Subject: **Northeast Wyoming River Basins Plan**
Legal and Institutional Constraints
Task 5A

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INTRODUCTION

The purpose of this technical memorandum is to identify and discuss federal and state laws, rules, regulations and policies that affect water development and management. Legal and institutional constraints effecting water development and management in the Northeast River Basins, comprised of the Little Missouri River, Belle Fourche River, Cheyenne River, and Niobrara River Basins, are, in many ways, similar if not identical to issues encountered in the other basins of Wyoming. Consequently, applicable portions of the related document prepared for the Green River Basin titled *TECHNICAL MEMORANDUM, Green River Basin, Institutional Constraints*, by Purcell Consulting, P.C., dated April 26, 2001, form the basis for the presentation in this document. The reader is referred to the Green River Basin technical memorandum for citation of references used to develop the information presented in that memorandum.

FEDERAL ENVIRONMENTAL LAWS

The following is a list of water development and management actions that can initiate or "trigger" federal environmental laws. A discussion of applicable federal legislation is presented following the list.

1. Issuance of special use and right-of-way permits for new water projects on federal lands, including those lands administered by the Bureau of Land Management (BLM), the U.S. Forest Service (USFS), and other federal agencies.

2. Renewal of special use and right-of-way permits for existing water projects on federal lands, including those lands administered by the BLM, the USFS, and other federal agencies.

3. Contracting for storage water from federal reservoirs.

4. Renewal of existing contracts for storage water from federal reservoirs.

5. Discharge of dredged and/or fill material into waters of the United States, including rivers, streams, and wetlands

6. Procurement and renewal of licenses from the Federal Energy Regulatory Commission (FERC) to produce hydropower.

7. Use of federal loan or grant funds to construct a new water project or rehabilitate an existing water project.

Endangered Species Act

The Endangered Species Act of 1973 (ESA) requires the Secretary of Interior, through the U.S. Fish and Wildlife Service (USFWS), to determine whether wildlife and plant species are endangered or threatened based on the best available scientific information. The ESA constrains all federal agencies from taking

any action that may jeopardize the continued existence of an endangered or threatened species. If a federal agency is considering an action that may jeopardize an endangered species, Section 7 of the ESA requires that the agency must consult with the USFWS. There is a process of biological assessments and opinions that may result in conclusions that the proposed action will not jeopardize the species, that a reasonable or prudent alternative is needed to mitigate the impacts of the proposed action on the species or its habitat, or that the action should not be taken. The USFWS strongly encourages the coordination of the Section 7 consultation procedures with those procedures required by other statutes such as the National Environmental Policy Act and the Clean Water Act.

National Environmental Policy Act

The National Environmental Policy Act of 1969 (NEPA) requires that federal agencies consider all reasonably foreseeable environmental consequences of their proposed actions. A review of that action under NEPA can be in the form of a simple environmental assessment (EA), or the more extensive environmental impact statement (EIS). NEPA requires federal decision makers to "… study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." (42 USC 4321 et seq., Sec. 102(2)E). NEPA created the Council of Environmental Quality (CEQ). Regulations of the CEQ require that the "no action" alternative be considered; all reasonable alternatives should be considered; the reasons for eliminating potential alternatives must be provided; the action preferred by the federal action agency should be identified, if possible; and appropriate mitigation measures should be included (40 CFR Part 1502). NEPA provides federal agencies the opportunity to determine which alternative, including no action, they feel best serves the applicant's purpose and need. The alternative selected by the federal agency may differ from the one preferred by the applicant.

Clean Water Act

Section 404 of the Clean Water Act of 1972 prohibits discharging dredged and/or fill materials into waters of the United States without a permit from the U.S. Army Corps of Engineers (USCOE). The waters of the United States include rivers and streams and, as of 1993, wetlands. USCOE policy requires applicants for 404 permits to avoid impacts to waters of the U.S. to the extent practicable, then minimize the remaining impacts, and finally, take measures to mitigate unavoidable impacts. In addition to the alternative review required by NEPA, Section 404 (b)(1) guidelines (40CFR Part 230) require an alternative review to define the least environmentally damaging practicable alternative. Further, the guidelines are used to ensure that a project, after considering mitigation, will not cause significant impacts to the aquatic ecosystem.

Section 303(d) of the Clean Water Act requires the State of Wyoming to identify water bodies that do not meet uses, as designated by stream classifications, and are not expected to meet water quality standards after application of technology-based controls. It is also intended to identify a priority ranking for each water quality limited segment and develop total maximum daily loads (TMDL) to restore each water body segment. TMDL is the ability of a water body to assimilate pollution and continue to meet the use designated by the stream classifications. Future water development projects will need to address water quality benefits and impacts. Section 319 of the Clean Water Act provides funding assistance to address non-point source water quality issues. Water quality issues are more specifically and fully addressed in the Water Quality Issues technical memorandum (HKM, 2002).

