Federal Non-Reserved Water Rights: Fact or Fiction

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FEDERAL NON-RESERVED WATER RIGHTS: FACT OR FICTION?

WATER LAW: A Department of the Interior Solicitor's Opinion, in the wake of recent United States Supreme Court pronouncements, concludes that there is an insufficient basis for the creation of federal "non-reserved" water rights. 88 Interior Dec. __ 1982.

INTRODUCTION

Water has always been a scarce resource in the western United States. The recent shift of population from the east and midwest to the western states will place increasing demands on already limited water supplies. Traditionally, water rights in the west have been apportioned through the doctrine of prior appropriation. Under this doctrine, persons who take water from a particular source for a "beneficial" use have priority over subsequent users during times of water shortage.

The federal government is one of the major allocators of water in the west because of its extensive land holdings in these states. Congress has generally given great deference to state substantive water law, even in cases where the government is a potential water user. Water rights which have been specifically reserved through congressional legislation constitute an exception to this general rule. Several recent Supreme Court decisions have narrowed the applicability of this reserved rights doctrine. In cases where it is not applicable, the United States has been forced to develop new theories upon which it may base its claims. One theory, the "non-reserved" water rights theory, has been controversial and a recent Department of Interior Solicitor's Opinion has argued that the theory has no legal basis. A case which could be the ultimate test for the theory is now in progress in Wyoming. If the theory is not valid, the federal government will have to develop new approaches for the fulfillment of their future water needs in the west.

FEDERAL RESERVED WATER RIGHTS

The property clause of the United States Constitution vests title to all lands acquired by cession from other nations in the United States with

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1. The Congress shall have the 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.

U.S. Const. art. IV § 3 cl.2.
the exception of lands which have been disposed of in accordance with
an Act of Congress.\textsuperscript{2} Ownership of this land carries with it the right to
utilize and dispose of natural resources which are part of the land, in-
cluding the right to utilize and dispose of waters appurtenant to these
public lands.\textsuperscript{3}

Congress delegated control of water usage on this land to the states
through legislation enacted in the late 1800s.\textsuperscript{4} The western states chose
to allocate their scarce water resources through the adoption of the doctrine
of prior appropriation, which had grown out of local mining customs.\textsuperscript{5}

To perfect a water right under the prior appropriation doctrine, the user
must prove that the water has been applied continuously to a beneficial
use from the date of its first application. When water supplies are insuf-
icient to satisfy all claims, users with later priority dates must give up
water to supply those with earlier priority dates. Generally, each state
has permit requirements and definitions of beneficial use which must be
met to obtain a valid water right.

Even though Congress granted control over water rights to the states,
the United States retains a certain amount of power in special situations.
The Supreme Court in \textit{Winters v. United States}\textsuperscript{6} explicitly recognized an
exception to the congressional grant of state control over water on the
public domain. In \textit{Winters}, the Court found congressional intent to trans-
form the Indians into a "pastoral and civilized people" in the creation of
the Fort Belknap Indian Reservation.\textsuperscript{7} The Court acknowledged that water
for irrigation was necessary to fulfill this purpose by making the lands
productive. Thus, the Court held that Congress had implicitly reserved
the right to an amount of water sufficient to support the primary purpose
of the creation of the reservation. Under this limited exception, the Court
found that federal "reserved water rights were exempt from the require-
ments of state law."\textsuperscript{8}

In 1963, the Supreme Court broadened the reserved rights doctrine in
\textit{Arizona v. California}.\textsuperscript{9} In that case, the Court held that this exception,
which had previously only been applied to Indian water rights, also
extended to other federal reserves. These reserves include wildlife ref-
geuges, national recreation areas, and national forests. The Court examined
the congressional intent behind legislation which delegates authority over
water resources to the states. It thereby concluded that whatever powers

\begin{footnotes}
\footnote{2. United States v. Grand River Dam Authority, 363 U.S. 229 (1960).}
\footnote{3. \textit{Id.} at 235.}
\footnote{4. 43 U.S.C. § 661 (1976) (originally enacted as Acts of July 26, 1866 § 9 and July 9, 1870
§17); 43 U.S.C. § 321 (1976) (Desert Lands Act of 1877).}
\footnote{5. \textit{Coffin v. Left Hand Ditch Co.}, 6 Colo. 443 (1882).}
\footnote{6. 207 U.S. 564 (1908).}
\footnote{7. \textit{Id.} at 576.}
\footnote{8. \textit{Id.} at 577.}
\footnote{9. 373 U.S. 546 (1963).}
\end{footnotes}
were given to the states as a result of this legislation, "Congress did not intend to relinquish its authority to reserve unappropriated water in the future for use on appurtenant lands withdrawn from the public domain for specific federal purposes."10

