MEMORANDUM

TO: Colorado Water Conservation Board
FROM: Paula C. Phillips
       First Assistant Attorney General
       Natural Resources Section
DATE: September 12, 1984
SUBJECT: Status of Reserved Rights Instream Flow Claims in the National Forests

The United States has pending claims for reserved instream flow rights in water divisions 1, 2, 3, and 7. In general, those claims assert as their bases the two primary Organic Act purposes recognized in United States v. New Mexico, 438 U.S. 696 (1978), i.e., to secure favorable conditions of flows and to furnish a continuous supply of timber, and the recreational and conservational purposes of the Multiple-Use Sustained-Yield Act.

The government is expected to base its claim that instream flows are essential to fulfill Organic Act purposes on a theory that a minimum quantity of continuous flow is needed within a stream in order to prevent degradation of the natural channel. Such degradation assertedly occurs from excess deposition of sediment within the channel during periods of diminished flows, which in turn decreases the carrying capacity of the stream and leads to increased meandering and erosion. The potential for flooding is thereby increased and the delivery of water downstream is adversely impacted, both in terms of quality and timing, thus impairing the capacity of forest lands to secure favorable conditions of flow. The government may also argue that channel degradation undermines the forest's ability to furnish a continuous supply of timber because of increased flooding, meandering, and erosion.
The Colorado Supreme Court in United States v. Denver, 656 P.2d 1 (Colo. 1982), affirmed the existence of reserved water rights within the national forests to fulfill Organic Act purposes. Each such claim must undergo a two-pronged assessment. The court must first determine whether the particular type of claim is essential to the furtherance of the national forest purposes, and if so, quantify the minimum amount of water necessary to achieve the purposes. The Denver court concluded that the government had failed to prove that instream flows are necessary to fulfill primary national forest purposes, and further that such claims would be inconsistent with the intent of Congress in the Organic Act to "enhance the quantity of water available to western appropriators" and "to further the economic development of the West." 656 P.2d at 23. It also held that the United States Supreme Court's decision in United States v. New Mexico foreclosed any claims for reserved water rights based on the Multiple-Use Sustained-Yield Act.

While the Denver decision therefore disposed of instream flow claims in divisions 4, 5, and 6, such claims are pending in the other divisions. In division 7, trial on United States reserved rights claims was indefinitely postponed by order of the court in January 1977. In the remaining three divisions, discovery is proceeding and the United States is gathering factual data to quantify its claims. It is expected to file quantification first in division 3. It is anticipated that instream flow claims will amount to between 60% and 80% of the total average annual runoff from the national forest lands. Such a reservation for instream flows would severely constrain direct usage of national forest streams. Moreover, in situations where there are existing users upstream of national forest lands whose priorities would be antedated by a reserved instream flow right, those users would effectively be subordinated to junior appropriators below the national forests.

The state is actively participating in discovery in divisions 1, 2, and 3. Interrogatories and document production requests have been served and answered, and additional discovery is in preparation. The state is also investigating, in cooperation with other objectors, avenues for securing a legal determination on the instream flow claims that would foreclose or limit a trial on the merits on that issue.