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Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management

Solicitor's Opinion #M-36914

(June 25, 1979)

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UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

JUN 25 1979

Memorandum

To: Secretary

From: Solicitor

Subject: Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management

I. INTRODUCTION

This opinion discusses the nature and extent of the United States' rights to use water on the federal lands administered by the National Park Service (NPS), Fish and Wildlife Service (FWS), Bureau of Reclamation (Reclamation), and the Bureau of Land Management (BLM) within the United States Department of the Interior. The President's Water Policy message (June 6, 1978) and subsequent memorandum to you (July 12, 1978) directed the Department to expeditiously identify, establish and quantify its non-Indian federal reserved water rights. As a part of this effort, my office has undertaken a comprehensive analysis of the reserved water rights which may be asserted on the federal lands administered by NPS, FWS, Reclamation and BLM.1/ My staff has also analyzed other (non-reserved) federal water rights. This opinion summarizes my legal conclusions.

II. NATURE OF FEDERAL-STATE RELATIONS IN DETERMINING WATER RIGHTS

The westward expansion of the United States resulted from cessions by various foreign nations, through which the United States obtained ownership of the lands now comprising the western states and ownership of all rights appurtenant to the lands, except those interests in lands and appurtenant rights established under previous sovereigns. Borax Consolidated, Ltd. v. Los Angeles, 296 U.S. 10, 15-16 (1935); Knight v. United States Land Assn., 142 U.S. 161, 183-184 (1891).

1/ None of the other bureaus or agencies within the Department of the Interior administer significant amounts, if any, of lands for which a reserved water right may be claimed. This opinion does not deal with reserved water rights which may be claimed on behalf of Indians.

The plenary power that Congress has under the Property Clause 2/ by virtue of federal ownership of these lands includes the power to control the disposition and use of water on, under, flowing through or appurtenant to such lands. See United States v. Grand River Dam Authority, 363 U.S. 229, 235 (1960) (Because the "Federal Government was the initial proprietor in these western lands . . . any claim by a state or by others must derive from this title."); cf., Kleppe v. New Mexico, 426 U.S. 529, 539-41 (1976). Congress may exercise its power to manage or dispose of all the lands and waters on the public lands, together or separately. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 152, 162 (1935); see also United States v. California, 332 U.S. 19, 27 (1947). No interest in the property of the United States may be acquired in the absence of an express grant from Congress; and, absent that grant or consent, it continues to be held by the United States. United States v. Grand River Dam Authority, supra; Utah Power and Light Company v. United States, 243 U.S. 389, 404-05 (1917). Such grants and disposals to the states are not lightly inferred; i.e., "nothing passes but that which is conveyed in clear and explicit language -- inference being not against but for the government." Caldwell v. United States, 250 U.S. 14, 30-21 (1918); see also Andrus v. Charlestone Stone Products, 436 U.S. 604, 617 (1978).

It follows that 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.3/

The admission of a state into the Union and the "equal footing" doctrine did not divest the United States of its plenary control over such water. Cappaert v. United States, 426 U.S. 128, 144-45 (1976); Arizona v. California, 373 U.S. 546, 599 (1963). The Supreme Court has, however, recently noted the existence of one school of legal thought that this doctrine vested Western states, upon admission to the Union, with "exclusive sovereignty" over the unappropriated waters in their streams.

2/ U.S. CONST. art. IV, § 3, cl. 2 provides:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

3/ See, e.g., Morreale, "Federal-State Rights and Relations," 2 Waters and Water Rights, 51-52, 81 (R. Clark ed. 1967).

California v. United States, 438 U.S. 645, 654 (1978). This school of thought is difficult to square with the reserved rights doctrine repeatedly affirmed by the Supreme Court as applying to reservations of land in a state after statehood. See, e.g., United States v. New Mexico, 438 U.S. 696, 698, 700, n. 4 (1978); Cappaert v. United States, supra; cf. Winters v. United States, 207 U.S. 564, 577 (1908).

Moreover, the states may not exercise any governmental authority over federal property unless they have been expressly granted that authority by the Congress, since Congress retains exclusive control over the acquisition of private rights in federal lands and interests. Broder v. Natoma Water and Mining Co., 101 U.S. 274 (1879); Gibson v. Chouteau, 80 U.S. (13 Wall.) 92, 99 (1872); Irwine v. Marshall, 61 U.S. (20 How.) 558, 563 (1858). Federal control over the disposition and use of water in, on, under or appurtenant to federal land ultimately rests upon the Supremacy Clause 4/, which permits the Federal Government to exercise its constitutional prerogatives without regard to state law. Cappaert v. United States, supra at 145. Arizona v. California, 282 U.S. 423, 451 (1931); cf., Kleppe v. New Mexico, supra, at 543; Ohio v. Thomas, 173 U.S. 276, 283 (1899); Johnson v. Maryland, 254 U.S. 51 (1920).

Federal control over its needed water rights, unhampered by compliance with procedural and substantive state law, is supported by the Supremacy Clause and the doctrine that federal activities are immune from state regulation unless there is a "clear congressional mandate," Kern-Limerick Inc. v. Scurlock, 347 U.S. 110, 122 (1954); or "specific congressional action," Paul v. United States, 371 U.S. 245, 263 (1963), providing for state control. See also Mayo v. United States, 319 U.S. 441, 448 (1943); Hancock v. Train, 426 U.S. 167, 178-81 (1976); EPA v. State Water Resources Control Board, 426 U.S. 200, 214, 217, 221 (1976). Cf. Arizona v. California, 283 U.S. 423, 451 (1931) (Congressionally-authorized dam and reservoir can proceed without submitting plans and specifications to State Engineer for approval). State legislative claims to all water found within state boundaries do not alter this premise, since Congress, under the Property Clause, has the exclusive power to dispose of federal property. California Oregon Power Co. v. Beaver Portland Cement Co., supra at 162; Utah Power & Light Co. v. United States, supra at 404.

Originally, the common law riparian rules of natural flow applied to the public lands. United States v. Rio Grande Dam and Irrigation Co., 174 U.S. 690, 703 (1899). There the Court opined, in dicta, that these riparian rules could be changed by the state legislatures if, in the absence of specific Congressional consent, they did not destroy the right of the United States to the continued flow of water bordering its lands needed for the beneficial use of government property. The

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4/ U.S. CONST. art. VI, cl. 2.

Court furthermore held that the states could not destroy or interfere with the paramount power of the United States to secure the navigability of navigable streams. Ibid.

In the arid Western states, the state legislatures adopted the appropriation doctrine, which grew out of local mining customs. The appropriation doctrine permits beneficial water uses under a priority system ("first in time is first in right") without regard to ownership of a watercourse's abutting lands or the impacts on downstream riparian landowners. With the settlement of the public lands, conflict arose over the water rights of federal patentees claiming riparian rights and prior appropriators whose rights were recognized under local laws and customs.

Beginning in 1866, Congress passed three statutes which resolved this conflict between private users in favor of prior appropriators. These three statutes still, more than one hundred years later, provide the basis for state regulatory authority over water rights. The Acts of July 26, 1866, 14 Stat. 253, and July 9, 1870, 16 Stat. 218, 43 U.S.C. § 661 (1970), recognized and sanctioned possessory rights to water on the public lands asserted under local laws and customs, thereby validating, in effect, state appropriation water law procedures for private users and previous trespassers on the public lands. Federal Power Commission v. Oregon, 349 U.S. 435, 447-8 (1955); Broder v. Natoma Water and Mining Co., 101 U.S. 274, 276 (1879); Jennison v. Kirk, 98 U.S. 453 (1878); for background on the 1866 Act, see United States v. Gerlach Live Stock Co., 339 U.S. 725, 745-49 (1950).5/ By these 1866 and 1870 Acts, Congress in effect waived its proprietary and riparian rights to water on the public domain to the extent that water is appropriated by members of the public under state law in conformance with the grant of authority found in these two Acts. Thus, these two Acts confine assertion of inchoate federal water rights to unappropriated waters that exist at any point in time.

5/ The Mining Act of 1866 provided, in pertinent part:

> [W]henever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same.

The 1870 Act provided that "all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights."

The third statute, the Desert Land Act of 1877, 19 Stat. 377, 43 U.S.C. § 321 et seq. (1970), provides generally for the homesteading of the public domain in tracts larger than prior laws allowed, if the homesteader irrigated and reclaimed the land. The Supreme Court's treatment of the effect of the Desert Land Act on federal water rights has been unclear and conflicting, as developed below. The provision of the Act with which we are here concerned (43 U.S.C. § 321) was a proviso that the homesteader would have rights to use only that water "necessarily used for the purpose of irrigation and reclamation," and went on to state:

> all the surplus water over and above such actual appropriation and use together with the water of all lakes, rivers, and other sources of supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.

The application of this part of the Act to federal water rights requires some discussion, for several limitations appear on its face. First, it applies only to non-navigable sources of water. Second, it applies only to such sources on the public lands. Third, it applies to "surplus water over and above actual appropriation and use." (emphasis added). Fourth, it makes the water available only for "irrigation, mining and manufacturing purposes." Fifth, it does not directly address federal rights to use water for congressionally-authorized purposes on the federal lands, but instead is aimed at appropriation and use by "the public." Finally, the Desert Land Act applies only to certain states, originally California, Oregon and Nevada, and the then territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico and Dakota (later to become the states of North and South Dakota). 43 U.S.C. § 323. Colorado was added later. (26 Stat. 1096, March 3, 1891)

Several things can be said about these limitations. First, the Supreme Court has been careful to repeat the Act's limitations to non-navigable waters in subsequent cases.6/ Moreover, it has squarely held that the Act does not allow the right to appropriate

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6/ See, e.g., United States v. Rio Grande Irrigation Co., 174 U.S. 690, 706 (1899); California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 162 (1935); Ickes v. Fox, 300 U.S. 82, 95 (1937); Brush v. Commissioner, 300 U.S. 352, 367 (1937); Cappaert v. United States, 426 U.S. 128, 143, 145 (1976); California v. United States, 438 U.S. 645, 658 (1978).

non-navigable waters which are sources of navigable streams "to such an extent as to destroy their navigability . . . ."7/

On the other hand, the two predecessor acts of the Desert Land Act both recognized and ratified a pre-existing right to possession of water in accordance with local custom, laws and court decisions, see 14 Stat. 251, 253 (1866); 16 Stat. 217, 218 (1870); Broder v. Natoma Water and Mining Co., 101 U.S. 274, 276 (1879), and neither statute was expressly limited to non-navigable waters.8/ Moreover, the Supreme Court has held that these two acts are not limited to rights acquired before 1866, but "reach into the future as well . . . ."9/ Therefore, the significance of the Desert Land Act's limitation to non-navigable waters is unclear.

Second, the Act's limitation to sources on the public lands received express recognition in Federal Power Commission v. Oregon, 349 U.S. at 448 (1955), which held the Act inapplicable to reservations of land from the public domain, see 349 U.S. at 448, without distinguishing between whether the water involved was needed to carry out the purposes of the reservation, see part III A, infra, or was for congressionally-authorized uses apart from the purposes of the reservation; see part III B.

Third, the Act's limitation to unused, unappropriated waters means that to the extent the Federal Government was using water in connection with federal land management in 1877, it was not free for "the appropriation and use of the public." But whether it prevented the Federal Government from using additional water after 1877 except in compliance with state law requires further scrutiny, provided below.

Fourth, the Act's limitation to water for "irrigation, mining and manufacturing purposes" has not been found by the Supreme Court to be particularly significant. In 1935 the Court, purporting to give this

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7/ United States v. Rio Grande Irrigation Co., supra, 174 U.S. at 706. As passed by the Senate, the provision read: "and the water in all lakes, rivers, and other sources of water supply shall remain and be held for the use of the public for purposes of irrigation and mining." See Cong. Rec. (Feb. 27, 1877), p. 1973. The language was changed to apply only to non-navigable waters in Conference, without explanation. Cong. Rec. (March 3, 1877), p. 2156.

8/ Somewhat curiously, however, the Supreme Court in 1935 said these two statutes were the "test and measure of private rights in and to the non-navigable waters on the public domain." California Oregon Power Co., supra, 295 U.S. at 155 (emphasis added).

9/ Ibid; see also California v. United States, supra, 438 U.S. at 657, n. 11.

language its "natural meaning," held that it "effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself," apparently without limitation to the purposes for which the waters could be appropriated.10/ No mention of the limitation to certain purposes was made in subsequent Supreme Court cases.

Fifth, the fact that the Desert Land Act does not deal with federal acquisition of water rights has had varying significance for the Supreme Court over the years. Initially, in Rio Grande, supra, the Court stated (albeit in dictum apart from its discussion later in the opinion of the Desert Land Act), that the United States' right, as the owner of lands bordering a stream, to the continued flow of such waters "as may be necessary for the beneficial uses of government property" cannot be destroyed by state legislation. 174 U.S. at 703. This limitation was repeated and endorsed in Winters v. United States, 207 U.S. 564, 577 (1908), and in California Oregon Power Co., supra, 295 U.S. at 159. Later in the latter decision, however, the Court stated that the Desert Land Act vested the states with power "to affect the riparian rights of the United States [and] its grantees . . . ." 295 U.S. at 162 (emphasis added); see also 295 U.S. at 164.11/

10/ Id., 295 U.S. at 158 (emphasis added).

11/ Before it was revived to some extent by the decision in California v. United States, discussed infra, Dean Trelease, a noted authority on water law, commented that the decision in California Oregon Power Co. "now seems to be a spurious reading of the Desert Land Act." Trelease, "Federal Reserved Rights Since the PLLRC," 54 Denver L. J. 473, 476 (1977). Four years after California Oregon Power, the Ninth Circuit cited the decision for the proposition that "private rights in the waters of non-navigable streams on the public domain are measured by local customs, laws, and judicial decisions," but that the government may, "independently of the formalities of an actual appropriation, reserve the waters of non-navigable streams on the public domain if needed for governmental purposes." United States v. Walker River Irrg. Dist., 104 F.2d 334, 336-37 (9th Cir. 1939) (emphasis added). To the extent the Court's remark extends to non-reserved federal water rights, it is dictum, since the case concerned an Indian reserved water right. See also Nebraska v. Wyoming, 325 U.S. 589, 611-16 (1945), where the Court declined to decide whether the United States owned the unappropriated water of the Platte River, because the water rights for reclamation projects on that River were obtained in accordance with state law pursuant to section 8 of the Reclamation Act, 43 U.S.C. § 383, and therefore the question of ownership by the United States "of unappropriated water is largely academic . . . ." 325 U.S. at 616. See also Cappaert v. United States, supra, 426 U.S. at 144, fn. 9; and Arizona v. California, supra, where the Court declined to consider Arizona's "rights to interstate or local waters which have not yet been, and which may never be, appropriated." 283 U.S. at 464 (citations omitted).

These statements concerning the rights of the United States were dictum. since the case itself concerned rights of a patentee of public land, squarely covered by the Desert Land Act itself.

Twenty years later, in Federal Power Commission v. Oregon, supra, the Court said that the Desert Land Act "severed, for purposes of private acquisition, soil and water rights" on public lands. 349 U.S. at 448 (emphasis added), without expressly mentioning federal agencies' acquisition of water rights.

Twenty-one years after FPC v. Oregon, the Court again construed the Act as providing only that patentees of public land "must acquire water rights in non-navigable water in accordance with state law." Cappaert v. United States, supra, 426 U.S. at 143. The Court went on to state flatly: "Federal water rights are not dependent upon state law or state procedures . . . ." 426 U.S. at 145. To the extent that the remark applies to federal non-reserved water rights, it is dictum, because the case itself concerned a federal reserved right.

Two years later, however, the Supreme Court, in construing the Reclamation Act, found occasion to observe in dictum that there are two limitations on the states' "exclusive control of its streams -- reserved rights . . . and the navigation servitude." California v. United States, supra, 438 U.S. at 662. The Court cited only United States v. Rio Grande Irrigation Co., supra, 174 U.S. at 703, for the proposition that only reserved rights, rather than all federal water rights needed to carry out congressionally-mandated land management responsibilities, fall within this exception allowed by the Desert Land Act. In the passage cited by the Court in California v. United States, the Court had stated, in dictum:

> [I]n the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as owner of lands bordering a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property.12/

It therefore seems plain that the Rio Grande Court, in construing the Desert Land Act twenty-two years after its passage, did not limit the exception to the higher reserved rights standard -- the right to

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12/ This passage has been repeated and endorsed several times by the Supreme Court. See, e.g., Gutierres v. Albuquerque Land Co., 188 U.S. 545, 554 (1903); Kansas v. Colorado, 206 U.S. 46, 86 (1907); California Oregon Power Co., supra, 295 U.S. at 159.

use waters on lands reserved from the federal domain for specific purposes, "where without the water the purposes of the reservation would be entirely defeated,"13/ -- but instead allowed it under a lesser standard, for water necessary for the beneficial uses of the government property.

