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Federal Non-Reserved Water Rights

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COMMENT

FEDERAL NON-RESERVED WATER RIGHTS

On June 25, 1979, Leo Krulitz, Solicitor of the United States Department of Interior, issued a formal opinion on "Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management."[1] The Solicitor explained the purpose of the Opinion: "[M]y office has undertaken a comprehensive analysis of the reserved water rights which may be asserted on the federal lands administered by NPS, FWS, Reclamation and BLM."[2] In fact, the Opinion goes further, and attempts to set forth a doctrinal basis for federal non-reserved right claims to water. While the primary focus of the Opinion is a restatement of the established doctrine of non-Indian reserved rights, most professional attention has been devoted to the assertion of a new and alternative basis for federal claims to water. The Solicitor defines the rights as "water rights obtained through appropriation and use for Congressionaly authorized purposes."[3] Criticism of the Opinion's treatment of non-Indian reserved rights was limited to disagreements about the application of the doctrines in specific areas. However, the assertion of Federal water rights based on inference from Congressional purpose created the most severe political outcry from the Western water community since President Carter announced his water project hit list. But there is more to this response than politics; Western water lawyers and administrators have questioned the legal basis and the workability of the doctrine.

This comment is directed to the Solicitor's new doctrine. The Solicitor's discussion of reserved rights is considered only to the extent that the assumptions made therein relate to the assertion of rights of appropriation for Congressionally authorized purposes. Primary focus is directed to: I. the

1. SOL. OP. _____ (June 25, 1979), "Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management." [hereinafter cited as OPINION]
2. *Id.* at 1.
3. *Id.* at 15.

historical and legal context of the Opinion; II. the conceptual basis of the new right; III. the Solicitor's use of authorities; and IV. practical dimensions of the Opinion. The analysis leads to three conclusions, the merits of which will eventually be tested by the courts and practical experience. The conclusions are:

(1) The assertion of appropriation for Congressional purpose is at best a formal statement of the Solicitor's position, not the enunciation of an established legal doctrine.

(2) The reasoning on which the appropriation for Congressional purpose doctrine rests is flawed.

(3) If the courts were to accept the Solicitor's position, the operational and functional results would be disastrous.

I. THE CONTEXT OF THE SOLICITOR'S OPINION[4]

Western water law is a shifting concoction of legal principles, American Westward expansion policies, the politics of federalism, and the natural limitations of climate and hydrology. While the interplay of these forces has created confusing and often conflicting statements from Congress and the courts, the system as a whole has maintained a reasonable balance with a strong role for state governments. The confusion did not disrupt the balance prior to the early 1960's, in part because the Western states had not reached the physical limits of their water resources. Further, major federal claims to Western water were not vigorously asserted prior to the extension of federal reserved water rights to non-Indian federal reservations in *Arizona v. California*.[5] New forces of national significance, including population shifts and national energy programs, have destroyed any illusions of water sufficiency. These new forces threaten to irrevocably upset the present balance, to the long-standing detriment of the states. In a larger context, tensions origi-

4. For a more detailed treatment of the origins of state water law, see TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW (Working Paper No. 5, Prepared for the National Water Commission, Sept. 7, 1971), [hereinafter cited as TRELEASE] and WHEATLEY, STUDY OF THE DEVELOPMENT, MANAGEMENT AND USE OF WATER RESOURCES ON THE PUBLIC LANDS, (1969), [hereinafter cited as WHEATLEY].

5. Arizona v. California, 373 U.S. 546 (1963).

nating from the national debate over the role of resource conservation and environmental protection in public land law and policy have made Western states increasingly nervous about pronouncements from Washington and its minions.[6] Thus, the Solicitor's assertion of a new federal claim to water is viewed as another attempt to shift an already questionable balance away from the states and towards the federal government.

Western water law was born of necessity. Social and economic activity in the semi-arid West is largely dependent on the availability of water. Lack of rainfall, the need for storage and the mining practices of the 19th century forced the early settlers to abandon the established riparian system. They substituted a system for the orderly recognition and enforcement of priorities, based on the simple concept that the first use in time would have a senior priority. This system was established, and flourished, far beyond the effective reach of the federal government.

The Congress generally recognized and accepted the course of this early economic development. Early federal policies towards the West emphasized settlement and transfer of the public domain to private ownership. Congress not only legislated to accomplish this transfer, but also explicitly recognized a Western water law system that effectively severed the water from the land.[7] Congress delegated "responsibility for . . . water to the states . . . back in the 1860's and 1870's through three acts of Congress."[8] The Acts of July 1866[9] and July 1870[10] "recognized and sanctioned possessory rights to water on the public lands asserted under local laws and customs. . . ."[11] The Desert Land Act of 1877[12] required "settlers to use appropriation law, not the common law of riparian rights which might give him a

6. *The Angry West vs. the Rest*, Newsweek, September 17, 1979, at 31.
7. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).
8. *Coal Pipeline Act of 1979: Hearings on H.R. 4370 Before the House Committee on Interior and Insular Affairs*, Statement by Honorable Leo Krulitz, Solicitor, U.S. Dept. of Interior, 95th Cong., 2d Sess. (1979).
9. Act of July 26, 1866, 14 Stat. 251.
10. Act of July 9, 1870, 16 Stat. 218, 43 U.S.C. § 661 (1970).
11. OPINION, *supra* note 1, at 4.
12. 19 Stat. 377, 43 U.S.C. § 321, et. seq. (1970).

claim to the entire natural flow, and reserved the surplus for appropriation by others."[13] The Taylor Grazing Act also contains provisions requiring adherence by water users to state law. Professor Trelease points out one possible exception to the federal pattern, the National Forest Act of 1897, which required compliance with state law but "hinted at" a possible federal alternative:[14]

> All waters within the boundaries of national forests may be used for domestic, mining, milling or irrigation purposes, under the laws of the state wherein such national forests are situated, or under the law of the United States and the rules and regulations established thereunder.[15]

Several subsequent Congressional actions continue the early pattern and contain express provisions upholding state law. The Supreme Court in *United States v. New Mexico*[16] referred to 37 statutes which contained explicit directives that state water law was to be followed or not disturbed.[17]

Early Court decisions tended to interpret these Congressional statements broadly in favor of the states.[18] However, later decisions, particularly those involving Section 8 of the 1902 Reclamation Act, took a more narrow view of the Congressional pronouncements.[19] Two potentially landmark opinions, *U. S. v. New Mexico*[20] and *California v. U. S.*,[21] were recently handed down by the Court. Both decisions reestablish judicial recognition of Congressional deference to state water law.

