Federal and Indian Reserved Water Rights

A Report to the Washington State Legislature

By The Office of the Attorney General

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Pursuant to Laws of 2002, ch. 371, § 122(4)(a), the Attorney General provides this report to the Washington Legislature on federal and Indian reserved water rights. The report is presented in three parts:

PART 1: The Issues Presented In Defining Federal And Indian Reserved Water Rights

- **A. The Basic Principles Of Washington State Water Rights Law**
- **B. The Basic Principles Of Law On Reserved Federal Water Rights For Indian Reservations And Other Purposes**
- **C. Accounting For Federal Reserved Water Rights While Operating A State Water Rights System**

PART 2: How Other States Deal With Federal Reserved Water Rights

PART 3: Methods For Dealing With Federal Reserved Water Rights

INTRODUCTION AND SUMMARY

Washington, as a sovereign state, administers and regulates the right to use water, but state water law exists within a larger federal context. When Congress created the Washington territory, and later when the territory was admitted as a state, most of the land was still owned by the United States. Portions of the land were occupied by Indian tribes and bands that had depended upon the area's resources for thousands of years. Through treaties or other federal arrangements, water was reserved for tribal use as a matter of federal law. Certain federal lands were set aside for specific federal uses, ranging from national forests to military installations. Although Washington has the responsibility to manage water and other natural resources as one of the attributes of statehood, that responsibility must account for, and yield to when necessary, water rights reserved and protected by the laws of the United States.

As Washington's population grows, its water supply faces increasing demands from Indian tribes, federal agencies, municipalities, developers, industry, farmers, and others. Requests for new water rights and requests for changes to existing water rights must be evaluated in light of existing water rights and instream needs such as flows necessary to support fish.

Federal and Indian reserved water rights are among the water rights that place current and future demands on many Washington watersheds. Many of these rights have not yet been judicially confirmed, quantified, or prioritized. The uncertainty surrounding the existence, quantity, and priority of these rights in a particular watershed gives rise to an overall uncertainty among all water users in the watershed.[1]

The current means to address these uncertainties is through the general adjudication process.[2] A general adjudication may be filed in state or federal court. The general adjudication process is frequently criticized as slow and costly. To date, 82 general adjudications have been completed in Washington. However, these proceedings adjudicated only approximately 10 percent of the surface waters in the state and many were completed in the 1920's in relatively small watersheds. The only general adjudication currently ongoing in Washington is the Yakima basin adjudication. The Yakima River adjudication, which involves approximately 4,000 parties and 40,000 land owners and covers over 10 percent of the surface waters in the state, was initiated in 1977 and is not expected to conclude for another 5 to 10 years.

In order to determine whether alternative approaches might be used in Washington to address water rights issues associated with federal and Indian reserved water rights, the 2002 Legislature directed the Attorney General's Office to prepare a report on the topic of federal and Indian reserved water rights. The report was intended to (1) examine and characterize the types of water rights issues involved; (2) examine the approaches of other states to these issues; and (3) examine methods for addressing these issues including administrative, judicial, and other methods, and combinations of these methods, with a brief discussion of implementation and funding requirements.

Federal reserved water rights and Indian reserved water rights are based on principles of federal law. However, these rights are frequently addressed in the context of Washington's state law-based systems because they are defined within the context of the state's priority system and must be considered as the state makes water rights decisions. Furthermore, as discussed below, federal water rights are addressed and resolved in state court general adjudications. Therefore, to provide a backdrop for addressing federal and Indian reserved water rights issues, Part I of this report begins with a description of basic principles of Washington water law.

Washington water law was originally developed as common law by the courts. Since 1917 when the first comprehensive water code was adopted, Washington's water law has been based on both statutes and case law. Pursuant to the "prior appropriation" doctrine, the first to initiate the diversion of water and put it to use holds the most senior right to the water. Other basic tenets of Washington water law provide that a water rights holder must put her water to

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[1] This uncertainty may also prove helpful in some scenarios. For example, the presence of a reserved (but unconfirmed and unquantified) claim in a particular watershed may create incentives for the water users to work together to better manage the limited resource.

[2] Ad hoc litigation involving two or more competing claims may resolve the rights of the litigating parties, but will not resolve the potentially competing claims of those who have rights to the same body of water but are not joined in the case.

continuous use to preserve her water rights and water rights can be finally fixed and quantified only by a judicial proceeding.

When land is reserved by a tribe under a treaty, or when the federal government reserves public land for federal purposes, sufficient water is reserved either explicitly or implicitly to meet the purposes of the reservation. Issues, such as whether a particular reservation creates a water right and, if so, for what quantity and with what priority date, are questions that depend upon the particular facts, circumstances, and legal documents surrounding the creation of the reservation. In other western states, these issues are addressed most frequently in the context of general adjudications, similar to those conducted in Washington. As part of these proceedings, the parties often attempt to settle these claims through traditional settlement negotiations. However, in most western states, including Washington, there are no specific procedures established in state law for negotiating these rights.

Some states, most notably Montana, have employed innovative approaches to resolving federal and Indian reserved water rights. Montana has created a commission, consisting partly of legislators and partly of executive branch appointees, with the specific mission of negotiating with Indian tribes and federal government agencies on questions of reserved water rights. Successful negotiations produce compacts that define the extent and nature of federal or tribal reserved water rights in a given area. The compacts are subject to approval by the state Legislature, by the tribal council, and by appropriate federal government agencies.

Montana combines its Reserved Rights Compact Commission with a state Water Court of specialized judges. The Water Court is currently conducting a long-term, statewide adjudication of water rights within the state, and the resolution of reserved rights is part of that adjudication. Other western states employ negotiation with federal and tribal agencies as part of their administration of water rights, usually implemented as part of a general adjudication (as in Idaho) or a water court system (as in Colorado).

By examining the approaches used in Washington and in other western states, we have identified three administrative and four judicial options for addressing federal and Indian reserved water rights. Some of these options can be used alone and some are more likely to be used in combination with others. The administrative options include: (1) a compact commission or similar state body like the one created by Montana's Legislature, (2) ad hoc negotiations led by the state's water resource agency, and (3) more aggressive watershed planning. Judicial options include: (1) more aggressive use of general stream adjudication, (2) negotiations coupled with commencement of general adjudications, (3) ad hoc approach of mixing litigation with negotiations when specific cases arise, and (4) creation of water courts.

The report identifies the costs and implementation issues associated with each of these options. If implemented in a wholesale manner, such as by creating state-wide water courts, many of these options will require new legislation and substantial financial investment on the part of the state. As an alternative, some of these options may be able to be implemented on a focused basis, such as by funding negotiations and adjudications in a few watersheds where the need for certainty is greatest.

PART I

ISSUES PRESENTED IN DEFINING FEDERAL AND RESERVED WATER RIGHTS

A. Basic Principles Of Washington Water Law

The primary purpose of this report is to assess the issues involved with accounting for federal and Indian reserved water rights. Even though these rights are based on principles of federal law, they frequently need to be addressed in the context of state systems (e.g., state permitting decisions or state adjudications) because they involve water bodies and watersheds that are also subject to state-based water rights claims. Thus, to understand the issues involved with federal and Indian reserved water rights, we begin with fundamentals of Washington state water law.

1. Washington Water Law Is Based On The "Prior Appropriation" Doctrine

When the United States was formed by the union of thirteen former British colonies, all located on the Atlantic seaboard of North America, water was abundant, especially given the small colonial population. The colonies inherited the law of water rights as part of the common law of Great Britain, where no land is far from a lake, stream, or underground aquifer. Part of this common law heritage was the notion that water is a public resource, subject to regulation by the state. All fifty of the American states adopted this view.

Other common law rules defined how to allocate the right to use water and resolve disputes. The basic common law doctrine was that of "riparian" rights, in which the owner of a piece of land had a right to use water located within or next to that land. All of the "riparian" owners had an equal right to use of any body of water touching more than one property, with various rules developed to handle disputes.

