

M-36914 (Supp. I)

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

****1** NONRESERVED WATER RIGHTS--UNITED STATES COMPLIANCE WITH STATE LAW [FN1]

September 11, 1981

***1055** This Supplements Solicitor's Opinion M-36914, 86 I.D. 553 (1979) and M-36914 (Supp.), 88 I.D. 253 (1981).

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

The National Park Service, Fish and Wildlife Service, Bureau of Land Management and Bureau of Reclamation must follow state substantive and procedural law when appropriating water except in the limited instances where water is necessary to accomplish the original purpose(s) of a Federal reservation or protect the navigation servitude.

OPINION BY Office of the Solicitor

TO: Secretary
FROM: Solicitor
SUBJECT: Nonreserved Water
Rights--United
States Compliance
with State Law

I. INTRODUCTION

Solicitor's Opinion No. M-36914 of June 25, 1979 [FN1] (hereinafter "Prior Opinion") sets forth a partial analysis of the nature and extent of non-Indian federal water rights for the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management. In addition to its major conclusions concerning reserved water rights, [FN2] the Prior Opinion announced the existence of what has come to be referred to as "non-reserved federal water rights." As defined by the Prior Opinion, "non-reserved" water rights represented a class of federal appropriative water rights that may possibly be claimed by the United States for congressionally authorized programs. [FN3] The Prior Opinion asserted that these non-reserved federal water rights are automatically appropriated by the mere application of water to a beneficial use and are acquired by the United

States without regard for or compliance with state substantive law. [FN4] On Jan. 16, 1981, a Supplemental Solicitor's Opinion (hereinafter "Supplemental Opinion") was issued which addressed the inapplicability of the "non-reserved" rights concept under certain federal statutes. This Opinion further analyzes the constitutional and statutory bases for the "non-reserved" water rights doctrine based upon an exhaustive review of the issues related to the so-called "non-reserved" rights theory. To the extent the Prior Opinion and the Supplemental *1056 Opinion are inconsistent with the conclusions reached herein, they are rescinded.

II. BACKGROUND

In brief, the proponents of the federal non-reserved rights theory assert that by enactment of various land use statutes "Congress authorized the United States to appropriate unappropriated water available on the public domain" implicitly, without regard to the substantive provisions of state water law, [FN5] and that such "federal non-reserved water rights are not dependent upon the substantive contours of state water law." [FN6] The Prior Opinion asserts that, since the Federal government has never granted away its right to make use of unappropriated water on federal lands, "* * * the United States has retained its power to vest in itself water rights in unappropriated waters and may exercise such power independent of substantive state law." [FN7] Such water rights were asserted to be available to fulfill authorized congressional purposes on the public domain, reserved and acquired lands, could be consumptive and could be used for "fish and wildlife, scenic values, and areas of critical environmental concern." [FN8] The priority date was said to be the date of initial use, and the quantity of the right determined by the requirements necessary to carry out "congressionally authorized management objectives on federal lands." [FN9]

**2 The Supplemental Opinion amended and modified the prior Opinion by concluding that neither the Federal Land Policy and Management Act of 1976 (FLPMA) [FN10] nor the Taylor Grazing Act of 1934 [FN11] authorized the Bureau of Land Management (BLM) to claim water rights under the expansive "non-reserved" rights theory. The Supplemental Opinion did not, however, uniformly deny the existence of a federal "non-reserved" water right.

The concept of the "non-reserved" water rights has been the subject of continuing debate and controversy. [FN12] State officials have stridently criticized federal control of state water resources. There is great uncertainty concerning the practical application, if any, of the non-reserved rights theory by the federal agencies. In particular, the asserted existence of this right has hampered the ability of the State and Federal governments to quantify federal water rights and to negotiate agreements to determine the procedures and methods to be used in quantifying and adjudicating water rights. The assertion of non-reserved rights has also created a new and unnecessary cloud of ambiguity over private *1057 water rights dependent on water sources that are on, under, over or appurtenant to federal lands. For these reasons, the comprehensive review of "non-reserved" water

rights was undertaken.

