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Jerome C. Muys

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COMMENTS ON "FEDERAL RESERVED WATER RIGHTS"

BY JEROME C. MUYS*

In its 1970 report to Congress and the President,[1] the Public Land Law Review Commission evaluated the problems posed by the so-called reservation doctrine of federal water rights as follows:

> The result has been apprehension in the western public land states that the doctrine will have the effect of disrupting established water right priority systems and destroying, without compensation, water rights considered to have vested under state law. Moreover, the uncertainty generated by the doctrine is an impediment to sound coordinated planning for future water resources development.[2]

Consequently, it recommended "legislative action to dispel the uncertainty which the implied reservation doctrine has produced and to provide the basis for cooperative water resources development planning between the Federal Government and the public land states."[3]

The Commission enumerated four specific legislative actions that it felt essential to accomplish that goal, concluding that Congress should:

> 1. *Provide a reasonable period of time within which Federal land agencies must ascertain and give public notice of their projected water requirements for the next forty (40) years for reserved areas, and forbid the assertion of the reservation claim for any quantity or use not included within such public notice.*
> 2. *Establish a procedure for administrative or judicial determination of the reasonableness of the quantity claimed, or the validity of the proposed use under present law.*
> . . . .
> 3. *Provide that procedures for creation of future withdrawals and reservations require, as a condition to claims of reserved water rights, a statement of prospective water requirements and an express reservation of such quantity of unappropriated water; and*
> 4. *Require compensation to be paid where the utilization of the*

* Mr. Muys is presently a partner in the firm of Debevoise and Liberman in Washington, D.C.

[1] PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND (1970).

[2] *Id.* at 144.

[3] *Id.*

[4] *Id.* at 147-49.

implied reservation doctrine interferes with uses under water rights vested under state law prior to the 1963 decision in Arizona v. California.[4]

Three years later, the report of the National Water Commission identified the same problems with the reservation doctrine, but decided not to endorse the proposed remedy of the Public Land Law Review Commission, which it found disadvantageous in two respects: (1) the expense of quantification; and (2) the likelihood that government officials would inflate federal claims under the quantification procedure.[5]

Consequently, it proposed that the uses on federal reserves be brought into conformity with state law, in accordance with the basic thrust of the Commission's broader recommendations in the field of federal-state water rights, by requiring the federal agencies to file their reserved rights claims with the state agencies.[6] With respect to uses existing on the effective date of the proposed National Water Rights Procedure Act,[7] the federal agencies would be entitled to a priority date for their *existing* uses as of the date of the original reservation of the federal lands. Uses on federal reserved lands subsequent to that date would receive a priority date as of the initiation of the actual use. The Commission also recommended that compensation be required where existing water uses under state law are displaced by uses under reserved water rights.[8]

Professor Trelease evaluates recent developments in the water rights field with respect to the reserved rights doctrine and generally finds that the problems which both the Public Land Law Review Commission and the National Water Commission were concerned about still have not yet ripened into any kind of serious threat to existing or potential water users. Therefore, he

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[5] NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE 467-68 (1973).

[6] *Id.* at 464-66.

[7] *Id.* at 462. This proposed act, as recommended by the National Water Commission, would require:

> (1) the conforming of Federal water rights to the form of State law, (2) Federal use of those substantive State laws that advance the Federal purpose, and (3) Federal observance of those State procedures which do not impair the substance of the Federal right. The Act would establish a policy of compensation for the holders of State water rights if the Federal Government takes their water for its programs.

Id.

[8] *Id.* at 467.

concludes that perhaps the solutions recommended by both commissions might really be unnecessary. To support his thesis he cites the results of several river basin adjudications in Colorado under the McCarran Amendment[9] in which a number of the federal reserved water rights in five river basins have been adjudicated by a water master, subject to review in the Colorado courts.[10] While I share his hope that the special master's recommendations will be finally approved, the final result remains uncertain. In addition, there are substantial claims for federal reserved water rights for minimum flows and naval oil shale reserves in those basins which have not yet been adjudicated, but have simply been deferred to later stages of the litigation.[11] These involve large volumes indeed,[12] as Professor Trelease recognizes, but he reports that the government may not be able to sustain them because the Colorado River may not be "appurtenant" to a reserve that never touches it. He also states that some National Forest officials were not assigning claims for reserved recreational rights to ski resorts, implying that perhaps a similar practice might be followed with respect to any reserved water rights that might be established for the oil shale reserves. This does not particularly hearten me. I do not think that the fate of existing water users should have to hinge upon how a particular federal official decides to exercise his discretion in asserting a federal reserved water right. Moreover, I do not think we can continue to expect this kind of self-restraint on the part of all federal water officials. Indeed several years ago some Forest Service regions were allowing Forest supervisors to delegate a portion of a National Forest's presumed reserved water right to special use permittees. There have also been contentions in some quarters that the Federal Government ought to assert a broad range of water rights on federal reserved and, indeed, unreserved public lands where actual uses have been made or are contemplated.[13] With respect to the situation in Colorado, moreover, it is important to

[9] 43 U.S.C. § 666 (1970).