It is apparent that prior Supreme Court dicta are somewhat at war with one another on this issue. One reason for this is found in the Desert Land Act itself. That Act was one of many statutes enacted in the latter half of the 19th and early part of the twentieth centuries to promote settlement and cultivation of public domain lands. It spoke principally to the process by which arid public lands were to be irrigated and reclaimed and transferred from the public domain into private hands. See, e.g., Williams v. United States, 138 U.S. 514 (1891); United States v. Healey, 160 U.S. 136 (1895). Except to the extent the quoted language applies to the Federal Government, it addressed not at all the rights and obligations of the United States as owner of those federal lands not brought within the settlement scheme it established. Because of this, the legislative history does not contain any debate over the impact of the bill on federal water rights.

In any event, because the Supreme Court has spoken only by inconsistent dictum on this subject, the guidance I must give federal agencies must be based to a large degree on predicting how the Supreme Court may resolve these conflicting statements contained in prior decisions.

I am of the opinion that by these relatively narrow Acts of 1866, 1870 and 1877, the United States did not divest itself of its authority, as sovereign, to use the unappropriated waters on the public lands for governmental purposes. Supreme Court decisions upholding federal reserved water rights created after the effective dates of these statutes affirm this conclusion (United States v. New Mexico, supra, at 698):

> The Court has previously concluded that whatever powers the States acquired over their waters as a result of congressional acts and admission to the Union, however, Congress did not intend thereby to relinquish its authority to reserve unappropriated water in the future for use on appurtenant lands withdrawn from the public domain for specific federal

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13/ United States v. New Mexico, 438 U.S. 696, 700 (1978), decided the same day and as a companion to California v. United States, supra.

purposes. Winters v. United States, 207 U.S. 564, 577 (1908); Arizona v. California, 373 U.S. 546, 579-98 (1963).

Given the constitutional underpinning for, and the nature of, federal ownership and control of the public lands and their associated resources, it is not difficult to understand why Congress has on numerous occasions expressly provided that state law would govern the acquisition of rights to use waters on the public domain by private individuals. In a constitutional context, this so-called "express deference to state water law"14/ is essential to divest the United States of its inherent power and control over its property and to give the states the opportunity and the power to regulate the use and acquisition of resources, including water, otherwise controlled by the United States.

In both United States v. New Mexico, supra, and California v. United States, 438 U.S. 645 (1978), the Supreme Court identified directives in various federal laws that state law should be followed or that the federal law should not be construed to interfere with state law.15/ Each of these laws deal with a specific federal project or program, or contained general standards pertaining to the acquisition or protection of private rights to the use of water on the public domain. I believe that neither the Desert Land Act nor any other federal statute deals generally with how the United States should acquire and maintain rights to use water on the public domain and reserved public domain.16/

14/ United States v. New Mexico, supra, 438 U.S. at 702 (1978).

15/ See Ibid., fn. 5.

16/ Of the 37 statutes referred to by the Court in New Mexico, supra, 438 U.S. at 702, n. 5, 33 contain general statements indicating that such legislation should not be construed to interfere with the right of states to control the use of water within their boundaries or that a private person or government official should comply with state law when carrying out a specific program or purpose such as constructing or planning a public works project, disposing of Indian lands, or conferring certain benefits on a state. The remaining statutes either do not mention state law or are not related to the acquisition of water rights.

Congress has been fully aware of the continuing problem of state-federal relations in this area and even though attempts have been made,17/ it has never acted to require compliance with state law in every instance where the United States acquires water rights. In fact, Congress has recognized that the United States could acquire rights to use water in ways other than through state law.18/ Since Congress has not generally directed the Federal Government to comply with state water law, such compliance is required only in those specific instances where Congress has so provided. But while Congress has not directed the Federal Government to comply with state water law, neither has it prohibited the United States from voluntarily complying with such state water laws unless specifically directed.

In summary, since the Federal Government has never granted away its right to make use of unappropriated waters on federal lands, it is my opinion that the United States has retained its power to vest in itself water rights in unappropriated waters and it may exercise such power independent of substantive state law. See United States v. Rio Grande Dam and Irrigation Co., supra; see also discussion at pp. 15-18 below.

17/ See, e.g., S. 863, 84th Cong., 1st Sess. (1955); S. 1275, 88th Cong., 2d Sess. (1964); Morreale, "Federal-State Conflicts Over Western Waters --A Decade of 'Clarifying Legislation,'" 20 Rutgers L. Rev. 423 (1966); Corker, "Water Rights and Federalism--The Western Water Rights Settlement Bill of 1957," 45 Calif. L. Rev. 604 (1957). A recent GAO Report summarizes some of the more important legislative proposals made over the past 25 years. See "Reserved Water Rights for Federal and Indian Reservations, A Growing Controversy in Need of Resolution" (GAO-CED-78-176, Nov. 16, 1978) pp. 39-50.

18/ See 16 U.S.C. § 1284(c). One of the statutes on the list cited by the Supreme Court in United States v. New Mexico, supra, is the McCarran Amendment, 43 U.S.C. § 666 (1970). It is noteworthy that this provision -- which waives the sovereign immunity of the United States in certain cases -- refers to the acquisition of water rights by the United States "by appropriation under State law, by purchase, by exchange, or otherwise . . ." (emphasis supplied). The Supreme Court relied on the "or otherwise" language in holding the Amendment waived the United States' sovereign immunity for all federal water rights, including "appropriative rights, riparian rights, and reserved rights." United States v. District Court for Eagle County, 401 U.S. 520, 524 (1971).

III. RETENTION AND ACQUISITION OF WATER RIGHTS BY THE UNITED STATES

The United States retains water rights by reserving federal lands and waters necessary to fulfill specified purposes and obtains water rights by (1) appropriation of water and application to those uses authorized by Congress to carry out congressionally-authorized programs on the public domain, reserved and acquired lands; and (2) acquisition of water rights through purchase, exchange or condemnation.

A. Reserved Rights Doctrine

The federal reserved water rights doctrine is a judicial creation 19/ which holds:

> that when the Federal Government withdraws its lands from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In doing so the United States acquires a

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19/ Federal reserved water rights were first explicitly recognized in a case interpreting an agreement between the United States an an Indian tribe. Winters v. United States, 207 U.S. 564 (1908). In Winters, the Court relied in part on Congress' inferred intent in the Fort Belknap Agreement to transform the Indians into a "pastoral and civilized people," the need for irrigated water to make the reservation lands productive, and the construction rule resolving ambiguities in the favor of Indians, to find that the undeniable "power of the Government to reserve the waters and exempt them from appropriation under the state laws" had been exercised in this case. Id. at 576-577.

The concept of federal reserved water rights was first expressly extended to non-Indian federal reservations; i.e., wildlife refuges, national recreation areas, national forests, in Arizona v. California, 373 U.S. 546 (1963), though the Court had intimated that the doctrine would be so extended several years previously. See Federal Power Commission v. Oregon, 349 U.S. 435 (1955). In Arizona v. California, the Court expressly held that the "principle underlying the reservation of water rights was equally applicable to other federal establishments." Id. at 601. Subsequently, numerous cases have applied the reserved water rights doctrine to withdrawals and reservations under the jurisdiction of NPS, FWS and BLM. See for example Cappaert v. United States, supra; In the Matter of the United States of America, Water Division's 4, 5 and 6, Civil Nos. W-425 etc., (Colo. D.C., March 6, 1978), appeal pending (Nos. 79-SA99 and 100, Colo. Sup. Ct.).

> reserved water right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of water is empowered by the Commerce Clause, Art. I, § 8, which permits regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and non-navigable streams.20/

Reserved water rights are most often created by implication rather than by express reservation. The intent to reserve water "is inferred if the previously unappropriated water is necessary to accomplish the purposes for which the land reservation is created," because the courts have reasoned that the Federal Government would not reserve lands for specific purposes unless it also intended to reserve unappropriated water necessary to fulfill those purposes. Cappaert v. United States, supra at 139; see United States v. New Mexico, supra, at 701-02. However, "[w]here water is only valuable for a secondary use of the reservation . . . there arises the contrary inference that Congress intended . . . that the United States would acquire water in the same manner as any other public or private appropriator." United States v. New Mexico, supra at 699-700. Thus, there is an important distinction between the purposes of a land reservation and secondary or subsidiary management apart from the reservation purpose(s); i.e., only the former obtain water rights by the act of reserving the land for particular purposes. This distinction is further explored in part III B, infra.

The measure of the federal reserved water right is that quantity of water needed to accomplish the purposes of the reservation and no more. Cappaert v. United States, supra, at 9 and 11. The priority date of the federal reserved water right for purposes of determining seniority of water rights relative to those obtained under state or federal law is the date of the federal reservation or withdrawal action initiated toward a reservation. A reserved water right may be created by an act of Congress (United States v. New Mexico, supra), a Presidential Proclamation (Cappaert v. United States, supra), an executive order (Arizona v. California, 373 U.S., supra), a treaty (Winters v. United States, supra), a Secretarial land order (Arizona v. California, supra), or other departmental action ultimately creating a reservation (United States v. Walker River Irrigation Dist., 104 F.2d 334 (9th Cir. 1939)).

20/ Cappaert v. United States, supra, at 138.

State law requirements such as notice of application to beneficial use are not required to perfect reserved water rights. Cappaert v. United States, supra, at 143, 145. The "volume and scope of particular reserved rights, are federal questions" calling for the application of federal law (e.g., the fact that state water law systems may not provide for minimum instream flows is irrelevant if such flows are needed to carry out the purposes of the reservation), though state courts are competent to initially determine federal reserved water rights in McCarran Amendment (43 U.S.C. § 666) proceedings. United States v. District Court for Eagle County, 401 U.S. 520, 526 (1971). Finally, reserved water rights encompass both existing and reasonably foreseeable future water uses necessary to fulfill the purposes of the reservation. See Arizona v. California, 373 U.S., supra, at 600-601.

In sum, the federal reserved water right is created by implication as well as by express language in the reservation of public land for particular purposes. It arises from federal law, and is not dependent on state law for its existence or perfection. It does not require that water be put to actual use, and therefore is different from the concept of appropriation of water upon which Western states principally, but not exclusively,21/ rely. It establishes a right to water to carry out the purpose(s) of the federal reservation as of the date the reservation is created, whether the water is actually put to use and whether future appropriators under state law have actual knowledge of its existence. Certain other contours of the reserved water rights doctrine "remain unspecified" and guiding the Department's approach to some of these must await concrete fact situations, in the absence of precedent to guide reasonable assertion of reserved water rights. See United States v. New Mexico, supra, at 700.22/ This reserved right doctrine is applied to the various types of federal reservations administered by the Department in sections IV-VIII of this opinion.

21/ Some Western states recognize the existence of riparian rights, which may not depend upon actual use, and can create uncertainty with respect to other, "vested" state water rights based on actual appropriation and use so long as they are unadjudicated, in the same manner as unquantified federal reserved rights. See, e.g., In Re Waters of Long Valley Creek System, 84 Cal. App.3d 140 (Cal. Ct. App. 1978), appeal pending, Cal. Sup. Ct.; see also United States v. Gerlach Live Stock Co., 339 U.S. 725, 742-55 (1950).

22/ As an example, this opinion does not discuss whether the reserved water rights doctrine applies to acquired lands. While I am of the opinion that persuasive arguments may be made both for or against the assertion of reserved rights on acquired lands of the United States, I do not find it necessary to resolve this issue in this opinion because it is the policy of the Department to acquire water rights on [footnote continued]

B. Federal Water Rights Obtained Through Appropriation and Use For Congressionally-Authorized Purposes

The land management agencies of the Department of the Interior have, throughout their history, appropriated water on the lands they administer to carry out congressionally-authorized or mandated programs. This appropriation of water -- its actual application to a federal use -- is necessary to carry out the secondary uses for which many federal reservations are administered. It is also essential for the management and administration of non-reserved federal lands. No opinion on the water rights of the land management agencies of this Department would be complete without the discussion that follows on the non-reserved water rights of this Department.

Even though federal reserved rights have received the greatest judicial and political attention, the United States also has the right to appropriate water on its own property for congressionally-authorized uses, whether or not such uses are part of any "reservation" of the land.

This right to use water for congressionally-sanctioned purposes is not a "reserved" right. That is, it does not arise by implication from the reservation of land for particular purposes, but instead arises from actual use of unappropriated water by the United States to carry out congressionally-authorized management objectives on federal lands. Unlike the reserved right, this federal right to appropriate water (like all state-recognized appropriative rights) may not pre-date, in priority, the date action is taken leading to an actual use, whether consumptive or non-consumptive, and it may not adversely affect other rights established under state law. The time of its actual initiation and the purpose and quantity of the use establish limitations on the extent of the right.

The existence of the right is supported by case law and a previous Solicitor's opinion. See discussion and cases cited at pp. 7-11, supra and United States v. District Court for Eagle County, supra, at 524; State of Nevada ex rel. Shamberger v. United States, 165 F. Supp. 600 (D. Nev. (1958) (dictum); aff'd on other grounds 279 F.2d 699 (1960); Sol. Op. M-33969, "Compliance by the Department with State Laws Concerning

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[footnote continued]
acquired lands through methods other than assertion of a reserved water right. Compare C. Wheatley, "Study of the Development, Management, and Use of Water Resources on the Public Lands," 83 (1969); Corker, "Water Rights and Federalism--The Western Water Rights Settlement Bill of 1957," 45 Calif. L. Rev. 604, 612 (1957); Tarlock and Tippy, "The Wild and Scenic Rivers Act of 1968," 55 Cornell L. Rev. 707, 735-36 (1970); with Federal Reserved Water Rights Task Group Report (prepared for Water Resources Policy Study, November 7, 1977), 7-8. A corollary issue not discussed is the application of the reserved water rights doctrine in non-public domain states.

Water Rights," 6-7 (Nov. 7, 1950); cf. United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973). It is also unanimously recognized by commentators and others; e.g., in the words of the National Water Commission: "Federal agencies [can make] some water uses that neither comply with State law nor can be justified under the reservation doctrine. The power of Federal agencies to make such uses cannot be denied under the Supremacy Clause, if the water has been taken through the exercise of constitutional power." And further: "The reservation doctrine is a financial doctrine only; it confers no power on the Federal Government that it does not otherwise enjoy. Anytime the United States needs water . . . to carry out a program authorized by the Constitution, it has ample power to acquire it." National Water Commission, Water Policies for the Future, at pp. 466, 467 (1973); see also F. Trelease, Federal-State Relations in Water Law 147; (Legal Study No. 5, prepared for National Water Commission, Sept. 7, 1971); C. Wheatley, Study of the Development, the Management, and Use of Water Resources on 78-80, 112-116 (1969).

Although such rights are in the foregoing respects exactly congruent with ordinary state appropriation law, the appropriation for authorized federal purposes cannot be strictly limited by what state water law says is a "diversion" of water or a "beneficial use" for which water can be appropriated.

Only Congress, as I stated earlier, has the authority under the Property Clause to control the disposition and use of water appurtenant to lands owned by the United States. See Kleppe v. New Mexico, supra; cf. United States v. Little Lake Misere Land Co., 412 U.S. 580, 593-97 (1973) (This case held that federal courts may fashion rules of federal law necessary to carry out important congressionally-authorized programs; i.e., land acquisitions under the Migratory Bird Conservation Act; where state laws do not provide appropriate standards or unduly interfere with federal programs); United States v. Albrecht, 496 F.2d 906, 909-11 (9th Cir. 1974) (state law's failure to recognize property interest in an easement taken by the Federal Government to carry out the Migratory Bird Hunting Stamp Act does not prevent enforcement of easement, to carry out congressionally-authorized national program). It is my opinion that, since Congress has vested only the public with the right to appropriate unappropriated water arising on, under, through or appurtenant to federally-owned lands under state law, the United States itself retains a proprietary interest in those waters that have not been appropriated pursuant to state law. The United States therefore retains the power to utilize those unappropriated waters to carry out the management objectives specified in congressional directives. Such directives are authorized under the broad powers contained in the Property Clause. See Kleppe v. New Mexico, supra.

Any legislation enacted by Congress to accomplish management objectives on federal lands preempts conflicting state regulations or laws as a result of the operation of the Property and Supremacy Clauses of the United States Constitution. See Kleppe v. New Mexico, supra. Any authority the states may have been given to regulate and administer

federal property and/or programs by the Congress may only be exercised in a manner which is "not inconsistent with congressional directives." See California v. United States, supra, 438 U.S. 645 at 672.

It seems plain, however, that most of the United States' appropriative (or non-reserved) water rights are recognized under the water law of most of the Western states, and therefore no conflict with state systems should generally exist. There may, of course, be conflicts between the Federal Government and provisions of state substantive law when federal agencies appropriate water for uses which are not recognized as "beneficial" under individual state water law systems, or where in-stream flows needed for federal purposes are not recognized as a "diversion" or "appropriation" of water under state law.