III. GENERAL AUTHORITY OF THE UNITED STATES TO APPROPRIATE WATER APPURTENANT TO FEDERAL LAND

As a starting point for reviewing the legal basis for the existence of "non-reserved" water rights, there are certain premises and conclusions in the Prior Opinion and Supplemental Opinion which are well settled. Specifically, the Prior Opinion reached the following conclusions regarding the United States right to appropriate unappropriated water with which I fully agree and therefore reaffirm:

1. The United States has the power to appropriate water pursuant to state law on federally-owned land, regardless of whether such land is classified as a reservation, acquired land or public domain. Congress also has retained the power to implement the original objective of congressional acts. [FN13]

2. The priority of an appropriative water right obtained by the United States, whether consumptive or non-consumptive, may not predate actual use, and it may not adversely affect prior rights established pursuant to state substantive and procedural law. [FN14]

3. Congress generally did not intend that the United States would acquire water rights for the ultimate beneficiaries of the disposed public lands or users of the non-renewable resources thereupon (such as miners, homesteaders, or railroads) unless Congress specifically directed the United States to reserve or otherwise acquire water for such specific public use. [FN15]

4. The United States may apply to the states to secure appropriative water rights needed to meet the multiple-use management objectives set forth by Congress in land management statutes, e.g., FLPMA, supra, and the Taylor Grazing Act, supra. [FN16] In so doing, the United States must comply with state substantive and procedural laws. [FN17]

****3** 5. In the area of water rights, FLPMA mandates the maintenance of the status quo ante in the relationship between the states and the United States. 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, (b) the right of the United States to use water for 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 substantive and procedural law for these purposes. [FN18]

6. Neither FLPMA nor the Taylor Grazing Act give the BLM an independent statutory basis for water uses which are inconsistent with the substantive and procedural requirements of state law. [FN19]

IV. THE INTERRELATIONSHIP OF FEDERAL AND STATE CONTROL OF WATER RIGHTS

In reviewing the interrelationship of federal and state law governing ***1058** water rights, the United States Constitution empowers Congress under the Property [FN20] and Commerce Clause [FN21] to control the disposition and use of water ap-

purtenant to lands owned by the United States. That power extends to water on, under, over and appurtenant to federally-owned lands in the states. [FN22] The power of the individual states to, at a minimum, promulgate and exercise non-conflicting state regulation. [FN23] Indeed, the states, as Congress clearly recognized in enacting the McCarran Amendment, [FN24] have a strong interest to regulate the water within their boundaries, including water appurtenant to federal lands. As the Supreme Court has noted "if the appropriation and use were not under the provisions of State law the utmost confusion would prevail. * * * Different water rights in the same state would be governed by different laws and would frequently conflict." [FN25] Despite the practical importance of local control of water, Congress, under the Supremacy Clause [FN26] has the ultimate power to preempt state laws regarding management and disposition of the public lands and the resources thereon, including water. [FN27] As a result, it is unlikely that state law could preclude reasonable water use by a federal agency if Congress specifies a particular federal usage. [FN28] While the Constitution may grant Congress plenary power in an area, Congress may generally defer to state control thereby delegating that authority to the states. [FN29] The Supreme Court has expressly recognized that Congress has delegated broad power to the states in regulating water resources on the public lands. [FN30] Accordingly, the ultimate issue is not the existence of authority but the exercise or delegation of that authority.

The United States' control over unappropriated non-navigable water located upon the public domain arises from retention of federal property, including the streams and lakes thereon at the time of statehood. [FN31] *1059 When the various western states were admitted to the Union, the title to the beds and waters of the navigable streams and lakes passed to the new states, with the United States retaining title to the non-navigable waters on the public domain. [FN32]

**4 Yet Congress has been said, as was earlier referenced, to have concurrently granted "exclusive sovereignty" over appurtenant non-navigable water rights when it granted statehood. In addition to the statehood acts, Congress very early on promulgated legislation which deferred to state control of water usage on the public domain. Specifically, Congress passed two statutes which, consistent with state law, recognized the rights of prior appropriators. [FN33] The statutory provisions in the 1866 and 1870 Acts had the effect of requiring water rights claimants on federal lands to comply with state water laws.

Since the appropriation system grew up partially as a consequence of and in conjunction with western states' mining laws, the statutory acknowledgment had the effect of placing the congressional imprimatur upon the water laws of the individual western states. [FN34] Thus, rather than exercising a constitutional prerogative of establishing a federal hierarchy of water rights and laws, these two statutes recognized the state substantive and procedural laws for the allocation of water resources on the public domain. This was an early signal to the States and Territories that the Federal government would yield to state water laws and naturally was an incentive to the new states to promulgate and apply their own

water laws.

