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Brief of the Spokane Indian Tribe

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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	No. 3643
vs.	)	
BARBARA J. ANDERSON ET AL.,	)	
Defendants.	)	

BRIEF OF SPOKANE INDIAN TRIBE

Harold A. Ranquist, Attorney,
U. S. Department of the Interior

Article re The Winters Doctrine
of Brigham Young University Law Review

June 3, 1974 Solicitor's Opinion
on the boundaries of and status of title
to certain lands within the Colville and
Spokane Indian Reservations.

(Both referred to in Brief of Spokane Tribe.)

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The *Winters* Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water

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Summary of Contents

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*Senior attorney, Office of the Solicitor, Department of the Interior; J.D., 1955, University of Utah. Recognition is given to the contributions of the present and past solicitors of the Department of the Interior, the personnel of the regional and field offices of that Department, the Special Projects Office in Reno, Nevada, and Robert Pelcyger of the Native American Rights Fund for his help on the section dealing with the absence of state jurisdiction over Indian water rights. The author also wishes to acknowledge the extensive assistance of the staff of the *Brigham Young University Law Review* in the reorganization and preparation of this article for publication.

This article is an expression of the opinions of the author and is not a statement of the official position of any office or agency of the Department of the Interior.

INTRODUCTION

"Have you ever heard anything about God, Topsy?"
The child looked bewildered, but grinned as usual. "Do you know who made you?"
"Nobody, as I knows on," said the child, with a short laugh.
. . . [a]nd she added,
"I spect I grow'd."[1]

1. H. STOWE, UNCLE TOM'S CABIN; OR LIFE AMONG THE LOWLY 161 (1851).

The concept of the implied reservation of water to fulfill the purposes of the federal sovereign, like Topsy, just "grow'd." And just as Topsy was a product of her background and circumstances, the legal concept of reserved water rights, known as the *Winters* doctrine, is a *natural* product of the circumstances surrounding the development of water law in the Western States.

This article is divided into three sections. Section I provides a brief overview of the historical setting, origin, and present scope of the *Winters* doctrine. Section II discusses its application as a judicially developed concept to specific types of federal lands, including Indian reservations; national parks, monuments, and forests; fish and wildlife reserves; the public domain; and military reservations. The incomplete development of the standards to be used in applying the doctrine and its effect on the administration of water is commented upon in that section. Section III examines state and federal claims to legislative, judicial, and administrative authority over reserved water rights and emphasizes the role of the Department of the Interior and other federal agencies in the development and administration of these water rights. Further, that section urges the establishment of an administrative mechanism for resolving the numerous unanswered questions of law and fact which pervade this area of the law. The section identifies the federal authority and capabilities presently existing and available to establish a mechanism, which will identify the reserved right to the use of water on a use-by-use basis in each watershed. A method for intergrating that administrative mechanism with the states' administrative and judicial systems is suggested.

I. The Historical Setting, Origin, and Scope of the *Winters* Doctrine

A. The Historical Setting of the Winters *Doctrine: Development of the Doctrine of Prior Appropriation*

No discussion of the *Winters* doctrine is complete without reference to the development of the doctrine of *prior appropriation* in the states of the arid West. Although the appropriation doctrine developed through state law, while the *Winters* doctrine is a federal development, each system finds its origin in the federal sovereign. Further, both establish the right to use water in the same streams. Therefore, the operation of each system can be fully understood and explained only by reference to its effect upon the other.

The following discussion of the appropriation doctrine is not

intended as a comprehensive statement of western water law.[2] The discussion's twofold objective is simple: (1) to assist the practitioner in locating the relevant source material in this area, and (2) to demonstrate that the *Winters* doctrine is not an aberration in the field of water law, but rather a natural outgrowth of the development of water law in the Western States.

When the federal government acquired western lands through the Louisiana Purchase and the Treaty of Guadalupe Hidalgo, little was known of the area. It was considered desert land incapable of crop production except along the rivers of the Great Plains and on the coastal strip bordering the Pacific Ocean. The area was unpopulated except for Indian communities: agricultural pueblos along the Rio Grande, farming communities of the Navajo and Pima-Maricopa Tribes, seed collecting cultures of California, fishing-based cultures of the Northwest, and nomad hunters of the Great Plains. By the mid-1800's, there was also a small irrigated colony in the Salt Lake Valley and surrounding areas established by the Mormon pioneers under Brigham Young.

With the discovery of gold in the West and the race to expand the number of both free and slave states in the Midwest, the settlement of the West increased rapidly. Miners swarmed over the uninhabited land, occupying the public domain and operating their mines with the silent acquiescence of the United States Government. To bring order out of the resulting chaos, the miners and the pioneers established customs and rules which regulated the ownership and operation of the mines and the right to the use of water. In essence, these rules provided that the first to locate the mining claim and the first to use the water held a prior right and would be protected against the claims of others.[3]

The United States owned all western lands not privately held under previous sovereigns and possessed the power to dispose of these lands and the water, together or separately.[4] By its acquiescence, the United States permitted those persons whose rights were recognized by the developing customs and rules to possess the public lands and waters and to divert those waters out of their watersheds and across the public lands to distant mining

2. For an excellent and comprehensive discussion of the development of western water law see W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES (U.S. Dep't of Agriculture Misc. Pub. No. 1206, 1971) [hereinafter cited as HUTCHINS].

3. *See* McGowan, *The Development of Political Institutions on the Public Domain*, 11 WYO. L.J. 1, 12-14 (1956).

4. California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 162 (1935).

claims and irrigated tracts.[5] The existence of federal authority to dispose of the water on one hand, and the actual disposition of that water under the growing doctrine of prior appropriation on the other, resulted in conflict between the first appropriator of water and the federal patentee who claimed an unencumbered title.

Shortly after the close of the Civil War, legislative proposals were made to have Congress withdraw the mines from the public domain of the West and either operate or sell them to obtain revenue to retire the Civil War debt. The opposition of western Senators and Congressmen resulted, however, in the enactment of legislation in 1866[6] which expressly confirmed both the rights of the miners and the rights of the appropriators of water.[7] A current water rights treatise explains the effect of the 1866 Act:

> The Act of 1866 thus gave *formal* sanction of the Government to appropriations of water on public lands of the United States, whether made before or after passage of the act, and rights of way in connection therewith, provided that the appropriations conformed to principles established by customs of local communities, State or Territorial laws, and decisions of courts. The act contained no procedure by which such rights could be acquired from the United States while the lands remained part of the public domain. *What it did was to take cognizance of the customs and usages that had grown up on the public lands under State and Territorial sanction and to make compliance therewith essential to the enjoyment of the Federal grant.*
>
> . . . The act merely recognized the obligation of the Government to respect private rights which had grown up under its tacit consent and approval. *Jennison v. Kirk*, 98 U.S. 453, 459 (1879). It proposed no new system, but sanctioned, regulated, and confirmed the system already established, to which the people were attached.[8]

An 1870 amendment[9] to the 1866 Act provided that all federal patents, homestead rights, or rights of preemption would be subject to any vested and accrued water rights or rights-of-way for ditches or reservoirs acquired or recognized under the Act of 1866. The amendment clarified the intent of Congress

5. *Id.* at 154; Basey v. Gallagher, 87 U.S. 670, 682 (1875); *see* Forbes v. Gracey, 94 U.S. 762, 763 (1877).

6. Act of July 26, 1866, ch. 262, 14 Stat. 251, *as amended* ch. 235, 16 Stat. 217 (1870).

7. 1 S. WIEL, WATER RIGHTS IN WESTERN STATES § 93 (3d ed. 1911).

8. 1 HUTCHINS 172-73 (emphasis added).

9. Act of July 9, 1870, ch. 235, 16 Stat. 217, *amending* ch. 262, 14 Stat. 251 (1866).

> that the water rights and rights of way to which the 1866 legislation related were effective not only as against the United States, but also as against its grantees—that anyone who acquired title to public lands took such title burdened with any easements for water rights or rights of way that had been previously acquired, with the Government's consent, against such lands while they were in public ownership.[10]

Seven years later, in 1877, Congress passed the Desert Land Act[11] which

> provided that water rights on tracts of desert land should depend upon bona fide prior appropriation; and that all surplus water over and above actual appropriation and necessary use, together with the water of all lakes, rivers, and other sources of water upon the public lands and not navigable, should be held free for appropriation by the public for irrigation, mining, and manufacturing purposes, subject to existing rights. This act applied specifically to Arizona, California, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming. An amendment in 1891 extended the provisions to Colorado.[12]

The highest courts of the various states could not agree on whether the application of the 1877 Act was limited to arid and desert lands or included all lands. The question was finally settled by the United States Supreme Court in 1935 when the Court held in *California-Oregon Power Co. v. Beaver Portland Cement Co.*[13] that the Desert Land Act applied to all the public domain of the states and territories named. More importantly, the Court also held that the Act severed the water from the public lands, leaving the unappropriated waters of nonnavigable sources open to appropriation for use by the citizens of the various states and territories pursuant to local law.