[10] M. WHITE, PARTIAL MASTER-REFEREE REPORT GOVERNING ALL OF THE CLAIMS OF THE UNITED STATES OF AMERICA IN AND FOR THE STATE OF COLORADO (1976).

[11] Trelease, *Federal Reserved Water Rights Since PLLRC* (this issue).

[12] *Id.*

[13] *See, e.g.*, Muys, *Legal Problems Involved in Developing Water Supplies for Energy Development*, 8 NAT. RESOURCE LAW. 335, 340-42 (1975).

remember that not all western states have a comparable comprehensive stream adjudication system in operation, although Professor Trelease informed me this morning that Wyoming has just enacted one. In most of the other states water rights are administratively determined, subject to judicial review, and there is no provision for an ongoing adjudication in which all rights can be determined under the McCarran Amendment.

Most important, I think that implementation of the Public Land Law Review Commission's recommendations for administrative quantification under Congressional guidelines, including provisions for judicial review, is still essential for meaningful water resource development planning in the West, particularly when we are faced with the substantial water requirements for energy development throughout all of the Rocky Mountain Region. Similarly, the reasonableness of a number of interstate compact water allocations that have been made over the last half century appears to be under increasing scrutiny. It is quite obvious that many of those compact allocations were made without any recognition of the impact of federal reserved water rights on the allocations made to each state. I know from my review of the minutes of the meetings of the negotiators who produced the Upper Colorado River Compact that federal and Indian reserved water rights were not a significant component of the asserted state requirements which were the foundation of the individual state percentage allocations of the Upper Basin supply. Consequently, if there is to be any amendment of such compacts as has been suggested in some quarters, it would seem essential to have a better idea of the magnitude of federal reserved water rights throughout the West than we have to date, and indeed than we can expect to have even under the most expedited kind of adjudication such as that recently completed in Colorado.

So, in my view, giving full recognition to all the developments that Professor Trelease has enumerated, I still find the basic problems presented by the reservation doctrine not only unresolved but no less troublesome than they were when the Public Land Law Review Commission and the National Water Commission made their recommendations. Furthermore, I continue to believe that the procedure proposed by the Public Land Law Review Commission is the best way to deal with the problem. It mandates an administrative quantification process, which is al-

ready being conducted by some of the federal agencies,[14] with appropriate judicial safeguards so that we can at least produce a ballpark figure for the magnitude of the claims that are potentially subject to the reservation doctrine throughout the West. With respect to the fears voiced by the National Water Commission that federal officials might make exorbitant inflated claims, I think Professor Trelease's evaluation of the general reasonableness of the claims made thus far by the Federal Government in the Colorado adjudications is pretty good evidence that, initially at least, the federal agencies have kept their claims at a reasonable level. Consequently, I have no reason to believe that they would do otherwise if Congress directed the quantification of these claims by the Secretary of the Interior.

Therefore, my conclusion is that it is time for Congress to implement the recommendations of the Public Land Law Review Commission and that an appropriate starting point is the so-called Kiechel bill that was prepared in the Justice Department several years ago to provide for quantification of all federally reserved water rights, including Indian water rights.[15] That proposal has met with widespread opposition in the West for a variety of reasons, but nevertheless I believe that it is basically a sound approach, although I strongly disagree with its failure to provide compensation for pre-1963 vested water rights which might be displaced by federal reserved water rights. Such compensation is essential, as a matter of equity, to all existing water rights holders and should be an integral component of any quantification legislation.

An example of what may be expected in the absence of legislation authorizing a system of quantification is found in the Federal Register of March 17, 1977,[16] in which the Secretary of the Interior published proposed regulations stating the scope of his proposed approval of the creation of water codes by individual Indian tribes for the allocation of their claimed reserved water

[14] A Task Force was at work in the Interior Department toward the close of the last administration attempting to make administrative quantification of reserved rights for a number of Indian reservations in order to facilitate meaningful water resource planning.

[15] *See* Kiechel, *Inventory and Quantification of Federal Water Rights—A Common Denominator of Proposals for Change*, 8 NAT. RESOURCE LAW. 255 (1975).

[16] 42 Fed. Reg. 14885 (1977) (to be codified in 25 C.F.R. § 260).

rights, under the doctrine of *Winters v. United States,*[17] to Indians and non-Indians for use on each reservation. The proposed regulations would essentially permit each tribe to establish unilaterally the magnitude of its claimed reserved rights under Secretarial guidelines which substantially expand the scope of such rights as announced by the Supreme Court to date, thereby adding even greater confusion to an already complex and controversial problem. They punctuate the need for Congress to establish guidelines for the quantification of federal reserved water rights claims as the first step to a permanent solution of the problem.

[17] 207 U.S. 564 (1908).