The question remains, however, whether and to what extent the United States must conform its assertion of non-reserved federal water rights to state law. The majority opinion in United States v. New Mexico, supra, suggests at one point that, if a reserved right does not exist, "there arises the contrary inference that Congress intended" federal agencies to "acquire water in the same manner as any other public or private appropriator." 438 U.S. at 702. It is not clear whether the Court was referring generally to the concept of appropriation of water used by the Western states, or full compliance with procedural and substantive state water law, or only compliance with state procedures. If the Court intended by this dictum that the United States could only assert water rights for purposes recognized as beneficial under state law, then the federal land manager would have to manage the same kind of federal lands significantly differently in different states, depending on local law. The BLM, for example, may not be able to manage lands for recreation and fishery protection in one state to the same extent that it could in a neighboring state because of differences in what are regarded as "beneficial uses" under each state's law.

The majority in New Mexico does not discuss whether Congress intended this anomalous result. As noted above, the Court had two years previously stated in Cappaert v. United States, supra, at 145, that "[f]ederal water rights are not dependent upon state law or state procedures . . . ." I must interpret the dictum in United States v. New Mexico in light of, and consistent with, prior Supreme Court pronouncements, especially since the Court did not purport to limit or overrule statements in prior decisions. Therefore, it is reasonable to conclude that although the majority in New Mexico believed that non-reserved federal water rights must be acquired through some form of appropriation and actual use, I cannot subscribe to the view that these non-reserved federal water rights, used in connection with congressionally-authorized land management programs, are dependent upon state law in defining their substantive contours. In my view, such a result would not comport comfortably with such Supreme Court decisions as United States v. Little Lake Misere Land Co., supra, recognizing the authority of the Federal Government to rely on federal law where state law interferes with congressionally-authorized programs, and Paul v. United States, supra, requiring an express action by Congress to delegate federal prerogatives to state authorities; and

would contradict the unanimous view of the authorities cited above that the Federal Government's right to appropriate unappropriated water necessary to carry out congressionally-mandated management functions cannot be defeated by state law definitions of beneficial use or diversion.

While I am firm in my opinion that federal non-reserved water rights are not dependent upon the substantive contours of state water law, the issue whether they must be perfected under state procedures is a closer question; e.g., while congressionally-authorized programs may plainly be frustrated in certain states if the substance of state law is binding on federal agencies, cf., United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973), no equal danger is posed by compliance with state procedures.

Complying with state procedural law has certain advantages. It puts subsequent state appropriators on clear notice of federal rights, reduces uncertainty, and allows better integration of state and federal water rights. It is also literally consistent with one interpretation of the dictum in United States v. New Mexico, supra; i.e., the United States would acquire water in the same way -- by the same procedures -- as any appropriator.

While predicting the outcome if and when this issue reaches the Supreme Court is difficult, given the conflicting indications over the last hundred years of decisions construing the 1866, 1870 and 1877 Acts, I am of the opinion that the better policy is to follow state law in acquiring federal water rights to the greatest practicable extent. This includes following state procedural law in all cases involving appropriation of non-reserved water rights and state substantive law where that law recognizes the federal appropriative rights in all pertinent respects.

I am unable to say that such compliance is required as a matter of law, but because it may be required, the safer course is to follow state procedures in perfecting non-reserved water rights. Although I have determined that Interior agencies should comply with state law to the greatest practicable extent, this should not be construed as a waiver of any rights to the use of water which agencies of this Department have established in the past, even if the use relates to other than a reserved right and is of a type which agencies should make application for through state procedures in the future. Interior agencies should, however, attempt promptly to record these existing uses with the states.

Therefore, application should be made pursuant to state procedural law for all uses of water Interior land management agencies are making and plan to make on the federal lands they manage which are not covered by reserved rights, as discussed more specifically in parts IV-IX below.

C. Other Methods for Acquiring Water Rights

The United States has available other methods by which it can acquire water rights for use on federal lands. Chief among these well-recognized methods are purchase, donation, exchange or condemnation.

Congress, pursuant to its power to provide for the management of federal lands under the Property Clause and its authority to appropriate funds for carrying out the mandated land management objectives, can appropriate funds for the use of the land management agencies to purchase water rights needed to carry out Congress' directives.23/ Water rights are sometimes purchased, along with the land, when establishing such areas as fish and wildlife preserves. The United States also has the authority to exchange parcels of land or other property interests with non-federal parties or accept donations of land and interests therein. This includes the right to exchange lands carrying water rights or the water rights themselves.24/

Finally, the United States, as an incident of sovereignty, may condemn lands or interests therein when necessary to carry out federal programs. Kohl v. United States, 91 U.S. 367 (1875). This power of condemnation includes the condemnation of water rights. Dugan v. Rank, 372 U.S. 609 (1962).

IV. RESERVED WATER RIGHTS APPLICABLE TO AREAS ADMINISTERED BY BLM

This section discusses the reserved water rights doctrine as applied to BLM lands. The most important reservations administered by the BLM which have judicially recognized reserved water rights are public springs and water holes reserved under 43 U.S.C. §§ 141, 300 and 30 U.S.C. § 229a.25/

A. Public Water Holes and Springs

1. Statutory Background and Legislative History.

In the Act of December 29, 1916,26/ Congress directly addressed the reservation of public springs and water holes and specifically included them as available for reservation under the broad authority previously

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23/ See, e.g., 16 U.S.C. §§ 17j-2, 715a, 718d, 1277.

24/ See, e.g., 16 U.S.C. § 1277.

25/ In the matter of the Application of Water Rights of the United States of America, Colo. Water Divs. 4, 5, 6, p. 38, et seq., Opinion of Judge Stewart (March 15, 1978), appeal pending (Nos. 79-SA99 and 100, Colo. Sup. Ct.).

26/ 43 U.S.C. § 291 et seq.

granted the President in the Pickett Act.27/ Section 10 of the 1916 Act, formerly 43 U.S.C. § 300, provided, in pertinent part (emphasis added):

> Lands containing waterholes or other bodies of water needed or used by the public for watering purposes shall not be designated under sections 291-301 of this title but may be reserved under the provisions of sections 141-143 of this title [the Pickett Act] and such lands, prior to December 29, 1916, or thereafter reserved shall, while so reserved, be kept and held open to the public use for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe . . . .

The Pickett Act authorized the President to withdraw lands for "other public purposes" and the 1916 Act stated that reservations may be created when "needed or used by the public for watering purposes" or "for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe." The purposes for which the public may use the water on these reserved water holes or other bodies of water under sections 141 and 300 must therefore be determined by interpretation of these sections, their legislative history, Executive Orders making the withdrawals, and the regulations of the Department of the Interior relating to these reservations.

27/ 43 U.S.C. § 141, commonly referred to as the Pickett Act, was enacted on June 25, 1910, and provided (emphasis added):

> The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

Pursuant to the authority granted by this section, certain public water reserves were created; e.g., Public Water Reserve No. 19, issued by President Wilson on May 4, 1916. The Pickett Act was repealed by section 704(a) of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701 Note; however, existing withdrawals remain in force until changed in accordance with the Act. § 701(c); Ibid.

Section 10 of the 1916 Act was part of the congressional plan to implement a system of stock raising homesteads in the western United States. It provided the Secretary of the Interior with authority to designate certain areas in the West for stock raising homesteads of 640 acres.28/

The purpose of Section 10 was described by the House Committee on Public Lands as follows:

> This is a new section and authorizes the Secretary of the Interior to withdraw from entry and hold open for the general use of the public, important water holes, springs, and other bodies of water that are necessary for large surrounding tracts of country, so that a person cannot monopolize or control a large territory by locating as a homestead the only available water supply for stock in that vicinity.29/

2. The 1926 Withdrawal

Most of the reserved springs and water holes were created by the Public Water Reserve No. 107, Executive Order of April 17, 1926.30/ That general withdrawal of public lands states:

> Every smallest legal subdivision of the public land surveys which is vacant, unappropriated, unreserved public land and contains a spring or waterhole and all lands within one quarter of a mile of every spring or waterhole, located on unsurveyed public land, be, and the same is hereby withdrawn from settlement,

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28/ 43 U.S.C. § 291.

29/ H.R. Rep. No. 35, Jan. 11, 1916, 64th Cong. 1st Sess.

30/ Numerous other specific withdrawals were made both prior and subsequent to the 1926 withdrawal, pursuant to the authority granted in the 1910 and 1916 Acts. See, e.g., Public Water Reserve No. 19, Colo. No. 1, May 14, 1914; Public Water Reserve No. 60, Colo. No. 2, Feb. 25, 1919; Exec. Order 5389 (July 7, 1930). These reserves are generally local in character or otherwise minor, and are not dealt with individually in this opinion. The general approach adopted here in relation to the 1926 Order is, of course, applicable to these reservations.

> location, sale or entry, and reserved for public use in accordance with the provisions of Section 10 of the Act of Dec. 20, 1916 (39 Stat. 862), and in aid of pending litigation.

Following the issuance of Public Water Reserve No. 107, Executive Order of April 17, 1926, the Department of the Interior adopted regulations pursuant to the direction in section 10 that water holes are to be reserved " . . . for such purposes under such general rules as the Secretary of the Interior may prescribe . . . ." Those regulations provide in pertinent part that:

> The executive order of April 17, 1926, was designed to preserve for general public use and benefit unreserved public lands containing water holes or other bodies of water needed or used by the public for watering purposes. It is not therefore to be construed as applying to or reserving from homestead or other entry lands having small springs or water holes affording only enough water for the use of one family and its domestic animals. It withdraws those springs and water holes capable of providing enough water for general use for watering purposes.31/

This blanket withdrawal had the effect of reserving not only the land, but also the water for public use, see Jack A. Medd, 60 I.D. 83 at 99; however, no specific purposes were set forth in this general withdrawal. The 1926 withdrawal was made in response to the fact that, prior to that time, effective control over vast areas of the public domain could be, and in some cases was, gained merely by securing patents to small

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31/ See 43 CFR 2311.0-3(a)(2). The original regulations issued with respect to the April 17, 1926 Executive Order were contained in Instructions issued by the Commissioner of the General Land Office as Circular No. 1066, May 25, 1926, 51 I.D. 457. The first paragraph of the Instructions was substantially the same as the language quoted above. The remaining part of the Instructions required affidavits to be filed with every selection, filing or entry stating that no such spring or water hole existed within the boundaries of the land applied for or within one-quarter mile of the external boundaries of the tract. Even though 43 U.S.C. §§ 141 and 300 were repealed by FLPMA, § 701(c) of that Act provides that all existing withdrawals on the date of enactment shall remain in force until changed in accordance with the Act.

tracts surrounding available water sources of a given area. By controlling access to the available water, a person could effectively retain exclusive use of great expanses of public lands. Stated another way, the water is often the key to the use of the land and land is the key to gaining access to the water.

The 1926 reservation was designed to prevent this private monopolization of water on the public domain. The means used was the traditional and most effective way of preserving resources on the public domain, i.e. restricting entry by withdrawing the land and thus maintaining the water thereon open and free for public use. After the withdrawal, therefore, a party desiring to use the water either on or off the reservation would be required to obtain permission to do so from the United States through some form of permit. The permitting process allowed the United States to determine that the proposed use was in the public interest and not in derogation of the purposes of the reservation.

3. Purposes of the 1926 Withdrawal

The 1916 Act referred to water holes "needed or used by the public for watering purposes," and authorized the reservation "for such purposes . . . as the Secretary of the Interior may prescribe." The 1926 Order reserved the water holes "for public use." It is obvious that the purposes for which the public water holes and springs were withdrawn include stock watering and human consumption.32/

We must, however, examine whether other purposes were also contemplated by the withdrawals. Such other purposes arguably might include, among other things, wildlife watering; range improvement, protection and management; agricultural irrigation; and watershed protection.

The language and legislative history of the public springs and water hole withdrawals, as well as the Departmental regulations, compel a conclusion that the purposes for which public springs and water holes were withdrawn were relatively narrow and specific. Water was, however, needed for purposes other than stockwatering and human consumption on the public lands that were intended to be homesteaded and patented pursuant to section 10 of the 1916 Act. Water was also needed for additional purposes on the unpatented public domain surrounding these soon-to-be-private lands that would be used by the influx of new settlers and homesteaders for livestock grazing and other uses.

I am therefore of the opinion that those other purposes include only (1) water for growing crops and sustaining fish and wildlife to allow the settlers on the public land to obtain food for their families

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32/ Colo. 4, 5, 6, supra at 40.

and provide forage for their livestock; and (2) water for flood, soil, fire and erosion control, the control of which was essential to protect the public and to allow the new patentees and settlers on the public domain to make a viable living in this arid and semi-arid region of the Nation where, for example, an uncontrolled prairie fire could completely destroy a home, life, belongings, livestock and forage.33/

There are two additional questions closely related to the purposes of the withdrawal. These are: (1) What quantity of water was withdrawn at each location by the 1926 Executive Order? and (2) Where may the waters so withdrawn be put to use for the stated purposes?

On the first question, it is clear that the 1926 Order was directed not so much at reserving 160-acre parcels of land as it was at preventing private acquisition of these scarce water resources.34/ It is therefore my opinion that the quantity of water reserved at each public water hole or spring is the total yield of each source. To claim less than that quantity would allow private rights to interfere with the public uses in derogation of the clear intent of the withdrawal. This is not to say, however, that the BLM may not make such reserved water available to private users of the public land under permits or licenses; rather, it means only that the BLM must decide whether and the extent to which such private use is compatible with the purposes of the withdrawal, and federal land management policies generally.

On the second question, there is no indication that the purposes for which the water was reserved were to be exclusively accomplished within the confines of the relatively small tracts of land withdrawn. Such a conclusion is, in fact, absurd in view of the thousands of acres of public lands which then and even now surround these public water sources and of the surrounding private lands that were homesteaded and patented under the 1916 Act, the full use of which were and still may be dependent upon the water reserved by this order. The withdrawal order cannot be reasonably interpreted to prevent the use of these reserved waters on nearby public or private lands beyond the area of land reserved. Considering that the purpose of the withdrawal was to fulfill a great public

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33/ These purposes are somewhat broader than those contained in the Master Referee's Findings in Colo. 4, 5, 6, which were confirmed by Judge Stewart. Partial Master Referee Report Covering All of the Claims of the United States of America, Water Divs. 4, 5, 6, Colo., 38-42, but I believe are justified given the history and manifest purposes of the 1926 Order.

34/ See discussion, supra, pp. 21-23.

need in providing water for human consumption, livestock watering, and other purposes noted above, these uses may, in my opinion, be made of the water other than simply on the withdrawn lands.35/

4. Types of Springs and Water Holes Subject to the 1926 Withdrawal

a. Small Springs and Water Holes

The 1926 Executive Order was a blanket withdrawal of "every" parcel of public domain land containing "a spring or water hole." No distinction was made on the face of the Executive Order as to the quantity of water in the water source to be reserved. The legislative history of the acts authorizing the withdrawal, the events leading up to, and reasons expressed for, the 1926 withdrawal, and the regulations promulgated by the Department following the Executive Order of April 17, 1926 are clear, however, that "lands having small springs or water holes affording only enough water for the use of one family and its domestic animals,"36/ were to be excluded from the withdrawal. The Executive Order must be construed in light of, and is limited by, the congressional grant of withdrawal power in 43 U.S.C. § 300. That Act and legislative history are consistent with the regulations.37/ In my opinion, only important springs and water holes providing enough water for general watering purposes beyond the needs of providing food and forage for just one family and its domestic animals were withdrawn by the 1926 Executive Order.

b. Artificially Developed Springs and Water Holes

Prior interior decisions have reached somewhat differing conclusions on the applicability of the 1926 withdrawal to artificially developed water holes. The first of these decisions, Santa Fe Pacific Railroad Company 38/, held that:

> It is not believed that said order contemplated the withdrawal of tracts containing mere dry depressions or draws which do not, in their natural

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35/ This opinion does not deal with the authority by which private persons may obtain authority to transport water off the withdrawn lands.

36/ 43 CFR 2311.0-3(a)(2). Original Circular No. 1066, May 25, 1926.

37/ See, e.g., H. R. Rep. No. 35, supra, note 20, referring to "important water holes, springs, and other bodies of water . . . necessary for large surrounding tracts of country . . . ."

38/ 53 I.D. 210 (1930).

> condition, furnish or retain a supply of water available for public use. Such a tract is not land which "contains a spring or water hole" in its natural condition, and it was not intended to withhold such land from acquisition by a person who has, by his own efforts, provided artificial means for collecting flood waters thereon.39/

A Solicitor's Opinion rendered six years later, however, held that the 1926 Order was applicable to an artifically developed water source. State of New Mexico 40/ held that:

> [T]he springs and water holes withdrawn are, as the regulations state, springs and water holes capable of providing enough water for general use for watering purposes. A water hole may be created by a flow from a well as from a spring or natural seep, and the fact that it was developed or brought into being by human agency, if rights thereto do not exist under the laws of the state, would not take it out of the letter or the spirit of the order . . . [The 1926 Order is] a continuing withdrawal and attaches to any lands that were at the time of its issuance or subsequently became of the character and status defined in the order.41/

Two years later, in Lee J. Esplin, et al.,42/ the Solicitor held that if the man-made water hole had been abandoned at the time of the 1926 Order, then it was withdrawn thereby. On the other hand, if the water hole had not been abandoned by the original developer or his successors

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39/ Id. at p. 211.