Federal reserve rights are consistently cited as the major exception to federal deference to state water law. The doctrine originated in a Supreme Court case interpreting the treaty establishing the Ft. Belknap Indian Reserva-

13. TRELEASE, *supra* note 4, at 76.
14. *Id.*
15. 16 U.S.C. § 481 (1964).
16. United States v. New Mexico, 438 U.S. 696, 702 n. 5 (1978).
17. *Id.*
18. *See*, Broder v. Natoma Water and Mining Co., 101 U.S. 274 (1879) and Jennison v. Kirk, 78 U.S. 453 (1878).
19. *See*, Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958).
20. United States v. New Mexico, *supra* note 16.
21. California v. United States, 438 U.S. 645 (1978).

tion in Montana. In *Winters v. United States*,[22] the Court held that Congress at the time of the treaty intended to reserve sufficient water from the then unappropriated waters to accomplish the specific purposes of the reservation. For many years it was assumed that this doctrine applied only to Indian reservations. But in 1963, the Supreme Court expanded the doctrine to include all federal withdrawals of land regardless of purpose.[23] Last year the Court restricted the amount of the claim to that water necessary to accomplish only the primary purpose of the reservation.[24]

Against this background, enter the Solicitor and the Opinion which is the subject of this comment. The Solicitor's initiative was prompted by President Carter's original *Federal Water Policy Message to Congress*, submitted on June 6, 1978.[25] The President's effort to formulate a comprehensive national water policy listed several initiatives in federal-state cooperation. Specifically, he issued:

> An instruction to Federal agencies to work promptly and expeditiously to inventory and quantify Federal reserved and Indian water rights. In several areas of the country, States have been unable to allocate water because these rights have not been determined. This quantification effort should focus first on high priority areas, should involve close consultation with the States and water users and should emphasize negotiations rather than litigation wherever possible.[26]

A related memorandum from President Carter to federal agencies including the Department of Interior extended this policy. The memorandum entitled "Federal and Indian Reserved Water Rights" directed the agencies to "[s]eek an expeditious establishment and quantification of Federal reserved water rights. . . ."[27] Further, the agencies were instructed to "[u]tilize a reasonable standard, when asserting

22. Winters v. United States, 207 U.S. 564 (1908).
23. Arizona v. California, 373 U.S. 546 (1963).
24. United States v. New Mexico, *supra* note 16.
25. *Presidential Papers, Administration of Jimmy Carter*, 1978, pp. 1044-1051.
26. *Id.*, at 1050.
27. Memorandum from Jimmy Carter to Secretaries of DOI, DOA, HUD, DOE, Army; Attorney General; Chairman, TVA, Subject: Federal and Indian Reserved Water Rights, 1 (undated).

Federal reserved rights, which reflects true Federal needs, rather than theoretical or hypothetical needs based on the full legal extension of all possible rights."[28]

In consultation with the Justice Department, the Department of Interior prepared the Opinion as part of the "procedures and standards for the purpose of implementing [the President's] directives."[29] Because the Opinion is binding on all Interior agencies it will serve as the basis for quantifying the majority of existing federal claims to Western water. Quantification of rights based on appropriation for congressional purpose will be extremely difficult. The solicitor's Opinion does not clearly set forth its dimensions or limitations. Similarly, neither state water law nor federal reserved rights provide appropriate analogs. The Solicitor's new claim "arises from actual use of unappropriated water by the United States to carry out congressionally-authorized management objectives on federal lands."[30] The use may be consumptive or nonconsumptive. Unlike a reserved right, no reservation of land for a particular purpose is necessary to activate this claim.[31]

Limitations on the extent of the right are "[t]he time of its actual initiation and the purpose and quantity of the use. . . ."[32] Evidently the scope of the Congressional directive determines the upper limit of the appropriation, while the date of use and the amount actually used establish the dimensions of the perfected right.[33] By comparison, federal reserved rights arise at the time of the congressional act reserving the land. The size of the right, regardless of the amount of water actually put to use, is the amount needed to accomplish the specific purpose of the reservation. The priority date for reserved rights is the date of congressional enactment, while the priorities for appropriations for con-

28. *Id.*, at p. 2.
29. *Id.*
30. OPINION, *supra* note 1, at 15.
31. *Id.*
32. *Id.*
33. The Solicitor refers to both actual use and action leading to an actual use as key elements of the appropriation. OPINION, *supra* note 1, at 15. This apparent conflict is not resolved in the Opinion.

gressional purpose are linked to the date of actual use, not to the date Congress passed the bill containing the objective.[34]

As previously noted,[35] the Solicitor's Opinion does not clearly define the contours of asserted right. Further, the language is often conflicting or unclear. Conflict exists as to its priority date. Several phrases are used: "acutal application to a federal use,"[36] "date action is taken leading to an actual use,"[37] and "time of its actual initiation."[38] It is not clear what determines the amount of the claim: "purpose"[39] or actual "quantity"[40] used. Nor does the Opinion specify what Congressional act trigggers the claim: "congressionally-authorized purposes;"[41] "congressionally-authorized management objective;"[42] "congressionally-authorized uses;"[43] "congressionally-sanctioned purposes;"[44] "management objectives specified in congressional directives;"[45] "important congressionally-authorized programs;"[46] are all mentioned as sufficient. This is more than just semantics. Defining the triggering Congressional action strikes to the heart of the Congressional intent necessary to delegate authority to an executive branch agency to establish federal water rights independent of state law.

Ambiguities in the phrasing of legal doctrines can often be resolved by reference to the theoretical underpinnings. Similarly, the prospective operation of a doctrine is best understood if the conceptual basis is clearly articulated. The Solicitor's Opinion does not contain such an articulation to guide federal agencies, the states or the courts in understanding this newly asserted right. As will be seen in the next section, the Solicitor's Opinion not only lacks a clear statement of its theoretical basis, but it draws indiscriminately

34. The Solicitor does not define the steps necessary to accomplish "actual use."
35. *See*, notes 30-33 and related text, *supra*.
36. OPINION, *supra* note 1, at 15.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*, at 16.
46. *Id.*

on two competing theories of federal power.[47] The resulting mosaic does not adequately explain or support the new federal claim to water.

II. THE CONCEPTUAL BASIS OF THE SOLICITOR'S OPINION

There are several accepted explanations of the relationship between state and federal governments relative to water.[48] The explanations generally rely on two fundamental theories. One theory views the federal claim as an exercise of a federal proprietary interest in the retained federal public lands and water, and the other relies on the federal power as sovereign to make use of the water by virtue of the enumerated powers and the operation of the supremacy clause.[49] Neither theory is adopted as a basis for the newly asserted right. Vague references to the property clause,[50] the supremacy clause[51] and historical activities of federal agencies[52] are insufficient to explain the right's genesis. In fact, elements of each theory can be found in the Solicitor's Opinion.

The Proprietary Interest View

> By these 1866 and 1870 Acts, Congress in effect waived its proprietary . . . rights to water on the public domain *to the extent that* water is appropriated by members of the public under state law. . . . Thus, these two Acts confine assertion of inchoate federal water rights to unappropriated waters that exist at any point in time.[53] (emphasis added.)
>
> . . . [T]he United States itself retains a *proprietary interest* in those waters that have not been appropriated pursuant to state law. The United

47. Authority over water is generally viewed as derived from the federal power as sovereign or powers based on the property clause.
48. Neither the Opinion nor this comment discusses in detail the federal authority associated with condemnation, federal enclaves or acquired lands.
49. *See*, ENGDAHL, *Some Observations on State & Federal Control of Natural Resources*, 1979 MINING YEAR BOOK, COLORADO MINING ASSOC. 89, for the suggestion that modern jurisdictional disputes over natural resources have their genesis in the general failure of law schools to properly explain the operation of the enumerated powers and the supremacy clause.
50. OPINION, *supra* note 1, at 16.
51. *Id.*
52. *Id.*, at 15.
53. *Id.*, at 4.

