1-3-1977

Brief of the Spokane Indian Tribe

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in the Wind River Act. The court's holding comports with the Department of the Interior's historical position that such statutes have limited application and provide only for procedural filing under state law for water used in the development of specific projects, but do not limit the existence or measure of the reserved right of the reservation.[125]

A federal statute also affects the water rights of the Pueblo Indians. On its face, the Pueblo Land Act[126] applies only to the middle Rio Grande pueblos. The Act authorizes the Secretary of the Interior to enter into a contract with the Middle Rio Grande Conservancy District, a political subdivision of New Mexico, requiring the District to recognize the Pueblo Indians' prior and paramount right to water for the purpose of irrigating the historically irrigated acreage of the middle pueblos (approximately 8,346 acres). The Act also states that land *reclaimed* for the Indians (now about 12,000 acres) should have water rights on the same basis as non-Indian lands of the same character.[127] In compliance with the Act, the Secretary entered into such a contract, which has been followed for the past 40 years.

New Mexico contends[128] that all of the Pueblo Indians' water rights within the tributary areas of the Rio Grande, not merely those of the middle Rio Grande pueblos to which the statute expressly applies, are limited to an amount sufficient to irrigate the Pueblo Indians' historically irrigated acreage. The State interprets the Act's declaration, that the six middle Rio Grande pueblos are entitled to a first right to water for their historically irrigated acres, as an expression of congressional intent to define the extent of the water rights of all the Rio Grande pueblos.

> It is not apparent that the waters in the streams within the Indian reservation were ever specifically granted by the United States to the state of Wyoming, although it is apparently the fact that the Indian service . . . and the officials of the state of Wyoming . . . have cooperated along the line of taking out water for irrigating purposes with the consent of the state. It must be assumed, however, in the absence of any specific grant, that the government has reserved whatever rights may be necessary for the beneficial use of the government in carrying out its previous treaty rights; those rights having become fixed and established before an act of admission which made Wyoming a sovereign state.

Id. at 643.

125. *See* Letter from Secretary of the Interior to the Attorney General, November 8, 1935 (discussing the appeal of United States v. Walker River Irr. Dist., 104 F.2d 334 (9th Cir. 1939)).

126. Act of March 13, 1928, ch. 219, 45 Stat. 312.

127. *Id.* at 313.

128. New Mexico has articulated this argument in cases presently being litigated. *See* note 104 and accompanying text *supra*.

Adoption of that interpretation would prevent the various pueblos from developing much of their irrigable lands and would severely limit their economic potential.

The Department of the Interior construes the same statute as preserving a minimum water right for the purpose of the project involved and not as limiting the Indians' reserved water rights. If the Department is correct, the *Winters* doctrine could be applied to all Pueblo Indian lands, including the lands of the middle pueblos, despite the statute.

The statutes opening Indian reservations to entry and settlement by non-Indians have in some instances contained provisions concerning the exercise of water rights.[129] This article cannot discuss each of these statutes, but perhaps a general conclusion is warranted. Although each statute must be carefully read to determine the purposes which Congress sought to fulfill by the statutory language, many of the statutes deal solely with procedural aspects of filing claims or of giving notice and do *not* alter the existence or measure of the Indians' reserved water rights.[130]

5. Rights of the non-Indian lessees, transferees, and entrymen on Indian reservations

Water reserved for the benefit of Indian reservations, when used for purposes of irrigation, are in the nature of realty and may be appurtenant to the land. In this way Indian water rights are much akin to state-created water rights.[131] Those rights may be exercised by non-Indian lessees of Indian lands.[132]

129. *E.g.*, Act of April 23, 1904, ch. 1495, 33 Stat. 302, *as amended* Act of May 29, 1908, ch. 216, § 15, 35 Stat. 448 (opening Flathead Indian Reservation to settlement and authorizing the Flathead Indian Irrigation Project to conditionally serve non-Indians); Act of March 1, 1907, ch. 2285, 34 Stat. 1035 (opening Blackfeet Indian Reservation to settlement by non-Indians); Act of March 22, 1906, ch. 1126, 34 Stat. 80 (opening Colville Indian Reservation to entry by non-Indians).

130. For example, the statute opening the Blackfeet Indian Reservation for entry by non-Indians, Act of March 1, 1907, ch. 2285, 34 Stat. 1035, when considered in connection with a subsequent statute, Act of May 18, 1916, ch. 125, § 11, 39 Stat. 142, indicates that Congress did not intend to reduce the reserved water rights held for the benefit of the Blackfeet Indians. These statutes should be interpreted in light of the confusion surrounding Indian water rights at the time they were enacted. In 1907, the *Winters* case was just being litigated. Therefore, it is necessary to look at what Congress did both before *Winters* (the 1907 Act) and after *Winters* (the 1916 Act) in order to determine the congressional intent concerning the Indians' reserved water rights.

131. Special Master, *supra* note 35, at 263, 266. For a discussion of the nature of state-created water rights see note 21 *supra*.

132. Special Master, *supra* note 35, at 266; Skeem v. United States, 273 F. 93 (9th Cir. 1921).

Further, the Supreme Court has held that the rights of Indians on the Crow Indian Reservation to use water on the allotted lands of that reservation passed with those lands into the hands of non-Indian transferees.[133] Although the Supreme Court did not discuss how the amount of water transferred to the non-Indian should be determined,[134] one lower court has held that either the amount of water which was put to use at the time of the transfer, or the amount that may be put to use by reasonable diligence within a reasonable time after the transfer, constitutes the proper measure.[135] Although this rule works well when it is an agricultural enterprise that is under development, it does not always work well in other circumstances. For example, the rule is not an effective means of measuring the transferee's water right when the transferee develops a subdivision on formerly allotted Indian lands overlying a groundwater basin, where the groundwater basin serves not only the subdivision but also adjacent Indian lands.[136]

There has never been a determination made with respect to the reserved water rights of non-Indian lands within the exterior boundaries of an Indian reservation which were entered by non-Indians pursuant to federal statutes.[137] Generally, the acts opening the Indian reservations to settlement by non-Indians indicate that the entrymen shall follow the provisions of state law in acquiring their water rights and that such water rights are subject to existing rights. Nevertheless, the question arises whether a

133. United States v. Powers, 305 U.S. 527 (1939). This case, dealing with a treaty which provided for the allotment of the lands of that reservation to individual Indians, held that the water right was appurtenant to the allotted land. Some authorities claim that the General Allotment Act of 1887, ch. 119, 24 Stat. 388, *as amended* 25 U.S.C. §§ 331-34, 339, 341-42, 348-49, 381 (1970), accomplishes the same thing for all of the allotted Indian reservations. They urge that the water rights of all Indian allottees vest in the allottee, become appurtenant to the allotment, and thereafter pass with the land. Others deny that such an effect is a necessary interpretation of the General Allotment Act despite the above case. They claim that all water rights belong to the tribe and do not attach to the land. Following this latter point of view, the reserved water right does not vest in the allottee and he cannot transfer it.

134. United States v. Powers, 305 U.S. 527, 533 (1939).

135. United States v. Hibner, 27 F.2d 909 (D. Idaho 1928).

136. A standard as to the measure of transferees' water rights in such circumstances may be developed by the court in United States v. Bel Bay Community & Water Ass'n, Civil No. 303-71C2 (W.D. Wash., filed Nov. 23, 1971). In that case the United States, under the authority of § 7 of the General Allotment Act, 25 U.S.C. § 381 (1970), and under the United States' general trust responsibility, is claiming the exclusive authority to control and administer the diversion of water from the groundwater basin underlying the tribal, alloted, and formerly alloted lands (now owned by non-Indians) of the Lummi Indian Reservation.