40/ 55 I.D. 466 (1936).

41/ Id. at p. 467, 468. See discussion, Infra at pp. 32-33, of the Act of June 16, 1934, 48 Stat. 977, 30 U.S.C. § 229a; concerning water producing oil and gas wells. Even though State of New Mexico dealt with such a well, it does not appear that the requirements of that Act were met in that case. Therefore, the decision rested solely on the effect of the 1926 Order, and the Solicitor did not rely on, or even cite, the 1934 Act in reaching his conclusion.

42/ 56 I.D. 325 (1938); see also M-36625 dated August 28, 1961.

in interest, then the Executive Order would have never attached.43/ In short, the decision holds that the 1926 Order does not apply to man-made or artificial structures upon the public domain unless they are abandoned by the original developer or his successor in interest.

That same year, in A.T. West and Sons, the Solicitor held, citing Santa Fe Pacific Railroad, supra, that, because the water hole was not natural and had been developed and continuously used by West since 1887, it was not of the character withdrawn by the 1926 Order.44/

The above decisions are the only ones found which relate to the prospective effect of the 1926 Order and its application to artificially developed water sources. I agree with the general conclusions reached in the earlier decisions of this Department that the 1926 Order does not apply to man-made or artificial structures on the public domain if the developer holds a valid, vested water right to such source under state law at the time of development.

I cannot agree, however, with the inference in some of the opinions of my predecessors that the 1926 Order causes a reservation of all artificially developed water sources upon their abandonment.45/ The intent of the 1926 Executive Order was, as I earlier stated at pages 21-22, supra, to reserve naturally occurring water sources on the public domain in order to prevent monopolization of large tracts of surrounding land by one or a few individuals. It was not intended to reserve lands containing artificial sources such as a metal stock tank.

43/ The 1938 opinion interpreted Executive Order 5389 dated July 7, 1930, which withdrew all hot springs or springs with curative properties existing on vacant, unappropriated, unreserved public lands. The order authorized the lease of those springs for public purposes under the Act of March 3, 1925 (43 Stat. 1133). The Solicitor held that the Executive Order was a continual withdrawal attaching to lands which became of that character after the date of the order. It was also held that the order applied to such water sources developed by other than natural forces, such as drilled wells, although all such withdrawals were held subject to prior rights established under state law.

44/ 56 I.D. 387 (1938). The decision did state that once such a source was abandoned by the original developer anytime after 1926, then the withdrawal order would automatically attach, converting the once private source into a public water reserve. (The Solicitor cited the unreported decision of Charles Lewis, July 29, 1935, for this proposition.)

45/ I am therefore overruling expressions in prior opinions, such as State of New Mexico, 55 I.D. 466 (1936) and Lee J. Esplin, 56 I.D. 326 (1930) to the extent they apply the 1926 Order to artifically developed water sources on the public lands.

When, however, the artificial (or man-made) structures are abandoned or forfeited by non-use, the United States as the owner of the real property succeeds to the ownership of the structures (as in the case of all fixtures) and may put the water from the developed source to beneficial use on the public domain.

c. Springs and Water Holes Which are Tributaries of Streams

In its unreported decision in Hyrup v. Kleppe,46/ the Tenth Circuit Court of Appeals appeared to restrict the effect of the 1926 withdrawal, citing a 1927 Solicitor's Opinion for support,47/ by holding that the 1926 withdrawal did not apply to a spring if its flow rose to the dignity of a running stream and was tributary to a natural water course. The Hyrup court did not define the term "tributary" in the opinion. In fact, there is no indication that the court considered placing any meaning on the term other than its common usage. This could be an important issue when viewed against a backdrop of state laws which attach significantly different meanings to the term, particularly in the context of defining which waters are subject to appropriation under state law.48/

46/ Nos. 76-1452 and 76-1767 (10th Cir., Nov. 7, 1977).

47/ Opinion of the Solicitor dated March 8, 1927. The Solicitor's Opinion referred to in the opinion of the 10th Circuit did not, contrary to the court's assertion, (slip op. pp. 10-11), conclude that the Executive Order applied only to springs and water holes which are not tributary to a stream. The opinion did not even address that issue; rather, it merely stated that the withdrawal could not be used as authority to reserve two tracts bordering on the Henrys Fork River in Wyoming for purposes of stock watering. The Henrys Fork is a perennial stream tributary to the Green River. It does not arise upon, but only flows through, BLM land. The Solicitor concluded that the 1926 Order did not effect withdrawals of lands bordering perennial rivers since they clearly did not fit the definition of a "spring" or "water hole." The opinion went on to conclude, however, that the withdrawal did apply to a water hole in the bed of an intermittent stream.

48/ In Colorado, for example, there is a presumption that all water is tributary to a natural watercourse and thus subject to appropriation. See Safranek v. Liman, 123 Colo. 330, 228 P.2d 975 (1951); Cline v. Whitten, 150 Colo. 179, 372 P.2d 145 (1962), holding a spring to be part of the stream. See Colo. Rev. Stat. 1973 § 37-92-101 et seq., and Kuiper v. Lundvall, 187 Colo. 40, 529 P.2d 1328 (1974), cert den. 421 U.S. 996 (1975), where the court found that groundwater which would take 178 years to reach a stream was not tributary.

Whether the waters of a particular spring or water hole are reserved is in each instance, however, a federal question calling for the application of federal law, U.S. v. District Court of Eagle County, supra at 526, and not dependent on state law or procedure. Cappaert v. U.S., supra at 145. It is thus clear that Hyrup does not, and could not under the holdings of the Supreme Court, stand for the proposition that the United States is subject to varying state definitions of such terms as "tributary," "spring," and "water hole," that in turn are always subject to change by state legislatures.

I believe that Congress, in authorizing the Executive withdrawals in the 1910 and 1916 Acts, intended to confer broad authority to preserve for public use the sources of water on the public domain which were necessary for the proper development and use of the lands. The Executive withdrawals of 1926, and those which preceded it, were intended to prevent the recurrence of past abuses on the public domain and affected all water holes and springs as commonly defined. These water sources, as of the date of the withdrawals, were no longer subject to private appropriation under state law. I am also of the opinion that abandonment of a spring or water hole as defined herein by an individual who had a vested water right to that source pursuant to state law causes the 1926 Executive Order to attach at the time of abandonment. Whether a given source is or has been affected by the withdrawal is a matter of federal law. See, e.g., Cappaert v. United States, 426 U.S. 128, 143-46 (1976). I am therefore of the opinion that actions by a state legislature in defining classes of water cannot alter the effect of the federal action.

5. Effect of 1926 Withdrawal on Water Rights Established Under State Law

Previous decisions of this Department, with which I fully concur, have uniformly held that the 1926 Order (like all reservations creating reserved rights) cannot interfere with a water right vested under state law prior to the 1926 withdrawal date.49/

Where a state water right does not vest until after 1926, however, that water right is ineffective against the 1926 withdrawal. For example, in Jack A. Medd 50/, the Department found that a 1940 permit was ineffective to appropriate the waters of the springs since those waters had been reserved in 1926. The Medd decision, standing for the proposition that a state appropriative permit issued subsequent to the 1926 withdrawal is ineffective to confer a right in the permittee, is hereby reaffirmed.

49/ See Thomas Morgan, 52 I.D. 735 (1929); State of Arizona, 59 I.D. 14 (1945); A.T. West & Sons, supra.

50/ 60 I.D. 79 (1947).

The United States is not required to object to attempts to appropriate those waters under state law at points off the public domain. The private appropriator establishing a right under state law after April 17, 1926, acquires his right with constructive notice that, to the extent of the yield of the reserved source, his right would be subject to the prior rights of the United States, whether exercised prior to or subsequent to the state-sanctioned private use.51/ This is, of course, the necessary result of the general concept of the reserved right, as recognized by the Supreme Court. Considerations of comity suggest, however, that the BLM should object to such attempted appropriations of water subject to a reserved right when it learns about them.

6. Summary of the Effect of the 1926 Order

From the discussion above considering the plain intent and purpose of the 1926 Executive Order, the congressional acts under which it was issued, and the subsequent Departmental interpretations relative thereto, I have reached the following conclusions concerning the legal effect of the 1926 order:

1. I believe the following definitions are consistent with the Executive Order and the cases construing it; e.g., Santa Fe Pacific Railroad Co., 53 I.D. 210 (1930): For purposes of the Executive Order of April 17, 1926, the term "spring" means a discrete natural flow of water emerging from the earth at a reasonably distinct location whether or not such flow constitutes a source of or is tributary to a water course, pond or other body of surface water. The term "water hole" means a dip or hole in the earth's surface where surface or groundwater collects and which may serve as a watering place for man or animals.

2. The Executive Order withdrew, as of April 17, 1926, all lands containing important springs and water holes, as defined herein, that existed as of that date on vacant, unappropriated, unreserved public lands.

3. The Order does not affect a valid private right to use some or all of the waters of such a source that had vested under the applicable state laws, custom or usage prior to April 17, 1926.

4. The Order does not withdraw artificially developed sources of water or man-made structures for collection of water on the public domain; however, any interest held in those artificially developed or constructed sources or structures passes to the United States upon abandonment by the developer or his successor in interest by virtue of the United States' ownership of the land.

51/ See discussion at pp. 12-14, supra.

5. The Order withdraws, by operation of law, lands which become of the character contemplated in the order subsequent to the date of the order; i.e., vacant, unappropriated, unreserved public lands upon which springs or water holes, as defined herein, come into existence after April 17, 1926. (See also para. 8, infra.)

6. The Order withdraws, by operation of law, any vacant, unappropriated, unreserved public land upon which is located a spring or water hole, as defined herein, and for which a private vested right to use all of such water under applicable state law, custom and usage has previously existed; upon abandonment or forfeiture of that state water right under the terms of the applicable state law, custom or usage. Of course, a person holding a valid, vested private right to use water of a spring or water hole on vacant, unappropriated, unreserved public lands may transfer that right in accordance with the applicable state law, but no private right can be perfected after abandonment or forfeiture of a right; i.e., the withdrawal attaches immediately upon forfeiture or abandonment.

7. The Order has withdrawn all lands containing springs and water holes, as defined, and subject to the limitations set forth above, regardless of whether the water source has been the subject of an official finding as to its existence and location.

8. The priority date for the public right to use the waters of a spring or water hole withdrawn by the Order is April 17, 1926 for all public springs or water holes existing on that date. Those public springs and water holes that naturally come into existence at a later date are withdrawn when they come into existence.

9. Any action taken by a private party who did not have a vested state water right prior to April 17, 1926 or had not received appropriate permission from the United States subsequent to that date to make use of a public water hole or spring withdrawn by the Order is a nullity and of no force and effect. Any entry onto the reserved land for such purpose constitutes a trespass.

10. The purposes for which water is reserved under the 1926 Order are (a) stockwatering, (b) human consumption, (c) agriculture and irrigation, including sustaining fish, wildlife and plants as a food and forage sources, and (d) flood, soil, fire and erosion control.

11. Because the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 et seq., (FLPMA), repealed both authorizing statutes under which the April 17, 1926 Order was issued,52/ springs and water

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52/ Section 10 of the Act of December 29, 1916 (formerly 43 U.S.C. § 300) and the Pickett Act, 43 U.S.C. § 141, were repealed by FLPMA's section 704(a).

holes on the public domain coming into existence after October 21, 1976 are not withdrawn by the April 17, 1926 Order but must be withdrawn under other, still-existing legislative authority to be effective.

B. Other BLM Reserved Rights.

Any other reserved rights which BLM might hold and administer on behalf of the U.S. must have a basis in other statutes or orders pertaining to the public lands. Because most BLM-managed lands are by definition non-reserved public domain, the reserved water rights doctrine is, therefore, not generally applicable.53/ Because hundreds of laws and thousands of executive actions over the years have dealt with BLM lands, it is possible that some of these have created reserved rights in addition to those discussed below; however, the discussion that follows addresses the important laws of general applicability. The approach set forth in this opinion should govern examination of any other laws and executive actions not specifically discussed herein.

1. Act of June 16, 1934

The Act of June 16, 1934, 48 Stat. 977, 30 U.S.C. § 229a, provides 54/ that all oil and gas prospecting permits or leases issued shall be subject to the condition that if water is struck by the permittee or lessee instead of oil or gas, the Secretary, upon finding that the well is capable of producing water "of such quality and quantity as to be valuable and usable at a reasonable cost for agricultural, domestic or other purposes,"55/ may purchase the well and provide for the use thereof "on the public lands or disposing of such water for beneficial use on other lands . . . ."56/ A previous Solicitor's Opinion held that the United States must obtain a right pursuant to state law in order to use the

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53/ The Supreme Court underscored this in the New Mexico case by referring to the reservation of water for land which is "withdrawn from the public domain for specific federal purposes." 438 U.S. at 698.

54/ This Act initially provided that the land on which such a water well is located "shall be reserved as a water hole under section 300 of Title 43." This provision was repealed by FLPMA's § 704(a), which also repealed 43 U.S.C. § 300. See note 52, supra.

55/ 30 USC § 229a(a).

56/ Id., subsection (c).

water of a well withdrawn by the 1934 Act.57/ This opinion is contrary to the reserved right doctrine and holdings of the Supreme Court 58/ and I therefore overrule that Opinion.

The Departmental regulations relative to this section are contained in 30 CFR, Part 241. These regulations provide that once an oil or gas well is found to be valuable for water production it will be purchased and "the land subdivision which contains the well will, if subject thereto, be held to be withdrawn by Executive Order of April 17, 1926, and reserved for public use pursuant to Section 10 of the Act of December 29, 1916."59/

Lands containing these types of water wells are actually hybrids, owing their reserved status to the 1916 Act and the 1926 Executive Order as well as the 1934 Act. The priority date for water uses from such a source is the date it was developed. The purposes for which the water could be used are stated in the 1934 Act itself as "agricultural, domestic or other purposes." It is my opinion that the term "other purposes" specified in the 1916 Act is limited by those purposes which I have found established by the 1926 Order.60/

Water reserved by withdrawals under the 1934 Act may also be used either on or off public lands, but only in accordance with terms prescribed by the Secretary.61/

57/ Opinion of July 20, 1937 (M-28853).

58/ See, e.g., Cappaert v. United States, supra; United States v. New Mexico, supra.

59/ 30 CFR 241.5.

60/ See discussion on page 21, supra. The Master-Referee in Colo. 4, 5, 6, supra, at p. 328, found that the uses which could be made of the reserved water under the 1934 Act were broader than those purposes encompassed in the 1926 Order and included (1) wildlife and stockwatering, human drinking, (a) flood, soil, fire and erosion control, (3) range improvement, protection and management, (4) agricultural and irrigation uses, (5) watershed protection and securing favorable conditions of water flows and (6) recreational and fish and wildlife uses. I believe the same purposes are encompassed in both the 1934 Act and the 1926 Order, and are narrower than the Master-Referee found with respect to the former, and broader than he found with respect to the latter. See note 33, supra.

61/ See 30 U.S.C. § 229a(c) which also gives a preference right to make beneficial use of these waters to owner or occupant of adjacent lands.

2. Power Site Withdrawals

43 U.S.C. § 141 62/ authorized the President to "temporarily withdraw . . . public lands . . . and reserve the same for water-power sites."

Pursuant to this statute, numerous tracts of land determined to be valuable for development as power sites were reserved from the public domain. Numerous other sites were classified as valuable for power sites by the Secretary through the Geological Survey, pursuant to the authority granted by Congress.63/ Any lands so classified are automatically reserved or withdrawn from the public domain for power purposes when an application is filed under section 24 of the Federal Power Act for development as a proposed power project.64/

The development of these reserved lands for power purposes is under the administration of the Federal Power Commission (now the Federal Energy Regulatory Commission). The Secretary of the Interior retains, however, the authority to administer and manage these lands for all other purposes, and can open such lands to location, entry, or selection under the public land laws, subject to the possibility of power development when it is determined by FERC that the value of such lands for power development will not be harmed by such activity.65/

It is clear that the only purpose for the reservation of these lands is their value as sites for power development. Because the administration of these lands for this single, purpose is not under the jurisdiction of this Department, I find it unnecessary to express an opinion

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62/ Supra, p. 20, note 27.

63/ The Act of March 3, 1879, 43 U.S.C. § 31, provides in pertinent part that "(a) The Director of the Geological Survey . . . shall have the direction of the Geological Survey, and the classification of the public lands . . . ."