Congress reaffirmed and enlarged this implicit grant of broad control over water sources to the states in passage of the Desert Lands Act of 1877. [FN35] That Act provided homesteaders with a right to water, subject to prior appropriation, for "irrigation and reclamation usages" and further provided that surplus water would be available for later appropriation. As the Supreme Court has noted, the Desert Lands Act severed the water rights from surface rights [FN36] and directed patentees of federal lands to apply under state law to acquire water rights. [FN37]

These three statutes, the Desert Lands Act, as well as the 1866 and 1871 Acts, had the effect of severing water from land on the public domain, [FN38] *1060 requiring state laws to be followed and making all non-navigable waters a part of the "publici juris" and subject to the "plenary control" of the Western States. [FN39] These statutes, which are still in effect, demonstrate the early congressional deference to state water law.

In 1902, Congress again mandated that federal agencies comply with state water laws under sec. 8 of the Reclamation Act of 1902. [FN40] Sec. 8 directs the Secretary of the Interior to abide by state law in acquiring unappropriated water for reclamation projects in the various states. This deference to state law is particularly noteworthy because the Reclamation Act was "a massive program to construct and operate dams, reservoirs and canals for the reclamation of the arid lands in 17 western states." [FN41] Yet despite the provision for substantial federal action and federal expense to develop water resources within the state, Congress nevertheless maintained its commitment to allow state control of water rights.

**5 Congress has continuously encouraged, through federal legislation, the development of state control of water within state boundaries. The four statutes cited above are merely examples of the more important early legislation. Yet, there are many other statutes which similarly express or implicitly permit the states to control water appurtenant to federally-owned lands. As the Supreme Court has noted recently, Congress has continued its deference to state law in at least 37 statutes. [FN42]

Congressional deference to states in water law is well-documented by the above-referenced Court decisions. Only in very limited instances has Congress maintained its power and not deferred to state law. For example, in *United States v. Rio Grande Dam and Irrigation Co.*, [FN43] where the Supreme Court noted that the right of the United States to restrict a state appropriation system is limited. The United States sought to enjoin an irrigation company's appropriation of water under state law because a permit had not been acquired from the Secretary of War to make a diversion from the navigable Rio Grande River. The Supreme Court held that a state in establishing its own system of water law could not, without congressional consent, "destroy the right of the United States, as the owner of lands bordering on a stream to the continued flow of its waters; so far at least as may

be necessary for the beneficial uses of the Governmental property. [FN44] In so ruling the Court upheld New Mexico's control of state water, except to the limited extent it interfered*1061 with the navigation servitude. [FN45]

Shortly after the Rio Grande Dam decision, the Court applied the "beneficial use of Government property" exception to create the reserved right doctrine in the case of *Winters v. United States*. [FN46] *Winters* involved the interpretation of an agreement between the United States and the Fort Belknap Indian Tribe to resolve a dispute over water rights between the tribes and a private appropriator. The Court found Congress' intent in creating the Fort Belknap reservation was to assist in transforming the Indians into a "pastoral and civilized people." The Court acknowledged that irrigation was necessary to fulfill the purpose of the reservation by making the lands productive. Without irrigation, the principal purpose of the reservation would have been frustrated. In holding that Congress had implicitly reserved water for the Indian reservation, the Court relied upon the rule of construction that ambiguities are to be resolved in favor of the Indians. [FN47] Only with the assistance of this rule applicable specifically to Indians did the Court ultimately conclude that the "power of the Government to reserve the waters and exempt them from appropriation under the state laws" for use on the Government property had been implicitly exercised. [FN48] The Court left intact the well-recognized congressional deference to state water laws in all but the most limited circumstances.

**6 For over half a century, the "Winters doctrine" was construed as a limited exception to the congressional deference to state control of water and applicable only to Indian water rights. [FN49] In 1963, the Supreme Court broadened the reserved rights doctrine in *Arizona v. California* [FN50] holding the "principle underlying the reservation of water rights was equally applicable to other federal establishments," specifically in that case wildlife refuges, national recreation areas, and national forests. Notwithstanding this expansion of *Winters*, the Court viewed this broadening not as a revocation or renunciation of the general deference to state water laws, but rather as an acknowledgment of Congress' power to control water where necessary to fulfill the original purpose of a reservation. In narrowly deciding the issues, the Court specifically declined to address the issue of state control of water which had not been appropriated. [FN51] That is, could Arizona exert control over all nonappropriated water appurtenant to federal lands or did some inchoate federal right (i.e., non-reserved rights) limit Arizona's power in this *1062 regard? Since the issue was specifically not addressed by the Court, *Arizona v. California* provides no judicial basis for the exercise of federal "non-reserved" water rights.

