RECLAMATION
Managing Water in the West

U.S. Department of the Interior
Bureau of Reclamation

NOTICE OF INTENT TO AWARD

This Funding Announcement is not a request for applications. This announcement is to provide public notice of the Bureau of Reclamation's intention to fund the following project activities without full and open competition.

ABSTRACT	
Funding Announcement	BOR-GP-17-N004
Project Title	A Legal Review of Adaptation Strategies: Constraints and Opportunities
Recipient	University of Oklahoma
Principal Investigator / Program Manager	Drew L. Kershen
Anticipated Federal Amount	$79,626.00
Anticipated Non-Federal Amount	$0.00
New Award or Continuation?	New Award
Anticipated Period of Performance	August 1, 2017 – December 31, 2018
Award Instrument	Grant
Statutory Authority	Public Law 111-11, Section 9509
CFDA # and Title	15.560 SECURE Water Act – Research Agreements
Single Source Justification Criteria Cited	(4) Unique Qualifications
Reclamation Point of Contact	Nathan Kuhnert

OVERVIEW

As part of the Upper Washita Basin Study (UWBS) and Upper Red River Basin Study (URRBS), Reclamation is collaborating with the Oklahoma Water Resources Board (OWRB) and local water districts to (among other activities) to identify and evaluate non-structural adaptation strategies to help improve water supply reliability of four Reclamation reservoirs: Foss, Fort

Cobb, Lugert-Altus and Tom Steed Reservoirs. These strategies are aligned with the high priority recommendations in the 2012 Update of the Oklahoma Comprehensive Water Plan (OCWP) related to enhanced "Water Supply Reliability".

For surface water management scenarios per the OCWP Recommendations, key questions need further clarification that include the following: what is considered a "water shortage" in terms of a reasonable amount of reservoir storage volume to protect, how is interference defined, how is interference measured and determined, what level of impact could trigger interference, what actions have or could be taken to mitigate/compensate for interference, how would interference be enforced, how would interference differ depending on whether the senior permit use is for M&I verse agricultural purposes and to what extent are these issues complicated by domestic riparian rights verses water rights under prior appropriation.

For groundwater management scenarios, also with respect to the OCWP Recommendations, further questions need clarified including: could "water shortage" thresholds that trigger groundwater management scenarios be different than those that trigger surface water management scenarios, what is a considered a "water shortage" in terms of a reasonable amount of reservoir volume to protect, how could groundwater well pumping volume, location and depth affect allocation, how could other strategies be utilized to adept, mitigate, and/or compensate for base flow reductions caused by groundwater pumping, to what extent are these issues complicated by the status and changes in groundwater law (former/present), to what extent are these issues complicated by exempt domestic wells and to what extent are these issues complicated by implementation of conjunctive management system.

RECIPIENT INVOLVEMENT

A SOW has been developed that includes the following tasks: (1) Review documentation (i.e, water supply contracts between Reclamation and the Districts) in support of UWBS and URRBS, (2) Organize and describe in applicable context all Oklahoma water law, regulations, rules and policy which already provide or (with modification) could provide OWRB authority to either prevent or mitigate interference with water rights or are otherwise implement proposed adaptive strategies, (3) Summarize select Western water law/case studies, (4) through (11) Summarize legal and institutional constraints and opportunities related to conditioning junior water use permit holders upstream of the four Reclamation reservoirs to discontinue their diversion of water during predetermined periods of shortage to protect dependable yields and minimize interference between riparian/upstream users and users of reservoir storage; and summarize legal and institutional constraints and opportunities related to the use of a conjunctive water allocation system in the river/aquifer stream systems to address the reduction in surface water flows of the Project associated rivers that reduce the yields of the Project's reservoirs, and last (12) Compile documentation from tasks above into two final reports.

RECLAMATION INVOLVEMENT

Reclamation is seeking to complete this project under the Cooperative Ecosystem Studies Unit (CESU) National Network. The University of Oklahoma is a member of the Great Plains CESU which will employee Drew Kershen to research and publish these tasks. Reclamation will

continue to move forward with its two large Basin Studies and will facilitate frequent communications with Mr. Kershen and Partners to ensure the above listed tasks align and fully complement the SOWs underlying the two Basin Studies.

No substantial involvement on the part of Reclamation is anticipated for the successful completion of the objectives to be funded by this award. It is anticipated that Reclamation's involvement will consist of standard federal stewardship responsibilities such as monitoring project performance, technical assistance at the request of the recipient, etc.

