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OUTLINE

WATER RIGHTS FOR WESTERN MINERAL DEVELOPMENT
ON PUBLIC LANDS

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FEDERAL LANDS, LAWS AND
POLICIES AND THE DEVELOPMENT
OF NATURAL RESOURCES

THE UNIVERSITY OF COLORADO SCHOOL OF LAW

FEDERAL WATER RIGHTS FOR WESTERN MINERAL DEVELOPMENT ON PUBLIC LANDS

by

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I. RELATIONSHIP BETWEEN MINERAL DEVELOPMENT ON THE PUBLIC LANDS AND WATER RIGHTS

A. Coal, Oil and Gas, Oil Shale and Geothermal resources located on the public domain may be exploited by private individuals provided a lease from the Department of Interior is obtained.

B. The general assumption has been that a federal leasee must secure the water necessary to extract these minerals by perfecting a water right under state law. *Andrus v. Charlestone Products*, 436 U.S. 604 (1978).

C. However, this assumption is now open to question for four reasons:

1. It is argued that the region-wide impacts of accelerated energy development in the west call for a new water policy which makes clear macro allocations between mineral development and non-mineral uses, primarily agricultural and environmental uses. Should such a policy be formulated, the federal government is likely to assert a substantial interest in shaping the policy, despite the fact that the 1977-78 Carter Administration Water Policy Initiatives seem to have been a failure.

2. The federal government has a limited class of proprietary rights which it may seek to expand in the future within the confines of Supreme Court decisions and political constraints.

3. Federal environmental standards imposed under the Surface Mining Control and Reclamation Act of 1977 may have substantial impacts on traditional state-supervised water allocation patterns.

4. Indian tribes claim substantial amounts of water which may be available for energy development. Indian rights are defined by federal substantive law, and the Bureau of Indian affairs must supervise negotiations between the tribes and energy developers.

II. THE COUNTOURS OF AN ENERGY AGRICULTURE/ENVIRONMENT WATER ALLOCATIO POLICY

A. Harte and El-Gassier, Energy and Water, 199 Science, February 10, 1978 p. 623, 633 have argued:

The degree of dependence of energy development on freshwater hinges on a number of unknown factors: the extent to which water conservation practices, including water pollution treatment, are carried out in coal-conversion plants and mining operations; the economic feasibility of dry cooling or cooling with agricultural wastewater; the economic feasibility of desalination; the results of further research on groundwater and its management as a renewable resource rather than as a commodity to be mined and lost; the results of further experience with land reclamation, especially in areas hard to reclaim such as the northern Great Plains; and the feasibility of piping seawater inland for use in cooling power plants. The consequences to society of use of freshwater for energy will depend also on what the future demand will be in competing sectors of the water economy such as agriculture, municipal use, and industry. Moreover, decisions on acceptable limits of water use for energy will require greater understanding of rivers, lakes, and estuaries and greater knowledge of climatic variability.

Resolving these uncertainties will not be easy. Information on biological and climatic constraints is likely to be especially elusive. Yet planning must proceed, even in the face of uncertainty. Water constraints on energy development are sufficiently great to warrant far more attention. Two broad and urgent needs are identified. First is the need to develop adequate criteria for acceptable water consumption based on considerations of ecosystem balance, human well-being, nonuniform distribution of water, and the vicissitudes of its abundance under a capricious climate. Second is the need to set energy policy and water management on a course compatible with the criteria that are chosen. That course is certain to be characterized by a vital and enormous role for energy and water conservation.

B. Important References

1. Environmental Protection Agency, Energy From the West, April, 1980.
2. Plotkin, Gold and White, Water and Energy in Western Coal Lands, 15 Water Resources Bulletin 94 (1979).
3. Abbey, Water Use for Coal Gasification - How Much Water is Appropriate? Informal Report LA - 8060 MS, Los Alamos Scientific Laboratory, October, 1979.
4. Office Technology Assessment, The Direct Use of Coal (1979).