While never reviewing the issue of federal non-reserved rights, the Courts have continued to maintain a strict requirement for application of the reserved rights doctrine and clearly regard it as an exception, and not the rule, to a general deference to state law regarding appropriation and use of water. [FN52] Simply stated, there is neither a congressional nor judicial basis for the exercise of a

federal non-reserved water right.

In my opinion, this issue of "non-reserved" federal water rights was definitively and directly addressed on July 3, 1978, by the Supreme Court in two separate opinions regarding the water rights of the United States. In *United States v. New Mexico*, [FN53] and *California v. United States*, [FN54] the Court once again acknowledged the congressional deference to state water law concluding that "this congressionally mandated division between federal and state authority worked smoothly." [FN55]

In *California v. United States*, the United States sought declaratory relief to the effect that it could impound unappropriated water for reclamation purposes without regard for state substantive law. In connection with the 1902 Reclamation Act, the United States alleged that while it was required under § 8 of the Reclamation Act of 1902 to apply to the state for water rights permits for the federal project, the state could not substantially condition those permits. The United States alleged that to the extent there was unappropriated water in a source, the state must grant the United States the unconditional right to use that water. The Court, however, rejected this claim and held that the state may impose any condition on the control, appropriation, use, or distribution of water in a federal reclamation project that is not inconsistent with a congressional directive respecting the project. [FN56] The Court made a comprehensive analysis of the history of federal deference to state water law and in this regard quotes approvingly, the opinion of experts that the states, by Constitution or statute, gained absolute dominion over their non-navigable water upon their admission to the Union. The Court went on to note that:

****7** Congress 'effected a severance of all water upon the public domain not theretofore appropriated from the land itself'. * * * The non-navigable waters thereby severed were reserved for the use of the public under the laws of the states. [[FN57]] (citation omitted)

The Court thus held that the United States water use is limited until it reserves the water or complies ***1063** with the various state laws to appropriate that water, in the same manner as any other individual.

The Court also cited with approval its earlier opinion that a state has total control of water, limited only by the two exceptions, reserved rights and the navigation servitude:

The Court [in *Rio Grande Dam*] noted that there are two limitations to the states' exclusive control of its streams--reserved rights 'so far at least as may be necessary for the beneficial use of government property' and the navigation servitude. [[FN58]]

In addition to the legal basis for its opinion, the Court also acknowledged the practical necessity of having federal appropriation comply with local law in order to avoid "confusion" and "conflict." [FN59]

The New Mexico v. United States [FN60] opinion reaffirms and expands the strong statements made in California as to the scope of federal water rights. Specifically, a congressional grant of "exclusive sovereignty" to the State of all non-navigable waters (not formally reserved) is once again acknowledged by the New Mexico opinion. The New Mexico case analyzed the United States' power to claim reserved water rights in a national forest for other than an "original" purpose of the national forest. The Court initially noted the deference usually provided in the area:

Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law. [FN61]

In reviewing the United States' use and control of water before creation of the reserved rights, the Court noted that prior to the creation of the national forest reservations, Congress was of the opinion that:

the States had exclusive control of the distribution of water on public lands and reservations. [FN62]

The Court implies throughout the New Mexico opinion that the United States, without creating a reservation and thus impliedly reserving the water, had no control or means of preventing the public (or private appropriators) from appropriating all the waters in the National Forests pursuant to state laws. For example, the Court states that before the Forest Service Organic Act was passed the public had free reign to go upon the public domain and use water resources without restriction. [FN63] In other words, without the formal reservation of the land from the general public domain, the water resources upon the public domain could not be controlled by the United States without further action by Congress modifying, amending, or repealing the 1866, 1870, and 1877 Acts that gave the states the express right to control the disposition of water resources thereon.

****8 *1064** The New Mexico Court concluded that unless Congress expressly indicated to the contrary, "federal entities must abide by state water law," [FN64] and "where water is only valuable for a secondary use [on a federal reservation] * * * Congress intended that the United States would acquire water in the same manner as any other public or private appropriator." (italics added) [FN65] A clearer statement of the law could not be made.