In more recent cases, the Supreme Court has made it clear that the reserved rights doctrine comprises a limited exception to the general deference afforded to state law regarding use and appropriation of water.11 In its application of the reserved rights doctrine, the Court has emphasized that Congress reserved only the amount of water necessary to fulfill the purpose of the reservation.12 In United States v. New Mexico, the Court stated,

Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.13

Following this reasoning, the Court held that water in the Gila National Forest had been reserved for only two purposes, "to preserve the timber in the forest or to secure favorable water flows" and that the water had not been reserved for "aesthetic, recreational, wildlife-preservation, and stockwatering purposes."14

The Court's narrow definition of the reserved rights doctrine confines its application to the minimal uses required to carry out the primary purposes of a particular congressional reservation of the public domain. This narrow definition has forced federal agencies to develop a new theory on which to base claims of water rights for secondary uses on the public domain. The remainder of this article discusses this non-reserved or appropriative theory of federal water rights acquisition.

FEDERAL NON-RESERVED WATER RIGHTS

Development of the Federal Non-Reserved Water Right

In 1979, the office of the Solicitor of the Department of the Interior announced the existence of a "non-reserved" federal water right.15 The

12. 426 U.S. at 141.
13. 438 U.S. at 702.
14. Id. at 707, 708.
Solicitor's Opinion (hereinafter "Krulitz Opinion") and a Supplemental Solicitor's Opinion issued on January 16, 1981 (hereinafter "Supplemental Opinion"), contained an analysis of the nature and extent of non-Indian federal water rights. The opinions presented an argument, apart from reserved rights, which the National Park Service, Fish and Wildlife Service, Bureau of Land Management, and Bureau of Reclamation could use in support of water rights claims on public lands under their control.

Non-reserved rights claims would be based on the doctrine of prior appropriation, unlike reserved rights claims, which were based on legislative intent. Non-reserved rights would thereby be similar to the substantive water law of the western states, based on the doctrine of appropriation and application of the water to beneficial use. A conflict with state law could arise because the claims are arguably not constrained either by state definitions of appropriation and beneficial use, or by compliance with state permit procedures. For example, an agency could argue that it had a valid claim to in-stream flow rights even in states not recognizing in-stream flow as a beneficial use.

The Solicitor General argued that the property clause carries with it the right to use and dispose of water appurtenant to the public domain, and that the supremacy clause permits the federal government to exercise this prerogative regardless of state law.20

The Supplemental Opinion outlined two cases in which the non-reserved rights doctrine would be applicable.19 In the first situation, water has been historically used by federal agencies for consumptive beneficial use recognized by state law, but the federal government has not conformed with filing, permitting or other administrative procedures prescribed by state law. The Supplemental Opinion stated these claims would have only a de minimus effect because most of these uses had been integrated into the normal course of water usage in their various locations.

The second situation involved claims in which the federal use did not conform to all substantive requirements of a particular state law. The Solicitor General argued that an inability to press similar claims in all states would mean that, "the federal land manager would have to manage the same kind of federal lands significantly differently in different states, depending on local law."20 For example, management policies in Colorado, where in-stream flows are recognized as a beneficial use, would

16. U.S. Const. art. IV § 3 cl.2.
17. "This Constitution, and the Laws of the United States which shall be made in Persuance thereof . . . shall be the supreme Law of the Land. . . ."
U.S. Const. art. VI cl.2.
necessarily be different from those used in Wyoming, where in-stream flows are not considered to be a beneficial use.

**Problems With Federal Non-Reserved Rights**

Claims of federal non-reserved water rights have generated concern on the part of water policy makers and governmental authorities throughout the West. State officials argue that federal appropriation of water rights without regard to state law could seriously affect their ability to effectively plan for future control of this vital resource. The Supreme Court outlined the possible extent of the effect in *United States v. New Mexico*. The Court noted there that federally owned land comprises approximately 46 percent of the western states. The Court also noted that the amount of water originating and flowing through those federal reservations comprises about 60 percent of the average annual water yield in the western states since federal reservations normally lie in the uplands of the states.\(^1\) Successful claims of "non-reserved" water rights with priority dates relating back to passage of early federal land control acts could therefore seriously impair the rights of private water users throughout the western states. Federal claims for in-stream flows arguably might not have a large effect on downstream users. One possible problem could arise in states which do not allow the transfer of a water right if it impairs the rights of other users in the system. In that case, the transfer of a water right located downstream from a federal reservation to a point upstream could decrease the amount of water flowing through the reservation. The result would be a restriction on the transferability of such rights.