> ***Example 1:*** *A, B, and C own land in Crystal Valley, a small watershed containing Crystal Creek. A and B own the land directly abutting the creek, while C's property is some distance from the stream. C's predecessor in title began diverting water from Crystal Creek in 1880 for farming purposes. The land has been farmed ever since, using this water. B's predecessor in title began diverting water from Crystal Creek in 1910 for domestic and stock-watering purposes. This use has also continued since that date. A's land has never been developed in any way, except that a fishing cabin was built on the land in 1915. A uses the cabin two or three times a year, and takes water out of the creek for domestic needs at those times.*
>
> *If Crystal Valley is in a* ***riparian rights*** *state, A and B have an equal right to use water from Crystal Creek. C has no right to this water, and could be ordered to stop all use. At common law, it would make no difference that A and B use the water for different*

purposes. A and B could use the water in common, so long as they did not interfere with each other's reasonable uses.[3] *If there is a water shortage, A and B must share the limited resource, with no priority established for either over the other.*

As miners and farmers began to settle the arid west, the "riparian" theory of water rights proved inadequate. Miners often needed great quantities of water, and their mines were often quite distant from the nearest water source. Almost all the land was still in public ownership, including most of the land "riparian" to the water sources. For farmers, the most irrigable land was not necessarily "riparian" to any water body. By the end of the nineteenth century, almost all the western states had adopted, in place of the "riparian rights" doctrine, a "**prior appropriation**" doctrine which awards water rights to the person who first took the water and put it to beneficial use, without regard to "riparian" ownership.[4]

Example 2: *Assume the same facts as in Example 1, above. In a pure "prior appropriation" state, C, B, and A all have water rights in Crystal Creek, and in that order of priority. Early Washington case law gives riparian owners a priority date based on the date their land was patented, however, if Crystal Creek is in Washington, the priority dates for A and B might be their patent dates, which could be much earlier than the date when water was first beneficially used. For this example, assume the patent dates for A and B are the same as their original diversion dates. In that scenario, the order of priority for water use from Crystal Creek is C, then B, then A.*

2. Water Law Was Originally "Common Law" Developed By The Courts, But Is Now Based On A Statutory System Enacted By The Legislature

In 1917, the Legislature enacted a water code which for the first time required all users of surface water in the state to apply for and obtain a permit from the state as a prerequisite to appropriating state water.[5] This code is codified primarily in RCW 90.03. The code adopts the "prior appropriation" system and sets forth several other basic principles discussed

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[3] About 30 states, all in the eastern half of the United States, have water right laws based on the riparian rights doctrine. Many have developed individual variants on the basic common law, such as setting aside certain uses of water as a higher priority, or allowing use by "non-riparian" property owners in certain circumstances.

[4] In early case law the Washington courts adopted a "mixed" system, in which prior appropriation applied only to water on public land and the riparian doctrine was used as to disputes between private citizens. Since the enactment of the 1917 Water Code, which clearly adopts prior appropriation as the governing principle of Washington water law, the courts have followed the Legislature's policy choice. For all intents and purposes, Washington is now a "prior appropriation" state. The only diversionary riparian water rights that are now recognized in Washington are those that were perfected through beneficial use prior to 1932. *Dep't of Ecology v. Abbott*, 103 Wn.2d 686, 694 P.2d 1071 (1985). Such rights must have been preserved through the filing of a statement of claim and can only be confirmed through a superior court general adjudication. If there was a general adjudication conducted prior to 1932 for the water body where a particular riparian water right is claimed, the right had to be decreed in such adjudication. *Dep't of Ecology v. Acquavella*, 112 Wn. App. 729, 51 P.3d 800 (2002) ("*Acquavella* IV").

[5] There were earlier codes, but they either did not cover the whole state or were purely voluntary.

below. In 1945, the permit system was extended to ground water. The ground water code is RCW 90.44. It is now unlawful to appropriate any water in the state (with limited exceptions not relevant to this discussion) without first obtaining a water rights permit. The administrative duty of processing and approving permits was originally assigned to the state engineer, but that officer's powers and duties have now devolved to the state Department of Ecology.

There are a large number of pre-1917 water rights, which not only survive the enactment of the water codes but have high priority under both the riparian doctrine and the prior appropriation doctrine. Through a series of statutes, the Legislature has required holders of pre-1917 rights to preserve them by filing written claims with the state. The statute provides that claims not filed by the statutory deadlines will be cut off. There is no "approval" or other regulatory process as to these claims. They are simply kept on file, and only judicial proceedings in the form of general water rights adjudications can confirm or quantify the water rights represented by such claims. *See* RCW 90.14.041-.121.[6]

3. As Among Competing Claims To A Water Source, The Law Gives Priority Based On The Date When Water Was First Appropriated[7]

As noted earlier, there is no set "priority" among users in a "riparian rights" state. By contrast, "prior appropriation" states like Washington grant priority to those claims which were first established through the beneficial use of water.[8] In theory then, all the rights to any body of water in Washington can be ranked, with the highest priority granted to the oldest appropriation and the lowest priority granted to the most recent. If there is insufficient water to meet the needs of all claimants, the "junior" rights must cease using water, starting in "reverse seniority" order, until all "senior" claims are satisfied. Claimant No. 1 is first entitled to full satisfaction of his/her water right. When that claim is satisfied, Claimant No. 2 is next in priority, and so on.

> ***Example 3:*** *Assume the same facts as in Example 1 and the same patent dates specified in Example 2. If Crystal Creek does not produce enough flow to satisfy the water rights of A, B, and C, the law gives first priority to C, who is entitled to use sufficient water to meet the historic uses of its land. Once C's right is fully satisfied, B is entitled to use the*

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[6] As is discussed in more detail below, the state has no power to require persons claiming water rights under *federal* law to file claims with the state. The claims statute's requirements therefore apply only to those claiming pre-1917 rights acquired under state law.

[7] In some cases, the law recognizes that posting or other public expression of intent, followed by actual water use within a reasonable time, establishes the date of priority. For water rights established since the water codes were adopted, the date of application for a permit establishes the priority, so long as water is appropriated within a reasonable time after the permit is granted.

[8] As noted earlier, Washington does recognize some pre-1932 water rights based on riparian status, and to that extent is not a "pure prior appropriations" jurisdiction. The priority dates for such a right is based on the date the riparian land was patented from the federal government.

remaining water. When C's and B's rights are satisfied, A may resume using the water still remaining.

4. To Preserve A Water Right, Its Owner Must Put The Water To Continuous Beneficial Use

One important characteristic of prior appropriation law is that a water right first must be perfected by actual diversion and use of water,[9] and then the water must be put to continuous beneficial use to maintain and preserve the water right. *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998); *Okanogan Wilderness League v. Town of Twisp*, 133 Wn.2d 769, 947 P.2d 732 (1997). The term "beneficial use" is a term of art. The cases interpret the term to include virtually any reasonable use of water, so long as the public resource is not simply wasted. *Dep't of Ecology v. Grimes*, 121 Wn.2d 459, 852 P.2d 1044 (1993). Even though a water right is a vested property right, it may be lost for nonuse. If a water user stops using the water for long enough, her right may be subject to loss through statutory relinquishment (voluntary failure to continuously use water for five or more consecutive years unless a specified statutory exemption to excuse the nonuse is shown) or through common law abandonment (intentional nonuse of the water). Statutory relinquishment is governed by RCW 90.14.130-.180. A water right may be lost either completely (by ceasing to use any water at all) or partially (by reducing the amount of water taken and used beneficially).

Example 4: *Assume the facts of Example 1, except that, in many years, C significantly reduced the amount of land irrigated with Crystal Creek water and therefore significantly reduced the amount of water taken. C might be found by a court to have relinquished or abandoned part of its water right, and C would have its original priority date only as to the amount of water put to continuous beneficial use. If C, having abandoned or relinquished part of its water right, now wishes to resume a higher level of use, C must apply for and obtain a water permit for the additional water. If granted, the permit will have a later priority date than B or A has. C will then be "senior" to B and to A as to some water, but "junior" as to the remainder.*

5. A Water Rights Holder May Not Change The Place He Diverts The Water, The Place He Uses The Water, Or The Purpose Of Use To Which The Water Is Put, Without Obtaining Permission From The State

A basic principle of Washington water law is that the characteristics of a water right are essentially "fixed" when water is appropriated for beneficial use (either under the common law or under a statutory permit system). The amount of water appropriated, the place at which the

[9] More precisely, the right is perfected when the user gives public notice of intent followed by actual diversion within a reasonable time. Since this is a broad overview, this report will not discuss the specific statutes and case law explaining what acts satisfy these requirements.

water is diverted, the place at which the water is used, and the purpose of use of the water all define the nature of the right in question. Furthermore, except in limited circumstances, the owner of a water right does not have the right to change either the point of diversion or the purpose or place of use without obtaining approval for the change. Whether the change is approved depends on (1) whether the change would cause impairment of other existing water rights and (2) whether the change would result in an increase of the amount of water used or otherwise enlarge the right; and (3) for groundwater (but not surface water) changes, whether there is any public interest or welfare reason to deny the change. Water rights can be changed or transferred through statutory application procedures provided under RCW 90.03.380 and 90.44.100.

> ***Example 5.*** *In our continuing example, assume that C previously withdrew water from Crystal Creek far downstream from B's place of diversion. To reduce the length of its diversion pipes, C proposes to change its place of diversion to a point upstream from B's place of diversion. If C applies for a change in point of diversion, whether the request can be granted will depend upon whether the change would interfere with any other water rights in the area, including those of both A and B.*

On a related note, water rights are generally appurtenant (i.e., "attached to" in a legal sense) to the land on which the water is used. Case law holds that the transfer of land includes transfer of the water rights appurtenant to that land, unless the water rights are specifically reserved in the deed or other instrument of transfer. *Drake v. Smith*, 54 Wn.2d 57, 337 P.2d 1059 (1959). Thus land can be sold or conveyed separate from its appurtenant water. Statutes prescribe and limit the manner in which water rights may be transferred separate from the land to which they are appurtenant. RCW 90.03.380, 90.44.100.