Certainly New Mexico, supra, and California, supra, reaffirm that congressional deference to state control over water arises from the 1866, 1870, and 1877 Acts, as well as the 1902 Reclamation Act and numerous other public land use statutes enacted over the years. [FN66] The unavoidable conclusion to be reached from these cases is that Congress gave the states broad power to provide for the administration of water rights which would only be limited where necessary to accomplish the original purpose of a congressionally mandated reservation or to protect the navigation servitude. As a result of this implicit grant of power, the presumption is that state law will control all non-reserved claims unless Congress provides oth-

erwise. If Congress wishes to abandon its historical practice of deference it must explicitly exercise its power. While the Congress has retained the right to amend these laws and reassert legislative control over a portion or all of the remaining unappropriated water in a state, it has chosen not to do so. In construing land management statutes, this deference to state law rises to a presumption that the United States and its agencies must acquire water rights in accordance with state substantive and procedural law unless necessary for the original purpose of a reservation. [FN67]

V. CONCLUSION

A review of the applicable federal constitutional, legislative and judicial authorities demonstrate the power of Congress to control the usage of water appurtenant to the federal lands. The legislative and case law authorities also demonstrate congressional intent to defer control of water to the states, in all but the most limited circumstances. Congress has chosen to displace state control of water appurtenant to federal lands only when necessary to accomplish the original purpose of formal reservations. When not necessary to accomplish such original purpose, Congress has uniformly permitted and the Supreme Court has recognized state control.

Within this framework, there is an insufficient legal basis for the creation of what has been called federal "non-reserved" water rights, especially in the wake of the Supreme Court pronouncements in *United States v. California* and *New Mexico v. United States*. I must conclude therefore that there is no federal "non-reserved" water right. Federal entities, including, *1065 without limitation, the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, may not, without congressionally created reserved rights, circumvent state substantive or procedural laws in appropriating water. Rather, consistent with the express language in the *New Mexico* decision, federal entities must acquire water as would any other private claimant within the various states.

**9 Nothing in this Opinion limits federal procurement of water by other legally authorized means, if state water law prohibits the appropriation of water for the federally specified purpose. Specifically, condemnation, purchase or exchange may be used as a basis for acquiring water for use on federal lands.

WILLIAM H. COLDIRON

Solicitor

FN1. Not in chronological order.

FN1. 86 I.D. 553 (1979).

FN2. This Opinion is not intended to modify or supersede any portion of the Prior

Opinion dealing with the reserved water rights of the non-Indian land management agencies in the Department. I may further review those portions of the Prior Opinion at a future date as specific circumstances warrant.

FN3. 86 I.D. at 574-578.

FN4. 86 I.D. at 574-578, 612-616.

FN5. 86 I.D. at 615.

FN6. 86 I.D. at 577.

FN7. 86 I.D. at 571.

FN8. 86 I.D. at 615.

FN9. 86 I.D. at 574.

FN10. [43 U.S.C. § 1701 et seq. \(1976\)](#).

FN11. [43 U.S.C. § 315 et seq. \(1976\)](#).

FN12. See, D. Freudenthal, *Federal Non-Reserved Water Rights*, 15 *Land and Water L. Rev.* 66 (1980); Simms, *National Water Policy in the Wake of United States v. New Mexico*, 20 *Nat. Resources J.* 1 (1980); Gould, *Solicitor Issues Opinion on Federal Water Rights*, 12 *Rocky Mtn. Min. L. Fdn., Water L. Newsletter* 1 (No. 3 1979).

FN13. 86 I.D. at 574, 613.

FN14. 86 I.D. at 574.

FN15. 86 I.D. at 612.

FN16. 86 I.D. at 615.

FN17. Supplemental Opinion.

FN18. 86 I.D. at 614-615.

FN19. Supplemental Opinion.

FN20. U.S. Const., Art. IV, Sec. 3.

FN21. U.S. Const., Art. I, Sec. 8.

FN22. E.g., *United States v. Grand River Dam Authority*, 365 U.S. 229, 235 (1960).

FN23. *United States v. New Mexico*, 438 U.S. 697, 702 (1978); See also, note, [Federal Acquisition of Non-Reserve Water Rights after New Mexico](#), 31 *Stan. L. Rev.* 885 (1979).

FN24. 43 U.S.C. § 666; See, *United States v. Eagle County*, 401 U.S. 520 (1971); *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817-821 (1976).

