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Making a Wrong Thing Right: Ending the "Spread" of Reclamation Project Water

In the Pacific Northwest, especially east of the Cascade Range, water is a limited and precious resource. Diversions of water for out-of-stream uses regularly dry up certain reaches of many rivers and streams. Such diversions provide water for municipalities, industrial users, and farmers who irrigate millions of acres in Idaho, Oregon, and Washington. Diversions also harm fish and wildlife (including threatened and endangered salmon stocks), impair recreational uses of affected waterways, and degrade water quality.

Water law is primarily state law, and all of the western states regulate water use under some form of the prior appropriation doctrine. Federal law also governs much of this water use, however, because the Bureau of Reclamation (hereinafter Reclamation or the Bureau) has developed irrigation projects and facilities throughout the West. Reclamation supplies water to irrigators under various types of contracts. Irrigators with Bureau contracts must use water in accordance with these contracts.


1 Under the prior appropriation doctrine, a person acquires a legal right to use water by diverting it from its natural course and putting it to "beneficial use." The older a water right, the higher its priority. When water is scarce, users with senior rights get all the available water, and nothing is left for those with junior rights, or for instream uses. See Joseph Sax, et al., Legal Control of Water Resources 137-8 (2d ed. 1991).
2 "The program managed by Reclamation delivers irrigation water to approximately 137,000 landholders through contracts with 585 water districts. These water users farm over 10 million irrigable acres in the 17 Western [sic] States that are served by Reclamation." U.S. Bureau of Reclamation, The Reclamation Reform Act of 1982 Annual Report to the Congress 11 (Feb. 1991). This program has been developed under the authority of various federal reclamation laws. 43 U.S.C. §§ 371-573 (1988 & Supp. V 1993).
Thus, contracts, reclamation laws, and water rights all impose requirements and restrictions on water use; for example, they may require that water be used for a certain purpose, or may limit the quantity that may be diverted. They also may limit the place of use, often by specifying the lands on which water may be applied.

These restrictions are often violated. Throughout the West, federal water is being used to irrigate lands that have no legal right to receive it. Irrigators who apply water to these lands violate their contracts with Reclamation, and may also break federal or state law. These irrigators are engaged in a practice known as "water spreading."

Reclamation has known for many years that water spreading is a significant problem, especially in the Pacific Northwest. For the most part, however, they have done little or nothing to uncover water spreading, let alone stop it. Reclamation can only guess at the full extent of water spreading across the West—certainly several hundred thousand acres, perhaps a lot more.³

Today, water spreading is receiving unprecedented attention by the federal government and other entities. As stocks of salmonid fishes continue to decline, due in part to insufficient flows in the Columbia and Snake Rivers and their tributaries, environmentalists contend that the elimination of water spreading could improve flows.⁴ Native American tribes argue that illegal water use further impairs their unmet treaty rights.⁵ The draft recovery plan for threatened and endangered Snake River salmon urges Reclamation to take action on illegal water use, including water spreading.⁶ The Inspector General of the United States Interior Department is currently investigating water spreading, and is expected to issue a report in the summer of 1994.⁷

³ See infra Part I.C.
⁴ See, e.g., Letter from WaterWatch of Oregon to Dan Beard, Commissioner of Reclamation (Dec. 17, 1993) (on file with authors).
⁵ See, e.g., CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, WATER SPREADING POLICY (Mar. 2, 1994).
⁷ This report was issued in July, 1994, too late for its content to be reflected in this article. The report examines existing Bureau estimates of water spreading on 24 selected projects, and attempts to quantify the water and acreage involved. The report notes that water used on ineligible lands could instead be used for other purposes, such as protected species, Indian water rights, or reduction of toxic irrigation
Irrigators view the practice of water spreading quite differently. They argue that unauthorized lands are often irrigated with water that has been "saved" as a result of legitimate conservation measures. Many irrigators claim to have relied in good faith on the approval, or at least the acquiescence, of Reclamation officials. They warn of severe economic effects if currently irrigated lands lose their water supply.\(^8\)

The existence and history of water spreading, as explained in this article, certainly reflect Reclamation's lax institutional attitude. Over its history, the Bureau has cared more about building dams and satisfying irrigators than it has about protecting the environment or the interests of taxpayers.\(^9\) Reclamation provided cheap water but failed to enforce legal requirements, which led to widespread unauthorized water use and, in some cases, insufficient payments by irrigators who came to expect a pliant Bureau. Now it must clean up the resulting mess.

Today, Reclamation is belatedly coming to grips with water spreading. In doing so, it will need to comply with federal environmental and reclamation laws, as well as state water laws. The Bureau will also have some discretion to set policy, and it will face many difficult choices because of conflicting demands on the scarce supply of western water. Reclamation must address endangered species concerns, protect tribal trust assets, and respond to environmentalists who seek water for long-neglected instream values. At the same time, it must consider the interests of irrigators, local communities and others who have come to rely on federal water.

This article examines what water spreading is, how it came about, and how the Bureau has dealt with the problem thus far. It then identifies and briefly discusses some of the tough issues of law and policy that Reclamation will face in responding to water spreading.

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\(^8\) Water Spreading a "Sleeping Giant," CAPITAL PRESS (Salem, Oregon), Feb. 4, 1994, at 22.

\(^9\) For a lengthy and critical history of the Bureau and the Reclamation program, see MARC REISNER, CADILLAC DESERT (1986).
A WATER SPREADING PRIMER AND BRIEF HISTORY

A. What is Water Spreading?

Water spreading is the use of federal water on lands not authorized by the Bureau for such use. Federal water" is water developed under a federal irrigation project, or diverted or delivered through federally built facilities. Lands may be unauthorized to receive federal water because of (1) provisions of the legislation authorizing the federal project, (2) provisions of the water user's contract with the Bureau, (3) the statutory requirement that lands be classified by the Bureau as irrigable, or (4) the requirements of state water law. The application of federal water contrary to one or more of these restrictions is deemed to be water spreading.

Reclamation projects are authorized by acts of Congress, and this enabling legislation may restrict water use in a number of ways. It may confine water use to lands in a certain location, or impose a total limit on irrigated acreage. Users who violate the conditions set forth in the project legislation are spreading water. Applying water to excessive acreage may be the most egregious type of water spreading. Legislation may also authorize water only for irrigation purposes, so that use of project water by cities or industries would be contrary to law. Reclamation has acknowledged that unauthorized municipal or industrial use meets its definition of "water spreading."

10 Reclamation defines water spreading as "the unauthorized use of federally developed project water or facilities on lands not previously approved by Reclamation for such use." U.S. BUREAU OF RECLAMATION, WATER SPREADING (Mar. 3, 1994) (on file with authors).


12 Some irrigators have repayment contracts with the Bureau because they use federally built facilities to divert or deliver their water, even though it is not "project water."


16 Remarks of Walt Fite, Assistant Regional Director, Pacific Northwest Region, at a meeting of the Bureau's Water Spreading Task Force in Portland, Oregon (May 25, 1994). This Article focuses on agricultural water spreading, but unauthorized municipal and industrial use is a major concern in many areas. See IDAHO RIVERS
Reclamation contracts\textsuperscript{17} impose additional limits on water application. Most repayment contracts provide for delivery of water within an irrigation district, and nearly all of these contracts contain a provision much like the following: "While this contract is in effect, no change shall be made in the District, either by inclusion or exclusion of lands, . . . except with the consent of the [U.S. Interior] Secretary evidenced in writing."\textsuperscript{18} Some contracts also specify an irrigable acreage on which repayment is calculated,\textsuperscript{19} or contain specific provisions on "excess" lands\textsuperscript{20} and land classification.\textsuperscript{21} Other contracts contain specific limits on service to "new" lands.\textsuperscript{22} Finally, contract provisions may explicitly prohibit users from selling or transferring water under the contract for use on lands outside the district.\textsuperscript{23} Water spreading may violate these and other contract requirements.