6. Water Rights In Washington Cannot Be Finally Fixed Or Quantified Except Through A Judicial Proceeding

As noted above, Washington's water rights law began as a form of common law, dependent on case law decision. Since the enactment of the surface water code in 1917 and the groundwater code in 1945, Ecology has collected information about the permits issued concerning each body of surface water or underground aquifer, including certificates issued showing which water rights have been perfected through appropriation. However, Ecology may or may not have complete and accurate information about continuous beneficial use, changes in place of use or point of diversion, changes in land ownership or use of water, or other factors which would affect the determination of the extent of individual water rights. For pre-1917 water rights, Ecology may have written claims showing the water claimants believe they are entitled to, but cannot be certain whether the claims are accurate in all respects. Permits, statements of claims, and certificates provide the state with a rough sense how much water has been appropriated in a particular watershed and allow the exercise of judgment as to whether there is additional water available for appropriation, but they fall far short of the information needed to quantify or prioritize individual water rights.

To the extent that quantification and prioritization of water rights is necessary or desirable in Washington, it must be undertaken through court action. *See Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 858 P.2d 232 (1993) ("*Sinking Creek*").[10] This court action can take the form of a *general adjudication*, in which all the water rights in a particular stream or watershed are determined,[11] or the form of specific cases in which a few competing claims are brought to court for determination. General adjudications can be complicated and costly, unless they are small in scope.[12] Other cases may take the form of quiet title actions brought between individual water rights holders. However, these other cases will only resolve disputes as between the parties to the action. They will not establish priorities for all water uses within a watershed.

Where there is sufficient water to meet all current needs, there is no urgent necessity in adjudicating specific water rights. When the supply of suitable water grows short, however, questions of who has priority and for how much water come to the forefront. While judicial actions provide a thorough and fair process, their length, cost, and complexity may reduce their attractiveness as a solution to uncertainty concerning water rights.

B. Basic Principles Of The Law Of Federal Reserved Water Rights, Including Water Rights Reserved For Indian Reservations

Up to now, this discussion has been confined to Washington state law concerning water rights. Washington is one state within a federal union, however, and the United States government's role must be considered in analyzing any legal issue. At the very minimum, the United States is a major owner of land within the state and conducts various government operations which require water. Washington contains military reservations, national parks, national forests, wilderness areas, marine sanctuaries, and a host of other federally owned and operated facilities.

In addition to these direct federal government operations, nearly 30 Indian reservations have been established within the external boundaries of Washington. Each of these has been set aside as a homeland for one or more bands or tribes of Indians, through treaty, congressional act, or federal executive order. These tribes also need water, both for daily living and to conduct

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[10] The *Rettkowski* decision held that the Department of Ecology lacks administrative authority to quantify water rights, even tentatively, for purposes of enforcement actions. Under current law, Ecology cannot enforce without first establishing, through litigation, the priority and quantification of the rights in question. *Rettkowski* leaves open the possibility that the Legislature could establish some basis for administrative quantification of water rights. Subsequent cases have clarified that Ecology has authority to make tentative determinations regarding the extent and validity of water rights when processing applications to change water rights. *Merrill v. Pollution Control Hrgs. Bd.*, 137 Wn.2d 118, 127, 969 P.2d 458 (1999); *Pub. Util. Dist. v. State*, 146 Wn.2d 778, 794, 51 P.3d 744 (2002).

[11] The procedures for general water rights adjudications in superior courts are set forth at RCW 90.03.110-.245.

[12] Washington is currently undertaking only one general adjudication, covering the surface water rights in the Yakima River basin. The case was filed in 1977 and will not be completed for several more years.

various activities. This part of the report sets out the major issues encountered in trying to "fit" these federal and tribal reserved water rights into a state water rights system.

1. When The United States Reserves Land For Some Federal Purpose, Including An Indian Reservation, The Federal Government Thereby Also Reserves Sufficient Water To Meet The Primary Purposes Of The Reservation. The Priority Date Of A Federal Reservation, For Prior Appropriation Purposes, Is The Date The Reservation Was Created[13]

A basic principle of federal reserved water rights law, consistently followed by the federal courts since *Winters v. United States*, 207 U.S. 564, 28 S. Ct. 207, 52 L. Ed. 340 (1908), is that when the United States acquires or sets aside land through reservation for some specific federal purpose, including an Indian reservation, the federal government also reserves sufficient water to meet the purposes of the reservation.[14] Since the laws and treaties of the United States preempt state law, a state may not cut off or limit the operation of these federal *Winters* rights. *Winters* concerned the creation of an Indian reservation in Montana, but later cases establish that the same basic principles apply to other types of federal reservations such as military bases and national parks.[15]

> ***Example 6:*** *Again assume the facts as in Example 1, except note that Crystal Creek is a tributary of Large River. The territory just across Large River from the mouth of Crystal Creek has been part of an Indian reservation since 1875. The Indian tribe draws some water from Large River for irrigation of tribal land. In the treaty creating the reservation, the tribe reserved the right to fish at its usual and accustomed places, which includes Crystal Creek. It is a safe assumption, given these facts, that the tribe has a federally protected reserved right to take water from Large River to satisfy the primary purposes of the reservation. The priority of this right is, at the latest, the date of the reservation, 1875.*
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> *A question still before the courts is the extent to which a treaty fishing right implies a federally protected water right in specific off-reservation surface water bodies such as an instream flow right to maintain fish. The existence of such rights is clearly implied by*

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[13] On some occasions, courts have declared that certain tribal rights have a priority of "time immemorial" because they derive from the tribe's pre-existing sovereignty. This is particularly true of fishing rights reserved by a tribe in a treaty. In the case of most of Washington's Indian reservations, the date of creation of the reservation was so early that the reserved rights are the most senior water right in a watershed. Thus, it makes no practical difference whether the date of the reservation or "time immemorial" is named as the priority date.

[14] Cases uniformly hold that federal (non-Indian) reserved water rights are limited to the "primary purpose" of the federal reservation. An Arizona court has suggested that Indian reserved water rights may not be not limited in the same way. *In re the Adjudication of the Gila River*, Superior Court No. WC-90-0001-IR (filed November 26, 2001) ("Gila V").

[15] There have been some efforts, particularly within the federal government itself, to define one or more categories of federal water rights based on something other than the *Winters* analysis. None of these alternate theories have been tested in litigation, however. This report concerns traditional "reserved" water rights, but some of the analysis might be applicable to federal water rights asserted to be based on some other theory.

such cases as Ecology v. Yakima Reservation Irrigation District, 121 Wn.2d 257, 850 P.2d 1306 (1993) ("*Acquavella* II"), *and cases cited in that opinion, but the precise nature and extent of such rights have not been conclusively determined.*

***Example** 7: In 1960, the United States purchased a portion of C's land, where it has constructed and operated a salmon hatchery. When the government acquires land previously held in private ownership, the government may acquire water rights for its use of the land following the appropriate state procedures. In this case, the government may have acquired a portion of C's water rights as part of the land purchase. If so, the government should have applied to the state to change the purpose of that right from irrigation to fish propagation. Alternatively, the government may have applied to the state for a new water right. Assuming the U.S. applied for a new water right in 1960, the Indian reservation water right is senior to those of A, B, and C, and the fish hatchery water right dates to 1960, and is thus junior to those of the private landowners. If the U.S. obtained its fish hatchery right by obtaining a change in C's right, the right would still be junior to the Indian reservation, but it would retain the same priority date as C's original right. Note that the federal government has no reserved rights with respect to the fishery. The "reserved rights" doctrine applies only when the United States reserves federally-owned land for a federal purpose.*

2. A Federal Reserved Water Right Is Not Subject To The "Continuous Beneficial Use" Or "Use It Or Lose It" Requirements Of State Law

As noted earlier, state water rights generally must be kept in continuous beneficial use or they will be reduced in scope or eliminated altogether. Federal case law makes it clear that this "use it or lose it" requirement does not apply to federal reserved rights. For instance, if an Indian reservation is set aside in a treaty for "farming and fishing purposes", the measure of the water rights reserved is not the actual amount of water appropriated at some historic time, but the amount of water which is necessary, now or in the future, to meet the purposes of the reservation. For farming, this might involve a calculation as to the amount of water it would take to irrigate those portions of the reservation which are "practically irrigable", whether or not this land has yet been irrigated.