137. *See, e.g.*, statutes cited notes 129, 130 *supra*.

part of the Indians' reserved water right accompanies the entryman's land. If such a right to water does exist, a further question arises as to who has the authority to regulate the exercise of that right. These questions have not yet been resolved. Good grounds exist, however, for asserting that the non-Indian entryman did not participate in the water right reserved for the benefit of the Indians of the reservation.[138] There are also good grounds for asserting that the tribe, acting jointly with the Department of the Interior, has the authority to regulate the entrymen's rights, at least to the extent necessary to prevent interference with the Indians' reserved water rights.[139]

B. *Application of the* Winters *Doctrine to National Parks, Monuments, and Forests*

This, and the three subsequent sections, discuss the application of the *Winters* doctrine to specific enclaves other than Indian reservations. The bases for such applications were discussed above in section I, *C*. The application of the *Winters* doctrine to national parks, monuments, and forests may depend to a great extent on the status of the land in question prior to its designation as a federal area. In general, lands administered by the United States may be classified into three categories: (1) public lands (open to settlement, location, sale, and entry); (2) withdrawn or reserved lands, reserved for specific purposes (carved out of the public domain lands and not open to location, settlement, sale, or entry); and (3) acquired lands (purchased following congressional authorization for specific federal purposes). The rights to water on the public domain are discussed in section II, *D infra*. Subsection *1* of this section discusses water rights held by the United States for both reserved and acquired lands. Subsection 2 discusses how to determine the purposes for which water was impliedly reserved for use in national parks, monuments, and forests. Also in subsection 2, an important pending case dealing

138. Those grounds are found in 43 U.S.C. §§ 321-23, 661, which provide that a patentee of land gets no water rights by virtue of this patent. *See also* California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935) (determining that the land and water had been separated in the public lands of the West). It appears that even though reservations are not public lands, water rights for use on those opened lands by the non-Indian were to be acquired pursuant to public land law by compliance with state law; the entryman's priority to the use of water would be subject to existing rights. Hence their rights, however acquired, would be junior to the Indians' prior existing rights on that reservation.

139. For a discussion of that authority see section III, *C, 2, b infra*.

with this issue, *United States v. Cappaert*,[140] is examined in some detail.

1. The effect of the prior status of lands in national parks, monuments, and forests

a. Reserved and withdrawn lands. With few exceptions, the national parks, monuments, and forests were created by Congress through the enactment of express statutes delineating the lands to be included; most of those lands were withdrawn from the public domain. Reservations, whether Indian reservations, parks, monuments, or forests, which have been exclusively or primarily created by withdrawal from *public* lands, have water rights under the reservation doctrine[141] sufficient to fulfill the purposes for which the reservations were created. There is, however, one limitation on the reserved water rights of withdrawn lands that also limits any reserved rights for acquired lands. The reservation of water, either express or implied, by the federal sovereign is limited to the extent that water rights have already been acquired pursuant to state law. Thus, where private parties have gone upon the waterways or the public lands and acquired water rights under state law prior to the time of reservation or acquisition by the federal government, any federally reserved rights are subject to the prior state-granted rights held by those private parties.[142]

b. Acquired lands. Many areas administered by the National Park Service are checkerboarded with lands once privately held but subsequently acquired from their private owners by the Secretary of the Interior under the power of eminent domain for parks, monuments, and other national recreation areas. Indeed, when the various parks were created and their boundaries de-

140. 508 F.2d 313 (9th Cir. 1974), *cert. granted*, 422 U.S. 1041 (1975) (Nos. 74-1107, 74-1304).

141. *See* notes 38-44 *supra* and accompanying text. The *Winters* doctrine has its origins in cases involving an implied reservation of water associated with reserved public lands. *See, e.g.*, United States v. District Court for Eagle County, 401 U.S. 520 (1971) (national forest and public lands); United States v. District Court for Water Div. No. 5, 401 U.S. 527 (1971) (national forests, parks, and recreation areas); Arizona v. California, 373 U.S. 546 (1963) (Indian reservations, fish and wildlife refuges, national forests, and recreation areas); FPC v. Oregon, 349 U.S. 435 (1955) (Pelton Dam, a power site withdrawal); Winters v. United States, 207 U.S. 564 (1908) (Indian reservation); Nevada *ex rel.* Shamberger v. United States, 279 F.2d 699 (9th Cir. 1960) (military reservation); Glenn v. United States, Civil No. C-153-61 (D. Utah, Mar. 16, 1963) (national forest). *See also* United States v. Cappaert, 508 F.2d 313 (9th Cir. 1974), *cert. granted*, 422 U.S. 1041 (1975) (Nos. 74-1107, 74-1304) (national monument).

142. California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935); *see* Arizona v. California, 373 U.S. 546 (1963).

fined, the Secretary was expressly directed by the statutes to acquire the private parcels within the park boundaries. It is unclear what water rights exist for the benefit of these lands after acquisition by the United States.

Some of these acquired lands have state-created water rights appurtenant to them since the United States ordinarily acquires private lands with all their appurtenances, including water. Such appurtenant water rights, however, may not be sufficient to fulfill the purposes for which the land was acquired. If those rights are indeed inadequate, additional water might be obtained without compliance with statutory law under one of three legal theories:

(1) The acquired lands have the benefit of a federally reserved water right sufficient to fulfill the purposes contemplated at the time of the acquisition.

(2) No federally reserved water right attaches to the acquired lands, but surrounding reserved lands enjoy a reserved water right of sufficient magnitude to fulfill the purposes of the park in all areas, including the water-short acquired lands.

(3) The federal sovereign may obtain additional water only by eminent domain.[143]

Two additional questions arise when the United States acquires private lands and their appurtenant water rights. First, if the quantity of water, deemed appurtenant to the acquired lands under state law, exceeds the amount necessary to fulfill the purposes of the federal sovereign, does the United States keep the right to the water even though it does not use it? In other words, may the state law doctrine of nonuse operate to limit or extinguish the federal government's right to the unused waters? Second, can the federal government change the place or nature of use to another federal use in or out of the watershed at will, or may state law concerning changes in place and nature of use limit the federal government's prerogatives?[144] These questions remain generally unresolved.

2. *The determination of the various purposes for creating parks, monuments, and other reservations: a discussion of* United States v. Cappaert

In national parks, monuments, forests, and the like, the federal government has reserved water for greatly varying purposes.

143. For a discussion of the federal sovereign's power of eminent domain see Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972).

144. The *change of place and nature of use* issue is discussed in section II, *F infra*.

For example, national parks and monuments have been created for recreation, protection and conservation of fish and wildlife, and preservation of natural phenomena; national forests, for recreation, grazing, production of timber, and other uses under the multiple-use concept. Other kinds of reservations were also created for widely varying purposes. The courts have not yet fully resolved a crucial issue in this area: how does one identify those purposes of the sovereign which require an implied reservation of water? The currently pending case of *United States v. Cappaert*[145] provides the Supreme Court with an opportunity to resolve some of the uncertainty surrounding this and several other issues.[146]

In 1952, a Presidential proclamation, issued pursuant to the Act for the Preservation of American Antiquities,[147] withdrew 40 acres of a detached portion of the Death Valley National Monument, together with a remarkable underground pool of water known as Devil's Hole. The pool is the natural habitat of a peculiar species of tiny desert fish, known as pupfish (*cyprinodon diabolis*), found nowhere else in the world. The fish eat and reproduce on a sloping natural rock shelf near the water's surface in Devil's Hole. In 1968 the Cappaerts, who had recently acquired lands from Nevada and exchanged certain lands with the United States, began substantial groundwater pumping pursuant to Nevada state law in order to support a new ranching venture. Because the Cappaerts were pumping water from the same underground formation that supplied water to Devil's Hole, the water in that pool receded and exposed part of the natural stone shelf. As a consequence, the pupfish population declined precipitously.

The Cappaerts, in compliance with the laws of Nevada, had filed an application to appropriate the groundwaters underlying their lands. The National Park Service made a voluntary appearance in the administrative hearings held by Nevada. The Park Service did not introduce any evidence with respect to a federal reserved right to the water, but rather addressed itself to the fish

145. 508 F.2d 313 (9th Cir. 1974), *cert. granted*, 422 U.S. 1041 (1975) (Nos. 74-1107, 74-1304).

146. Some of the other issues involved in this case are: (1) what is the effect of the *Winters* doctrine on groundwater; (2) do state administrative officers have the authority to administer, control, or limit the federal government's use of reserved water; and (3) if a federal agency participates voluntarily in a state administrative proceeding, is the United States required thereafter to follow state procedure in establishing, exercising, and protecting its water right? For a discussion concerning the administrative authority over reserved water rights see section III, *C infra*.

147. 16 U.S.C. § 431 (1970).

and their endangered status, seeking to have the decision delayed until the survival of the fish could be studied further. The state engineer denied the request and issued the applications.