Federal law also requires that land receiving federal project water be classified as "irrigable."\textsuperscript{24} Essentially, Reclamation

\textsuperscript{17} Reclamation officials say that the Bureau supplies water under two main types of contracts: (1) water service contracts, under which Reclamation provides water to users on a pay-as-you-go basis; and (2) repayment contracts, under which water users regularly pay the Bureau a specified portion of the cost of building, maintaining and operating project facilities. Repayment contracts predominate in the Bureau's Pacific Northwest Region. Repayment contracts may obligate the Bureau to deliver a certain quantity of water (if available) to the user, or they may reserve for the user a certain amount of space in a project reservoir. Max Van Den Berg, Remarks at the Meeting of the Bureau of Reclamation's Water Spreading Task Force in Portland, Oregon (Mar. 3, 1994).

\textsuperscript{18} See, e.g., Repayment Contract with the Arnold Irrigation District, Deschutes Project, Oregon, ¶ 30 (1948) (on file with authors). These provisions sometimes prohibit only "substantial" changes in the district without the consent of the Secretary. See, e.g., Repayment Contract with the Baker Valley Irrigation District, Baker Project, Oregon, ¶ 32 (1965) (on file with authors).

\textsuperscript{19} See, e.g., Repayment Contract with the West Extension Irrigation District, Umatilla Project, Oregon, ¶ 11 (1954) (on file with authors).

\textsuperscript{20} Reclamation law imposes limits on the amount of land which a single owner can have irrigated with project water. To the extent that an owner has more land than these limits allow, the owner has "excess lands." The Reclamation Reform Act of 1982 rewrote the law on excess lands. See 43 U.S.C. §§ 390aa-390zz-1 (1988).

\textsuperscript{21} See, e.g., Repayment Contract with Baker Valley Irrigation District, Baker Project, Oregon, ¶¶ 15, 22 (1965) (on file with authors).

\textsuperscript{22} See, e.g., Repayment Contract of Island Irrigation Company, Minidoka and Palisades Projects, Idaho, ¶ 28 (1952) (on file with authors).

\textsuperscript{23} See, e.g., Repayment Contract of the Westland Irrigation District, Umatilla Project, Oregon, ¶ 32 (1949) (on file with authors).

\textsuperscript{24} This legal requirement dates back to the Fact Finders Act of 1924, Ch. 4, Pub. L. No. 292, 43 Stat. 672, 704 (codified at 43 U.S.C. § 462 (1988)). Other statutes pro-
must assess project lands to ensure that they can be productively and profitably irrigated over the long term. In addition, since 1986, Reclamation's land classification review must include an assessment of the potential for toxic or saline seepage from the irrigation of lands undergoing review. Lands outside project boundaries, or outside of a contracting irrigation district, are generally unclassified. Even inside these boundaries, lands may be receiving water even though they are classified as "unirrigable." Irrigation of these lands constitutes water spreading.

Spreading water may also violate state law if water is applied to lands without water rights. Some users have moved water without the benefit of either a state water right or the required approval of the Bureau. Others have the water rights needed for their land, either because they transferred existing rights or obtained new ones, but have never sought or received Reclamation's consent.


27 Classification is based on conditions existing at the time the land was evaluated, often many years ago. Thus, if a certain field was irrigated then using gravity flows, a high spot in the center of the field might be classified as unirrigable. Other lands might be deemed unirrigable because, at the time of classification, they had steep slopes, drainage problems, etc. As explained below, such lands have often come under irrigation because of changes in irrigation technology or "improvements" to the land.
28 A recent House Appropriations Committee report, however, attempts to exclude from the definition of "water spreading" the irrigation of certain lands in Washington's Columbia Basin Project which are not classified as irrigable. H.R. REP. NO. 533, 103d Cong., 2d Sess. 61 (1994). Congressman George Miller, Chairman of the House Natural Resources Committee, attacked this language in a statement on the House floor on June 14, 1994. 140 CONG. REC. H4412 (1994).
29 Applying water in violation of federal contracts may also violate state law. Oregon, for example, requires irrigation districts to comply with their Bureau contracts. OR. REV. STAT. § 545.062(t) (1993).
30 See Letter from Dennis B. Underwood, then Commissioner of Reclamation, to Congressman George Miller (Apr. 1, 1992) (on file with authors).
31 Other changes in water use may result in violations of state law, even though they are not "water spreading." In some river basins, irrigated farms are giving way to housing developments. The water formerly used to grow crops on these lands, however, has sometimes been shifted to other farms which are already receiving a full supply of irrigation water. The result may be excessive water use on the remaining farms. Idaho Rivers United has dubbed this practice "water stacking." Water
State legislatures in the Northwest have attempted to legalize, in arrangements favorable to existing users, many past changes in irrigation water use that otherwise would violate state law. Oregon has allowed districts to seek "remapping," so that a district's water right will reflect its actual—rather than legally authorized—use of water. In Idaho's massive Snake River Basin Adjudication (SRBA), statutes provide for retroactive approval of certain unauthorized changes which have already occurred.

B. How Has Water Spreading Developed?

To put it simply and broadly, water spreading results because irrigators have applied water to lands not authorized to receive it, and Reclamation has not enforced the requirements of federal statutes and contracts. Each individual case of water spreading, however, has its own cause(s). A recent Commissioner of Reclamation described some of the physical activities that have resulted in water spreading:

Frequently, projects formulated for gravity flood irrigation from open unlined ditches have been converted over time to lined ditches, pipe laterals, and water-saving sprinkler technologies. Thus, conserved water becomes available to serve additional lands on the fringes of the project or within project and district boundaries. The application of such conserved water and uncontrolled waste water to ineligible lands is sometimes a knowledgeable, willful violation of State [sic] water rights, project authorizations, and water service or repayment contracts.

In other cases, water has been spread to lands classified as unirrigable which are adjacent to or surrounded by irrigable land.
Many irrigators place the entire blame on the Bureau. Some claim to have made changes in reliance on the approval, or at least the knowing acquiescence, of Bureau officials. Irrigators also argue that, until recently, the Bureau had no established process for considering requests to expand irrigation district boundaries. These criticisms ring somewhat hollow since water users certainly benefited from Reclamation's failure to enforce the law.

C. How Large is the Water Spreading Problem?

The Bureau first attempted to quantify the water spreading problem in 1983 during a review of its backlog of land classification work. A report noted that some unclassified lands “have been irrigated either through water service contracting procedures, or through spreading of water delivered for service to irrigable lands onto adjoining or nearby tracts of unclassified (nonproject) lands.” The report estimated that 662,000 acres of such unclassified lands were receiving water in the western states. The Pacific Northwest Region reported two-thirds of this acreage. The Mid-Pacific and Upper Missouri Regions each reported about 100,000 acres, while the other four Bureau of Reclamation regions reported less than ten thousand acres each. The report made no attempt to explain such dramatic interregional differences. The report estimated that nearly four million acres of western land needed some classification work.

Eleven years after that report, Reclamation seems to have made little progress in determining the location and amount of

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Includes economic criteria, and lands may be classified as class 6 because of the cost of developing such lands exceeds limits defined in economic studies at the time of project authorization. Such class 6 lands can often be made productive over time because a water user has the means to slowly, but persistently, develop the land into a productive resource. Activities such as leveling, removing rocks, installing drains (surface or subsurface) can be too expensive for a water user to accomplish initially, but are often accomplished over time.

Letter from Dennis B. Underwood, supra note 30.

