specific transaction except when it is part of an Indian water rights settlement, a solution to a water rights controversy, or when it may provide a dependable water supply the provision of which otherwise would involve the expenditure of Federal funds. Such a suggestion would not be carried out without the concurrence of all affected non-Federal parties.

5. The fact that the transaction may involve the use of water supplies developed by Federal water resource projects shall not be considered during evaluation of a proposed transaction.

6. One of DOI's objectives will be to ensure that the Federal government is in an acceptable financial, operational, and contractual position following accomplishment of a transaction under this policy. Unless required explicitly by existing law, contracts, or regulations, DOI will refrain from burdening the transaction with additional costs, fees or charges, except for those costs actually incurred by DOI in performance of its functions in a particular transaction.

7. DOI will consider, in cooperation with appropriate State, Tribal and local authorities, necessary measures that may be required to mitigate any adverse environmental effects that may arise as a result of the proposed transaction.

VOLUNTARY WATER TRANSACTIONS

CRITERIA AND GUIDANCE

To assist in the implementation of the December 16, 1988, principles, the following criteria and guidance are provided. It is anticipated that each specific proposed voluntary water exchange will be unique, and that it should be evaluated on its own merits under the overall guidance of this policy statement.

Principle 1. Primacy in water allocation and management decisions rests principally with the States. Voluntary water transactions under this policy must be in accordance with applicable State and Federal laws.

Criterion: Does the proposed exchange comply with applicable State and Federal laws?

Guidance: Apparent conflicts with State laws or water rights will be reconciled with the appropriate State agency. State laws generally provide procedures for transferring water rights, and should be the primary mechanism for protecting the sellers/ lessors of water, as well as third parties.

Proposed transactions that involve a new use not specifically authorized as a Federal project purpose, or that propose a place of use not within the Federal project service area, may require authorizing legislation. The primary responsibility for such legislation will rest with those entities proposing the transaction.

Principle 2. The Department of the Interior (DOI) will become involved in facilitating a proposed voluntary water transaction only when it can be accomplished without diminution of service to those parties otherwise being served by such Federal resources, and when:

1. There is an existing Federal contractual or other legal obligation associated with the water supply; or
2. There is an existing water right held by the Federal Government that may be affected by the transaction; or
3. It is proposed to use federally-owned storage or conveyance capacity to facilitate the transaction; or
4. The proposed transaction will affect Federal project operations; and
5. The appropriate State, tribal, or other non-Federal political authorities or subdivisions request DOI's active involvement.

Criterion: Does the proposed action involve water that is encumbered by an existing Federal contractual obligation?

Guidance: If revision of existing water service or repayment contracts is required to facilitate an otherwise desirable water exchange

proposal, negotiations for those changes will be initiated expeditiously under the guidance of these principles and the appropriate legal authorities pertaining to the subject water.

Criterion: Does the proposed action potentially affect a Federal water right?

Guidance: In those instances where the United States' water rights may be be affected by a water transaction, DOI will work to facilitate the transfer so long as its rights or the rights of its contractors are protected or adequately compensated. In the evaluation of a proposed action, effects on existing water rights should be an initial consideration. If the proposed action would appear to involve lengthy and costly legal procedures in either the State or Federal courts, this information should be provided to the proposing parties. The policy does not provide for the avoidance of State and Federal laws and procedures in the establishment of water allocations and water rights.

Criterion: Does the proposed action propose the use of Federal storage/conveyance capacity?

Guidance: Federal facilities may be used to store/transfer both federally and nonfederally supplied water. The Warren Act provides the basis for storage/transfer of nonfederally supplied water for irrigation. Storage/transfer of nonfederally supplied water for municipal and industrial (M&I) purposes can be accomplished generally under the authority of section 9(c) of the Reclamation Project Act of 1939.

Except by mutual consent of affected parties, contracts for additional storage/conveyance will take into account existing Federal contracts, conveyance capacity and project obligations which must be honored as a first priority.

Approval to transfer water cannot obligate the Federal Government to incur extra nonreimbursed expense to store water or to convey it to a new location.

Approval to transfer water will not establish any right to future transfers beyond those expressly provided for in negotiated agreements.

Use of storage/conveyance will require a supporting contract to use federally built storage/conveyance systems.

Charges will be set to recover normally allocable storage, delivery, or extra costs incurred by the U. S.

If any additional pumping power is needed to effect a given transfer, the transfer entities must provide or pay for such power, and may have to secure it from non-Federal sources.