States therefore retains the power to utilize those unappropriated waters to carry out the management objectives specified in congressional directives.[54] (emphasis added.)

The Sovereign Right to Make Use View

> [T]he United States did not divest itself of its authority, as sovereign, to use the *unappropriated* waters on the public lands for governmental purposes.[55]

> I am of the opinion that . . . comments concerning 'ownership' of the unappropriated water on the public domain are overly broad and irrelevant to the right of the United States to make use of such water, ... As is the case of 'ownership' of wild animals, concepts of 'ownership' of unappropriated waters are not determinative in federal-state relations in non-reserved water rights. *See Hughes v. Oklahoma*, S. Ct. No. 77-1439 (April 24, 1979).[56]

The sovereign right to make use of unappropriated water on public lands for governmental purposes (which right the government has never granted away[57]) is different from an inchoate proprietary interest to all unappropriated waters that exist on public land at any point in time. Right to make use allows the government to vest water rights in itself by appropriating water through a proper exercise of constitutional power, i.e., through proper congressional action pursuant to an enumerated power.[58] Specific congressional actions under the proper constitutional power necessarily prevails by operation of the supremacy clause. In this context congressional intent is important, i.e., did Congress intend to occupy the field?[59] Congress must grant the authority to exercise the right to a federal agency to make use of unappropriated water on public lands. Thus, one must look for more than a management objective. One must find a

54. *Id.*, at 16.
55. *Id.*, at 9.
56. *Id.*, at 66-67.
57. For an amusing discussion of the inability to grant away sovereign rights, *See*, ATTY. GEN. (NEVADA), *Equal Footing Doctrine and Its Application By Congress and the Courts* (May, 1977).
58. For further discussion, *See*, TRELEASE, *supra* note 4, at 39-70 and 138-147m.
59. *Id.*, at 58.

specific grant from Congress to use water to accomplish that management objective. Such grant may be implied, as in the case of the traditional reserved rights doctrine, or explicit, as in the congressional grant of authority to the President to withdraw "lands containing waterholes or other bodies of water needed or used by the public for watering purposes"[60] under authority of the Pickett Act.[61] This view often poses difficult statutory construction questions (was congressional action sufficient), but presents no issue as to power.[62]

A proprietary view allows the federal government to claim water by perfecting through application to use, the already vested inchoate federal water right. The only means by which the federal government can be divested of this right is through the appropriations of private parties under state law pursuant to the trilogy of federal acts passed in the 1860's and 1870's.[63]

From the federal perspective, the mere fact of proper use will perfect the right in an agency. Here it makes no sense to talk of congressional intent to appropriate water. Congress doesn't need to give the agency the right to appropriate because the government never divested itself of its proprietary interest in unappropriated water on the public domain. All Congress need do is prescribe a congressional objective for which water could conceivably be useful.

Therefore, the only question, under proprietary interest, is whether the agency properly applied the unappropriated water (which the government already owned). The answer to this question only requires the existence and review of a management objective. By contrast, under the "right to make use view," the agency must have the authority to put water to a particular use. Therefore, one needs to look to the enabling legislation not only to justify the particular use to which the water was put, but to ascertain the existence of the authority to put water to *any* use.

60. OPINION, *supra* note 1, at 20.
61. 43 U.S.C. § 141.
62. *See*, United States v. New Mexico, *supra* note 16.
63. OPINION, *supra* note 1, at 4, 5, 6.

Finally, if the "right to make use view" is accepted, the "proprietary interest view" cannot follow by implication. The failure of the federal government to divest itself of its authority to make use does not imply that the federal government retained any property interest in unappropriated water. Therefore, there must always be an inquiry not only into the propriety of the use to which the water was put (entailing a review of the management objective), but also into the scope of the agency's power to put water to any use.[64]

One critical distinction between these views is the degree of congressional intent which must be present before a federal agency can appropriate water in contravention of state law. Both views hold that Congress has sufficient power to independently appropriate water for congressional purposes.[65] The sovereign "right to make use view" expands the location (to include non-public lands) and purposes (use justified under any enumerated power); but restricts the opportunities for federal agencies to exercise the right by requiring clear expressions of congressional intent to appropriate water and supercede state law. A narrow reading of the intent is applied to determine the amount of water which can be used.[66] The "proprietary interest view," as reflected in the Solicitor's Opinion, automatically vests the right to appropriate water in federal agencies (or that the delegation of such right is implied in every congressional directive to federal agencies), but restricts its application to public lands. The only other restriction, which may prove insignificant, is that there be some relationship between the appropriation and an agency objective.

The Solicitor's non-reserved federal right contains elements traceable to both theories. Priority dates set by actual application to federal use, congressionally sanctioned purposes, congressional directives and retained proprietary in-

64. The agency's power to use water need not be explicitly granted. In the case of the reservation doctrine, it is implied.

65. Contrary early cases such as *Kansas v. Colorado*, 206 U.S. 46 (1907) were based on the view that since the constitution did not authorize the U. S. to acquire water, the power was reserved to the states under the 10th Amendment. This view no longer prevails. *See*, U.S. v. Darby, 312 U.S. 100 (1941). (10th Amendment a truism).

66. *See*, United States v. New Mexico, *supra* note 16.

terest are all linked to the proprietary view of federal rights. Disregard of state law, emphasis on congressional intent, and much of the supporting authority actually speak to the right to use under the supremacy clause. Much of the confusion about the exact nature of this non-reserved right and its future application stems from this failure to clearly articulate its basis.

Eventually, the "right to make use view" may prevail over the "proprietary interest view." In fact the Court, as pointed out by Professor Trelease, has never really relied on the federal property view of water as a basis for its decisions.[67] The Solicitor acknowledges that, "As is the case of 'ownership' of wild animals, concepts of 'ownership' of unappropriated waters are not determinative on federal-state relations on non-reserved water rights."[68] Yet he returns to the notion of an inchoate federal property interest as the basis for the asserted right. This apparent contradiction may not have a legal justification. The Western States Water Council[69] has surmised an alternative explanation. Namely, since the Court in *New Mexico*[70] denied the federal government reserved rights claims to instream flows the Solicitor decided to offer an alternative basis for the claim. In a draft position paper the Council states that:

> Having lost the effort to claim such instream rights through the reservation doctrine, ... federal agencies will try . . . to claim that such instream non-consumptive uses have been 'appropriated' by the federal government for congressionally authorized purposes and therefore should be upheld without reference to state substantive law.[71]

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67. TRELEASE, *supra* note 4, at 139, 147k.
68. OPINION, *supra* note 1. at 66, cites to *Hughes v. Oklahoma*, S. Ct. No. 77-1439 (April 24, 1979).
69. The Western States Water Council (WSWC) is a water policy organization consisting of all states west of the 100th Meridian. Its membership consists of state water officials and citizens appointed by the respective Governors of each state.
70. United States v. New Mexico, *supra* note 16.
71. WSWC, *Working Draft Response to the Solicitor's Opinion on Federal Water Rights of June 25, 1979*, 19 (Aug. 1979).