36 Changes to Irrigation Districts Looming, HERMISTON HERALD (Hermiston, Or.) Nov. 16, 1993, at 1.

37 U.S. BUREAU OF RECLAMATION, supra note 24, at 10-11.

38 U.S. BUREAU OF RECLAMATION, supra note 24, at 10-11. Since that report, Reclamation has consolidated its seven regions into five. The Great Plains Region now includes the former Upper Missouri, Lower Missouri and Southwest regions.

39 U.S. BUREAU OF RECLAMATION, supra note 24, at 10-11.
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water spreading. In the recent words of a Bureau official, "[t]he numbers in those reports are very, very questionable . . . . We really don't know what the extent of the problem is." This lack of information on water spreading persists even though Reclamation has broad statutory authority to require water users to keep and submit records. Under the Reclamation Reform Act of 1982 (RRA), the Bureau can require such record keeping and reporting as it "deems reasonably necessary to implement . . . Federal reclamation law." Reclamation, however, has not used this authority to gain information on water spreading.

D. Why is Water Spreading Problematic?

As described above, water spreading violates federal contracts, federal statutes, state water law, or some combination of the three. It is not simply a legal problem, however. The practice also harms both the public fisc and the environment.

By applying water to unauthorized lands, water users may pay less money to the Bureau than they rightly owe. Reclamation repayment contracts require water users to repay the federal government's costs of construction, operation, and maintenance of water projects in regular installments. Since the 1939 Reclamation Project Act, the amount of these installments has been tied

40 It may be, however, that the Bureau knows more about water spreading than it has cared to admit. A 1985 "Blue Envelope" (confidential) memo from a Reclamation official in Denver challenged the notion that the Bureau does not know which districts have spread water. "While I am sure that this is sometimes the case (particularly in situations where acreages are small); [sic] I feel that the major instances . . . are not unknown to either the districts nor to ourselves." Memorandum from Richard Piper, U.S. Bureau of Reclamation, to Ineligible Lands Task Group Chairman (Jan. 10, 1985) (on file with authors).

41 Max Van Den Berg, Bureau of Reclamation, Remarks at a meeting of the Bureau's Water Spreading Task Force in Portland, Oregon (Mar. 3, 1994).


43 It was originally thought that the certification and reporting requirements of the Reclamation Reform Act would provide sufficient documentation to [identify] ineligible lands . . . . However, upon review of the returned RRA forms it became apparent that the information provided by the districts will not quantify the problem nor will it provide a basis for corrective action. At best the forms only serve as an indicator of some districts which have had changes in irrigation acreages.

INELIGIBLE LANDS TASK FORCE, REPORT ON DATA AVAILABLE AND DATA REQUIREMENTS FOR ANALYSIS OF THE INELIGIBLE LANDS ISSUE 1 (Feb. 4, 1985).
to water users' ability to pay.\textsuperscript{44} Many repayment contracts specifically tie these annual installments to a particular irrigated acreage within the contracting district.\textsuperscript{45} Where users apply water to additional lands without the Bureau's approval, their payments may be smaller than they should be. If the Bureau were to approve irrigation of new lands, it could change the basis of repayment so as to increase the annual installments and reduce the amount lost to the government on zero-interest loans.\textsuperscript{46}

Reclamation has recognized that it is losing money because of water spreading,\textsuperscript{47} but it has never estimated the extent of this loss. Reclamation official Phillip Doe, however, offered an estimation in 1992 during his whistle-blowing testimony before a Congressional subcommittee:

If we may assume that 1,000,000 acres are receiving water illegally because of the lack of a proper contract, then we can also come, through other calculations, to some approximation of the dollar value of the abuse. For instance, assume that each acre, on average, carries a water duty or need of 3 acre-feet and that the water, on average, carries a price tag of $5 per acre-foot. Under these assumptions, the American public is losing $15 million a year in recoverable costs, all as a result of the deliberate dithering of the managing federal agency.\textsuperscript{48}

\textsuperscript{45} See, e.g., Repayment Contract with Vale Oregon Irrigation District, 13 (1949) (on file with the author).
\textsuperscript{46} Where Reclamation amends repayment contracts to allow deliveries to out-of-district lands, it could also increase returns to the federal treasury by raising the amount charged for all water used by the district. This approach would be consistent with the Reclamation Reform Act, the provisions of which apply to all contracts made or amended after the RRA's enactment. 43 U.S.C. § 390ce(a)(1) (1988). Districts faced with this prospect, however, may choose to stop irrigating these lands rather than have their existing Bureau contracts amended.
\textsuperscript{47} A 1985 Bureau task force report lists four "incentives for taking positive action to address the 'water spreading' issues." One of these incentives is:

Potential for Gain of Additional Revenue—Where water conservation measures have led to acceptable application of water to additional lands, reformulation and reauthorization of projects could bring about a reallocation of costs to the additional land that would either accelerate repayment or reduce subsidies to the irrigation function through contract renegotiation.

Water spreading also raises two distinct environmental problems. The first relates to the effect of individual cases of water spreading. An irrigator who spreads water may alter the quantity, quality, and timing of return flows to the detriment of local streams, rivers, and groundwater. The second problem arises from the cumulative effects of water spreading on the rivers and streams of the West. Federal water is being used illegally to irrigate at least hundreds of thousands of acres West-wide, at a time when many rivers and streams have too little water to support instream uses adequately. If this unlawfully used water could be kept instream the fish and wildlife habitat, recreational opportunities, and water quality of western rivers and streams would improve.

Individual cases of water spreading may harm the environment by diminishing the quantity of irrigation return flows. If an irrigator takes measures to reduce seepage losses and uses the conserved water to irrigate more land, her consumption will increase and return flows will decrease. If an irrigator moves water from lands near a river to lands much more distant, return flows to the river may be diminished or significantly delayed.

The use of water on unauthorized lands may also contribute to impaired water quality. Irrigation has created water quality problems in many parts of the West because return flows carry salts, heavy metals, and other contaminants. When the Bureau classifies a parcel of land, it determines whether irrigation of that parcel will cause such problems. Thus, when an irrigator spreads water to unclassified lands, the risk is increased that return flows from those lands will adversely affect surface and ground water quality.

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49 When water is diverted from a river or stream for irrigation, not all is consumed by the crop. Water leaks out of unlined irrigation canals and seeps below the root zone of irrigated fields. Water "lost" to seepage actually returns to ground water, and often returns to the river or stream from which it was diverted. The amount of time needed for seepage losses to return to the river is a function of several factors, such as distance and soil type.

50 This problem received national attention in the 1980s when large numbers of dying and deformed waterfowl were discovered at the Kesterson National Wildlife Refuge in California. The birds were victims of toxic selenium leached from irrigated fields. The Kesterson tragedy, however, is only one example of the water quality problems resulting from irrigation in the West. See DONALD WORSTER, RIVERS OF EMPIRE 317-324 (1985).

The major environmental controversy over water spreading, however, involves its cumulative effects on western rivers. Federal water is being used illegally on vast areas of the Pacific Northwest at a time when many salmonid fish stocks are sliding toward extinction. This is due in part to low flows in rivers and streams.\textsuperscript{52}

Recognizing this problem, the draft recovery plan for the threatened and endangered Snake River salmon stocks recommended: "The [Bureau] should correct undocumented or illegal water diversions in the Snake River Basin. This should include an investigation of unauthorized uses of water such as 'water spreading.'"\textsuperscript{53}

While the Snake River salmon have received the most attention, fish stocks throughout the Northwest have been destroyed or decimated.\textsuperscript{54} Insufficient streamflows are at least partially responsible in many areas. Faced with these circumstances, environmentalists have called on the Bureau to respond to water spreading in a way that will benefit streamflows, fish, and other public values in rivers.\textsuperscript{55}

\textbf{E. A Case Study: Water Spreading and Streamflows in the Umatilla River Basin}

The conflict between water spreading and instream water needs is being played out in the Umatilla River Basin in northeastern Oregon. Low stream flows and fish passage problems in the Umatilla, due largely to irrigation diversions, have virtually wiped out formerly abundant stocks of salmon and steelhead.