64/ Section 24 of the Federal Power Act of June 10, 1920, 16 U.S.C. § 818, provides, in pertinent part, that:

> Any lands of the United States included in any proposed project under the provisions of this subchapter shall from the date of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the [Federal Power] Commission or by Congress

65/ 16 U.S.C. § 818.

on the question of whether water is reserved for power development on these lands.66/ I am of the opinion, however, that the uses of these lands for other purposes under the administration of this Department do not carry with them reserved water rights simply because of their reservation as a power site. Even assuming there is a reserved right for power site purposes, these other uses are clearly secondary, authorized uses of the reservation.67/ Furthermore, any power development of these lands in conjunction with a Bureau of Reclamation project also does not entitle the Bureau of Reclamation to assert a reserved water right because Congress has clearly directed the Bureau of Reclamation to apply to the state for water rights for its projects under section 8 of the Reclamation Act of June 17, 1902.68/

3. Stock Driveways

Section 10 of the Act of December 29, 1916 (43 U.S.C. 300) authorized the withdrawal of public lands from entry for driveways for livestock or in connection with water holes. The purpose of these withdrawals was to allow for the unhampered passage of livestock across the public domain to non-contiguous tracts of both private and public domain lands for grazing purposes, and to provide access to those springs and water holes reserved for livestock watering purposes. I am of the opinion that these water sources located within stock driveways are reserved to the extent necessary to provide for stockwatering during the process of moving livestock through these reserved access corridors. Because FLPMA repealed the authorizing statute under which these withdrawals were issued, water sources on the public domain created after October 21, 1976 are not withdrawn under the Act of December 29, 1916, but must be withdrawn under other, still-existing legislative authority to be effective.

4. Oil Shale Withdrawals

The BLM manages the use of the oil shale withdrawals reserved by Executive Order 5327 (April 15, 1930), subsequently amended to allow oil and gas and sodium development in Executive Orders 6016 (Feb. 6, 1933) and 7038 (May 13, 1935). The relevant language of Executive Order 5327 is as follows:

66/ That is, any possible federal claims for a reserved water right on lands withdrawn as power sites would appropriately be made by or through the Federal Energy Regulatory Commission.

67/ See United States v. New Mexico, supra, 438 U.S. at 702.

68/ 43 U.S.C. § 383; California v. United States, supra, 438 U.S. 645.

> the deposits of oil shale, and lands containing such deposits owned by the United States, be, and the same are hereby, temporarily withdrawn from lease and other disposal and reserved for the purposes of investigation, examination, and classification.

Under the "specific purpose" test formulated in New Mexico, supra, it appears that these oil shale withdrawals also withdrew enough water as is reasonably necessary for the "purposes of investigation, examination and classification." The investigation and examination of these oil shale-bearing lands are preliminary steps to classifying these lands as valuable for oil shale development. I find nothing, however, in Executive Order 5327 which would permit the inference of an intent to reserve water for actual oil shale development. Thus, I conclude that, while there is an inferred intent to reserve waters reasonably necessary for preliminary investigation, examination and classification of oil shale-bearing lands, Executive Order 5327 does not, by itself, create any reserved water rights for the development of oil shale in the withdrawn area.69/

69/ My conclusion is shared by the commentators. For example:

> [The Executive Order's] purposes are clearly stated: investigation, examination and classification. There is no mention of water, and, more significantly, none of oil shale development. The language of the order cannot support a conclusion that development was intended, and it cannot be inferred from the mere act of withdrawal as is possible for the oil shale reserves. Thus the argument that all federal oil shale lands carry with them their own protected water supply, intriguing though it may be, must fail.

Holland, "Mixing Oil and Water: The Effect of Prevailing Water Law Doctrines on Oil Shale Development," 52 Denver L. Rev. 657, 688 (1975).

5. The Taylor Grazing Act 70/

The Taylor Grazing Act established a comprehensive program which allows individual stockraisers to use the public lands for grazing. Congress directed that BLM manage the public domain for grazing purposes so as

> to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement and development of the range; and . . . to continue the study o: erosion and flood control and to perform such work as may be necessary amply to protect and rehabilitate . . . [the public domain].71/

The Taylor Grazing Act did not reserve any land from the public domain, but rather authorized the Secretary to manage the public lands for grazing "[i]n order to promote the highest use of the public lands pending its final disposal . . ."72/ Moreover, Congress specifically provided in 43 U.S.C. § 315b, in pertinent part, that

> nothing in this Act shall . . . diminish or impair any right to the possession or use of water . . . which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law.

Therefore, no reserved water rights were thus created by the Act.

6. O&C Act

The Oregon and California Railroad Lands and Coos Bay Wagon Road Lands ("O&C lands") were originally part of the public domain which Congress granted to the Oregon and California Railroad Company pursuant to the Act of July 25, 1866 (14 Stat. 239) to build a railroad and to the Coos Bay Wagon Road Company pursuant to the Act of March 3, 1869 (Stat L., XV 340-341) to build a wagon road. The grant was subject to

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70/ 43 U.S.C. § 315 et seq.

71/ 43 U.S.C. § 315a.

72/ 43 U.S.C. § 315.

conditions which were later determined by the Supreme Court to have been violated, and Congress ordered title revested in the United States.73/ Congress directed that those lands "classified as timber lands, and power-site lands valuable for timber," should be managed "for permanent forest production."74/

I am of the opinion that the revesting of these lands in the United States did not effect a formal reservation of these lands for which the United States may claim a reserved water right, nor did the "O&C" Act do anything more than provide (as did the Taylor Grazing Act) how these lands were to be managed. There are therefore no reserved water rights on "O&C" lands.

7. The Classification and Multiple Use Act of 1964

The Classification and Multiple Use Act of 1964 75/ provided a system for classifying which public lands were to be disposed of under applicable public land laws and which were to be retained for interim multiple use management.76/ The Act was to be "consistent with and supplemental

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73/ In 1908, Congress authorized the Attorney General to file suit against the Oregon and California Railroad Company for forfeiture of its unsold indemnity lands for violation of an enforceable covenant. The U.S. Supreme Court found for the United States, and remanded the case to Congress for a legislative solution. Oregon and California R.R. Co. v. U.S., 238 U.S. 393 (1915). Congress responded by passing the Act of June 16, 1916 which paid the Railroad Company $2.50 for each acre of land it was entitled to because of actual construction and revested in the United States title to all land which had been unsold prior to July 1, 1913. In the same 1908 resolution authorizing suit against the Oregon and California Railroad Company for recovery of its grant, Congress authorized suit against the Coos Bay Wagon Road Company upon the same grounds. In 1919, while the Company was awaiting appeal to the U.S. Supreme Court after losing in the federal district court, Congress authorized dismissal of the suit and payment to the Company for its interests in the lands upon reconveyance to the United States (40 Stat. 1179-1180). The money paid the Company was the maximum which Congress intended the Company should derive from its original grant.

74/ 43 U.S.C. § 1181 et seq.

75/ 43 U.S.C. § 1411 et seq.

76/ This Act expired of its own terms in 1970. See 43 U.S.C. § 1418.

to the Taylor Grazing Act of June 28, 1934,"77/ and its purposes were declared to be "supplemental to the purposes for which public lands have been designated, acquired, withdrawn, reserved, held, or administered."78/

Since I have determined that the Taylor Grazing Act did not effect the reservation of any water, finding a reservation of water in any classification under the Classification and Multiple Use Act would clearly be inconsistent with the Taylor Grazing Act. Therefore, lands classified under that Act do not have reserved water rights.

8. Wild Horse Ranges

The Act of December 15, 1971 79/ authorizes and directs the Secretary "to protect and manage wild free-roaming horses and burros as components of the public lands" and furthermore provides that he "may designate and maintain specific ranges on public lands as sanctuaries for their protection and preservation."80/ The Act does not authorize the withdrawal or reservation of public lands for these ranges, but says that such lands are to be "principally" devoted to providing for the welfare of the wild horses and burros.

It is clear that the animals sought to be protected by this Act need drinking water, but the mere designation of such sanctuaries does not effect a reservation of water for the purpose of wild horse and burro drinking.

77/ 43 U.S.C. § 315.

78/ 43 U.S.C. § 1416.

79/ 16 U.S.C. § 1333 et seq.

80/ "Range" is defined by the Act, 16 U.S.C. § 1332(c), as follows:

> the amount of land necessary to sustain an existing herd or herds of wild free-roaming horses and burros, which does not exceed their known territorial limits, and which is devoted principally but not necessarily exclusively to their welfare in keeping with the multiple-use management concept for the public lands.

9. Wild and Scenic Rivers

The Bureau of Land Management administers some of the components of the Wild and Scenic Rivers System.81/ The designation of a river as a wild, scenic or recreational river under this Act explicitly reserves sufficient unappropriated water to fulfill the purposes of the Act.82/ The scope and purposes of the reserved water rights for these rivers are discussed at pp. 58-60, Infra, and will therefore not be repeated here.

10. The Federal Land Policy Management Act (FLPMA)

Nothing in the Federal Land Policy and Management Act establishes a reserved right on BLM lands other than those discussed above. In particular, section 701(g) of FLPMA, 43 U.S.C. § 1701(g), provides in pertinent part as follows:

> Nothing in this Act shall be construed as limiting or restricting the power and authority of the United States or
> (1) as affecting in any way any law governing appropriation or use of, or Federal right to, water on public lands;
> (2) as expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control; . . .83/

By neither expanding nor diminishing either state or federal power, this provision maintains the status quo with respect to water rights on the public lands.

V. RESERVED WATER RIGHTS APPLICABLE TO AREAS ADMINISTERED BY THE NATIONAL PARK SERVICE

The National Park Service (NPS) administers a variety of lands collectively known as the National Park System:

81/ 82 Stat. 906, 16 U.S.C. §§ 1271-1287 (1976). E.g., Rio Grande River, New Mexico; Snake River, Idaho and Oregon; Flathead River, Montana; American River, California.

82/ 16 U.S.C. § 1284(c).

83/ This provision was contained in the Senate version of the bill and adopted by the conferees without debate or explanation as to its meaning.

> The "national park system" shall include any area of land and water now or hereafter administered by the Secretary of the Interior through the National Park Service for park, monument, historic, parkway, recreational, or other purposes.84/

The following subsections describe the reserved water rights that may be claimed for components of the National Park System under existing precedent.

A. National Parks

1. Pre-1916 National Parks

The concept of national parks is an American invention. In the period prior to 1916, the early national parks, such as Yellowstone (1872), Sequoia (1890), Mount Rainier (1899), and Crater Lake (1902), were established by legislation using nearly identical "purpose" language:

> [Yellowstone was] . . . dedicated and set apart as a public park or pleasuring ground for the benefit and enjoyment of the people. . . . [The Secretary of the Interior] . . . shall make regulations providing for the preservation from injury or spoliation, of all timber, mineral deposits, natural curiosities, or wonders, within the park, and their retention in their natural condition. The Secretary may, in his discretion, grant leases for building purposes . . . for the accommodation of visitors. He shall provide against the wanton destruction of fish and game found within the park . . . and is generally authorized to take all such measures as may be necessary or proper

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84/ Section 2(a), Act of August 18, 1970, 84 Stat. 826, 16 U.S.C. § 1c (1970). The inclusion of "water" in the definition of the National Park System clarifies congressional intent that NPS has jurisdiction over activities relating to water areas within system boundaries. See United States v. Brown, 552 F.2d 817 (8th Cir. 1977), cert. denied 431 U.S. 949 (1977); United States v. Carter, 339 F. Supp. 1394 (D. Ariz. 1972); 16 U.S.C. § 1a-2(h) (1970).

> to fully carry out the objectives and purposes of this section.85/

These statutes state that the reservation for park purposes includes the preservation of natural resources and natural curiosities, and public enjoyment thereof. In United States v. New Mexico, supra at 709-11, the Court intimated in dictum that the early park legislation's express concern for the natural curiosities and biotic elements would allow the assertion of reserved water rights required to fulfill such purposes. But see Id., at 74, fn. 19. Like the 1916 Act discussed below, these broadly articulated purposes support a variety of reserved water rights, both consumptive and non-consumptive, and the priority date for such claims is the pre-1916 date of each area's enabling legislation.86/

2. The National Park Service's Organic Act of 1916

When the early parks and monuments were established, there was little coordination of policy and no continuity of personnel. The National Park Service's 1916 organic act provided a centralized administration, and contains an enduring statement of purpose.

> The service thus established shall promote and regulate the use of . . . national parks, monuments, and reservations hereinafter specified . . . by such means and measures as conform to the fundamental purpose of said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.87/ (emphasis added)

85/ Act of March 1, 1872, 17 Stat. 32-33, 16 U.S.C. §§ 21, 22 (1970); see also Act of Sept. 25, 1890, 26 Stat. 478, 16 U.S.C. §§ 41, 43 (1970) (Sequoia); Act of March 2, 1899, 30 Stat. 993, 16 U.S.C. §§ 91-93 (1970) (Mount Rainier); Act of May 22, 1902, 32 Stat. 202, 16 U.S.C. §§ 121, 123 (1970) (Crater Lake).

86/ The specific reserved water rights applicable to these pre-1916 National Parks are the water rights described below in subsection 2, supplemented by any additional reservation purposes stated in the individual park enabling legislation. See page 49, below, on the "relation-back" provisions of 16 U.S.C. § 1 to pre-1916 National Parks.

87/ § 1, Act of Aug. 25, 1916, 39 Stat. 535, as amended, 16 U.S.C. § 1 (1970).

This statement of fundamental purpose encompasses a variety of consumptive and non-consumptive reserved water rights necessary to conserve scenic, natural, historic and biotic elements and to provide for sustained public enjoyment thereof.

I conclude that the particular reserved water rights for national park areas encompassed under 16 U.S.C. § 1 include water required for:

1. Scenic, natural and historic conservation uses, such as: ecosystem maintenance (e.g., protecting forest growth and vegetative cover, watershed protection, soil and erosion control, lawn watering, fire protection), maintenance of water-related aesthetic conditions (e.g., minimum stream flows and lake levels), and maintenance of natural features (e.g., wilderness protection, geysers, waterfalls).

2. Wildlife conservation uses, such as: the protection, reproduction and management of migratory wildlife and birds (e.g., wildlife and bird watering, habitat maintenance, irrigation for hay and other food staples); and the protection, reproduction and management of fish and other aquatic life (e.g., minimum stream flows and lake levels).

3. Sustained public enjoyment uses, such as: visitor accommodation uses through NPS and concessioneer operations (e.g., campground uses and maintenance, hotel water and sewer uses), public facility uses (e.g., water fountains, sewage), visitor activities (e.g., visitor centers, park office, shop uses); and visitor enjoyment of the scenic, natural, historic and biotic park resources (e.g., trail maintenance, minimum stream flows and lake levels for water-borne public enjoyment and recreation, hay and watering of horses and mules used by park visitors).

4. NPS personnel uses to provide the above uses, such as domestic uses (ranger stations, NPS residences), NPS animal maintenance (e.g., hay and watering of NPS horses and mules).

These enumerated reserved water rights uses for national parks are largely consistent with the Master-Referee and Colorado district court's decree in the Colorado 4, 5, and 6 litigation, supra.88/ My conclusions on national park reserved water rights are also consistent with the Supreme Court's holding in New Mexico, supra. As recognized in that decision, any doubt about the breadth of park system purposes and the concomitant reserved water rights, is resolved by comparing the narrower utilitarian purposes for which national forests were reserved under the 1897 Act. United States v. New Mexico, supra, at 709-11. The consistency of my conclusions on national park reserved water rights with New Mexico can also been seen from the post-New Mexico Colorado district court opinion in Colorado 4, 5, and 6 (Judge Stewart, Oct. 2, 1978), which did not substantially alter national park reserved water rights in light of New Mexico.

The above-defined reserved water rights uses are all intimately related to the fundamental purpose for park reservations, as articulated in 16 U.S.C. § 1. Thus, I conclude that the above-defined water uses for parks fall within the fundamental purpose for park reservations, and accordingly receive reserved water rights under the reserved water rights doctrine as recently reiterated in the New Mexico decision.

88/ The Colorado 4, 5, and 6 decree found fourteen types of water uses to be within the reserved water rights ambit of 16 U.S.C. § 1. The decree is consistent with my conclusions in all but the following two respects.

First, the Master-Referee concluded that only concession uses operated by the United States receive reserved water rights. In my view, the 1916 Organic Act clearly envisioned permit and lease concession agreements to provide for accommodation of visitors in parks. Moreover, subsequent congressional action has reenforced the concept that the concession system is the preferred means for providing facilities for public enjoyment of the parks, in furtherance of the fundamental purpose of 16 U.S.C. § 1. See 16 U.S.C. §§ 20, 20a (1970). Since providing for sustained public enjoyment is one of the fundamental purposes for park reservations under 16 U.S.C. § 1, and the concession system is the congressionally-favored method for effecting that fundamental purpose, I conclude that concession uses obtain reserved water rights.