***Example 8:** A has been approached by D company about the possibility of buying A's land to develop a "destination resort" on it. The company's plans include creating an artificial lake with water from Crystal Creek, building a golf course, a large hotel, and several hundred housing units. To accomplish this goal, D will need to apply for large additional water rights. In assessing whether there is water available, D (and Ecology) might have to consider, in addition to the rights of B and C, whether the additional water appropriations will impair the Indian tribe's existing water supplies or an asserted tribal right to preserve the fishing in Crystal Creek. In addition, possible future needs of the Indian reservation might affect whether there will be continued water available for the resort. These additional needs are often difficult to estimate.*

3. Federal Reserved Rights May Be Used For Any Of The Primary Purposes Of The Reservations, And Changed From Time To Time As Among Those Purposes, Without Obtaining State Permission

As noted above, state water rights may not be changed as to the point of diversion, place of use, or purpose of use without obtaining authorization from the state. These limitations do not apply to federal reserved water rights, so long as the reserved water is used for the primary purposes of the reservation. In some cases, this begs a question what the "primary purposes" of a reservation are. For instance, most of the Indian treaties mention agriculture as a primary purpose (sometimes the only primary purpose) for the establishment of Indian reservations. Much reservation land however is not suitable for agriculture or could not be profitably used for that purpose. Some reservation land could be profitably used for commercial or industrial purposes not mentioned in the treaty or executive order creating the reservation. The types of purposes that may be considered to be "primary purposes" for quantifying an Indian reserved water right, and the extent to which water rights set aside for one purpose may be shifted and used for another, are not clearly established.[16]

4. The Law Of Federal Reserved Water Rights Does Not Establish What Particular Body Of Surface Water Or Aquifer Otherwise Available For Use By An Indian Tribe Is Subject To The Reserved Water Rights

The *Winters* case involved a dispute between an Indian tribe and a non-Indian water company over the waters of a river which was apparently the only source of irrigation and domestic water in the area. What if a federal or Indian reserved water right could be satisfied by appropriating water from any of several lakes and streams, or some combination of them, each with a different set of potentially competing water rights claimants? Aside from the implication that any body of water lying within or bordering the reservation could be used for this purpose, the federal case law does not address this issue.[17]

All of the federal law precedent on reserved rights involves the right to water in surface water bodies located on or next to a reservation. No federal case has squarely established

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[16] See discussion in footnote 14 above concerning the significance of "primary purposes" in determining reserved water rights. The Wyoming Supreme Court ruled that water rights set aside for agriculture could not be used instead for instream flows for fishing where fishing was not one of the primary purposes of the reservation and the instream flows would harm the rights of junior appropriators. The decision was closely divided, however, and affirmed by the United States Supreme Court on a tie vote with no precedental value. *In re the Water Rights of Big Horn River System*, 753 P.2d 76 (Wyo. 1988), *aff'd without opinion in Wyoming v. United States*, 492 U.S. 406, 109 S. Ct. 2994, 106 L. Ed. 2d 342 (1989). As a closely divided opinion coming from another state, the *Big Horn* case is not significant precedent in this state, but it illustrates how hard courts struggle to define the precise nature of reserved water rights.

[17] The Arizona Supreme Court has ruled that federal reserved water rights may apply to groundwater as well as to surface water, especially if the two are in continuity. *In re the Water Rights of Gila River System & Source*, 980 P.2d 739 (Ariz. 1999). Neither the federal courts nor Washington state courts have directly ruled on this issue yet, although it may be addressed in a pending case, *Lummi Indian Nation v. Ecology, United States District Court, Western District of Washington, Cause No. C01-0047Z.*

whether there are *Winters* rights to groundwater. There is also a question whether a federal reserved water right might include the right to take water located *outside* the reservation, especially if the tribe could demonstrate that on-reservation water sources are insufficient to meet the purposes of the reservation.

> ***Example 9:*** *There is an Indian community located on reservation land, near the mouth of Crystal Creek, which lacks an adequate supply of water for drinking and domestic purposes. The closest sources of good water appear to be Crystal Creek itself or groundwater wells which might be drilled in the Crystal Creek watershed. Could either source of water be used as an exercise of the tribe's reserved water rights? Would a diversion of water for that purpose be junior or senior to the rights of A, B, and C, or to the federal fish hatchery? Who can decide these issues? On questions such as these, 7existing case law provides few clear answers. The specific facts and history of a particular controversy may determine the allocation of water rights in that area, without necessarily providing legal precedents for dealing with other situations.*

5. Much Land On Indian Reservations Has Changed Ownership, Sometimes Many Times, Giving Rise To Additional Levels Of Complexity Concerning The Water Rights Appurtenant To Such Land

Although Indian reservations were originally set aside as homelands for Indian tribes, the land ownership patterns within reservations are often complicated. Some land is owned by the United States in trust for a tribe, or for individual tribal members. Some land is owned by Indian tribes in their own right. On many reservations, tracts of land were allotted to individual tribal members. Some of these are still owned by the allottees or by their descendants.[18] Some tribal members sold or conveyed their allotments to non-members. Large portions of some reservations are now owned in fee by non-members. Some of this "fee land" has been reacquired by the tribe or by the federal government, and some of that has been restored to "trust" status. Portions of some reservations were directly opened to non-Indian settlement pursuant to various federal land programs and contributed further to the extent of "fee land" within reservations.

What about the reserved water rights appurtenant to these various categories of property? The law is complex, but some general principles stand out. When land is allotted to an individual tribal member, it carries with it a portion of the water rights reserved for the reservation. These water rights are acquired by anyone who acquires the land, including a non-member.[19] *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981). To maintain the water right, the nontribal member must adhere to State law of continuous beneficial use of

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[18] Some tribal members received allotments outside the boundaries of the reservation, and these off-reservation allotments are treated as Indian lands for some purposes.

[19] The case law appears to hold that in the hands of someone other than a tribal member, a *Winters* right loses its distinct federal character and is more like an ordinary state water right—that is, its continuation depends on beneficial use, and it may be lost through common law abandonment or statutory forfeiture.

the water or risk losing the right. If the land is later reacquired by the United States or by the reservation tribe, the water right, if it remained valid while in non-tribal ownership, may again become a reserved water right. Land opened to non-member settlement and sold in fee (that is, without ever being allotted to an individual tribal member) does not carry federal reserved water rights with it. This is an especially complicated issue, however, and many questions relating to "allottee" water rights are still unresolved.

6. Although The Law Remains Unresolved, Indian Off-Reservation Fishing Rights May Be A Basis For A Tribal Claim Of Rights For Instream Flow To Protect The Fish

Many Indian tribes in the Pacific Northwest are parties to treaties with the United States that secure to the tribes a "right of taking fish at all usual and accustomed places" outside of Indian reservations. Most of the tribes whose treaties contain such language have urged that the treaty right carries with it a right to have fish habitat protected from human-caused degradation, including water diversions. The courts have generally confirmed that such rights exist as to surface waters that run through or adjacent to reservations,[20] but the extent to which these rights include groundwater, or water outside the reservation, remains uncertain. Note the discussion in Example 6, above.[21]

7. The United States Has Consented To Participation In General Water Rights Adjudications In State Courts; Otherwise, Neither The Federal Government Nor Indian Tribes May Be Joined Without Their Consent In State Court Litigation Concerning Water Rights

Just as Congress chose to allow each state to develop its own law of water rights, Congress has also expressed a policy preference for adjudication of water rights by state courts, at least where states undertake general adjudications. In the McCarran Amendment, codified as 43 U.S.C. § 666(a), Congress waived federal sovereign immunity and allowed the United States to be named in state water rights general adjudications conducted by state courts.[22] However, in cases that do not amount to general adjudications of a watershed, federal and tribal governments enjoy sovereign immunity and may not be joined without their consent.

The table on the next page depicts the key differences between state-based water rights and federal reserved water rights.

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[20] *See, e.g., Dep't of Ecology v. Yakima Reservation Irrig. Dist.*, 121 Wn.2d 257, 282-86, 850 P.2d 1306 (1993); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981).

[21] In a general water rights adjudication in Idaho concerning allocation of water in the Snake River basin, the Nez Perce Tribe and the United States asserted that the reserved treaty "right of taking fish" carries with it a right to instream flows sufficient to fulfill the purpose of the reserved fishing right. The trial court rejected the claim, but the appellate courts have not yet considered the issue.

[22] The case law makes it clear that the waiver of federal sovereign immunity covers the federal government both in its direct capacity and as trustee for Indian tribes.

DIFFERENCES BETWEEN STATE-BASED AND FEDERAL RESERVED WATER RIGHTS

ISSUE	STATE LAW BASED WATER RIGHT	FEDERAL OR INDIAN RESERVED WATER RIGHT
Applicable Legal Authority	Mix of statute and case law.	Case law.
On what principles is existence of water right premised?	Principles of prior appropriation and actual beneficial use.	Principles of sovereignty and prior appropriation.
How is priority determined?	For pre-code riparian rights, by date of land patent; For pre-code prior appropriation rights, by date appropriation is initiated; For code-rights, by date of permit application, assuming water is put to beneficial use within reasonable time.	Date of reservation or earlier (e.g., time immemorial).
How is right quantified?	Extent of actual use.	Purposes of reservation.
Is Continuous Beneficial Use Required?	Yes. Unused rights subject to statutory relinquishment (unless specified statutory exemption is applicable) and common law abandonment.	No. Not lost if not used.
Does a change or transfer require state approval?	Most changes or transfers require state approval.	No.
What is the effect of a change or transfer?	Unless modified, original conditions remain attached to changed right; new conditions may be added.	If transfer is to non-tribal member, right becomes subject to requirement of continued beneficial use.