\textsuperscript{52} The Northwest Power Planning Council has called for an additional one million acre-feet of water in the Snake River to aid salmon migration, and has recommended better enforcement of water rights as one means of increasing flows. See \textit{Northwest Power Planning Council Strategy for Salmon, Volume I} 21, 38 (1992).

\textsuperscript{53} \textit{Snake River Salmon Recovery Team for Peer Review}, \textit{supra} note 6.


\textsuperscript{55} See, e.g., \textit{American Rivers Northwest Regional Office, Waterspreading—Tentative Framework for Solutions} (May 23, 1994); \textit{Idaho Rivers United}, \textit{supra} note 16; Memorandum from WaterWatch of Oregon to Walt Fite, Bureau of Reclamation (May 16, 1994) (all of the preceding documents were delivered at a meeting of the Bureau's Water Spreading Task Force in Portland, Oregon, May 25, 1994); Letter from Karen Garrison, Natural Resources Defense Council, to John W. Keys III, Regional Director, Bureau of Reclamation (November 30, 1993) (on file with authors).
The State of Oregon has recognized that improved streamflows are needed if the fish are to be restored.56

The Confederated Tribes of the Umatilla Indian Reservation reserved fishing rights in their 1855 treaty with the United States.57 Early in the 20th century, however, the Bureau built the Umatilla Project to provide irrigation water to local farmlands, and the fish soon disappeared. In 1988, Congress authorized the Umatilla Basin Project, an exchange which utilizes Columbia River water to restore flows needed to fulfill the treaty fishing rights of the Confederated Tribes, while preserving the local agricultural base.58

Four irrigation districts have contracts with the Bureau under the Umatilla Project, and they have spread water to approximately 17,000 acres of land outside their boundaries.59 These districts have now asked Reclamation to approve changes to their boundaries to reflect their actual water use, which would effectively legalize their current water spreading. As of this writing, the Bureau is at the scoping stage of analyzing the districts' request under the National Environmental Policy Act.60 However, the National Marine Fisheries Service, the agency with primary responsibility for protecting anadromous fish, has already taken a dim view of the proposal:

We are concerned that the action proposed in the scoping document will: 1) authorize present potentially illegal water use in the basin; 2) encourage additional water withdrawal from the Umatilla that does not legally exist at present; 3) preclude the Umatilla project from achieving its Congressionally mandated purpose; 4) preclude the project from meeting the Uma-

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56 "Low streamflows are the chief limiting factor to salmonid production. Low streamflows impede and block fish migration, increase water temperatures, and contribute to reduced habitat and competition from warm water fish species." OREGON WATER RESOURCES COMM'N, OREGON WATER PLAN, UMATILLA BASIN SECTION 19 (June 24, 1988).

57 Treaty with the Walla Walla, Cayuse and Umatilla Tribes, June 9, 1855, 12 Stat. 945.


59 Memorandum from Douglas James, Regional Environmental Officer, Bureau of Reclamation, Pacific Northwest Region (Nov. 1993) (on file with authors).

60 See generally 40 C.F.R. § 1501.7 (1993) (prescribing scoping process requirements).
tilla Tribal anadromous fish restoration expectations; and 5) set an unacceptable precedent for dealing with the over-allocation of water resources. In short, we believe that this apparent after-the-fact authorization of potentially illegal water use is extremely inappropriate.61

Water spreading has created intense controversy in the Umatilla Basin. The Confederated Tribes, irrigators, environmentalists, local business interests, and several government agencies all play important roles. Some issues have been settled through negotiations, while others have landed in court. Most are unresolved and are likely to remain so for years.62

F. What has Reclamation Done About Water Spreading?

As explained above, Reclamation recognized in a 1983 report that federal water was being spread to over 660,000 acres West-wide. For unexplained reasons, however, the report stated that classification work on these lands would be a low priority, and would not be completed within five years.63

Reclamation then formed an informal “Ineligible Lands Task Force” led by the Pacific Northwest Region. This group issued a brief report in 1985, which primarily emphasized the need to collect more information on water spreading before attempting to solve the problem.64 The report also identified “incentives for taking positive action to address the ‘water spreading’ issues,”65

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62 A full history of the Umatilla Basin controversy is not possible in this article. The issues have been well chronicled in the Pendleton East Oregonian. Relevant stories from that newspaper include Compromise Urged in Water Dispute, EAST OREGONIAN, Apr. 7, 1994, at 1; Farmers Fear Loss of Water, EAST OREGONIAN, November 24, 1993, at 1; ‘No Saints’ Found in Water Dispute, Ladd Says, EAST OREGONIAN, May 20, 1994, at 3; Seeking a Water Rights Truce, EAST OREGONIAN, Nov. 15, 1993, at 1; Tribes Take Irrigators to Task Over Water Issues, EAST OREGONIAN, Jan. 17, 1994, at 3; Tribes Wary of ‘Water Spreading’, EAST OREGONIAN, Dec. 6, 1993, at 1.

63 U.S. BUREAU OF RECLAMATION, supra note 24, at 10-11.

64 INELIGIBLE LANDS TASK FORCE, supra note 43, at 1.

options for solving the problem, and constraints to implementing these options. Later that year, Reclamation opted to dissolve the task force and delegate the water spreading problem to the regional offices. “Because of the complexity and magnitude of the problem,” wrote Acting Commissioner Robert Olson, “we are taking a long-range approach to resolution.”

Long range, indeed. Today, Reclamation can claim only limited progress in addressing a few scattered cases of water use on ineligible lands. The Bureau has issued guidelines for processing water users’ requests to approve new lands for irrigation which set forth requirements for compliance with NEPA and other federal environmental laws. Reclamation is now processing its first expansion proposal (that of the Umatilla Basin irrigation districts) under these guidelines. But the Bureau’s water spreading problem—conservatively estimated at two-thirds of a million acres in 1983—has not yet been dented.

Reclamation now seems determined to act. It has assembled a new task force in the Pacific Northwest to provide public input on how to approach the problem of water spreading. The Water Spreading Task Force includes representatives of environmental groups, irrigation interests, Native American tribes and state governments, as well as Reclamation officials. Reclamation Commissioner Daniel P. Beard spoke to the task force at its first

66 The Bureau listed “solution options to the ineligible lands problem” as: (1) “Bring ineligible lands under existing contracts without opening contract provisions for the old lands”; (2) “Obtain legislation giving authority to legitimatize lands...”; (3) “Take no action or only selected action”; (4) “Take legal steps to eliminate water service”; (5) “Write water service contracts to cover the ineligible lands”; and (6) “Advise districts of the problem and defer resolution to them.” Ineligible Lands Task Force, supra note 43, at 8.

67 The report identified the following factors as limiting Reclamation’s options: (1) “Current policy requires opening up existing repayment contracts if the service area is expanded”; (2) “Congressional authorization usually limits service to a specific number of acres in a specific location”; (3) “State water right considerations could be very difficult”; and (4) “Conflicting demands for water (fish and wildlife, NEPA, power, etc.) could preclude legitimatizing the use of the water for irrigation.” Ineligible Lands Task Force, supra note 43, at 8-9.

68 Memorandum from Robert Olson, Acting Commissioner, Bureau of Reclamation, to seven Reclamation regional directors (May 17, 1985) (on file with authors).

