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Federal Nonreserved Water Rights

Frank J. Trelease

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FEDERAL NONRESERVED WATER RIGHTS

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I. THE BASIC THEORY

"If a constitutionally enacted statute gives an agency of the United States the power to perform a federal function on any federal land in any state, ... and that function requires the use of water, no state's law can block or limit the use of the water or the acquisition of a water right." F. Trelease, *Federal-State Relations in Water Law*, 147m (1971).

II. EXAMPLES AND TYPES OF FEDERAL NONRESERVED WATER RIGHTS

A. "Water rights assertable by federal agencies [include]... 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 act of Congress. Such rights date 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." C. Martz, *Supplement to Solicitor Opinion No. M-36914*, Jan. 16, 1981.

1. The water right for Hoover Dam: The Boulder Canyon Project Act of December 21, 1928, authorizes the Secretary of the Interior to "construct, operate and maintain a dam and incidental works...adequate to create a storage reservoir of a capacity of not less than 20 million acre feet of water...[for the stated purposes of] controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for delivery of the stored waters thereof, for reclamation of public lands and other beneficial uses... and generating electrical power,subject to present perfected rights." 45 Stat.1057 (1928), 43 U.S.C.A. §617.

"[Arizona's] statutes prohibit the construction of any dam whatsoever until written approval of plans and specifications shall have been obtained from the state engineer....The United States may

perform its functions without conforming to the police regulations of a state....If Congress has power to authorize the construction of the dam and reservoir, Wilbur [the Secretary] is under no obligation to submit the plans and specifications to the state engineer for approval. And the federal government has the power to create this obstruction in the river for the purpose of improving navigation if the Colorado River is navigable." Arizona v. California, 283 U.S. 423 (1931).

2. Denison Dam, on the Red River between Texas and Oklahoma: "Since the construction of this dam and reservoir is a valid exercise by Congress of its commerce power, there is no interference with the sovereignty of the state. And the suggestion that this project interferes with [Oklahoma's] own program for water development and conservation is likewise of no avail. That program must bow before the 'superior power' of Congress." Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941).
- B. "Water rights assertable by federal agencies [include].... 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...the priority date vests as of the historic date of first use." Martz, supra.
1. The campground pump.
 2. Stockwater wells and ponds.
- C. "Instream flows... FLPMA requires BLM to manage the public domain lands for 'multiple use' and dictates that the land-use plans to be developed for the public lands include provisions for the protection and enhancement of such things as fish and wildlife resources and scenic values. If Congress' management directives are to be effectively carried out, water is required for human and fish and wildlife consumption at such places as recreation areas, concession operations, wildlife watering and feeding areas, and for non-consumptive uses to maintain such things as fish and wildlife habitats, scenic values and areas of critical environmental concern." L. Krulitz, Solicitor's Opinion No. M-36914 (June 25, 1979).

1. United States' Statement of Claims, filed in In re General Adjudication of All Rights to Use Water in the Big Horn River System, District Court for the Fifth Judicial District, County of Washakie, State of Wyoming (1980): "Fisheries and wildlife habitats: Priority dates: January 28, 1934 [Taylor Grazing Act] and October 21, 1976 [FLMPA]: The United States claims the right to maintain the in-stream flows set forth in Attachment A to preserve and enhance the fisheries and wildlife habitat on federal lands...Attachment A. Stream: Big Horn River...cfs: 600...Streams: Tributary of Mud Creek, T.43N, R.91W, S.25. cfs: 1. Tertiary tributary: Mud Creek. Secondary tributary: Nowater Creek [etc. for 17 pages]."
2. "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 for food, habitat and food for fish, wildlife and domestic animals: timber production, recreation and mining to name a few. However,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 equally applicable to the Taylor Grazing Act." Martz, supra II.A.

III. HISTORICAL DEVELOPMENT

- A. The marriage of reserved rights and the environmental movement: "If the waters on the public domain are thrown open indiscriminately for such use, misuse, or non-use that may be made of them under state recognized reservations as well as under state recognized rights based on actual use, what can we expect for the future of millions of acres of national forests, parks, grazing lands, highland recreation areas, water storage programs, water, land and wildlife conservation plans? How many millions of acres needing reforestation, resodding, water for recreational development, water for all the needs that can be anticipated for millions of acres held in trust by the United States for future generations of Americans may lay barren and eroded?" Statement of Nicholas Katzenbach, Deputy Attorney General, Hearings on S.1275, before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs 39, 88th Cong. 2d Sess. (1964).

B. The National Water Commissioner's attempted solution:

"The reservation doctrine is a financial doctrine only; it confers no power on the federal government that it does not otherwise enjoy....What the reservation doctrine does is to empower the taking of water without compensating prior established users for impairment of their supply....The United States, in making use of water and in constructing, administering and operating any project or program involving...the use of water, should proceed in conformity with state laws relating to the appropriation, diversion and use of water...subject to two exceptions...(2) it should not apply where law conflicts with the accomplishment of the purposes of a federal program or project." Water Policies for the Future, 462, 462 (1973).

C. Adjudication and limitation of reserve rights.

"Petitioner contends that Congress intended to reserve minimum instream flows for aesthetic, recreational, and fish-preservation purposes. An examination of the limited purposes for which Congress authorized the creation of national forests, however, provides no support for this claim....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' expressed 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." United States v. New Mexico, 438 U.S. 696 (1978).

D. The Reclamation Analogy.

"Section 8...requires the Secretary to comply with state law in the 'control, appropriation, use or distribution of water'...While later Congresses have indeed issued new directives to the Secretary, they have consistently reaffirmed that the Secretary should follow state law in all respects not directly inconsistent with those directives." California v. United States, 438 U.S. 648 (1978).

IV. THEORY AND PRACTICE--WATER RIGHTS FOR:

- A. The Columbia-Colorado Diversion of 1995.
- B. The MX Missile.

- C. The National Forest Campground.
- D. The National Forest Fishing Stream.
- E. The BLM Waterwell and Stockwater Pond.
- F. One cfs in tributary to Mud Creek, tributary to Nowater Creek, tributary to Big Horn River.