The United States sought an injunction compelling the Cappaerts to reduce their water use to th extent necessary to prevent lowering the water table and exposing the natural rock shelf. The federal district court recognized the pupfish as an endangered species and found that the reduced water level caused by the pumping threatened their extinction. It thereupon entered a preliminary injunction limiting the Cappaerts' water use and appointed a special master to control the pumping of water. Soon thereafter, pursuant to direction from the Ninth Circuit Court of Appeals,[148] the district court entered a permanent injunction.[149]

On appeal from the permanent injunction, the Ninth Circuit Court of Appeals affirmed the district court's decision and directed the lower court to retain jurisdiction in order to determine exactly what level of water is required to assure the survival of the pupfish. The court held, despite the contention of the Cappaerts and Nevada to the contrary, that the *Winters* doctrine applies to groundwater as well as surface water.[150] In reaching its decision, the Ninth Circuit determined that the fundamental purpose of the reservation of Devil's Hole was to assure that the pool would not suffer changes in the condition that existed at the time of the 1952 Presidential proclamation; that condition included the pool's unique habitat in which the pupfish live. The court stated that the proclamation referred to the significant contribution of the pupfish to the scientific importance of Devil's Hole and that by the proclamation the United States impliedly insured "enough groundwater to assure preservation of the pupfish." The court believed that its conclusion that the Presidential proclamation manifested an intent to reserve the water was rein-

148. 483 F.2d 432 (9th Cir. 1973).

149. 375 F. Supp. 456 (D. Nev. 1974).

150. 508 F.2d at 317. The court cited Nevada *ex rel.* Shamberger v. United States, 165 F. Supp. 600 (D. Nev. 1958), *aff'd on other grounds*, 279 F.2d 699 (9th Cir. 1960) and Tweedy v. Texas Co., 286 F. Supp. 383 (D. Mont. 1968), for the proposition that the *Winters* doctrine applies to groundwater. The court also noted that Nevada law provides for the acquisition of rights for the use of groundwater just as readily as for the acquisition of rights to surface water.

It is interesting to note that no party has referred to interlocutory decree No. 41, dated April 1, 1966, as amended on June 27, 1968, in United States v. Fallbrook Pub. Util. Dist., 165 F. Supp. 806 (S.D. Cal. 1958), *rev'd in part*, 347 F.2d 48 (9th Cir. 1965) (Civil No. 1247, filed Jan. 25, 1951). The amended decree established reserved water rights for Indian reservations in substantial groundwater basins along the Santa Margarita River in southern California.

forced by the act establishing the National Park Service,[151] "which states that 'the fundamental purpose' of all national parks and monuments is '. . . to conserve the scenery . . . and the wildlife therein . . . by such means as will leave them unimpaired for the enjoyment of future generations.'"[152] Thus, the court identified the purpose of the sovereign that supported an implied intent to reserve water from several interrelated statutes and actions of the federal government. Hence, it appears that the search for the purposes of the federal sovereign may include those pertinent statutes or other documents which were in existence at the time of the withdrawal.

The court also rejected the Cappaerts' claim that the government should be estopped from enjoining them due to its knowledge at the time it transferred certain lands to them that they intended to undertake substantial pumping of water. Nevada had contended that the federal government could not acquire groundwater except in conformity with state law. The court rejected that argument and, citing *FPC v. Oregon*,[153] held that state water laws do not apply to federal reservations.

The *Cappaert* case is currently pending before the Supreme Court on a writ of certiorari. Hawaii, Idaho, Kansas, Montana, New Mexico, Wyoming, and Arizona have appeared as amici curiae in support of the position of the appellants.[154] Each of the

151. 16 U.S.C. § 1 (1970).

152. 508 F.2d at 318.

153. 349 U.S. 435 (1955).

154. The states are concerned with the following questions: (1) Did Congress intend under the Act for the Preservation of American Antiquities, 16 U.S.C. § 431 (1970), to vest the President with authority to reserve water for the purpose of protecting an endangered species? (2) Can the federal government invoke the reservation doctrine to assert superior rights to groundwater, so as to enjoin a landowner adjacent to the federal lands from pumping water from beneath his land pursuant to state-granted well permits? (3) Should the federal government be barred under the principles of res judicata from seeking to litigate in a subsequent judicial action issues decided in a state administrative proceeding in which it participated and from which it failed to appeal? Brief for States as Amici Curiae at 7, United States v. Cappaert, 422 U.S. 1041 (1975) (Nos. 74-1107, 74-1304).

Arizona has submitted a separate brief requesting determination of essentially the same questions. It also points out the difference that occurs in the application of Arizona's water law which does not provide for the control and administration of the use of that portion of groundwater described as percolating waters. Arizona attempts to differentiate such waters from the waters of recognizable and established streams or flows, both surface and underground. Brief for Arizona as Amicus Curiae, United States v. Cappaert, 422 U.S. 1041 (1975) (Nos. 74-1107, 74-1304).

With respect to the application of the *Winters* doctrine to groundwater, hydrologists have shown that all water in a watershed is in hydrologic continuity. Sometimes it is on the surface, and sometimes it is percolating more or less slowly through the ground, but in most instances it is moving downhill. Groundwater simply moves slower than surface streams and fills the swales and depressions within a watershed above bedrock; at times

states alleges that extending the *Winters* doctrine to groundwater will render administration of the groundwater within those states impossible. The states contend that catastrophic effects on the various states and their economic conditions will result if the decision is not overturned. The United States counters by asserting that the question presented is whether the sovereign, by virtue of the Presidential proclamation declaring Devil's Hole to be a national monument, reserved sufficient underground water to preserve the pool and the pupfish. The government points out that it has not requested, nor have the courts required, that petitioners restore the pool to its natural level or completely terminate their pumping operations. The injunction merely restrains the Cappaerts from lowering the water level to a point that endangers the fish. It rejects the states' claims of catastrophe and denies that the state administrative agencies have jurisdiction over federal reserved water rights.

C. *Application of the* Winters *Doctrine to Fish and Wildlife Areas Reserved by the United States*

The United States Supreme Court, in *Arizona v. California*,[155] decreed that specific quantities of water from the Colorado River were reserved from unappropriated water to fulfill the purposes of the Havasu and Imperial Wildlife Refuges in Arizona and California.[156] Water was also reserved for the Cibola Refuge, located in both states, but a specific quantity was not named because the refuge was still in the planning stage. In each of these wildlife refuges the date of withdrawal from the public domain established the respective water priority date.[157]

1. *Activities of the Bureau of Sport Fisheries and Wildlife*

The Bureau of Sport Fisheries and Wildlife has taken a pecu-

it rises to the surface and, in some cases, disappears again in varying amounts depending upon the size and configuration of underground basins in the area and the consistency of the materials through which the underground water must move. Therefore, all water in a given watershed should be treated as a single body of water and the *Winters* doctrine, in order to effectively protect reserved rights, should be applied to surface and groundwater alike. The courts and engineers have and do consistently develop reliable knowledge of various groundwater basins and determine their safe yield in connection with the various sources of recharge in the watershed.

155. 373 U.S. 546 (1963).

156. *Id.* at 601; Special Master, *supra* note 35, at 296-98.

157. It is important to remember that some refuges contain acquired lands. Although the water rights appurtenant to such lands are incorporated into the refuge's operation, state law is considered applicable to such rights. Whether these acquired lands also have reserved water rights is an important unresolved question. *See* section II, *B, 1, b supra.*

liarly independent approach to reserved water rights. When a refuge under its jurisdiction does not have recorded water rights, the Bureau generally files a notice with the appropriate state agency in order to inform the state of the government's claim to reserved water rights. Such notice specifically states that it does not constitute a waiver of any federal rights. No action has yet been taken by the states either to deny or to recognize water rights claimed by the Bureau. Some states, however, have responded by issuing state water right permits based upon actual use, with a priority as of the date of filing. The Bureau contends that these permits do not alter the priority date or the amount of the federal reserved water rights.

In addition to filing with the state, the Bureau has its own representatives appear in state administrative hearings concerning conflicting water rights. The Department of the Interior claims that such appearances do not recognize the jurisdiction of the state administrative officer over the reserved right. At times the Bureau also prepares and files documents in pending water rights hearings, but it asserts that such action is taken as a matter of comity for communicating information concerning the reserved rights and that no adjudication of those rights occurs. The Department of Justice is the only department of the federal government that may initiate an adjudication of water rights reserved by the United States. It generally does so only at the specific request of the affected federal agency or department. Thus, an adjudication of a reserved water right cannot occur by a federal agency or department communicating information to a state administrative officer.

2. The measure of the reserved water right and full development of the refuge

The measure of the federal reserved water right for a fish or wildlife refuge should be the amount of water necessary to meet the minimum consumptive use on the lands and facilities involved. This includes amounts sufficient to meet the water requirements of the refuge when *fully developed*. The actual amount of the reserved right needs to be kept open-ended until full development of the habitat or refuge has been achieved. Since it takes many years to fully develop a refuge, few refuges have reached full development, and any present estimates of the measure of the reserved water right must include prospective use. This has not always been done. The water rights established for

certain refuges in *Arizona v. California*[158] do not adequately fill those refuges' requirements; the amount of consumptive use was determined without correctly estimating evaporation and seepage losses.