69 Letter from Dennis B. Underwood, supra note 30.

70 Pacific Northwest Region, Bureau of Reclamation, Guidelines for Processing Requests for Inclusions, Exclusions, Water Transfers and Related Actions (Mar. 15, 1993).

meeting, and asked the group for its input on how to address the concerns of the various interest groups. He made it clear, however, that Reclamation would end water spreading. “You should know that there is no doubt... that we have to comply with the law, that we will comply with the law, and that we will solve this problem one way or the other.”

II

RESPONDING TO WATER SPREADING—LEGAL ISSUES

It will be extremely difficult for the Bureau to craft a satisfactory solution to water spreading. Part of the challenge is that western water issues tend to be highly contentious and polarized. Beyond the politics, however, Reclamation will need to resolve some genuinely tough legal questions if its response to water spreading is to benefit western streamflows.

Many of these legal issues have never been decided. The Bureau has no regulations regarding water spreading or contract enforcement. In addition, since contract enforcement seems to have been a low priority for most of reclamation’s history, little directly relevant case law exists. Thus, while Reclamation statutes and cases give the Bureau considerable authority and latitude, they provide few definitive answers to the legal questions surrounding water spreading.

These questions would be simpler if Reclamation only had to choose between shutting off illegal water use or allowing such use to continue. Stopping all deliveries to unauthorized lands would obviously end water spreading, but that action alone would not do much to restore streamflows. Many western rivers are already overappropriated, with current users not getting all the water they want. If deliveries to unauthorized lands are stopped, irrigators with Reclamation contracts will simply apply more water to those lands currently eligible to receive it. Even if these irrigators’ diversions are reduced, others may take the water for irrigation under new Reclamation contracts or under existing state-law water rights. Thus, stopping water spreading without further

72 Conference Call with Daniel Beard, Commissioner of Reclamation (Feb. 8, 1994).
74 See United States v. Quincy-Columbia Basin Irrigation Dist., 649 F. Supp. 487 (E.D. Wash. 1986); see also Madera Irrigation Dist. v. Hancock, 985 F.2d 1397 (9th Cir. 1993).
changes will merely scramble irrigation patterns, leaving rivers as
dry as ever.

If the Bureau seeks to translate water spreading into stream-
flow restoration, it must take at least four distinct steps. First, it
must terminate existing unauthorized deliveries—that is, it must
end the status quo. Second, it must assume control of water that
has been illegally used. Third, it must designate all or part of that
water for instream uses. Finally, it must take steps to protect in-
stream water from diversion for out-of-stream uses. Questions
exist as to whether Reclamation can and should take these
actions.

A. The Bureau's Authority to Stop Water Spreading

As noted, water spreading occurs when irrigators violate the
terms of their water allocation contracts with the Bureau, fail to
adhere to requirements of federal statutes, and/or violate state
law. As the agency in charge of the federal reclamation program,
the Bureau has the responsibility to enforce existing contractual
and legal requirements. However, little reported precedent ex-
ists to clarify the Bureau's contract enforcement authorities and
remedies. Nonetheless, Reclamation seems to have several op-
tions, described below, any of which would reduce water
spreading.

Reclamation's chronic failure to take this responsibility seri-
ously has left it with a major water spreading problem, and will
complicate its attempts to solve that problem. The Bureau has
no regulations applicable to water spreading, having chosen in
1985 to approach the problem on a case-by-case basis.

First, the Bureau could promulgate regulations regarding the
use of water on unauthorized lands. The Secretary has clear stat-
utory authority "to perform any and all acts and to make such
rules and regulations as may be necessary and proper for the pur-
pose of carrying out the provisions of [the Reclamation] Act into
full force and effect." In addition, most reclamation contracts

grounds, 559 F.2d 509 (9th Cir. 1977).
76 "The unique character of the situations of which we have knowledge supports
the case-by-case approach, and suggests that generalized guideline development
would be time consuming and an inefficient use of resources." Memorandum from
Robert Olson, Acting Commissioner of the Bureau of Reclamation, to Regional
Bureau Directors (May 17, 1985).
recognize the Bureau's authority to adopt regulations. Thus, Reclamation may promulgate and enforce regulations which apply even to contracts that predate those regulations, and it could clarify several issues by writing rules to address water spreading.

Second, the Bureau could simply direct its contractors to stop illegal deliveries. The Bureau successfully took such an action in 1993, when it ordered a Umatilla Basin irrigation district to cease delivering water to another district that did not have a Bureau contract for the water.

Third, since water users are violating their federal contracts, Reclamation could resort to remedies for contract breach. One obvious remedy would be the cessation of water deliveries to unauthorized lands. In one reported case, certain Washington irrigation districts conceded that Reclamation could require them to withhold water deliveries to users who failed to comply with legal requirements.

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78 See, e.g., Amendatory Contract, Apr. 11, 1949, Bureau of Reclamation—Vale Oregon Irrigation District, Malheur County; Repayment Contract of the Vale Oregon Irrigation District, Vale Project, Oregon ¶ 47 (1949):

The Secretary reserves the right, as far as the purport thereof may be consistent with the provisions of this contract, to make rules and regulations, and to add to and modify them, as may be deemed proper and necessary to carry out the true intent and meaning of the law and of this contract . . . .


80 Letter from John W. Keys III, Pacific Northwest Regional Director, Bureau of Reclamation, to William I. Porfily, Manager, Westland Irrigation District (July 16, 1993) (on file with authors).

81 The districts argued that certain regulations were invalid or were inapplicable to them because of their contracts with the Bureau. The districts, however, conceded that if the court found that the Secretary had the authority to issue the regulations and that the regulations were enforceable under the contracts, the district would be obliged not to supply water to offending individuals. [The districts' counsel] further stated, however, that if the court so ruled, the districts would attempt to give notice and hold a hearing prior to terminating any delivery. In light of the severe consequences of depriving irrigation water in the arid land of Eastern Washington, the court notes that such an approach is desirable and encourages governmental cooperation in that procedure.

As noted, many irrigators claim to have spread water in reliance upon the assurances (or, at least the acquiescence) of Bureau officials. Thus, they may raise a variety of defenses against the Bureau in the nature of estoppel. The cases make it clear, however, that Reclamation will rarely be bound by its past inaction and erroneous statements of the law. In a case involving a Reclamation law limitation that allowed resident landowners to irrigate a maximum of 160 acres each, the Ninth Circuit held that the limitation remained applicable despite both a legal opinion and Bureau practice to the contrary:

It is true that, in practice, the Department of the Interior did not enforce the 160-acre limitation on lands in the Imperial Irrigation District. This inaction was based at first upon the Wilbur letter which was itself an informal opinion that is legally incorrect and that does not even deal with the reclamation statute at issue in this case. Sometime thereafter, the Department of the Interior abandoned justifying its inaction on the analysis contained in the Wilbur letter but instead decided against nonenforcement [sic] of the 160-acre limitation because it had not been enforced before. Inaction based on previous inaction cannot be elevated into an administrative determination to which the courts should defer.\(^8\)

The Bureau has the authority to stop water use on ineligible lands, but the water may still remain in the hands of those who spread it. Thus, the next step in restoring streamflows is for Reclamation to gain control of illegally used water.

**B. Securing Control Over Illegally Used Water**

Curbing water delivery to unauthorized lands is only the first step in getting water instream. The Bureau must also identify the amount of water illegally spread and gain control of it. Irrigators, however, may attempt to claim a continuing right to the water.

In the Umatilla Basin controversy, Reclamation has stated that irrigators have no right to continue receiving water which they have spread. "[I]n the Bureau’s view, the districts have no right

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to rely on continued use of . . . water which the districts have used in violation of their contracts with Reclamation . . . .”  