C. Accounting For Federal Reserved Water Rights While Administering A State Water Rights System

From the discussion above, several major issues arise in accounting for federal reserved water rights. Because the rights rest on federal and/or tribal sovereignty rather than the state's, the state has no legal authority to change or shape the substance of federal reserved water rights, or even to impose procedural prerequisites on the establishment of such rights. Because most federal reserved water rights are (1) high in seniority and (2) significant in size and (3) not previously quantified, the existence of such water rights raises serious water management issues in watersheds where there are federal reservations.

1. Because The Federal Reserved Water Rights Are Senior And Not Quantified, The State Does Not Know How Much Water In A Water Body Is Still Available For Appropriation

Ecology is directed by state statute to consider effects on senior water rights and availability of water for appropriation when the state reviews an application for a water rights permit or for a transfer or change of water rights. The existence of potentially large quantities of water reserved for federal or tribal purposes but not yet used complicates management decisions. Should Ecology avoid issuing any more permits related to water bodies which "on paper" appear to be fully appropriated, or is it more prudent to permit junior appropriators to use water which may or may not eventually be curtailed to allow for the exercise of senior (including federal) rights? What notice, if any, should Ecology place in its permits or correspondence to advise citizens about federal reserved rights? These management decisions are even more complicated where the law is still unsettled, and the state cannot be sure of the existence, nature, or quantification of some asserted senior right as it tries to make state water policy or carry it out through permit decisions and enforcement actions.

2. Federal Reserved Water Rights Make It Difficult For Junior Appropriators To Plan Future Water Usage

The State is not the only party impacted by the uncertainty regarding how much water in an area might be needed to meet federal needs. Existing junior appropriators are impacted in deciding which crops to grow, how much to invest in wells and pumps and pipes, whether to employ conservation practices, and whether to consider changing the use of their water. The lower a user's priority, the larger the question marks become. Cities and community water systems are uncertain whether they have, or will continue to have, sufficient water to meet community needs. Industries considering construction or relocation may not have enough solid information to assess where there might be sufficient water, or how long it will be available.

3. Federal Reserved Water Rights Make It Difficult To Coordinate State, Tribal, And Federal Natural Resource Policies

The United States, Indian tribes, and the State all operate governments which, among other things, adopt and enforce policies concerning natural resources. One of those resources is water itself. Beyond that, however, the availability of water affects the management of fish and wildlife, timber and agricultural crops, commerce and industry, and land use planning. The existence of large but undefined federal and tribal reserved water rights leaves governments uncertain as to which natural resources are subject to their jurisdiction, as well as uncertain whether a shortage of water will frustrate government policy objectives in other areas.

4. A State's Choices Essentially Are To Litigate Questions Of Federal Reserved Water Rights Or To Attempt To Negotiate Them

Because the state has no power to legislate concerning federal reserved water rights, such rights can be quantified and resolved by either of two other processes: *litigation* and *negotiation*. Litigation, in addition to being costly and time-consuming, requires finding a court that has

jurisdiction to decide state, tribal, and federal claims at the same time. As noted earlier, the United States has consented to state court jurisdiction on water law issues, but only as to comprehensive general adjudications. Thus, the state may include federal rights along with all other rights by commencing the adjudication of a stream or aquifer, but the state may not commence separate litigation concentrating solely on the reserved water rights in a given area.[23] Litigation can be an awkward and inflexible tool for resolving federal reserved water rights issues, effective only when the state is otherwise committed to a general adjudication of all water rights.

Although negotiation sounds like an attractive alternative to lawsuits and conflict, current federal and state law provide no clear procedure for negotiations concerning federal reserved water rights. State law has not authorized any officer or agency to conduct negotiations, or established what the scope of such negotiations might be. If a federal agency or an Indian tribe expressed an interest in negotiations, it is unclear how the state could respond, other than by seeking new legislation to authorize negotiations and to set limits on the process. In the absence of a specific statutory negotiation framework, each negotiation is an ad hoc process which must be tailored to fit the particularity issues at hand.

To date, then, federal reserved water rights issues have been resolved either through ongoing general adjudications or on an ad hoc basis as they happened to arise in litigation in suits brought in federal court by the United States and tribes. The question then becomes whether Washington should look for a more systematic approach and should investigate the legal changes which would allow for it.

PART II

HOW OTHER STATES DEAL WITH FEDERAL RESERVED WATER RIGHTS

As requested by the Legislature, the Attorney General's Office contacted a number of other states to find out how they handle federal reserved water rights issues. These contacts included a dozen or more telephone conversations, legal research into the laws of other states, and a written survey distributed to other western states. Contacts were generally limited to western states that use the prior appropriation doctrine for determining water rights, because (1) the legal issues presented by federal reservations are quite different in "riparian rights" states, (2) the amount of federal land in those states is relatively small, and (3) most have relatively abundant supplies of water.

The contacts and research revealed that most of the "prior appropriation" states, like Washington, have not created specific institutions or programs to deal with federal reserved water rights. In most of the western states, federal water rights issues are dealt with as "one

[23] Federal reserved water rights are sometimes litigated in cases that are not general adjudications. Typically, these would be cases brought by the United States (on its own behalf or on behalf of an Indian tribe) in federal courts against the state and/or private water right claimants.

piece in the puzzle" and are resolved as they may arise in general adjudications or in other water rights litigation.[24]

This part of the report is itself divided into three parts. Part A summarizes the system used in Montana, which provides the most comprehensive model directly addressing federal and Indian reserved water rights. Part B discusses the experiences of seven other states, all of which are making special efforts to resolve reserved rights questions but without adopting Montana's Compact Commission system for doing so. Part C summarizes the survey results from those states that report no particular emphasis on resolution of federal reserved water rights.

A. Montana

There is one state which has developed a specific goal of seeking to resolve federal reserved water rights issues: Montana. In connection with that effort, Montana uses two institutions not present in Washington: a *water court* and a *reserved rights compact commission.* A third element of Montana's water law policy is a *statewide water rights adjudication.* These three ideas will be examined more closely.

1. Water Courts

Montana did not create its water courts for the specific purpose of dealing with federal reserved water rights issues, but the water courts do play a key role in Montana's overall strategy for resolving such issues. Montana is not the only state with a water court, either. Colorado also has a water court consisting of judges, referees, clerks, and other staff dedicated solely to water rights adjudication.[25] In each of these states, the water judges are either sitting or retired judges of the state's general trial level court[26] designated either primarily or exclusively to handle water rights adjudications.[27] Water referees, clerks, and other staff are assigned to the water courts. For purposes of appeal, authority to issue orders, etc., the water courts are treated as the equivalents of other general jurisdiction trial courts in the state.

The water court system is designed to provide a set of knowledgeable judges specializing in the resolution of water rights disputes. Over time, the law is developed by these specialists rather than by "generalist" trial judges who encounter water rights cases only by the "luck of

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[24] For instance, there has been ongoing litigation concerning water rights to the Colorado River for decades. This litigation involves the allocation of water among several states, the allocation of water between the United States and Mexico, and thousands of private water rights along with the water rights associated with several Indian reservations and other federal facilities in the Colorado River basin. For several states, adjudication of Colorado River basin claims includes a high proportion of their reserved water rights issues.

[25] Nevada and Idaho also use the term "water court", but unlike Montana and Colorado, neither of these states has created a separate court with its own staff. The term "water court" as used by Nevada and Idaho appears to simply refer to a regular trial court conducting a water rights adjudication.

[26] In both Montana and Colorado, these courts are called "district courts", but they are analogous to Washington's superior courts.

[27] In Montana, the water judges are chosen by the district court judges whose counties lie within each division of the water court. In Colorado, the water judges are designated by the chief justice of the state supreme court. In both states, the divisions of the water court correspond generally with the major watersheds in the state.

the draw". The system of specialized water courts assures that water rights cases will receive a certain level of priority. Furthermore, state funding of the water courts may relieve financial and workload burdens that might otherwise fall on county governments playing host to major water rights litigation.

Both the Montana and Colorado water courts serve conceptually as a part of a statewide water rights adjudication. The existence of specialized judges and other staff for this purpose facilitates the progress of the adjudications and helps to produce a consistent approach over time.

2. Reserved Water Rights Compact Commission

Montana is the only state to date which has established a commission whose specific mission is to negotiate federal reserved water rights. In 1979, the Montana Legislature created the Reserved Water Rights Compact Commission in connection with legislation providing for a statewide general adjudication of water rights in Montana. The commission has nine members: four appointed by the governor, two by the presiding officer of the state senate, two by the speaker of the state house of representatives, and one by the state Attorney General. The commission has a staff including attorneys, a historical researcher, an agricultural engineer, two hydrologists, a soils scientist, a digital geographer, and administrative staff.