3. Minimum stream flows

Whether a right exists to maintain minimum stream flows for recreational fisheries and wild fowl habitats constituting part of a federal project[159] remains an unresolved issue. Its resolution is currently being sought by the Bureau of Sport Fisheries and Wildlife. The right to a maintained minimum flow has, in the past, been based on the language of the statute authorizing the project or on an agreement with the entity operating the project, such as the Bureau of Reclamation. As various streams, however, become the subject of adjudicative action, this right to a minimum stream flow should be asserted and then incorporated as part of the final decree in order to preserve the right and to establish its position in the ladder of priorities. The existence of this right may be contested because wildlife, fishery, and recreational uses historically have not been recognized as beneficial uses by most Western States. Recent developments in water law, however, may reverse this trend. Colorado and Washington have adopted statutes recognizing wildlife, fishery, and recreational uses as beneficial uses, thus enabling the state to establish a right to a minimum stream flow in various selected streams.[160]

D. Application of the Winters *Doctrine to Lands of the Public Domain*

1. The effect of statutes on federal reserved rights to water on the public domain

The public domain has always been utilized as a source of forage for livestock and game. Access to water, therefore, has been a critical part of the right to use public lands. In recognition of this fact, Congress in 1916 provided that lands containing waterholes or other bodies of water needed or used by the public for watering purposes may be reserved. While so reserved, the lands

158. 373 U.S. at 601; Special Master, *supra* note 35, at 292-300.

159. *E.g.*, Navajo Indian Irrigation Project and San Juan-Chama Reclamation Project, 43 U.S.C. §§ 615ii-yy (1970).

160. COLO. REV. STAT. ANN. § 37-92-103(4) (1973); WASH. REV. CODE ANN. § 90.22.010 (Supp. 1974). In general, the states select those streams in which the public interest requires the maintenance of minimum flow. Thereafter, the right to appropriate water from those streams is limited.

are to "[b]e kept and held open to the public use for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe . . . ."[161] In other words, under this Act, water may be expressly reserved, not for use on reserved or withdrawn lands, but for the preservation of the public's right of access to waters on the public domain. In 1925, the Secretary of the Interior was authorized by a second act[162] to issue permits for a period of up to 20 years for the erection of bath houses, hotels, or other improvements upon

> suitable spaces or tracts of land near or adjacent to mineral, medicinal, or other springs which are located upon unreserved public lands or public lands which have been withdrawn for the protection of such springs . . . .[163]

Such permits have been issued in order that service could be rendered to the general public. Thus, even though there is no case specifically treating the subject, it appears that when the Secretary of the Interior reserves public watering holes or issues permits for development of medicinal springs, sufficient water is reserved on the public domain to fulfill the purposes stated in the document of reservation or in the permit. The reserved water rights created pursuant to these statutes are entitled to the same protection as other federal reserved rights.

At times there has been discussion of a possible claim for a federally reserved water right on the public domain arising out of the Taylor Grazing Act,[164] which contains language concerning conservation, flood control, cooperation with those engaged in conservation and propagation of wildlife, and hunting and fishing.[165] The intent of the sovereign to reserve water is allegedly found in the language of the General Withdrawal Order[166] issued under the Taylor Grazing Act on November 26, 1934. Section 3 of that Act,[167] however, specifically negates any intention to re-

161. 43 U.S.C. § 300 (1970). For the order of the Secretary of the Interior withdrawing the lands and waters of public waterholes see 51 Interior Dec. 457 (1926).

162. 43 U.S.C. § 971 (1970).

163. *Id.*

164. 43 U.S.C. §§ 315 *et seq.* (1970).

165. 43 U.S.C. § 315 (1970).

166. Exec. Order No. 6910, 3 C.F.R. 297.11 (1938).

167. 43 U.S.C. § 315b (1970). That section states:

> [N]othing in this subchapter shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law.

serve water under the Act. It is the position of the Department of the Interior that the Taylor Grazing Act does not reserve water for use on the public domain.[168]

Another argument attempting to establish a federal reserved water right on the public domain is based on the Act of September 19, 1964.[169] The 1964 Act does not mention water; rather, it classifies lands for fish and wildlife development, outdoor recreation, timber production, watershed protection, and wilderness preservation. It has been argued that the 1964 Act impliedly reserves water, since the express purposes of the Act cannot otherwise be fulfilled. The Department of the Interior recently rejected that argument in a letter to the Department of Justice,[170] stating that the Act must be interpreted "consistent with and supplemental to" the entire Taylor Grazing Act, including the water clause in section 3.[171] The Department of the Interior, in arriving at its decision, drew analogies to the water clause of the Reclamation Act[172] and to section 27 of the Federal Power Act.[173]

2. Creation of federal water rights by application to beneficial uses upon the public domain

Federal water rights on the public domain may be created when the federal sovereign, without filing for a water right under state law, actually applies water to a beneficial use, such as the construction of a small flood control structure, the construction of a debris basin on a stream, or the creation of a wildlife watering pond.[174] The priority of these water rights would apparently be the date of first use. The status of these federal water rights, if such exist, and the authority of the Secretary to reserve water in this manner have never been adjudicated in court. Perhaps they never will, because of the minimal amount of water involved and the obvious benefits to the public. Nevertheless, where an adjudica-

168. Letter from Raymond C. Coulter, Deputy Solicitor, Department of the Interior, to Kent Frizzel, Assistant Attorney General, Department of Justice, August 9, 1972.

169. 43 U.S.C. §§ 1411-18 (1970).

170. Letter cited note 168 *supra*.

171. 43 U.S.C. § 315b (1970).

172. 43 U.S.C. § 383 (1970).

173. 16 U.S.C. § 821 (1970). The Department's letter, cited in note 168 *supra*, included the following authority: Ivanhoe Irr. Dist. v. McCracken, 357 U.S. 275, 291 (1958) (construing § 8 of the Reclamation Act); FPC v. Oregon, 349 U.S. 435, 444 (1955); California v. FPC, 345 F.2d 917 (9th Cir.), *cert. denied*, 382 U.S. 941 (1965) (construing the Federal Power Act.).

174. Authority for applying the water for such uses can be found in the general duties imposed upon the Secretary of the Interior. Exec. Order No. 10,355, 3 C.F.R. 873 (1949-1953 Comp.); 43 U.S.C. § 141 (1970).

tion of rights within a watershed is contemplated, these rights should be claimed along with other federal reserved rights to avoid future uncertainty as to the validity of such rights.

3. *Summary*

The authorities on the subject indicate that, except for public waterholes and medicinal springs, the United States probably will not claim that it intended to impliedly reserve waters on the public domain for present and future uses under the *Winters* doctrine. This position, however, does not appear to prevent the sovereign from applying unappropriated water to a beneficial use and thereby establishing a right to it. The only question is whether the federal sovereign must comply with state law to perfect rights acquired in this manner.

E. *Application of the* Winters *Doctrine to Military Reservations*

The Federal Constitution specifically provides for federal reservations for the use of the armed forces.[175] The right of the United States to use as much water as desired for these military reservations went uncontested for many years. The military is just becoming aware, however, of the many implications of applying the *Winters* doctrine to the operation of its various military reservations. This new awareness, demonstrated in part by recent articles in *The Army Lawyer* discussing the water rights of military reservations,[176] is the result of two recent occurrences. First, litigation in the Colorado state courts[177] is adjudicating all rights to the use of water in each watershed in that state. That adjudication involves the water rights of various military reservations, including the Air Force Academy. Second, there is a growing demand on the nation's water supply which may limit the water

175. U.S. CONST. art. I, § 8, cl. 17 provides:

> The Congress shall have Power . . . [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority 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 . . . .

176. *E.g.*, Zimmerman, *Protecting the Army's Water Rights*, 2 THE ARMY LAWYER 11 (1972).