Here again, Reclamation could clarify its authority, and its process, for gaining control of illegally used water by promulgating regulations. Such regulations might specify that a contractor who uses project water on unauthorized lands may not continue to receive the quantity of water so applied. Reclamation may base such a measure on its power to set terms and conditions for the use of project water.  

As the courts have recognized, even when the government has entered into a contract, it retains its sovereign authority unless surrendered in unmistakable terms.  

As noted, the Secretary is authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper to carry out reclamation law.  

Moreover, the Bureau may resort to its remedies for breach of contract. Scant case law exists regarding the Bureau’s remedies for breach of water supply contracts. In one case, irrigation districts acknowledged that the Bureau could order them to cease deliveries to water users who did not comply with Reclamation regulations. In a case involving the sale of excess lands under the Reclamation Reform Act, a dissenting judge suggested that the government might have several options if the districts breached their contracts: “[O]ne could argue that the Secretary could sell the excess lands himself, or stop delivering water, or even, perhaps, refuse to deliver water unless a higher price was

83 Letter from John W. Keys III, Regional Director, Bureau of Reclamation to Don Sampson, Chairman, Confederated Tribes of the Umatilla Indian Reservation, and four irrigation district board chairpersons (May 25, 1994) (on file with authors).

84 As the Ninth Circuit has recognized, project water would not exist but for the fact that it has been developed by the United States. It is not there for the taking (by the landowner subject to state law), but for the giving by the United States. The terms upon which it can be put to use, and the manner in which rights to continued use can be acquired, are for the United States to fix. If such rights are subject to becoming vested beyond the power of the United States to take without compensation, such vesting can only occur on terms fixed by the United States.

Israel v. Morton, 549 F.2d 128, 132-33 (9th Cir. 1977). See also Flint v. United States, 906 F.2d 471 (9th Cir. 1990); Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 626 F.2d 95 (9th Cir. 1980), cert. denied, 449 U.S. 1079 (1981).


paid." Presumably, Reclamation could pursue any common law remedy for contract breach, including rescission.

Irrigators may agree to cede control over illegally used water under certain circumstances. The water spreading policy of the Confederated Tribes of the Umatilla Indian Reservation calls on the Bureau to "take custody of all the water which has been used illegally," and the Tribes have sought to apply this policy to the Umatilla Basin irrigation districts' boundary expansion proposal. The Bureau has agreed that "it is appropriate for the Districts to assign custody to Reclamation for all Federal project water that is delivered to out-of-boundary lands for the period from now until completion of the NEPA process on the boundary expansion request and issuance of a Record of Decision (ROD) by the Regional Director." In May of 1994, the Umatilla districts agreed in principle to such an assignment. Thus, some water users may agree to cede control over spread water, as a condition of boundary expansion or to prevent Reclamation from seeking contract rescission or money damages for past water spreading.

Finally, the Bureau might also assert that illegally spread water has been forfeited. Some Bureau contracts stipulate that if the district does not use some of its water for a certain length of time, the district forfeits that water. Thus, the Bureau may argue that water use in violation of contract provisions—particularly use outside the district's approved boundaries—is tantamount to nonuse, and that the contractor has therefore forfeited this "unused" water.

If the Bureau is able to gain control of illegally spread water, it would then need to reallocate the secured water from irrigation to instream uses in order to ensure instream benefits.

89 CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, supra note 5, at 2.
90 Letter from John W. Keys III to Don Sampson and Thomas G. Myrum 2 (Apr. 15, 1994) (on file with authors).
91 Irrigation District, Tribes Reach Water Agreement, EAST OREGONIAN (Pendleton, Oregon), May 3, 1994, at 3. More recently, the Bureau has stated that an assignment is unnecessary because the districts have no right to rely on continued deliveries of spread water. Letter from John W. Keys III, supra note 83.
92 See, e.g., Amendatory Contract, Nov. 18, 1949, Bureau of Reclamation—Stanfield Irrigation District, Umatilla Project, Oregon. "[S]hould the District fail to use any portion of said water for a period of three (3) consecutive years ... the United States may provide for permanent delivery to others of the unused water ..." Id., ¶ 10(e).
C. Allocating Water to Instream Uses

In general, water from a reclamation project must be used for purposes listed in the legislation authorizing that particular project. Older legislation tends to limit uses of Reclamation project water to irrigation, hydropower, and flood control. In recent years, however, Congress has authorized many projects for fish and wildlife purposes. In newer projects, this language is part of the original authorizing legislation.\(^9\) For the older projects, Congress has reauthorized projects on an individual basis to include instream fish and wildlife uses.\(^9\) Congress could facilitate the allocation of water to instream uses through legislation establishing fish and wildlife purposes for all Bureau projects.

Absent legislation, the Bureau may have trouble reallocating water from agricultural purposes to instream uses in federal projects not authorized for fish and wildlife or recreation. Such reallocation may be necessary, however, to comply with requirements of other federal laws. The Endangered Species Act (ESA), the Northwest Power Act, and the federal government's Native American trust responsibility are three such examples.\(^9\)

The Endangered Species Act places an affirmative duty upon the Bureau to protect listed species by directing federal agencies to "use . . . all methods which are necessary to bring any endangered . . . or threatened species to the point at which" the protections of the Act "are no longer necessary."\(^9\) The ESA grants agencies the authority to issue regulations to provide for conservation and prohibit the taking of listed species.\(^9\) It further mandates that federal agencies develop and implement recovery

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\(^{95}\) Other potentially applicable statutes include the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-668 (1988), and the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1988). In addition, the public trust doctrine may affect decisions regarding the allocation of Project water. The public trust doctrine mandates that states have an affirmative duty to take the public trust into account in the planning and allocation of water resources and to protect public trust resources. While this doctrine has thus far applied only to state allocation of water resources, the doctrine may also apply to water use decisions of the federal government. See generally, Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269 (1980).


\(^{97}\) §§ 1533(d), 1538(a)(1)(B) (1988).
The "Spread" of Reclamation Project Water

The "Spread" of Reclamation Project Water

plans. These mandates may require the Bureau to make water available instream where needed for the survival of listed species. The Bureau has recognized this responsibility in operating the Stampede Dam and Reservoir for endangered fish in Pyramid Lake, rather than selling the stored water for municipal and industrial uses. The Ninth Circuit held that "the ESA supports the Secretary's decision to give priority to the fish until such time as they no longer need ESA's protection." Given the growing number of aquatic species throughout the West that are being listed under the ESA, the statute will increasingly dictate the use of project water.

The Northwest Power Act affects Reclamation projects which generate hydropower in the Pacific Northwest. The Bureau must operate and manage these projects consistent with the purposes of this chapter and other applicable laws, to adequately protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, affected by such projects or facilities in a manner that provides equitable treatment for such fish and wildlife with the other purposes for which such system and facilities are managed and operated. Reclamation also must consider the Northwest Power Planning Council's program, in managing and operating these projects.

The federal government also has an affirmative responsibility to protect the trust assets of Native Americans. More specifically, the Bureau has an Indian Trust Asset Policy which requires that the agency carry out its activities in a manner which protects

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98 § 1533(f).
99 § 1536(a)(2).
100 Carson-Truckee Water Conservancy Dist. v. Clark, 741 F.2d 257, 262 (9th Cir. 1984), cert. denied, 470 U.S. 1083 (1985).
102 § 839b(h)(11)(A)(i).
104 "Trust assets . . . include, among others: fish, mammals, birds, reptiles and amphibians, insects, plants, water quality and quantity, water rights, fishing sites, access to hunting and gathering areas, and cultural resources." Letter from Donald Sampson, Chair, Board of Trustees, Confederated Tribes of the Umatilla Indian Reservation, to Rusty Schuster, Bureau of Reclamation (Feb. 14, 1994) (on file with authors).
Indian Trust Assets and avoids adverse impacts. This trust responsibility may obligate the Bureau to reallocate water instream to protect the aquatic resources Native Americans depend upon for cultural, spiritual, and economic survival. Because the Bureau’s Trust Asset Policy is new and untested, its effects are uncertain. However, federal courts have recognized Reclamation’s tribal trust responsibility in at least one case—the dispute over water from the Stampede Reservoir.