Thus, the conflict between prior appropriators and federal patentees was resolved in favor of the former. Not only were appropriators protected against grantees of the federal government, they could also appropriate water on the entire public domain of the Western States, not just arid or desert lands.

A second conflict developed between the common law riparian concepts of water rights and the developing appropriation doctrine. Each western state, either in its constitution or by legis-

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10. 1 HUTCHINS 173.
11. Ch. 107, 19 Stat. 377 (1877), *as amended* 43 U.S.C. § 321 (1970).
12. 1 HUTCHINS 173 (citations omitted).
13. 295 U.S. 142, 160-63 (1935).

lation, sought to resolve the clash between these two systems of water law.[14] Generally, the states followed one of three approaches. Some, such as California and Washington, adopted a dual system known as the *California doctrine* in which appropriative rights and riparian rights continued to coexist.[15] Others, such as Oregon, recognized riparian rights which had actually been exercised by making beneficial use of the water prior to adoption of a comprehensive statutory water system with a priority as of the date of entry; all rights arising thereafter had to be established in compliance with the statutory system that used the appropriation concept.[16] The third approach, followed in Colorado, recognized only appropriative rights. Those states that presently recognize only appropriative rights are said to be following the *Colorado doctrine*.[17]

As the dispute raged between states and among citizens of the various states over which doctrine, riparian or appropriation, was best as a practical matter, or which was legally correct, the United States Supreme Court observed in dictum in *Kansas v. Colorado*,[18] a 1907 stream apportionment suit, that each state could determine for itself which rules, whether riparian or appropriative, it would follow with respect to water rights. The Court stated further that Congress had no authority to force either rule upon a state. In 1935, in *California-Oregon Power Co. v. Beaver Portland Cement Co.*,[19] the Court's earlier dictum was elevated to law when the Supreme Court held that a federal patent conveyed only the land and that the question of relative rights to water among the various citizens of a state is a question for state law. The Court explicitly relied upon the Act of 1866, as amended in 1870, and in part on the Desert Land Act of 1877.[20] It should be noted that this case dealt only with the respective rights to water among the various citizens of a state.

14. *See, e.g.*, IDAHO CODE §§ 42-101 to -112 (Supp. 1975); ORE. REV. STA. §§ 537, 538 (Supp. 1974); UTAH CODE ANN. § 73-3 (1968); WASH. REV. CODE ANN. § 90.03.010 (Supp. 1974).

15. This solution was exemplified in Lux v. Haggin, 69 Cal. 225, 344-409, 10 P. 674, 724-63 (1886).

16. Trelease, *Coordination of Riparian and Appropriative Rights to Use of Water*, 33 TEX. L. REV. 24, 32-35 (1954).

17. The *Colorado doctrine* was enunciated in Coffin v. Lefthand Ditch Co., 6 Colo. 443, 447 (1882): "We conclude, then, that the common law doctrine giving the riparian owner a right to the flow of water in its natural channel upon and over his lands, even though he makes no beneficial use thereof, is inapplicable to Colorado."

18. 206 U.S. 46, 94 (1907).

19. 295 U.S. 142, 162 (1935).

20. Statutes cited notes 6, 9, and 11 *supra*.

Early state water law legislation was generally incomplete. The water law systems created thereby, however, developed into elaborate and detailed schemes that erected a ladder of priorities establishing the measure and extent of each right, the place and nature of its use, the manner in which rights could be acquired and used, and the method of giving notice to the public of each use.[21] Because the states created and enforced comprehensive systems of water law, a pattern of reliance on state law developed and the role of federal law was ignored for many years. No one considered what right the federal sovereign had to make use of the unappropriated water to fulfill its own purposes. Further, no one considered how such a right might be established and recorded. But in 1908 the United States Supreme Court thrust upon the scene the federal reserved water right with the claim to an early priority and a right to expand the use of water in the future as the need arose, but with no known means of establishing the amount of use or allowable types of uses. The painful howls of protest from the states and from their water users were at least understandable. This response resulted in part from the failure to recognize the already established principle that the source of the authority to administer the use of water was the federal sovereign. It also demonstrated a failure to fully appreciate the concept of federal supremacy as applied to the fulfillment of the federal sovereign's objectives.[22]

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21. The same basic legal concepts are found in each state system: (1) beneficial use is the measure of the existence and scope of the right; (2) the right may, but need not necessarily, be appurtenant to the land; (3) ownership of the land itself is not considered a basis for a water right; (4) the appropriated water may be applied at any place where it is needed, regardless of the distance from the stream; (5) diversions out of a watershed and interstate diversions are protected; (6) the rights of the prior appropriator must be filled before a junior appropriator is permitted to take water, and the burden of shortage falls on those who have the latest right; (7) in time of shortage, there is no proration; (8) the holder of the prior right can take no more water than is necessary for his original need; (9) the rights of the various users among themselves are very carefully regulated by means of court decrees, state administration practices, and a bevy of water masters and ditch riders who operate a system of diversions through canals, headgates, and ditches; (10) the right to the water is intended to be good as against the whole world except against someone with an earlier priority; (11) each right is recorded in detail on a use-by-use basis; and (12) mining, irrigation, municipal and sanitary purposes, and industrial power production are recognized as beneficial uses. [1881] Colo. Laws 142; [1879] Colo. Laws 94; [1881] Idaho Laws 267, 273; ch. 115, [1886] Kans. Laws Spec. Sess. 154; [1885] Mont. Laws 130; ch. 68, [1889] Nebr. Laws 503; ch. 20, [1880] Utah Laws 36; ch. 61, [1886] Wyo. Laws 294.

Some of the states are beginning to recognize that recreation and the maintenance of minimum stream flows are beneficial uses. *See, e.g.*, WASH. REV. CODE ANN. § 90.22.010 (Supp. 1974). In addition, the constitutions of some states have given a preference to some water uses over others. *See, e.g.*, IDAHO CONST. art XV, § 3 (domestic use preferred over all other uses, and agricultural use preferred over manufacturing).

22. *See* text accompanying notes 204 & 205 *infra*.

B. The Origin of the Winters *Doctrine:* Winters v. United States

In the 1908 case of *Winters v. United States*,[23] the United States Supreme Court held that the right to use the nonnavigable waters of the Milk River, which flowed through or bordered on the Fort Berthold Indian Reservation in Montana, was impliedly reserved by the government and the Indians in the treaty establishing the reservation. In its decision, the Court recognized that conflicting implications concerning the intent of the sovereign arose from the facts and circumstances surrounding the creation of the reservation, but held that the implication "which makes for the retention of the waters is of greater force than that which makes for the cession."[24] The Court further declared that

> [t]he power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years.[25]

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23. 207 U.S. 564 (1908).

24. *Id.* at 576. The Court stated:

> The [Indian] reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such the original tract was too extensive, but a smaller tract would be inadequate without a change of conditions. The lands were arid and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government. The lands ceded were, it is true, also arid; and some argument may be urged, and is urged, that with their cession there was the cession of waters, without which they would be valueless, and "civilized communities could not be established thereon." And this, it is further contended, the Indians knew, and yet made no reservation of the waters. We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession. The Indians had command of the lands and the waters—command of all their beneficial use, whether kept for hunting, "and grazing roving herds of stock," or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate? And, even regarding the allegation of the answer as true, that there are springs and streams on the reservation flowing about 2,900 inches of water, the inquiries are pertinent. If it were possible to believe affirmative answers, we might also believe that the Indians were awed by the power of the Government or deceived by its negotiators. Neither view is possible. The Government is asserting the rights of the Indians.

Id.

25. *Id.* at 577 (citations omitted).

