

M-36914 (Supp.)

Department of the Interior (D.O.I.)
Office of the Solicitor

****1** SUPPLEMENT TO SOLICITOR OPINION NO. M-36914, ON FEDERAL WATER RIGHTS OF THE NATIONAL PARK SERVICE, FISH & WILDLIFE SERVICE, BUREAU OF RECLAMATION AND THE BUREAU OF LAND MANAGEMENT [FNal]

January 16, 1981

***253** Taylor Grazing Act: Generally--Federal Land Policy and Management Act: Generally--Water and Water Rights: Federal Appropriation

Neither FLPMA nor the Taylor Grazing Act authorizes appropriation of water or provide an independent statutory basis for claims for water uses inconsistent in any way with the substantive requirements of state law.

Water and Water Rights: State Laws--Water and Water Rights: Federal Appropriation

The United States should comply with the substantive and procedural provisions of state law when acquiring and appropriating water except

1. where Congress or the Executive has reserved land or water for particular Federal purposes;
2. where Congress has clearly mandated that unappropriated water on the public lands is reasonably required for a Federal program or purpose and that water cannot be acquired in a manner conforming to all substantive requirements of state law;
3. the United States is entitled to a priority date as of its historic date of first use where water has been used historically for consumptive beneficial uses recognized by state law but without having conformed to procedural requirements prescribed by state law.

TO: Secretary

FROM: Solicitor

SUBJECT: Supplement to Solicitor Opinion No. M-36914, on Federal Water Rights of the National Park Service, Fish & Wildlife Service, Bureau of Reclamation and the Bureau of Land Management

***254** Introduction

The Solicitor's Opinion No. M-36914 of June 25, 1979 (herein called the "opin-

ion") made a comprehensive analysis of the nature and extent of Federal rights to use water on lands administered by the National Park Service, Fish and Wildlife Service, Bureau of Reclamation (now the Water and Power Resources Service) and the Bureau of Land Management. It defined and characterized the reserved water rights those agencies may assert under various statutes, executive orders, and Secretarial orders. It also discussed other forms of water rights assertable by Federal agencies, including rights initiated by application of water to beneficial use for congressionally authorized or mandated purposes. [FN1]

Concerns were raised regarding the exact nature, basis and character of the right of the Federal Government to appropriate water for specific purposes authorized or required by Act of Congress. In response to those concerns, the Secretary, following consultation with the governors of the seventeen western states, opted not to implement certain provisions of the Opinion dealing with Federal non-reserved water rights outlined therein except (i) when the agencies receive specific approval determined on a case-by-case basis, from the appropriate Assistant Secretary, or the Secretary to assert such a right, or (ii) when required to submit all claims for water rights in the course of litigation. [FN2]

****2** The President's Water Policy Implementation Task Force Report on Federal Non-Indian Water Rights thereafter appearing in June 1980 has raised questions about the Report's relationship with the Opinion and the Secretarial instruction. Further uncertainty appears to exist within agencies of the Interior Department regarding (i) the steps that should be taken pursuant to the President's Directive of June 6, 1978, to expeditiously identify, establish and quantify federal water rights; and (ii) the legal basis and procedures to be used for assertion of non-reserved water rights in on-going adjudication proceedings and in negotiations with the states consistent with the Solicitor's Opinion, the Secretary's instruction of Feb. 4, 1980 and the Task Force Report.

To clear up such uncertainties, I am issuing this supplement to the Opinion. [FN3] To the extent the Opinion is inconsistent with this supplement, it is modified and superseded hereby.

I. Federal Water Rights Defined

Water Rights assertable by Federal agencies fall into the following categories:

***255** 1. A water right created expressly or by implication through the reservation of land, measured by the needs of water to fulfill the specific purposes of the reservation and subject to all rights which have vested under State law prior to the effective date of the reservation; this is the commonly recognized federal reserved water right discussed at length in the Opinion. [[FN4]]

2. A water right initiated either (i) by application or other appropriative act prescribed by State law; or (ii) by the historic use of water on public lands for consumptive beneficial uses. This right is limited to quantities of water required for beneficial uses recognized by state law. Its priority date is fixed by

applicable state law in all cases except for historic consumptive beneficial uses of water not heretofore perfected by permitting or other procedural requirements of state law, in such cases, for reasons discussed herein, the priority date vests as of the historic date of first use.

