REMARKS BY THE ATTORNEY GENERAL
CHAMBER OF COMMERCE AND KIWANIS CLUB OF
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It is a great pleasure for me to be in Wyoming today, and an honor to address such a distinguished gathering. Speaking at a luncheon, however, is always a dangerous proposition. I can't help remembering a story about a politician who was invited to speak at a banquet in a small town. It was quite an occasion, and everyone was enjoying the meal and conversation. After awhile, the mayor turned to the guest speaker and asked: "Shall we let them enjoy themselves a little longer or had we better have your speech now?"

Although I was born in the East, I went west in my youth and -- until my recent exile to Washington, D.C. -- have spent all of my professional life in the west. Coming from Washington, D.C. to Wyoming, one is impressed by the diversity so characteristic of our republic. This diversity has not always resulted in the greatest degree of understanding and empathy between inhabitants of different regions. One hundred and forty years ago, an Easterner -- Daniel Webster -- dismissed the Wyoming area as "a region of savages, wild beasts, shifting sands, whirlwinds of dust, cactus, and prairie dogs." Since that time, however, settlers coming here have been struck by Wyoming's awesome natural beauty. Through persistent industry, they have transformed what was once called a part of the Great American Desert into a dynamic and prosperous state. A foreign visitor to Cheyenne, writing just after the Civil War, noted:

> "This little city, . . . which no geography yet mentions, proud of its hotels, its newspapers, its marvelous growth, and its topographic situation, already dreams of the title of capital . . . So local patriotism is born, and so local questions arise, even in the midst of a great desert."

Our federal system is designed to accommodate such "local patriotism " and "local questions" in one Nation. I have come West to talk about federalism.

The question of relations between the federal government and the states is starkly presented in the

West because of the vast tracts of federally owned land that cover the maps of the western states. When the western states were admitted into the Union, the federal government took title to all unappropriated lands. At that time, little removed from the frontier days, most land was unappropriated. As a result, about half of the land in the West is today owned by the federal government -- either as public domain or reserved for a specific purpose like Yellowstone Park was eighty years ago. In Wyoming, forty-nine percent of the land is owned by the federal government. By contrast, in the Northeast less than four percent of the land is federally owned, and in the South the figure is just over five percent. This concrete federal presence means that the activity of the federal government directly affects the citizens of the western states differently from those in other parts of the country, and in a way that is generally not understood in other parts of the country.

The impact of the federal presence is perhaps felt most strongly in the area of water rights. While the proportion of western land owned by the federal government is staggering in itself, that federal land accounts for an even greater proportion of the water available in the West. For example, over sixty percent of the average annual water yield in the West is from federal reservations. I do not have to tell a Wyoming audience about the importance of this water to the arid states of the West. Annual precipitation in Wyoming averages less than fifteen inches. Your state constitution itself specifically notes both that water supply is essential to industrial prosperity and that water is limited in amount. So important is water regulation that your Constitution also establishes the office of state engineer and the board of control to supervise the use and distribution of water.

In one of the clearest examples of the virtues of federalism, Wyoming and the other western states departed from the common law of water rights prevailing in the water-rich eastern states. You developed your own system of rules based on the legal concept of appropriation to allocate scarce water among competing users.

The federal government is, of course, one of the leading users of water in the West. Demand for water for projects carried out on the large tracts of federal land inevitably competes with other public and private claims upon the same water. There is perhaps no more sensitive issue of federalism in the West than the

question of how the federal government asserts claims for the limited resource of water.

The federal government can, of course, acquire water rights in the same fashion as anyone else, by complying with state procedural and substantive water law. It is also well-recognized that the federal government may acquire water rights when it reserves federal land from the public domain and water is necessary to fulfill the purposes of the reservation. By this means, however, the federal government acquires only those water rights necessary for the primary purposes of the reservation of the public land, and only that minimum amount of water "without [which] the purposes of the reservation would be entirely defeated." Finally, the federal government also acquires rights to water necessary to fulfill specific congressional directives authorizing a particular project.