III. THE OPINION'S TREATMENT OF AUTHORITIES

The advocacy posture attributed to the Solicitor's Opinion may also explain the Opinion's unusual treatment of legal authorities. As legal counsel to the Department of Interior, the Solocitor is obligated to promote and advocate the policy position of the Department. In view of this obligation, it is not surprising that the Solicitor would try to expand federal claims to water in the arid West. As a general rule, federal lands would clearly be more productive if added water was available. But the same rule applies to lands owned by the states and private parties in the West. The federal government and private parties are competitors for the same resource—water. This section addresses the Solicitor's creative use of legal authorities in advocating expanded claims to water.

The Opinion relies heavily on *U.S. v. Rio Grande Irrigation Co.* for the proposition that water rights can be claimed by the federal government under the "lesser standard, for water *necessary for the beneficial uses of the government property.*" (emphasis added.)[72] The underlined language is contained in a general discussion of the division of authority between states and federal government. The Court stated:

> Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of land 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 government property. Second, (navigation servitude).[73]

The language is properly referred to as *dictum* by the Solicitor, as the case was decided on the basis of the navigation servitude. But the language of *Rio Grande* was cited in 1978 by the Court in the context of a dispute over non-re-

72. OPINION, *supra* note 1, at 19, relies on *United States v. Rio Grande Irrig. Co.*, 174 U.S. 690, 703, (1899).
73. United States v. Rio Grande Irrig. Co., 174 U.S. 690, 703 (1899).

served, unappropriated water to be impounded by a Bureau of Reclamation project.[74] In *California v. United States* the Court held that the State of California could impose any conditions on the appropriation, control, use and distribution of water in a federal reclamation project not inconsistent with clear congressional directives. The Court interpreted the language of *Rio Grande* to mean that "except where the reserved rights or navigation servitude of the United States are invoked, the State has total authority over its internal waters."[75]

Treatment of the *Rio Grande* holding in the two major cases involving reserved rights also supports an interpretation contrary to the Solicitor's. In *Winters v. United States* the Court cited *Rio Grande* in saying "The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be."[76] To the same effect in *Arizona v. California:* "We have no doubt about the power of the United States under these clauses to reserve water rights for its reservations and its property."[77] Neither the *Rio Grande* decision nor the Court's subsequent treatment of its own language, support the Solicitor's claim that water is available for use on federal property under a lesser standard. The only standard found in these cases is the reserved right standard articulated by the Court in *United States v. New Mexico*, water claims for lands reserved for specific purposes where "without the water the purposes of the reservation would be entirely defeated."[78]

The Solicitor attempts to dismiss the Court's recent interpretation of its own language by referring to the fact that the *Rio Grande dicta* was offered only 22 years after the passage of the act in question—Desert Land Act of 1877. The unspoken premise is that the passage of 90 years, combined with changes in the High Court's membership,

74. California v. U.S., *supra* note 21.
75. *Id.*, at 662.
76. Winters v. U.S., *supra* note 22, at 577.
77. Arizona v. California, *supra* note 23, at 598.
78. U.S. v. New Mexico, *supra* note 16, at 700.

have made the Solicitor more qualified than the Court to interpret earlier cases.[79]

A second reference to *Rio Grande* later in the Opinion reveals a failure to distinguish between the powers retained by the Congress and those granted to federal agencies. The Solicitor states:

> In summary, since the Federal Government has never granted away its right to make use of unappropriated waters on federal lands, it is my opinion that the United States has retained its power to vest in itself water rights in *unappropriated* waters and it may exercise such power independent of substantive state law. See *United States v. Rio Grande Dam and Irrigation Co.*, supra; *see also* discussion at pp. 15-18.[80]

Rio Grande does not stand for the broad proposition asserted. Limited to its facts, the case can only be viewed as the Court's explicit recognition that the navigation servitude is a sufficient basis for the federal government to enjoin construction of dam and appropriation of water under state law, where such action threatens the highways of commerce. Professor Trelease makes a strong argument that the power described by the Solicitor exists in the United States (Congress) under the supremacy clause.[81] However the existence of the power in the Congress does not mean that such power has been either exercised or granted to the executive branch of the federal government, i.e., the Department of the Interior.

The Solicitor's questionable treatment of case law continues with references to *United States v. New Mexico*.[82] The Solicitor offers the case as support for the view that the United States did not "divest itself of its authority, as sovereign, to use the *unappropriated* waters on the public

79. This decision to ignore the current Court's rulings is curious in view of the Solicitor's claim that "the guidance I must give federal agencies must be based to a large degree on predicting how the Supreme Court may resolve [the] conflicting statements contained in prior decisions." OPINION, *supra* note 1, at 9.
80. OPINION, *supra* note 1, at 11.
81. TRELEASE, *supra* note 4, at 147 et. seq.
82. United States v. New Mexico, *supra* note 16.

lands for governmental purposes."[83] The case actually enunciates a much narrower principle. The Solicitor quotes from *U.S. v. New Mexico* as follows:

> The Court has previously concluded that whatever powers the States acquired over their waters as a result of congressional Acts and admission into the Union, however, Congress did not intend thereby 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* (citations omitted).[84] (emphasis added.)

Rather than supporting the breadth of the Solicitor's congressional purpose doctrine, this is a clear statement that the reservation doctrine is limited to *"lands withdrawn from the public domain;"* and it recognizes that claims to water attach to *"a specific federal purpose."* This is simply a restatement by the Court of the reservation doctrine. The case does not support a lesser standard for federal water claims. In fact, four pages later the Court stated Congress intended that, outside of the umbrella provided by the reservation doctrine, "the United States would acquire water in the same manner as any other public or private appropriator."[85]

Similarly, *United States v. District Court for Eagle County*,[86] a case interpreting the scope of the McCarran Amendment,[87] is cited for the proposition that Congress has recognized that the federal government may "acquire rights to use water in ways other than through state law."[88] The case is also cited as general support for the congressional purpose doctrine.[89] The Solicitor directs attention to the Court's discussion of the Amendment's phrase, "water rights by appropriation under State law, by purchase, by exchange, or otherwise."[90]

83. OPINION, *supra* note 1, at 9.
84. U.S. v. New Mexico, *supra* note 16, at 698.
85. *Id.*, at 702.
86. United States v. District Court for Eagle County, 401 U.S. 520 (1971).
87. 43 U.S.C. § 666 (1970).
88. OPINION, *supra* note 1, at 11.
89. *Id.*, at 15.
90. United States v. District Court for Eagle County, *supra* note 86, at 524.