Second, though the Master-Referee appeared to acknowledge reserved water rights for necessary stream flows to permit public water-borne enjoyment and recreation in parks, the Colorado district court held that recreational boating was not a fundamental purpose for park reservations under 16 U.S.C. § 1. In the Matter of the Application for Water Rights of the United States of America, Water Divisions 4, 5, and 6, 2-6 (Opinion of Colorado Water Judge Stewart, Oct. 2, 1978). This holding [footnote continued]

The purposes stated in the 1916 Organic Act attach to all "national parks" created prior to 1916 by virtue of the statutory reference to "national parks" in the general sense. The above-defined reserved water rights carry a priority date as of the date of the individual park's enabling legislation.

3. Post-1916 Acts

The post-1916 acts establishing new national parks generally state that park protection and administration will be pursuant to the 1916 organic act. See for example 16 U.S.C. § 80d (King's Canyon National Park), 16 U.S.C. § 90c (North Cascades National Park), and 16 U.S.C. § 158 (Big Bend National Park). In any event, 16 U.S.C. § 1 would be applicable to these subsequent national park units by virtue of its inclusive "national parks" language. Therefore, the purposes outlined in the 1916 Act constitute stated purposes for the individual post-1916 reservations and the reserved water rights described above attach as of the date of an individual park's enabling legislation. Moreover, it is possible that the individual park's enabling statutes may state additional purposes not encompassed by the 1916 Act for which reserved rights may attach.

Congress has taken no action subsequent to 1916 to negate the implied intent contained in the Organic Act that all unappropriated waters necessary to fulfill the purposes of the national parks are reserved as of the date of the enabling legislation. General post-1916 legislation reinforces the principles of federal control over water and paramount protection of park resources. For example, the Act of March 3, 1921, 41 Stat. 1335, 16 U.S.C. § 979a (1970), prohibits licensing of water projects within parks and monuments without the specific authority of Congress. The 1921 Act reaffirms the principle of the

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[footnote continued]
is internally inconsistent with the recognition of reserved water rights for land-based public enjoyment and recreation (e.g., maintenance of hiking trails, campgrounds, hay and watering of animals used to enjoy parks). The public enjoyment of certain scenic, natural, historic and biotic park resources can best be obtained through water-borne public enjoyment and recreation (e.g., canoeing, rafting, boating), rather than through land-based public enjoyment and recreation (e.g., hiking, horseback riding). Thus, I conclude that water-borne public enjoyment and recreation is a fundamental purpose for park reservations under 16 U.S.C. § 1, and that necessary minimum stream flows and lake levels for public enjoyment and recreation may be claimed under the reserved water rights doctrine for national parks.

1916 Organic Act that park waters should be reserved for conservation and public enjoyment purposes, and not allocated for conflicting federal (and by implication, state or private) purposes. Moreover, recent legislation confirms the high public value of national parks and provides that actions taken in derogation of park values and purposes shall not be authorized unless specifically directed by Congress.

> Congress further reaffirms, declares, and directs that the promotion and regulation of the various areas of the National Park System, as defined in . . . [16 U.S.C. § 1c], shall be consistent with and founded in the purpose established by . . . [16 U.S.C. § 1], to the common benefit of all the people of the United States. The authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress.89/

The purpose of this provision is to ensure that the resources and values of areas in the National Park System are afforded the highest protection and care in governmental decisions. H.R. Rep. No. 95-581, 95th Cong., 1st Sess. 21, 96, 108 (1977); S. Rep. No. 95-528, 95th Cong., 1st Sess. 9, 13-14, 20 (1977). This provision reinforces my conclusion that Congress, by the 1916 Act and other enabling legislation, intended to reserve unappropriated waters necessary to accomplish park purposes, in order to protect the "high public value" of national parks that might otherwise be lost by less secure water rights.

In addition to reserving water rights, the National Park Service is also authorized to acquire water rights in accordance with state law. The Act of August 7, 1946, 60 Stat. 885, 16 U.S.C. § 17j-2(g) (1970), authorizes appropriations to the National Park Service for the:

89/ § 101(b), Act of March 27, 1978, 92 Stat. 166, 16 U.S.C.A. § 1a-1 (Supp. 1979).

> [I]nvestigation and establishment of water rights in accordance with local custom, laws, and decisions of courts, including the acquisition of water rights or of lands or interests in lands or rights-of-way for use and protection of water rights necessary or beneficial in the administration and public use of the national parks and monuments.90/

I do not view the 1946 Act as inconsistent with the principle that, when park lands were set aside, the Congress also intended to reserve the unappropriated waters appurtenant to such lands necessary to accomplish park purposes. The reference to establishing water rights in accordance with court decisions should be read to include authority to establish reserved water rights under applicable Supreme Court decisions. The 1946 Act grants discretionary authority 91/ to the NPS to obtain water in compliance with state law and to purchase valid, existing water rights, when it is in the government's best interest to do so (e.g., if there are not sufficient amounts of unappropriated water available to fulfill park purposes when a park is established). I also view this statute, as apparently does the Supreme Court in the New Mexico case, supra, at 702, as authorizing the NPS to acquire water rights to carry out secondary uses which may be permitted in park areas, but are by definition not among the purposes for which the parks are created. These conclusions are compatible with the provision's scant legislative history.

90/ This provision was intended to clarify the Service's basic authority to investigate, establish, and acquire water rights, so as to avoid points of order to appropriation bills. H.R. Rep. No. 2459, 79th Cong., 2d Sess. 2 (1946). When originally introduced, this provision contained no reference to state or local law. The reference was added, however, at the suggestion of the Committee on Public Lands. 92 Cong. Rec. 9103 (1946). There was no discussion of the underlying reason or need for this amendment on the House floor or in the House Committee Report.

91/ The 1946 Act is readily distinguishable from section 8 of the Reclamation Act of 1902, 32 Stat. 390, as amended, 43 U.S.C. § 383 (1970), construed in California v. United States, supra, to require federal deference to both substantive and procedural state water laws for the appropriation and distribution of federal reclamation project water, except where inconsistent with congressional directives. Section 8 provides:

> [N]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any

[footnote continued]

B. National Monuments

The Antiquities Act of 1906, 34 Stat. 225, 16 U.S.C. § 431 et seq., (1976), empowers the President to proclaim national monuments on lands owned or acquired by the Federal Government containing historic landmarks, historic or prehistoric structures, or other objects of historic or scientific interest, and to reserve adjacent federal lands for the proper care and management of the protected objects. It is well settled that reserved water rights may attach to national monuments. Cappaert, supra.

1. Pre-1916 National Monuments

Between 1906 and 1916, the President acted several times to create national monuments. See, e.g., Proc. 658, 34 Stat. 3236 (Devil's Tower National Monument); Proc. 697, 34 Stat. 3266 (Petrified Forest National Monument). The proclamations establishing these early national monuments are brief, generally citing the statutory language, naming the landmarks, structures or other objects to be protected, stating that the "public good would be promoted" by the reservation, and giving a land description.

Clearly the proclamations intended to reserve such water as necessary to provide for the proper care and management of the stated landmarks, structures, or objects of historic or scientific interest, the raison d' etre for the reservation. It is less clear, however, whether the early proclamations also reserved water rights for the protection of other unstated elements of the national monuments (e.g., biological resources) and for their public enjoyment.

In the Colorado 4, 5, 6 litigation, supra, the Master-Referee and Colorado district court approved a decree granting broad reserved water rights for the Colorado National Monument's unstated objects and public enjoyment thereof, carrying a priority date of 1911. This

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[footnote continued]

> States or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested rights acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws.

Unlike the general discretionary authority of the 1946 Act, the specific and mandatory language of section 8 evidences a clear congressional intent to defer to state law in securing of federal water rights.

holding is supported by the view that the promotion of the public good is a primary purpose of the monument reservation and that it includes public enjoyment of both stated and unstated monument objectives. Moreover, the holding is supported by the view that the 1916 National Park Service Organic Act, discussed below, merely confirmed the purposes for which national monuments have always been reserved. Finally, the 1911 priority date for reserved water rights in conserving objects not expressly covered until the 1916 Act is supported by a "relation-back" theory in Arizona v. California, supra (Lake Mead National Recreation Area given priority dates of 1929 and 1930 when executive orders withdrew lands "pending determination as to the advisability of including such lands in a national monument," though no national monument was created and Lake Mead National Recreation Area purposes were not expressly stated until 1964), and United States v. Walker River Irrigation District, 104 F.2d 334 (9th Cir. 1939) (where an Indian reservation was given an 1859 priority date when the Indian Commissioner suggested a reservation, though the tract was not formally reserved until 1874). This "relation-back" theory is not inconsistent with the New Mexico Court's view of the effect of the 1960 Multiple Use-Sustained Yield Act on national forests, since that statute indicated that the additional purposes were supplemental and subsidiary to the 1897 Organic Act purposes, while the 1916 Act merely confirmed the "fundamental purpose" for which national monuments have always been reserved. Thus, I conclude that pre-1916 national monuments receive the reserved water rights discussed above in the national park context, carrying a priority date of the date of the establishing presidential proclamation.

2. Effect of the 1916 National Park Service Organic Act

With the passage of the 1916 National Park Service Organic Act, the purposes of national monuments were explicitly stated for the first time:

> the fundamental purpose of said . . . monuments . . . is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.92/

92/ 16 U.S.C. § 1 (1970).

As previously developed in the national park context, this statement of "fundamental purpose" incorporates the reserved water rights described above which are necessary for scenic, natural, historic and biotic conservation, and sustained public enjoyment thereof. My conclusions on reserved water rights applicable to national monuments were also substantially confirmed in the Colorado 4, 5, and 6 litigation, where thirteen types of reserved water rights were decreed. The priority date for reserved water rights is the date of the presidential proclamation establishing the national monument reservation. Cappaert, supra.

C. Other Areas Administered by the National Park Service

In addition to traditional national parks and national monuments, the National Park Service administers a variety of other areas, such as: national historical parks, national memorial parks, national memorials, national military parks, national battlefields, national historic sites, national seashores, national rivers, national scenic riverways, national scenic trails, national lakeshores, national recreation areas, national parkways and national preserves.

By use of the term "reservation," the general purposes stated in section 1 of the 1916 Act, 16 U.S.C. § 1 (1970), are also applicable to these other areas administered by the National Park Service. Notwithstanding its general applicability, 16 U.S.C. § 1 is almost always reiterated expressly in the authorizations for these other specific system areas. See, for example, 16 U.S.C. §§ 245, 264, 4569a-1, 460a-2, 460m-5, 460m-12, 460s-5, and 460bb-3 (1976). The general applicability of the 1916 Act was confirmed by the passage of section 2 of the Act of August 18, 1970, 84 Stat. 826, 16 U.S.C. § 1c (1970), which defines the National Park System and expressly makes the Service's general authorities, including the 1916 Act, applicable to all areas of the System to the extent not in conflict with any individual area's specific enabling legislation. The underlying commonality of purpose of these various areas served as a rationale for the 1970 Act. H.R. Rep. No. 91-1265, 91st Cong., 2d Sess. 2 (1970).

As a general rule, I conclude that the earlier stated fundamental purposes of 16 U.S.C. § 1 and resultant reserved water rights apply to these various components of the National Park System, with a priority date as of the establishing statute's enactment. The extent to which particular reserved water rights are applicable to a given area must be determined on a case-by-case basis, involving an interpretation of both 16 U.S.C. § 1 and the establishing legislation.

VI. RESERVED WATER RIGHTS IN AREAS ADMINISTERED BY THE FISH AND WILDLIFE SERVICE

The Fish and Wildlife Service (FWS) administers a number of areas to which reserved water rights may properly be ascribed. Arizona v. California, supra, at 601. Most of these areas are now components of the National Wildlife Refuge System (hereinafter "NWRS"), which consists of:

> all lands, waters, and interests therein administered by the Secretary as wildlife refuges, areas for the protection and conservation of fish and wildlife that are threatened with extinction, wildlife ranges, game ranges, wildlife management areas, or waterfowl production areas.93/

The consolidation of management authorities created by the National Wildlife Refuge Administration Act of 1966, is of recent origin, as compared to the organic authorities for the Forest Service (1897) and the NPS (1916). Unlike the other organic authorities, the National Wildlife Refuge Administration Act does not authorize the reservation of lands or explicitly define the purposes of the NWRS. Prior to 1966, NWRS components were reserved pursuant to an array of individual statutes, executive orders and secretarial public land orders, making these authorities the primary sources for delineating the purposes for which reserved water rights may attach. This part sets forth generic "purposes" for public domain reservations administered by the Fish and Wildlife Service, which may be used in quantifying reserved water rights.

A. Executive Refuge Reservations Prior to the Migratory Bird Conservation Act

Prior to the enactment of the Migratory Bird Conservation Act in 1929, the reservation of land for fish and wildlife purposes took place through Executive action and without any organic legislation defining the purposes for the reservation. Under the "specific purpose" test formulated by the New Mexico Court, it appears that reserved water rights attach only to the extent necessary to fulfill the purposes or objectives named in the individual executive orders establishing the reservations. These executive orders are similar in structure, utilizing succinct language to establish preserves for species groups.

93/ National Wildlife Refuge Administration Act of 1966, 80 Stat. 927, 16 U.S.C. § 668dd (1970).

In the pre-1910 period, "refuge" reservations were created by the President's implied power under Article II, section I of the Constitution, subsequently upheld in United States v. Midwest Oil, 236 U.S. 459 (1915). By 1910, 44 executive orders had established bird reserves. 42 House Doc. 93 (1908); 43 House Doc. 44 (1909). These executive orders generally stated that the identified tract was:

> hereby reserved and set apart for the use of the Department of Agriculture as a preserve and breeding ground for native birds.94/

For the native bird reserves, I infer an intent to reserve sufficient water needed for native bird breeding and the maintenance of native bird 95/ populations (e.g., ecosystem food supply, fire protection, domestic needs of FWS personnel) on the reservation, since this was the stated reason for the creation of the preserves.

After 1910, the Executive branch also had the delegated authority of the Pickett Act, 36 Stat. 847, 43 U.S.C. §§ 141, 142 (1970) to rely on in creating fish and wildlife reservations for "public purposes." The later executive orders are equally succinct in their language, merely reserving areas as an "elk refuge" (Exec. Order No. 1814, Aug. 25, 1913), "preserves and breeding ground for muskrat and beaver" (Exec. Order No. 4592, Feb. 21, 1927), "breeding ground for wild animals and birds" (Exec. Order No. 5316, April 3, 1930), or similar purpose language. For these and similar executive order reserves, I infer an intent to reserve sufficient water needed for the maintenance of the species (e.g., ecosystem food supply, breeding habitat, fire protection, domestic needs of FWS personnel) mentioned in the executive orders establishing the individual reservations.

94/ See Exec. Order Nos. 357B-D (Oct. 10, 1905), 703-705 (Oct. 23, 1907), and 1041 (Feb. 27, 1909). [Note: The functions of the Secretary of Agriculture relating to the conservation of wildlife, game and migratory birds were transferred to the Secretary of the Interior by the 1939 Reorganization Plan II and are now under the administrative jurisdiction of the Fish and Wildlife Service.]

95/ Prior to the Migratory Bird Treaty Act, all wild birds were considered "native" in the sense of being subject to regulation by the states to the exclusion of the Federal Government. Compare Geer v. Connecticut, 161 U.S. 519 (1896) (recently overruled by the Supreme Court in its April 24, 1979 opinion in Hughes v. Oklahoma), with Missouri v. Holland, 252 U.S. 416 (1920). Accordingly, I conclude that the term "native birds" means "all wild birds frequenting the area, whether or not they inhabited the area on the date of the reservation."

These early reservations carry the date of the establishing executive order as the priority date for reserved water rights. Many of these executive order reservations have been subsequently expanded in geographical area and in named purposes by Executive action and legislation. These new purposes and areas carry priority dates as of the date of the expanding legislation or Executive action.

B. Executive Order Reserves Created to Fulfill the Purposes of the Migratory Bird Conservation Act

As originally written, the 1929 Migratory Bird Conservation Act (hereinafter "MBCA"), 45 Stat. 1222, provided for the acquisition of "lands, waters and interests therein" to be administered "as inviolate sanctuaries for migratory birds." Additionally, many refuges were reserved from the public domain to more fully effectuate the purposes of the MBCA.

The executive orders reserving such refuges appear to be of two styles, a pre-1939 version which specifically cites the MBCA purposes and post-1939 version which generally cites migratory bird and wildlife refuge purposes.

1. Pre-1939 language:

> to effectuate further the purposes of the Migratory Bird Conservation Act (45 Stat. 1222) . . . [there is] hereby reserved and set apart . . . as a refuge and breeding ground for migratory birds and other wildlife. Exec. Order No. 7926, 3 CFR 355 (1938-1943 Comp.).