The commission is authorized by Montana statute to conduct negotiations with federal agencies and Indian tribes claiming federal reserved water rights. Many of the negotiations have been federal/tribal/state processes concerning reserved water rights associated with Indian reservations, but the commission has also negotiated compacts with federal agencies concerning national parks, recreational areas on Bureau of Land Management, and wildlife refuges. When a settlement is negotiated, it is subject to ratification by the Legislature and by tribal councils, and to approval by the federal agencies. In some cases, Congressional approval is sought, especially where federal appropriations or federal statutory changes are needed to implement the compact. As of 2001, the commission had negotiated 10 compacts, though not all have been finally approved.

Although Montana's negotiation of federal reserved water rights furthers the state policy of moving to adjudication of all water rights claims, negotiations are not conducted explicitly under the "adjudication" umbrella. By statute, claims under negotiation are suspended from adjudication in the Montana Water Court. The commission is required to report every six months to the chief water judge concerning the commission's activities and transmit each compact to the Water Court upon ratification and approval. The Water Court has upheld the state's authority to enter into compacts and to determine federal reserved water rights in this manner, although the courts have reserved the right to overturn compact provisions which are clearly unlawful.

3. Statewide General Water Rights Adjudication

As noted above, Montana instituted its Reserved Water Rights Compact Commission as part of an effort to achieve a statewide general adjudication of all water rights, which has been commenced and is an ongoing process in the state's Water Court.

As evidenced by its request for this Federal and Indian Reserved Rights Report, the Washington Legislature is interested in the possibility of negotiating some or all federal reserved water rights in this state. However, the Legislature has not expressed a strong interest in favor of commencing a statewide adjudication of all Washington water rights. Looking at the Montana model, then, an obvious question arises: Could Washington adopt some version of a compact commission to negotiate federal and tribal reserved water rights without tying this process to a statewide adjudication?

The answer to the question is not entirely clear. It appears, first of all, that Montana commenced a general water rights adjudication for independent policy reasons and not simply as a pretext for negotiating federal reserved water rights. At least part of Montana's rationale, however, may have been that the state could invoke McCarran Amendment jurisdiction over federal water rights because of the general adjudication, with this jurisdiction providing a legal backdrop for engaging in the compact process. If there is no adjudication pending, questions arise concerning (1) the willingness of federal and tribal agencies to engage in negotiation and (2) if they are willing, how to confirm and enforce the terms of any compacts resulting from such negotiation. These are significant issues, but if resolved, there is no inherent reason why Washington would have to engage in a general adjudication as a prerequisite to the establishment of a tribal/state/federal negotiation process.

Materials relating to the Montana Commission and Montana survey results are included in the Appendix.

B. Arizona, Colorado, Idaho, New Mexico, Oregon, Utah, and Wyoming

In addition to the opportunities presented by the Montana experience, experiences of seven other states may prove useful:

Arizona

Arizona officials report that determining Indian water rights is among the most important water resource issues in their state today. There are currently two means by which Indian water rights claims are resolved in Arizona: negotiation of water rights settlements and adjudication of water rights.

Two general stream adjudications of water rights are now in progress in Arizona. In the adjudication of the Gila River system, eleven Indian tribes have filed claims. In the Little Colorado River system adjudication the Hopi, Navajo, San Jaun Piaute, and Zuni nations filed claims. In the absence of comprehensive settlements, the adjudications will eventually resolve the Indian claims and the claims of all other water users in these watersheds. To date, several settlements of water rights claims have been reached and negotiations regarding other settlements are underway.

When the settlement process begins in Arizona, parties potentially impacted by the Indian water rights claims identify the sources of water necessary to satisfy the tribal needs. A federal negotiating team works with the parties to assure that federal concerns are addressed. The Arizona Department of Water Resources (ADWR) participates in the settlement discussion, offering technical assistance and ensuring state water laws and policies are followed. In addition to ADWR's efforts, until last year an Office of Indian Water Rights Settlement Facilitation existed to serve as a mediator and facilitator between ADWR and tribes. Materials describing reserved rights settlements to which Arizona has been a party are included in the Appendix.

Colorado

Colorado Water Courts. The Water Right Determination and Administration Act of 1969 created seven water divisions based upon the drainage patterns of various rivers in Colorado and located in each of the major river basins (South Platte, Arkansas, Rio Grande, Gunnison, Colorado, White, and San Juan rivers). These divisions make up Colorado's water courts. Each division is staffed with a division engineer, appointed by the state engineer; a water judge, appointed by the Supreme Court; a water referee, appointed by the water judge; and a water clerk, assigned by the district court. Water judges are district judges appointed by the Supreme Court and have jurisdiction in the determination of water rights, the use and administration of water, and all other water matters within the jurisdiction of the water divisions. Water Court adjudications include determinations regarding federal and Indian reserved water rights.

Federal and Indian reserved water rights have been addressed in a number of the divisions. For example, in the San Juan division, eleven tribal claims were asserted. Nine were the subject of unconditional settlements. Two were the subject of provisional settlements that included an agreement by the state to develop a water project for the area and allocate a share to the tribe. The project has yet to be developed, but efforts are still being made. If the project is not completed, the tribe can revisit the provisional settlement.

Colorado Water Conservation Board. The Colorado Water Conservation Board (CWCB) was created in 1937 and is responsible for water supply protection, flood protection, water supply planning and finance, stream and lake protection, and water conservation and drought planning, as well as management of related water information. The role of the CWCB, as defined in statute, includes, among other duties: mediating and facilitating resolutions of disputes between basins and water interests; establishing policy to address state water issues; and representing citizens within individual basins. The CWCB is required to cooperate with federal agencies and other states to better utilize water resources. In addition, the CWCB coordinates the interface with other states and federal entities.

Idaho

Idaho is currently involved in a general adjudication of the Snake River basin, which covers approximately 87 percent of the state's area. Approximately 200,000 claims have been

filed in this adjudication, including both federal and tribal reserved water rights claims. In addition, all rights previously decreed in Idaho's two prior adjudications are included in the Snake River basin adjudication. Although Idaho does not have any formal mechanism for addressing federal reserved water rights similar to Montana, Idaho officials report that the state has a clear policy of attempting to resolve federal reserved water rights through negotiation before focusing on litigation. As a result, Idaho has been successful in obtaining several settlements. Court-ordered mediation that is focusing on reserved water rights claims of the Nez Perce Tribe is currently underway.

New Mexico

New Mexico's attorneys report that adjudications are currently underway in both federal and state courts in New Mexico. State officials report that they negotiate over federal and tribal reserved water rights claims only within the context of a filed adjudication. Officials also report that they typically work first through informal negotiation processes, then through court-ordered mediation, and lastly through litigation. New Mexico officials observe that negotiations have proven to be far more complex and lengthy than originally anticipated and that litigation may have been less time-consuming. Nevertheless, state officials report that the parties appear to participate in negotiations to avoid potential unintended consequences of litigation.

The approach used in New Mexico in several adjudications may provide some lessons for Washington. In the Lower Rio Grande and Nutt-Hockett basin adjudications, originally filed in 1986 during the height of the litigation surrounding the applications of the City of El Paso for water from southern New Mexico, the Office of the State Engineer has been successful in its request to the court to adopt procedures to streamline the adjudication process. In place of traditional adversarial litigation, the court established an alternative dispute resolution process for resolution of legal issues and factual disputes before any formal hearings or trials are scheduled by the court. New Mexico officials report that this process is intended to allow for acceptance of negotiated or mediated offers of judgments over the course of a couple of months after the original offer of judgment is served upon a water rights claimant.

Oregon

Approximately two-thirds of Oregon's water systems have been adjudicated (covering the eastern and some Willamette valley areas of Oregon). Approximately 100 decrees have been issued on individual streams. Tribal and federal reserved water rights are addressed through these adjudications. There are five or six Indian tribes in Oregon and a number of federal interests. Oregon officials report that whether there are opportunities to negotiate varies with each claimed right.

Oregon has a specific statute that authorizes negotiations with tribes outside of the adjudication system. Under this statute, the Water Resources Director may negotiate with

representatives of any federally recognized Indian tribe that may have a reserved water right claim in Oregon. All negotiations are open to the public. The director must provide public notice of the negotiations, allow for public input, and provide regular reports on the progress of the negotiations to interested members of the public. One example of the use of this process was the negotiations and ultimate resolution of issues involving the Warm Springs tribal rights. Oregon officials report that the case was well-suited for this approach because there were not very many non-tribal or non-federal entities with interests in the subject watershed.