The issue squarely before the Court was whether the McCarran Amendment encompassed the adjudication of reserved water rights. The Court held the Amendment to be all-inclusive, necessarily encompassing reserved rights. The reference included in the Solicitor's Opinion, when read in context and properly quoted, is to water rights appropriated "under state law and rights acquired 'by exchange' or 'by purchase,' which [the Court] assume(s) would normally be appropriative rights."[91] While the case recognizes that the Government may obtain water rights through purchase or exchange, it does not support the existence of a federal appropriative right as implied by the Solicitor. Even creative reading of the *dicta* in this case cannot stretch it to include judicial sanction of the asserted rights.

A citation to the federal district court decision in *Nevada ex rel. Shamberger v. United States*[92] (hereinafter *Hawthorne*) is equally flawed. At issue was the right of the Government to drill wells within the confines of the Hawthorne Naval Ammunition Depot "in order to provide a water supply for beneficial uses necessary to accomplishment of the purposes of said depot."[93] The court considered a supremacy clause analysis of the case depositive of the issue. The court also noted Nevada legislative acts ceding jurisdiction to the federal government,[94] the fact that the area had been properly withdrawn by executive order,[95] and national defense,[96] and concluded that state laws need not be observed. As a federal enclave the United States had exclusive jurisdiction.[97] These specific circumstances clearly distinguish the case from the Solicitor's position; there is not even *dictum* to support the Opinion. The case was appealed and judgment affirmed[98] by the Ninth Circuit, not on the merits, but on the ground that the McCarran Amendment of sovereign immunity was inapplicable to the broad relief

91. *Id.*
92. Nevada ex rel. Shamberger v. United States, 165 F. Supp. 600 (D.Nev., 1958) *aff'd on other grounds*, 279 F.2d 699 (1960).
93. *Id.*, at 603.
94. *Id.*, at 602.
95. *Id.*, at 601.
96. *Id.*, at 609.
97. *See*, WHEATLEY, *supra* note 4, at 74.
98. Nevada ex rel. Shamberger v. United States, *supra* note 92.

sought by Nevada, "[R]elating as Nevada's case did to sovereign proprietary rights of the state over waters in general, and not to [the specific] water rights of water users."[99] *Hawthorne* clearly appears to be limited to federal enclaves, although the court's reliance on the *Pelton Dam* case invokes the broader reserved rights doctrine. *Hawthorne* does not support a general federal right to appropriate water in contravention of state water law merely for congressionally authorized uses.[100]

The Solicitor also relies on a 1950 Solicitor's Opinion entitled "Compliance by the Department with State Laws Concerning Water Rights."[101] The Opinion, prepared by Solicitor White, is expressly based on

> [T]he position taken by the executive branch of the Government in the case of *Nebraska v. Wyoming*, (325 U.S. 589), the title to all such water remained in the United States as the owner of all unappropriated non-navigable water on the public domain.
>
> As the owner of unappropriated non-navigable water on the public domain, the United States may exercise all powers of ownership over such water.[102]

At issue was a private party's right to construct a stockwatering reservoir under a permit from the Secretary. Even with the assertion of absolute ownership Solicitor White maintained:

> Of course, before an officer of the United States can effectively act to exercise the ownership of the United States in unappropriated non-navigable water on public land, he must have the proper authority to do so.
>
> [And] . . . section 4 of the Taylor Grazing Act (43 U.S.C., 1946 ed., sec. 315c) *specificaly provides that reservoirs* and other improvements necessary to care and management of livestock for which grazing permits have been issued may be constructed on public lands within grazing districts

99. *See*, WHEATLEY, *supra* note 4, at 79.
100. *See, id.* at 74-79.
101. Memorandum M33969 From The Solicitor to The Director, Bureau of Land Management, Subject: Compliance by the Department with State laws concerning water rights (Nov. 7, 1950).
102. *Id.*, at 6.

under permits issued by the Secretary.[103] (emphasis added.)

Solicitor White stated that an assertion of federal ownership, combined with a specific Congressional authorization, justified non-compliance with state law. Further, the Opinion is limited to non-navigable waters on the public domain.

Solicitor Krulitz acknowledges in his Opinion that the Supreme Court declined to decide whether or not the United States owned the water in *Nebraska v. Wyoming*.[104] Nor has such position ever been sanctioned by the Supreme Court. Furthermore, the Krulitz Opinion's discussion of BLM non-reserved rights contains an explicit rejection of the earlier Opinion's ownership concepts.

> [C]omments concerning 'ownership' of the unappropriated water on the public domain are overly broad and irrelevant to the right of the United States to make use of such water, and I disavow them to the extent inconsistent with the opinion. . . . [C]oncepts of 'ownership' of unappropriated waters are not determinative in federal-state relations in non-reserved water rights. (citations omitted.)[105]

It is difficult to accept Solicitor White's Opinion as support for the non-reserved rights doctrine. Reason dictates that rejection by Solicitor Krulitz of the only two premises supporting Solicitor White's conclusion deprive the White Opinion of its logical force. It becomes no longer a source of legal support, but simply an assertion of policy.[106]

A more forceful argument (not dependent on federal property interest in water) would be to view the specific

103. *Id.*, at 7.
104. OPINION, *supra* note 1, at 7 n. 11, reference to *Nebraska v. Wyoming* 325 U.S. 589, 611-616 (1945).
105. OPINION, *supra* note 1, at 66.
106. Two earlier Solicitor's Opinions were also overruled to the extent they did not conform to the new right. OPINION, *supra* note 1, at 67 n.114. They were 55 I.D. 371 and 55 I.D. 378 (1935). This is not surprising since they contained statements such as "Having thus surrendered its primary rights to nonnavigable waters on the public domain, the Federal Government, with respect to its public lands, stands on the same footing as private owners, and must conform to State Laws governing the appropriation of water." 55 I.D. 378, at 379.

congressional authorization for the Secretary to build stock-watering ponds as a specific delegation of authority by Congress. By operation of the supremacy clause, state law would not be binding on the Secretary. Such a delegation could be easily analogized to the congressional grant of authority to the President, authorizing him to make reservations for specific purposes through executive order.[107]

The Solicitor also refers to a non-water rights case *United States v. Little Lake Misere Land Co.*[108] This case is offered as general support for the property rights theory of appropriation for congressionally authorized purposes. Further, the Solicitor's Opinion cites *Lake Misere* for the principle:

> that federal courts may fashion rules of federal law necessary to carry out important congressionally-authorized programs; . . . where state laws do not provide appropriate standards or unduly interfere with federal programs.[109]

Such a reading of *Lake Misere* is haphazard at best. This choice-of-law case decided in 1973, was the culmination of extensive litigation over title to parcels of land originally purchased by the federal government in 1937 and 1939 pursuant to the Migratory Bird Conservation Act.[110] The original grantor reserved the right to extract minerals for ten years from the time of purchase. At the end of ten years, the federal government would have fee title unless minerals were being produced on the property. In 1940, the Louisiana State Legislature passed a statute designed to make such reservations imprescriptible in the case of land transfers to the United States.[111] The Supreme Court ruled that the United States had acquired the mineral rights in spite of the acts of the 1940 Louisiana Legislature.