177. *See, e.g.*, United States v. District Court for Eagle County, 401 U.S. 520 (1971). Colorado is systematically adjudicating all water rights in each watershed pursuant to recent legislation and is suing the United States pursuant to 43 U.S.C. § 666, the McCarran Amendment. For a discussion of the jurisdictional impact of that Amendment see sections III, *B, 1* and III, *B, 2 infra*.

available for military reservations. This demand is evidenced in part by a recent Environmental Protection Agency report[178] indicating that within a few years the flow of the Potomac River may be deficient for demands placed on it during several weeks each summer. Recognizing this increasing demand, one eastern state, Mississippi, has already adopted some aspects of the prior appropriation doctrine, and more are considering it.[179] Because of the rapidly increasing demand for water, issues concerning federal reserved water rights for military reservations will be increasingly important in the Eastern States, where the doctrine of riparian rights is applicable, as well as in the arid states of the West, where the appropriation doctrine has traditionally been applied.[180]

Following the Supreme Court decisions in *Arizona v. California*[181] and *United States v. District Court for Eagle County*,[182] there is little question that the *Winters* doctrine is properly applicable to military reservations. At the time of the reservation of public lands for particular military enclaves, sufficient water was reserved to fulfill the purposes for which the reservations were created. Nevertheless, numerous questions dealing with the limitations on state jurisdiction, the water rights appurtenant to acquired lands, the effect of abandonment, nonuse, and transfer, and the various purposes for which water was reserved must be answered before the military's reserved rights to water can be established and quantified.

1. The issue of state jurisdiction over the military's reserved water rights

Nevada ex rel. Shamberger v. United States[183] considered whether it is necessary for the military to comply with the administrative provisions of state law in order to perfect and exercise reserved water rights. Nevada ceded to the United States exclusive jurisdiction over the Hawthorne Naval Ammunition Depot. That depot was reserved from the public lands of the United States. Thereafter, the Navy Department filed under the provisions of state law and drilled several wells for use on the enclave.

178. EPA. TECH. REP. 135, WATER SUPPLY STUDY OF THE POTOMAC ESTUARY (1971).

179. Kennard, Lectures on Law in Relation to Water Resources, Use, and Development, Institute of Water Resources, The University of Connecticut (March 29, 1967).

180. For a discussion of the development of the appropriation doctrine in the West see section I, *A supra*.

181. 373 U.S. 546 (1963).

182. 401 U.S. 520 (1971).

183. 165 F. Supp. 600 (D. Nev. 1958), *aff'd on other grounds*, 279 F.2d 699 (9th Cir. 1960).

Following a Supreme Court decision that state law does not apply to federal reservations,[184] the Navy refused further compliance with state law.[185] Nevada responded by instituting a suit seeking a declaratory judgment that it had the right to administer and control the use of the groundwater and that the federal government, in appropriating the water, was required to comply with state law. The federal district court held that the United States could not be compelled to obtain permits to use water from wells that it had dug on property to which it had full title at all times since cession of the lands by Mexico.[186]

2. *Water rights of acquired lands on military reservations*[187]

Recently, on the Sandia Air Force Base near Albuquerque, New Mexico, water was put to use on a golf course for the benefit of the officers and men of the base. The golf course is located on *acquired* lands, not reserved lands. Those lands have no

184. FPC v. Oregon, 349 U.S. 435 (1955).

185. The Navy had followed state law for a period of six years, until Nevada law required it to prove beneficial use of the water. At that time, the Navy refused further compliance.

186. Nevada *ex rel.* Shamberger v. United States, 165 F. Supp. 600 (D. Nev. 1958), *aff'd on other grounds*, 279 F.2d 699 (9th Cir. 1960). The court relied heavily on the language of McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), and FPC v. Oregon, 349 U.S. 435 (1955). The court also cited Ivanhoe Irr. Dist. v. McCracken, 357 U.S. 275 (1958), and Public Util. Comm'n of Calif. v. United States, 355 U.S. 534 (1958).

On appeal, the Ninth Circuit Court of Appeals did not reach the merits of the case. It held that the United States had not consented to the suit and thus had not waived its sovereign immunity. The district court had entertained the suit on the basis of the McCarran Amendment, 43 U.S.C. § 666 (1970), which waives federal sovereign immunity in suits "for the adjudication of rights to the use of waters of a river system or other source." The appellate court held, however, that the suit was not an attempt to adjudicate the rights to the use of the water among the various users from the supply, but an attempt by the state to obtain a ruling on the question of its authority to require the United States to comply with the terms of its statutes in connection with the administration and control of water. 279 F.2d 699 (9th Cir. 1960).

Rights to the use of water on a military reservation were also involved in United States v. Fallbrook Pub. Util. Dist., 165 F. Supp. 806 (S.D. Cal. 1958), *rev'd in part*, 347 F.2d 48 (9th Cir. 1965). That case involved the Navy-Marine Base at Camp Pendleton, California. The base had a historical water right as a rancho recognized under Spanish and California water law. (The land, known as *Rancho Santa Margarita*, was mostly in private ownership at the time it was acquired by the Navy Department as a Marine base.) An unfortunate stipulation was made before trial that the water rights of the base were claimed pursuant to the laws of California. The court held that no water rights could be acquired under the laws of that state except by compliance with the terms of its statutes. The court did not address itself to the question of the federal right to apply unappropriated water to a beneficial use on a military reservation, nor to the question of the state's right to assert administrative control over the exercise of the federal right.

187. For a discussion of acquired lands in national parks, monuments, and forests see section II, *B, 1, b supra*.

appurtenant water rights. The source of the water, the Rio Grande, contains insufficient water to meet existing uses during dry periods. The law is not clear as to the basis upon which water may be obtained for use on *acquired* lands of military reservations that do not have appurtenant water rights when acquired. The *Winters* case and its progeny do not address the extension of the *Winters* doctrine to acquired lands that become part of a federal reservation. Those cases speak only of a reserved water right on lands reserved by the sovereign from the public domain.

3. The military purposes for which water was reserved

A critical question arises concerning the use of reserved water rights on military reservations: what are the purposes underlying creation of a particular military enclave that require the use of water? There is no question about those uses of water necessary to carry out strictly military purposes. Rather, the controversy centers on those uses of the water that are merely convenient, as opposed to essential. On reservations created today, the intent to reserve water for *convenient* uses such as the irrigation of golf courses may perhaps be readily implied. But if the question is approached from the standpoint of contemplated purposes at the time the older military reservations were created, the result may be different. The creators of reservations formed prior to the present emphasis on recreational activities more than likely did not contemplate golf as one of the uses of the enclave. Other recreational uses, such as swimming pools, however, present a more difficult problem. As the demand for water increases, the resolution of these problems becomes imperative. An administrative mechanism for resolving these conflicts is suggested in section III, *C infra*.

4. The effect of nonuse, abandonment, or transfer

Nonuse presents a peculiar problem to military reservations. Between wars or between periods of extensive mobilization, all the reserved waters of a military enclave may not be utilized on the enclave. During such periods, under the *Winters* doctrine, the unused water could be put to use under the provisions of state law. The economies of whole cities might be built upon its use. When it becomes necessary to reactivate a base due to increased military activity, what should be the relationship between those water users and the United States? Under the *Winters* doctrine, the United States has the right to take the water without compen-

sation because of its prior right.[188] This would appear to be unfair, however, unless the amount of the reserved right was identified in each source and notice of that right was available to developers.

In those instances where military enclaves have been abandoned or converted to nonmilitary uses, as occurred with the Fort Yuma Indian Reservation on the California-Arizona border, what water right accompanies the land when it passes from one federal use to another? Where ownership of the land remains with the federal government but the purpose for which the land is used changes, what is the measure or extent of the water right for the new use? Of greater importance, what is its date of priority? Does the date of withdrawal of the military reservation or the date of conversion to the new use set the priority? These questions remain unresolved.

Generally, the rights to the use of water on military reservations have not been adjudicated in court because the military has either taken unappropriated water or condemned land with existing water rights. Thus, the question of the military's right to use the water arises only after the military reservation is abandoned and the land passes to private ownership pursuant to an act of Congress. At that time, the question arises whether the reserved water right passes to the grantee with the land.[189] Only one case has addressed this issue. In the pre-*Winters* case of *Story v. Woolverston*,[190] the Montana Supreme Court held that the water rights of a military reservation did not pass to post-abandonment private transferees, since those rights were not expressly conveyed.[191]

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188. *See generally* United States v. District Court for Eagle County, 401 U.S. 520 (1971); Arizona v. California, 373 U.S. 546, 595-601 (1963).

189. If this question is answered in the affirmative, a further, more complex question arises: With what part of the land of the enclave will the water be transferred—all parts or only that part where the military actually used the water?

190. 31 Mont. 546, 78 P. 589 (1904).

191. The Montana Supreme Court stated:

> The only inference is that the government, when it abandoned the reservation, intended that the water should continue to flow in its natural channel, and to be subject to appropriation by any one who should take it and use it for beneficial purposes, possibly upon land included within the reservation. Had the government desired so to do, it could have granted the right to the use of the water in express terms, but this it did not do.