FEDERAL LANDS

A significant portion of the Northeast River Basins are federal lands administered by the Bureau of Land Management (BLM) and the U.S. Forest Service (USFS). Federal agencies managing these lands must assure that the requirements of the above laws are met before they can issue a special use permit authorizing a proposed action, such as construction of a water project.

The scrutiny under which the federal laws will be applied is based on the sensitivity of the environment impacted or effected. For example, it may be a rather simple process to obtain a special use permit to

construct a small water pipeline across the prairie within BLM jurisdiction. However, it would be virtually impossible to obtain a special use permit to construct a large dam within a wild and scenic designation.

Project proponents must demonstrate a "purpose and need" for a project in order to obtain federal clearances for major water projects, whether or not the proposed project is located on federal lands. However, if the proposed location of the project is on federal lands, the "purpose and need" of the project proponent may be secondary to goals of the federal agency's management plans.

As previously noted, NEPA provides federal agencies the opportunity to determine which alternative, including no action, they feel best serves the applicant's purpose and need.
If the proposed project is located on federal lands and does not comply with the federal agency's management plan, project proponents may be faced with the daunting task of convincing that federal agency that the proposed project at that specific location is the only alternative available to meet the proponent's purpose and need.

Lands within national forests, wilderness areas, wildlife refuges, and wild and scenic designations are environmentally sensitive. The costs to mitigate the project impacts to the stream, fishery, terrestrial habitat, and wildlife resources in these areas must be born by the project proponent. These mitigation costs must be considered in determining whether or not the proposed project is economically feasible.

Special use permits to develop water projects on federal lands are typically issued with an expiration date and the project owner is required to renew the permit to continue operation. This renewal requirement shrouds the project with a degree of uncertainty because the issuance of the renewal will be based on the federal laws, rules and regulations in effect as of the date of the renewal rather than the requirements under which the special use permit was originally issued. For example, if a species in the project area is placed on the threatened or endangered lists, the project owner may be required to revise the operations of the project to accommodate the perceived needs of the species. If the project is a dam, the owner may be required to deliver a portion of the storage water supply to the habitat of the species in order to obtain the renewal of the special use permit.

WYOMING ENVIRONMENTAL LAWS

Section 401 of the Clean Water Act provides that the State of Wyoming certify any federally licensed or permitted facility which may result in a discharge into the waters of the state. The 401 certification provides a mechanism for the Wyoming to amend, or perhaps veto, an action that the federal agency might otherwise permit. While the 401 certifications are required for several federal actions, most 401 Certifications relate to Section 404 Dredge and Fill Permits required from the U.S. Army Corps of Engineers.

A Section 401 certification issued by the State of Wyoming typically requires the applicant to provide: 1) a Pollution Control Plan; 2) an on-site Pollution Control Officer; 3) water quality monitoring for turbidity; 4) safe handling of all hazardous materials located on-site; and 5) adequate water supply, sanitary, and trash facilities for construction camps located on-site.

The Section 401 certification also outlines the additional permits required prior to the initiation of construction activities. These additional permits are described below:

- National Pollution Discharge Elimination System (NPDES) Permit – Typically, the selected contractor for the project will prepare a "Notice of Intent" thirty days prior to any surface disturbances taking place. The major requirements of the NPDES (storm water general permit) pertain to the development and implementation of a pollution plan along with regular inspection of pollution control facilities.

- Non-Storm Water Discharges – An individual NPDES discharge permit from the State Department of Environmental Quality may be required for point source discharges to

surface waters not related to storm water runoff. These can include discharges from gravel crushing and washing operations, cofferdam dewatering, vehicle or machinery washing, or other material processing operations, if they are conducted.

- Spill Prevention, Control, and Countermeasures (SPCC) Permit – If above ground storage of petroleum products exceeds 1,320 gallons in total or more than 660 gallons in a single tank an SPCC plan may be required as provided for in the EPA's Oil Pollution Prevention regulations.

WYOMING WATER LAW

The Wyoming constitution establishes water in the state to be the property of the state, and use of water requires a permit from the State Engineer. Consequently, before a proposed water project can proceed to development the project sponsor must obtain a permit from the State Engineer.