After fifty-five years of inconclusive debate over the legal principle articulated in the *Winters* case, the Supreme Court, in the 1963 case *Arizona v. California*,[26] discussed the doctrine in these terms:

> The Court in "Winters" concluded that the Government, when it created that Indian reservation, intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless. "Winters" has been followed by this Court as recently as 1939 in *United States v. Powers*, 305 U.S. 527. We follow it now and agree that the United States did reserve the water rights for the Indians effective as of the time the Indian reservations were created.[27]

As recently as 1971, in *United States v. District Court for Eagle County*,[28] the Supreme Court reaffirmed the principles articulated in *Winters*. Further, both the National Water Commission and the Public Land Law Review Commission in their reports on the subject have recognized the existence of the principle that the federal sovereign impliedly reserved water to fulfill its purposes when it withdrew lands from the public domain.[29]

The *Winters* case and its progeny have been used by the courts to define the already existing power of the federal sovereign over water, particularly the power of the sovereign to reserve unappropriated water to fulfill its purposes.[30] Indeed, with the *Winters* doctrine, the courts have filled the void in the law created when Congress gave the states authority to administer individual rights to the use of water within their boundaries[31] without establishing a means whereby the federal sovereign could secure the water needed for its purposes. It should be remembered in this context that there is no body of statutory law governing the reservation of water by the federal sovereign—the doctrine rests solely in judicial decisions.

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26. 373 U.S. 546 (1963).

27. *Id.* at 600.

28. 401 U.S. 520 (1971).

29. NATIONAL WATER COMM'N, WATER POLICIES FOR THE FUTURE 459-83 (1973) [hereinafter cited as NATIONAL WATER COMM'N]; 1 C. WHEATLEY, C. CORKER, T. STETSON & D. REED, STUDY OF THE DEVELOPMENT, MANAGEMENT, AND USE OF WATER RESOURCES ON THE PUBLIC LANDS 61-145 (1969) (prepared for the Public Land Law Review Comm'n) [hereinafter cited as WHEATLEY].

30. For a discussion of the constitutional source of that power see the text accompanying notes 195-198 *infra*.

31. *See* text accompanying notes 6-13 *supra*.

C. The Scope of the Winters *Doctrine: Water Impliedly Reserved to Fulfill the Purposes of the United States in Establishing Reservations and Enclaves by Withdrawals from the Public Domain*

In *Arizona v. California*[32] the Supreme Court not only reaffirmed the viability of the *Winters* doctrine, but for the first time extended its application beyond Indian reservations. The Court, by adopting the holding of the special master initially appointed to hear the case,[33] upheld claims asserted by the United States to the waters of the Colorado River and some of its tributaries for use on non-Indian federal reservations such as national forests and recreation and wildlife areas.[34]

Since the Court discussed only the claims on behalf of Indian reservations, it is necessary to refer to the report of the special master to determine the basis for extending the doctrine of reserved water rights to other reservations and enclaves. The special master first determined that the United States had the *power* to reserve water to fulfill its purposes in creating the various kinds of reservations involved in the case. With respect to the Lake Mead National Recreation Area, for example, he declared:

> It is necessary to adjudicate the water rights of the Lake Mead National Recreation Area for the same reason that the rights of the mainstream Indian Reservations must be adjudicated. I conclude that the United States had the power to reserve water in the Colorado River for use in the Lake Mead National Recreation Area for the same reasons that it could reserve such water for Indian Reservations. Although the authorities discussed above which establish the reservation theory all involved Indian Reservations, the principles seem equally applicable to lands used by the United States for its other purposes. If the United States can set aside public land for an Indian Reservation and, at the same time, reserve water for the future requirements of that land, I can see no reason why the United States cannot equally reserve water for public land which it sets aside as a National Recreation Area. Certainly none of the parties has suggested a tenable distinction between the two situations.[35]

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32. 373 U.S. 546 (1963).

33. Special masters are appointed by the Supreme Court in interstate stream apportionment suits. For a discussion of the original jurisdiction of the Court in such cases see section III, *B, 4 infra*.

34. 373 U.S. at 601.

35. Report of Special Master Rifkind at 292-93 (1960), Arizona v. California, 373 U.S. 546 (1963) (citation omitted), [hereinafter cited as Special Master]. With respect to the

After determining that the United States had the power to reserve water for use upon the non-Indian federal reservations involved,[36] the special master determined that the circumstances surrounding their creation demonstrated the *intent* of the United States to do so.[37]

In 1971 the Supreme Court identified those lands for which a reserved water right may be implied. That year, in its most recent decision involving reserved rights, *United States v. District Court for Eagle County*,[38] the Court declared:

> It is clear from our cases that the United States often has reserved water rights based on withdrawals from the public domain. As we said in *Arizona v. California*, 373 U.S. 546, the Federal Government had the authority both before and after a State is admitted into the Union "to reserve waters for the use and benefit of federally reserved lands." *Id.*, at 597. The federally reserved lands include any federal enclave. In *Arizona v. California* we were primarily concerned with Indian reservations. *Id.*, at 598-601. The reservation of waters may be only implied and the amount will reflect the nature of the federal enclave.[39]

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power to reserve water to serve the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge, and the Cibola Valley Waterfowl Management Area see *id.* at 296-98.

36. These included wildlife refuges, waterfowl management areas, and recreation areas.

37. Again in the context of the Lake Mead National Recreation Area, Special Master Rifkind declared:

> In determining whether the United States intended to reserve water for future reasonable needs of the Lake Mead National Recreation Area, I have followed the course outlined in regard to Indian Reservations. Since the purposes of the Recreation Area could not be fully carried out without the use of water from the mainstream of the Colorado River, I have found that the United States intended to reserve such water for use within the Recreation Area. Furthermore, having found that the United States intended to reserve water for the Area, I have assumed, since there is no evidence to the contrary, that the reservation was for reasonable future requirements. As in the case of Indian Reservations, it is not likely that the United States intended that any future development of the Area would have to depend on appropriative rights to water obtained under state law.

Special Master, *supra* note 35, at 293. The federal government's intent to reserve water for the other lands involved was also discussed. *Id.* at 296-98.

Some commentators, following the decision in *Arizona v. California*, sought to narrow the scope of the holding by noting that, except for Indian reservations, the federal uses involved therein were minimal. Therefore, they claimed that the water rights which the United States could reserve for non-Indian reservations and enclaves were limited to those which were, by their nature, de minimus. *See* Address by Mr. Charles P. Corker, Rocky Mountain Mineral Law Institute, July 18, 1971.

38. 401 U.S. 520 (1971).

39. *Id.* at 522-23.

Thus, water rights may have been impliedly reserved to serve not only Indian reservations but also any federal enclave created by reserving or withdrawing lands from the public domain. Whether the United States can reserve water to serve acquired lands, as opposed to reserved or withdrawn lands, is undecided.[40] In light of *Eagle County*, however, it is apparent that a court can find a federal reserved water right if (1) the land in question constitutes a federal enclave or reservation, (2) the land is withdrawn from the public domain, and (3) the circumstances surrounding creation of the enclave or withdrawal of the reservation reveal an intent to reserve water.

The term *federal enclave* historically meant those military areas described in article I, section 8, clause 17 of the United States Constitution.[41] Today, however, the definition includes any land of the United States, or private land within an enclave, where the United States exercises exclusive jurisdiction and exclusive legislative authority.[42]

Since the reservation doctrine arose in the Western States, where most land was once public land held by the United States, it is also necessary to differentiate between *public lands* and *reserved lands* of the United States. Congress has defined *public lands* as those lands owned by the United States that are subject to private appropriation and disposal under public land laws,[43] whereas *reservations* are not, after withdrawal, subject to such disposal.[44] Therefore, a reserved water right may be implied to serve any formerly public lands withdrawn or reserved by the federal sovereign if, at the time of withdrawal, the sovereign intended to accomplish a purpose that requires the use of water for its fulfillment.

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40. For a discussion of this issue see section II, *B, 1, b infra*.

41. The definition is included in a proviso which gives Congress the power to:

> [E]xercise exclusive Legislation in all Cases whatsoever . . . over all places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . .

U.S. CONST. art. I, § 8, cl. 17.

42. Macomber v. Bose, 401 F.2d 545, 547 (9th Cir. 1968). In Collins v. Yosemite Park & Curry Roman Co., 304 U.S. 518, 529 (1938), the Supreme Court established that enclaves over which the United States has jurisdiction are not limited to those established for the military purposes enumerated in art. I, § 8, cl. 17.