SINGLE-SOURCE JUSTIFICATION

DEPARTMENT OF THE INTERIOR
SINGLE SOURCE POLICY REQUIREMENTS

Department of the Interior Policy (505 DM 2) requires a written justification which explains why competition is not practicable for each single-source award. The justification must address one or more of the following criteria as well as discussion of the program legislative history, unique capabilities of the proposed recipient, and cost-sharing contribution offered by the proposed recipient, as applicable.

In order for an assistance award to be made without competition, the award must satisfy one or more of the following criteria:

(1) Unsolicited Proposal – The proposed award is the result of an unsolicited assistance application which represents a unique or innovative idea, method, or approach which is not the subject of a current or planned contract or assistance award, but which is deemed advantageous to the program objectives;

(2) Continuation – The activity to be funded is necessary to the satisfactory completion of, or is a continuation of an activity presently being funded, and for which competition would have a significant adverse effect on the continuity or completion of the activity;

(3) Legislative intent – The language in the applicable authorizing legislation or legislative history clearly indicates Congress' intent to restrict the award to a particular recipient of purpose;

(4) Unique Qualifications – The applicant is uniquely qualified to perform the activity based upon a variety of demonstrable factors such as location, property ownership, voluntary support capacity, cost-sharing ability if applicable, technical expertise, or other such unique qualifications;

(5) Emergencies – Program/award where there is insufficient time available (due to a compelling and unusual urgency, or substantial danger to health or safety) for adequate competitive procedures to be followed.

Reclamation did not solicit full and open competition for this award based the following criteria:

(4) UNIQUE QUALIFICATIONS

Single Source Justification Description:

Drew L. Kershen, Earl Sneed Centennial Professor Emeritus, taught the course "Water Law" at the University of Oklahoma College of Law from 1990 until his retirement in June 2012. During those years, he was a regular speaker at the CLE International Oklahoma Water Law Conference, at the Oklahoma Governor's Water Law Conference, and at other venues on Oklahoma water law topics. Professor Kershen co-chaired Although water law was not the focus of his scholarship (his scholarship focus was agricultural law), he authored several articles on Oklahoma water law and was the director and editor of Project Report Number A-130, for the Environmental Institute of Oklahoma State University titled *The Impact of Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Board* (October 1995).

The Franco-American Charolaise decision of the Oklahoma Supreme Court is the most significant water law decision in Oklahoma jurisprudence. By this decision, the Supreme Court of Oklahoma reinvigorated the riparian doctrine of water law for Oklahoma water rights. The Supreme Court of Oklahoma thereby turned Oklahoma into a hybrid water law state – i.e., a state that has both the riparian doctrine and the prior appropriation doctrine of water law for surface water. These two water law doctrines are very difficult to reconcile and other Western states abandoned riparian rights in favor of the prior appropriation doctrine. The USBR Basin Studies will require that this "conflict" in Oklahoma surface water law – and any impacts on groundwater law – be addressed and discussed as the Final Report presents options for management strategies to the Bureau for its reservoirs in the arid (western) half of the State of Oklahoma.

For more than a decade Professor Kershen served on the Oklahoma Water Law Advisory Group that served the Executive Director of the Oklahoma Water Resources Board. He was actively involved in discussions and presentations related to the Oklahoma Comprehensive Water Plans of 1995 and 2010. At times, he was also a consulting lawyer to Oklahoma attorneys who had clients with Oklahoma water law legal issues. Professor Kershen succeeded Dr. Joseph Rarick, the legislatively-designated Father of Oklahoma Water Law, as the OU Law School water law professor after Professor Rarick died in 1989. Through all these activities and relationships, Professor Kershen acquired a comprehensive understanding of Oklahoma water law, both theoretical and practical knowledge.

Since his retirement, Professor Kershen has continued to be active in Oklahoma water law matters, meaning that his knowledge is current and he does not have clients to avoid any potential conflict of interest. In 2016, he co-chaired another CLE Water Law Conference that featured the historic settlement agreement between the State of Oklahoma, the Choctaw Nation, the Chickasaw Nation, and the City of Oklahoma City which has a nexus to both USBR Basin Studies. Professor Kershen's immense familiarity with Oklahoma Water Law including the processes and controversies that have led to the existing laws and practices administered by the OWRB today in addition to his relationships with Oklahoma colleagues and stakeholders is invaluable and broadly meets single source criteria.

STATUTORY AUTHORITY

Public Law 111-11, Section 9509.