The use of water is administered by the State Engineer and the State Board of Control which consists of the State Engineer and the Superintendent of each of the four water divisions of the state. Water is administered under the prior appropriations doctrine that dictates the water right with a senior or earlier priority date is entitled to receive its full amount before water rights with later, or junior, priority dates receive any of their allocation. The priority date of a water right is established as the date the water right application is filed with the State Engineer. Before water is available for use by a new project all water rights with priority dates senior to the priority of the proposed project need to be satisfied.

RIVER BASIN COMPACTS

The development and use of water from the Belle Fourche River and Niobrara River are subject to the terms of the Belle Fourche River Compact of 1943, and the Upper Niobrara River Compact of 1962, respectively.

The Belle Fourche River Compact divides the water between Wyoming and South Dakota. The compact recognizes all rights in Wyoming existing as of the date of the compact, and permits Wyoming unlimited use for stock water reservoirs not exceeding twenty acre-feet in capacity. Wyoming is allowed to deplete the flow of the Belle Fourche River under the conditions existing as of the date of the Compact by an additional 10%. No reservoir constructed subsequent to the date of the compact solely to utilize the water allocated to Wyoming shall have a capacity greater than 1,000 acre-feet.

The Upper Niobrara River Compact between Wyoming and Nebraska provides that stock water reservoirs not larger than twenty acre-feet capacity in Wyoming shall not be restricted except by Wyoming law. No restrictions are placed on diversion or storage of water in Wyoming except on the main stem of the Niobrara River east of Range 62 West and on Van Tassel Creek south of Section 27, Township 32 North, Range 60 West. In this area direct diversions are regulated on an interstate priority basis with lands in Nebraska west of Range 55 West, and storage reservoirs with priority dates prior to August 1, 1957, may store water only during the period of October 1 to June 1, while storage reservoirs with priority dates after August 1, 1957, may store a maximum of 500 acre-feet in any water year with dates of storage limited to the period of October 1 to May 1. Ground water development is recognized to be a significant factor and the compact provides for investigation of this resource and possible apportionment at a later date.

Compacts have also been developed for the Cheyenne River and the Little Missouri River, but these agreements have yet to be fully ratified. Wyoming and South Dakota negotiated the Cheyenne River Compact in 1949 only to have it rejected by the United States Congress over an Indian water rights issue. In 1951 the states submitted a revised compact to their respective legislatures for approval. While South Dakota approved the revised agreement, Wyoming withheld approval under the belief the allocation of water to Wyoming was not equitable.

For the Little Missouri River, Wyoming, Montana, North Dakota, and South Dakota began exploring the possibility of an interstate compact in 1958. Discussions were terminated because there was little interest

in developing a compact, and because the lack of specific data on hydrology and water rights required extensive investigation to formulate the basis for compact negotiation.

WYOMING WATER DEVELOPMENT PROGRAM

In 1975, the Wyoming Legislature authorized the Wyoming Water Development Program and defined the program in W.S. 41-2-112(a), which states:

> *The Wyoming water development program is established to foster, promote, and encourage the optimal development of the state's human, industrial, mineral, agricultural, water and recreation resources. The program shall provide through the commission, procedures and policies for the planning, selection, financing, construction, acquisition and operation of projects and facilities for the conservation, storage, distribution and use of water, necessary in the public interest to develop and preserve Wyoming's water and related land resources. The program shall encourage development of water facilities for irrigation, for reduction of flood damage, for abatement of pollution, for preservation and development of fish and wildlife resources [and] for protection and improvement of public lands and shall help make available the water of this state for all beneficial uses, including but not limited to municipal, domestic, agricultural, industrial, instream flows, hydroelectric power and recreational purposes, conservation of land resources and protection of the health, safety and general welfare of the people of the state of Wyoming.*

The Wyoming Water Development Commission (WWDC), which was authorized by the legislation, is responsible for setting priorities under the all-encompassing definition provided in the legislation. The WWDC is made up of ten Wyoming citizens who are appointed by the Governor. The Wyoming Water Development Program is administered by the director and staff of the Wyoming Water Development Office.

The WWDC can invest in water projects as state investments or can provide loans and grants to public entities such as municipalities, irrigation districts and special districts, for the construction of projects specific to their water needs. The WWDC has adopted operating criteria to serve as a general framework for the development of program or project recommendations and generation of information.

REFERENCES

Christopulos, George L., State Engineer. Documents on the Use and Control of Wyoming's Interstate Streams, Compacts, Treaties, and Court Decrees, State of Wyoming, 1982.

Wyoming State Engineer's Office. Wyoming Water Planning Program, Report 10, Water & Related Land Resources of Northeast Wyoming, April 1972.

HKM Engineering Inc. Water Quality Issues, Technical Memorandum, Northeast Wyoming River Basins Plan, February, 2002.