III. FEDERAL PROPRIETARY RIGHTS AS A SOURCE OF WATER FOR MINERAL DEVELOPMENT

A. The federal Government may claim three sources of proprietary water rights to water which arises on public lands or indian reservations for use on public lands or indian ressevatons. In addition, the federal government has the power to condem water rights for any valid Congressional purpose which includes all mineral development. See Machmeier, Federal Acquisition of Non-Reserved Water Rights After New Mexico, 31 Stan. L. Rev. 885 (1979). The three sources of federal proprietary rights are:

1. The creation of an Indian reservation by treaty, executive order or statute carries with it, by implication a reservation of sufficient quantities of water to fulfill the purposes of the reservation. *Winters v. United States*, 207 U.S. 564 (1908). The priority date is the date of the reservation, not the date of initiation of the use.
2. Reserved rights extend to the withdrawal and reservation of public lands for water-related uses which benefit the public generally. *Arizona v. California*, 373 U.S. 546 (1963)

and Cappaert v. United States, 426 U.S. 128 (1976). The priority date is the date of the withdrawal not the date of initiation of use and the federal government is not bound by state definitions of beneficial use.

3. The Solicitor of the Department of the Interior issued an Opinion, M- 36914, 86 Interior Dec. _____ (1979), which asserts the right of various agencies to appropriate unappropriated water arising on the public domain to carry out federal statutes imposing management duties on public land management agencies.

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

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.

(p. 15-16)

a. The Opinion has been widely criticized on the ground that it confuses the question of Congressional power with Congressional intent. See Simms, National Water Policy in the Wake of United States v. New Mexico, #20 Natural Resources J. 1 (1980); Comment, Federal-Non-Reserved Water Rights, 15 Land and Water L. Rev. 67 (1980); and Tarlock and Fairfax, Federal Water Rights: A Case of "Paper Over-Appropriation", Oregon Law Review forthcoming.

b. The scope of federal non-reserved rights have been restricted by the exercise of discretion by the current Secretary of Interior, but the future of this doctrine cannot be fully predicted. Letter from Secretary of the Interior, Cecil B. Andrus to the Honorable Scott M. Matheson and Ed Herschler, February 4, 1980.

IV. LIMITATIONS ON THE USE OF NON-INDIAN FEDERAL PROPRIETARY RIGHTS FOR ENERGY DEVELOPMENT.

A. There are three major limitations on the use of federal reserved rights and federal non-reserved rights for energy development. These are (1) Supreme Court Doctrines (2) federal agency policy and (3) Congressional restrictions on the assertion of federal proprietary rights.

1. Federal Non-Indian Reserved Right Claims were limited in *United States v. New Mexico*, 438 U.S. 696 (1978) which sets forth a strict two part test for the assertion of non-Indian reserved rights: (1) an appurtenant water right must be necessary to prevent the frustration of a water-related withdrawal and (2) the use must be for a primary not secondary purpose.

2. The implications of New Mexico for energy development seem to be that non-Indian reserved rights may not be claimed by the federal government for federal development of energy resources on public lands, e.g., naval oil shale reserves, but not energy development on public lands by federal leasees. This is consistent with the general understanding that non-Indian reserved rights are limited to water necessary to support public land reservations which benefit the public generally rather than to allow the beneficiaries of federal disposal policies to avoid state water law.

3. Federal policy has not been completely formulated at this time but the Solicitor's Opinion, M- 36914, declined to assert reserved rights for oil shale reserves withdrawn under Executive Order 5327 (April 15, 1930) except for investigation, examination and classification of the Shale. The Department of Energy, however, claims extensive reserved rights for naval oil shale development.

4. Congress has so far declined to use its theoretical absolute powers to preempt state water (both prospectively and retroactively) to provide coal and other energy leasees with federal rights. See H.R. 96- 692 Part I (Coal Pipeline Act 1979) rejecting federal appropriation of unappropriated waters within a state. The Priority Energy Act of 1980 requires that all priority energy projects must obtain water pursuant to state law. See explanation in S. Rep. 96-331, 96th Cong., 1st Sess. 40-41 (1979).