31 Mont. at 355, 78 P. at 590.

It is interesting to note that when the *Winters* case was before the Ninth Circuit Court of Appeals in 1906, that court relied in part on the *Woolverston* decision in reaching the conclusion that a reserved water right existed for the benefit of an Indian reservation. The court quoted the following language from *Woolverston*:

F. Changes in the Place and Nature of Use of Reserved Water Rights

After a measure of the amount of water impliedly reserved for use on an Indian reservation or enclave of the United States has been established by decree, permit, or otherwise, what may the Indian tribe or the United States do with the water? Are they restricted to that use contemplated at the time of the creation of the reservation as recognized in the permit or decree? Or may the Indians or the federal government change the place and nature of the use of the reserved water? The emerging development of Indian reservations, particularly in the field of energy resources, the extension of the *Winters* doctrine to other federal enclaves, and the current attempts to establish a national land and water use policy, such as that contemplated in the Water Resources Planning Act[192] and the Western United States Water Plan Study,[193] are giving this issue increased importance.

Before this issue can be fully resolved, two preliminary but fundamental questions must be answered. First, who is to decide the issue, state courts and state administrative bodies or federal courts and federal agencies? Second, what substantive law, state or federal, applies? The author has treated these questions elsewhere.[194] Suffice it to say here that these issues remain primarily unresolved.

III. Legislative, Judicial, and Administrative Authority over Reserved Water Rights

Winters and its progeny recognize the power of the federal

> Prior to the time of settlement upon the lands in question, and prior to the appropriation of the waters of Bear creek by any one, both the land and the water were the property of the government. When the government established the reservation, it owned both the land included therein and all the water running in the various nearby streams to which it had not yielded title. It was therefore unnecessary for the government to "appropriate" the water. It owned it already. All it had to do was to take it and use it.

Winters v. United States, 143 F. 740, 747 (9th Cir. 1906).

192. 42 U.S.C. §§ 1962 *et seq.* (1970).

193. Authorized in 43 U.S.C. § 1511 (1970), a part of the Colorado River Basin Project Act.

194. Ranquist, *The Effect of Changes in Place and Nature of Use of Indian Rights to Water Reserved Under the "Winters Doctrine,"* 5 Nat. Res. Law. 34 (1972). This article treats the issue solely in the context of Indian reserved water rights; generally, however, the application of the principles discussed is similar to non-Indian reservations. The major differences between Indian and non-Indian reservations in this area—the applicability of the McCarran Amendment, the jurisdiction of state courts, and the jurisdiction of state administrative bodies—is discussed in sections III, *B, 1* and III, *B, 2 infra*.

sovereign to reserve the use of water to fulfill its purposes. Interestingly, the Constitution does not expressly address the power of the United States over water, nor has Congress adopted any legislation on the subject of the federal government's power to reserve water for its uses, other than perhaps the Wild and Scenic Rivers Act.[195] Nevertheless, the courts, for more than half a century, have held that the federal government derives the power to control and administer the water resources of the public lands from the property clause[196] of the Federal Constitution.[197] In 1963, the commerce clause was cited for the first time as an additional basis for the exercise of the power of the federal government to reserve water. The Supreme Court stated:

> We have no doubt about the power of the United States under these clauses [commerce and property] to reserve water rights for its reservations and its property.[198]

Although Congress has not specifically legislated in the area of reserved water rights, it has exercised its authority to develop programs involving the use of unreserved water.[199] Some of those programs impinge upon the states' authority over water. For example, section 8 of the Reclamation Act of 1902 makes the water rights of project beneficiaries appurtenant to their lands, regardless of state law.[200] As noted above, the judicially created *Winters* doctrine constitutes a large portion of federal law concerning the use of water. Under it the courts have held that the reservation of land by the federal government may manifest an intent to

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195. 16 U.S.C. §§ 1271-87 (1970). This Act preserves, and thus in a sense reserves, certain rivers in their "free-flowing condition" and incorporates those rivers into a national wild and scenic rivers system. Hence, sufficient water to maintain that "condition" is apparently reserved.

196. U.S. CONST. art. IV, § 3.

197. *See, e.g.*, Arizona v. California, 373 U.S. 546, 593, 597-98 (1963). The property clause has also been used to affirm federal authority to build irrigation projects which serve federal lands, United States v. Arizona, 295 U.S. 174, 184-185 (1935), although the authority of the states to administer and control the use of water *among their citizens* was granted by Congress to the states almost a century ago. *See* text accompanying notes 6-20 *supra*.

198. Arizona v. California, 373 U.S. 546, 593, 598 (1963).

Other possible constitutional sources of federal authority over water are the general welfare clause, U.S. CONST. art. I, § 8, cl. 1; the treaty clause, U.S. CONST. art. II, § 2, cl. 2; and the interstate relations clause, U.S. CONST. art. I, § 10, cl. 1, which requires the consent of Congress to any compact between states. *See* F. TRELEASE, *supra* note 48.

199. *See, e.g.*, Federal Power Act, 16 U.S.C. §§ 797(e)-809 (1970); Watershed Protection and Flood Prevention Act, 16 U.S.C. §§ 1001-08 (1970); Rivers and Harbors Act of 1899, 33 U.S.C. § 401 (1970); Desert Land Act, 43 U.S.C. § 321 (1970); Reclamation Act of 1902 § 8, 43 U.S.C. § 372 (1970).

200. Reclamation Act of 1902, § 8, 43 U.S.C. § 372 (1970).

reserve water to fulfill the purposes underlying the creation of the enclave or reservation. That intent is effectuated by recognition of a reserved right to the use of water.[201] The recognition of the existence of that right, however, has often not occurred until long after creation of the reservation.[202] Further, the extent of the right has in many cases remained uncertain even after its existence has been recognized.[203] Thus, the *Winters* doctrine has inevitably come into conflict with state water law. In this conflict, the power of the federal sovereign has been recognized as supreme.[204] The effect of federal supremacy on state-created private rights to the use of water has been stated in these terms:

> A state cannot create or give to an individual a right that would permit interference with a federal power, project or water use. Such a right cannot rise above the powers of the granting authority, and just as the states are limited by federal supremacy, so are the private rights stemming from them.[205]

The Western States have claimed plenary authority to control all uses of water within their boundaries. They have diligently opposed the existence and expansion of the *Winters* doctrine.[206] Nevertheless, the Supreme Court's decision in *Arizona v. California*,[207] as explained in *Eagle County*,[208] established that federal and Indian reserved water rights do exist and that those rights are controlled and administered by federal law.[209]

In summary, state law apparently controls the acquisition

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201. *See* notes 23-29 and accompanying text *supra*.

202. The reserved water rights of reservations, other than Indian reservations and perhaps military reservations, were not recognized or discussed by the courts until the decision of the special master in *Arizona v. California* in December of 1960, which was later adopted by the Supreme Court. 373 U.S. 546, 601 (1963).

203. Part of the uncertainty concerning the extent of the right arises because the federal or Indian user may expand the use of water to meet future needs within the purpose for which the reservation was created. United States v. District Court for Eagle County, 401 U.S. 520 (1971); 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).

204. F. TRELEASE, *supra* note 48, at 56-59.

205. *Id.* at 70; United States v. Rio Grande Irr. Co., 174 U.S. 690, 703 (1899); *see* Arizona v. California, 373 U.S. 546, 586 (1963).

206. Briefs for States as Amici Curiae, United States v. Cappaert, 422 U.S. 1041 (1975) (Nos. 74-1107, 74-1304); Briefs for States as Amici Curiae, United States v. District Court for Eagle County, 401 U.S. 520 (1971); Briefs for States as Parties and Amici Curiae, Arizona v. California, 373 U.S. 546 (1963).

207. 373 U.S. 546 (1963).

208. 401 U.S. 520 (1971).

209. *Id.* at 522-23.

and administration of water rights within state boundaries with the following exceptions:

(1) Where a prior right to water from an interstate stream is acquired by a user in one state by compliance with that state's law, federal law will protect the prior right[210] against claims by a water user in another state to the extent that the right is within the amount of the first state's apportioned share of the steam.[211]

(2) Where the federal sovereign has imposed a limitation or qualification upon the applicability of state law to water rights in the construction or operation of federal projects and programs, federal law governs.[212]

(3) Where the federal sovereign has withdrawn lands from the public domain for purposes requiring the use of water, sufficient water from streams which arise upon, border, flow through, or underlie the withdrawn lands may be expressly or impliedly reserved to fulfill the purposes of the reservation or enclave.[213] The resulting reserved water rights are established and controlled by federal law.[214] Water rights obtained pursuant to state law prior to the creation of the reservation or enclave, however, are prior to the federal reserved right and cannot be taken unless condemned. All private rights acquired after the date of creation of the reservation are inferior and junior to the reserved water rights.[215]

(4) Where the aboriginal rights of an Indian tribe to the use of water are involved, federal law protects that right.[216]

The following three subsections discuss legislative, judicial,

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210. Howell v. Johnson, 89 F. 556, 557-58 (C.C.D. Mont. 1898).