These three means of acquiring federal water rights are entirely consistent with the values of federalism. Three years ago, however, the previous Administration adopted and supported a fourth theory of law for obtaining federal rights in unappropriated water, the so-called "non-reserved water rights" theory. The clearest assertion of this view occurred in an opinion by the Solicitor of the Department of the Interior in the Carter Administration. According to his opinion, the federal government had the right to use unappropriated water on federal land -- reserved or not -- without regard to state substantive or procedural water law whenever the water was needed for an authorized function of the federal agency. As might be expected, the "authorized functions" envisioned were quite broad.

In the prior Administration's opinion, the usual values of federalism were turned on their head. According to that opinion, federal agencies had a right to whatever unappropriated water they felt was needed for authorized purposes, unhampered by compliance with state law, unless Congress specifically provided to the contrary. As the opinion put it:

> "to the extent Congress has not clearly granted authority to the states over waters which are in, on, under or appurtenant to federal lands, the Federal Government maintains its sovereign rights in such waters and may put them to use irrespective of state law."

If Congress wanted federal agencies managing federal lands in the west to comply with state law in acquiring water rights, it had to say so. Otherwise, federal bureaucrats were given free rein, bound only by the loose requirement that the unappropriated water they obtained be used for an authorized land management function.

Under this federal non-reserved water right theory, mere congressional authorization to an agency to manage federal land empowered the agency to ignore and override carefully devised state law and procedures governing water rights. A federal agency, for example, would be entitled to minimum instream flows for stockwatering, recreation, and wildlife purposes, so long as these uses served a congressionally mandated function. This would be true even if the uses were not recognized as beneficial under state law, and even if state law did not recognize minimum instream flows. And in acquiring such rights, the federal agency would not even have to comply with state permit or other procedural requirements.

While not clearly expressed, one basis for the previous Administration's view was apparently the theory that the federal government owned all unappropriated water in the western states. This interest supposedly derived from the federal government's ownership of the lands from the time they were ceded by foreign nations. The federal government, it was reasoned, has plenary power to control its property, and neither states nor private parties can acquire any interests in this property in the absence of an express grant from Congress. Since Congress has never expressly granted authority to the states over water on federal land, the previous Administration concluded that the federal government could use that water without interference from the states.

The potential disruptive effect of the federal non-reserved water rights theory on carefully crafted state water law systems was clear. Under this theory, one of the leading users of water in the West -- the federal government -- would not have to play by the rules applicable to everyone else. Not surprisingly, the loosing of that federal bull in the china shop of state water law created serious problems. Wyoming's own Attorney General [Stephen Freudenthal] recently wrote that "the non-reserved right doctrine creates a nightmare for Western States' water resources management."

I am here today to tell you and the Nation that the nightmare is over. As Westerners know all too well, the question of non-reserved federal water rights has been both unsettled and unsettling. Last Fall, the Department of Interior repudiated the prior Administration's opinion. As Secretary James Watt put it, the new Interior Department position

> "means federal land managers must follow state water laws and procedures except when Congress has specifically established a water right or where Congress has explicitly set aside a federal land area with a reserved water right. If they need more water for their programs, they must take their place in line like any citizen and let State authorities decide."

That conclusion, however, was binding only on the Department of Interior and the agencies under its jurisdiction.

The Department of Justice has been deeply involved in this controversy because we are responsible for conducting water rights litigation on behalf of the entire federal government. Even after adoption of the new Interior Department position, there were possible claims by other agencies under consideration in pending litigation based on the prior Administration's position. Rather than proceeding with those claims, we decided to conduct a thorough review of the question of federal non-reserved water rights. That review was the first comprehensive review ever undertaken by the Department of Justice, whose legal decision will be binding on all federal agencies that assert claims to water in the West.

Our review is now complete. Our analysis and conclusions are contained in an eighty-page legal opinion being released today by the Justice Department's Office of Legal Counsel. Briefly stated, we do not agree with the prior Administration's view on this question. We have concluded that the non-reserved water rights theory does not provide an appropriate basis for assertion of water rights by federal agencies in western states. Accordingly, they may no longer claim water on the basis of such a right.