Governor Ed Herschler of Wyoming outlined another managerial problem arising from the "non-reserved" rights doctrine in a speech presented to western governors at their annual meeting in September, 1981: "Given the broad directives of [the Federal Land Policy Management Act] and the Taylor Grazing Act, it is impossible to rationally assign a stream flow amount to the accomplishment of these directives and, therefore, impossible to integrate these claims into the regimen of water use and development in the watershed."\(^2\)

The conflict between the federal government and the western states is clear. Federal officials feel that they must be able to manage federally owned lands in all states with a single uniform policy. They also would argue that the supremacy clause of the United States Constitution empowers them to carry out such a policy. State officials feel that claims of water rights which do not conform to substantive or procedural state law

\(^1\) \[438 U.S. 645, 699, n.3 (1978).\]

constitute federal intervention into a field where Congress has historically delegated control to the individual states. The states will also argue that it is impossible for them to formulate a coherent water policy if that policy does not apply equally to all lands within the state, including federal lands. Obviously, no simple solution to this problem exists. The partial answers may be political as well as judicial.

Current Attitude Toward Federal Non-reserved Water Rights—The Coldiron Opinion

Under a new administration in 1981, the Solicitor’s office of the Department of the Interior undertook a comprehensive review of the “non-reserved” water rights doctrine expressed in the Krulitz Opinion. Solicitor Coldiron found several reasons to support this review of the past opinion,

There is great uncertainty concerning the practical application, if any, of the non-reserved rights theory by 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 water rights dependent on water sources that are on, under, over or appurtenant to federal lands.

In this opinion (hereinafter “Coldiron Opinion”), the Solicitor examines the interrelationship between federal and state law governing water rights. The opinion first recognizes that Congress has the power to control the disposition and use of water appurtenant to federally owned land in the states under both the property and commerce clauses of the United States Constitution.

Solicitor Coldiron indicates that the real issue in federal non-reserved water rights is not the existence of authority, but the exercise or delegation of that authority. Although the federal government retained the title to non-navigable waters on the public domain when the states were admitted to the union, Congress delegated control of water usage to the states through the passage of several acts in the mid-1800s. Through these acts, Congress recognized the rights of private persons to appropriate non-navigable water on the public domain through compliance with “local customs, laws and decisions of the courts.”

23. 88 Interior Dec. ___. (Coldiron Opinion at 3). Another important reason for the review was pressure exerted on the new administration by western governors.
24. See supra notes 16-17.
25. 88 Interior Dec. at ___. (Coldiron Opinion at 5).
26. See supra note 4.
Much of the controversy surrounding the non-reserved rights doctrine arises from the debate over the effect Congress intended these and other acts to have on federal control of water on the public domain. Those in favor of the theory argue that the right to all unappropriated water resides with the federal government. This conclusion is reached through a narrow interpretation of the federal acts. Proponents claim that no right passes from the federal government to the states, except that which is conveyed by clear and explicit language. They argue further that any ambiguities in the language of the acts should be resolved in favor of the federal government.

Solicitor Coldiron, however, finds in these acts, as well as in more than 30 additional statutes, a continuing congressional intent to recognize state substantive and procedural law in the allocation of water resources on the public domain. He notes that this adherence to state law has been established in lieu of a federal hierarchy of water rights and laws.

The Coldiron Opinion acknowledges the existence of exceptions to the federal grant of control over water to the states. The most notable is the Winters reserved rights exception. The opinion states, however, that two 1978 Supreme Court cases, California v. United States and United States v. New Mexico, strictly limit this exception and directly refute the existence of a federal non-reserved water right.

In California v. United States, the federal government argued that it could impound unappropriated water for reclamation purposes without regard for state substantive law. Even though the United States had applied for a state permit, the federal government argued that the state could not substantially condition the permits and that, to the extent there was unappropriated water in a source, the state must grant the unconditioned right to use that water to the United States. The Court rejected that argument and held that a state could impose any restriction on the appropriation of water not inconsistent with a direct congressional mandate regarding a federal reclamation project. The Court in California found that state control over water resources was limited by only two exceptions: reserved rights and the navigation servitude.