The Bureau can expect legal challenges if it attempts to reallocate water from traditional uses to instream uses, but it may defend such actions on several grounds. First, Reclamation has the power to fix the terms for the use of project water, as well as “wide discretion . . . over water management under the 1902 Reclamation Act.” Second, most Bureau contracts specifically provide that the United States will be held harmless for any water shortage arising from “prior or superior claims” or “other causes,” and this contract language may insulate the Bureau where it reallocates water instream to satisfy ESA requirements or other legal mandates. Third, the federal government—even where it has entered into a contract—retains its sovereign power “unless surrendered in unmistakable terms,” and federal con-

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106 The Interior Secretary’s “judgment call,” dividing project water between an irrigation district and an Indian tribe, was held to violate his trust responsibility to the tribe in Pyramid Lake Paiute Tribe of Indians v. Morton:

In order to fulfill his fiduciary duty, the Secretary must insure, to the extent of his power, that all water not obligated by court decree or contract with the District goes to Pyramid Lake. The United States, acting through the Secretary of Interior, has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.


107 Israel v. Morton, 549 F.2d 128, 132-33 (9th Cir. 1977). See also Flint v. United States, 906 F.2d 471 (9th Cir. 1990); Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 626 F.2d 95 (9th Cir. 1980).


109 See, e.g., Repayment Contract of the Arnold Irrigation District, Deschutes Project, Oregon, ¶ 22 (1948).
tracts must be construed so as to avoid foreclosing the exercise of sovereign authority.\textsuperscript{110}

State law may inhibit Bureau efforts to reallocate water for in-stream uses. Bureau projects must have state water rights,\textsuperscript{111} and these rights limit the purposes for which water may be stored and used. At present, few projects can be expected to have the water rights needed to provide water instream. Reclamation will generally need to seek state approval to store and release water for instream purposes,\textsuperscript{112} which could pose a major obstacle in many Western states.

Even if the Bureau succeeds in reallocating spread water, it still must provide legal protection for that water against out-of-stream diversions. State laws may inhibit that task.

**D. Protecting Instream Flows**

State laws governing the establishment and protection of instream flows may pose the greatest barrier to the Bureau. With few exceptions, state law governs the distribution and allocation of water resources, including protection of instream flows. The Bureau must comply with both the form and substance of state law unless it would interfere with Congressional directives.\textsuperscript{113} State laws generally take a restrictive view of the purposes for which instream flows may be established\textsuperscript{114} and may limit the Bureau's ability to make water available for instream uses.

The federal government has been granted an instream flow water right not associated with a diversion of water in only three states: Nevada, Arizona, and Alaska.\textsuperscript{115} In most or all western states, the state government plays the key role in establishing and protecting instream rights.\textsuperscript{116} Thus, while the Bureau may be

\textsuperscript{110} See Madera Irrigation Dist. v. Hancock, 985 F.2d 1397, 1401 (9th Cir. 1993); Peterson v. U.S. Department of the Interior, 899 F.2d 799, 807 (9th Cir. 1990).

\textsuperscript{111} California v. United States, 438 U.S. 645 (1978).

\textsuperscript{112} But see NRDC v. Patterson, 791 F. Supp. 1425, 1433 (E.D. Cal. 1992) (citing U.S. v. California Water Resources Control Board, 694 F.2d 1171 (9th Cir. 1982)) (questioning whether Reclamation needs to comply with state laws governing dam operations—"the opening of dam gates for the release of water"—as opposed to laws relating to the impoundment and distribution of water).

\textsuperscript{113} California v. United States, 438 U.S. 645 (1978).

\textsuperscript{114} Lawrence J. MacDonnell & Teresa A. Rice, The Federal Role in In-Place Water Protection, in INSTREAM FLOW PROTECTION IN THE WEST at 5-17 (Lawrence J. MacDonnell et al. eds., 1993).

\textsuperscript{115} Id.

\textsuperscript{116} Id. at 1-4 to 1-7.
able to use federal water to establish instream flows, state cooperation may be crucial.

Here again, the ESA could mandate instream flows which state law might not otherwise provide. The ESA has been held to require limits on water withdrawals to protect listed species, even in the absence of state agency action.\textsuperscript{117} Moreover, while the Act calls for federal cooperation with state and local water resource agencies to resolve endangered species concerns, the ESA does not give way to state water rights.\textsuperscript{118} Thus, where listed species need water to survive, the ESA may mandate reallocation and protection of federal water for instream purposes despite limiting provisions of federal and state law.

In sum, it seems that new regulations may be the Bureau's best choice if its response to water spreading is to benefit instream flows. They could clarify the Bureau's authority and its process for halting deliveries to unauthorized lands, for gaining control of illegally used water, and for reallocating and protecting water for instream uses. Such regulations would provide opportunities for public involvement in both the formulation and implementation of the Bureau's water spreading policy. In addition, regulations would ensure a measure of consistency in the Bureau's response to a Westwide problem. While regulations might not resolve every water spreading issue—particularly those involving state law—they could go a long way towards answering a number of unsettled legal questions.

\section*{III \hspace{1cm} Responding to Water Spreading—Policy Considerations}

\textbf{A. Alternative Approaches to Water Spreading}

Even if Reclamation had unfettered discretion in addressing water spreading, it nonetheless would face difficult policy choices. The Bureau must balance the competing interests of

\textsuperscript{117} Sierra Club v. Lujan, 36 Env't Rep. Cas. (BNA) 1533 (W.D. Tex. 1993) (ordering the State of Texas and the Interior Department to take action to protect listed aquatic species jeopardized by water withdrawals from the Edwards Aquifer).

several constituencies in seeking solutions. Reclamation's traditional clientele, irrigated agriculture, would like to resolve legal problems in a way that preserves the status quo as much as possible.\textsuperscript{119} U.S. taxpayers—a constituency that the Bureau has long ignored—would benefit from increased payments to the Treasury by those who have spread project water. Tribes and environmentalists now have the Bureau's ear for the first time, and they seek reallocation of illegally used water for instream purposes.\textsuperscript{120}

If Reclamation were to cut off all existing deliveries of water to unauthorized lands but take no further action, none of these interests would be satisfied. Irrigated acreage would shrink, no additional revenue would flow to the Treasury, and environmental benefits would be uncertain. This option might meet legal requirements, but it would produce few winners.

For this reason, environmentalists have argued for an approach which would allow water spreading to be legalized under certain conditions, but would also provide for instream flows and for greater payments to the Treasury.\textsuperscript{121} Such an approach would face several obstacles, but it could provide benefits for many parties interested in water spreading.