In the majority opinion, Chief Justice Burger fashioned a limited exception to the rule that property transactions are "local" and that there is no federal common law. He

107. OPINION, *supra* note 1, at 19, 20.
108. United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973).
109. OPINION, *supra* note 1, at 16.
110. 41 Stat. 1222, 16 U.S.C. § 711 et. seq.
111. Louisiana Act 315 of 1940, LA. REV. STAT. § 9:5806A (Supp. 1973).

justified the decision on the basis that the case "is one arising from and bearing heavily upon a federal regulatory program."[112] He took pains to point out:

> This is not a case where the United States seeks to oust state substantive law on the basis of 'an amorphous doctrine of national sovereignty' divorced from any specific constitutional or statutory provision and premised solely on the argument 'that every authorized activity of the United States represents an exercise of its governmental power,' (citations omitted) . . . . Here we deal with an unquestionably appropriate and specific exercise of congressional regulatory power which fails to specify whether or to what extent it contemplates displacement of state law.[113]

The Chief Justice further held that the outcome in these cases is "dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law."[114] In judging the applicability of state laws the Court suggested they were "acceptable only 'so long as it is plain, . . . that the state rules do not effect a discrimination against the Government, or patently run counter to the terms of the Act.' "[115] The Louisiana Statute was rejected because "land acquisitions of the United States, explicitly authorized by the Migratory Bird Conservation Act, are made subject to a rule . . . that is plainly hostile to the interest of the United States."[116]

The opinion for the Court expressly states that the decision was affected by the clarity of the specific congressional intent, both in the words of the Act and in the legislative history.[117] It observed that their conclusion might be influenced if the state law "served legitimate and important state interests the fulfilment of which Congress might have contemplated through application of state law."[118] While

112. U.S. v. Little Lake Misere Land Co., *supra* note 108, at 592.
113. *Id.*, at 592-593 n. 10.
114. *Id.*, at 595.
115. *Id.*, at 596.
116. *Id.*, at 596-597.
117. *Id.*, at 597.
118. *Id.*, at 599.

no such finding was justified in the *Lake Misere* case, the Supreme Court has found such congressional recognition of state water law.[119]

The Solicitor's apparent disregard of congressional intent in the context of federal-state relations is contrary to the Supreme Court reasoning in *United States v. New Mexico*.[120] In that case, the Majority held that careful examination of federal reserved rights claims was necessary because of the history of congressional intent with respect to jurisdiction over the allocation of water. "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."[121] Mr. Justice Powell's Opinion, dissenting in part, concurred with the Majority's analysis of "Congress' general policy of deference to state water law."[122]

The Court's finding of "historical deference" is discarded on the basis of the Solicitor's view that the 37 statutes referenced by the Court do not support their conclusion.[123] An almost identical approach was taken in a Stanford Law Review article,[124] shortly after the *New Mexico* decision, in which the author argued that "historical deference" was an illusion. Even though the article strongly advocates that a federal agency has the right to obtain water for secondary purposes of federal reservations, the author concludes that the combined impact of the companion decisions in *California* and *New Mexico* is that the Supreme Court believes that it is the intent of Congress that federal agencies comply with substantive and procedural state law. "[I]nterpreting the Court's language as only mandating procedural conformance to state law would 'trivialize' its effect."[125]

Again, in an advocacy posture, the Solicitor quotes *Cappaert v. United States*, that "federal water rights are

119. U.S. v. New Mexico, *supra* note 16, at 702 n. 5.
120. *Id.*, at 701.
121. *Id.*, at 702.
122. *Id.*, at 718 (dissenting opinion).
123. OPINION, *supra* note 1, at 10 n. 16.
124. Machmeier, *Federal Acquisition of Non-Reserved Water Rights after New Mexico*, 31 STAN. L. REV. 885, 909-910 (1979).
125. *Id.*, at 887-888 n. 7.

not dependent on state law or state procedures. . . ."[126] This is offered to counter the Court's holding in *United States v. New Mexico* that as to non-reserved rights the federal agencies must "acquire water in the same manner as any other public or private appropriator."[127] The quotation from *Cappaert* is inappropriate; *Cappaert* was a reserved rights case and did not even approach non-reserved rights issues.[128]

The Solicitor's Opinion goes on to cite *California v. United States*[129] for the proposition that states may exercise authority over federal property or programs in a manner "not inconsistent with congressional directives."[130] A close reading of the case shows that the word 'clear' which appears in the Court's opinion has been omitted from the quoted passage. The Court refers to "*clear* Congressional directive."[131] (emphasis added) Again, the Solicitor has disregarded the theme of specificity in congressional intent.[132]

Turning to a recent Supreme Court case, the Solicitor relies on *Kleppe v. New Mexico*[133] for the proposition that

> [O]nly Congress has the authority under the Property Clause to control the disposition and use of water appurtenant to lands owned by the United States.
>
> [S]ince Congress has vested only the public with the right to appropriate unappropriated water . . . on, . . . federally-owned lands under state law, the United States itself *retains a proprietary interest* in those waters. . . . The United States therefore retains the power to utilize those unappropriated waters to carry out the management objectives specified in congressional directives. . . . Any legislation enacted by Congress to accomplish man-

126. OPINION, *supra* note 1, at 17.
127. U.S. v. New Mexico, *supra* note 16, at 702.
128. *Cappaert* dealt only with the protection of a federal agency's claim to the minimum amount of water necessary to accomplish the purposes of a specific reservation of land. *New Mexico*, on the other hand dealt not only with water legitimately claimed under the reserve right doctrine, but agency claims in excess of that amount. The *New Mexico* language has more force in the context of the new right asserted by the Solicitor.
129. California v. U.S., *supra* note 21.
130. OPINION, *supra* note 1, at 17.
131. California v. U.S., *supra* note 21, at 672.
132. *See*, part II, *infra*.
133. Kleppe v. New Mexico, 426 U.S. 529 (1976).

> agement objectives on federal lands preempts conflicting state regulations or laws as a result of the operation of the Property and Supremacy Clauses of the United States Constitution. *See Kleppe v. New Mexico.*[134] (emphasis added.)

This is an extremely broad conclusion to draw from a case that is not even remotely related to water. In *Kleppe* the Court concluded that the federal Wild Free-Roaming Horses and Burros Act[135] preempted enforcement of the New Mexico estray law as it related to the immediate facts.