2. Post-1939 language:

> reserved and set apart . . . as a refuge and breeding ground for migratory birds and other wildlife. Exec. Order No. 8647, 3 CFR 864 (1934-1943 Comp.).

It is clear that either style of executive order creates reserved water rights to the extent "reasonably necessary to fulfill the purposes of the Refuge," since the second style language comes from Havasu Lake National Wildlife Refuge given such water rights in Arizona v. California, supra. Though the Arizona Court did not focus on purposes for the reservation, but rather on demonstrable management needs in determining the quantity of reserved water rights, subsequent refinements of the reserved water right doctrine would appear to limit such needs to the

extent needed for the specific purposes of maintaining "a refuge and breeding ground for migratory birds and other wildlife." Such reserved water rights include consumptive and non-consumptive water uses necessary for the conservation of migratory birds and other wildlife (e.g., watering needs, habitat protection, ecosystem food supply, fire protection, soil and erosion control) and attendant FWS personnel needs (e.g., refuge staff domestic needs). These reserved water rights carry the priority date of the establishing executive order.

C. Refuges Created by Statute

In addition to refuges created by Executive action, several refuges have been created or explicitly authorized by statute, largely within national forest boundaries. See 16 U.S.C. §§ 671-697a (1976).96/ These statutory refuges obtain reserved water rights in waters unappropriated as of the date of enactment necessary to fulfill stated refuge purposes.

D. Game Ranges Created by Executive Order

In addition to establishing the native bird preserves, migratory bird sanctuaries and wildlife refuges described earlier, executive orders have also established game ranges. The language of these executive orders is nearly identical in terms of purposes for the reservations:

> [T]hey are hereby, withdrawn and reserved and set apart for the conservation and development of natural wildlife resources and for the protection of and improvement of public grazing lands and natural forage resources. . . .97/

It is reasonable to presume an intent to reserve water necessary for the conservation and development of wildlife, grazing and forage resources on these game ranges (e.g., irrigation, ecosystem food supply, breeding habitat, fire protection, erosion control), which are under the jurisdiction of the Fish and Wildlife Service. See 43 Fed. Reg. 19045, 19046 (May 3, 1978).

96/ In New Mexico, supra, the Supreme Court at least intimated that minimum stream flows could be claimed for fish and game sanctuaries reserved within national forests. See 16 U.S.C. § 694 (1970). However, the Court expressly refrained from reaching the question of what, if any, water Congress reserved under that statute. New Mexico, supra, at 711, fn. 19.

97/ Exec. Order No. 8039, 3 CFR 447 (1938-1943 Comp.) (Kofa Game Range, Jan. 24, 1939); Exec. Order No. 7509, 3 CFR 227 (1936-1938 Comp.) (Fort Peck Game Range, Dec. 11, 1936); Exec. Order No. 8038, 3 CFR 446 (1938-1943 Comp.) (Cabeza Prieta Game Range, Jan. 25, 1939).

E. Refuges Superimposed on Existing Withdrawals

The Executive Branch has also reserved lands for refuge purposes within areas previously withdrawn for power site, reclamation or other purposes. These layered withdrawals were undertaken largely to mitigate fish and wildlife impacts resulting from development, in accordance with the Fish and Wildlife Coordination Act, 16 U.S.C. § 661 et seq.

Pertinent examples include:

1. John Day Wildlife Management Area -- "reserved for the John Day Wildlife Management Area of the John Day Lock and Dam Project" (a Corps of Engineers Project). Public Land Order 4210, 32 Fed. Reg. 6643 (April 29, 1967).

2. Havasu Lake National Wildlife Refuge -- "reserved and set apart . . . as a refuge and breeding ground for migratory birds and other wildlife . . . [the land] reservation is subject to their use for the purposes of the Parker Dam Project." Executive Order 8647, 6 Fed. Reg. 593 (Jan. 25, 1941).

These refuges share the common feature of being subject to use under earlier withdrawals.

I conclude that these refuges do obtain reserved water rights for refuge purposes (e.g., habitat maintenance, watering needs, etc.), carrying a priority date as of the date of reservation for refuge purposes. Superimposed refuge reservations, such as the Havasu Lake National Wildlife Refuge, received reserved water rights in Arizona v. California, 373 U.S. 546, 601 (1963); 376 U.S. 340, 346 (1964). The fact that such refuges are subject to another withdrawal is a distinction without a difference. United States v. New Mexico, supra, continued the traditional rule of the reserved water rights doctrine that water is implicitly reserved to the extent necessary to fulfill the "specific" or "direct" purposes of the reservation. Since the self-evident purpose of these reservations was to create a refuge offering a measure of protection to wildlife, these reservations would obtain reserved water rights necessary for refuge management purposes under existing precedent.

F. Other Refuges, Wildlife Management Areas and Waterfowl Production Areas Created by Executive Order

In addition to refuges reserved in accordance with the Migratory Bird Conservation Act or reserved on existing withdrawals, other components of the National Wildlife Refuge System have been reserved by Executive action. Pertinent examples include:

1. Seedskadee National Wildlife Refuge -- "reserved for the Seedskadee National Wildlife Refuge." Public Land Order 4834, 35 Fed. Reg. 8233 (May 26, 1970).

2. Sunnyside Wildlife Management Area -- "reserved for management in cooperation with the State of Nevada Sunnyside Wildlife Management Area . . . [under cooperative agreement] the State of Nevada is authorized to manage the withdrawn lands for the conservation of small game and waterfowl." Public Land Order 3441, 29 Fed. Reg. 12233 (Aug. 27, 1964).

3. Gila River Waterfowl Area -- "reserved under the jurisdiction of the Interior Department for use by the Arizona Game and Fish Commission in connection with the Gila River Waterfowl Area Project." Public Land Order 1015, 19 Fed. Reg. 6478 (Oct. 7, 1954).

I conclude that such public domain reservations for refuge, wildlife management or waterfowl production purposes obtain reserved water rights necessary to fulfill stated purposes. The priority date for these reserved water rights is the date of reservation.

G. <u>The Impact of the Refuge Receipts Act, the Refuge Recreation Act and the National Wildlife Refuge Administration Act</u>

The Refuge Receipts Act of 1935, 49 Stat. 383, 16 U.S.C. § 715s(f) (1970), provides for the disposition of receipts from various activities (sale and lease of animals, timber, hay, grass, soil products, minerals, shells, gravel, public accommodations) that Congress recognized were carried out on refuges. Under the specific purpose test of <u>New Mexico</u>, <u>supra</u>, these uses would not be accorded reserved water rights.

The Refuge Recreation Act of 1962, 76 Stat. 653, 16 U.S.C. §§ 460l-460k-4 (1976), provides a congressional directive that refuge areas and fish hatcheries be managed for public recreation where compatible with the primary purposes for which such areas were acquired or established. Since such recreational uses are not a specific purpose for establishing refuges and fish hatcheries, recreational uses would obtain no reserved water rights under <u>New Mexico</u>.

As developed earlier, the National Wildlife Refuge Administration Act of 1966, 16 U.S.C. §§ 668dd-668ee (1976), applies to:

> all land, waters, and interests therein administered by the Secretary as wildlife refuges, areas for the protection and conservation of fish and wildlife that are threatened with extinction, wildlife ranges, game ranges, wildlife management areas, or waterfowl production areas . . .

This includes the areas discussed in subsections A-F of section VII. While the Act does not appear to establish any new purposes for the new National Wildlife Refuge System, this consolidating statute did confirm that public recreational use and accommodations are subsidiary or secondary uses of wildlife refuges:

> The Secretary is authorized, under such regulations as he may prescribe, to -- 1) permit the use of any area within the system for . . . public recreation and accommodation and access whenever he determines that such uses are compatible with the major purposes for which such areas were established . . . (emphasis added) 98/

Thus, reserved water rights for public recreational use and accommodations within the Refuge System would not be allowed under existing legal precedent, since they are not direct purposes for reserving the land, but rather allowable secondary uses. See United States v. New Mexico, supra, at 3015.

H. Fish Hatcheries Created Pursuant to Executive Action

The Fish and Wildlife Service manages fish hatcheries in addition to the National Wildlife Refuge System. The public land orders reserving such fish hatcheries generally state that the areas are "reserved and set apart . . . for fish-cultural purposes" or that the area is "reserved for use . . . [as a] Fish Cultural Station." See Public Land Order 617, 14 Fed. Reg. 7295 (Dec. 6, 1949); Public Land Order 1941, 24 Fed. Reg. 6713 (Aug. 19, 1959). I am of the opinion that these public land orders reserved sufficient unappropriated water for

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98/ 16 U.S.C. § 668dd(d) (1970).

fish-cultural purposes. Since fish hatcheries generally lie at the headwaters of streams, these largely non-consumptive water uses should not adversely affect other uses.

VII. NATIONAL WILD AND SCENIC RIVERS SYSTEM

The Wild and Scenic Rivers Act, 82 Stat. 906, 16 U.S.C. §§ 1271-1287 (1976), contains an express, though negatively phrased, assertion of federal reserved water rights:

> Designation of any stream or portion thereof as a national wild, scenic or recreational river shall not be construed as a reservation of the waters of such streams for purposes other than those specified in this chapter, or in quantities greater than necessary to accomplish these purposes.99/

The legislative history of the Wild and Scenic Rivers Act emphasizes the congressional intent to reserve unappropriated waters necessary to fulfill the Act's purposes. In explaining the conference report on the Senate floor, Senator Gaylord Nelson, a principal sponsor and floor manager of the bill in the Senate, read the following sectional analysis:

99/ § 12(c) of the Act, 82 Stat. 917, 16 U.S.C. § 1284(c) (1970) (emphasis added). The preceding subsection, 16 U.S.C. § 1284(b), provides:

> Nothing in this chapter shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws.

The meaning of this provision is difficult to discern, especially in light of Congress' express invocation of the reserved water rights doctrine in the next subsection. Even without considering section 1284(c), no consistent reading of this provision appears possible. Giving literal effect to the "no implied claim . . . as to exemption from State water laws" phrase, denies the literal effect of the "no express or implied . . . denial . . . as to exemption from State water laws" phrase, and vice versa. There is no clarifying legislative history. I therefore must conclude that the provision is a non sequitor roughly designed to preserve the status quo of federal-state relations in water law "under established principles of law," including the reserved water rights doctrine. 16 U.S.C. § 1284(b).

> Enactment of the bill would reserve to the United States sufficient unappropriated water flowing through Federal lands involved to accomplish the purpose of the legislation. Specifically, only that amount of water will be reserved which is reasonably necessary for the preservation and protection of those features for which a particular river is designated in accordance with the bill.100/

Thus, the intent to reserve unappropriated waters at the time of river designation is clear and the remaining question is the scope of the reserved water right. The previously quoted excerpt suggests that the scope question is to be resolved by examining the purposes of the Act, limited by protecting those features which led to a particular river's designation. The purposes of the Act were to implement the policy section (see 16 U.S.C. § 1272 (1970)), which reads in pertinent part:

> It is hereby declared to be the policy of the United States that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations.101/

It is my opinion that the extent of the water reserved is the amount of unappropriated waters necessary to protect the particular aesthetic, recreational, scientific, biotic or historic features ("values") which led to the river's inclusion as a component of the National Wild and Scenic Rivers System, and to provide public enjoyment of such values.

The required congressional reports for additions to the System will be a fruitful source for determining which features led to the river's

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100/ 114 Cong. Rec. 28313 (Nov. 26, 1968); see also 114 Cong. Rec. 26494 (Sept. 12, 1968); 13 Cong. Rec. 21747-48 (Aug. 8, 1967); S. Rep. No. 491, 90th Cong., 1st Sess. 5 (1967).

101/ 16 U.S.C. § 1271 (1970).

designation and, hence, the volume of instream flow and consumptive use intended to be reserved. See 16 U.S.C. § 1275 (1970). For these later added national wild and scenic rivers, it appears that the date Congress formally declares the river to be a wild and scenic river pursuant to 16 U.S.C. § 1274, and not the date of study pursuant to 16 U.S.C. §§ 1275-1276, would be the priority date for reserved water rights, unless Congress provides otherwise.102/

The argument that river designation entails the reservation of the entire flow of system component rivers in all cases is untenable in light of the Act's legislative history. The legislative history indicates that private parties likely could obtain consumptive water rights subsequent to river designation.

> It follows that all unappropriated and unreserved waters [following the reserved water right accompanying river designation] would be available for appropriation and use under state law for future development of the area.103/

Therefore, it is clear that river designation does not automatically reserve the entire unappropriated flow of the river and an examination of the individual features which led to each component river's designation must be conducted to determine the extent of the reserved water right.

VIII. NATIONAL WILDERNESS PRESERVATION SYSTEM

Under the Wilderness Act of September 3, 1964, 78 Stat. 890, 16 U.S.C. § 1131, et seq. (1970), Congress has designated wilderness areas on lands managed by Interior agencies; e.g., Bandelier Wilderness, Bandelier National Monument, New Mexico (designated Oct. 20, 1976); Black Canyon of the Gunnison Wilderness, Black Canyon of the Gunnison National Monument, Colorado (designated Oct. 20, 1976); Medicine Lake Wilderness, Medicine Lake National Wildlife Refuge, Montana (designated Oct. 19, 1976); Point Reyes Wilderness, Point Reyes National Seashore, California (designated Oct. 18, 20, 1976). Wilderness area designation is undertaken for the purpose of preserving and protecting wilderness in its natural condition without permanent

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102/ See 113 Cong. Rec. 2147-48 (Aug. 8, 1967).

103/ 114 Cong. Rec. 28313 (Nov. 26, 1968); see also 114 Cong. Rec. 26594 (Sept. 12, 1968).

improvements or human habitation, to fulfill public purposes of recreation, scenic, scientific, educational, conservation, and historic use.104/ I conclude that formally designated wilderness areas receive reserved water rights necessary to accomplish these purposes.

The uses which may be made of water reserved under the purposes stated in the Wilderness Act are restricted to the maintenance of minimum stream flows and lake levels (e.g., for scenic appreciation and primitive water-borne recreation), and water required for ecological maintenance (e.g., evapotranspiration for natural communities, wildlife watering, fire fighting). Reserved water rights may not be claimed for motor boating or other intensive commercial recreational development within wilderness areas, since such uses are not among the purposes of wilderness designation. See 16 U.S.C. §§ 1131(c), 1133(c). Thus, reserved water rights in wilderness areas will not have significant impact on present or future downstream appropriators.

Two additional provisions of the Wilderness Act deserve discussion because of their effect on the judicial rule of construction implying the reservation of water upon the creation of federal reservations. See Cappaert and New Mexico, supra. First, as far as NPS and FWS areas are concerned, it is clear that wilderness designations establish purposes for the creation of the reservations; i.e., designation as wilderness does more than merely authorize secondary uses entailing

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104/ The Wilderness Act contains several congressional statements of purpose for the National Wilderness Preservation System. Under 16 U.S.C. § 1131(a), wilderness areas are designated for the purpose of "preservation and protection in their natural condition . . . to secure for the American people of present and future generations the benefits of an enduring resource of wilderness." Wilderness is defined by 16 U.S.C. § 1131(c) to be "an area where the earth and its community of life are untrammeled by man, where man is a visitor who does not remain," and is further defined to include an area "retaining its primeval character and influence, without permanent improvements or human habitation . . . [which] has outstanding opportunities for solitude or a primitive and unconfined type of recreation . . . [and] may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value." Finally, 16 U.S.C. § 1133(b) provides that "wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use."

no reserved water rights.105/ Second, similar to my conclusions concerning identical language in the Wild and Scenic Rivers Act and National Wildlife Refuge Administration Act, I do not view the provision of 16 U.S.C. § 1133(d)(7) 106/ as undercutting the implied reserved water rights doctrine. Rather, the provision is intended to continue the application of then-existing principles of federal-state relations in water law, which includes the reserved water rights doctrine.

105/ This reading of the Wilderness Act is confirmed by 16 U.S.C. §1133(a), which provides that the:

> purposes of this chapter are hereby declared to be within and supplemental to the purposes for which national forests and units of the national parks and national wildlife refuge systems are established . . . . (emphasis added).

By stating that Wilderness Act purposes are "within" existing area purposes, this forecloses any argument that wilderness area designation is subsidiary to other management objectives. Cf. United States v. New Mexico, supra, 438 U.S. at 713-15.

106/ The provision provides:

> Nothing in this chapter shall constitute an express or implied claim or denial on the part of the Federal government as to exemption from State water laws.

This language cannot reasonably be construed to prevent reserved water rights from being created by wilderness area designation. The identical language was used four years later in the Wild and Scenic Rivers Act, where Congress went on to invoke the reserved water rights doctrine. See 16 U.S.C. § 1284(b) and (c). Rather, by not constituting either a new claim or a new denial or exemption from state water law, I am of the opinion that Congress intended to continue the status quo which allows for the creation and assertion of reserved water rights on lands withdrawn and reserved under the Wilderness Act. See discussion in fn. 99, supra.

