FEDERAL RESERVED WATER RIGHTS OF THE BUREAU OF LAND MANAGEMENT IN COLORADO

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INTRODUCTION

The United States Bureau of Land Management (BLM) administers about 8.2 million acres of public land in Colorado (see Figure 1). The land is used by the public for grazing, mining, oil and gas production, fishing, hunting and many other purposes.

Until recently, the water being consumed for multiple use management on the public lands had not been systematically located and quantified.

The policies of the BLM relating to water have been mired in confusion over legality of Federal rights on public lands. Certainly the administrators of the vast public domain recognized the importance of water as the common denominator in all resource decisions, but little or no action was taken to protect Federal water rights interests. The concept of the Federal government as a sovereign entity also tended to retard any effort to obtain Federal water rights for public lands. Consequently, there has been a severe shortage in manpower and money for conducting the necessary water inventories.

The United States declined to participate in state water adjudication proceedings prior to the passage of the McCarran Amendment in 1952 (43 U.S.C. 666). The amendment stated that the U.S. could be joined (brought into the proceedings) as a party to general water adjudication proceedings in state courts (Hill, 1980).

The western states have sparingly utilized the McCarran Amendment to seek a resolution to the question of reserved water rights. As of mid-1979, the U. S. has been joined as a party in all seven Water Divisions in Colorado. In response to these court actions, the Federal Government has now filed to obtain recognition of its water rights throughout the State. Many of the water rights sought by Federal agencies fit precisely into Colorado's system. Other water right claims do not fit as neatly into the system and are the subject of intense controversy.

At the core of the controversy lies the basic tenet of reserved rights. Reserved rights have generally been held to be the date that the reservation was created. Asserting a reserved right is analogous to cutting into line at a drinking fountain that has a limited supply of water. People toward the end of the line may not be able to rely on getting the drink they once counted on.

A Federal reserved right is a construction of the U.S. Supreme Court. In U.S. v. New Mexico, 438 U.S. 696 (1978), it is stated that:

> The court has previously concluded that Congress in giving the President the power to reserve portions of the Federal domain for specific Federal purposes, impliedly authorizes him to reserve "appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." . . . Congress reserved "only that amount of water necessary to fulfill the purpose of the reservation, no more." . . . [and finally] without the water the purposes of the reservation would be entirely defeated.

FEDERAL RESERVED WATER RIGHTS ADMINISTERED BY THE BLM

In Colorado the BLM administers five types of reserved water rights:

1. Public Water Reserves (PWR 107)
2. Mineral Hot Springs

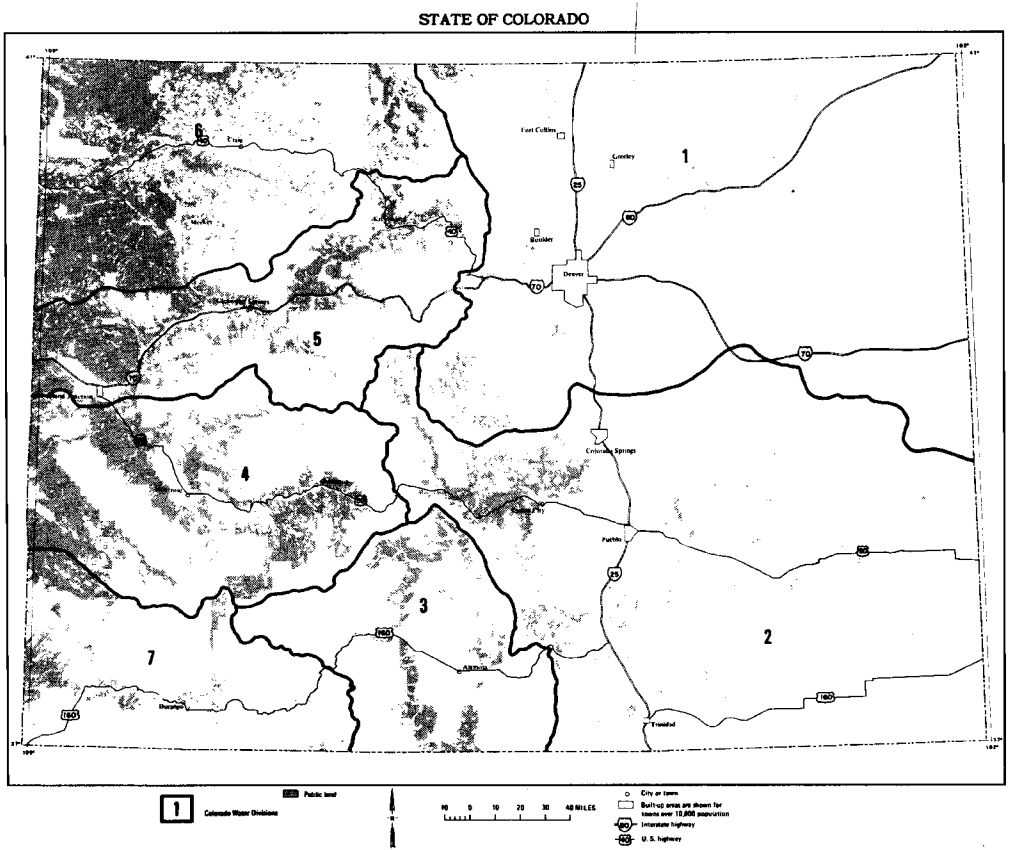

Figure 1. Colorado Water Divisions and BLM administered lands (Public Lands)

3. Livestock Driveways

4. Oil and Gas Well Conversions

5. Oil Shale Development

PUBLIC WATER RESERVES (PWR 107)

The most important water reserve administered by BLM is PWR 107. The Executive Order of April 17, 1926 reserved public lands containing springs or waterholes for use by the public for watering purposes. The withdrawal was designed to prevent individuals from controlling vast amounts of public domain through the control of water sources. The Executive Order states:

> Every smallest legal subdivision of the public land surveys which is vacant, unappropriated, unreserved public land and contains a spring or waterhole and all lands within one quarter of a mile of every spring or waterhole, located on unsurveyed public land, be, and the same is hereby withdrawn from settlement, location, sale or entry, and reserved for public use . . .

All unappropriated springs and waterholes were reserved that existed at the time of the Executive Order or that came into existence before October 21, 1976 (the passage of the Federal Land Policy and Management Act (FLPMA) 43 U.S.C. § 1701). All of the water in each source is reserved regardless of whether the water source has been the subject of an official finding as to its existence and location.

The total number of springs and waterholes administered by the BLM in Colorado is not known. However, a comprehensive inventory has begun and it is estimated that there are from 4,000 to 8,000 sources. Based on existing data, the average amount of water per source is estimated to be less than 1-1/2 gpm. In Water Division 2, see Figure 1, there are about 170 water sources being claimed as public water reserves with a total combined flow of .51 cfs which is 0.02% of the water being diverted from all sources within the Arkansas River Basin in Colorado.

The extent of Federal Reserved Water Rights is frequently characterized as a vast body of claims with the potential to dewater many major western rivers. However, reserved water rights associated with public lands administered by the BLM are proving to be extremely small.

Even though most PWR 107s produce very little water on a regional or river basin scale, they are extremely important for the management of the public lands because they may be the only water source within several miles. In Water Division 2 there is an average of only one spring for every five and a half square miles.

MINERAL HOT SPRINGS

On March 3, 1925 (43 U.S.C. 971) Congress withdrew mineral, medicinal or other hot springs located on public lands to protect them for public use. There are a total of four known mineral hot springs for which BLM has made or is contemplating making claims on in Colorado.

LIVESTOCK ORIVEWAYS ACT

The withdrawal of public lands for driveways of livestock or in connection with waterholes was authorized by Section 10 of the Livestock Driveways Act of December 29, 1916 (43 U.S.C. § 300 (1970)). The purpose of these withdrawals was to allow the unhampered passage of livestock across public lands to non-contiguous tracts of private and public lands for grazing and to provide access to springs and waterholes reserved for livestock watering. The Solicitor's opinion M-36914 of June 25, 1979 states that . . . "water sources located within stock driveways are reserved to the extent necessary to provide for stock watering during the process of moving livestock through these reserved access corridors." Since there are only 200 acres in the two reserved livestock driveways still in use in Colorado, and since there is no water in either driveway, there are no reserved water rights associated with livestock driveways in Colorado.

OIL AND GAS WELL CONVERSION ACT

The Oil and Gas Well Conversion Act of June 16, 1934, (30 U.S.C. § 229a (1976)) provides that all oil and gas prospecting wells which do not produce oil and gas that are found to be capable of producing water "of such quality and quantity as to be valuable and usable at a reasonable cost for agricultural, domestic or other purposes", may be purchased by the Secretary of Interior for use "on the public lands or disposing of such water for beneficial use on other lands . . ." The Solicitor has concluded that the priority date for water uses from these wells is the date the well is drilled. Therefore, the only difference from Colorado's water well permitting system is that the necessary water well permits are obtained after the well is drilled rather than before.

There is one oil and gas well conversion in Water Division 2 for which a claim is being filed. It produces 4 cfs or 0.16% of the water diverted from the Arkansas River basin which is a substantial amount of water for one well. However, it is the only oil and gas exploration well that BLM has successfully converted to a water well in Colorado and is used almost entirely to supply water for a local municipality. After the passage of FLPMA, converted oil and gas wells are no longer automatically reserved. To assert a Federal reserved water right now, the BLM must request the Secretary of the Interior to withdraw the lands for public water resource purposes under the provisions of Section 204 (FLPMA) and the applicable regulations contained in 43 CFR 2300. However, in the interest of furthering State/Federal comity, the BLM in Colorado intends to obtain its future water rights to abandoned oil and gas wells through the State system rather than through an attempt to create a Federal reserved water right.

OIL SHALE DEVELOPMENT

The oil shale lands withdrawn by Executive Order 5327 (April 15, 1930) may also, according to the Solicitor's opinion, have withdrawn enough water for the purpose of investigation, examination and classification. The Solicitor went further to express his opinion that no water was reserved for actual oil shale development. Some water is occasionally used for core drilling activities during oil shale investigations; however, most water being used is trucked in from sources outside the oil shale reserves. The language ". . . investigation, examination and classification," specifically limits this reservation which in effect eliminates any significant claim to water.

WATER USES

As discussed above, the most important reserved water right administered by the BLM is PWR 107, the Solicitor's Opinion (M-36914, June 25, 1979) states that, "The purposes for which water is reserved under the 1926 Order are (a) stockwatering, (b) human consumption, (c) agriculture and irrigation, including sustaining fish, wildlife and plants as a food and forage sources, and (d) flood, soil, fire and erosion control." The major consumptive uses for most springs and waterholes are stockwatering, wildlife, and transpiration. Most of the water sources are in remote areas surrounded entirely by public land and rarely generate sufficient quantities of water to produce flow beyond BLM boundaries.

Water produced by nearly all sources on public land is used in some way for the management of public lands. Livestock permittees water their cattle and sheep, recreationists drink from the springs, wildlife rely on the water, well drillers use the water in their drilling operations, and in some cases communities depend on the public lands to produce a dependable water supply. If individuals were to obtain exclusive water rights to sources of water on public land, they could effectively control the use of the surrounding land and eliminate uses by the rest of the public. Consequently, BLM is striving to perfect the Water Rights of the United States on public land to protect the interests of the public.

INVENTORY PROCEDURES

When the United States was brought into the general adjudication in Water Divisions 4, 5 and 6 in 1972, and in 1 and 7 shortly thereafter, a broad brush survey of developed and some undeveloped water sources was made. In most cases existing records were relied upon to provide information required by the state courts. Since then an interlocutory decree has been made by the Water Judge in WDs 4, 5 and 6. In the decree BLM has been given four years to more specifically quantify the water being used in most of the water claimed during the general adjudication. In addition, the President's Task Force Report on non-Indian Federal Water Rights (June 1980) recommended that "all consumptive uses of water being made by Federal agencies (or by their permittees, or licensees in carrying out agency purposes and programs) not heretofore quantified should be quantified within five years." As a result, BLM has begun a comprehensive inventory of all water sources on public lands.

The first step was to review all existing information. It was found that many of the old records that were relied upon for the original claims were outdated and inaccurate. The most common problem was in the location of water developments. In the early 1900's when many water sources were developed, the maps that were available to plot locations from were fairly gross and not completely accurate. With today's modern technology, it is relatively easy to determine an exact location on the ground so the locations derived from the old maps do not always coincide with the locations on today's maps. As a result, BLM has found it necessary to reinventory most of its water sources. A plan has been developed to obtain low level IR photography during the period when all the vegetation except that which immediately surrounds the water sources has "browned off." Since most public land is rangeland, springs and waterholes should show up fairly readily due to the contrasting vegetation. The photos will be interpreted and locations of all potential water sources will be plotted on U.S.G.S. quadrangle maps that show BLM boundaries. The information on the maps will be compared with existing records. Any discrepancies will be noted and local people will be interviewed to determine what is known about each potential source. Wherever necessary, each location will be visited to determine the quantity and quality of water, and the exact location. An estimate of the amount and periods of use, and future needs will be made for each source. Finally, the necessary water rights will be sought from the water court.

STATUS OF OUR KNDWLEDGE IN COLORADO

As pointed out in the previous section, a broad brush inventory was completed for most of the public land in the State in the early 197D's. In 1979 the United States was brought into a general adjudication in Water Divisons 2 and 3. An intensive inventory has been completed in Water Division 2 and is nearing completion in Water Division 3. A total of 4.5 cfs or 0.18% of the total diversions in the Arkansas River Basin in Colorado is being claimed as reserved water rights by BLM.

A review of existing data is in various stages of completion in the remaining Water Division. Based upon the completed inventories and data reviews, it is estimated that BLM administers less than 35 cfs in all of the sources of reserved water in Colorado. This amounts to about one-tenth of one percent of the water being diverted in the State.

CONCLUSIONS

Federal Reserved Water Rights adminstered by the BLM in Colorado are proving to be infinitesimal when compared to the water being consumed in the remainder of the State. Although Federal Reserved Water Rights are extremely important to the management of the public lands, the quantities are so small that it would appear that the historic concerns as to the amount of Federal claims expressed at times by the public or State water right administrators have been vastly overestimated.

More important than the quantities involved are the purposes for which these waters are used. The water is not hermetically sealed for some future, unspoken purpose. Instead it is currently used by the public for any of a number of purposes. The primary uses are stockwatering and wildlife consumption. Without the protection that a reserved right affords, these waters could be monopolized for a single purpose or diverted from the public lands entirely. The cattle industry, already hard pressed in Colorado, would suffer a considerable set back with the loss of these springs and waterholes which dot public allotments. From the standpoint of maintaining the existing multiple use doctrine, it is essential that water resources on public lands be properly managed and protected to the extent possible under the law.

REFERENCES

Hill, John. 1980. The Colorado Water Rights Determination and Adjudication Process.

United States Department of the Interior, Office of the Solicitor. 1979. Solicitor's Opinion (M-36914, June 25, 1979).

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United States Statutes

43 U. S. C. § 170 (1976) (Federal Land Policy and Management Act).
43 U.S.C. § 300 (1970) (Livestock Driveways Act).
43 U.S.C. 666 (McCarran Amendment).
43 U.S.C. 971 (Mineral Hot Springs).
30 U.S.C. § 229a (1976) (Oil and Gas Well Conversion Act).

Executive Orders

Executive Order of April 17, 1926 (PWR 107)
Executive Order 5327 (April 15, 1930).