The Solicitor's reference to a retained proprieary interest is either a reference to property theories of water law, or an attempt to directly parallel the Court's treatment of wild horses and burros on public lands. It is unlikely that the Solicitor would use this case to support the proprietary view of federal water claims since his opinion appears to reject federal ownership as a basis for the claim.[136] Also federal ownership of the animals was not considered by the Court, "The Secretary makes no claim here, however, that the United States owns the wild free-roaming horses and burros found on public land."[137]

Nor can any parallel between the Court's treatment of wild horses and burros on the public lands and the newly asserted federal right of appropriation for congressional purpose be drawn. The *Kleppe* decision arose in the context of a statute specifically directing the Secretaries of Interior and Agricuture "to protect and manage [the animals] as components of the public lands . . . in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands."[138] Much of the Court's opinion is devoted to recounting the explicit nature of the congressional intent in protecting the horses and burros. This is necessary because the Court recognizes that "determinations under the Property Clause are entrusted primarily to the judgment of Congress."[139] State jurisdiction was a

134. OPINION, *supra* note 1, at 16.
135. 85 Stat. 649, 16 U.S.C. §§ 1331-1340 (1970 ed. Supp. IV).
136. OPINION, *supra* note 1, at 66, 67.
137. Kleppe v. New Mexico, *supra* note 133, at 537 n. 8.
138. *Id.*, at 531.
139. *Id.*, at 536.

specific consideration. "Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause." (citations omitted)[140] The operation of the supremacy clause necessarily required that the specific congressional enactment prevail.[141] But the Court goes on to observe "that 'without more,' federal ownership of lands within a State does not withdraw those lands from the jurisdiction of the State."[142] The "more" in the *Kleppe* case is a specific congressional act, clearly intended to preempt state law in the event of actual conflict. The *Kleppe* Court openly declined to decide whether the Act could be sustained in all instances.[143]

Congress has not chosen to pass a statute analogous to Wild Free-Roaming Horses and Burros Act directing the Secretaries of Interior and Agriculture to manage waters arising on, under, through or appurtenant to federally owned lands as "components of the public lands."[144] Absent such an act of Congress, or similar expression of intent in a specific context, the reasoning used in *Kleppe* cannot support a general federal agency right to appropriate water for management objectives.

The Solicitor's Opinion also relies on the National Water Commission Final Report.[145] The Opinion quotes the report as saying:

> 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.[146]

140. *Id.*, at 543.
141. *Id.*, at 543.
142. *Id.*, at 544.
143. *Id.*, at 546.
144. The BLM Organic Act does not contain language remotely suggesting such an intent.
145. NATIONAL WATER COMMISSION, FINAL REPORT TO THE PRESIDENT AND CONGRESS, WATER POLICIES FOR THE FUTURE (1973) [hereinafter COMMISSION].
146. OPINION, *supra* note 1, at 16.

The first sentence is taken out of context and misquoted. Among the recommendations submitted by the Commission was a proposed National Water Rights Procedures Act. Commission Recommendation No. 13-4 suggests that the proposed act is a means for integrating existing federal water claims into state administrative structures. It contains absolutely no reference to the asserted appropriation for congressionally-authorized purposes. The full text of the sentence in question is: "*Recommendation 13-4 recognizes that* Federal agencies *may also have made* some water uses that neither comply with State law nor can be justified under the reservation doctrine."[147] (emphasis added) The underlined portions were deleted or altered by the drafters of the Solicitor's Opinion. Viewing the sentence in context and with its actual language reduces it from a legal conclusion to a tentative statement of fact. The second quoted sentence is a simple statement of the operation of the supremacy clause. No one would argue that federal agencies derive their powers directly from the constitution. Federal agencies have the right to "make such uses" only if Congress, acting pursuant to a constitutional power, has properly delegated the necessary authority to them.

The Solicitor relies on recognized scholars, including Professor Trelease.[148] The Solicitor refers to the Professor's conclusion, that: "[I]n-so-far as the federal purpose, right, law and power is valid and operative on reserved lands, it is valid and operative on any federal land no matter where located or how acquired."[149] The argument is based on a forceful supremacy clause analysis which purports to show that "the 'reservation doctrine' is a superfluity,"[150] and that a careful reading of the cases shows the supremacy clause theory as the actual basis for the reservation doctrine.[151] Since this conclusion does not necessarily support, and may even go beyond, the Solicitor's Opinion, it is doubtful that the Solicitor truely wishes to embrace the Professor's theory. Furthermore, acceptance of the supremacy clause theory

147. COMMISSION, *supra* note 145, at 466.
148. TRELEASE, *supra* note 4.
149. *Id.*, at 147.
150. *Id.*, at 143.
151. *Id.*, at 138, et. seq.

does not automatically lead to the conclusion that Congress has delegated its power to the Department of Interior to appropriate water, independent of state law, for every congressionally authorized program.[152]

The Solicitor's reference to two sections of Wheatley's *Study of the Development, the Management, and Use of Water Resources on the Public Lands*[153] is more perplexing. The first reference is to a discussion of federal enclaves. Without reaching a final conclusion, Wheatley discusses four alternative theories for determining what law to apply when there is no federal statutory or common law, such as in water disputes. Wheatley evaluates *Nevada ex rel. Shamberger v. U. S.*[154] as less than satisfactory because it does not provide "a rule of law which determines when compensable property interests of the non-federal parties are affected."[155] Indeed Wheatley's conclusion is diametricaly opposed to the Solicitor's generalized use of *Nevada ex rel. Shamberger*. After assessing the court's opinion, Wheatley states that "It should be clear that the *Hawthorne* case provided none of the answers, except that the state could not interfere with the use of waters from wells on the ammunition depot."[156]

The second reference is to a discussion of two lower federal court decisions which considered the reservation doctrine.[157] According to Wheatley these decisions produced "inconclusive results." More important the context of Wheatley's comments, directed to developing rules of law defining compensable vested rights, makes it clear that he was largely concerned with the development of non-Indian reserved rights as a financial doctrine. There is absolutely no reference to the kind of rights asserted by the Solicitor.

The case law and authorities offered to support the Solicitor's independent federal right of appropriation based

152. See discussion of theoretical basis.
153. WHEATLEY, *supra* note 4.
154. Nevada ex rel. Shamberger v. U.S., *supra* note 92.
155. WHEATLEY, *supra* note 4, at 79.
156. WHEATLEY, *supra* note 4, at 80.
157. WHEATLEY, *supra* note 4, at 112, discusses *Nevada ex rel. Shamberger v. U.S.*, *supra* note 92 and an unreported order without opinion issued by the District Court of Utah. Glenn v. United States, Civil No. C-153-61 (D. Utah, Mar. 16, 1963).

on congressionally authorized purposes offer superficial support at best. In several instances they actually undermine the Solicitor's position. The effect of the Solicitor's sources is to increase concern about the functional dimensions of the congressional purpose doctrine.

IV. PRACTICAL DIMENSIONS OF THE OPINION

Solicitor Krulitz's Opinion concludes that under the Federal Land Policy and Management Act,[158] Congress "authorized the United States to appropriate unappropriated water available on the public domain as of October 21, 1976, to meet the new management objectives dictated in the Act."[159] The management objectives referred to by the Secretary are broad ranging (mineral and fiber production to preservation of scenic and ecological values).[160]

Assume *arguendo* that the right asserted by the Solicitor exists and that FLPMA is sufficient to trigger its application. Remember that this right is initiated by application to use and the purpose and quantity of the use are its limitations. Further, the right is independent of the contours of state substantive law, including requirements of diversion and beneficial use.