As an initial matter, our review of the applicable authorities indicates that it is not helpful to approach the issue of water rights as a question of ownership, either by the federal government or the state governments. While the Supreme Court has sent

conflicting signals over the years, careful scrutiny reveals that federal-state water law questions cannot be properly resolved in this fashion. The issue should not be viewed as a struggle over ownership between the federal and state governments but as a question of competing regulatory jurisdiction.

From the time of the earliest acts dealing with land development in western states, Congress has actively encouraged the development of state regulation of water appropriation. Congress has conspicuously avoided the imposition of a general federal regulatory scheme. The major nineteenth century land acts -- the Mining Acts of 1866 and 1870 and the Desert Land Act of 1877 -- fostered state regulatory systems applicable to unappropriated water on federal as well as private or state-owned land. As Justice Rehnquist wrote for the Supreme Court in California v. United States:

> "The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress."

The Congress does, of course, have the constitutional power to displace state regulation of unappropriated water on federal lands. The question is when and how that power has been exercised.

Congress has historically deferred to state water law, a fact recognized and considered highly significant by the Supreme Court in decisions such as California v. United States and United States v. New Mexico. In light of this traditional deference, we believe that there must be a presumption attaching to federal statutes authorizing the management of lands that state water law not be displaced. As a general rule, it must therefore be presumed that Congress intended federal agencies to acquire water rights in accordance with state substantive and procedural law. It logically follows that state law could in certain circumstances deny some uses of water sought by federal agencies.

Under our view, federal agencies are limited to water rights obtainable under state law, unless Congress clearly intended to displace state water law. Congress may do this, for example, by specifically directing the use of water. Congress could also establish specific

purposes or conditions for the use of land that cannot be fulfilled without water. In the absence of such clear congressional intent, a federal agency is not, for example, entitled to water for a minimum instream flow when state law does not recognize that use as beneficial.

This approach is not only solidly grounded on the pertinent legal authorities but also far more consistent than the approach of our immediate predecessors with basic principles of federalism. Federalism consists in leaving the broadest scope for state law, unless and until Congress specifically directs otherwise. The usual rule is not that federal agencies may ignore state law unless Congress tells them to observe it. It is that federal agencies abide by state law unless Congress directs them otherwise. The theory of federal non-reserved water rights advanced by the previous Administration -- which in reality was little more than an assertion that federal agencies could take unappropriated water whenever they wanted to -- runs counter to this historic rule. Our approach is true to the basic principles of our system of government -- and true to the realities of life in the West.

In his famous work on the American Frontier, Frederick Jackson Turner wrote that "the stubborn American environment is there with its imperious summons to accept its conditions." The citizens of Wyoming and the other western states have prospered by adapting to the conditions of the West. The early settlers had to adapt to new terrain and climate. The common law of water rights itself had to adapt to new conditions in the arid expanses, and the old riparian rules were changed. The federal government, too, should be sensitive to conditions in the West. The notion that federal agencies could ignore state law in acquiring water rights simply because Congress was silent reflects insensitivity to the scarcity of water in the West and the state systems carefully developed in response.

Considering the many conflicts over water rights throughout history, I can understand how the word "rivalry" was derived from the Latin word "Rivus," which means stream. I am pleased today to put an end to one of the more recent conflicts over water rights -- the struggle between the federal and state governments over non-reserved water rights. Surely, the federal government has better things to do than to fight with our state governments over the allocation of water.

Under the Reagan Administration, the federal government will do what it can do best. Those things the states can and should do will be left to the governments of those states. That is clearly the system our Constitution established nearly two centuries ago. As Thomas Jefferson wrote at that time:

> "Were not this country divided into states, that division must be made, that each might do for itself what concerns itself directly, and what it can so much better do than a distant authority . . . Were we directed from Washington when to sow, and when to reap, we should soon want bread."

Water is a scarce enough resource in the West without the federal government adding to the want. The decision I have announced today recognizes that reality -- and it will therefore strengthen our federal system.