MEMORANDUM

FEDERAL IRRIGATION WATER RIGHTS

by

ETHELBERT WARD, January 22, 1930.

The United States is the owner of the unappropriated waters in the non-navigable streams in the public land States of the arid West. This means, for practical purposes, in part, as follows:

1. The United States prescribes the method by which the right to use such unappropriated waters may be acquired.

2. The United States may reserve from further appropriation so much of such unappropriated waters as may thereafter be needed for irrigation uses upon an Indian reservation.

3. The United States may reserve from further appropriation so much of such unappropriated waters as may thereafter be needed for irrigation uses upon the Government's Reclamation Project.

The United States originally owned all the lands in the arid West as a common law proprietor as well as a sovereign proprietor. At the English common law the sovereign owned and controlled the beds of navigable tide waters, while the beds and waters of non-navigable (fresh water) streams were owned and controlled by the proprietor of the lands through which such streams ran. The term "fresh water" used in the common law referred to streams where the tide did not flow; and in England were all non-navigable. The Supreme Court of the United States has extended the common law rule of

navigable tide water to navigable fresh water streams such as the Mississippi and Columbia Rivers.

Shively v. Bowlby, 152 U. S. 1, 13-15.

At common law the waters of a non-navigable (fresh water) stream belong to the owners of the riparian lands.

> Fresh waters of what kind soever do of common right belong to the owners of the soil adjacent; so that the owners of the one side have of common right the propriety of the soil usque filium aquae, and the owners of the other side the right of soil or ownership unto the filium aquae on their side. And if a man be owner of the land on both sides, in common presumption he is the owner of the whole river according to the extent of his land in length.

Hale's De Jure Maris, Chap. 1.

When the Western States were admitted into the Union these states acquired all the sovereign rights of the English Crown theretofore possessed by the United States, except such sovereign rights as were retained by the United States under the Constitution.

> For when the revolution took place, the people of each States became themselves sovereigns; and in that character held the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by

> the Constitution to the general Government.
>
> Martin v. Waddell, 16 Pet. 367, 410.
>
> Shively v. Bowlby, 150 U. S. 1, 14-15

One of the sovereign rights acquired by the new States was the title and control of the beds of navigable waters, subject to the Federal paramount navigation control. The new States did not acquire any ownership in the waters of non-navigable (fresh water) streams because that was not a sovereign right of the English Crown. Such waters belong to the proprietor of the riparian lands. That proprietor was the United States.

> Hale's De Jure Maris, Chap. 1.

The Supreme Court of the States of New York, one of the original thirteen States, holds:

> "Fresh rivers of what kind soever do of Common right belong to the owners of the soil adjacent", is the expressive language of the common law and is of universal application.
>
> Smith v. Rochester, 92 N. Y. 463, 473.

The Supreme Court of Massachusetts, another one of the thirteen original States, holds:

> It is to be noticed, first that the nature of their ownership on the border of tidewater differs from the ownership of a riparian proprietor upon an innavigable river or small stream. The title of the owner in the latter case goes to the thread

> of the stream, he owns all of the land under the water with a right to the flow of the water which goes with the land as a part of the real estate included in his ownership. The State has no ownership of any part of these small streams, nor any control over them except such as it has in all parts of its domain for governmental purposes.
>
> Home for Aged Women v. Commonwealth, 202 Mass. 422,

Some of the State courts in the arid West seem to think that irrigation was unknown or impossible at common law, and that a riparian proprietor had no right to use the water of a stream for irrigation, because, according to their ideas of the common law, the riparian proprietor must let the water flow past his lands unpolluted in quality and undiminished in quantity.