211. *Cf.* Nebraska v. Wyoming, 325 U.S. 589 (1945).

212. *See, e.g.*, Reclamation Act of 1902 § 8, 43 U.S.C. § 372 (1970) (water rights of reclamation project beneficiaries made appurtenant to their lands, regardless of state law); Federal Power Act § 14, 16 U.S.C. § 807 (1970) (water rights acquired pursuant to state law may be divested by action of the Federal Power Commission at the end of the license period as in United States v. Appalachian Electric Power Co., 311 U.S. 377, 421-28 (1940)). Pursuant to the latter statute, the water rights necessary to the operation of a project apparently may be recaptured by the United States at the end of the license period or awarded by the Federal Power Commission to a competing power or non-power applicant pursuant to § 15 of the Act, 16 U.S.C. § 808. The divestiture is subject to the licensee recovering his net investment in the assets of the project, either from the operations during the project or by payment at the end of the license period. 16 U.S.C. §§ 807, 808 (1970).

213. United States v. District Court for Eagle County, 401 U.S. 520, 522 (1971); Arizona v. California, 373 U.S. 546, 597-98 (1963).

214. *See* notes 207-09 and accompanying text *supra*.

215. Arizona v. California, 373 U.S. 546, 600 (1963); *cf.* United States v. District Court for Eagle County, 401 U.S. 520 (1971).

216. United States v. Gila Valley Irr. Dist., Globe Equity, No. 59 (D. Ariz., June 29, 1935). Aboriginal water rights are discussed in section II, *A*, *2 supra*.

and administrative power over the third category of water rights governed by federal law—the reserved rights of withdrawn lands. Subsection *C*, dealing with the administrative power of the states and the federal government, proposes the establishment of federal administrative machinery under existing federal authority to resolve the numerous unsettled issues of law and fact which pervade this area of the law.

A. Legislative Authority over Reserved Water Rights

1. Reserved water rights of Indians

The special master in *Arizona v. California* found that water rights for Indian reservations, depending upon the use to which the water is put, are appurtenant in nature and have characteristics similar to state water rights.[217] If this is correct, the water rights of the various reservations held for irrigation purposes are appurtenant to the land those rights were reserved to serve, and reserved water rights, like other water rights, are in the nature of realty. Thus, the legislative authority of Congress over Indian water rights is similar to its authority over Indian lands. In this context, it should be noted that Congress has *plenary* authority over tribal lands of Indian reservations.[218]

> The power of Congress extends from the control of the use of the lands, through the grant of adverse interests in the lands, to the outright sale and removal of the Indians' interest. And this is true, whether or not the lands are disposed of for public or private purposes.[219]

Plenary authority, however, does not mean absolute power; the exercise of the power must be founded upon some reasonable basis, and the Indians must be given just compensation for their lands.[220] Further, the congressional power is "subject to constitutional limitations and does not enable the government to give the lands of one tribe or band to another, or to deal with them as its own."[221]

Congress also has legislative authority over lands held by individual Indians, although it is more limited:

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217. Special Master, *supra* note 35, at 266.

218. Cherokee Nation v. Hitchcock, 187 U.S. 294, 306-07 (1902); Stephens v. Cherokee Nation, 174 U.S. 445, 485-86 (1899); *cf.* Choate v. Trapp, 224 U.S. 665, 670-71 (1912).

219. U.S. DEP'T OF THE INTERIOR, FEDERAL INDIAN LAW 36 (1958) [hereinafter cited as FEDERAL INDIAN LAW].

220. *Id.* at 37; *see* United States v. Creek Nation, 295 U.S. 103, 110 (1935).

221. Chippewa Indians v. United States, 301 U.S. 358, 357-76 (1937).

> The power of Congress over individual lands, while less sweeping than its power over tribal lands, is clearly broad enough to cover supervision of the alienation of individual lands.[222]

Congress may by statute enhance or inhibit the exercise and enjoyment of Indian water rights. For example, Congress has denied to the various states legislative, judicial, and administrative jurisdiction over the Indians' lands and reserved water rights, principally because those lands and rights are held in trust by the United States.[223] Non-Indians, acting pursuant to state law may, however, indirectly affect Indian water rights. Indian tribes have not had sufficient capital to construct the irrigation and other water development projects necessary to make full use of their reserved water. The unused reserved waters continue to flow in the steams and thus become subject to use by non-Indians pursuant to state law. These non-Indian users may expend substantial capital to expand their operations in reliance upon the presence of the water. When this occurs, recovery of the water by the Indians may become difficult, if not impossible.[224] The failure to quantify reserved rights in each watershed contributes significantly to this problem. If the problem is not resolved, the expansion of use pursuant to state law may in reality have a serious adverse effect on Indian water rights in the long term, although the states themselves lack statutory authority over reserved rights.

2. *Reserved water rights of other federal reservations and enclaves*

While joint federal-state jurisdiction is the rule with respect to most federal lands other than Indian reservations, article I,

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222. FEDERAL INDIAN LAW, *supra* note 219, at 40.

223. For example, 28 U.S.C. § 1360(a) (1970) grants to the states jurisdiction over civil actions to which Indians are parties, but 28 U.S.C. § 1360(b) (1970) expressly provides:

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water right, belonging to any Indian or any Indian tribe, band or community that is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

See also United States v. Morrison, 203 F. 364, 366 (C.C.D. Colo. 1901) (explaining in dictum the trust relationship of the Indians and the United States).

224. *See* Veeder, *Indian Prior and Paramount Right to the Use of Water*, 16 ROCKY MT. MINERAL L. INST. 631, 660-62 (1971).

section 8, clause 17 of the Constitution provides that the federal government can exercise exclusive legislative jurisdiction, with the consent of the states involved, over areas acquired by the government for various federal purposes.[225] By this means, some areas have become federal islands or enclaves. In many respects, the law governing these areas is foreign to the law of the states in which they are situated; in general, federal law, rather than state law, is applicable to an area under the exclusive legislative jurisdiction of the United States. Once a state has ceded jurisdiction to the United States, it is powerless to assert control over the area.[226] It should be noted in this context that the term *exclusive legislative jurisdiction* is applied to situations where the federal government has received all authority over the enclave except the power reserved to the state to serve process in litigation arising from activities that occur off the enclave.[227] The contrast between areas under exclusive federal jurisdiction and areas under concurrent federal-state jurisdiction was discussed by the Supreme Court in *Surplus Trading Co. v. Cook*.[228]

The extent of federal legislative authority over reserved lands could have a bearing on whether the states can exercise jurisdiction over the water rights reserved for use on those lands or within that area. In *Nevada ex rel. Shamberger v. United States*,[229] Nevada challenged the right of the United States to withdraw water from wells on the Hawthorne Naval Ammunition Depot without full compliance with Nevada law, which requires a permit from the state engineer. Exclusive jurisdiction over the site had been ceded by the state in 1935. The federal district court denied relief on the merits, rejecting Nevada's claim of proprietary rights over the groundwater in question on a theory of exclusive federal legislative jurisdiction within the depot.[230] In reaching this conclusion, the court relied in part on the fact that the state had ceded legislative and administrative jurisdiction over the area.[231] The court relied more directly, however, on the fact that only Congress

225. The cited clause is not the source of federal authority over Indian reservations; that authority derives from the commerce clause, U.S. CONST. art. I, § 8, cl. 3, and the property clause, U.S. CONST. art. IV, § 3, cl. 2.

226. *See* Nevada *ex rel.* Shamberger v. United States, 165 F. Supp. 600 (D. Nev. 1958), *aff'd on other grounds*, 279 F.2d 699 (9th Cir. 1960).

227. *See, e.g.*, 16 U.S.C. § 163 (1970). *See also* U.S. DEP'T OF THE INTERIOR, LAW IN RELATION TO NATIONAL PARKS 162 (1933).

228. 281 U.S. 647 (1930).

229. 165 F. Supp. 600 (D. Nev. 1958), *aff'd on other grounds*, 279 F.2d 699 (9th Cir. 1960).