WaterWatch of Oregon, one of the environmental groups represented on the Water Spreading Task Force, has suggested that Reclamation address water spreading under the following principles:\textsuperscript{122}

1. \textit{Water Spreading is Illegal and Cannot Continue.} Reclamation must determine where ineligible lands are receiving water under federal contracts. It then must notify all water spreaders that the practice is illegal and that they must cease deliveries to ineligible lands by a certain date unless the Bureau approves these lands for irrigation. Reclamation must receive a formal expansion request before it can consider approving new lands for

\textsuperscript{119} See Agricultural Representatives of the Water Spreading Task Force, The Issue of Water Spreading (position statement delivered at a Meeting of the Task Force in Portland, Oregon, May 25, 1994) (on file with authors).  
\textsuperscript{120} See Confederated Tribes of the Umatilla Indian Reservation, supra note 5; Idaho Rivers United, supra note 16.  
\textsuperscript{121} See Memorandum from WaterWatch of Oregon to Walt Fite, Bureau of Reclamation (May 16, 1994) (delivered to the Water Spreading Task Force in Portland, Oregon, on May 25, 1994 and on file with authors); American Rivers Northwest Regional Office, Waterspreading—Tentative Framework for Solutions (delivered to the Water Spreading Task Force in Portland, Oregon, on May 25, 1994, and on file with authors).  
\textsuperscript{122} Memorandum from WaterWatch of Oregon, supra note 121.
irrigation. The Bureau should also impose controls, such as periodic contract audits, to prevent future water spreading.

2. Reclamation Must Assess Environmental Impacts Before Approving New Lands for Irrigation. Reclamation must comply with NEPA in considering expansion requests, and must seek input from all affected interests and meet all requirements for public notice and participation. All expansion requests require at least an Environmental Assessment, and major requests (those exceeding a few thousand acres) will need a full Environmental Impact Statement. The entity requesting expansion must provide all funding for the necessary environmental studies. No request in a river basin may be approved until Reclamation has considered the cumulative impacts of water spreading in that basin.

3. Reclamation Must Determine the Amount of Historic Illegal Water Use. Reclamation must determine the amount of water diverted annually for application on ineligible lands. That quantity of water may no longer be diverted under the Reclamation contract, even for use on eligible lands. Thus, a person who violated a Reclamation contract by water spreading loses the right to as much water as was illegally applied.

4. Reclamation Should Reallocate Illegally Used Water to Benefit the Public. Reclamation should reallocate illegally used water where it has authority to do so. Where flows are insufficient to support public values in a natural waterway, Reclamation should reallocate illegally used water diverted from that waterway to the extent necessary to provide sufficient streamflows. Public values include fish and wildlife habitat (including threatened and endangered species), water quality, and recreation. Reclamation must take all actions necessary under federal and state law to ensure that water reallocated for public values is legally protected instream. Illegally used water may be reallocated for out-of-stream uses only if legally protected instream flows are sufficient to support public values. In reallocating water among competing out-of-stream uses, Reclamation should maximize public benefits.

5. Reclamation May Approve New Lands for Irrigation Under Certain Conditions. Reclamation may approve requests to irrigate new lands under a contract, but total diversions under the amended contract must not exceed historic diversions for use on eligible lands. In addition, any adverse environmental impacts of a change must be fully mitigated. Reclamation should condition
approvals on the implementation of specific water conservation measures by the requesting person. Reclamation must adjust repayment obligations to reflect the irrigation of new lands. Finally, water may be applied only to lands with state-law water rights.

IV

Specific Policy Issues Relating to Water Spreading.

Even after Reclamation decides on a general approach to water spreading, it will need to resolve a large number of policy issues. A detailed discussion of these issues is beyond the scope of this article. The following list, however, should give the reader some idea of the variety and difficulty of the policy questions the Bureau must answer.123

1. Should Reclamation seek damages or other compensation from districts that choose simply to stop illegal deliveries rather than pursuing boundary expansion? An irrigation district which has delivered water to unauthorized lands may opt to terminate such deliveries rather than seek Bureau approval to irrigate those lands. The Bureau has established a process for dealing with boundary expansion requests,124 but has not yet said what it will do regarding past water spreading by a district that has come into compliance with its contract. If Reclamation chooses to ignore past water spreading while creating significant disincentives for districts to seek approval of service to previously unauthorized lands,125 it could encourage districts to terminate service to unauthorized lands and increase the likelihood that formerly irrigated lands will lose their water supply.

2. Should Reclamation allow interim water deliveries to ineligible lands while it considers a request to approve irrigation on those lands? This issue has created controversy in Oregon’s Umatilla River Basin, where four irrigation districts requested approval for boundary expansion in 1993 (see above). As of this writing, the question is unresolved.

123 Memorandum from WaterWatch of Oregon, supra note 121.
124 PACIFIC NORTHWEST REGION, BUREAU OF RECLAMATION, supra note 70.
125 Districts may be discouraged by the cost of environmental reviews required by NEPA, and by the prospect of having their existing contracts revised. Such contract revisions might allow irrigation of formerly unauthorized lands, but increase repayment obligations for the entire district.
3. Should Reclamation consider extenuating circumstances, such as past statements by Bureau officials purporting to condone delivery of water to ineligible lands, in responding to individual cases of water spreading? Many irrigators claim to have applied water to ineligible lands after relying on the assurances of Bureau officials. While these assurances are not likely to be legally binding, they may affect Reclamation’s treatment of individual water spreaders.

4. If Reclamation has discretion to reallocate illegally used water to different uses or users, what criteria should it use in deciding whether and how to reallocate? Reclamation must consider a variety of legal, environmental and economic factors in determining the disposition of illegally used water. It also must decide whether certain types of water spreading—such as those which violate only the land classification requirement—should be treated differently from the others.

5. If federal or state law prevents federal water from being legally protected instream, can streamflows be restored in other ways? As explained above, the laws of many Western states may prevent the Bureau from acquiring instream flow rights. If state governments and other interested parties are interested in cooperating, however, creative solutions should be feasible.

6. What should be done to mitigate the economic impacts of stopping water spreading? Irrigators and local communities are concerned about the economic effects of terminating irrigation of ineligible lands. Reclamation should consider whether its response to water spreading can be “phased in,” thereby reducing some economic dislocation.

7. What types of measures should be required to mitigate the environmental impacts of approving an expansion request? If Reclamation approves water users’ requests to approve ineligible lands for irrigation, it should ensure that these approvals do not further impair streamflows. In the Umatilla Basin, all the interested parties agreed that the Bureau would “approve no boundary expansion that would cause a net adverse effect on flows needed for the [Umatilla River salmonid] fishery.”

8. What repayment obligations should apply to past water spreading and future boundary expansions? The Bureau has rec-

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126 See supra note 112 and accompanying text.
127 Bureau of Reclamation Memorandum of Agreement (Feb. 27, 1992) (on file with authors).
ognized that it loses money when water is applied to unauthorized lands. If Reclamation approves a district’s request to serve these lands, it may seek increased payments from that district, even for the irrigation of lands which have always been authorized. In addition, Reclamation may choose to pursue back payments for past illegal water use.

**CONCLUSION**

The Bureau of Reclamation is finally turning its attention to the long-neglected issue of water spreading, but it faces a daunting task. Reclamation lacks good information on where, and how much, water spreading is occurring throughout the West. In addition, the Bureau’s authority to stop existing water spreading, to take control of illegally used water, and to reallocate and protect that water instream is unclear. Finally, the Bureau must resolve many difficult policy issues if its approach to water spreading is to succeed.

The Bureau’s response to water spreading has major implications for all users of western water, and for Reclamation itself. The modern Bureau is struggling to adopt a more balanced approach to water resources, and has stated that it “will facilitate changes from current to new uses of water in accordance with state law when such changes increase benefits to society and the environment.” In addressing water spreading, Reclamation can attempt to preserve the status quo and protect its traditional constituencies. On the other hand, the Bureau may seek to provide more water for instream uses and greater returns for taxpayers. The choices it makes will indicate whether the Bureau is ready to manage the waters of the West in the public interest.

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128 This statement is the first “organizational principle” listed in the Bureau’s “Blueprint for Reform.” U.S. BUREAU OF RECLAMATION, BLUEPRINT FOR REFORM 1 (November 1, 1993).