V. INDIAN WATER RIGHTS AND ENERGY DEVELOPMENT

A. Indians are asserting claims to substantial amounts of water under the Winters doctrine. Although the theoretical basis of the Indian's claims to substantial amount of western waters is somewhat difficult to justify, it is unlikely that any court will overrule Winters. There are four major uncertainties surrounding Indian water rights claims which present problems for energy developers. These are:

1. The scope of the right. Courts have defined Indian water rights in terms of potential irrigable acreage, *Arizona v. California*, 373 U.S. 546 (1963) and decree, 376 U.S. 340 (1964) but *United States v. New Mexico* suggests that the Indians could be limited to water needs in existence

at the time of the creation of the reservation. Many tribes now claim rights under the theory that Winters not grant the tribes anything but confirmed aboriginal rights that they already possessed. See Merrill, Aboriginal Water Rights, 20 Natural Resources J. 45 (1980).

2. Can Indian water rights be (a) leased for energy development on the reservation by tribal leasees and (b) transferred for off-reservation development by federal or private leasees. It has been argued that Indian water rights are limited to support the way of life of the tribe at the time the reservation was created and thus cannot be transferred, Palma II, Considerations and Conclusions Concerning the Transferability of Indian Water Rights, 20 Natural Resources J. 91 (1980).

a. The Supreme Court has held that Indian allotments and appurtenant water rights may be transferred to non-Indians, *United States v. Powers*, 305 U.S. 527 (1939), but,

b. *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320 (E.D. Wash. 1978) reaches a contrary result. But see *United States and Klamath Indian Tribes v. Adair*, 478 F. Supp. 336 (D. Ore. 1979). See generally Dellwo, Recent Developments in the Northwest Regarding Indian Water Rights 20 Natural Resources J. 101 (1980).

3. The power of Indians to negotiate settlements with states, the federal government or energy developers seems well established under the compact clause. However, Indian agreements are strictly construed in favor of the tribe and federally approved concessions are subject to vague

fiduciary duties imposed on the federal government by its trusteeship over Indians. These problems are important since Indian water claims take the form of waivers of present use in favor of a present claim to be put to use at a later date, and effective use of Indian waters may require future federal financing. Examples of Indian negotiation include:

a. Navajo Indian Irrigation Project, 43 U.S.C. §§615ii-615yy (1964).

b. Ute Indian Compact, S.B. 64 (Utah Legislature, 1980)

4. As a result of the 1977-78 Presidential Water Policy Initiatives, proposals are pending within the federal government to encourage the quantification of Indian rights, but tribal objections are likely and the effectiveness of proposed implementation schemes is open to question. See Note, Indian Reserved Water Rights: The Winters of Our Discontent, 88 Yale L.J. 1688 (1979).

B. References

1. Bloom, Indian Paramount Rights Water Use, 16 Rocky Mt. Min. L. Inst. 631 (1977).

2. Pelcyger, Indian Water Rights: Some Emerging Frontiers, 21 Rocky Mt. Min. L. Inst. (1975)

3. Abrams, Indian Water Rights and the Narrowing Scope of Federal Jurisdiction, 30 Stan. L. Rev. 1111 (1978).

4. Clyde, Special Considerations Involving Indian Rights, 8, Natural Resources Lawyer 237 (1975).

VI. FEDERAL ENVIRONMENTAL CONTROLS AND WESTERN WATER LAW

A. Pursuant to the Surface Mining Control and Reclamation Act of 1977, the Department of the Interior has the power to enact regulations which provide for the preservation of the hydrologic balance of an area. 30 U.S.C. §1200 (b) (3).

B. 30 C.F.R. §715.17, amended 44 Fed. Reg 77451, December 31, 1979 provides:

§ 715.17 Protection of the hydrologic system.