230. 165 F. Supp. at 604-09.

231. *Id.* at 602-03.

may impose conditions on the use of reserved waters.[232] The trial court's dismissal of the state's complaint was affirmed by the Ninth Circuit Court of Appeals on the ground that the waiver of sovereign immunity provided by the McCarran Amendment[233] did not apply to the relief sought by Nevada.

Whether the United States has exclusive legislative authority may also affect jurisdiction of the federal courts and the law to be applied when adjudicating the status of the water rights appurtenant to private lands within the exterior boundaries of a federal enclave. In *Macomber v. Bose*,[234] the plaintiff's predecessor owned land within the boundaries of Glacier National Park in Montana as it was created by an act of Congress in 1910. Montana ceded jurisdiction in 1914. In 1936, plaintiff's predecessor conveyed to the government a parcel of land containing a spring. The grantor, however, reserved the water rights to the spring and an easement to get the water to his other properties within the boundaries of the park.[235] The court action was brought for the purpose of protecting those water rights. The federal district court dismissed the case for lack of jurisdiction on the ground that state law was applicable to determine and protect the water rights.[236] The Ninth Circuit Court of Appeals reversed, remanded for trial, and stated:

> By this cession [of state legislative authority] and acceptance, federal authority became the only authority operating within the ceded area. State law theretofore applicable within the area was assimilated as federal law, to remain in effect until changed by Congress. Rights arising under such assimilated law arise under federal law and are properly the subject of federal jurisdiction.[237]

Accordingly, the federal courts have jurisdiction over an action adjudicating *any* water rights within a federal enclave, whether acquired at the time of or subsequent to the creation of the enclave and cession of state jurisdiction over the area.

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232. *Id.* at 608-09. For a discussion of the *Shamberger* case see notes 183-86 and accompanying text *supra*.

233. 43 U.S.C. § 666 (1970).

234. 401 F.2d 545 (9th Cir. 1968).

235. Some of the facts stated are taken from the district court's decision, 266 F. Supp. 665 (D. Mont. 1967).

236. 266 F. Supp. 665 (D. Mont. 1967).

237. 401 F.2d at 546.

B. Judicial Authority over Reserved Water Rights

> [T]he title to a water right is not perfect in any claimant until there has been an adjudication or legal determination of the same and the title thereto adjudged to be in the claimant as against all the world, either by the judgment or decree in a proper action brought in a court of competent jurisdiction or the award or determination as the result of a proceeding before some board or administrative officers under a special statute authorizing such proceeding, and such final decree or determination designating the owner of the right and defining the nature and extent of the same and making a permanent record thereof.[238]

An action to adjudicate water rights is an equitable action to determine and fix the ownership, nature, and extent of the rights of all users claiming rights in the same stream or water supply in relation to each other.[239] Until an administrative mechanism is developed to define the nature and extent of federal reserved water rights,[240] state and federal courts will remain the only forums where the scope and measure of such rights may be established. This subsection discusses the division of jurisdiction between those judicial forums.

Following a brief discussion of state court jurisdiction over reserved water rights owned by the United States, this subsection considers the unresolved issue of whether the states also have jurisdiction over Indian reserved water rights which are held in trust by the United States. It is possible that Indian water rights could be subjected to state jurisdiction in the future by legislation or judicial decree; hence, the right to remove cases involving Indian reserved rights from state to federal courts may become an issue and is also analyzed. Finally, the Supreme Court's original jurisdiction over interstate stream adjudications is discussed.

1. The McCarran Amendment and state jurisdiction over non-Indian reserved water rights

All reserved water rights were adjudicated in federal courts[241]

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238. 3 C. KINNEY, A TREATISE ON THE LAW OF IRRIGATION AND WATER RIGHTS 2755 (2d ed. 1912) [hereinafter cited as KINNEY].

239. *Id.* at 2756-57.

240. The establishment of such a mechanism is proposed and discussed in section III, *C infra*.

241. *See, e.g.*, Arizona v. California, 373 U.S. 546 (1963); United States v. Powers, 305 U.S. 527 (1939); 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

until the 1952 passage of the McCarran Amendment,[242] which granted a limited waiver of federal sovereign immunity.[243] The Amendment permits suit against the United States in stream adjudications where the United States' water rights are involved. Early constructions of the McCarran Amendment placed two restrictions on the scope of the statute: (1) before the United States could be joined, a complete adjudication of the entire stream system was necessary,[244] and (2) the United States could only be joined in those cases involving federal water rights acquired pursuant to state law.[245] In the 1971 case of *United States v. District Court for Eagle County*,[246] however, the Supreme Court interpreted the Amendment to include the *reserved* water rights of federal non-Indian reservations and enclaves.

An analysis of the *Eagle County* case must begin with an examination of the states' position.[247] Prior to *Eagle County*, the states, in applying their own laws of appropriation, were unable to quantify the reserved water rights held in any given stream. Since the United States could refuse to submit to stream adjudi-

U.S. 924 (1965); United States v. McIntire, 101 F.2d 650 (9th Cir. 1939); 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); United States *ex rel.* Ray v. Hibner, 27 F.2d 909 (D. Idaho 1928).

242. The McCarran Amendment, 43 U.S.C. § 666 (1970), provides in part:

> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgements, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

243. For an application of the McCarran Amendment in a case involving non-Indian water rights of the United States in Colorado, see United States v. District Court for Eagle County, 401 U.S. 520 (1971).

244. *See, e.g.*, Dugan v. Rank, 372 U.S. 609, 617-19 (1963).

245. This latter restriction was never articulated by a court construing the McCarran Amendment. Federal authorities, however, generally believed that the Amendment applied only in cases involving federal water rights acquired under state law. *See* Brief for the United States at 8-19, United States v. District Court for Eagle County, 401 U.S. 520 (1971).

246. 401 U.S. 520 (1971). *See also* United States v. District Court for Water Div. No. 5, 401 U.S. 527 (1971).

247. Arizona, California, Colorado, Oregon, Nevada, Idaho, Montana, Alaska, Oklahoma, Utah, Washington, and Wyoming filed amici curiae briefs in support of the respondent and in opposition to the position of the United States. 401 U.S. at 521.

cations by asserting sovereign immunity, the states found themselves in what they regarded as an intolerable position: they were unable to effectively quantify and administer water rights among their citizens.[248] The states asserted the need for a forum where all claimed rights in a given stream, whether private, state, or federal, could be adjudicated without the need to await a stream adjudication initiated by the federal government. In addition, the states desired to have a hand in determining the measure and scope of the reserved rights. The McCarran Amendment was the vehicle used to assert state jurisdiction over reserved water rights.

In *Eagle County*, the United States Supreme Court ruled that the states could subject reserved water rights for non-Indian reservations[249] to judicial determination in state courts whenever the proceedings will result in a general adjudication of an entire watershed or a substantial portion thereof.[250] The Court interpreted the McCarran Amendment in these terms:

> [W]e deal with an all-inclusive statute concerning "the adjudication of rights to the use of water of a river system" which in § 666(a)(1) [the McCarran Amendment] has no exceptions and which, as we read it, *includes appropriative rights, riparian rights, and reserved rights*.[251]

In the new era brought about by *Eagle County*, it is clear that the United States will be required to submit to the jurisdiction of state courts for the adjudication of its water rights, whether reserved or acquired for the benefit of federal enclaves other than Indian reservations. Neither the *Eagle County* case nor its companion case, *United States v. District Court for Water Division No. 5*,[252] however, resolved whether the waiver of the McCarran Amendment applies to Indian reserved water rights; neither Indian lands nor Indian water rights were involved in those cases.[253]

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248. For an example of the states' inability to adjudicate water rights because of the absence of the United States, an indispensible party, see Texas v. New Mexico, 352 U.S. 991 (1957).

249. Some may argue that the *Eagle County* decision permits state courts to adjudicate federal water rights for all federal reserved lands, including Indian reservations. This article takes the contrary position; see section III, *B, 2 infra*.

250. 401 U.S. at 523. The Court held that the Eagle River was a sufficiently large area for a general adjudication. In the companion case, United States v. District Court for Water Div. No. 5, 401 U.S. 527, 529 (1971), the Court held that regardless of the fact that the Colorado statutes involved proceedings each month on water rights applications filed during that month, there was still a general adjudication for purposes of the McCarran Amendment.

251. 401 U.S. at 524 (emphasis added).

252. 401 U.S. 527 (1971).

253. Brief for Petitioners at 10 n.3, United States v. District Court for Water Div. No. 5, 401 U.S. 527 (1971).