Proposals may involve the Corps of Engineers' facilities or projects. In these cases, consideration of their concerns will be included in the evaluation of the specific proposal.

Criterion: Does the proposed action affect existing Federal project operations?

Guidance: With a change in type, location, or priority of use, the potential for effects on the authorized purposes and project operations must be investigated. For example, such effects could result from changes in operation of a reservoir or delivery system, that might change minimum stream flow or power generation. If these potential effects are identified, avoidance of these consequences, or mitigation of such consequences to the satisfaction of the affected party, is necessary.

As stated in the guidance area 2.(b), DOI will work to facilitate the proposed transfer so long as its (water) rights or the (water) rights of its contractors are protected or adequately compensated; and in guidance area 2.(c), except by mutual consent of affected parties, contracts for additional storage/conveyance will take into account existing Federal contracts and project obligations.

Power interference charges or similar compensation measures will be the responsibility of those entities proposing the transaction.

In addition to the evaluation of effects on existing project operations, and authorized project beneficiaries, the following general issues must also be addressed:

1. Third party effects. See Principle 3.

2. Documentation for compliance with NEPA. See Principle 7.

3. Land Classification.

If the proposed action is a change in location of use for irrigation water, land classification is necessary to ensure that the land is capable of sustaining irrigation activities without damage to the land or water resource. Demonstration that sufficient payment capacity exists during the term of the transfer may also be required. The level of detail, amount of original work, and depth of analysis, will be determined on the merits of each situation.

4. Reclamation Reform Act of 1982.

If the existing contract must be changed to allow the proposed exchange, the discretionary provisions of the Reclamation Reform Act of 1982, must be considered. For futher guidance on supplemental or additional benefits and the amendments to existing contracts, refer to the

Solicitor's memorandum dated May 20, 1988, "Interpretation of Section 203(a) of the Reclamation Reform Act of 1982 and Sections 105 and 106 of Public Law 99-546." Additional guidance is contained in the Acreage Limitation Rules and Regulations on contracts, additional and supplemental benefits, and water transfers.

Criterion: Does the proposed action stem from a request by a State, tribe or non-Federal agency?

Guidance: DOI will continue its policy of providing technical assistance to State, tribal or local agencies. A positive and expeditious technical assistance/consultation program will continue within available budget resources.

The specific involvement of DOI necessary to accommodate the requested exchange will determine the type of Reclamation involvement. Existing procedures for approving new or amendatory contracts should be followed.

Principle 3. DOI will participate in or approve transactions when there are no adverse third-party consequences, or when such third-party consequences will be heard and adjudicated in appropriate State forums, or when such consequences will be mitigated to the satisfaction of the affected parties.

Criterion: Concerns for third party effects must be addressed from both the State and the Federal perspective. Any consideration of the "public trust doctrine" is left to the State.

Guidance: Concerns for authorized project functions and operations were addressed in Principle 2. This principle addresses the concerns for "third party" effects. Third parties are identified as those entities who may have some identifiable interest in the exchange, and would have a legal standing in an adjudication process in an appropriate State forum. The identification of these entities, the validity of their concerns, and the appropriate satisfaction of their concerns rests with the States and their adjudication process.

Principle 4. As a general rule, DOI's role will be to facilitate transactions that are in accordance with applicable State and Federal law and proposed by others. In doing so, DOI will consider the positions of the affected State, tribal, and local authorities. DOI will not suggest a specific transaction except when it is part of an Indian water rights settlement, a solution to a water rights controversy, or when it may provide a dependable water supply, the provision of which otherwise would involve the expenditure of Federal funds. Such a suggestion would not be carried out without the concurrence of all affected non-Federal parties.

Criterion: Does the proposed action displace the need for expenditure of Federal funds?

Guidance: Within Reclamation's resource management program, opportunities will be explored to achieve management objectives through the use of voluntary exchanges of water. The intent of this policy is to ensure that voluntary exchanges of water are considered as alternatives in water resource management within Reclamation's planning, operation, and other resource development programs. For example, a water exchange may be considered as an alternative to construction of a storage or delivery facility that otherwise would or could require Federal investment.

Criterion: Does the proposed action provide for an opportunity for the Indian tribe or community to benefit economically from the lease or transfer of water rights that may be secured under a settlement with the Federal Government or with non-Federal parties?

Guidance: It is a common situation that the water rights available to Indian tribes represent a significant portion of their resource base. It also is a common situation that the use of those water resources for agricultural purposes is marginally feasible, and that local water demands by non-Indians are such that the lease or transfer of the tribal water resources can be a mutually beneficial transaction.