For a discussion of exclusive legislative authority, see text accompanying notes 225-227 *infra*.

43. *See generally* FPC v. Oregon, 349 U.S. 435, 443-44 (1955).

44. *Id.* at 444.

II. The Application of the *Winters* Doctrine to Indian Reservations, Federal Enclaves and Other Reservations, and the Public Domain

The first five subsections of this section discuss the application of the *Winters* doctrine to Indian reservations; national parks, monuments, and forests; fish and wildlife areas; the public domain; and military reservations. Certain questions concerning the *Winters* doctrine, although applicable to more than one type of land, will be addressed only once, at the most appropriate point. These questions include: How is the implied intent to reserve water established? For what purposes or uses was water reserved? What is the measure of water reserved for each use? Does the Indian reserved right include immemorial, or aboriginal, water rights? How is the reserved right modified or affected by federal or state statutes? Does the *Winters* doctrine apply to acquired lands as well as to withdrawn or reserved lands? What happens to reserved water rights when reserved lands are leased or transferred? Who has the interim right to use reserved waters not presently being used by the holder of the reserved right? Yet another question is discussed only briefly in a sixth subsection, because the author has already addressed it in another publication:[45] What is the effect of a change in the place or nature of the use of reserved waters?

While considering the specific applications of the *Winters* doctrine in the subsections which follow, it is important to keep in mind that there is no statute dealing directly with the subject—the doctrine is judicially created. Because the courts defined only as much of the doctrine as was necessary to resolve each particular controversy, many issues concerning the nature and scope of these water rights have been left undetermined.[46] Also, the states have for various reasons opposed the development of the *Winters* doctrine.[47] The cumulative result has been confusion, conflict, and controversy between federal and state interests and pronounced disagreement among legal scholars.[48] Since water

45. For a full citation to the publication mentioned see note 194 *infra*.

46. 2 Wheatley, *supra* note 29, at 556-63.

47. Morreale, *Federal-State Conflicts over Western Waters—A Decade of Attempted "Clarifying Legislation,"* 20 Rutgers L. Rev. 423 (1966).

48. The following is a representative sampling: Ely, *Federal-State Relations in Water Resources Development*, statement in behalf of the American Bar Association before the National Water Comm'n, November 6, 1969; F. Trelease, National Water Comm'n, Legal Study No. 5: Federal-State Relation in Water Laws (1971) [hereinafter cited as F. Trelease]; Bannister, *The Question of Federal Disposition of State Waters in Priority*

is scarce, and a secure, steady supply is essential to economic growth in the West, the stakes are high and the emotions of the participants are deeply involved.

The purpose of this section is not to propose solutions on a piecemeal basis for the multitude of unsettled issues. Rather, it is to identify the present state of the law and the major unresolved issues concerning the *Winters* doctrine. Section III proposes the establishment of an administrative procedure to deal with these issues in a comprehensive and cohesive fashion.

A. Application of the Winters *Doctrine to Indian Reservations*

The doctrine of the implied reservation of nonnavigable waters was applied in the *Winters* case[49] to an Indian reservation created pursuant to a treaty antedating the admission of Montana to statehood. Since that decision, the courts have applied the doctrine to navigable and nonnavigable waters[50] and to Indian reservations created by treaty, statute, and executive order,[51] both before and after statehood.[52] The courts have not, to date, excluded any Indian reservations from the ambit of the doctrine,[53]

States, 28 HARV. L. REV. 270 (1915); Bloom, *Indian Paramount Rights to Water Use*, 16 ROCKY MT. MINERAL L. INST. 669 (1971); Carver, *The Implied Reservation Doctrine: Policy or Law*, 6 LAND & WATER L. REV. 117 (1970); Clark, *The Federal Interest in Water Resources*, LIST WESTERN WATER LAW SYMPOSIUM 85 (1963); Corker, *Federal-State Relations in Water Rights Adjudication and Administration*, 17 ROCKY MT. MINERAL L. INST. 579 (1971); Forer, *Water Supply: Suggested Federal Regulation*, 75 HARV. L. REV. 332 (1961); Goldberg, *Interposition—Wild West Water Style*, 17 STAN. L. REV. 1 (1964); Hanks, *Peace West of the 98th Meridian—A Solution to Federal-State Conflicts over Western Waters*, 23 RUTGERS L. REV. 33 (1968); Martz, *The Role of Government in Public Resource Management*, 15 ROCKY MT. MINERAL L. INST. 1 (1970); Morreale, *Federal Power in Western Waters with Navigation Power and the Rule of No Compensation*, 3 NATURAL RESOURCES J. 1 (1963); Morreale, *Federal-State Conflicts over Western Waters—A Decade of Attempted "Clarifying Legislation,"* 20 RUTGERS L. REV. 423 (1966); Trelease, Arizona v. California: *Allocation of Water Resources to People, States, and Nation*, 1963 SUP. CT. REV. 158; Trelease, *Government Ownership and Trusteeship of Water*, 45 CALIF. L. REV. 638 (1957); Trelease, *Reclamation Water Rights*, 32 ROCKY MT. MINERAL L. REV. 37 (1960); Trelease, *Water Rights of Various Levels of Government—States' Rights vs. National Powers*, 19 WYO. L.J. 189 (1965); Veeder, *Indian Prior and Paramount Rights to the Use of Water*, 16 ROCKY MT. MINERAL L. INST. 631 (1971); Warner, *Federal Reserved Water Rights and Their Relationship to Appropriative Rights in the Western States*, 15 ROCKY MT. MINERAL L. INST. 399 (1969). For a recent discussion of the present status of the controversy see *Symposium—Federal Reserved Rights*, 8 NATURAL RESOURCES LAW 219 (1975).

49. 207 U.S. 564 (1908).

50. Arizona v. California, 373 U.S. 546 (1963); United States v. Walker River Irr. Dist., 104 F.2d 334 (9th Cir. 1939); Conrad Inv. Co. v. United States, 161 F. 829 (9th Cir. 1908).

51. Arizona v. California, 373 U.S. 546 (1963); United States v. Walker River Irr. Dist., 104 F.2d 334 (9th Cir. 1939).

52. Arizona v. California, 373 U.S. 546, 597 (1963).

53. Whether the pueblos on the Rio Grande River, because of the particular circum-

thus in effect adopting the position taken for many years by the Department of the Interior that the *Winters* doctrine applies to all reservations to the same extent, regardless of how or when created.[54] Further, the courts in applying the *Winters* doctrine have held that the sources of reserved waters include waters arising upon, flowing through, or bordering Indian reservations.[55] The water was reserved as of the date the reservations were created.[56] Whether waters may be reserved in a distant stream when there is insufficient water available on a reservation has never been decided. Several courts have applied the doctrine of reserved water rights to groundwater.[57]

Some courts and commentators, in discussing the reservation of water for Indian reservations created by treaty, have posited that it was the Indians and not the United States who reserved the water.[58] Such a position, however, should be approached with caution as it is not supported by the weight of the case law and may operate to the detriment of the Indians.[59]

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stances surrounding those reservations and their historical water rights, also have federally reserved water rights is discussed in the text accompanying notes 99-107 *infra*.

54. *See* Arizona v. California, 373 U.S. 546, 598-600 (1963); United States v. Walker River Irr. Dist., 104 F.2d 334 (9th Cir. 1939). *See also* Letter from the Secretary of the Interior to the Attorney General, November 8, 1935 (concerning the appeal of the Walker River Indian Reservation case cited above).

55. Arizona v. California, 373 U.S. 546, 600 (1963); Winters v. United States, 207 U.S. 564 (1908); United States v. Walker River Irr. Dist., 104 F.2d 334 (9th Cir. 1939).

56. Cases cited note 55 *supra*.

57. United States v. Cappaert, 508 F.2d 313 (1974), *cert. granted*, 422 U.S. 1041 (1975) (Nos. 74-1107, 74-1304); Tweedy v. Texas Co., 286 F. Supp. 383 (D. Mont. 1968); United States v. Fallbrook Pub. Util. Dist., 165 F. Supp. 806 (S.D. Cal. 1958), *rev'd on other grounds*, 347 F.2d 48 (9th Cir. 1965).