3. A right to use such unappropriated water arising on the public lands of the United States as may be reasonably required for Federal purposes expressly or impliedly mandated by the Act of Congress. Such right dates from the date of the Act if the Act is self executing or from the date of implementing administrative action if the Act contemplates implementation by administrative action. The legal basis for this right is set out in this Supplemental Opinion.

4. Water rights that are acquired by the United States through purchase, exchange, condemnation or gift.

II. Federal Non-Reserved Water Rights--Legal Basis and Nature

Except where Congress has reserved land or water for particular federal purposes, Federal agencies should, as a matter of policy, acquire water rights in accordance with the substantive and procedural provisions of state law. There are two limited exceptions to this legal policy.

****3** The first situation is where water has been used historically by federal agencies for consumptive beneficial uses recognized by State law but without conforming to the filing, permitting, or other administrative procedures prescribed by state law. Most, if not all, of these uses are de minimus or small in quantity and have long been integrated into the regimen of water use and development in the watershed. Unappropriated water is and has been historically available for uses on the public lands, as recognized in [United States v. Rio Grande Dam and Irrigation Co., 174 U.S. 690 \(1899\)](#), notwithstanding any past failure of the United States to conform to procedures prescribed by state law for the initiation of water rights.

***256** The second situation is where a legal basis exists for asserting a federal right to use water in a manner not conforming to all substantive requirements of state law. Federal claims in such cases may be founded on Federal supremacy if and where clearly mandated by Act of Congress. Such claims may also be supported by the dominion the United States has and continues to exercise over unappropriated waters arising on the public lands.

Only the foregoing two situations are encompassed by the nonreserved water right theory detailed in the Opinion. Water right claims thereunder assuredly will be limited in number, limited in impact and are clearly supported by the following principles:

1. The United States acquired dominion over Western lands ceded from foreign powers and not previously disposed of, together with waters on, under or flowing through such lands. [FN5]

2. Article IV, sec. 3 of the Constitution vested Congress with sole authority

over the management and disposition of such waters; those which are not disposed of by Act of Congress remain under the dominion of the United States. [FN6]

3. By certain general statutes in the mid 1800's [FN7] Congress authorized private persons, through compliance with local laws and customs, to appropriate non-navigable water on the public domain; and by enabling acts providing for the admission of western states to the Union, it conferred jurisdiction on the states to dedicate such waters to public use and permit their appropriation in accordance with state law. In no such act, however, did the Congress relinquish its right to exercise future dominion over unappropriated water on public land to the extent it was needed from time to time for Congressionally authorized uses upon such lands nor could any such act or state constitution divest the United States of its right by Federal supremacy to use water arising on public domain lands for Federal purposes subject, of course, to all prior vested rights. [FN8] In other words, Congress retains the right to otherwise provide for future use of presently unappropriated water.

4. As stated by the Supreme Court in *United States v. Rio Grande Dam and Irrigation Co.*, supra, the right of the state to establish its own system of water law is limited by two exceptions, the first of which is the right of the United States as a land owner to demand the continued availability of water for use on its own property; the second exception *257 is the navigation servitude. This statement has been reiterated by the Court consistently through the years. *California v. United States*, supra at 662.

**4 5. Notwithstanding express directives in sec. 8 of the Reclamation Act of 1902 for the United States to comply with State water law, the Supreme Court has recognized the right of Congress to mandate particular uses in excess or in derogation of provisions of state law. *Id. Dicta in New Mexico v. United States*, supra, at 702, 709 n. 16, 718 n. 24 and *California v. United States*, supra, at 654, 657-658, 670 n. 23, sometimes cited for a contrary conclusion, related only to substantive compliance with State law in cases where the use is not mandated by Act of Congress and is only incidental to the purpose of a statutory authorization or directive.

6. Neither the New Mexico case nor any other case has precluded the exercise of a Federal right for failure in the past to meet the filing, permitting and other procedural requirements of State law.