DOI will facilitate transfers, in its capacity as a trustee, for an Indian tribe to the extent that it results in assisting local water users in resolving their water resource management problems within appropriate State law. The specific authorities involved will be determined on a case specific evaluation of the water rights, Federal and State laws, and the specific nature of the proposed transaction.

Principle 5. The fact that the transaction may involve the use of water supplies developed by Federal water resource projects shall not be considered during the evaluation of a proposed transaction.

Criterion: Is the water to be transferred, exchanged, leased, sold, etc. available by virtue of a Federal Reclamation project?

Guidance: If the Federal Government is not made worse off financially by the transaction, if the proposed transaction has been approved by the State and local authorities, and if the proposed transaction complies with Federal and State law; then it may be in the public interest to allow federally developed water to be employed. The fact that it was developed by virtue of a subsidized Federal project or program should not, in and of itself, be a barrier to the transaction.

On the other hand, DOI should seek the most appropriate source for water to be transferred, exchanged, leased, or sold without regard to presently available supplies from Federal projects.

Principle 6. One of DOI's objectives will be to ensure that the Federal Government is in an acceptable financial, operational, and contractual position following accomplishment of a transaction under this policy. Unless required explicitly by existing law, contracts, or regulations, DOI will refrain from burdening the transaction with additional costs, fees, or charges, except for those costs actually incurred by DOI in performance of its functions in a particular transaction.

Criterion: The financial terms negotiated between entities do not concern DOI.

Repayment subsidies associated with the original type of use of the water are not transferable to a different type of use of the water.

Exchanges cannot result in a reduction in the present worth of the outstanding obligations remaining to be repaid to the Federal Government.

If the proposed exchange would involve the execution of a contract with a "new" entity, that entity must have sufficient legal authority to enter into such a contract and be able to perform all functions required by the contract.

Any additional costs associated with the transfer shall be advanced or repaid in a manner negotiated by the entities involved.

Guidance: A distinction must be made between financial terms between the entities proposing the exchange and Federal repayment considerations associated with the water. Financial terms between the non-Federal entities are extraneous to the repayment considerations discussed herein.

1. The costs or subsidies associated with the original use are not transferable to a different use of the water.

2. A change in use from irrigation to municipal and industrial purpose would require a change in the repayment of costs to include interest during construction and interest on investment, but only to the extent of the remaining years in the payout period. It is not the intent of this water transfer policy to recover subsidies originally allocated to that block of transferred water during the time it served the irrigation purpose.

A short-term transfer should recognize the repayment of the appropriate cost, with the repayment interest rate, calculated for the year of the transfer, after which the irrigation rate would be reestablished.

A current repayment interest rate for the interest bearing obligations will be utilized, unless otherwise provided by law.

Any repayment of principal above the level that would have been repaid by the irrigators (i.e., the power assistance amount) should be reflected in a reduction in the amount to be repaid through power assistance.

3. An exchange involving change in location and contracting entities, but not a change in use (i.e., irrigation to irrigation) could involve the continuation of the repayment subsidies.

4. An exchange in which there would be a change in use from reimbursable function to a nonreimbursable function (e.g., irrigation to anadromous fishery) will require special negotiations. In lieu of special legislation, specific contractual obligations will be identified to ensure that repayment to the Federal Government after the exchange will be no less than the conditions that existed prior to the exchange.

5. To the maximum extent possible, financial or economic disincentives to the transfer or exchange are to be avoided. The additional costs to the water users, as discussed in these principles, (i.e., NEPA documentation, power interference charges, recalculation of water rates, or incremental pumping costs) are all required by existing law, contracts, or regulations. While these are costs to the water user, they are not the disincentives that are to be avoided.

The disincentives to be avoided can be characterized as charging a percentage of any "profit" that might be envisioned as the difference between appropriate costs, and the market value of the water.

Principle 7. DOI will consider, in cooperation with appropriate State, tribal and local authorities, necessary measures that may be required to mitigte any adverse environmental effects that may arise as a result of the proposed transaction.

Criterion: Is approval of the transaction subject to NEPA requirements?

Guidance: Documentation for compliance with NEPA could range from a categorical exclusion to an environmental impact statement. The type of documentation required will be a function of the specific action being proposed. Any Federal NEPA compliance costs associated with the transfer shall be advanced or repaid in a manner negotiated by DOI and the entities involved.