58. The advocates of this position, citing United States v. Winans, 198 U.S. 371, 381 (1905), claim that an Indian treaty establishing a reservation "is not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." *See, e.g.*, United States v. Ahtanum Irr. Dist., 236 F.2d 321, 326 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957), *rev'd*, 330 F.2d 987 (9th Cir.), *rehearing denied*, 338 F.2d 307 (9th Cir. 1964), *cert. denied*, 381 U.S. 924 (1965); Veeder, *Indian Prior and Paramount Rights to the Use of Water*, 16 ROCKY MT. MINERAL L. INST. 631, 645-49 (1971).

59. Some reservations were not created by treaty, but by executive order or statute. For example, the Walker River and Pyramid Lake Indian Reservations were created by executive orders. *See* U.S. DEP'T OF THE INTERIOR, EXECUTIVE ORDERS RELATING TO INDIAN RESERVATIONS FROM MAY 14, 1855 TO JULY 1, 1912 (1912). A claim could be made that if the water was impliedly reserved by treaty, the nontreaty reservations would be without a reserved water right. The courts, however, have extended the doctrine to imply the reservation of waters on Indian reservations whether created by treaty, statute, or executive order. Cases cited note 51 *supra*.

Further, to suggest that the Indians contemplated reserving the water credits them with an intent which they were incapable of enforcing, then or now, without the active assistance of the United States. The protection of their rights, even their very existence, has in the past required affirmative action by the federal sovereign. *See* D. BROWN, BURY

1. The nature of the Indians' reserved water right

The water right reserved for the benefit of Indian reservations is not a public right; rather it is a private right held in trust by the United States for the benefit of the Indians. Other reserved water rights, in contrast, are public in nature.[60] Further, the Indians' reserved water right, when used for irrigation, appears to be in the nature of a right to realty. It may be appurtenant to the land.[61] In this way it is very much akin to state-created water rights.[62]

The Indians' reserved water rights cannot be lost by nonuse under state laws, nor by legal action of the various states through condemnation, inverse condemnation, or statutory enactment,[63] nor by private appropriation.[64] The overriding power of the federal sovereign under the supremacy clause[65] of the Constitution is the source of the protection of Indian property and water rights against state and private encroachment.[66] The right protected

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MY HEART AT WOUNDED KNEE (1970) (cataloging instances during the late 1800's of severe deprivation at the hands of non-Indians which were resisted only by late and often ineffective federal action).

Finally, since the Indians are citizens of their respective states, water rights reserved by them might arguably be lost by nonuse under state law or by state legal action. If the federal sovereign is the source of the right, the Indians cannot be deprived of the water by the application of state law. See authorities cited notes 63, 64 *infra*. Recognizing this, the courts have based Indian reserved water rights upon the implied intent of the federal sovereign, not that of the Indians. *See, e.g.*, Special Master, *supra* note 35, at 254-61, 292-300.

60. As stated in NATIONAL WATER COMM'N, *supra* note 29, at 477:

> Indian water rights are different from Federal reserved rights for such lands as national parks and national forests, in that the United States is not the owner of the Indian rights but is a trustee for the benefit of the Indians. While the United States may sell, lease, quit claim, release, or otherwise convey its own Federal reserved water rights, its powers and duties regarding Indian water rights are constrained by its fiduciary duty to the Indian tribes who are beneficiaries of the trust.

61. United States v. Powers, 305 U.S. 527 (1939).

62. Special Master, *supra* note 35, at 263, 266. The effect of this characteristic on the rights of non-Indian lessees and transferees is discussed in note 133 and accompanying text *infra*.

63. *See generally* Rice, *The Position of the American Indian in the Law of the United States*, 16 J. COMP. LEG. & INT'L L. (3d ser.) 78 (1934); Letter from John V. Truesdale, Special Assistant to Attorney General, to Nevada State Engineer, April 1, 1921 (concerning Moapa Indian Reservation).

64. Arizona v. California, 373 U.S. 546 (1963); Winters v. United States, 207 U.S. 564 (1908); United States v. Ahtanum Irr. Dist., 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957), *rev'd*, 330 F.2d 897 (9th Cir.), *rehearing denied*, 338 F.2d 307 (9th Cir. 1964), *cert. denied*, 381 U.S. 924 (1965); United States v. Walker River Irr. Dist., 104 F.2d 334 (9th Cir. 1939).

65. U.S. CONST. art. VI, cl. 2.

66. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 116-21 (1971) [hereinafter cited as

cannot be set aside, overridden, or denied except as clearly specified by Congress.[67] Thus, the courts have held that since the Indian is legally incapable of protecting his own rights, the federal government is obligated, as the trustee of Indian reserved water rights, to protect and enforce those rights.[68]

The *Winters* doctrine provides that sufficient water was reserved for the present *and future needs* of the Indians.[69] This reservation for future uses constitutes a significant departure from western appropriative water law. That departure has caused considerable consternation among and opposition from the states and non-Indian water users. Because there is no well-defined measure of the amount of water reserved for Indian uses, the states and non-Indian water users have no assurance of the quantity of water left for their use.[70]

The quantity of water reserved for Indians can be determined only after examining (1) the uses or purposes for which water was reserved, and (2) the appropriate measure of water to be allocated for each use.[71]

a. Uses for which water was reserved. Agricultural needs have figured prominently in the application of the *Winters* doc-

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COHEN]; Solicitor's Memorandum concerning petition for certiorari in United States v. Powers, 94 F.2d 783 (1938), to the Department of Justice, May 5, 1938.

67. Arizona v. California, 373 U.S. 546, 565, 580-89 (1963). *See also* United States v. Alexander, 131 F.2d 359 (9th Cir. 1942); United States v. McIntire, 101 F.2d 650 (9th Cir. 1939) (no title to waters impliedly reserved for Indian reservations can be acquired except as specified by Congress). As stated in COHEN, *supra* note 66, at 117:

> It is enough for the present to note that the domain of power of the Federal Government over Indian affairs marked out by the federal decisions is so complete that, as a practical matter, the federal courts and federal administrative officials now generally proceed from the assumption that Indian affairs are matters of federal, rather than state, concern, unless the contrary is shown by act of Congress or special circumstance.

68. For a discussion of this obligation see Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1973).

69. Arizona v. California, 373 U.S. 546 (1963); United States v. Ahtanum Irr. Dist., 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957), *rev'd*, 330 F.2d 897 (9th Cir.), *rehearing denied*, 338 F.2d 307 (9th Cir. 1964), *cert. denied*, 381 U.S. 924 (1965); Conrad Inv. Co. v. United States, 161 F. 829 (9th Cir. 1908). *But see* United States v. Walker River Irr. Dist., 104 F.2d 334 (9th Cir. 1939) (placing a limitation on future uses based on historical use over 70 years, an action that is no longer justified in light of the Supreme Court's decision in *Arizona v. California*).

70. Hanks, *Peace West of the 98th Meridian—A Solution to Federal-State Conflicts over Western Waters*, 23 RUTGERS L. REV. 33, 42, 61 (1968). *See also* Morreale, *Federal-State Conflicts over Western Waters—A Decade of Attempted "Clarifying Legislation,"* 20 RUTGERS L. REV. 423 (1966).

71. The place and time of diversion, the nature of each use, the amount of water consumed, and the amount of return flow are all factors that should be considered in establishing the measure of the reserved right.

trine to Indian reservations.[72] For example, in *Arizona v. California*, the Indian water rights were measured in terms of the "practicably irrigable acreage" on the five reservations involved.[73] The Supreme Court, however, based its decision on the special master's report[74] which stated in pertinent part:

> The reservations of water were made for the purpose of enabling the Indians to develop a viable agricultural economy; other uses, such as those for industry, which might consume substantially more water than agricultural uses, were not contemplated at the time the Reservations were created . . . . I hold only that the amount of water reserved, and hence the magnitude of the water rights created, is determined by agricultural and related requirements, since when the water was reserved that was the purpose of the reservation . . . .
>
> . . . The measurement used in defining the magnitude of the water rights is the amount of water necessary for agricultural and related purposes because this was the initial purpose of the reservations . . . .[75]

The basis of the special master's holding was that the sovereign reserved water to fulfill those purposes, whether agricultural or *other*, for which the reservations were created. It should be remembered, however, that the Supreme Court limited its decision in *Arizona v. California* to the facts in that case.[76] Thus it is clear that when an Indian reservation is established to provide an agricultural economy for the Indians, the measure of the water right will include that amount of water necessary to irrigate the practicably irrigable acreage and to satisfy related uses.[77] Nothing has been said to date, however, by the Supreme Court or Congress about an Indian reservation which has a purpose behind its creation different from that of establishing an agricultural economy either in whole or in part.