IX. LANDS ADMINISTERED BY THE BUREAU OF RECLAMATION

The Bureau of Reclamation administers large irrigation projects in the 17 Western States and the United States owns the lands upon which the dams, diversion works and other supporting facilities are located. These projects have been constructed pursuant to the authority granted by Congress in the Reclamation Act of 1902,107/ and amendatory and supplementary reclamation laws.

Section 8 of the Reclamation Act of 1902,108/ provides that

> nothing in this Act shall be construed as affecting or intending to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation . . . and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws.

This section has been interpreted by the courts as requiring the United States to apply, pursuant to state law, for water rights needed for any proposed Bureau of Reclamation project. In California v. United States, supra, 438 U.S. at 675, the Court held that

> Section 8 . . . requires the Secretary to comply with state law in the "control, appropriation, use, or distribution of water" . . . [and] the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law.

The Court concluded by stating that

> the Secretary should follow state law in all respects not directly inconsistent with these [congressional] directives. Id. at 678.

107/ 43 U.S.C. § 372, et seq.

108/ 43 U.S.C. § 383.

It is my opinion that section 8 of the 1902 Reclamation Act clearly prohibits the Bureau of Reclamation from claiming any reserved water rights for any reclamation project unless the terms of any project authorization subsequent to 1902 can fairly be read to provide for a reservation of water.109/ I know of none, but have not reviewed the multitude of post-1902 reclamation laws in sufficient detail to say with absolute confidence that none were intended.

X. APPROPRIATION OF WATER RIGHTS BY THE UNITED STATES ON LANDS ADMINISTERED BY THE BUREAU OF LAND MANAGEMENT, BUREAU OF RECLAMATION, NATIONAL PARK SERVICE AND FISH AND WILDLIFE SERVICE

Having completed the review of the principal reserved water rights the agencies of this Department may claim, I now return to build on the discussion set forth in parts II and III B above, pp. 1-11, 14-16, concerning the acquisition of non-reserved water rights by agencies of this Department.

A. BLM Non-Reserved Water Rights

Throughout the history of this Nation, the public lands and the resources thereon have generally been administered for ultimate disposition as Congress has determined to be in the national interest. Congress has generally provided that the beneficiaries of the land grants -- such as miners, homesteaders, railroads -- would themselves acquire the water rights needed to develop the lands granted and the resources thereon pursuant to state law.110/ The United States has never claimed water rights for these ultimate beneficiaries of disposed public domain lands (except in the limited situations where Congress has specifically provided for the reservation of water such as in springs and water holes for use on adjoining tracts of public and private lands).

109/ See also 32 I.D. 254 (1903), holding that a proposed withdrawal of lands and waters in contemplation of a federal reclamation project would be ineffective to reserve waters because section 8 of the Reclamation Act generally requires reclamation project water rights to be obtained in accordance with state law. Broader statements in that opinion concerning the general authority of the United States to reserve waters to carry out purposes of federal reservations are plainly inconsistent with subsequent decisions of the Supreme Court, and are therefore overruled to the extent inconsistent with this opinion.

110/ See, e.g., Desert Land Act, supra, pp. 5-11; U.S. v. New Mexico, supra, at 702, fn. 5.

Congress has in other instances, however, provided that public domain lands will be retained by the United States and managed for particular purposes. The Taylor Grazing Act, supra, and FLPMA, supra, are the major statutes providing for such retention of lands and providing for multiple-use, sustained yield management of the public domain. While, as I discussed earlier, these acts do not create reserved water rights in the United States, the management programs mandated in these acts require the appropriation of water by the United States in order to assure the success of the programs and carry out the objectives established by Congress.

My predecessors have held that the BLM has the right to make use of unappropriated water on the public domain to fulfill these management objectives without being limited by the substantive contours of appropriation as defined in the various state water laws. In a 1950 opinion,111/ Solicitor White found that this inherent power of the United States had been exercised under the Taylor Grazing Act.112/ He observed:

> As the owner of unappropriated non-navigable water on the public domain, the United States may exercise all powers of ownership over such water. It may withdraw such water generally from private appropriation, as was done in the case of springs and water holes by the Executive order of April 17, 1926, or it may simply make the water in a particular case unavailable for private appropriation through taking it and using it. No specific form of reservation of water is required. Of course, before an officer of the United States can effectively act to exercise the ownership of the United States in unappropriated non-navigable water on public land, he must have the proper authority to do so. In section 2 of the Taylor Grazing Act (43 U.S.C., 1946 ed., sec. 315a), the Secretary of the Interior has been directed to "make provision for the protection, administration, regulation, and improvement" of grazing districts, and to "do any and all things necessary to

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111/ Sol. Op. M-33969 (Nov. 7, 1950), "Compliance by the Department with State Laws Concerning Water Rights."

112/ 43 U.S.C. § 315a et seq.

> accomplish the purposes of this Act and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range * * *" (emphasis added).
>
> Section 10 of the act, as amended (43 U.S.C., 1946 ed., sec. 315i), provides that 25 percent of the money received under the act shall be available, when appropriated by Congress, for expenditure by the Secretary of the Interior "for the construction, purchase, or maintenance of range improvements." In addition, section 4 of the Taylor Grazing Act (43 U.S.C., 1946 ed., sec. 315c) specifically provides that reservoirs and other improvements necessary to the care and management of livestock for which grazing permits have been issued may be constructed on public lands within grazing districts under permits issued by the Secretary.
>
> It is my opinion that these statutory provisions give the Secretary of the Interior broad authority to develop the unappropriated non-navigable waters on the public domain within grazing districts and to make such waters available for use by the public for stock-watering purposes. In the exercise of this authority, it is not necessary that the Secretary make a formal reservation of the water; it is sufficient that he (or his authorized representative) exercise such dominion and control over the water as to indicate that it is being reserved for public use and is being withdrawn from private appropriation.

I am of the opinion that Solicitor White's comments concerning "ownership" of the unappropriated water on the public domain are overly broad and irrelevant to the right of the United States to make use of such water, and I disavow them to the extent inconsistent with this opinion. As is the case of "ownership" of wild animals, concepts of "ownership" of unappropriated waters are not determinative in federal-state relations in non-reserved water rights. See Hughes v.

Oklahoma, S. Ct. No. 77-1439 (April 24, 1979).113/ What matters is that Congress, with few exceptions, has not authorized Interior agencies to transform any inchoate federal "ownership" of unappropriated waters into a federal water management system for private water rights competing with state systems, but rather has directed private parties to seek water under state law. See pp. 4-10, supra. However, I agree with and reaffirm Solicitor White's conclusion that by congressional directives to administer federal lands for particular management objectives, Interior agencies have the right to appropriate and make beneficial use of unappropriated water on the various federal lands for congressionally-authorized management programs.

Solicitor White's further conclusion that mere exercise of "dominion and control over the water" on the public domain by the United States causes the water to be "reserved for public use," and "withdrawn from private appropriation," without further action, is inconsistent with my conclusion reached earlier concerning the need to comply with state law to the greatest practicable extent, and I thereby overrule it.114/

113/ That is, water rights in the arid West are generally considered "usufructuary;" i.e., based on a right to use water rather than "ownership" of the corpus of the water. See generally R. E. Clark and C. O. Martz, "Classes of Water and Character of Water Rights and Uses," in R. E. Clark I Waters and Water Rights, ¶ 53.2 (1967).

114/ See pp. 15-18, supra. Two earlier Solicitor's Opinions also deserve mention. They were 55 I.D. 371; 55 I.D. 378 (1935), issued shortly after the Supreme Court's decision in California Oregon Power Co., supra, and ten years before the United States took the position before the Supreme Court in Nebraska v. Wyoming, supra, that the Federal Government retained title to all unappropriated non-navigable water on the public domain. In the first, Solicitor Margold suggested that application might be made to the state for certain water rights in flowing streams subject to appropriation and diversion above or below a federal reservation, to afford "greater security" to the federal right, and to allow these rights to be incorporated into the state system. 55 I.D. at 375, 378. In the second opinion, the Solicitor held that the United States must apply to the state to obtain rights to use underground water made available by wells drilled on unreserved, public domain lands. Read together with Solicitor White's 1950 opinion, (which does not mention the earlier opinions), they illustrate the uncertainty that has abounded in this area of law. I overrule each of them insofar as they are inconsistent with the conclusions expressed in this opinion.

In 1976, Congress passed the Federal Land Policy and Management Act 115/ which reversed the historic policy of favoring general disposal of the public lands, and directed that, in general, they be retained in federal ownership and managed for the various resource uses and values they have. Section 102 of FLPMA, 43 U.S.C. § 1701, summarizes this management philosophy:

> (a) The Congess declares that it is the policy of the United States that --
>
> (1) the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest;
>
> (2) the national interest will be best realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process coordinated with other Federal and State planning efforts;
>
> * * * *
>
> (7) goals and objectives be established by law as guidelines for public land use planning, and that management be on the basis of multiple use and sustained yield unless otherwise specified by law;
>
> (8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use . . . ;
>
> . . .

115/ 43 U.S.C. § 1701 et seq.

(11) regulations and plan for the protection of public land areas of critical environmental concern be promptly developed;

(12) the public lands be managed in a manner which reflects the Nation's need for domestic sources of minerals, food, timber and fiber.

As part of the management of the public domain lands for multiple use, water is of necessity required to carry out the congressional mandate expressed in FLPMA and other laws. As I have noted, part of that mandate in FLPMA is a maintenance of the status quo ante in the relationship between the states and the Federal Government on water. Section 701(g), 43 U.S.C. § 1701(g). The status quo is a recognition of existing laws and practices, and thus allows for (a) the continued appropriation of unappropriated non-navigable waters on the public domain by private persons pursuant to state law, as authorized by the Desert Land Act, (b) the right of the United States to use unappropriated water for the congressionally-recognized and mandated purposes set forth in legislation providing for the management of the public domain, and (c) application by the United States to secure water rights pursuant to state law for these purposes. Prior to FLPMA, these purposes were, as Solicitor White discussed, primarily those expressed in the Taylor Grazing Act and related laws. It is my opinion that in FLPMA, Congress authorized the United States to appropriate unappropriated water available on the public domain as of October 21, 1976, to meet the new management objectives dictated in the Act. Two specific examples follow:

1. Water for such consumptive uses as recreational campgrounds, timber production, and livestock grazing

Unappropriated water which is needed by the BLM to carry out Congress' management directives in FLPMA, the Taylor Grazing Act, the O&C Act, and other statutes which I have determined in this opinion do not create reserved water rights may be appropriated by the BLM in accordance with this opinion. These purposes are diverse and found in several statutes, and need not be repeated here.

2. Instream flows and other non-consumptive uses.

FLPMA requires BLM to manage the public domain lands for "multiple use" and dictates that the land-use plans to be developed for the public lands include provisions for the protection and enhancement of

such things as fish and wildlife resources and scenic values.116/ If Congress' management directives are to be effectively carried out, water is required for human and fish and wildlife consumption at such places as recreation areas, concession operations, wildlife watering and feeding areas, and for non-consumptive uses to maintain such things as fish and wildlife habitats, scenic values, and areas of critical environmental concern.

B. Bureau of Reclamation

All water needed by the Bureau of Reclamation to operate and maintain its reclamation projects must, by express congressional enactment, be acquired pursuant to state law, unless Congress has provided otherwise. 43 U.S.C. § 383, California v. United States, 438 U.S. 645 (1978).

C. Appropriation of Water on Lands Administered by the National Park Service

The National Park Service may appropriate water to fulfill any congressionally-authorized function for National Park System areas. These congressionally-authorized uses include consumptive and non-consumptive water uses actually used:

1. to conserve the scenery, natural and historic objects, and wildlife and to provide for public enjoyment of the same in National Park System areas, as authorized by 16 U.S.C. § 1 (1970) (e.g. uses outlined in Part V above);

2. In concession operations providing for public use and enjoyment of National Park System areas, as authorized by 16 U.S.C. §§ 3, 17(b), 20 (1970);

3. In the construction and maintenance of rights-of-ways in National Park System areas, as authorized by 16 U.S.C. § 5 (1970);

4. In construction and maintenance of airports in National Park System areas, as authorized by 16 U.S.C. § 7a (1970);

5. In the construction and maintenance of roads and trails in National Park System areas, as authorized by 16 U.S.C. § 8 (1970); and

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116/ See, e.g., section 102(a)(8) of FLPMA, which refers to management with consideration given to "fish and wildlife habitat," land in its "natural condition," and "outdoor recreation;" 43 U.S.C. § 1701(a)(8); section 103, which defines "areas of critical environmental concern," "multiple use" and "principal and major uses," with reference to, among other things, fish and wildlife, recreation and natural scenic and scientific values; 43 U.S.C. § 1702(a), (c), (l); and "rehabilitation, protection and improvements" including "water development and fish and wildlife enhancement;" 43 U.S.C. § 1751(b)(1).

6. In carrying out various miscellaneous authorities, e.g., 16 U.S.C. §§ 1a-2, 16 and 17j-2 (1970), and the enabling legislation for individual areas of the National Park System.

D. Appropriation of Water on Lands Administered by the Fish and Wildlife Service

The Fish and Wildlife Service may appropriate water to fulfill any congressionally-authorized use of National Wildlife Refuge System areas and other areas under FWS jurisdiction. The congressionally-authorized uses include cons mptive and non-consumptive uses actually used:

1. to conserve fish and wildlife and their habitat, as authorized by 16 U.S.C. § 668dd (1970) and individual statutes, executive orders, etc., establishing wildlife refuges, game ranges, bird preserves, etc. (e.g., uses outlined in Part VI above);

2. to provide public accommodation and recreational use of the National Wildlife Refuge System, as authorized by 16 U.S.C. §§ 460k, 460k-1, 668dd(b)(1), 668dd(d)(1) (1970);117/

3. In construction and maintenance of easements, as authorized by 16 U.S.C. § 668dd(d)(2) (1970);

4. In managing timber, range, agricultural crops, and animals, as authorized by 16 U.S.C. § 7151(b)(1970); and

5. In carrying out National Wildlife Refuge System uses established in an individual System component's enabling legislation.

CONCLUSION

In this opinion, my staff and I have engaged in a review of the law relating to reserved and non-reserved water rights which may be claimed by the important land management agencies of this Department. The basic legal framework for the assertion of such rights is in some cases clearly established and in other cases not. When faced with the latter, we have been forced to reach conclusions which represent our best judgment about what Congress has intended in light of applicable judicial guidance, largely in dicta.

117/ I do not believe that the provision of 16 U.S.C. § 668dd(1), "[n]othing in this Act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from state water laws," in any way prohibits the acquisition of appropriative water rights for NWRS areas. By not constituting a claim or denial to exemption from state water law, this Act preserves the status quo. See notes 99, 106, supra, pp. 58, 62.

Having issued this opinion, the important remaining issues in this sensitive area will be in the application of individual laws, regulations, and other executive actions to specific factual circumstances. The principal problem facing agencies in this context is the task of proceeding as rapidly as funds will permit with an inventory of present water uses and needs. This information will enable this office (in consultation with the Justice Department as required where litigation has been filed) to determine what steps are required in each case to establish for the record our entitlement to a firm water supply for our identified uses and needs.

This Department's most extensive experience with the recordation and adjudication of its water rights has been in Colorado Water Divisions 4, 5 and 6 (see p. 12, note 19; p. 24, note 33; p. 33, note 60; p. 44, note 88; pp. 48, 50, supra). The result of these proceedings to date has been the granting of most (but not all) of interior agency claims; however, this has not resulted in displacement of private rights to any degree. In reviewing these cases, Dean Trelease has recently agreed that no state or private water user has shown that the United States has destroyed a private right by the assertion of a reserved water right and went so far as to suggest that the approved claims are minimal compared to the total flow of the five rivers.118/ While this result may not always obtain, we think it may be typical.

Once reserved rights are quantified, we fully expect that future water rights claims for agencies of this Department will be based largely on appropriation of unappropriated water to meet existing and future congressional directives regarding land management. Such appropriations do not threaten water rights previously established under state law. Thus if the Department's agencies can proceed promptly to quantify their reserved rights, there is ample room to foresee greater certainty and less antagonism between the states and the Federal Government over these issues.

This opinion was prepared with the assistance of John D. Leshy, Associate Solicitor for Energy and Resources; Gary Fisher, Special Assistant to the Associate Solicitor for Energy and Resources; James D. Webb, Associate Solicitor for Conservation and Wildlife; Tom Lundquist, Sharon Allender, and William Garner, attorneys in the Division of Conservation and Wildlife; John Little, Jr., Regional Solicitor--Denver; Reid Nelson, Regional Solicitor--Salt Lake City;

118/ Trelease, "Federal Reserved Water Rights Since PLLRC," 54 Denver L. J. 473, 487-92 (1977); see also Corker, "A Real Live Problem or Two for the Waning Energies of Frank J. Trelease," 54 Denver L. J. 499, 504 (1977).

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