The permittee shall plan and conduct coal mining and reclamation operations to minimize disturbance to the prevailing hydrologic balance in order to prevent long-term adverse changes in the hydrologic balance that could result from surface coal mining and reclamation operations, both on- and off-site. Changes in water quality and quantity, in the depth to ground water, and in the location of surface water drainage channels shall be minimized such that the postmining land use of the disturbed land is not adversely affected and applicable Federal and State statutes and regulations are not violated. The permittee shall conduct operations so as to minimize water pollution and shall, where necessary, use treatment methods to control water pollution. The permittee shall emphasize surface coal mining and reclamation practices that will prevent or minimize water pollution and changes in flows in preference to the use of water treatment facilities. Practices to control and minimize pollution include, but are not limited to, stabilizing disturbed areas through grading, diverting runoff, achieving quick growing stands of temporary vegetation, lining drainage channels with rock or vegetation, mulching, sealing acid-forming and toxic-forming materials, and selectively placing waste materials in backfill areas. If pollution can be controlled only by treatment, the permittee shall operate and maintain the necessary water-treatment facilities for as long as treatment is required.

(a) *Water quality standards and effluent limitations.* All surface drainage from the disturbed area, including disturbed areas that have been graded, seeded, or planted, shall be passed through a sedimentation pond or a series of sedimentation ponds before leaving the permit area. Sedimentation ponds shall be retained until drainage from the disturbed areas has met the water quality requirements of this section and the revegetation requirements of § 715.20 have been met. The regulatory authority may grant exemptions from this requirement only when the disturbed drainage area

within the total disturbed area is small and if the permittee shows that sedimentation ponds are necessary to meet the effluent limitations of this paragraph and to maintain water quality in downstream receiving waters. For purpose of this section only, disturbed area shall not include those areas in which only diversion ditches, sedimentation ponds, or roads are installed in accordance with this section and the upstream area is not otherwise disturbed by the permittee. Sedimentation ponds required by this paragraph shall be constructed in accordance with paragraph (e) of this section in appropriate locations prior to any mining in the affected drainage area in order to control sedimentation or otherwise treat water in accordance with this paragraph. Discharges from areas disturbed by surface coal mining and reclamation operations must meet all applicable

(h) *Ground water.* (1) *Recharge capacity of reclaimed lands.* The disturbed area shall be reclaimed to restore approximate premining recharge capacity through restoration of the capability of the reclaimed areas as a whole to transmit water to the ground water system. The recharge capacity should be restored to support the approved postmining land use and to minimize disturbances to the prevailing hydrologic balance at the mined area and in associated offsite areas. The permittee shall be responsible for monitoring according to paragraph (h)(3) of this section to ensure operations conform to this requirement.

(2) *Ground water systems.* Backfilled materials shall be placed to minimize adverse effects on ground water flow and quality, to minimize offsite effects, and to support the approved postmining land use. The permittee shall be responsible for performing monitoring according to paragraph (h)(3) of this section to ensure operations conform to this requirement.

(3) *Monitoring.* Ground water levels, infiltration rates, subsurface flow and storage characteristics, and the quality of ground water shall be monitored in a manner approved by the regulatory authority to determine the effects of surface coal mining and reclamation operations on the recharge capacity of reclaimed lands and on the quantity and quality of water in ground water systems at the mine area and in associated offsite areas. When operations are conducted in such a manner that may affect the ground water system, ground water levels and ground water quality shall be periodically monitored using wells that can adequately reflect changes in ground water quantity and quality resulting from such operations. Sufficient water wells must be used by the permittee. The regulatory authority may require drilling and development of additional wells if needed to adequately monitor the ground water system. As specified and approved by the regulatory authority, additional hydrologic tests, such as infiltration tests and aquifer tests, must be undertaken by the permittee to demonstrate compliance with paragraph (h) (1) and (2) of this section.

(i) *Water rights and replacement.* The permittee shall replace the water supply of an owner of interest in real property who obtains all or part of his supply of water for domestic, agricultural, industrial, or other legitimate use from an underground or surface source where such supply has been affected by contamination, diminution, or interruption proximately resulting from surface coal mine operation by the permittee.

C. Hydrologic balance requirements may give groundwater surface water holders greater rights than they now possess under the law of prior appropriation, and thus coal developers may be forced to purchase federally-defined state water rights.