158. 43 U.S.C. § 1701, et. seq. (Supp. 1979).
159. OPINION, *supra* note 1, at 69.
160. Section 102 of FLPMA, 43 U.S.C. § 1701 reads in part:

> (a) The Congress declares that it is the policy of the United States that —
>
> (1) the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest;
>
> (2) the national interest will be best realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process coordinated with other Federal and State planning efforts;
>
> * * * *
>
> (7) goals and objectives be established by law as guidelines for public land use planning, and that management be on the basis of multiple use and sustained yield unless otherwise specified by law;
>
> (8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use . . .;

Consider a possible situation in State X which does not recognize instream flows or most other non-consumptive uses as beneficial. The BLM controls a tract of land containing coal, oil and gas, rangeland, free-roaming horses and burros, timber, fish and other wildlife. A major stream crosses the tract and natural springs and potential water well sites abound. The tract is bordered by private appropriators and Forest Service lands. Assume the following sequence of events.

1976: FLPMA passes.

1978: BLM files claims with the state for: wildlife and horse and burro water; instream flows for fish and waterfowl; maintenance of timber; secondary recovery of oil (through private party as agent for BLM director); preservation of scenic areas and a waterfall; and a fish hatchery.

1979: Appropriation by Forest Service for secondary purposes of reservation (1/2 under state law, 1/2 under federal right).

1980: Appropriation under state law by private appropriators (downstream and upstream).

1981: Appropriation by BLM to irrigate pasture to produce hay for winter feeding of elk herd (four months use), 50% return flow.

1982: Appropriation by downstream private party under state law. Stream now fully appropriated and return flows from BLM are critical to this appropriation.

1983: BLM closes fish hatchery and apparently lets water return to non-use.

1995: BLM wants to change irrigation water to year-round use and reactivate fishing claim for coal processing and surface-mined land reclamation. Also wants to change point of diversion on wildlife instream flows and convert a portion of instream flows to consumptive use for expanded wild horse and burro population.

Both the Forest Service and the private appropriators believe their rights will be damaged by BLM's actions. What court is appropriate and what doctrines will be applied? Is it possible to advise each of the parties of their legal rights or to predict the possible results of litigation?

A private appropriator, independently or acting through the state government, cannot use the McCarran Amendment as a basis for jurisdiction to contest a single BLM appropriation. The McCarran Amendment[161] is only useful in the case of stream-wide adjudications. Private party litigants can seldom justify this expense. As to the dispute between the Forest Service and Interior, jurisdiction rests in the federal courts. However, litigation between these parties will impact the private parties. Private appropriators will necessarily attempt to intervene, but with justifiable fears that they are entering a legal wilderness without a compass.

Assuming this question could be brought into a court of competent jurisdiction,[162] the conceptual problem of defining a line of demarcation between federal and non-federal rights remains. Interior could argue that the federal rights are paramount, that subsequent non-federal rights fail and that prior "vested" rights will be compensated. But this begs the question until the dimensions of the federal rights are determined. As Wheatley observed in another context, "The doctrinal necessity is to discover a source of substantive rules, with as much certainty as the physical situation permits."[163] No detailed federal common law exists in this area and Congress has not tailored any rule, nor is it likely to do so.[164] Since the federal right is independent of state substantive laws on "diversion" and "beneficial use"[165] it is equally independent of state laws governing preference of use, abandonment, change in point of diversion and change in use.

161. 43 U.S.C. 666.

162. Jurisdictional questions are equally interesting in the context of a suit between two state law appropriators in state court and a federal agency wishes to intervene to protect its federal appropriative rights.

163. WHEATLEY, *supra* note 4, at 78.

164. The only federal common law of water that exists relates to interstate allocation of water. *See*, Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938).

165. OPINION, *supra* note 1, at 16.

Will the rules of decision spring forth full grown from the head of Zeus?

The Solicitor's Opinion dismisses this problem with two assertions: (1) the federal courts can fashion the necessary rules of federal law,[166] and (2) "that most of the United States appropriative (or non-reserved) water rights are recognized under the water law of most of the Western states, . . . no conflict . . . should generally exist."[167] This comment has previously discussed the Solicitor's remarks on the federal court's ability to fashion common law rules. The Solicitor's second assertion reflects a lack of detailed thought about the administration of Western water rights. State recognition of a right does not equate to acceptance of the specific definition offered by the federal agency. Furthermore, the major conflicts will not be with the state system but with private appropriators who are operating within the state system, while federal agencies operate under an ill-defined alternative federal system.

Returning to the hypothetical, consider the court's problem in evaluating the appropriative claims filed by BLM in 1978. Since BLM's notice to the state is not strictly required by law, it cannot automatically be the priority date. According to the Solicitor's Opinion, priority date is set by date of actual use pursuant to congressional directives. Therefore any existing use, within the scope of FLPMA would have as a priority date, the date of the Act's passage. All of the 1978 filings are properly within the broad language of FLPMA. This may result in federal water rights for purposes which the BLM State Director never intended to appropriate water. For instance, the BLM Land Use Plan for this tract may anticipate instream flows to support fish and waterfowl at level X, but the actual water in the stream supports a level of X + 2. Since X + 2 is the actual use and within the goals of FLPMA, the Solicitor's Opinion would support the greater appropriative right.

Suddenly, the court is considering the very issues confronting early Western courts; i.e., what are the necessary

166. *Id.*
167. *Id.*, at 17.

elements of an appropriation and what are the "first steps" necessary to manifest an intent to appropriate water?[168]

Similarly, the Solicitor's assertion that federal rights are independent of state definitions of diversion and beneficial use does not solve problems, it creates them. Independence from state definition does not mean that the definitions are unnecessary, it means only that the federal courts must create their own. Federal courts are unlikely to say that every use, even if wasteful is beneficial or acceptable. The goals and objectives set forth in FLPMA are so broad that they do not provide a clear guide as to what Congress considered an acceptable use. Analogous reasoning applies to "diversion" and other substantive state provisions.

Equally thorny problems are created by the dependence of downstream private appropriators on the BLM return flows; conversion of instream flows to consumptive use for stockwater; and changes in point of diversion. Federal courts will be forced to formulate doctrines to handle all of these issues and many more. The net result will be an independent body of federal law to govern these newly asserted rights. This system would be applied to streams already regulated by state water systems.

In pragmatic terms the Solicitor is suggesting that Congress intended to subject a single stream to two inconsistent rules without a rational basis for resolving inconsistencies. It is difficult to believe that the Solicitor, the Supreme Court, or the Congress really intended such a result.

DAVID D. FREUDENTHAL

168. Harkey v. Smith, 31 N.M. 521, 247 P. 550 (1926) and Walsh v. Wallace, 26 Nev. 229, 67 P. 914 (1902).