The Court in United States v. New Mexico states, "where water is only available for a secondary use [on a federal reservation] . . . Congress intended that the United States would acquire water rights in the same manner as any public or private appropriator." (emphasis added by

30. 88 Interior Dec. at (Coldiron Opinion at 6).
31. 438 U.S. at 657.
34. 88 Interior Dec. at (Coldiron Opinion at 11), quoting 438 U.S. at 702.
Solicitor). The Coldiron Opinion found that this language refuted the existence of a federal non-reserved water right.

As a result of the above considerations, Solicitor Coldiron finds,

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 otherwise.\(^3\)

Thus, the Coldiron Opinion refutes the non-reserved water rights theory contained in the earlier Krulitz Opinion.

Application of the Doctrine—the Big Horn Adjudication

The existence of non-reserved water rights has become an issue in a recent Wyoming case (hereinafter “The Big Horn Adjudication”).\(^3\) In that case, the federal government claimed the right to use a large amount of water in the Big Horn River Basin in Wyoming. The federal government argued that it possessed water rights which had been implicitly reserved in the Taylor Grazing Act and the Federal Land Policy Management Act. The Wyoming District Court did not agree and dismissed those reserved rights claims with prejudice. The United States was therefore forced to defend its claims on the basis of the non-reserved rights doctrine.\(^3\)

Prior to the announcement of the Coldiron Opinion, the state of Wyoming moved to have non-reserved rights claims dismissed for failure to state a claim upon which relief could be granted.\(^3\) The state based its argument in favor of the dismissal on the delegation of authority to the states through the various acts passed in the middle 1800s in the same manner as that outlined in the Coldiron Opinion. The state focused specifically on the Desert Lands Act, which states:

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\text{all surplus water over and above such actual appropriation and use,}
\text{together with the water of all lakes, rivers, and other sources of water 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. (emphasis added by Wyoming)}\] \(^{39}\)

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\(^{35}\) 88 Interior Dec. at _ [Coldiron Opinion at 11].

\(^{36}\) In re The General Adjudication of all Rights to Use Water In the Big Horn River System and all Other Sources, State of Wyoming, Civil No. 4993 (5th D. Wyo., filed March 6, 1980).

\(^{37}\) James Merrill, Phone Conversation, Oct. 30, 1981.

\(^{38}\) Wyoming Brief at 153 (Big Horn Adjudication).

The state argued that this wording "not only recognizes state rights but also affirmatively argues against the existence of any federal appropriation doctrine." Following the announcement of the Coldiron Opinion, the state of Wyoming renewed its motion to dismiss the federal non-reserved rights claims and requested that the special master assigned to the case consider the opinion before ruling on the motion.

The special master is not bound by the findings in the Coldiron Opinion. In this case, however, the Opinion might be influential because it reflects the policy of the present administration and follows the trend towards returning power previously exercised by the federal government to the states. The opinion's greatest effect could be that it will dissuade other divisions of the Department of the Interior from pressing claims for non-reserved water rights. At this point in the case, the Justice Department has failed to indicate its position on this question (i.e. through the amendment of the pleadings).

CONCLUSION

The Wyoming district court in the Big Horn Adjudication will probably leave undecided the question of who has ultimate control over unappropriated waters on the public domain. On appeal, this case may lead to a definitive decision on the existence of federal non-reserved water rights. The solution may ultimately hinge on a determination of whether the state or the federal government has a greater interest in consistent management of water policy.

The states base their argument on the impossibility of developing a coherent water policy if the federal government is allowed to appropriate water without regard for substantive state law. The states will also argue that the non-reserved water rights doctrine constitutes federal intervention into an area which has traditionally been within the states' control.

The federal government will argue that its interest in having a uniform water management policy for all publicly owned lands throughout the West should be the overriding consideration in the determination of this issue. In many cases, the government may also argue that its use has been integrated into the total regimen of water use in the area and that granting water rights in these cases would not have a great effect on the water usage of the community.

40. Id.
41. Supplemental Wyoming Brief at 2.
42. See supra note 22.
43. Wyoming Brief at 158.
44. 86 Interior Dec. at 576.
Alternative methods exist for the federal government to obtain water rights. The government may conform to state procedural law and receive a water right in the same manner as any other private appropriator. The government could also obtain rights by purchase and transfer or by condemnation. The government might possibly argue adverse possession for some of its historical uses, although most states would probably prohibit this approach.

If the courts follow the present philosophy of a return of power from the federal government to the states, they quite likely will rule against the existence of a federal non-reserved water right. If the courts do find that such a right exists, its impact could be limited. The amount of unappropriated water remaining in the West is small. The doctrine of non-reserved water rights applicable to the acquisition of unappropriated water on the public domain may therefore be limited in the litigation of historic uses of water on previously reserved public land.

GARY K. KING