Due to the unresolved status of this issue, the extent of the reserved water rights of numerous Indian reservations remains uncertain. One example is the Pyramid Lake Paiute Indian Reservation in Nevada, which completely encloses a large desert lake at the terminus of the Truckee River. The lake produces

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72. *See* authorities cited note 64 *supra*; United States v. Powers, 305 U.S. 527 (1939); United States v. McIntire, 101 F.2d 650 (9th Cir. 1939); Skeem v. United States, 273 F. 93 (9th Cir. 1921).

73. 373 U.S. at 596.

74. *Id.* at 595.

75. Special Master, *supra* note 35, at 265-66 (emphasis added).

76. 373 U.S. at 595.

77. *Id.* at 600-01.

large, highly marketable trout and other fish, upon which the tribe has relied from time immemorial for its main source of food. The fish were also used as an item for trade and barter with other Indian bands before the arrival of the white man. That trade continued with the white man prior to and after the establishment of the reservation. Indeed, it appears that one purpose for establishing the reservation was to preserve to the Indians the benefit of the lake and its fish.[78] A question now arises, however, whether sufficient water was reserved in the Truckee River to maintain the lake and the fishery. The correspondence and the executive order creating the reservation are silent on the subject.[79] This particular issue is currently being litigated.[80]

When the purposes of a reservation differ from the agricultural purpose described in *Arizona v. California*,[81] two possible standards suggest themselves for determining which uses will be accorded reserved waters:

(1) Those uses necessary to fulfill the purposes contemplated at the time the reservation was created. This is the standard used by the special master in *Arizona v. California*.[82]

(2) All possible uses, including uses which appear in the future without reference to the purposes contemplated at the time of the creation of the reservation.[83] This standard is inferred by some constructions of *United States v. Winans*[84] and *United States v. Ahtanum Irrigation District*.[85]

The first, or contemplated purposes standard, would permit

78. United States v. Sturgeon, 27 F. Cas. 1357 (No. 16,413) (D. Nev. 1879) (prosecution of a non-Indian for fishing in the lake without authority from the tribe).

79. Letter from Department of the Interior, Office of Indian Affairs, to General Land Office, November 29, 1859, *and* Exec. Order, March 23, 1874 (signed by Ulysses S. Grant), *cited in* United States v. Walker River Irr. Dist., 104 F.2d 334, 338 (9th Cir. 1939).

80. United States v. Truckee Carson Irr. Dist., Civil No. 2987 JBA (D. Nev., filed Dec. 21, 1973). The claim is made for sufficient water to maintain the level of the lake over the long run and sufficient water to sustain natural spawning runs for the fish. However, that claim was not introduced by the United States in a prior adjudication of the Truckee River and the defendants are seeking to bar the action under the doctrines of res judicata and collateral estoppel. Whether those doctrines will prevent the claim from being litigated is at issue in the first part of a bifurcated trial in the above case.

81. 373 U.S. at 600-01.

82. Special Master, *supra* note 35, at 265-66.

83. The advocates of this second standard also advocate the view that the Indians, not the federal government, reserved waters for the Indians' use. Thus, they perceive an inquiry into the federal government's purposes for creating a reservation as irrelevant to a determination of the existence or measure of reserved water rights. *See* note 59 *supra*.

84. 198 U.S. 371 (1905).

85. 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957), *rev'd.* 330 F.2d 897 (9th Cir.), *rehearing denied*, 338 F.2d 307 (9th Cir. 1964), *cert. denied*, 381 U.S. 924 (1965).

immediate quantification of the Indians' water rights. Its primary advantage, therefore, is that a specific quantity of water can be identified and protected from encroachment by others. Under the second standard, on the other hand, the Indians' rights would remain uncertain, and to a degree, unprotected. The non-Indian is rapidly appropriating all available water and will claim a right to continue that established use. The courts or Congress may uphold such a claim, forcing the Indians to take monetary compensation for their water. That result could severely hinder the preservation of viable Indian communities and the development of Indian lands, minerals, and other resources. If it is to be protected, the Indians' right to use water must be quantified. Applying the contemplated use standard and branding the right so it can be identified as to source and amount will make it possible to protect the right and prevent the loss of this valuable resource.

If the contemplated purposes standard is adopted, the purposes underlying the creation of each Indian reservation must be carefully considered. The various treaties and statutes creating reservations speak in terms of providing a permanent home for the Indian or of setting aside a place for him to live free from encroachment by non-Indians.[86] It appears that this language reveals an intention to permit the Indian to do the same thing with the reserved lands of his home as the white man does with his lands, such as irrigate the irrigable acres, develop the minerals, create communities, preserve the environment for fish and game, preserve minimum stream flows, provide for recreation, and establish industries to the extent that the lands lend themselves to these types of development. Assuming that all of these purposes were intended, not all may require water for their fulfillment. If water is required, however, for the fulfillment of a contemplated purpose, the sovereign may be deemed to have reserved the water.

b. The measure of water reserved for each use. Once it is determined that water was reserved for the uses necessary to fulfill a particular purpose, the quantity of water reserved for each use must be determined. The measure for agricultural uses will be that amount of water sufficient to irrigate the "practicably irrigable acreage" and satisfy related uses.[87] What constitutes the

86. *See, e.g.*, Northern Pac. Ry. v. Wismer, 230 F. 591, 593 (9th Cir. 1916), *aff'd*, 246 U.S. 283 (1918) (discussing an 1877 agreement with the Spokane Indians); Treaty with the Eastern Band of Shoshonees and the Bannock Tribe of Indians, July 3, 1868, 15 Stat. 673 (Treaty of Fort Bridger).

87. Arizona v. California, 373 U.S. 546, 600 (1963).

practicably irrigable acreage of an Indian reservation, however, remains unclear.

The standard for determining the practicably irrigable acreage and the economic feasibility of proposed water projects on Indian reservations may differ substantially from the standard applied to irrigation projects on non-Indian lands; the policies and objectives underlying the two situations are substantially different. In *Arizona v. California*,[88] the special master used a Bureau of the Budget report[89] as a guide in determining the soil characteristics and economic considerations involved in establishing the practicably irrigable acreage of the five reservations. This guide, however, was promulgated for application to reclamation projects; it was not developed to accommodate the special circumstances of Indian reservations. That report has since been rescinded,[90] as has its successor. Recently, Congress provided that another report, the findings and recommendations of the Special Task Force of the United States Water Resources Council,[91] should be used in proceedings for evaluation of water and related land resource projects. The standards in those subsequent reports were also promulgated without consideration of the peculiar nature of Indian reservations.

The need of the Indians to utilize the limited land base of their reservations should compel a less stringent standard of feasibility than is applied to non-Indian lands. It should be remembered that to the Indian his lands represent much of his heritage. Further, if he desires to maintain tribal ties, he generally cannot go elsewhere in search of better lands. The necessity for less stringent standards of economic feasibility of irrigation projects bene-

88. 373 U.S. 546 (1963).

89. The Special Master referred to exhibits 570, 1009, 1121, 1210 and 1322 of the United States as the source for the correct number of irrigable acres on the Indian reservations involved in the case. Special Master, *supra* note 35, at 267-81. Those exhibits of the United States relied on the standards in BUREAU OF THE BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, CIRCULAR NO. A-47 (Dec. 31, 1952) (officially withdrawn May 15, 1962) in calculating the practicably irrigable acreage of the reservations.

90. SEN. DOC. NO. 97, 87th Cong., 2d Sess. iii (1962) (statement of Senator Andersen).

91. The report, *Principles and Standards for Planning Water and Related Land Resources*, was adopted and published at 38 Fed. Reg. 24777, 24789 (1973). It will not be discussed herein because the Department of the Interior has not yet determined whether it applies to projects constructed on Indian reservations. There are those who believe that the trust responsibility of the United States requires it to assist Indian tribes, communities, and individuals to develop their lands without restrictive economic and social considerations established for non-Indians. The counter argument suggests that some standard for Indian projects is necessary, even if it excludes some lands that could be irrigated.

fiting Indian land was recognized by the Leavitt Act[92] which permits the Secretary of the Interior to postpone repayment of the construction cost of such projects. That postponement may be continued as long as the land remains in Indian hands. Since construction costs, as a practical matter, are repaid out of the increased value of the land when it is sold and its trust status is terminated, an Indian irrigation project can be considered economically feasible if it generates a return in excess of the operation and maintenance charges. This standard of feasibility which disregards construction costs is being urged by the United States in cases adjudicating the irrigable acreage of various Indian reservations.[93]

Some provisions of the Leavitt Act, however, should not be viewed as part of that Act's standard of economic feasibility. For example, the Secretary of the Interior, in cases of hardship and unless Congress objects, may cancel not only the construction costs but also the operation and maintenance charges of Indian irrigation projects.[94] Such action is intended, however, as relief from hardship encountered after a project is constructed. The possibility of such relief should not be considered in the prospective evaluation of practicably irrigable acreage or project feasibility.