Utah

Utah has an adjudication procedure defined by statute. Utah officials report that in most cases, attempts are first made to resolve issues through negotiation or settlement, with litigation as the last resort. The Utah State Engineer's Office and the Attorney General's Office report some recent successes in negotiating federal reserved tribal water rights. They also report success in negotiating other federal reserved water issues. A prime example is the negotiations addressing water rights for Zion National Park. The process used for the Zion negotiations has been used as a model for subsequent negotiations. Utah officials reported that the process focused on technical solutions to water rights disputes, particularly on significant data gathering and exchange of information. Many discussions occurred between mid-level state and federal officials without involving attorneys or the legal dispute process. Utah reports that success in this process was attributable to determinations made by both sides of the amount of water necessary for their respective needs and uses as well as an acknowledgement by both sides of the legitimacy of the other side's needs and assertions.

Wyoming

Wyoming has a general adjudication statute, 1-37-106. One general adjudication, the Big Horn River general adjudication, has been ongoing since 1977. This adjudication has involved both federal and tribal reserved water rights (BLM, Forest Service, and a fraction of Yellowstone National Park). The adjudication was divided into 3 phases: Phase I dealt with tribal reserved water rights and has been finalized and quantified; Phase II involved the federal reserved water rights and resulted in a stipulated settlement agreement and an interlocutory decree; Phase III is ongoing and involves individual and private water claims. Wyoming officials believe that dividing the adjudication into three phases made the adjudication more manageable. Finally, due to the cost and time-consuming nature of general adjudications, Wyoming officials report that they make every possible effort to settle claims.

C. Other Western States

Several other states provided information which may be useful, but none of these states has established a priority of resolving federal reserved water rights issues or developed any specific strategy for doing so. In several of these states, federal reserved water rights are simply not a major issue.

Alaska

Alaska does have a general adjudication process established in statute. This statute was specifically written so that federal reserved water rights can be addressed through the adjudication process. The nature of tribal rights in Alaska is very unique. Pursuant to the Alaska Land Claims Settlement Act, no water, hunting, fishing, etc., rights were reserved for the tribes (with the exception of one tribe in South Eastern Alaska). Alaskan natives voted to become corporations and received a monetary settlement of these types of claims. Alaskan tribes now operate as corporations and businesses. As a result, there has been no litigation or negotiations as they relate to federal reserved tribal water rights.

California

The California State Water Resources Control Board allocates water rights and adjudicates water right disputes. The Board's duties include conducting statutory adjudications and serving as a court referee. The statutory adjudication is a comprehensive determination of all water rights in a stream system that involves the Board and the appropriate superior court. California officials report that the trend has been away from general adjudications with the focus instead on individual actions on specific claims. Reserved tribal water rights have been acknowledged and confirmed in past adjudications, but there are no current or recent disputes regarding the existence of or extent of federal reserved Indian water rights.[28] There also are no current disputes involving other federal reserved water rights.

Hawaii

In 1978, Hawaii adopted amendments to the state constitution regarding the state's "obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people". In 1987, the Hawaii Legislature enacted the state water code and created the Commission on Water Resource Management. Hawaii does not have a general adjudication system. Instead, Hawaii has the ability to designate water management areas when the water resources in the area may be threatened by existing or proposed withdrawals or diversions of water. This process appears to be similar in some respects to a general adjudication system. Hawaii officials report that the state has not found it necessary to resolve federal reserved water rights (tribal or otherwise) issues.

Kansas

Kansas does not have a general adjudication system for surface water rights. With respect to ground water, which is separate and distinct from the surface appropriation process, Kansas' chief engineer has the authority to allocate water among users as well as among priority dates. This process is similar to a general adjudication except that it is done by an administrative agency.

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[28] California's comments were not intended to ignore the ongoing litigation associated with the Colorado River referenced in footnote 24 above.

There are four tribes in Kansas that are small in terms of numbers of members and amount of reserved land. Kansas officials report that water rights for these tribes have never risen to a level where litigation or negotiation has become necessary. Kansas has one military installation but no other major federal interests that are likely to claim water rights. Water rights and/or water uses for this base and other federal entities have never risen to a level where litigation or negotiation has become necessary.

Nevada

Nevada reports that it has dealt with federal and tribal reserved water rights claims, but that it did not develop any special procedures that officials felt would be useful to Washington.

North Dakota

North Dakota has not found it necessary to resolve federal reserved water rights (tribal or otherwise) issues.

South Dakota

South Dakota has a general statewide adjudication process. General adjudications are filed directly with the courts, with notification to interested parties upon which the individuals must file a claim. There has been only one effort to conduct a general adjudication in the 1980's (Missouri water right basin). However, the adjudication was never actually started due to the estimated cost of proceeding with adjudication. No further general adjudications have been attempted since that time. South Dakota officials report that no reserved water rights claims have been filed on behalf of either the federal government or tribes and, therefore, South Dakota has not found it necessary to deal with these issues.

Texas

There are only three federally recognized tribes in Texas. The reservations for two of these tribes are in areas in which there have been general adjudications. These two tribes did not submit claims for reserved water rights. The watersheds for the area in which the third tribe is located have not yet been adjudicated. However, Texas officials do not anticipate that this tribe will submit any reserved water rights claim. As a result, Texas has not dealt with any issues related to tribal claims for reserved water rights. Texas officials also are not aware of any other federal reserved water rights or claims. Texas officials note that, in general, the federal government applies for water rights through the state permitting process.

Please see the surveys attached in Appendix 1 for more information regarding these states' systems. The office was unsuccessful in contacting or obtaining information from Nebraska or Oklahoma.

PART III

POSSIBLE LEGISLATIVE OPTIONS FOR RESOLVING FEDERAL RESERVED WATER RIGHTS ISSUES

A. Possible Administrative Options[29]

1. A Compact Commission Or Similar State Body Authorized To Negotiate Reserved Water Rights With Federal Government Agencies And Indian Tribes

Montana appears to have struck a useful approach in using federal/state or tribal/federal/state compacts as an alternative to litigation concerning federal reserved water rights. As discussed above, current federal and state law provide no clear procedure for negotiating compacts or similar agreements. In contrast, a system which authorized the state to enter into compacts could be used to reach agreement on the validity, extent, and priority of federal reserved water rights, including both tribal and non-tribal claims. The establishment of a state body and procedures for such negotiations would facilitate the compacting process.

Relevant highlights of the Montana Compact Commission system are as follows: The Montana Compact Commission is composed so as to represent both the executive and legislative branches of state government and is designed to deal with the state's policy goals as well as with purely legal or technical questions; the commission also has the resources at hand to do its job, including experts in law, history, and science; and compacts negotiated by the commission are subject to ratification by the Legislature, so the state Legislature retains ultimate policymaking authority in this area.

The Montana Compact Commission was created as part of a commitment by the state to commence general water rights adjudications of the entire state. To make this model work in Washington, primarily in order to meet the legal and policy concerns of the federal government and of the Indian tribes, Washington might have to make a similar commitment. It is unclear whether Washington could successfully implement a compacting process without linking it to a water rights adjudication. Tribal governments and federal agencies, however, might be responsive to such an approach. Washington has more Indian reservations, more non-Indian federal reservations, and a larger population than Montana, so the tasks awaiting a negotiating team would be at least as complex as those faced in Montana, if not more so.

Implementation And Cost Considerations

Although the governor or the director of Ecology could administratively emphasize negotiation of federal reserved water rights under existing law, a fully effective and fully-funded effort would require legislation. Following Montana's model

[29] These are identified as administrative options because the activity of negotiation occurs through an administrative process. However, where these options contemplate effectuation by a court, they may also be characterized as judicial.

and creating a commission with its own full-time staff would entail considerable start-up costs as well as a commitment to ongoing costs of operation. The composition of the commission and the size and professional mix of the staff would depend on legislative and administrative policy choices, and different options could lead to different cost levels.

The current annual budget for Montana's compact commission (not including court costs) is about $746,000. Washington's costs could be higher or lower, depending on decisions about the type of commission created, the number and professional levels of staff, the duties and responsibilities assigned, and the extent to which the commission's work "replaced" similar staff work already being performed. A successful compact commission approach could also save litigation costs in the long run.

2. Ad Hoc Negotiations To Be Conducted As Specific Issues Arise

As an alternative to creation of a commission with the specific mission of negotiating federal reserved water rights, the Legislature could authorize a specific officer or body (the Department of Ecology, or a committee or commission designated by law) to negotiate federal reserved water rights issues without commencing any specific new adjudications. Negotiations could be conducted against the background of current adjudications (as in the Yakima River basin) or as they might relate to other specific issues where litigation has already been filed or is likely to be filed. The experiences of several states discussed in Part II B, above, provides examples of this general approach. This solution would be a less "global" approach than a full compact commission. Presumably it would not involve the creation of a new body with its own staff, but would redirect existing staff efforts.

