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The United States and Water Development

Carol E. Dinkins

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THE UNITED STATES AND WATER DEVELOPMENT

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New Sources of Water for Energy
Development and Growth: Interbasin Transfers

a short course sponsored by the
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The Land and Natural Resources Division, which was established in 1909, represents the United States, its agencies and officials in matters relating to public lands and natural resources, Indian lands and native claims, wildlife and fishery resources and environmental quality. The client agencies served by the Division include the Departments of Agriculture, Commerce, Defense, Energy, Interior and Transportation as well as the Environmental Protection Agency.

An integral part of the Division's work pertains to the development and conservation of the natural resources of the United States. Litigation in this area involves the balancing of national environmental priorities and programs designed to develop the energy, timber and water resources of the United States. In recent years natural resources litigation has increasingly involved issues relating to the proper division of authority between the states and the national government within our federal system.

The most significant issue associated with the development of water resources is the extent of federal water rights. First Colorado, and now increasingly other states, have decided to quantify water rights in major water sources in the state. Because the United States owns substantial land in these water-short western states, it must quantify its rights and participate in these general water adjudications. Most of the adjudications are in state court pursuant to provisions of the McCarran Act. We expect this area of work to increase dramatically in the next few years. Currently most of the work is handled from our Denver office, which is staffed with two attorney positions. The Division also handles other cases related to federal water interests, including suits challenging water projects and federal water allocations in California, Nevada and Arizona. Another important part of federal water litigation concerns federal water reclamation law which governs the development and operation of federal water projects. The following summary

of some of the pending cases in this area illustrates the scope of the federal interest in this precious resource.

CASE: National Audubon Society v. Superior Court of Alpine County (S.F. No. 24368) on Appeal to the Supreme Court of California

DESCRIPTION: In June, 1981 the United States intervened as a defendant in an action brought by four environmental organizations to limit diversions of water from the Mono Lake Basin by the City of Los Angeles. The issue being appealed by the United States is whether the California public trust doctrine is applicable to water rights in California held by the United States.

CASE: United States v. Alpine Land & Reservoir Co., et al., (Nos. 81-4084, 81-4116) on appeal in Ninth Circuit from Judge Bruce Thompson's decision reported at 503 F. Supp. 877 (D. Nev. 1980).

DESCRIPTION: The United States is appealing a final decree by the district court adjudicating rights to the use of water in the Carson River System in Nevada and California. The primary issues on appeal are whether section 8 of the Reclamation Act of 1902 precludes the Secretary of the Interior from exercising his statutory and other authority to control and regulate the use of reclamation water delivered from the Newlands Reclamation Project in Nevada.

CASE: Truckee-Carson Irrigation District v. Watt and Pyramid Lake Paiute Tribe of Indiana (Civ. No. R-74-34-BRT) (D.Nev.)

DESCRIPTION: The Truckee-Carson Irrigation District (TCID) filed suit challenging the legality of the Secretary of the Interior's 1973 decision to terminate a 1926 contract which permitted TCID to operate the Newlands Project. Termination of the contract resulted from TCID's refusal to follow the Secretary's Operating Criteria for water conservation.

CASE: Arizona v. California (No. 8, Original)
Supreme Court of the United States, Oct.
Term 1981.

DESCRITPION: Water rights on the Colorado River have been resolved in a 1963 opinion by the Supreme Court, Arizona v. California, 373 U.S. 546 (1963), in a 1964 decree, 376 U.S. 340 (1964) and in a 1979 decree, 439 U.S. 419 (1979). The major questions resolved in these earlier proceedings involved the division of water rights among the states and the priorities to be allocated to those rights. Left undecided were questions relating to the boundaries of five Indian reservations and water rights of the tribes based on additional acreage added to these reservations. On February 22 a Special Master submitted a report to the Supreme Court setting forth certain findings relating primarily to the factual question of whether the land in question is "practically irrigable."

CASE: Carson-Truckee Water Conservancy District, et al., v. Watt and Pyramid Lake Paiute Tribe of Indians
(Civ. No. 4-76-152-GJS) (D.Nev.)

DESCRIPTION: The district court, in preliminary rulings, held that plaintiffs have standing and that review of the Secretary's failure to obtain repayment of the costs of the Stampede Reservoir is appropriate under the Administrative Procedures Act. The court further held that the Secretary has authority to seek Sampedo waters which are not required to fulfill his obligations with respect to the Endangered Species Act and Paiute Tribe's reserved water rights. The remaining issue in this case is whether the Secretary may be compelled to contract with plaintiff for a supply of water from Stampede Reservoir. The position of the United States is that compliance with the Endangered Species Act and NEPA, as well as the Secretary's trust responsibility to the Tribe override any obligation to enter into such a contract.

CASE: Riverside Irrigation District and the Public Service Company of Colorado, et al., v. Colonel V.D. Stipo and National Wildlife Federation (Civ. No. 80-K-624) (D. Colo.)

DESCRIPTION: This case is now before the district court after remand by the Tenth Circuit. The single remaining issue is whether the Army Corps of Engineers was correct in advising the builders of a proposed dam on Wildcat Creek that the project did not qualify for a nationwide permit under section 404(e) of the Clean Water Act and that the builders should apply for an individual permit. The position of the United States is that applicable federal law does not permit projects such as the one proposed by plaintiffs until a full environmental review of its direct and indirect effects including effects on endangered species, has been carried out.

CASE: In Re: The General Adjudication of All Rights to Use Water In The Big Horn River System And All Other Sources, State of Wyoming District Court of the Fifth Judicial District State of Wyoming (Civ. No. 4993)

DESCRIPTION: Following a trial lasting more than a year, the United States has submitted proposed findings of fact and conclusions of law regarding the proper quantity of water for the Indians of the Wind River Reservation. The issues before the court include: 1) whether the United States retains reserved water rights for the benefit of the Wind River Reservation; 2) whether reserved water rights can exist in groundwater; and 3) whether reserved water rights for the reservation can exist for mineral development.