7. Whether a particular paramount Federal purpose is mandated by act of Congress rests on the reasonable interpretation of the Act and its legislative history.

Without cataloging the presence or absence of such mandated uses under all major statutes dealing with land management issues for Departmental agencies, I do believe it is appropriate to readdress Congressional intention under FLPMA [FN9] and the Taylor Grazing Act. [FN10]

As to FLPMA, it is clear, as the 1979 Opinion noted, that FLPMA authorizes a wide range of land management activities that require the use of water, i.e., livestock grazing, habitat and food for fish, wildlife, and domestic animals, timber production, recreation and mining to name a few. However, FLPMA does not authorize or otherwise mandate the Department to appropriate or otherwise utilize water outside state recognized beneficial use concepts for the broad general purposes outlined as management objectives in the Act. To the contrary, sec. 701(g), 43 U.S.C. § 1701(g), states:

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 resource development or control;

Reading FLPMA as a whole and paying special attention to sec. 701 (g), I conclude that FLPMA does authorize appropriation of water for land management uses but does not give an independent statutory basis for claims for water uses inconsistent in any way with the substantive requirements of state law. The same analysis and conclusion is *258 equally applicable to the Taylor Grazing Act. To the extent the Opinion M-36914 of June 25, 1979, is inconsistent with these conclusions it is withdrawn.

This opinion was prepared with the assistance of Gary Fisher, Special Assistant to the Associate Solicitor for Energy and Resources and John R. Little, Jr., Regional Solicitor, Denver, Colorado.

****5** CLYDE O. MARTZ

Solicitor

FN1. Not in chronological order.

FN1. Pages 15-18, 86 I.D. 574-78 and 64-71, 86 I.D. 611-16. This right has become commonly known as the Federal non-reserved water right.

FN2. This decision of the Secretary was announced in a letter of Feb. 4, 1980 to Governors Matheson of Utah and Herschler of Wyoming.

FN3. This supplement does not affect or apply to any water right(s) that may be claimed by or on behalf of any Indian or Indian Tribe. This supplement is also not intended to modify or supersede any portion of the Opinion numbered M-36914 of June 25, 1979 dealing with the reserved water rights of the non-Indian land management agencies in the Department.

FN4. In the future it is my opinion that most federal water rights will be founded on appropriation or purchase. As to federal reservations created in the future,

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this office strongly supports the recommendations of the Non-Indian Reserved Water Rights Task Force that, as a matter of policy, reservations of land created by Executive action to be placed under the administration and management of this Department contain a specific provision as to whether or not reserved water rights are to be claimed to meet the purposes of that reservation. If such a policy is not mandated Governmentwide by Executive Order, it should be adopted as a requirement by this Department.

FN5. *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10 (1935), See, Opinion pgs. 1-15. See, also Solicitor Opinion M-33969 (Nov. 7, 1950), "Compliance by the Department with State Law Concerning Water Rights".

FN6. *United States v. Grand River Dam Authority*, 363 U.S. 229, 255 (1960); Cf. *Kleppe v. New Mexico*, 426 U.S. 529, 539-41 (1976).

FN7. Act of July 26, 1866, § 9 (14 Stat. 253), re-enacted as § 2339, R. S. (43 U.S.C. § 661, 1946 ed.); Act of July 9, 1870, § 17 (16 Stat. 218), re-enacted as § 2340, R.S. (43 U.S.C. § 661, 1946 ed.); and the Act of Mar. 3, 1877, § 1 (43 U.S.C. § 321, 1946 ed.)

FN8. *Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546 (1963); *Cappaert v. United States*, 426 U.S. 128 (1976); *United States v. New Mexico*, 438 U.S. 696 (1978); *Kleppe v. New Mexico*, 426 U.S. 539 (1976); *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955); F. Trelease, *Federal-State Relations in Water Law* 147 (Legal Study No. 5 prepared for National Water Commission, Sept. 7, 1971).

FN9. 43 U.S.C. § 1701 et seq.

FN10. 43 U.S.C. § 315a et seq.

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