Implementation And Cost Considerations

The Legislature could enact new legislation directing current officers or agencies as to a negotiation or other process. Costs would depend on the extent to which the legislation would add or shift staff and other resources. This option would be cheaper and easier to implement than option A1, but it might be less effective, or the redirection of effort might be achieved at the expense of other existing programs. Note elsewhere that any "negotiation" approach should be considered together with options to handle areas where negotiation is unsuccessful (general adjudications, ad hoc litigation, other forms of dispute resolution).

3. More Aggressive Watershed Planning

RCW 90.82 authorizes the creation and operation of watershed planning units to develop watershed plans for the purpose of managing water resources and for protecting existing water rights. As watershed planning units are authorized to, among other things, recommend instream flows to Ecology for potential adoption as regulations, there is potential for this process to help resolve issues related to treaty fishing rights or other federal claims relating to instream flows.

The current statutory framework is probably inadequate to include any serious consideration of federal reserved water rights. It is designed for the relatively narrow purpose of achieving local consensus on instream flows. Moreover, once adopted, the instream flows arrived at through the efforts of watershed planning obtain a junior priority date (based on the date the regulation establishing the instream flows is adopted). This does not preclude the use of watersheds in devising a broader approach, such as some form of reserved water right negotiations or a program of watershed adjudications. Both Montana and Colorado organize their water rights systems around watershed planning, which is logical in that a watershed geographically defines, for most purposes, the "corpus" of water which is available for sharing among those who are using it, or seek it for future use.

Indian tribes can participate in watershed planning, and some have chosen to do so. Watershed plans could result in the maintenance of sufficient instream flows in some bodies to satisfy federal and tribal concerns, making it unnecessary (at least for the time being) to adjudicate or quantify the reserved rights. Of course, neither federal nor Indian reserved water rights can be determined by this process, and watershed planning cannot prevent the federal government or an Indian tribe from starting litigation. Furthermore, there is no way to force federal agencies or Indian nations to participate in the watershed planning process or to abide by the results. However, if successful, watershed planning could provide a forum for the exchange of ideas and legal views, either facilitating actual negotiations about water rights or making litigation unnecessary. If watershed planning becomes a possible focus of legislation, ways to encourage federal agency and tribal participation could be explored. Ecology is already funding and engaged in assisting a large number of communities in watershed planning efforts, so this option would be an enhancement of an existing process. As noted earlier, the watershed planning process would probably have to be considerably broadened in scope and altered in form to be useful for resolution of reserved water rights issues.

Implementation And Cost Considerations

Like the previous option, this one could be implemented with a relatively modest shifting of program priorities, or it could be the subject of additional staffing at the state and/or local levels. Costs would depend on the extent to which staffing would be added or the goals and objects of planning were changed. Significant changes in the nature of watershed planning would require implementing legislation and continued budgeting.

B. Potential Judicial Options

1. More Aggressive Use Of General Stream Adjudications

Montana and Colorado both are engaged in a long-term process of adjudicating all water rights in their respective states. These stateside adjudications, working together with the McCarran Amendment, provide a legal backdrop for Montana's Reserved Rights Compact Commission and its work.

Either together with or separate from the establishment of a compact commission, Washington could commit to a more aggressive use of general adjudications. Washington could adopt Montana's approach and undertake a statewide adjudication, or it could simply prioritize adjudications (*see* RCW 90.03.110-.245) in watersheds which contain Indian reservations and/or national parks, national forests, and other federal land. Either a uniform approach could be taken where adjudications would be commenced in sequence in all watersheds with such lands, or adjudications could simply be commenced in select watersheds where federal reserved water rights produce the most uncertainty in managing water resources. Adjudications could be very large (Idaho is currently adjudicating its Snake River basin, covering 85 percent of all the surface and water rights claims in the whole state) or relatively small (such as many conducted in Washington in the 1920's and 1930's).

Under the McCarran Amendment, 43 U.S.C. § 666(a), the United States can be named as a defendant in a general adjudication, both in its direct capacity and as trustee for one or more Indian tribes. Thus, this process would result in the determination of federal and Indian water rights in the area chosen for adjudication, along with claims based on state law.

Implementation And Cost Considerations

Undertaking a statewide adjudication would require implementing legislation and ongoing budget. Ecology lacks the staff and the resources to make such an undertaking without legislative sanction. The costs would be significant, but the Legislature could manage the costs over time by deciding how rapidly to proceed and how much staff and financial resources to devote to adjudication.

Currently, Washington budgets approximately $1.2 million annually for the Yakima basin adjudication. This is generally inclusive of the court, referee, other staff, and attorney costs. For another example, Idaho's Snake River basin adjudication has cost Idaho between $4.4 and $5.3 million per year in the most recent years. In both states, the costs have fluctuated over time as the litigation has moved from one stage to another.

2. Negotiations Coupled With The Commencement Of State General Water Rights Adjudications

This is essentially the approach Montana has taken and combines proposals A1 and B1, discussed above. In tandem with general adjudications, negotiations could be pursued with Indian tribes and federal agencies to resolve federal reserved water rights. The approach would not necessarily involve creation of a separate compact commission. For instance, Idaho and the Nez Perce Tribe are engaged in court-ordered mediation in the Snake River basin adjudication. Idaho's approach has been to enter into settlement negotiations with reserved water rights claimants who are willing to negotiate. Then, if negotiations fail, rights can be determined through the adjudication itself.

For this approach, it would be necessary to create either a body such as a commission or at least a designated process to conduct negotiations. Negotiations could be essentially independent of the adjudication itself (as in Montana) or incorporated into the adjudication and approved by the court conducting the adjudication process.

Implementation And Cost Considerations

This would require new legislation defining how the state would conduct negotiations and how these would relate to adjudications. For costs of a compact commission, see option 1A, above. The costs of an adjudication, as noted above, would be considerable over time. However, there would be flexibility in spreading the adjudication over a number of years. One possible approach would be to devote early effort to negotiating federal reserved water rights (using a commission or some other mechanism), deferring the rest of the adjudication to a later time. This would reduce start-up costs and spread the adjudication over more years. It might also simplify and shorten the adjudication process if the resolution of reserved water rights issues removed a major tangle in the process or facilitated the negotiation of other major water rights issues.

3. Ad Hoc Approach Mixing Litigation And Negotiations As Specific Cases Arise, Probably In Federal Court

The survey showed that this is the approach adopted by most of the western states and is basically Washington's historical approach. Where there is no general water rights adjudication pending, the state cannot compel either the federal government or an Indian tribe to litigate water rights in state courts. If litigation arises over federal reserved water rights, then it is usually initiated by the United States on its own behalf or as trustee for an Indian tribe. Historically, the bulk of such litigation has been handled by federal courts. This has occurred in the past in cases related to the water rights of the Colville Tribe and the Spokane Tribe and is now occurring in litigation brought by the United States on behalf of the Lummi Nation.

This is necessarily a reactive approach since it is hard to "plan" to be sued in federal court. Each case has the potential for resolving the specific reserved water rights issue before the court and might produce useful precedent for dealing with similar claims in other parts of the state. Federal reserved water rights often depend heavily on the history and factual context of a particular federal reservation, however, which often reduces the precedental value of specific decisions. Since the federal court cases are not general adjudications, state-based water rights are not determined by them.

Implementation And Cost Considerations

Since this essentially describes Washington's current strategy, it would not necessarily entail additional implementing legislation or additional cost. However, the Legislature would still have the option of redirecting effort or adding additional resources to improve the state's ability to respond to situations as they arise. If the costs

are largely driven by litigation brought against the state, it is hard to predict which cases will be filed when, and how much they will cost.

4. Water Courts

As noted above, Colorado and Montana have created separate water courts— specialized trial courts whose judges devote their time either primarily or exclusively to water rights cases. The water courts in both states are financially supported by the state and include referees, clerks, and administrative staff, as well as the judges themselves. In both states, the water court fits in with the policy goal of conducting a statewide general adjudication of all water rights. The jurisdiction of the water courts is based primarily on watershed boundaries, so that local watershed planning, ongoing water rights negotiations, and administrative management can be coordinated with the work of specific courts.

Of course, states can conduct general adjudications without creating specific water courts. If adjudications are conducted by the general jurisdiction superior courts, however, issues arise such as workload allocation with a court dealing with a large adjudication, state versus county issues as to financial support for adjudications, and potential delays in the process caused by competition for court time with criminal and other civil matters.

Implementation And Cost Considerations

Establishing specialized water courts would require significant new legislation defining the nature and duties of these courts and relating their work to the rest of the court system and to the administrative process. Creation of new courts with judges additional to those now serving, with attendant needs for staff and housing, would be significant. In addition to the costs of maintaining the courts themselves, there would be added costs for the agencies that would appear in those courts, either as parties or as attorneys.

Separate water courts on the Montana or Colorado model are not the only possibility here. The Legislature could provide for the designation of existing judges as "water judges" with jurisdiction over adjudications and other water rights cases, possibly with different jurisdiction and venue provisions from other superior court cases. This option might not involve significant increased cost, unless it were paired with increased adjudication efforts or linked to increased staffing.