There are as yet no standards for determining the amount of water reserved for nonagricultural uses. However, the measure should be that amount of water necessary to fulfill the particular purpose for which the water is impliedly reserved. The claims of the United States on behalf of the Indians in three pending cases demonstrate this principle. First, where a water right is asserted for the purpose of sustaining a viable fishery in a desert lake and its supporting stream, the United States claims sufficient water to maintain the present level of the lake over the long term, and sufficient stream flows to sustain spawning runs and to preserve the in-stream habitat for the fish and their fingerlings.[95] Second,

92. 25 U.S.C. § 386a (1970); Act of August 1, 1914, ch. 222, § 1, 38 Stat. 583, *as amended* 25 U.S.C. § 385 (1970).

93. *E.g.*, United States v. Akin, 504 F.2d 115 (10th Cir. 1974), *cert. granted*, 421 U.S. 946 (1975) (No. 74-949), *rev'g* Civil No. C-4497 (D. Colo., July 20, 1973) (involving the Ute Mountain Ute and Southern Ute Indian Reservations on the San Juan River); New Mexico *ex rel.* Reynolds v. Abeyeta, Civil No. 7896 (D.N.M., filed Feb. 4, 1969); New Mexico *ex rel.* Reynolds v. Aamodt, Civil No. 6639 (D.N.M., filed Apr. 20, 1966) (the latter two cases involve the New Mexico Pueblo Indian Reservations on the Rio Grande).

94. *See* Statutes cited note 92 *supra* as to Indian lands. *See also* 25 U.S.C. § 389 (1970) (non-Indian lands served by Indian irrigation projects).

95. United States v. Truckee Carson Irr. Dist., Civil No. 2987 JBA (D. Nev., filed Dec. 21, 1973). This case involves Pyramid Lake, a large desert lake enclosed entirely

where coal mines exist on an Indian reservation, the claim is for sufficient water to bring the coal to a marketable state.[96] Finally, if preservation of the ecology of a stream is the purpose to be effectuated, the claim is for a minimum flow of water sufficient to maintain the environment of the stream and its wildlife values.[97]

2. Aboriginal water rights

In addition to the water reserved by the federal sovereign upon the creation of an Indian reservation, some Indian tribes may have established an aboriginal, or immemorial, water right by diversion and use prior to the acquisition of sovereign authority by the United States. This aboriginal right, simply stated, is a right to continue using water as it was used by the Indians in their aboriginal state from time immemorial. Such a right was recognized in the adjudication of the Gila River; the Pima-Maricopa Indian Tribe was held to have an aboriginal right to irrigation waters from that river.[98] Also, the Pueblo Land Act recognizes an aboriginal right in the middle pueblos of the Rio Grande.[99]

Two issues related to the Pueblo Indians' aboriginal water rights are currently being litigated: (1) do the Pueblo Indians have the benefit of a reserved right, and (2) do the Pueblo Indians have a water right recognized under Spanish law enabling them to use water to irrigate all of their practicably irrigable acreage. The resolution of the first issue turns in part on whether the pueblos are Indian reservations to which the *Winters* doctrine applies.

The Rio Grande pueblos were in existence when the United States acquired sovereignty over New Mexico in 1848 pursuant to the Treaty of Guadalupe Hidalgo.[100] Although the pueblos be-

within the Pyramid Lake Indian Reservation. The fish native to the lake must spawn in the Truckee River, the only substantial stream flowing into the lake, in order for a natural fishery to survive.

96. United States v. Akin, 504 F.2d 115 (10th Cir. 1974), *cert. granted*, 421 U.S. 946 (1975) (No. 74-949), *rev'g* Civil No. C-4497 (D. Colo., July 20, 1973) (involving the Ute Mountain Ute and Southern Ute Indian Reservations in southern Colorado).

97. United States v. Anderson, Civil No. 3643 (E.D. Wash., filed May 5, 1972) (involving a minimum stream flow in Chamokane Creek, a tributary to the Spokane River on the Spokane Indian Reservation).

98. United States v. Gila Valley Irr. Dist., Globe Equity No. 59 (D. Ariz., June 29, 1935).

99. *See* notes 126-128 and accompanying text *infra*.

100. Treaty with Mexico, Feb. 2, 1848, 9 Stat. 922, T.S. No. 207 (Treaty of Guadalupe Hidalgo).

came a part of the United States at that time, it appears that the lands of the pueblos did not constitute a portion of the public domain; in any event, no treaty, statute, or executive order has ever designated or *withdrawn* the pueblos as Indian reservations. It is arguable that this fact, however, should not bar application of the *Winters* doctrine for the benefit of the Pueblo Indians. What constitutes an Indian reservation is a question of fact, not law, and the pueblos have always been treated as reservations in fact by the United States.[101] This pragmatic approach is supported by *Arizona v. California*[102] where the Court indicates that the manner in which a reservation is created does not affect the application of the *Winters* doctrine.[103] If the *Winters* doctrine does apply to the pueblos, the reserved water rights of the Pueblo Indians would have a priority as of 1848, the date they became reservations under the laws of the United States.

An 1848 priority on the Rio Grande is a late priority date and would not assure the Pueblo Indians a water right sufficient to irrigate all their irrigable acreage. The United States, therefore, claims that the water rights of the Pueblo Indians recognized by Spanish law, remained valid after the Treaty of Guadalupe Hidalgo.[104] The United States asserts that Spanish law recognized not only the aboriginal right but also a right to sufficient water to meet the Indians' future needs, including irrigation of all their irrigable acreage.[105] New Mexico disputes this construction of Spanish law and argues that the Pueblo Land Act,[106] which applies on its face only to the middle Rio Grande pueblos, effectively limits all the pueblo Indians' water rights to the aboriginal use. If the federal government is correct, the Pueblo Indians al-

101. United States v. Candelaria, 271 U.S. 432, 440 (1926); United States v. Sandoval, 231 U.S. 28, 41 (1913); Minnesota v. Hitchcock, 185 U.S. 373, 389-90 (1902); Harkrader v. Goldstein, 31 Interior Dec. 87 (1901); Minnesota, 22 Interior Dec. 388 (1896); Act of July 22, 1854, ch. 103, § 8, 10 Stat. 309 (pueblo lands reserved from sale or other disposal by the federal government). *Cf.* 25 U.S.C. §§ 253, 621 (1970); COHEN, *supra* note 66, at 396.

102. 373 U.S. 564 (1963).

103. Authorities cited note 54 *supra*.

104. The United States intervened and asserted the aboriginal claim in the consolidated northern pueblo cases presently underway in New Mexico: New Mexico *ex rel.* Reynolds v. Aamodt, Civil No. 6639 (D.N.M., filed Apr. 20, 1966) [Editor's Note: the federal district judge hearing this case recently entered an interlocutory order dated February 28, 1975, holding that the northern pueblos are not Indian reservations having a reserved water right. The judge's order is presently under an interlocutory appeal to the Tenth Circuit Court of Appeals.]; New Mexico *ex rel.* Reynolds v. Abeyeta, Civil No. 7896 (D.N.M., filed Feb. 4, 1969).

105. RECOPILATION DE LEYES DE REINOS DE LOS INDIOS, Book VI, Title 3 (this code includes the Spanish system of protecting pueblo water rights).

106. See notes 126-128 and accompanying text *infra*.

ready possessed a water right to irrigate all their irrigable acres when their lands became a part of the United States, and the Pueblo Land Act does not limit that right.