FN25. *California v. United States*, supra at 667-68; See also Trelease, *Federal State Relations in Water Law*, (Sept. 7, 1971) (Legal Study No. 5 prepared for the National Water Commission); Public Land Law Review Commission, *One Third of the Nation's Land*, 144 et seq. (1970); Report of the Task Force on Non-Indian Federal Water Rights-Task Force 5(b), *President's Water Policy Implementation*, 20 (1980).

FN26. U.S. Const., Art VI, Sec. 2.

FN27. See, e.g., *Kleppe v. New Mexico*, 426 U.S. 529 (1976); see also, Discussion at 86 I.D. 562-564 and cases cited therein. But see, discussion regarding states "exclusive sovereignty over the unappropriated waters in their streams" in *California v. United States*, 438 U.S. 645, 654-55 (1978).

FN28. *Cappaert v. United States*, 426 128 (1976); *United States v. New Mexico*, 438 U.S. 696 (1978); See also, 31 *Stan. L. Rev.* 885 (1979) supra, ftnt. 23.

FN29. *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152 (1946); *United States v. Rio Grande Dam & Irr. Co.*, 174 U.S. 690, 703 (1899).

FN30. *California v. United States*, 438 U.S. 645, 654 (1978); *United States v. New Mexico*, 438 U.S. 696, 702 (1978).

FN31. 86 I.D. at pages 562-574 and cases cited therein. See also, Op. M-33969 (Nov. 7, 1950), "Compliance by the Department with State Laws Concerning Water Rights."

FN32. See, *Pollard's Lessee v. Hagan*, 3 How. 212 (1845); *United States v. California*, 332 U.S. 19, 29-30, 38 (1947); *Arizona v. California*, 373 U.S. 546, 579 (1963); Clark, *Water and Water Rights*. Vol. 2, pp. 51-52.

FN33. Act of July 26, 1866, § 9 (14 Stat. 253), re-enacted at § 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.).

FN34. *California v. United States*, supra at 656.

FN35. The Act of Mar. 3, 1877. § 1, (43 U.S.C. § 321, 1970 ed.).

FN36. *Federal Power Commission v. Oregon*, 349 U.S.C. 435 (1955).

FN37. *Cappaert v. United States*. 426 U.S. 128 (1976).

FN38. F. Trelease, *Federal State Relation in Water Law*, at 147d-47(f) (Sept. 7, 1971) (Legal Study No. 5 prepared for the National Water Commission).

FN39. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-164 (1935).

FN40. 43 U.S.C. § 372, 383 (1970).

FN41. *California v. United States*, supra at 650.

FN42. *United States v. New Mexico*, supra at 702, nt. 5.

FN43. 174 U.S. 690 (1899).

FN44. *Id.* at 703,. See, Hutchins, *Water Rights Laws in the Nineteen Western States*, Vol. [1], Ch. 21 (1977).

FN45. 174 U.S. at 709.

FN46. 207 U.S. 564 (1908).

FN47. *Id.* at 576-577, See also, *United States v. Winans*, 198 U.S. 371 (1905); *Colville Conf. Tribes v. Walton*, -- F.2d. --, -- (9th Cir., 1980).

FN48. *Id.*

FN49. *Trelease*, supra, note 38 at 105.

FN50. 373 U.S. 546 (1963).

FN51. *Id.* at 567-575.

FN52. *Cappaert v. United States*, supra; *In the Matter of the United States of America*, Water Divisions 4, 5, 6, Civil Nos. W-425, etc., (Colo. D.C., Mar. 6, 1978), appeal pending (Nos. 79-SA99 and 100, Colo. Sup. Ct.).

FN53. 438 U.S. 696 (1978).

FN54. 438 U.S. 645 (1978).

FN55. *Id.* 670.

FN56. 438 U.S. at 674, 678.

FN57. *Id.* at 657-58.

FN58. 438 U.S. at 662.

FN59. *Id.* at 667-68.

FN60. *Supra*, nt. 53.

FN61. 438 U.S. at 702.

88 Interior Dec. 1055, 1981 WL 143261 (D.O.I.)

(Cite as: 88 Interior Dec. 1055, 1981 WL 143261 (D.O.I.))

FN62. U.S. v. New Mexico, *supra*, at 718, nt. 24.

FN63. 438 U.S. at 705-706.

FN64. *Infra.* page 702.

FN65. *Id.*

FN66. 438 U.S. at 702, nt. 5.

FN67. Little, Administration of Federal non-Indian Water Rights, 27th R. Mtn. Min. Law Inst. 50.

88 Interior Dec. 1055, 1981 WL 143261 (D.O.I.)

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