For instance, the Supreme Court of Colorado says:

> A riparian proprietor, owning both sides of a stream, may divert water therefrom, providing that he returns the same to the natural stream before it leaves his own land so that it may reach the riparian proprietor below without material diminution in quantity, quality or force.
>
> Oppenlander v. Ditch Co., 18 Colo. 142, 148.
>
> It is suggested on behalf of the appellants that the use of water for

irrigation was practically unknown to the common law. But, while it may be true that it is seldom necessary or desirable to irrigate land in England by artificial means, yet it appears that a reasonable use of running streams for the purpose by riparian proprietors is recognized by the Courts of that county. It is expressly so stated in Gould on Waters, where a number of English cases are cited; and in Pomeroy on Riparian Rights it is declared that the common law rule that every proprietor has an equal right to the use of water as it is accustomed to flow, without diminution or alteration is subject to well-recognized limits that each owner may make reasonable use of the water for domestic, agricultural and manufacturing purposes; and the author there cites several English and American decisions in support of that declaration.

Benton v. Johncox, 17 Wash. 277, 289.

Gould on Waters, Sec. 217.

Pomeroy on Riparian Rights, Sec. 125.

Wiel on Water Rights (3rd Ed.) 807, 815, 818, 819.

Jones v. Conn, 39 Ore., 30, 36.

Clark v. Allaman, 71 Kans. 206, 241.

Even in the States where the appropriation system prevails, the United States continues to hold its land and waters as a riparian proprietor at common law.

> Although this power of changing the common law rule as to the stream within its domain 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 lands bordering on streams, to the continued flow of its water so far at least as may be necessary for the beneficial uses of the government property****
>
> U. S. v. Rio Grande Irr. Co., 174 U. S. 690, 703.
>
> Gutierrez v. Albuquerque Co., 188 U. S. 545, 554.
>
> The Congress shall have power to dispose of and make all needful rules and regulations regarding the Territory or other property belonging to the United States.
>
> U. S. Constitution. Art. IV, Sect. 3, Par. 2.

In about 1836, it seems that the State of Illinois conceived the notion that the United States held the public lands in the Northwestern territory solely in trust for the State; that the words of the Constitution, "to dispose of" meant only to sell; and that the future state had some sort of a claim or interest in the

minerals in the public lands which prevented the United States from reserving or leasing such mineral lands. The Supreme Court held that the term "territory" in the Constitution meant lands, and that words "to dispose of" meant to reserve, lease, sell, or otherwise handle without let or hindrance.

> U.S. v. Gratiot, 14 Pet. 526, 537-8, (Decided in 1840).

This early case is interesting in view of the claims now made by the Western States that the United States held the waters of non-navigable streams in trust for the future state, and that the ownership of such waters went to the States.

The exclusive Constitutional power of Congress to dispose of the public domain and other property of the United States has been upheld time and again by the Supreme Court.

> No State legislation can interfere with this right or embarrass its exercise; and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new States have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made.
>
> Gibson v. Ghouteau. 13 Wall. 92, 99.
>
> These are rights incident to a proprietor, to say nothing of the power of the United States as a sovereign over the property belonging to it.

Light v. U. S. 220 U.S. 523, 537.

Prior to the Mexican war, and for some years thereafter, the appropriation system, regardless of ownership of riparian lands, was practically unknown in the United States. During that period riparian rights attached both to privately owned lands and to the public lands of the United States. Congress, as early as May 18, 1796, recognized this right by enacting

> That all navigable rivers within the territory to be disposed of by virtue of this Act, shall be deemed to be and remain public highways and that in all cases where the opposite banks of any stream not navigable shall belong to different persons, the stream and the bed thereof shall become common to both.
>
> Act of May 18, 1796, 1 Stat. 468.

The above Act applied to lands in the Northwest Territory. Later Congress enacted what is now Revised Statutes, Sec. 2476, where the rule is extended to all public lands.

As non-riparian settlers in California and elsewhere in the West had for a number of years appropriated the public waters of the United States, regardless of the riparian proprietary rights of the United States, and vast mining and agricultural interests were dependent thereon, Congress gave relief by passing the Mining and Water Act of July 26, 1866 (14 Stat. 451). This Act ratified and validated prior appropriations and provided a method by which such rights could in the future be acquired from the United States. Sec. 9 of that Act provides:

> That whenever by priority of possession, rights to the use of water for mining, agriculture, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same ***
>
> Act of July 26, 1866, Sec. 9 (14 Stat. 451)

Section 17 of the Act of 1870, amends and interprets Section 9 of the Act of 1866, as follows:

> *** and all patents granted, or preemption of homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights as may be acquired under or recognized by the ninth section of the Act of which this Act is amendatory ***
>
> Act of July 9, 1870, Sec. 17 (16 Stat. 217)

Without citing the numerous court decisions which discuss the meaning of this Act, it is sufficient to state that Congress thereby provided the way by which persons should in the future acquire the right and title to use the unappropriated waters of the United States flowing upon its public lands. The Act is prospective in its operation.

Jacob v. Lorenz, 98 Calif. 332, 335-6.

Beaver Brook Co. v. St. Vrain, 6 Colo. App. 130, 138.

By the Act of 1866, Congress made the State its agent by requiring compliance with "local customs, laws and the decisions of courts" before the individual could acquire a right and title to the Government's unappropriated waters. The United States have never granted its waters to any State. The unappropriated waters, or the waters that have not been granted by the United States still belong to the United States.

> The waters in question were a part of an innavgable stream, the title to which was never acquired by any State, but remained in the Federal Government.
>
> Anderson v. Bassman, 140 Fed. 14, 20.
>
> The water in an innavigable stream flowing over the public domain is a part thereof, and the national Government can sell or grant the same, or the use thereof, separate from the rest of the estate under such conditions as may seem to it proper.
>
> Howell v. Johnson, 89 Fed. 556, 558.
>
> As the United States then owns the waters which are incident to its lands, it dispose of them separate from its lands if it chooses.
>
> Cruse v. McCauley, 96 Fed. 369, 374.

> It was apparent to Congress, and indeed to everyone, that neither the local customs nor State laws nor decisions of State courts could vest the title to public land and waters in private individuals without the sanction of the owner, viz: the United States.
>
> Benton v. Johncox, 17 Wash. 277, 289.

It will be noted that the Act of 1866 refers principally to mining, and that the same provisions are inserted in that Act regarding compliance with local customs, laws and the decisions of courts before mining rights could be acquired. The Supreme Court held in a well-considered case that the provisions of the mining law, which are similar to the provisions in Sec. 9 concerning water rights, made in effect the states and Territories the agents of the United States to enact and enforce local rules under which, within the limits fixed by Congress, these mineral rights must be acquired and enjoyed. The same rule applies to the water provisions of the Act of 1866. The State acts as the agent of the United States.

> Butte City Water Co. v. Baker, 196 U.S. 119,126

It will be noticed that the Act of 1866 provides for the issue of a patent by the United States for the mining claim, if the locator desires a patent; or the locator can hold the claim under possessory rights. No provision is made for the issuance of a patent for a water right. Congress evidently thought it wiser to grant a possessory right to the use of the water so long as the claimant complied with "local customs, laws and

decisions of courts". The Act of 1866 is the claimant's title deed to water. The grant is in the Act itself, the highest kind of a patent.

> A water right can, therefore, be acquired only by the grant, express or implied, of the owner of the lands and water. The right acquired by appropriation and use of the water on the public domain is founded on the grant from the United States as the owner of the land and water. Such grant has been made by Congress.
>
> Smith v. Denniff, 24 Mont. 20, 21.
>
> Union Co. v. Ferris, 2 Sawyer 176, 184.

In appropriation States the United States still holds its undisposed of waters as a riparian proprietor regardless of State laws. The Supreme Court says:

> Although this power of changing the common law rule as to the streams within is domain 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 lands bordering on streams, to the continued flow of its waters so far at least as may be necessary for the beneficial uses of the Government property***
>
> U.S. v. Rio Grande Irr. Co., 174 U.S. 690, 703.

Gutierrez v. Albuqueque Co., 188 U.S. 545, 554.

INDIAN RESERVATIONS.

By the establishment of an Indian Reservation the United States, as the owner of the unappropriated waters in the adjacent non-navigable streams, reserves from further appropriation so much of such waters as will in the future be needed for the lands of the reservation.

> 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. United States v. Rio Grande Ditch & Irrigation Co., 174 U.S. 690, 702; United States v. Winans, 198 U.S. 371. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years.
>
> Winters v. U.S., 207 U.S. 564, 577.

The Federal decisions on the water rights of the United States for the Indian reservations are the following:

1901. U.S. v. Morrison, 203 Fed. 364 (Colo.)

1906. Winters v. U.S., 143 Fed. 740 (Mont.)

1906. Winters v. U.S., 148 Fed. 684 (Mont.)

1907. U.S. v. Conrad, 156 Fed. 123 (Mont.)

1908. Winters v. U.S., 207 U.S. 564 (Mont.)

1908. Conrad v. U.S., 161 Fed. 829 (Mont.)

1918. U.S. v. Wightman, 230 Fed. 277 (Ariz.)

1922. Skeem v. U.S., 273 Fed. 93 (Idaho)

1926. U.S. v. Parkins, 18 F (2d) 642 (Wyo.)

1928. U.S. v. Hibner, 27 F (2d) 909 (Idaho)

U. S. District Judge Hallett of Colorado held in 1901:

> The Acts of Congress and of the State Assembly relating to appropriation of Water for irrigating lands were made for and are applicable only to cases arising between citizens. They have no application whatever to the case in which water is appropriated to a public use by the Government in the exercise of its sovereign authority over the Indian tribes.

U.S. v. Morrison, 203 Fed. 364, 366.

RECLAMATION PROJECTS.

Act of July 2,1902 (32 Stat. 388).

The same rights and powers of the Unites, upon which the Winters case is based, apply to the reservation of waters for the Government's reclamation

projects. It seems that only one case is found in the printed reports of Federal decisions which announces the rule above stated as applicable to the Government's reclamation projects. This was one of Mr. B. E. Stoutemyer's early cases decided in 1910. That opinion is by the United States Circuit Court of Appeals, 9th Circuit. It says:

> That the United States may, where the circumstances and conditions require it, reserve the waters of a river flowing through its public lands for a particular beneficial purpose, was held by this court in Winters v. United States, 143 Fed. 740, and 148 Fed. 684. This decision was affirmed by the Supreme Court of the United States in Winters v. United States, 207 U.S. 564, 577, where the Court said:
>
> "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. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 702; U.S. v. Winans, 198 U.S. 371."
>
> To the same effect was the decision of this Court in Conrad Inv. Co. v. U.S., 161 Fed. 829, 831.
>
> Burley v. U.S., 179 Fed. 1, 12.

It seems that the authorities cited in this memorandum, relating to the ownership by the United States of the unapproprated waters in the non-navigable streams and its power to reserve the same

for beneficial Governmental purposes, are sufficient to establish the proprietary and sovereign rights of the United States. I shall, therefore, not repeat those decisions here.

Judge Cavender of the State District Court of Colorado held in 1912 for the Government's Grand Valley Project, and again in 1913 for the Government's Uncompahgre Project, that the United States owned the unappropriated waters of the non-navigable streams in Colorado, and by establishing a reclamation project had reserved so much of said unappropriated waters as were needed for the project. Following these decisions the Attorney General announced his approval of the doctrine in his Annual Report for 1914, at page 39.

Special Master George F. Talbot of the United States District Court of Nevada has announced the same rule. See his Explanatory Report in the case of U.S. v. Orr Water Ditch Co., Departmental File No. 182979. The decree prepared by him enforcing this right of the Government has been temporarily enforced during the past four years by the United States Judge of Nevada.

Section 8 of the Reclamation Act.

Counsel opposing the Government's water rights always rely upon Section 8 of the Reclamation Act as a relinguishment of the Government's proprietary and sovereign rights over its waters and as a mandatory compliance by the United States at its peril with State water laws. The pertinent portions of Sec. 8 are as follows:

> Sec. 8: That nothing in this Act shall be construed as affecting or

> intending to affect or to in any way interfere with the laws of any State or territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired there under, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any land owner, appropriator or user of water in, to, or from any interstate stream or the waters thereof***.
>
> Act of July 2, 1902, Sec. 8 (52 Stat. 388, 390.)

The first part of Section is a re-affirmance of the Government's guaranteed protection of the water rights recognized and validated by the Act of 1866, and water rights thereafter to be acquired from the United States under the provisions of Section 9 of the Act of 1866 by conformity with "the local customs, laws and decisions of courts."

The Secretary of the Interior, in carrying out the provisions of the Reclamation Act is directed to conform with the State water laws provided that such conformity shall not in any way affect any right of the Federal Government.

There are many proprietary, constitutional and sovereign rights of the Federal Government that would be seriously affected by strict conformity with State water laws and the rules and regulations of States

Engineers—such as appropriation permits and time limits for completion of works and application of water.

For illustration, the first requirement of the laws of most of the appropriation States is that the prospective user must obtain a permit to "appropriate" the desired water. An "appropriation" of water means the taking of the steps required by the "local customs, laws and the decisions of courts" of the State, by which the title to the right to use the water—a real property right—vests from the Federal Government to the individual—"whereby the appropriator is granted by the Government the exclusive use of the water."

Monte Vista v. Centenial Ditch Co., 22 Colo. App. 364, 370.

There is no need that the Government should appropriate or acquire title to that which it already owns, viz: the inappropriated waters which, by the establishment of a reclamation project, the Government reserves for the uses of its reclamation project.

> The Government has not to make a prior appropriation to enable it to obtain the use of the waters. It has only to take that which has been reserved or that which has never been subject to prior appropriation upon the public domain. It has only to come into its own when its needs may require—the Department of the Interior being the instrumentality by which it exercises that right and privilege—and all persons seeking appropriations from public streams must take subject to this paramount right.

> U.S. v. Conrad Inv. Co., 156 Fed. 123, 129-130.
>
> It was, therefore, unnecessary for the Government to appropriate the water. It owned it already. All it had to do as to take and use it.
>
> Story v. Wolverton, 31 Mont. 346, 353.
>
> Winters v. United States, 143 Fed. 740, 747.

Section 8, in excepting conformity which will interfere with State rights or with Federal rights or with interstate stream rights, states these exceptions in the disjunctive. Separately stating these exceptions, we have:

1. Nothing herein shall affect any right of any State.

2. Nothing herein shall affect any right of the Federal Government.

3. Nothing herein shall affect any right of any land owner, appropriator, or user of water in, to, or from any interstate stream, or the waters thereof ****.

The Supreme Court of the United States has interpreted the language excepting interstate stream rights.

> Congress was solicitous that all questions respecting interstate streams thought to be involved in that litigation (Kans. V. Colo.) should be left to judicial determination unaffected by the Act,—in other words, that the matter be left just

> as it was before. The words aptly reflect that purpose.
>
> Wyo. v. Colo. 259 U.S. 419, 463.

Applying the same interpretation to the language excepting the rights of the Federal Government from the conformity provisions of Section 8, the Court undoubtedly would hold that Congress was solicitous that all questions regarding any rights of the Federal Government be left just as they were before the enactment of Section 8; and that the words "nothing herein shall in any way affect any right of the Federal Government" would aptly reflect that purpose.

We call attention to the numerous decisions regarding conformity with State laws as found in the Conformity Act in Revised Statutes, Sec. 914, and the Eminent Domain Act, Aug. 1, 1888 (25 Stat. 357).

I call special attention to the decision of Judge Lewis, now presiding judge for the 10th Circuit, in the case of U. S. v. O'Neill, 198 Fed. 677, 682-3, and the cases cited by him, especially the case of Hills & Co. v. Hoover, 220 U.S. 329, 336, and the decisions there cited. These decisions are to the effect that conformity with State law is not required where any right of the Federal Government is impaired thereby.

It, therefore, is evident that the conformity provisions of Section 8 are not mandatory, but merely directory and modal, provided that such compliance does not in any way affect any right of the Federal Government.

In actual practice, the Reclamation Service does "conform" with State laws in every way possible in

order to give notice to all of the water requirements of the Government for its projects.

Respectfully submitted,
(Sgd) Etherlbert Ward
Special Assistant to the Attorney General

Denver, Colorado,
January 22, 1930.