The concept of aboriginal water rights can also be applied to nonagricultural water uses. Aboriginal rights may include the right to maintain minimum stream flows to preserve the environment of a reservation and its fish and wildlife resources. This claim would appear to be particularly appropriate where the Indians have relied upon those resources as a source of food and recreation from time immemorial. In any event, the federal government believes that it is obligated to protect the Indians' aboriginal rights as well as all other reserved rights held for the benefit of Indians.[107]

3. *The effect of the Reclamation Act of 1902 on reserved water rights*

In order to provide "storage, diversion, and development of waters for the reclamation of arid and semi-arid lands of the West,"[108] Congress enacted the Reclamation Act of 1902[109] and acts amendatory and supplementary thereto.[110] Section 8 of the Reclamation Act of 1902 requires the Bureau of Reclamation to proceed in conformance with state law for the acquisition and administration of water rights in the construction and operation of reclamation projects.[111]

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107. It is possible to assert that one of the sovereign's purposes when the reservations were created was to preserve the Indians' aboriginal uses of water. Following this rationale, the aboriginal uses of water would be a part of the *reserved* water right.

108. 43 U.S.C. § 391 (1970).

109. Act of June 17, 1902, ch. 1093, 32 Stat. 388 (codified in scattered sections of 43 U.S.C.).

110. *E.g.*, Act of April 21, 1904, ch. 1402, § 26, 33 Stat. 225; Washoe Project Act, 43 U.S.C. §§ 614, 614a-d (1970). The act authorizes the Newlands Reclamation Project, which diverts water from the Truckee River into the Carson River watershed, thus depleting the supply of water that would have maintained Pyramid Lake, a large desert lake, and its fishery. That lake and its fishery were arguably reserved for the Pyramid Lake Paiute Indian Tribe and the last supplemental act contains a section which indicates a desire to preserve the fishery that the original reclamation project was destroying. The Indians' right to sufficient waters to preserve the Pyramid Lake fishery is currently being litigated. *See* note 95 *supra*.

111. Section 8 of the Reclamation Act reads as follows:

> [N]othing in this Act shall be construed as affecting or intended 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 thereunder, and the Secretary of the Interior, in carrying out the provision 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 landowner, appropriator, or user of water in, to, or from

The question arises whether and to what extent congressional action in authorizing reclamation projects affects reserved water rights. When there is sufficient water to meet the needs of a reclamation project, prior vested rights, and the reserved rights of the Indians and other reservations and enclaves, there is no conflict. If there is *insufficient* water for those purposes, however, a conflict must necessarily develop. Its resolution is not readily apparent; neither case law nor statutes speak to this subject.

Four possible alternatives present themselves. First, under a restrictive application of section 8, the needs of reclamation projects may be filled only with unappropriated and unreserved waters.[112] If, after satisfying reserved and other rights with an earlier priority, there is insufficient water remaining for an already constructed reclamation project, the blame can be placed on the Department of the Interior and Congress for miscalculating the feasibility of the project. This alternative would encourage full disclosure and require a certain degree of candor in establishing the feasibility of projects. Second, the reclamation project takes all the water necessary to complete the project and the quantity of reserved water is reduced accordingly. The rationale supporting this second approach is that supplementary reclamation acts are the most recent expressions of congressional intent respecting the water rights involved. It could be assumed that those acts were promulgated with full awareness of conflicting rights and with the intent that this subsequent legislation prevail over prior federal action in the area. Third, in times of shortage, all water is prorated. Fourth, Congress could resolve the issue between all the users for each particular reclamation project by adopting legislation allocating the available water among prior appropriated rights, reserved rights, and project rights. Whichever of these solutions is adopted, it should be speedily implemented. The impact of reclamation projects on water rights, particularly Indian rights, is an issue that affects more water users than most other unresolved issues in this area of the law.

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any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

Act of June 17, 1902, ch. 1093, § 8, 32 Stat. 390 (codified at 43 U.S.C. §§ 372, 383 (1970)).

112. Section 8 would appear to subject reclamation project water rights to prior existing rights, including reserved water rights, when its states that "nothing herein shall in any way affect any right of . . . the Federal Government or of any landowner, appropriator or user . . . ." *Id.*

The United States has the authority to condemn both Indian tribal and allotted lands for construction of a reclamation project.[113] A restriction against alienation of Indian allotted lands does not prohibit an allottee Indian from selling his improvements on his land to the United States and *exchanging* the land itself for other lands.[114] The United States usually acquires other lands to give to tribes or individual Indians in place of the acreage needed for a project. For example, the government gave lands in southeastern Utah to the Navajo Tribe to replace lands flooded by Lake Powell in the Glen Canyon Project.[115]

The water rights questions arising from this exchange program are varied and numerous. For example, what happens to the reserved water rights of the lands transferred to the United States? Were the water rights transferred to the lands received in exchange by the Indians? Has the date of priority changed? What is the effect of the exchange on other water users in the watershed with vested rights at the time of transfer? Does a water right attach to public lands added to the reservation? If so, what are its characteristics? Is it the same as any other Indian reserved right? If the reclamation project is to serve acquired lands as well as public lands held in trust for the tribe, as does the Navajo Project,[116] must the right to the use of water be established pursuant to state law?

The Navajo Project was apparently given to the Navajo Tribe as a *quid pro quo* for its water rights in the Colorado River which the government stored in large part for downstream use by non-Indian interests.[117] The question arises, however, whether the tribe's water rights under the project have the same priority as the rights to the water given up. Further, if some of the lands acquired either by the United States for the tribe or by the tribe itself had appurtenant water rights at the time of acquisition, what is the effect on the measure of the total water right of the reservation? None of these questions has been answered. The legislation is silent on the subject.

113. United States v. 5,677.94 Acres of Land, 162 F. Supp. 108 (D. Mont. 1957) (citing section 9(c) of the Flood Control Act of 1944, the federal reclamation laws, and the General Condemnation Act of 1888 as authority); Solicitor's Opinion, Dep't of the Interior, M-36148 (Feb. 3, 1954) (involving the Yellowtail Dam and the Crow Indian Reservation).

114. Henkel v. United States, 237 U.S. 43 (1915).

115. *See* Act of Sept. 2, 1958, Pub. L. No. 85-868, 72 Stat. 1686.

116. 43 U.S.C. § 615kk (1970).

117. The Navajo Tribe also receives up to 50,000 acre-feet per year from Lake Powell for use in the coal stream plant at Page, Arizona.

4. The effect of other federal statutes on reserved water rights

The effect of specific federal legislation on the reserved water rights of Indian reservations can best be introduced by reference to congressional acts dealing with the Wind River Reservation and the Uintah and Ouray Reservation. Since both acts specified that certain actions should be taken pursuant to state law in connection with the exercise of the Indians' water right, a possible conflict arose between the acts and their reference to state water law on one hand and the *Winters* doctrine on the other.

The Wind River Act[118] provided, in pertinent part, that certain funds be devoted to

> *the performance of such acts as are required by the statutes of the State of Wyoming in securing water rights* from said State for the irrigation of such lands as shall remain the property of said Indians, whether located within the territory intended to be ceded by this agreement or within the diminished reserve.[119]

Another act[120] established irrigation systems for the allotted lands of the Utes of the Uintah and Ouray Reservation and provided that

> such irrigation systems shall be constructed and completed and held and operated and *water therefore* [sic] *appropriated under the laws of the State of Utah*, and the title thereto until otherwise provided by law shall be in the Secretary of the Interior in trust for the Indians . . . .[121]

Notwithstanding the references in these statutes to state law, the courts held that the statutes did not change the reserved water right of these reservations.[122] The Wind River Act was interpreted in *United States v. Parkins*.[123] In effect, the court held that the statutory language should not be construed as an abandonment of prior existing rights by the Indians and the taking of an inferior right under state law unless that intent was clearly expressed.[124] The court said that no such clear intent was apparent

118. Act of March 3, 1905, ch. 1452, 33 Stat. 1016.

119. *Id.* at 1017 (emphasis added).

120. Act of June 21, 1906, ch. 3504, 34 Stat. 375.

121. *Id.* at 375 (emphasis added).

122. For decisions concerning the water rights of the Indians of the Uintah and Ouray Reservation see United States v. Cedar View Irr. Co., Equity No. 4416 (D. Utah, Mar. 18, 1929), and United States v. Dry Gulch Irr. Co., Equity No. 4427 (D. Utah, Mar. 18, 1929), wherein the court held that the reserved rights of the reservation were not affected by the statute.

123. 18 F.2d 642 (D. Wyo. 1926).

124. In that case the court declared: