ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 8672

3594 HRES SB 150

470

Amendment: Delete "a certificate of," and substitute "an" in subsection (d) of AS 46.15.140.

Rationale: This change will delete the reference to "certificate of appropriation" and refer only to an appropriation, which by definition [AS 46.15.260(2)] includes reservations of water for instream uses among appropriative water rights. Since instream flow and other reservations are issued with a "Certificate of Reservation," this amendment eliminates an ambiguity which could be interpreted to preclude application of this section to a reservation of water for instream use.

Proposed by: Federal Reserved Water Rights (FRWR) Work Group

Amendment: Move proposed subsection (d) of AS 46.15.140 to become a new subsection (g) of AS 46.15.145. Re-letter subsection "e" as "d".

Rationale: It was agreed that subsection (d) would be more appropriately moved to become a new subsection (g) of AS 46.15.145. The point of this new subsection is to insure that a state agency does not walk away from a reservation of water for instream use without public notice. Through the public notice, potential water users are made aware that water is now available for consumptive beneficial uses. In addition, the members of the public interested in preserving a reservation of water for instream use would have an opportunity to comment in advance.

Proposed by: Senator Rick Halford

Section 46.15.165

Amendment: Add a new subsection (d) "Service of an order under subsection (c) is not an admission by the State of Alaska that the person served with the order has a water right." Reletter the following subsections.

Rationale: This will make it clear that the State's notice to any person of an administrative adjudication is not a representation that the person holds a water right.

Proposed by: FRWR Work Group

Amendment: In Section 46.15.165(e), delete the sentence "The master may be an employee of the state" and substitute "Employment by a federal, state, or local governmental agency does not disqualify a person from being appointed a master under this subsection if in the opinion of the commissioner the person is otherwise impartial and qualified to act as a master."

Rationale: This broadens the pool of possible masters, and helps ensure that any master the commissioner appoints is both impartial and qualified.

Proposed by: FRWR Work Group

Amendment: Move the following sentence, "Any state agency may assert a water right on behalf of the state in the adjudication," from Section 46.15.165(f) to a new subsection (e) and reletter the following subsections.

Rationale: This sentence appears to be out of place and is clearer and more logically placed as a new subsection (e).

Proposed by: FRWR Work Group

Amendment: In subsection (i), change the word "shall" to the word "may."

Rationale: Allows the Commissioner discretion to take this action.

Proposed by: FRWR Work Group

Section 46.15.166

Amendment: In Section 46.15.166(c), delete the word "initially." Delete the phrase "a designee of the Commissioner as" and substitute the phrase "an impartial qualified person as."

Rationale: "Initially" is an unnecessary word. Changing the phrase allows the court to appoint a person of its choice as master, rather than being limited by the Commissioner, and requires that the appointed master be impartial.

Proposed by: FRWR Work Group

Amendment: Also in subsection (c), delete the sentence "the master may be an employee of the state" and substitute "Employment by a federal, state, or local governmental agency does not disqualify a person from being appointed a master under this subsection if in the opinion of the court the person is otherwise impartial and qualified to act as master."

Rationale: This broadens the pool of possible masters, and requires that any master is both impartial and qualified.

Proposed by: FRWR Work Group

Section 46.15.168

Amendment: In Section 46.15.168(c), delete the words "with a private person or the federal government."

Rationale: That arbitration is entered into with a person is understood and "person" is already defined in AS 46.15.260(8) and includes private persons and the federal government; therefore, these words are redundent and unncessary.

Proposed by: FRWR Work Group

Amendment: In subsection (d) of Section 46.15.168, delete the word "federal."

Rationale: This will broaden the phrase to include both federal and state court decrees.

Proposed by: FRWR Work Group

Section 46.15.169

Amendment: Rewrite this section as follows: "Nothing in AS 46.15 represents a commitment by the State of Alaska to any specific federal reserved water right."

Rationale: Federal agencies have commented that the wording in proposed Section 46.15.169 suggests that the State of Alaska believes that federal reserved water rights do not exist. The new proposed language clarifies the meaning that the state has made no commitment to any federal reserved water rights for any specific federal land reservations.

Proposed by: FRWR Work Group

Section 46.15.256

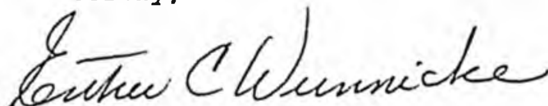
Amendment: In Section 46.15.256(3), change "an" to "a", delete "administrative", and after the word "subpoena" add "or subpoena duces tecum."

Rationale: This will make the language concerning subpoenas consistent with other state agencies' statutes.

Proposed by: Assistant Attorney General Mike Frank

Senator Halford's comments along with those of the state and federal resource agencies are very useful and we support these proposed changes. Due to the critical need for this legislation, we urge your continued support for this bill.

Sincerely,



Esther C. Wunnicke
Commissioner

cc: Senator Jan Faiks
Senator Jim Sackett
Senator Pat Rodey
Senator Rick Halford
House Resources Committee
Molly McCammon
Jim Ayers

THE *WINTERS* OF OUR DISCONTENT: FEDERAL RESERVED WATER RIGHTS IN THE WESTERN STATES

INTRODUCTION

Water is the life-blood of the American West. Like other people, westerners need water for basic human sustenance and for a variety of other purposes. But unlike most other Americans, westerners must fill their needs from an extremely limited supply of water.[1] As a result, westerners face a problem that may seem incomprehensible to nonwesterners who live in areas with abundant water supplies: they must decide how to allocate the limited quantity of available water among all the users and uses.

To deal with this problem, the western states[2] developed the doctrine of prior appropriation as a basic scheme for allocating the available surface water among various users.[3] This prior appropriation system, based on continued beneficial use of appropriated water and strict quantification of the rights of users,[4] insists that water may not be wasted or go unused. In the land-rich and water-poor West, any other system would probably be wasteful and inefficient.[5]

Through application of the prior appropriation doctrine, the western states seek to apportion their limited water resources in a fair and

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[1] The United States Water Resources Council's Second National Water Assessment graphically illustrates the critical water shortage in the western states. For example, in 1975, the Rio Grande water resources region showed 78% present streamflow depletion from all demands, and the Lower Colorado region showed 82% depletion. 2 WATER RESOURCES COUNCIL, THE NATION'S WATER RESOURCES: 1975-2000 (pt. 4), at 48 (1978). The Water Resources Council projects that 91% of the surface water in the Rio Grande region will be in use by 1985. More dramatically, the council predicts that the surface water supply in the Lower Colorado region will be overdrawn by 26% in 1985. The council summarized its concern over western water supply:

> Competing offstream uses of water for energy, agricultural, domestic, and industrial needs coupled with associated environmental and instream flow uses have resulted in basinwide and local problems throughout the United States . . . . The problem of inadequate surface-water supply is or will be severe by the year 2000 in 17 [water resources] subregions located mainly in the Midwest and Southwest.

1 WATER RESOURCES COUNCIL, THE NATION'S WATER RESOURCES: 1975-2000, at 56 (1978). For additional discussion of the water shortage in the western states, see generally NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE (1973).

[2] The "western" states referred to in this Note are: Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.

[3] *See infra* note 11 and accompanying text.

[4] *See infra* notes 11-18 and accompanying text.

[5] *See infra* note 14 and accompanying text.

rational way. The prior appropriation doctrine conflicts, however, with the doctrine of federal reserved water rights, which the United States Supreme Court announced in *Winters v. United States.*[6] The *Winters* doctrine provides that in reserving public land for a federal enclave such as an Indian reservation, national forest, or military reservation, the federal government also implicitly reserves a sufficient quantity of water to carry out the purpose of the reservation of land.[7] Federal reserved rights exist independently of beneficial use or quantification; they are therefore fundamentally different in character from rights established by prior appropriation.

From 1908 through the 1970s, the Supreme Court expanded the scope of the *Winters* doctrine of federal reserved rights, thereby aggravating the inherent conflict between appropriative rights and reserved rights.[8] More recently, however, the Court has attempted to ease the conflict by narrowly defining the *Winters* doctrine's scope.[9] Both reserved rights and prior appropriation serve important purposes, and therefore both doctrines, and their conflict, will persist.[10] By strictly defining federal reserved rights to make them mesh as smoothly as possible with the water law systems of the various states, the Court's well-directed efforts to harmonize the two doctrines can ease the tension between the *Winters* doctrine and the prior appropriation doctrine.

I
Background

A. Water Rights in the Western States: The Doctrine of Prior Appropriation

The doctrine of prior appropriation provides the basic framework for the statutory water use schemes of the western states.[11] A complete understanding of the conflict between the federal reserved rights doc-

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6 207 U.S. 564 (1908).

7 *See infra* notes 23-25 and accompanying text.

8 *See infra* notes 20-57 and accompanying text.

9 *See infra* notes 58-96 and accompanying text.

10 *See infra* note 122 and accompanying text.

11 The western states can be divided into two doctrinal categories: the Colorado doctrine states and the California doctrine states. The nine Colorado doctrine states (Alaska, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming) recognize only appropriative rights to surface water. 5 R. Clark, Waters and Water Rights § 405, at 50 (1972). The nine California doctrine states (California, Kansas, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Washington) recognize some riparian rights as well as appropriative rights to surface water. *Id.* § 420, at 232.

The statutory water law systems in the West vary considerably from state to state. A detailed examination of these different systems is beyond the scope of this Note. For a thorough comparative discussion, see *id.* §§ 400-33.

For a basic discussion of the riparian system, see 7 R. Clark, Waters and Water Rights § 610, at 28 (1976).

trine and prior appropriation necessitates some acquaintance with the workings of prior appropriation systems.

The foundation of the prior appropriation doctrine is its requirement of beneficial use.[12] A user acquires an appropriative right by putting the water he claims to some beneficial use. Moreover, he loses his right if he does not continue to use his appropriated water beneficially.[13] In this respect, the appropriative rights system differs strikingly from the English common law riparian system generally employed in the eastern states. Riparian rights accrue to an owner of land adjoining a stream merely by virtue of his property ownership and thus exist independently of any use at all.[14]

Prior appropriation works by strict chronological priority. A senior appropriator, whose priority date[15] is earlier in time, may take his entire entitlement of water before a junior holder may take any water at all. In this priority system, junior holders bear the entire brunt of any shortage.[16]

All appropriative rights are determined by means of an *in rem* proceeding called a water adjudication,[17] which determines the priority

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12 Mining, irrigation, industrial power production, and sanitary and municipal uses are generally recognized as "beneficial." Ranquist, *The* Winters *Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water,* 1975 B.Y.U. L. REV. 639, 646 n.21.

Because appropriative rights accrue by virtue of beneficial use, they need not be appurtenant to land. *Id.* Ownership of land adjoining a stream is not considered a basis for an appropriative right. *Id.* Water obtained by appropriation may generally be used at any place, regardless of its distance from the stream, so long as the use is beneficial. *Id.*

All of the western states except Montana and Colorado impose the additional statutory requirement that the appropriator must obtain a permit from the proper state administrator before he may acquire an appropriative right. *See, e.g.,* WYO. STAT. §§ 41-4-501 to -516 (1977). For an extended discussion of these permit schemes, see 5 R. CLARK, *supra* note 11, § 409, at 99-107.

13 5 R. CLARK, *supra* note 11, §§ 413.1, 429.2.

14 The riparian system would be inappropriate as the *primary* means of allocating available water resources in the West because riparian rights do not depend on beneficial use of the water, and the West can ill afford the luxury of owned but unused stream flow. Riparian law evolved in England, where water is plentiful. The English (and the Americans living in the water-rich East) had no incentive to develop a more thrifty and efficient water use scheme. *See* McGowen, *The Development of Political Institutions on the Public Domain,* 11 WYO. L.J. 1, 14 (1956).

15 The priority date of a holder's right is usually the date on which the holder initially diverted the water. Although such an appropriation is not technically "complete" until the appropriator actually puts the water to some beneficial use, the relation back doctrine provides that if he completes the appropriation with due diligence, the appropriator's priority date is the date of the initial act of diversion. *See, e.g.,* COLO. REV. STAT. § 37-92-305(1) (1973); *see also* Ellis, *Water Rights: What They Are and How They Are Created,* 13 ROCKY MTN. MIN. L. INST. 451, 458-59 (1967); Comment, *Determining Priority of Federal Reserved Rights,* 48 COLO. L. REV. 547, 551 (1977).

16 Ranquist, *supra* note 12, at 646 n.21.

17 The western states are again split into two groups. The Colorado system, employed only by Colorado and Montana, leaves the entire process of adjudication to the courts. An appropriative claimant files a petition in state court, and all other owners or claimants are served with notice as required by statute. *See, e.g.,* COLO. REV. STAT. § 37-92-302 (1973 &

rights of the appropriators participating in the hearing as against the entire world. A water adjudication strictly quantifies a holder's rights and limits his entitlement to his original appropriation, unless he either claims further amounts of unappropriated water or purchases the rights of another appropriator.[18]

Principles of strict quantification and rigid control underlie the prior appropriation systems employed by the western states. Federal reserved water rights, on the other hand, are usually awarded without quantification and may exist independent of any use. Thus, when federal reserved rights are imposed upon these appropriative water use schemes, fundamental incongruities appear.[19]

B. The Development of the *Winters* Doctrine of Federal Reserved Rights

1. *Expansion of the Reserved Rights Doctrine: From* Winters *to* Cappaert

From 1908 through the 1970s, the United States Supreme Court steadily expanded the scope of the *Winters* doctrine of federal reserved water rights.[20] By nature, federal reserved rights differ fundamentally from appropriative rights established under state law.[21] The Court's expansive application of the reserved rights doctrine during this period aggravated this inherent conflict between the two types of water rights.[22]

The Supreme Court first announced the doctrine of federal reserved water rights in the 1908 case of *Winters v. United States.*[23] In 1888, one year before Congress admitted Montana to the Union, it established by treaty the Fort Belknap Indian Reservation in the Montana Territory. Winters and others sought to dam the Milk River, which flows

Supp. 1983). Each participant is responsible for producing his own evidence at trial to protect or establish his water right. Ellis, *supra* note 15, at 462.

The other states, which employ permit systems, *see supra* note 12, use the New Mexico system of adjudication. This system also involves the courts, but the state engineer's office makes an initial determination of fact as to the rights of the parties. *See, e.g.,* ARIZ. REV. STAT. ANN. § 45-257 (Supp. 1983). This determination is then subject to challenge by the parties at the adjudication. Ellis, *supra* note 15, at 462.

18 Only a small amount of unappropriated water remains in the West. Many streams are overappropriated, which means that the aggregate quantity of all the water rights claimed from the stream exceeds the actual stream flow. *See supra* note 1 and accompanying text; Comment, *supra* note 15, at 551 n.26. Junior holders unable to draw water must wait until stream flow increases or until senior holders relinquish their rights. *See id.* at 551-52 & n.26.

19 *See infra* notes 102-15 and accompanying text.

20 *See infra* notes 23-57 and accompanying text.

21 *See infra* notes 102-15 and accompanying text.

22 *See infra* notes 116-20 and accompanying text.

23 207 U.S. 564 (1908).

through the Fort Belknap reservation.[24] The Court recognized the conflicting inferences arising from the treaty's silence as to the Indians' water rights; nonetheless, the Court held that the treaty had *implicitly* reserved a sufficient quantity of water for the Indians to irrigate their land.[25]

In *Federal Power Commission v. Oregon (Pelton Dam),*[26] to the astonishment of western water lawyers,[27] the Court indicated that the *Winters* doctrine might extend to non-Indian federal lands.[28] In *Pelton Dam,* the Federal Power Commission issued a license to the Northwest Power Supply Company, allowing it to build the Pelton Dam on the Deschutes River in Oregon. One terminus of the dam was to be on federal Indian land, and the other terminus was to be on federal non-Indian land.[29] The state of Oregon argued that under the Desert Land Act of 1877,[30] which requires the federal government to obtain water rights for federal lands in accordance with state law,[31] the state must give its consent before the dam could be built.[32] The Court distinguished between *public* lands, which belong to the federal government because no one has yet claimed them, and *reserved* lands, which the federal government has withdrawn from the public realm and which are no longer subject to private appropriation or disposal.[33] The Court then held that the Desert Land Act of 1877 applied only to *public* lands, and not to *reserved* lands.[34] Therefore, the sponsors of the Pelton Dam project did not need the permission of the state of Oregon to build the dam.[35] The Court

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24 *Id.* at 565.

25 *Id.* at 576-77. The Court 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." *Id.* at 577 (citations omitted). The Court also held that Montana's subsequent admission to the Union had no effect on the treaty's implicit reservation of water. *Id.*

26 349 U.S. 435 (1955).

27 *See, e.g.,* Trelease, *Federal Reserved Water Rights Since PLLRC,* 54 DEN. L.J. 473 (1977). Professor Trelease was a practicing water lawyer when the Court decided *Pelton Dam* and his comments indicate the general chaos caused by the decision:

> At no time prior to 1955 did I ever hear a suggestion that the reserved rights doctrine was anything but a special quirk of Indian water law.
>
> . . . .
>
> This case was a real bombshell, and it certainly lit a fire under western water lawyers. . . . [A] number of western state water officials and others raised a chorus of protest at this reversal of what they had always thought to be the law.

Id. at 475-77 (footnotes omitted).

28 *Pelton Dam,* 349 U.S. at 448.

29 *Id.* at 437-38.

30 43 U.S.C. §§ 321-39 (1976).

31 *Pelton Dam,* 349 U.S. at 448.

32 *Id.* at 446-47.

33 *Id.* at 443-44.

34 *Id.* at 446-48.

35 *Id.* at 452.

thus implied that federal reserved lands, both Indian and non-Indian, are not subject to state water law.[36]

The Court explicitly extended the *Winters* doctrine to non-Indian federal reservations in *Arizona v. California* (*Arizona I*).[37] *Arizona I* began as a dispute among several western states over each state's share of the waters of the Colorado River.[38] The United States intervened to protect its claims to water for five Indian reservations and several wildlife refuges, recreational areas, and national forests.[39] Writing for the Court, Justice Black declared that the federal government, through Congress and the executive,[40] had implicitly reserved a sufficient quantity of water to accommodate the purposes of the Indian reservations and the non-Indian federal lands.[41] Thus, the Court not only reaffirmed the viability of the reserved rights doctrine, but also expanded the doctrine's scope by applying it to non-Indian federal lands.

In *Arizona I*, the Court also questioned whether the special master appointed to the case correctly determined the quantity of water that the government intended to reserve for the federal enclaves.[42] In earlier reserved rights cases, the Court had not closely examined what quantity of water was necessary to satisfy the purposes of the reservations, perhaps because those purposes were clearly limited. Furthermore, in examining the purposes of the reservation, the Court seemed to stress the present purposes.[43] In *Arizona I*, however, the Court noted that the water set aside for the Indian reservations "was intended to satisfy the *future* as well as the present needs of the Indian Reservations and . . . that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations."[44] The Court's language could mean that the "purpose" of a federal reservation might be expanded; thus, the

36 *Id.* at 448. The Court noted that:

> The lands before us in this case are not "public lands" but "reservations." Even without [the] express restriction of the Desert Land Act to sources of water supply on public lands, these Acts would not apply to reserved lands. . . . [I]t is enough . . . to recognize that these Acts do not apply to this license, which relates only to the use of waters on *reservations* of the United States.

Id. (emphasis added).

37 373 U.S. 546 (1963).

38 *Id.* at 550-51 (the states involved were Arizona, California, Nevada, New [illegible] Utah).

39 *Id.* at 551 n.3, 595.

40 *Id.* at 598. The Court had not previously had occasion to decide whether [illegible]tive could create a *Winters* right.

41 *Id.* at 600-01.

42 *Id.*

43 *See, e.g.*, United States v. Powers, 305 U.S. 527 (1939) (Indians and their [illegible] interest needed water for irrigation of limited acreage); Winters v. United States, [illegible] (1908).

44 *Arizona I*, 373 U.S. at 600 (emphasis added).

quantity of the water guaranteed by the *Winters* right might also be increased.

The Court next addressed the reserved rights doctrine in the case of *United States v. District Court in and for the County of Eagle* (*Eagle County*).[45] In that case, the Court first showed concern with the federal-state tensions generated by judicial recognition of *Winters* rights. At issue was the scope of the McCarran Amendment,[46] which provides for a limited waiver of the United States' sovereign immunity in water rights adjudication.[47] The amendment allows the United States to be joined as a party defendant in state water adjudications, but in *Eagle County*, the government contended that this waiver of sovereign immunity applied only to water rights acquired under state law and not to reserved water rights.[48] Writing for a unanimous Court, Justice Douglas stated that the McCarran Amendment was an "all-inclusive statute" which made no exception for reserved rights and that the waiver of sovereign immunity therefore applied to federal reserved rights as well as nonreserved rights.[49] This case made the United States amenable to suit in *state* water adjudications and thus marked the Court's first step toward allowing the states to determine federal reserved water rights.

The Court again addressed the question of jurisdiction over reserved rights in *Colorado River Water Conservation District v. United States* (*Colorado River*).[50] The United States filed suit in federal district court in Colorado seeking a declaration of all reserved rights held by the federal government, in its own right and as a fiduciary for certain Indian tribes, in the San Juan River Basin.[51] The government named as defendants private irrigators who presumably would claim appropriative rights to the same water.[52] Several Colorado water conservation districts then intervened as defendants. One defendant subsequently filed suit in Colorado state court seeking adjudication of the same rights[53] and joined the United States as a defendant under the McCarran Amendment.[54]

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45 401 U.S. 520 (1971).

46 43 U.S.C. § 666 (1976) (also known as the McCarran Water Rights Suits Act).

47 The McCarran Amendment, 43 U.S.C. § 666 (1976), provides in part:

> Consent is 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.

See also infra note 96.

48 *Eagle County*, 406 U.S. at 523-24.

49 *Id.* at 524.

50 424 U.S. 800 (1976).

51 *Id.* at 805.

52 *Id.*

53 *Id.* at 806.

54 *Id.*

The water conservation districts then moved to dismiss the federal action, arguing that the McCarran Amendment vested the state courts with exclusive jurisdiction to detemine the reserved rights of the United States.[55]

The Supreme Court held that the McCarran Amendment merely created *concurrent* jurisdiction in the state courts to determine federal water rights and did not divest the federal courts of jurisdiction.[56] Nevertheless, the Court held that dismissal of the federal proceeding was proper. The Court reasoned that if the state has a comprehensive system for water rights adjudication, federal water rights are more appropriately determined in state court for reasons of judicial efficiency and expertise.[57] The *Colorado River* doctrine thus creates a presumption that when both federal and state actions are pending for adjudication of federal reserved water rights, the federal action should be dismissed.[58]

Later in the same Term, the Court decided *Cappaert v. United States.*[59] The dispute in *Cappaert* centered on a pool of water, located fifty feet down inside a huge cavern that the President had reserved in 1952 as the Devil's Hole National Monument.[60] This pool was fed by groundwater and was the only known habitat of a rare species of desert fish known as the Devil's Hole pupfish.[61] In 1968, the Cappaerts, owners of a nearby ranch, began pumping groundwater from the same aquifer that fed the pool.[62] As a result of the Cappaerts' extensive pumping, the water level in the pool dropped, endangering the pupfish.[63] The United States filed suit seeking an injunction to limit the Cappaerts' pumping to an amount that would save the pupfish from extinction.[64] The Supreme Court unanimously decided for the pupfish and affirmed the modified injunction.[65]

Two aspects of Chief Justice Burger's opinion in *Cappaert* are noteworthy. First, although the Court's narrow holding sustained a *Winters* right, the opinion announced a "minimal need" standard for determin-

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55 *Id.*

56 *Id.* at 807-09.

57 *Id.* The Court noted that "[t]he clear federal policy evinced by [the McCarran Amendment] is the avoidance of piecemeal adjudication of water rights in a river system." *Id.* at 819. The Court further recognized "the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals." *Id.*

58 *Id.* at 818-20.

59 426 U.S. 128 (1976).

60 *Id.* at 131 & n.1.

61 *Id.* at 132.

62 *Id.* at 133.

63 *Id.* at 133-34.

64 *Id.* at 135.

65 The district court permanently enjoined Cappaert from lowering the water level of the pool below 3.0 feet, but the court of appeals modified the injunction to allow the Cappaerts to pump as long as the water level did not drop below 3.3 feet. *Id.* at 137 n.3, 138.

ing the quantity of water reserved by the federal government.[66] Second, the Court had a clear opportunity to extend the *Winters* doctrine to groundwater but refused to do so.[67] The *Cappaert* case thus marked a turning point in the Court's reserved rights jurisprudence.

2. *Narrowing the Scope of the* Winters *Doctrine: Reserved Rights after* Cappaert

In 1978, the Supreme Court decided *United States v. New Mexico (Mimbres)*.[68] At issue was the Rio Mimbres, which originates in the

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[66] *Id.* at 141. Chief Justice Burger noted that:

> The implied-reservation-of-water-rights doctrine . . . reserves only that amount of water *necessary* to fulfill the purpose of the reservation, no more . . . . Devil's Hole was reserved "for the preservation of the unusual features of the scenic, scientific, and educational interest." . . . The pool need only be preserved . . . to the extent necessary to preserve its scientific interest . . . . Thus . . . the level of the pool may be permitted to drop to the extent that the drop does not impair the scientific value of the pool. . . . The District Court thus tailored its injunction, very appropriately, to *minimal need* . . . .

Id. (emphasis added) (citation omitted) (quoting the presidential proclamation that established the national monument).

[67] The Ninth Circuit had explicitly held below that the *Winters* doctrine applied to groundwater as well as to surface water. United States v. Cappaert, 508 F.2d 313, 317 (9th Cir. 1974), *aff'd*, 426 U.S. 128 (1976).

The Supreme Court essentially evaded this issue by dealing with it ambiguously:

> No cases of this Court have applied the doctrine of implied reservation of water rights to groundwater . . . . Here, however, the water in the pool is surface water. The federal water rights were being depleted because . . . the "[g]roundwater and surface water are physically interrelated as integral parts of the hydrologic cycle" . . . . [S]ince the implied-reservation-of-water-rights doctrine is based on the necessity of water for the purpose of the federal reservation, we hold that the United States can protect its water from subsequent diversion, whether the *diversion* is of surface or ground water.

426 U.S. at 142-43 (emphasis added) (citations and footnote omitted).

[68] 438 U.S. 696 (1978). On the same day, Justice Rehnquist, the author of the *Mimbres* majority opinion, also announced the opinion of the Court in California v. United States (*New Melones Dam*), 438 U.S. 645 (1978). In *New Melones Dam*, the United States applied to the state of California for permits to appropriate water for the New Melones Dam, a new reclamation project on the Stanislaus River. *Id.* at 651-52. California issued the permits but limited the amount of water that the project could impound. *Id.* at 652-53. The federal government then sought a declaratory judgment in federal district court to allow the United States to impound all of the previously unappropriated water it needed for the project without obtaining state permission. *Id.* at 647. The district court held that, as a matter of comity the federal government should seek a permit from California, but that California should unconditionally grant the permit if sufficient unappropriated water existed. *Id.* The Ninth Circuit affirmed but held that § 8 of the Reclamation Act of 1902, 43 U.S.C. §§ 372, 383 (1976) compelled the federal government to seek state approval before making the appropriation. *Id.*

Although *New Melones Dam* did not deal directly with the doctrine of federal reserved rights, it did shed some light on the relationship between the western states and the federal government in the area of water law. The Supreme Court held that § 8 of the Reclamation Act of 1902 requires the United States to acquire its appropriative rights to water for projects in accordance with state law, even if the state imposes conditions upon the water's use. *Id.* at 665-75. This holding gave the states great control over federal reclamation projects, illustrating the Court's newfound concern for the states interest in controlling the water within their

Gila National Forest in New Mexico and flows through private land before "disappearing in a desert sink just north of the Mexican border."[69] The state of New Mexico initiated a general adjudication of water rights in the Rio Mimbres.[70] The United States was joined as a party because it claimed *Winters* rights to the Rio Mimbres for use in the Gila National Forest.[71] Justice Rehnquist, writing for a majority of five justices, affirmed the "minimal need" standard set forth in *Cappaert*[72] and scrutinized the government's proposed uses for the water.[73] Contrary to its decision in *Arizona I*,[74] the Court held that national forests exist for only two purposes: to preserve a supply of timber and to protect and maintain adequate water flow.[75] Therefore, the government's reservation of water from the Rio Mimbres could not exceed the amount necessary to accomplish these two purposes. The general tenor of the *Mimbres* opinion is quite unsympathetic to the government's *Winters* rights claims.[76]

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borders. *See* Winston, *Reborn Federalism in Western Water Law: The* New Melones Dam *Decision*, 30 HASTINGS L.J. 1645, 1672-73 (1979).

69 *Mimbres*, 438 U.S. at 697.

70 *Id.* at 697 & n.1.

71 *Id* at 697-98. The United States was joined pursuant to the McCarran Amendment, 43 U.S.C. § 666 (1976). 438 U.S. at 697 n.1; *see supra* note 47 and accompanying text.

72 438 U.S. at 699-700; *see supra* note 66 and accompanying text.

73 438 U.S. at 698-718.

74 The Court in *Arizona I* expressly adopted the special master's conclusion that the national forests are reserved for five purposes. Arizona v. California, 373 U.S. 546, 595 (1963). The special master found that the national forests exist for: "(1) the protection of watersheds and the maintenance of natural flow in streams below the sheds; (2) production of timber; (3) production of forage for domestic animals; (4) protection and propagation of wildlife; and (5) recreation for the general public." Note, United States v. New Mexico: *The Beginning of a Trend Toward Favoring State Water Rights over Federal Water Rights*, 9 N.M.L. REV. 361, 364 (1979) (quoting Special Master Report at 96, Arizona v. California, 373 U.S. 546 (1963)).

75 *Mimbres*, 438 U.S. at 705-13. The United States Forest Service's enabling act, the Organic Administration Act of 1897, 16 U.S.C. §§ 473-78, 479-82, 551 (1982), provides in part: "No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber . . . ." *Id.* § 475. In *Mimbres* the government argued that the Act established national forests for three purposes: to preserve a supply of timber, to protect water flow, and additionally to improve and protect the forest in general. 438 U.S. at 707 n.14. This third objective would be accomplished by reserving "minimum instream flows for aesthetic, recreational, and fish-preservation purposes." *Id.* at 705. The Court, construing the Act narrowly, however, recognized only the first two purposes: "Forests [will] be created only 'to improve and protect the forest within the boundaries,' or, *in other words*, 'for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber.'" *Id.* at 707 n.14 (emphasis in original) (quoting 16 U.S.C. § 475 (1982)). The Court's restrictive reading of the Act is certainly plausible, but persuasive arguments can be made from the legislative history of the Act in support of the government's reading. *See, e.g.*, Note, *Water Rights and National Forests—Narrowing the Implied Reservation Doctrine:* United States v. New Mexico, 40 OHIO ST. L.J. 729, 743-47 (1979); Note, *Reserved Water Rights on National Forests After* United States v. New Mexico, 1979 UTAH L. REV. 609, 617-24.

76 Professor Trelease's comments on the *Mimbres* case are illustrative:

> [The Court] emphasized that the quantities allowed would be limited to "only that amount of water necessary to fulfill the purpose of the reservation.

In 1983, the Supreme Court had three occasions to address the reserved rights doctrine. In *Arizona v. California (Arizona II)*,[77] five Indian tribes represented by the United States petitioned for an increase in the quantity of water guaranteed by their *Winters* rights. The petitioners contended that the quantity of their rights did not conform to the Court's 1963 decree in *Arizona I*.[78] That decree measured the Indians' reserved rights by the amount of water necessary to irrigate all of the "practicably irrigable acreage" on the reservations.[79] In *Arizona II*, the tribes contended that the special master's report in *Arizona I* underestimated this acreage.[80] The Court invoked principles of res judicata to bar the Indians from reopening the 1963 decree, citing a strong public interest in finality.[81]

In *Nevada v. United States (Truckee-Carson)*,[82] the Court again held

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> no more"; it held that reserved rights exist not for "secondary" or "supplemental" purposes, but only for those that qualified as "direct." "Necessary" was amplified to "essential"; the test applied was whether, if water were not provided, "the purposes of the reservation would be entirely defeated."
>
> This was a substantial victory for the water users of the West.

Trelease, *Uneasy Federalism—State Water Laws and National Water Uses*, 55 WASH. L. REV. 751, 759 (1980) (footnotes omitted) (quoting from the *Cappaert* and *Mimbres* opinions).

77 103 S. Ct. 1382 (1983). *Arizona II* is a continuation of *Arizona I*, 373 U.S. 546 (1963). *See supra* notes 37-44 and accompanying text.

78 *Arizona II*, 103 S. Ct. at 1385.

79 In the original action, the Court, endorsing the master's conclusion, held that the federal government had implicitly reserved enough water to allow the Indians to irrigate all of the "practicably irrigable acreage" on the reservations. *Arizona I*, 373 U.S. at 600-01.

80 The Indian tribes claimed that certain irrigable lands had been "omitted" from the master's calculations. *Arizona II*, 103 S. Ct. at 1391. The United States contended that these omissions had occurred inadvertently due to "the complexity of the case." *Id.* at 1391 n.6. The states claimed, however, that the omission was a deliberate "tactical decision made to portray the irrigable acreage standard as a reasonable basis for calculating the reservations' water needs." *Id.*

81 Res judicata was technically inapplicable because *Arizona II* was a continuation of the *Arizona I* litigaton, rather than a separate action. *See* C. WRIGHT, THE LAW OF FEDERAL COURTS 680 (4th ed. 1983); *see also* RESTATEMENT (SECOND) OF JUDGMENTS §§ 17(1), 18(1) (1980). The Court found, however, that the principles of finality behind the doctrine of res judicata compelled its holding in *Arizona II*. 103 S. Ct. at 1392-95. The Court said:

> Recalculating the amount of practicably irrigable acreage runs directly counter to the strong interest in finality in this case. . . .
>
> . . . .
>
> . . . The record demonstrates that it was the understanding of the parties and Master Rifkind's intention that the calculation of practicably irrigable acreage be final. That was our understanding as well . . . .
>
> . . . Our long history of resolving disputes over boundaries and water rights reveals a simple fact: This Court does not reopen an adjudication in an original action to reconsider whether initial factual determinations were correctly made. . . .
>
> . . . .
>
> . . . [W]e have determined that the principles of res judicata advise against reopening the calculation of the amount of practicably irrigable acreage. . . .

Id. (citations and footnotes omitted).

82 103 S. Ct. 2906 (1983).

that a *Winters* right, once quantified, cannot be increased. In 1913, the United States instituted an action to adjudicate the reserved rights of the Pyramid Lake Indian Reservation and the planned Newlands Reclamation Project. These rights were finally quantified in a 1944 consent decree.[83] The United States sued again in 1973 to obtain additional rights for both federal enclaves.[84] Justice Rehnquist, speaking for a unanimous Court, invoked res judicata to bar relitigation of the United States' reserved rights.[85]

The Court's most recent decision in the area of federal reserved rights, *Arizona v. San Carlos Apache Tribe of Arizona (San Carlos Apache),*[86] is essentially a sequel to *Colorado River.*[87] Several water rights claimants initiated general water adjudications in Arizona state courts in the mid-1970s.[88] The United States, on behalf of itself and various Indian tribes, was joined as a defendant.[89] Later, some of the Indian tribes whose rights were implicated in the state proceedings removed the state court actions to federal court and sought declaratory and injunctive relief to block further adjudication of their reserved rights in state court.[90] The federal district court, relying on *Colorado River,* remanded the removed actions back to state court and dismissed the other federal actions without prejudice.[91] The tribes appealed from these dismissals and the Ninth Circuit reversed, holding that the Arizona statehood enabling act[92] deprived Arizona state courts of jurisdiction over the Indians' water claims.[93]

The Supreme Court held that despite the statehood enabling act's provision that the federal government reserved exclusive jurisdiction

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83 *Id.* at 2909-10.

84 *Id.*

85 *Id.* at 2925. The Ninth Circuit held below that the Tribe and the Project were neither parties nor coparties to the original action: "They were non-parties who were represented simultaneously by the same government attorneys." United States v. Truckee-Carson Irrigation Dist., 649 F.2d 1286, 1309 (9th Cir. 1981). The court of appeals reasoned that the Tribe and the Project were not adverse parties bound by the first action because "[a]s a general matter, a judgment does not conclude parties who were not adversaries under the pleadings." *Id.* The Ninth Circuit further cautioned that "[i]n representative litigation we should be especially careful not to infer adversity between interests represented by a single litigant." *Id.* Therefore, the court reasoned, the earlier litigation did not conclude the dispute in the later action between the Tribe and the Project. *Id.* at 1309-11.

The Supreme Court disagreed: "We hold that . . . the interests of the Tribe and the Project landowners were sufficiently adverse so that both are now bound by the final decree entered in the [first] suit." *Truckee-Carson,* 103 S. Ct. at 2925.

86 103 S. Ct. 3201 (1983).

87 *See supra* notes 50-58 and accompanying text.

88 *San Carlos Apache,* 103 S. Ct. at 3209.

89 *Id.*

90 *Id.*

91 *Id.*

92 Act of June 20, 1910, ch. 310, 36 Stat. 557, 569 (1910).

93 San Carlos Apache Tribe v. Arizona, 668 F.2d 1093 (9th Cir. 1982), *rev'd,* 103 S. Ct. 3201 (1983); *see San Carlos Apache,* 103 S. Ct. at 3209.

over Indian lands in Arizona, the McCarran Amendment[94] gave the state courts jurisdiction in comprehensive water rights adjudications.[95] The Court also reiterated the *Colorado River* doctrine, which established state courts as the preferred fora for water adjudications involving federal reserved rights.[96]

II
Analysis: Reconciling the Prior Appropriation Doctrine and the *Winters* Doctrine

The western states developed the prior appropriation doctrine to apportion their limited surface water supplies fairly and efficiently among competing users.[97] The prior appropriation system depends upon quantification and strict control of the rights of all users.[98] In contrast, the *Winters* doctrine awards water rights of uncertain dimension, thus injecting a large measure of uncertainty into the western states' water use schemes.[99] The courts can minimize the tension between the *Winters* doctrine and prior appropriation by treating federal reserved rights in the same manner as ordinary appropriative rights.[100]

A. The Inherent Conflict Between Prior Appropriation and the *Winters* Doctrine

An ordinary appropriative right, once obtained, occupies a place in the state water system based on its relative seniority.[101] A *Winters* right, however, does not fit so neatly into the state water systems. A federal reserved right differs in three important ways from an ordinary water

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94 43 U.S.C. § 666 (1976); *see supra* note 47.

95 103 S. Ct. at 3212. The Court stated that "we are convinced that, whatever limitation the Enabling Acts or federal policy may have originally placed on state court jurisdiction over Indian water rights, those limitations were removed by the McCarran Amendment." *Id.* (footnotes omitted).

96 *Id.* at 3212-16. The Court summarized the policy behind the *Colorado River* doctrine and applied it to the instant case:

> The McCarran Amendment, as interpreted in *Colorado River,* allows and encourages state courts to undertake the task of quantifying Indian water rights in the course of comprehensive water adjudications. . . .
>
> . . . [A]ssuming that the state adjudications are adequate to quantify the rights at issue in the federal suits, and taking into account . . . the expertise and administrative machinery available ot the state courts, the infancy of the federal suits, the general judicial bias against piecemeal litigation, and the convenience to the parties, we must conclude that the District Courts were correct in deferring to the state proceedings.

Id. at 3214-15 (footnotes omitted); *see also supra* note 57 and accompanying text.

97 *See supra* notes 11-19 and accompanying text.

98 *See id.*

99 *See infra* notes 101-21 and acompanying text.

100 *See infra* notes 122-35 and accompanying text.

101 *See* Trelease, *supra* note 27, at 474.

right established under the prior appropriation doctrine.[102]

First, the creation and maintenance of a *Winters* right does not depend on any use, beneficial or otherwise.[103] The reserved right may lie dormant for many years, set aside for some future use.[104] The priority of such a reserved right dates from the establishment of the federal reservation.[105] Junior holders of water rights may use this federally reserved water during "dormant" periods, but the federal government may exercise its reserved right and preempt these junior users at any time.[106] In contrast, holders of ordinary appropriative rights must maintain a beneficial use of their water or lose their rights.[107]

Second, a *Winters* right generally is not quantified.[108] To determine the quantity of a reserved right, a court must examine the purposes of the reservation of land set aside by Congress.[109] Until quantified in an adjudication, the size of a *Winters* right remains completely uncertain.[110] Nevertheless, the right exists, with its priority dating from the establishment of the reservation of land.[111] Ordinary appropriative rights, however, are not legally recognized *until* they are quantified and adjudicated.[112]

Third, a federal reserved right need not be recorded.[113] In the reserved rights cases, the Supreme Court has consistently recognized unrecorded federal reserved rights.[114] Claimants of ordinary appropriative rights, by contrast, will lose their rights if they do not fix them in a water adjudication.[115]

Because of the striking differences between federal reserved rights and appropriative rights, the continuing coexistence of the two poses serious questions. The tension between federal reserved rights, which

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102 *Id.*

103 *Id.; see also* Abrams, *Reserved Water Rights, Indian Rights and the Narrowing Scope of Federal Jurisdiction: The* Colorado River *Decision,* 30 STAN. L. REV. 1111, 1113 (1978).

104 *See* Trelease, *supra* note 27, at 474.

105 Trelease, *supra* note 76, at 756; *see* Comment, *supra* note 15, at 560; Comment, *Federal Reserved Rights in Water: The Problem of Quantification,* 9 TEX. TECH L. REV. 89, 93 (1977) ("[M]ost reservations were created around the turn of the century and have that time as a priority date.").

106 Trelease, *supra* note 76, at 756.

107 *See supra* notes 12-13 and accompanying text.

108 Trelease, *supra* note 27, at 474.

109 *See, e.g.,* Cappaert v. United States, 426 U.S. 128, 141 (1976) ("The implied-reservation-of-water-rights doctrine . . . reserves only that amount of water necessary to fulfill the purposes of the reservation, no more.").

110 Comment, *supra* note 105, at 93-94.

111 Trelease, *supra* note 76, at 756; Comment, *supra* note 15, at 560; Comment, *supra* note 105, at 93.

112 *See supra* notes 17-18 and accompanying text.

113 Trelease, *supra* note 27, at 474.

114 *See, e.g.,* Arizona v. California, 373 U.S. 546, 598-600 (1963); United States v. Powers, 305 U.S. 527, 532-33 (1939); Winters v. United States, 207 U.S. 564, 577 (1908).

115 *See supra* notes 17-18 and accompanying text; *see also* Comment, *supra* note 15, at 551.

exist "in a state of uncorrelated mystery,"[116] and appropriative rights, which are strictly quantified and controlled, is all too clear. *Winters* rights threaten the West in two ways: because they are not based on use, *Winters* rights allow water to go unused; because they are uncertain, they interfere with public and private decisions. The resulting uneasiness and frustration that western water users feel has led to melodramatic descriptions of the *Winters* doctrine as " 'a first mortage of undetermined and indeterminable magnitude' "[117] and as a " 'sword of Damocles' hanging over 'every title to water rights to every stream which touches a federal reservation.' "[118] The reserved rights doctrine has not yet caused western appropriative water users any substantial harm.[119] Nevertheless, future assertion of reserved rights may cause serious problems in the West, as more users compete for less available water.[120]

The Supreme Court, demonstrating some sensitivity to the states' concerns over reserved rights, has begun to circumscribe the scope of the *Winters* doctrine. The Court's new decisions make federal reserved rights mesh more smoothly with the states' prior appropriation water law systems.[121] These efforts have eased the tension between *Winters* rights and appropriative rights.

B. Reconciliation of Prior Appropriation and the *Winters* Doctrine in Western Water Law

Both the *Winters* doctrine and the doctrine of prior appropriation serve important functions in the West: federal reservations of land would be useless without sufficient water to fulfill their purposes, and prior appropriation has developed as a matter of necessity to provide for prudent and beneficial use of the West's most vital and scarce resource. Surely neither system is likely simply to vanish, thereby eliminating the conflict. Furthermore, the likelihood that Congress will enact comprehensive legislation to effect a reconciliation is small.[122] Thus, a judicial compromise seems to be the only possible solution. The Court's efforts to make *Winters* rights inoffensive to western states' prior appropriation schemes have been a significant step in the right direction.

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[116] United States v. District Court in and for the County of Eagle, 169 Colo. 555, 580, 458 P.2d 760, 772 (1969), *aff'd*, 401 U.S. 520 (1971).

[117] Address by Northcutt Ely to the National Water Commission (Nov. 6, 1969), *quoted in* Trelease, *supra* note 27, at 475.

[118] *Id.*

[119] *See* Trelease, *supra* note 27, at 474-75, 491-92.

[120] *See supra* note 1.

[121] *See supra* notes 45-49, 56-96 and accompanying text.

[122] Numerous bills have been proposed since 1955, but Congress has passed none of them. *See* Morreale, *Federal-State Conflicts Over Western Waters—A Decade of Attempted "Clarifying Legislation,"* 20 RUTGERS L. REV. 423 (1966); Trelease, *supra* note 27, at 475.

Federal reserved rights and appropriative rights conflict in three major areas: use,[123] quantification,[124] and adjudication and recordation.[125] By molding reserved rights to make them resemble ordinary appropriative rights as closely as possible, the Court can protect both the interests of the United States in supplying its reservations and the states' interest in controlling their water supplies.

The federal reserved rights doctrine and the prior appropriation doctrine clash most strikingly in the area of use.[126] Appropriative rights terminate if the appropriated water is no longer put to a continuous beneficial use. Appropriative rights, therefore, are concrete and ensure that water not go unused. *Winters* rights, however, exist independently of any use, present or future, beneficial or otherwise. In reserving land for a particular purpose, Congress may have contemplated the reservation of the water required to carry out that purpose. Therefore, the courts should limit *Winters* rights to the amounts of water required by the government or the Indians to carry out the *present* purposes of the reservation. Since the *Arizona I* case,[127] in which the Supreme Court last expressly stated that the quantity of a *Winters* reservation may accommodate future as well as present uses, the Court has limited this expansive interpretation of reserved rights by strictly construing the purposes of the federal reservations.[128] The Court's next step may be to limit reserved rights to those needed for immediate beneficial uses in the federal enclaves while eliminating *Winters* rights reserved for future purposes.

The prior appropriation doctrine and the *Winters* doctrine must be reconciled not only on the issue of use, but also on the issue of quantification. At present, the controlling standard for quantifying *Winters* rights is that of "minimal need" put forth in *Cappaert.*[129] This standard requires the examination of the purpose of the reservation whose "minimal need" must be met. Again, a court need determine only the present water needs of the federal enclave. The courts should eliminate such forward-looking standards as the "practicably irrigable acreage" measure employed by the Supreme Court in *Arizona I,* because they generate uncertainty and therefore hinder decisionmaking. In addition to avoiding forward-looking standards, courts should follow the Supreme

123 *See supra* notes 103-07 and accompanying text.

124 *See supra* notes 108-12 and accompanying text.

125 *See supra* notes 113-15 and accompanying text.

126 *See supra* notes 103-07 and accompanying text.

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

128 *See* United States v. New Mexico, 438 U.S. 696, 705-13 (1978) (The Court noted that Congress intended to reserve water for "domestic, mining, milling, or irrigation purposes," not for recreational purposes (quoting 16 U.S.C. § 481 (1976))).

129 *See supra* note 66.

Court's lead in *Arizona II*[130] and *Truckee-Carson*,[131] and invoke principles of strict finality to deny reopening the issue of quantification of *Winters* rights.

The final step is to decide how best to subject legitimate reserved rights to the states' systems of adjudication and recordation. Although various administrative[132] and legislative[133] schemes have been suggested, the Court's instincts, in delegating this responsibility to the state courts through the *Colorado River*[134] doctrine and the *Eagle County*[135] interpretation of the McCarran Amendment, are correct. The best way to integrate reserved rights into the states' prior appropriation systems is to determine these reserved rights in the state systems. By means of water adjudications, reserved rights can be recorded and defined in the same manner as ordinary appropriative rights.

CONCLUSION

The doctrine of federal reserved water rights has the potential to greatly disrupt the prior appropriation systems of the western states. The Supreme Court, after allowing a steady expansion of the *Winters* doctrine up through the 1970s, has since shown increased solicitude for the rights of the states to determine how best to allocate their scarce waters. By strictly defining *Winters* rights, the Court has made the federal government's presence as a western water user much less disruptive. By continuing this trend and further circumscribing the scope of the reserved rights doctrine, the Court perhaps can largely eliminate this source of federal-state tension in the western states.

Todd A. Fisher

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130 103 S. Ct. 1382 (1983).

131 103 S. Ct. 2906 (1983).

132 *See, e.g.,* Ranquist, *supra* note 12, at 710-24.

133 *See, e.g.,* U.S. Dep't of Justice, A Proposed Bill for the Inventorying and Quantification of the Reserved, Appropriative and Other Rights to the Use of Water by the United States (June 20, 1974 draft); *see also* Little, *Administration of Federal Non-Indian Water Rights*, 27B ROCKY MTN. MIN. L. INST. 1709, 1772-79 (1982) (discussing adjudication alternatives).

134 424 U.S. 800 (1976); *see also supra* notes 55, 58 and 96 and accompanying text.

135 401 U.S. 520 (1971); *see also supra* notes 47-49 and accompanying text.

ESTHER WUNNICKE,
COMMISSIONER

Fact Sheet:
WATER RIGHTS IN ALASKA

SEPTEMBER 1985

WHAT ARE WATER RIGHTS?

A water right is a property right for the use of surface and subsurface waters by the public as provided by the Alaska Water Use Act (Alaska Statutes 46.15). This water right allows specified amounts of water from particular water sources to be diverted, impounded and withdrawn for specified uses. When a water right is granted, it becomes attached to the land where the water is being used for as long as you use it. If the land is sold, the water right goes with the land to the new owner, unless it is separated from the land with the approval of the Department of Natural Resources.

HOW DO I OBTAIN WATER RIGHTS?

To obtain water rights in Alaska you submit an Application for Water Rights to the Alaska Division of Land and Water Management. You are issued a permit to develop a water source and construct the means to use the water. Once you prove you are beneficially using the water, a certificate of appropriation is then issued. This is a legal document which conveys water rights once the water is being used. In Alaska, there are no automatic rights to ground water because of ownership of overlying land and there are no rights to surface waters because of ownership of adjoining or surrounding land. Use of water without a permit or certificate does not give the user defensible legal rights to the water, no matter how long the water use continues.

WHAT COSTS ARE INVOLVED?

To insure that the public is notified of the proposed water use, you are required to pay the cost of legal advertisement in at least one issue of a local newspaper in the vicinity of the proposed appropriation. However, if the proposed use will not exceed 1,000 gallons of water per day in a single-family domestic household there is no requirement to publish an advertisement. If there are more potential users than the source of water can supply, the Department may require legal advertisement of all types of water rights applicants.

WHY SHOULD I APPLY FOR WATER RIGHTS?

1. If you have established water rights, you have a legal standing to assert those rights against conflicting uses of water with people who do not have water rights.
2. A person with established water rights has priority to the use of water over persons who later file for water rights from the same water source.
3. Anyone who constructs works for the taking of water (an appropriation), or uses a significant amount of water without a permit or certificate of appropriation is guilty of a misdemeanor. (Alaska Statutes 46.15.180)

A significant amount of water as defined by regulation [Alaska Administrative Code 11 AAC 93.970(14)] is the:

- use of 5,000 or more gallons of water in a day from a single source, or;
- the regular daily or recurring seasonal use of 500 or more gallons of water per day for 10 days or more per year from a single source, or;
- any water use that may affect the water rights of other users or the public interest.

4. By filing for water rights, you provide valuable information about water use and consumption in Alaska. This is essential in estimating the present uses of water, predicting future withdrawals, protecting the rights of prior appropriators, and providing for proper management for this important resource.

WHAT OTHER WATER RESOURCES PERMITS MIGHT BE NEEDED FROM THE DEPARTMENT OF NATURAL RESOURCES?

A certificate of approval is required if you want to construct or modify a dam of 10 feet or more in height, or if the storage capacity exceeds 50 acre-feet. A separate application form along with a sliding filing fee applies for various size dams as set forth in the regulations (11 AAC 93.200).

An application for reservation of water may be filed to maintain a specified flow or level of water in a water body at a specified point for specified times. By statute, an instream flow reservation can be made to ensure sufficient water is maintained for protection of fish and wildlife, recreation and park purposes, navigation or transportation purposes, and sanitary and water quality purposes.

HOW DO I OBTAIN AUTHORIZATION FOR SHORT-TERM WATER USE?

Temporary authorization may be required for significant short-term water uses such as construction projects. This authorization does not establish a water right but may help avoid problems with fisheries or existing water right holders. Applications should be made in the form of a letter request to the Department with an associated map showing the location of the water take point and location and amount of water use.

Further information about water rights and copies of the application forms may be obtained from one of the following offices. Applications for water rights must be submitted to a Division of Land and Water Management regional office.

DEPARTMENT OF NATURAL RESOURCES DIVISION OF LAND AND WATER MANAGEMENT

SOUTHEASTERN REGIONAL OFFICE
400 Willoughby Avenue
Suite 400
Juneau, Alaska 99801
465-3400

NORTHERN REGIONAL OFFICE
4420 Airport Way
Fairbanks, Alaska 99701
479-2243

SOUTHCENTRAL REGIONAL OFFICE
Frontier Building
3601 C Street, 10th Floor
Pouch 7-005
Anchorage, Alaska 99510
762-2277

Mat-Su Area Office
Central Plaza, Suite 202
Pouch 874008
Wasilla, Alaska 99687
376-4595

DIVISION OF FORESTRY

HAINES AREA OFFICE
Room 6, Gateway Building
Main Street
Post Office Box 263
Haines, Alaska 99827
766-2120

KETCHIKAN AREA OFFICE
318 NBA Building
Post Office Box 5220
Ketchikan, Alaska 99901
225-3070

PETERSBURG AREA OFFICE
Petersburg State Office Building
215 Sing Lee Alley
Box 1580
Petersburg, Alaska 99833
722-3236

DELTA AREA OFFICE
Mile 267.5 Richardson Highway
Post Office Box 1149
Delta Junction, Alaska 99737
895-4225

TOK AREA OFFICE
Mile 124.1 Glenn Highway
Post Office Box 10
Tok, Alaska 99780
883-5134

SOUTHWEST (McGRATH) AREA OFFICE
McGrath Airport
Box 130
McGrath, Alaska 99627
524-3010

KENAI PENINSULA AREA OFFICE
Mile 92.5 Sterling Highway
S.R.2, Box 107
Soldotna, Alaska 99669
262-7559

COPPER RIVER AREA OFFICE
Mile 110 Richardson Highway
Post Office Box 185
Glennallen, Alaska 99588
822-5534

ESTHER WUNNICKE,
COMMISSIONER

Fact Sheet: FEDERAL RESERVED WATER RIGHTS

JULY, 1985

WHAT ARE FEDERAL RESERVED WATER RIGHTS?

- Federal reserved water rights are created when federal lands are withdrawn from entry (by Congress or other lawful means) for federal use.
- Federal reserved water rights:
  - apply to both instream and out-of-stream use
  - may be created without actual diversion or beneficial use
  - are not lost by non-use
  - priority dates are established as the date the land is withdrawn for the primary purpose(s)
  - are created for the minimal amount of water reasonably necessary to satisfy both existing and reasonable foreseeable future uses of water for the primary purpose(s) for which the land is withdrawn
- Water rights for secondary purposes must be obtained under state law, AS 46.15.

WHY ARE FEDERAL RESERVED WATER RIGHTS IMPORTANT TO YOU?

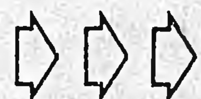
- Water users in areas where there are federal land withdrawals should file for water rights with DNR in order to protect their use of water. If a basin wide adjudication is started for your river basin, you can then be assured of being included in the adjudication.
- Holders of water rights with priority dates established before the withdrawal of federal lands within a basin will have water rights senior to the federal government. Water users filing for water rights after the withdrawal of federal lands within a specific basin will have water rights with priority dates later than those of the federal government.

HOW ARE FEDERAL RESERVED WATER RIGHTS ADJUDICATED?

- Federal reserved water rights are a judicial creation. The United States Supreme Court first recognized federal reserved water rights in *Winters v. United States*, 207 U.S. 564 (1908), an Indian reservation case. Since that time, court cases have extended the Winters Doctrine to other types of federal land withdrawals.
- Federal law, the McCarren Amendment (43 U.S.C. 666), allows judicial adjudication of federal reserved water rights in state court.
- The McCarren Amendment requires that state court adjudications include all water rights in a river basin, including all claimed federal reserved water rights and state administered water rights.

WHY ARE WE CONCERNED ABOUT FEDERAL RESERVED WATER RIGHTS?

- Because federal reserved water rights are unquantified, DNR does not know how much water is needed or used for the primary purposes of federal land withdrawals in Alaska. Because the unappropriated water available from a water source and the amount of water reserved by a federal withdrawal is unknown, water resources cannot be effectively managed.
- Alaska's growing population and development pressures have caused water supply and water rights conflicts in several areas of unquantified federal reserved water rights. Examples include Sitka's Indian River and Anchorage's Ship Creek.
- For DNR to effectively manage and allocate the state's water and adjudicate water rights, it is necessary to have the federal reserved water rights in Alaska inventoried and quantified by the appropriate federal land management agencies in cooperation with the State of Alaska. The state can then integrate federal reserved water rights with state administratively adjudicated water rights and manage water sources with greater certainty.



HOW MUCH LAND IN ALASKA HAS FEDERAL RESERVED WATER RIGHTS?

- Of the 367.7 million acres in Alaska, almost 49 percent, or more than 178 million acres are reserved federal lands which may have federal reserved water rights:

These federal lands are made up of:

Military land - 2.5 million acres
National Forests - 23.2 million acres
BLM lands - 26.1 million acres
National Parks - 51 million acres
Fish and Wildlife Refuges - 76 million acres

For more information about federal reserved water rights and application forms for water rights, please call, write, or come to one of the following Offices:

DEPARTMENT OF NATURAL RESOURCES
DIVISION OF LAND AND WATER MANAGEMENT

SOUTHEASTERN REGIONAL OFFICE
400 Willoughby Avenue
Suite 400
Juneau, Alaska 99801
465-3400

NORTHERN REGIONAL OFFICE
4420 Airport Way
Fairbanks, Alaska 99701
479-2243

SOUTHCENTRAL REGIONAL OFFICE
Frontier Building
3601 C Street, 10th Floor
Pouch 7-005
Anchorage, Alaska 99510
561-2020

Mat-Su Area Office
Century Plaza, Suite 202
Pouch 874008
Wasilla, Alaska 99510
376-4595

DIVISION OF FORESTRY

HAINES AREA OFFICE
Room 6, Gateway Building
Main Street
Post Office Box 263
Haines, Alaska 99827
766-2120

KETCHIKAN AREA OFFICE
318 NBA Building
Post Office Box 5220
Ketchikan, Alaska 99901
225-3070

PETERSBURG AREA OFFICE
Petersburg State Office Building
215 Sing Lee Alley
Box 1580
Petersburg, Alaska 99833
722-3236

DELTA AREA OFFICE
Mile 267.5 Richardson Highway
Post Office Box 1149
Delta Junction, Alaska 99737
895-4225

TOK AREA OFFICE
Mile 124.1 Glenn Highway
Post Office Box 10
Tok, Alaska 99780
883-5134

SOUTHWEST (McGRATH) AREA OFFICE
McGrath Airport
Box 130
McGrath, Alaska 99627
524-3010

KENAI PENINSULA AREA OFFICE
Mile 92.5 Sterling Highway
S.R. 2, Box 107
Soldotna, Alaska 99669
262-7559

COPPER RIVER AREA OFFICE
Mile 110 Richardson Highway
Post Office Box 185
Glennallen, Alaska 99588
822-5534

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

POUCH M
JUNEAU, ALASKA ..11
PHONE: 907-465-2400

OFFICE OF THE COMMISSIONER

April 28, 1986

The Honorable Dick Shultz
The Honorable Adelheid Herrmann
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Dear Representatives Shultz and Herrmann:

I am writing to urge your committee's consideration of SB 150 which makes amendments to Alaska's Water Use Act, and to provide a proposed amendment. This legislation provides a mechanism for comprehensive adjudication of all water rights in a predefined basin (basinwide adjudication). I supplied background information to committee members in my April 9, 1986 letter.

One point of particular concern in the bill is the floor amendment No.1 adopted in the Senate. I endorsed the amendment in concept as I understood it would protect water rights permittees from losing their permits because a proposed water use was not developed during the permit time period. As adopted, however, the amendment may not achieve that original purpose, but rather cause confusion about the system of perfecting water rights under Alaska's Water use Act.

Alaska is a prior appropriation state, as mandated by the Alaska Constitution, Article VIII, Section 13. The Water Use Act, AS 46.15, sets up a three step system for obtaining water rights, following the procedures of the other western states who also have the prior appropriation system of water rights. The first step occurs when a potential water user files an application for water rights with the department. After public and interagency notice, a permit to appropriate water may be issued. The permit authorizes the applicant to complete step two by constructing the means to use water, such as drilling a well or installing diversion pipes from a stream, and begin beneficial use of the water. The final step occurs when the water use has been developed and beneficial use of water established. At that time a certificate of appropriation is issued to certify the final water right.

We certainly understand and agree with the Senate's concern to allow water rights permittees adequate time to develop their water use. As amended, however, AS 46.15.140(b) may allow speculators to apply for water rights to put water to beneficial use without any intention to do so, knowing they would have an indefinite period of time by filing a "notice of intention" to either hold water until it becomes more valuable, or to block the development of water by some other user with current intentions to beneficially use the water.

I have enclosed a suggested amendment to Section 3 of the bill for your consideration. The amendment is intended to make certain that a permittee may file for and obtain an extension in time to perfect the beneficial water use, rather than allowing an appropriator to hold rights to water which is not beneficially used.

Your consideration of this amendment is appreciated. Please let me know if there is additional information I might provide.

Sincerely,

Esther C. Wunnicke
Commissioner

Enclosure

cc: Representative Cato
Representative Jenkins
Representative M.W. Miller
Representative Pearce
Representative Sund
Representative Thompson
Representative Wallis

Senator Bennett
Senator Fahrenkamp
Senator Sturgulewski
Senator Kerttula
Senator Coghill

Tom Hawkins
Mike Frank
Alaska Water Board Members

DEPARTMENT OF NATURAL RESOURCES April 28, 1986

Suggested Amendment to SB 150

Amend the last sentense of Sec. 46.15.140(b) to read as follows:

> A person [PROPERTY OWNER] who has a permit to develop a use of water [WATER RIGHT], including but not limited to, [WHETHER FOR] residential, agricultural, industrial, or mining use, but has not developed that property to the point of water use prior to the permit expiration, may file a request for permit extension [NOTICE OF INTENTION TO RETAIN THAT WATER RIGHT] with the commissioner.

STATE OF ALASKA
DEPARTMENT OF NATURAL RESOURCES
OFFICE OF THE COMMISSIONER

BILL SHEFFIELD, GOVERNOR

POUCH M
JUNEAU, ALASKA 99811
PHONE: 907-465-2400

April 9, 1986

The Honorable Adelheid Herrmann
The Honorable Richard Shultz
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Representatives:

Senate Bill 150 has just been referred to the House Resources Committee, and we wish to offer the following comments as background information and to explain why we feel this legislation is important to Alaska. The bill contains housekeeping amendments to the Alaska Water Use Act, AS 46.15, and procedures for administrative and judicial basinwide adjudication of water rights. This is crucial water resources legislation for Alaska because it would establish procedures to adjudicate federal reserved water rights.

Currently, the Water Use Act does not have procedures for basinwide adjudication of state administered water rights or claimed federal reserved water rights. The bill establishes an administrative basinwide adjudication procedure for state water rights when a controversy exists between appropriators, such as the scarcity of water within a river basin or ground water aquifer, and for claimed federal reserved water rights when the federal government consents to an administrative adjudication. The bill also provides a state Superior Court procedure for efficiently adjudicating federal reserved water rights in instances where the federal government may not consent to an administrative adjudication.

A federal reserved water right is one created either expressly or by implication when the federal government withdraws land for a specific purpose. The U.S. Supreme Court first recognized federal reserved water rights in Winters v. United States in 1908. Since that time court cases have extended the doctrine to national forests, parks, refuges, and monuments. Since federal reserved water rights are most often created by implication, no specific quantity of water and no priority date for the water right is established until the court does so by decree. Congress passed the McCarran Amendment to allow water adjudication suits to be brought against the federal government in state courts. While allowing state court adjudication of

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federal reserved water quantities and priority dates, the McCarran amendment also requires the adjudication of all rights within a hydrologic basin where a federal reserved water right may exist.

Federal land reservations make up almost 49 percent of Alaska's total land mass of 367.7 million acres, and may carry federal reserved water rights. While competition for water resources in the locale of many Alaska federal reservations is limited, we have recently encountered instances where a procedure for adjudication would enhance opportunities for state economic development. Applications for additional hatchery water in Sitka were shelved pending study of federal rights to Indian River water. Of more immediate consequence are National Park Service requests for Nuka River appropriations which could reduce Bradley Lake power production potential. These situations will continue to arise and require a resolution mechanism.

We summarize the bill briefly as follows: Section 1 of SB 150 adds a disclaimer to the Water Use Act that a right to appropriate water which the state grants is not a guarantee of a particular water quality, volume, or pressure, or that water may be withdrawn at a particular cost. This is needed because the state cannot always guarantee the quantity or quality of water due to insufficient hydrologic data in our state.

Sections 2 and 3 of the proposed bill amend AS 46.15.140 to clarify the existing abandonment and forfeiture provisions. It creates a rebuttable presumption so that an appropriator who does not beneficially use water granted by a certificate for five successive years, bears the obligation to prove to the commissioner that the appropriation has not been abandoned. Section 4 of the bill clarifies how the commissioner may terminate an instream flow reservation.

Section 5 contains the body of the proposed basinwide adjudication provisions. It would allow the Commissioner of Natural Resources to initiate an administrative adjudication to quantify and determine the priority of all water rights and claims, including federal reserved water rights when federal government consents, in a particular hydrologic basin. Section 5 provides that when a federal reserved water right may be involved, and the claimant refuses to consent to an administrative adjudication, the commissioner could initiate the adjudication in Superior Court consistent with the McCarran Amendment. In that instance, the proposed bill gives the Superior Court authority to appoint a master to perform the same functions a master would have in an administrative adjudication, but under the court's supervision. While the design of the adjudication bill is to provide a procedure for the adjudication of both state issued water rights and claimed federal reserved water rights, AS 46.15.169 makes clear that nothing in the Alaska Water Use Act is to be construed as an admission against the State of Alaska that a federal reserved water right exists in any particular context.

Section 6 of the bill adds provisions to clarify the Department of Natural Resources' authority to take action to remove unsafe or unpermitted works of appropriation such as dams or diversions where the appropriator refuses to do so, and to inspect records of an appropriator pertinent to water use under the Act.

Legislation for basinwide adjudication was first submitted to the Legislature in 1982. SB 150 was prepared by the Attorney General's Office after extensive review of that original bill and other western states' laws dealing with federal reserved water rights adjudication. This bill is the best of the basinwide adjudication legislation of the western states. We have worked closely with the departments of Fish and Game and Environmental Conservation, members of the Alaska Water Resources Board, federal agencies represented on our state's Federal Reserved Water Rights Work Group, and the Western States Water Council in preparing this legislation.

Enclosed with this letter is background material on the bill and some general information about federal reserved water rights. The following attachments are included:

Attachment 1: SB 150 as passed by the Alaska Senate;

Attachment 2: Copies of testimony given to the Senate Resources Committee;

Attachment 3: Resolutions and letters from the Alaska Water Resources Board concerning the bill;

Attachment 4: "The Winters of Our Discontent: Federal Reserved Water Rights in the Western States", presenting background on the doctrine of prior appropriation (Alaska's system of allocating water) and the development of the Winters Doctrine of federal reserved water rights;

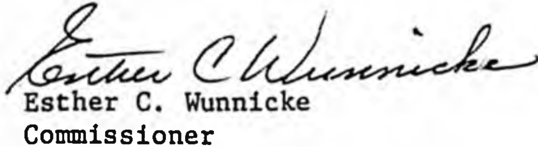
Attachment 5: "Introduction to Reserved Water Rights", discussing the origin of the reservation doctrine and decisions held in some of the major federal reserved water rights cases;

Attachment 6: Fact Sheets on Water Rights and Federal Reserved Water Rights.

In summary, under the state's system of allocating water rights based on prior appropriation, there is no way that dealing with federal reserved water rights can be avoided. Adjudication of water rights in areas where federal reserved water rights exist or are claimed by the federal government becomes difficult and sometimes impossible due to the uncertainty of not knowing how much water will be available for other appropriators once the federal reserved water rights are adjudicated. We will either adjudicate administratively, through state courts, or in federal court - these are the choices as we see them. Adjudication using the procedures provided by enactment of SB 150 is the most efficient and least expensive alternative.

We hope you find this information useful. Please contact me if we can provide you with further information.

Sincerely,



Esther C. Wunnicke
Commissioner

Enclosures

cc: Representative Bette Cato
Representative Roger Jenkins
Representative M. Mike Miller
Representative Mike W. Miller
Representative Drue Pearce
Representative John Sund
Representative Dave Thompson
Representative F. Kay Wallis
Tom Hawkins, Land & Water Mgmt., DNR

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

POUCH M
JUNEAU, ALASKA 99811
PHONE: 907-465-2400

Senate Bill 150

Testimony/Senate Resource Committee

Department of Natural Resources

Senator Sturgelewski, Members of the Committee:

Senate Bill 150, dealing with federal reserved water rights, was introduced during the past legislative session. This committee held a hearing on the bill in March of last year. We think it is crucial piece of water resources legislation for Alaska because it would establish procedures to adjudicate federal reserved water rights.

Currently, the Water Use Act, AS 46.15, does not have procedures for basin-wide adjudication of state administered water rights or claimed federal reserved water rights. The proposed bill would provide a state superior court procedure for efficiently adjudicating federal reserved water rights through the use of existing state agency expertise. The bill also sets up an administrative basin-wide adjudication procedure for state administered water rights when a controversy exists between appropriators, such as the scarcity of water within a river basin or ground water aquifer.

A federal reserved water right is one created either expressly or by implication when the federal government withdraws land for a specific purpose. The U.S. Supreme Court first recognized federal reserved water rights in Winters v. Unites States, in 1908. Since that time court cases have extended the doctrine to national forests, parks, refuges, and monuments. Since federal reserved water rights are most often created by implication, no specific quantity of water and no priority date for the water right is established until a court does so by decree. Congress passed the McCarren Amendment, to allow water adjudication suits to be brought against the federal government in state court to determine the quantity and priority date of these implied water rights. While allowing state court adjudication of federal reserved water quantities and priority dates, the McCarren amendment also requires a comprehensive adjudication of all rights within a hydrologic basin where a federal reserved water right may exist.

Federal land reservations make up almost 49 percent of Alaska's total land mass, and may have federal reserved water rights. While competition for water resources in the locale of many of Alaska's federal reservations is limited, we have recently encountered instances where a procedure for adjudication would improve opportunities for state economic development. Applications for additional hatchery water in Sitka were shelved pending study of federal rights to Indian River water. Of more immediate consequence are National Park Service requests for Nuka River appropriations which could reduce Bradley Lake power

production potential. These situations will continue to arise and require a resolution mechanism.

Legislation for basin-wide adjudication was first submitted to the Legislature in 1981. SB 150 was prepared by the Attorney General's Office after extensive review of that initial bill and other western states' laws dealing with federal reserved water rights adjudication. This bill is the best of the basin-wide adjudication legislation of the western states. Drafts of this bill were reviewed by the Departments of Fish and Game and Environmental Conservation, members of the Alaska Water Resources Board, the Western States Water Council, and the states of Idaho and Wyoming. During the past legislative session, there was one hearing by the Senate Resources Committee on SB 150 and we received a number of written comments. This fall we have worked with Senator Halford and the state and federal resource management agencies that participate on the Federal Reserved Water Rights Work Group, chaired by DNR. The committee substitute before you incorporates the changes suggested during this review.

A unique feature affecting federal reserve water rights in Alaska is that so much of Alaska's water resources are undeveloped and unappropriated. Thus, unlike the other western states, federal agencies in Alaska may encounter little competition for their water needs. For this reason, we may find that the courts in Alaska may be more lenient in adjudicating federal reserved water rights for the amounts claimed by the federal government. The

state's challenge will be to persuade the courts to apply the same standards in Alaska that have been applied outside--granting the minimum amount of water needed for the primary purposes of the land reservation. This is important to ensure that developable water resources are available for the continued growth and development of our state.

In summary, under the State's system of allocating water rights based on prior appropriation, there is no way that dealing with federal reserved water rights can be avoided. We will either adjudicate administratively, through the state courts, or in federal court -- these are the choices as we see them. Adjudication using the administrative and state court procedures that would be provided by enactment of SB 150 is the most efficient as well as the least expensive alternative.

Cyril R. Wanamaker
P.O. Box 2234
Juneau, Alaska 99803

Alaska Water Resources Board

January 22, 1986

Honorable Arliss Sturgulewski
Chairman, Senate Resources Committee
Pouch V
Juneau, Alaska 99811

RE: Committee Substitute for SB 150

Dear Senator Sturgulewski:

The Committee Substitute (Bradley/01/20/86) for SB 150 has been proposed as an act to make miscellaneous amendments to the Alaska Water Use Act (AS 46.15), to establish procedures for the administrative and judicial adjudication of water rights under the act and to provide for an effective date. The substitute bill appears to meet the concerns identified by the Alaska Water Resources Board, the administrative needs of the Alaska Department of Natural Resources (as identified to you in a letter from Commissioner Wunnicke dated January 9, 1986) and to provide the means to properly adjudicate any Federal Reserved Water Rights that may be asserted.

The Alaska Water Resources Board has had a long period of involvement with the development of SB 150 the predecessor to the Committee Substitute. Although the Board as a whole has not had an opportunity to review and comment on the Committee Substitute a member has had input into the substitute bill and previous Board suggestions have been incorporated as well. I think it meets the concerns of the Board and the needs of the State in its present form.

The Board will meet in Juneau from February 26th through the 28th and additional comments may come from the Board after that meeting. I am sure that new revisions or amendments to this substitute or SB 150 will prompt additional Board comments or recommendations.

As the Chairman of the Alaska Water Resources Board I support the Committee Substitute. I recommend that it be passed this legislative session in its present form.

Respectfully,

Cyril R. Wanamaker

Cyril R. Wanamaker, Chairman
Alaska Water Resources Board

cc: All Board members

To: Senate Resour·:s Committee
Butrovich Roo
205 Capitol Building
Juneau, Alaska

Re: Senate Bill 150

Senator Sturgulewski and Committee Members:

My name is Ann Puffer. I am the Regional Hydrologist for the USDA, Forest Service, Alaska Region. My comments reflect the position of Federal Land Management Agencies in Alaska (USDA - Forest Service; USDI - Bureau of Land Management, Park Service and Fish and Wildlife Service).

Today you have before you a bill which proposes to establish procedures for adjudicating water rights under the Alaska Water Use Act. The current legislation has been thoroughly reviewed and agreed to by the recently formed State/Federal Water Rights Work Group. Of particular interest to the Federal government are the administrative procedures for general basin-wide adjudication. This landmark procedure will be a significant step forward to avoid costly and time consuming court battles currently occurring in other Western states such as Colorado and Wyoming. It provides a format of mutual benefit to all parties concerned to achieve a negotiated settlement of water rights within a defined basin. More significantly, it establishes a setting for conducting adjudications outside the more traditional antagonistic courtroom situation.

The members of the State/Federal Work Group feel this legislation provides an important tool for water resource management in the State. We, therefore, encourage this committee to recommend Senate Bill 150 to the general legislature for passage.

Thank you for your time.

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF FISH AND GAME

OFFICE OF THE COMMISSIONER

P.O. BOX 3-2000
JUNEAU, ALASKA 99802
PHONE: 907 . 465-4100

January 23, 1986

The Honorable Arliss Sturgulewski
Alaska State Legislature
P. O. Box V
Juneau, AK 99811

Dear Senator Sturgulewski:

The Department of Fish and Game supports the January 20 version of Senate Bill 150, which will allow the state to adjudicate Federal Reserved Water Rights.

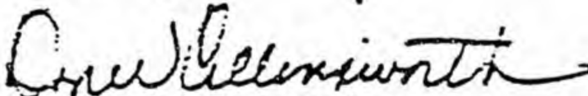
The adjudication process permits the state to ensure that proper consideration is given to reserving adequate water supplies for fish and wildlife when Federal Reserved Water Rights allocations are determined administratively or through the state court system.

As you may know, we have been working with the State/Federal Federal Reserved Water Rights Work Group to incorporate our input into this legislation.

We believe there is a critical need for this legislation and we urge you to support it.

If you have any questions pertaining to our comments, please do not hesitate to contact me.

Sincerely,



Don W. Collinsworth
Commissioner

cc: Commissioner E. Wunnicke, ADNR
Chairman C. Wanamaker, Alaska Water Board

Resolution No. 84-5

FEDERAL RESERVE WATER RIGHTS — BASIN-WIDE ADJUDICATION

The federal government is vested with reserved water rights on numerous federal land withdrawals in Alaska. Federal legislation establishing the reserves specifies the purposes of the reserved water rights and the enacting date establishes their priority date. These water rights include both diversionary and instream uses.

Of the 367.7 million acres in Alaska, federal reserve water rights exist on almost 60 percent of the land mass or over 215 million acres. From a miniscule 2.5 million acres of military land, to 50 and 75 million acres of land for national parks and fish and wildlife refuges respectively, federal reserve water rights issues and problems have the potential to be large as well as complex.

In order for DNR to adequately manage the state's water and adjudicate water rights, it will ultimately be desirable to integrate federal reserved water rights with state adjudicated water rights. The federal government has indicated it will await requests from the states before initiating quantification of federal reserved water rights. Adjudication of claimed federal reserved water rights must be undertaken pursuant to the requirements of the McCarran Amendment (43 USC 666(a)) which requires that the adjudication be basin-wide and judicially determined. The Water Use Act, AS 46.15 does not specifically provide for basinwide court adjudication for federal reserved water rights.

THE ALASKA WATER RESOURCES BOARD, therefore, urges that the Commissioner of the Department of Natural Resources propose legislation for basin-wide adjudication. Current statutes and regulations may be adequate to initiate a basinwide adjudication of federal reserved rights using a declaratory judgement suit in Superior Court. However, more explicit statutes are needed to establish the Superior Court's duties and responsibilities and to set the limits of the Court's authority. This type of case has not previously occurred in Alaska. In addition, the Department of Natural Resources should review existing provisions of the Water Use Act and propose any needed amendments to improve and update the Act.

ADOPTED this 14th day of March, 1984

ALASKA WATER RESOURCES BOARD

Dave Vanderbrink

David Vanderbrink, Chairman

Resolution No. 86-5

Federal Reserved Water Rights Adjudication

The Alaska Water Resources Board fully recognizes the need for an administrative method of adjudicating Federal Reserved Water Rights. In the past, this Board has supported legislation which would implement an administrative procedure.

This support was given in the 1985 legislative session to SB 150. SB 150 would have provided the desired administrative adjudication process. It is this Board's understanding that the bill was not passed as a result of proposed general housekeeping revisions of the Alaska Water Use Act.

The ALASKA WATER RESOURCES BOARD supports legislation in the 1986 legislative session which would give Alaska an administrative process to adjudicate Federal Reserved Water Rights. Because of the problems associated with attaching the general housekeeping revisions to the adjudication bill, it is this Board's recommendation that the general revisions identified in SB 150 be removed from future legislation providing for administratively adjudicated Federal Water Rights.

Adopted this 13th day of September, 1985
ALASKA WATER RESOURCES BOARD

Cyril R. Wanamaker, Chairman

March 14, 1985

The Honorable Arliss Sturgulewski
Alaska State Legislature
Pouch V (MS 3100)
Juneau, Alaska 99811

Re: The Alaska Water Resources Board's Comments on SB 150

Dear Senator Sturgulewski:

Attached are comments regarding SB 150 prepared by the Alaska Water Resources Board during its March 4-8 Board meetings.

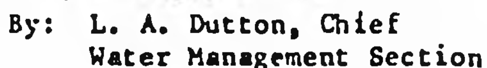
I would like to emphasize that this Board supports SB 150 provided the enclosed suggested changes are incorporated in the proposed legislation.

The Board as a unanimous body supports the adoption of a systematic water adjudication process. If the bill, as amended herein, is not adopted in this legislation, the Alaska Water Resources Board will do everything within its power to see that legislation addressing this issue is introduced in the next session.

Thank you for your kind consideration of these recommendations.

Sincerely,

Cyril R. Wanamaker, Chairman
Alaska Water Resources Board



By: L. A. Dutton, Chief
Water Management Section

cc: Governor Sheffield
Senate Resources Committee

CRW:CML:ref

Alaska Water Resources Board
Recommendations for changes to
SB 150 "An Act making miscellaneous
amendments to the Alaska Water Use Act."

Although the following proposed changes to SB 150 may not be procedurally correct, the Alaska Water Resources Board requests that the Senate Resources Committee review the substantive changes requested in this document.

The State of Alaska is in need of a workable and systematic water adjudication system. This Board therefore supports the basic principles espoused in SB 150. We do, however, have some reservations about the present draft as it relates to notice requirements and water appropriation abandonment. The Board makes the following recommendations:

I. Delete Section 46.15.140(d) and replace it with Section 46.15.145(g) which would read:

> "A state agency may not abandon or forfeit an instream flow certificate in whole or in part except after public notice."

II. Add a new subsection to AS 46.15.165 to read:

> "AS 46.15.165(c)(c) serve The Alaska Native Village and Regional Corporation whose lands fall within the adjudication area."

III. Add a new sub-section to AS 46.15.166 to read:

> "AS 46.15.166(a)(3) by any person or party asserting a federal reserve water right."

Although these are the only recommended changes of the Board, we would like to point out one section of SB 150 that may have the potential to create future problems. This section is AS 46.15.165(d) as it applies to native allotees served under AS 46.15.165(c)(3).

This board recognizes that one of the primary purposes of SB 150 is to create an adjudication system which satisfies the requirements of the McCarren Amendment 43 U.S.C. Sec. 666, thereby providing for state adjudication of federal reserve water rights. Federal agencies have the resources and responsibility to assert and defend their reserved water rights. This state should not be responsible for a federal agency's failure to assert its rights.

The Bureau of Indian Affairs (BIA), as trustee, has the primary responsibility of protecting a native allotee's property interests in a native allotment. It has been suggested, however, that because of any number of reasons, such as the vast number of allotments in the state, other BIA priorities, the failure of the BIA representatives to properly judge the significance of a water adjudication to the allotment holder, inadvertent ommissions, etc., federal reserve water rights which may be a legitimate property interest of the allottee may be forfeited due to BIA failure to assert water right as required in this subsection.

If a pattern of forfeitures of federal reserve water rights on native allotments does emerge as a result of this subsection, it is this Board's recommendation that the state's position should be flexible enough to assure that the necessary amendments will be made to protect any legitimate rights of the native allottees.

We wish to make it clear, however, that this Board does not take the position that the state is responsible for asserting a federal reserve water right for a native allottee. Furthermore, we are not suggesting that the state is responsible for affecting any repairs that are necessary to correct an injury created by a federal agency's failure to perform its responsibilities.

The point that we wish to make is that native allottees are state residents. Any federal reserve water rights that they may be entitled to as an appurtanence to their real property, acquired pursuant to the Native Allotment Act, is a valuable and necessary property interest. Forfeiture of real property interests should not be taken lightly. The forfeiture of a legitimate property interest for a failure to respond to service in a timely manner as required by this subsection is a drastic action and should not, therefore, be taken lightly.

Although we are not suggesting any changes to this subsection at this time, we do wish to demonstrate to the Senate Resources Committee that this subsection may have serious consequences to an identifiable group of longtime Alaska residents and not just to the myriad federal agencies which manage numerous and vast federally withdrawn lands.

INTRODUCTION TO RESERVED WATER RIGHTS

Ralph W. Johnson

Natural Resources Law Center

University of Colorado School of Law

June 11-13, 1984

INTRODUCTION TO RESERVED WATER RIGHTS

Ralph W. Johnson

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INTRODUCTION.
This paper will discuss the origin and development of the reservation doctrine, describe the various legislative attempts to limit or abolish the doctrine, and discuss its current status and implementation. The paper will concentrate on the NonIndian aspects of the doctrine.

The reservation doctrine inspires anger, fear, disdain, and occasionally eloquence:

Corker.

It is the product of a fabricated legislative history. It is a perversion and a fabrication." Corker, A REAL LIVE PROBLEM OR TWO FOR THE WANING ENERGIES OF FRANK J. TRELEASE, 54 Den. L. J. 499, 500 (1977).

Trelease.

"Cyprinodon diabolis, The Devil's Hole pupfish is alive and well and living in a striated marble palace in Nevada, located within a small addition to the Death Valley National Monument created for his benefit in 1952.". The reserved rights doctrine "is very like the Devil's Hole pupfish in many ways. It too is an evolutionary sport. It too lives in Devil's hole. It too has friends in high places within the federal bureaucracy and judicial system." Trelease, FEDERAL RESERVED WATER RIGHTS SINCE PLLRC, 54 Den. L. J. 473 (1977).

Goldberg.

Described the relationship between western water law, including the reservation doctrine, and federalism as a "concoction of Byzantine politics and legalistic archaeology." Goldberg, INTERPOSITION--WILD WEST WATER STYLE, 17 Stan. L. Rev. 1, 36 (1964).

Commenting on westerner's criticism of the doctrine, and of federal bureaucracy generally, he said: "This sort of fulmination is well within the tradition that permits the

Westerner to "blast at an all-consuming federal encroachment in words more blistering than all the winds that blow from Spokane to San Antonio" in unconcerned disregard of the historical fact "that from start to finish he was [federally subsidized from his brogans to his sombrero. . . ". Goldberg, id. at 1.

Ely.

The reservation doctrine is a "first mortgage of undetermined and indeterminable magnitude," is a "sword of damocles" hanging over private water rights. Ely. Address to National Water Commission, Nov. 6, 1969. Reported in 54 Den. L. J. at 475 (1977).

Hanks.

The impact of the reservation doctrine could be "staggering indeed": "In 16 western states, the BIA administers 52,307,036 acres; a total of 138,595,360 are included in national forests, which are reserved areas, in the reclamation states. Approximately 85% of the entire state of Nevada is owned by the US. Of the 60 million acres of federal land in Nevada, 12 million acres are reserved lands. In Arizona, approximately 73 percent of all land is owned by the federal government." Hanks, PEACE WEST OF THE 98TH MERIDIAN--A SOLUTION TO FEDERAL-STATE CONFLICTS OVER WESTRN WATERS, 23 Rutgers L. Rev. 33,43 (1968).

Johnson.

Commenting on US v. New Mexico: "If you think that you can think about a thing (that thing being the purposes for which water was reserved under the Forest Service Organic Act in 1897) and that thing is inextricably attached to something else (the something else being the Reserved Rights Doctrine) without thinking of the thing to which it is attached to (which, of course, is the Reserved Rights Doctrine, which you can't think about because it didn't exist in 1897) then you have a legal mind. Or at least you may be qualified to sit on the Supreme Court!" Inst. for Nat. Res. Law Teachers, Boulder Colo., May 28, 1981. Adapted from saying by Thomas Reed Powell.

THE ORIGIN OF THE RESERVATION DOCTRINE

Disagreement on the date of origin of the doctrine.

The earliest cited case on the doctrine is United States v. Rio Grande Irrigation Co. 174 US 690 (1899), where the court said, per dicta, "[A] state cannot by its legislation destroy the

right of the United States, as owner of the land bordering on a stream, to the continued flow of its waters, so far at least as may be necessary for the beneficial uses of the government property." Id. at 703.

In Winters v. United States, 207 US 564 (1908) the Court recognized reserved rights in an Indian Tribe even though nothing had been said in the Agreement with the Indians about water. The Court relied on Rio Grande for the proposition that "The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be."

Samuel Weil, in his treatise WATER RIGHTS IN THE WESTERN STATES (Bancroft-Whitney, 1911), says there are "divergent theories regarding the law of waters . . . on military and Indian reservations. . . .

But the general tendency of the Federal courts in dealing with water on or used by military or Indian reservations is to . . . tacitly assume that the creation of the reservation impliedly repealed the act of 1866 as to waters thereon; and to restore the proprietary rights of the Unites States, . . . not limited to the amount of water in actual use at any specific time."

"Military and Indian reservations are in exclusive government occupancy, wherein they may possibly differ from the forest and other reserved areas, which are intended to be open to the people." (Sec. 207).

The state's rights argument. This position argues that three acts, the Act of 1866, 1870, and 1877, constituted waivers of federal reserved rights claims . This argument seemed to be confirmed in California Oregon Power Co. v. Portland Beaver Cement Co., 295 US 142 (1935) where the court said:

> [The Desert Land Act] effected a severance of all water on the public domain, not theretofore appropriated, from the land itself. . . Congress intended to establish the rule that for the future the land should be patented separately; and that all nonnavigable waters thereon should be reserved for the use of the public under the laws of the states and territories. . . " 295 US at 162.

FPC v. Oregon, 349 US 435 (1955), alerted western lawyers to the possibility that the reserved rights doctrine might apply to NonIndian reserves, although no actual allocation of water was made in the case. The Court denied Oregon's claim of ownership of a nonnavigable stream, saying that the three above acts did not constitute a severance of waters as to federally "withdrawn" lands, and then held that a federally licensed project could go forward over state objections.

Arizona v. California, 373 US 546 (1963), firmly held that the reservation doctrine applied to NonIndian, reserved public lands, and the court allocated water to such reserved lands, 41,839 acre-feet per year for the Havasu Lake National Wildlife Refuge, and 28,000 acre-feet per year for the Imperial National Wildlife Refuge, both with 1941 priorities.

EXPECTATIONS DASHED

The western water establishment cried "unfair" after FPC v. Oregon and Arizona v. California, arguing that these cases destroyed legitimate expectations of prior appropriators. Trelease, debunking the claim that the doctrine originated with Rio Grande in 1899, and Winters in 1908, argued:

> "I was there. I took a course in water law in 1938 and got an A in it. I then went to work for L. Ward Bannister, one of the negotiators of the Colorado River Compact and lecturer in water law at Denver University and Harvard University. I helped to bring his notes up to date. I listened in on discourses he had with Ralph Carr, Jean Breitenstein, John Reed, and other "irrigation lawyers" of the old school. I started to teach water law in 1946, and I was General Counsel for the Missouri River Basin Survey Commission in 1952. At no time prior to 1955 did I ever hear a suggestion that the reserved rights doctrine was anything but a special quirk of Indian water law." Trelease, FEDERAL RESERVED WATER RIGHTS SINCE PLLRC, 54 Den. L. J. 473 (1977).

WESTERN WATER RIGHTS SETTLEMENT BILLS

Starting in 1955 and for the next 15 years, over 50 bills were introduced in Congress to reverse the effects of the reservation doctrine.

Four principal objections were raised to the doctrine.

(1) The federal government, rather than the states, decides how the water is to be used.

(2) The federal government does not follow state filing procedures, impairing the completeness of the state's water records. No centralized federal record system exists for reserved water rights.

(3) Reserved rights are unquantified, creating uncertainty and making long range planning impossible.

(4) Prior appropriators under state law can lose their rights to preexisting, unquantified, unrecorded,

undiscoverable federal reserved rights.

THE FIRST BILLS

The first bills were introduced by Senator Barrett. Their central theme was that "All unappropriated water in the 17 western states is declared to be free for appropriation under state law" (See Corker, WATER RIGHTS AND FEDERALISM, 45 Cal. L. Rev. 604,606 (1957)) and to require the United States to comply with state appropriation laws rather than claiming waters under the reservation doctrine.

LATER BILLS

Most of the bills introduced over the ensuing years dealt not only with the reserved rights issue, but also with the compensation question under the navigation servitude. In general they proposed that compensation be required for the loss of private property rights under the reservation doctrine and the navigation servitude, that the federal government be required to comply with state water law when it buildsprojects under the Reclamation Act of 1902, and that FPC licensees be required to comply with state law when they build projects under the Federal Power Act of 1920.

Various compromises were developed, under Senator Kuchel of California and others. None of these bills ultimately passed. See, Hanks, PEACE WEST OF THE 98TH MERIDIAN--A SOLUTION TO FEDERAL-STATE CONFLICTS OVER WESTERN WATERS" 23 Rutgers L. Rev. 33 (1968).

REPORT OF THE PUBLIC LAND LAW REVIEW COMMISSION. (One Third of the Nation's Land, 1970) 147-149. For commentary, see Trelease, WATER RESOURCES ON THE PUBLIC LANDS: PLLRC's SOLUTION TO THE RESERVATION DOCTRINE, 6 Land and Water Law Review 89 (1970); Muys, COMMENTS ON "FEDERAL RESERVED WATER RIGHTS", 54 Den. L. J. 493 (1977).

The Commission recommended:

(1) Require federal agencies to give notice of their projected water requirements for the next 40 years;

(2) Establish administrative or judicial review of the reasonableness of the quantities claimed by the federal agencies;

(3) For reservations created in the future, require express statement of intent to reserve water, and the quantity reserved;

(4) Require compensation for the taking of water rights vested prior to the 1963 decision in Arizona v. California.

NATIONAL WATER COMMISSION REPORT (Water Policies for the Future, 1973) pp. 467-468.

The Commission took a different approach from the PLLRC. It recommended:

(1) Require federal agencies to give notice of their projected water requirements for the next 40 years.

As to existing uses by federal agencies, the agencies would be entitled to priority as of the date of the original reservation of the federal lands.

Future uses would receive a priority date as of the date of initiation of actual use.

Compensation would be required where existing private water uses were displaced by new federal agency uses.

REASONS FOR THE FAILURE OF PROPOSED SETTLEMENT LEGISLATION

(1) Eastern suspicion of western avarice.

> "The Wild West water version of interposition . . .: not only should the [western] states have the right to do as they please, but they should be able to do it with federal property, and at federal expense." Goldberg, 17 Stan. L. Rev. 1, 3 (1964).

(2) Rising influence of the environmental movement. Reserved rights tend to protect instream flows, forests, wildlife, and environmental interests.

(3) Splits in western water politics in the 1960s, e.g., over the proposed diversion of Columbia River water to the Southwest, and over the continuation of the 160 acre limitation.

(4) Enactment of Sec. 111 Rivers and Harbors Act, 1970, 33 USC Sec. 595a, reversing United States v. Rands, 389 US 121 (1967), and United States v. Twin City Power Co., 350 US 222 (1956) and providing that when condemnation occurs, compensation must be paid to riparians on navigable waters for the "highest and best use" of their uplands, unburdened by the navigation servitude. This excised one of the major problems addressed by proposed settlement legislation.

(5) The Supreme Court's interpretation of the McCarran Amendment, 66 Stat. 560, 43 USC Sec. 666 to constitute waiver of sovereign immunity for suits in federal or state courts to adjudicate, and quantify, federal reserved water rights. Colorado River Water Conservation Dist. v. United States, 424 US 800 (1976), United States v. District Court for Eagle County, 401 US 520 (1971).

(6) The fact that no one could be found whose vested water right had been destroyed by the exercise of a federal reserved right.

The PLLRC reported that "The federal lands are the source of most of the water in the 11 coterminous western states, providing approximately 61% of the total natural runoff occurring in the region. Most of this runoff comes from land withdrawn or reserved for specific purposes. Forest Service and National Park Service reservations contribute about 88 % and 8 %, respectively, of the runoff from public lands and more than 59 % of the total yield from all lands of those states." ONE THIRD OF THE NATION'S LAND, Final Report of the PLLRC, p. 141, 1970.

The PLLRC reported, however, that "Although most of the current concern relates to the doctrine's potential future impact, such potential impacts could be major". Id. at 144.

In 1964 Nicolas B. Katzenbach, Deputy Attorney General for the US said that

"for all the outcry. . . not one state, not one county, not one municipality, not one irrigation district, not one corporation, not one individual has come forward to plead and prove that the United States. . . has destroyed any private right." Hearings on S. 1275 Before the Subcommittee on Irrigation and Reclamation of the Senate Comm. on Interior and Insular Affairs, 88th Cong. 2nd. Sess. (1964). Trelease reported that "Twenty-two years after Pelton Dam this is still true." Trelease, 54 Den. L. J. at p. 492 (1977).

Corker, commenting on the "de minimus" quantity of reserved rights as to NonIndian lands, noted that

"It is the quantity beneath the accuracy of a stream guage. It is what a bird, a butterfly, a deer, or a backpacker drinks from a stream without need of permission. [This statement was made prior to US v. New Mexico; not even these minimal drinkers would now be protected]. The rest of the water flows from the National Forests and the National Parks subject to the law of gravity." Corker, 54 Den. L. J. 499 (1977).

Professor Corker, after extensive research on a report for the

PLLRC, finally found an "injured" person. Mrs. Glenn sued under the Tort Claims Act for loss of a 1930 irrigation appropriation to a recreation area in a National Forest established in 1897. Her suit was dismissed on stipulated facts. Apparently sufficient water was made available for both Mrs. Glenn and the Forest Service. See Glenn v. United States, Civil No. C-153-61 (D. Utah March 16, 1963) discussed in DEVELOPMENT, MANAGEMENT AND USE OF WATER RESOURCES ON THE PUBLIC LANDS, by Wheatley, Corker, Stetson, and Reed. Clearinghouse for Federal Scientific and Technical Information of the Dept. of Com., PB 188 065 & 188 066. See also, Corker, LET THERE NO NAGGING DOUBTS: NOR SHALL PRIVATE PROPERTY, INCLUDING WATER RIGHTS, BE TAKEN FOR PUBLIC USE WITHOUT JUST COMPENSATION, 6 Land & Water L. R. 109 (1970)

THE DEVIL'S HOLE PUPFISH

While this case is cited for the implied reservation doctrine, it really belongs in the express reservation category. In Cappaert v. United States, 426 US 128 (1976) the court enjoined an irrigator's groundwater pumping which was lowering the level of water in Devil's Hole, and endangering the spawning grounds of the tiny pupfish. A 1952 Presidential Proclamation had expressly reserved this water for the pupfish. The court adopted a rule of "minimal need" to effectuate the reservation's purposes, saying it applied to both express and implied reservations.

The use of this reserved water did not interfere with an "existing" private appropriation right. The creation of the federal reservation clearly pre-dated the planned private use, and the water-related purpose of the reservation was clearly expressed.

THE GILA NATIONAL FOREST

In United States v. New Mexico, 238 US 696 (1978), the Court upheld federal reserved rights for National Forest lands. The United States claimed reserved rights for minimum instream flows, and for recreational, stockwatering, and fish purposes. But the Court said it would recog ize only "primary" purposes under the National Forest Organic Act of 1897, 16 USC Secs. 473-478, 479-82, 551 (1976). These purposes did not include recreation, aesthetics, wildlife-preservation, or cattle grazing which the court called secondary purposes. They only include securing favorable conditions of water flows, and furnishing a continuous supply of timber for the people.

A second issue in New Mexico was whether the Multiple Use Sustained Yield Act of 1960, P.L. 86-517, 74 Stat. 215,

codified as amended at 16 USC Secs 528-531 (1976), reserved additional waters. The Court held not, saying that although Congress intended the forests to be administered for broader purposes after 1960, Congress did not intend to reserve water for secondary, MUSYA purposes.

Some 16 or 17 Articles and Notes appeared on the New Mexico case. See, e.g. "Water Rights and National Forests--Narrowing the Implied Reservation Doctrine: United States v. New Mexico, 40 Ohio State Law Journal 728 (1979); Boles, Jr. and Elliott, "United States v. New Mexico and the Course of Federal Reserved Water Rights, 51 Colo. L. Rev. 209 (1980); Fairfax & Tarlock, No Water for the Woods: A Critical Analysis Of United States v. New Mexico, 15 Ida. L. Rev. 509 (1979).

<u>UNITED STATES v. CITY AND COUNTY OF DENVER</u>, 656 P. 2d 1 (Colo. 1982). (Not appealed) This case is the most extensive implementation of the reservation doctrine to date and deserves careful attention.

In this complex state-court adjudication the United States submitted claims for reserved water rights covering seven national forests, three national monuments, one national park, over 1500 public waterholes and springs, two mineral hot springs, and the public domain administered by the Bureau of Land Management. The case involved thousands of claims for state law appropriation rights. 169 parties objected to the US claims, represented by at least 70 different attorneys. A Water Court decree was appealed to the Colorado Supreme Court. That court held:

<u>NATIONAL FORESTS</u>

<u>Instream flows for recreational, scenic, and wildlife purposes.</u> The United States claimed instream flow rights for watershed and timber protection, and wanted to use this water for recreational, scenic, and wildlife protection.

HELD: Instream flow claim rejected. The US failed to demonstrate that this water was needed for national forest purposes of watershed protection and timber production.

<u>Does MUSYA expand reservation purposes?</u> The United States claimed that MUSYA (1960) expanded the purposes for which water could be reserved under the 1897 Act.

HELD: MUSYA did not expand these purposes. While conceding the Supreme Court's statement in <u>New Mexico</u> was dicta, the Colorado Court said that the dicta was controlling. Congress was aware of the Reserved Rights Doctrine when it passed MUSYA, but did not choose to reserve additional water explicitly.

<u>DINOSAUR NATIONAL MONUMENT</u>

<u>Reservations for Monuments.</u> The US claimed reserved instream flows in the Yampa River for recreational boating (river rafting) within the Monument. This have seriously impaired junior appropriators upstream on the Yampa. This National Monument was created under 16 USC Sec. 431 (1976) by presidential proclamation to preserve public lands of outstanding historic and scientific interest. President Wilson created it in 1915 to preserve an "extraordinary deposit of Dinosaurian and other gigantic reptilian remains".

HELD: Recreational boating is not one of the purposes for

which water can be reserved under the National Monument Act.

Monument transferred to Park. This Monument was placed under the supervision of the National Park Service in 1938 and the US argued that its "purposes" were thus expanded to include National Park purposes.

HELD: The transfer was done for administrative convenience and did not change the purposes for which water could be reserved. The area is still a Monument, being administered by the National Park Service.

Instream flows for scientifically important species. The US claimed instream flows might be necessary for fish habitats of endangered species of historic and scientific interest.

HELD: Claim upheld. REMANDED for determination of quantity needed for these purposes. The US must quantify its claim within 6 months.

ROCKY MOUNTAIN NATIONAL PARK

National Forest transferred to Park status. This Park was created from a national forest. The land was transferred to the Park in 1915, and again in 1930.

HELD: For reservation purposes that are common to both national forests and national parks (watershed protection and timber production), the priority date is the initial national forest reservation.

National Parks also have broader purposes, inter alia, conserving scenery, historic and scientific objects, and wildlife. See National park Service Act of 1916, 16 USC Sec. 1 (1976). The priority date for the reserved rights for these broader purposes is the date the land was made into a Park. Decrees were awarded for minimum flows and lake levels for conservation of scenic, natural and historic objects and for recreational and aesthetic purposes.

PUBLIC SPRINGS AND WATERHOLES

Reservation by Interior Dept. regulation. The federal government claimed reserved water rights for the entire yield of numerous waterholes and springs, whether tributary or nontributary, located on lands withdrawn by a 1926 executive order titled "Public Water Reserve No. 107".

HELD: The Executive Order was issued under authority of

the Stock Raising Homestead Act of 1916, 43 USC Sec. 300 (1976). While the Exec. Order did not state an intention to reserve water and withdraw it from appropriation under state law, Department of Interior regulations did state such intention, and that is adequate to create a reserved right.

Anti-monopolization purpose for reservation. The Dept. of Interior REGULATIONS reserved water to "prevent the monopolization of vast land areas in the arid states by providing a source of drinking water for animal and human consumption".

HELD: These regulations reserved only sufficient water to carry out this anti-monopolization purpose, and no more. The springs and water holes contain more water than is minimally essential for this purpose. The government has 4 years to quantify its minimal needs to effectuate this purpose.

Tributary springs. The reservation applies to both tributary and nontributary springs; the reservation documents made no distinction between these two types of sources.

MINERAL HOT SPRINGS

Reservation for leasing purposes. The federal government claimed reserved water rights to hot springs for leasing purposes pursuant to the Pickett Act (43 USC Sec. 141 (1976).

HELD: Reserved rights upheld.

Reservation for geothermal power production. The federal government claimed reserved water rights to hot springs for geothermal power production, under the Pickett Act, and under the Geothermal Steam Act of 1970, 30 USC Sec. 1001, et seq. (1976).

HELD: No reserved rights. The Geothermal Act is principally a leasing Act. No express or implied intent can be found in either Act to reserve water for power generation.

Federal licensees and contractors exercising reserved right. The federal government claimed that permittees, licensees, and concessionaires could exercise the federal reserved right, and that it was not necessary for the federal government to itself exercise these rights.

HELD: Licensees etc. can exercise the federal reserved right.

TWO OTHER ISSUES were expressly not decided by the court:

(1) whether reserved rights are limited to waters on, under, or touching the reserved lands;

(2) Whether the reserved right can be transferred to a use not within the original purposes of the reservation. These issues were not properly before the court.

RESERVED WATERS ON BLM LANDS

In Sierra Club v. Watt, 659 F.2d 203 (D.C.Cir.1981) the Court denied the Sierra Club's claim that FLPMA had reserved waters on BLM lands for "scenic, scientific, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values", ruling that FLPMA merely set forth "purposes, goals and authority for uses of the public domain," and did not reserve any water.

THEORETICAL BASIS FOR THE RESERVATION DOCTRINE

This topic is considered last in this outline, or almost so, because it is a peculiar concern of academics, rather than the courts. The Courts have been concerned with results, letting theoretical bases take the hindmost. Nonetheless two theories hold some sway. Supporters of each theory claim judicial support:

(1) The federal government owns waters on lands that have been withdrawn, and therefore can do with those waters as it pleases, without regard to state law. See Hanks, FEDERAL-STATE RIGHTS AND RELATIONS, in 2 WATERS AND WATER RIGHTS Sec. 102.1, at 38-40 (R. Clark ed. Supp 1978).

(2) The reservation doctrine is explained by the supremacy clause, coupled with some incidental constitutional power (e.g. commerce power) exercised on the reserved land. See F. Trelease, FEDERAL-STATE RELATIONS IN WATER LAW 138-47 (National Water Commission Legal Study No. 5, 1971).

FEDERAL NON-RESERVED WATER RIGHTS

The argument about the existence of these oddities, and what they look like, has preoccupied a number of federal lawyers and academics. To date the courts have not been concerned with them.

If one cuts through the extensive verbiage on the subject, one thing seems clear. If Congress wants to claim waters for some federal government use, then it has the power to do so, assuming it acts under the Supremacy clause in conjunction with some other empowering clause, e.g., commerce or property. Of course if the federal use damages or destroys vested private water rights, the the owners of those rights, must be compensated. In view of past congressional history (e.g., the Acts of 1866, 1877), and Supreme Court cases (e.g., US v. New Mexico) the Congressional intention to claim such waters will have to be clearly expressed. But, that the power exists is not really be debatable.

Debate can, of course, occur about whether the Congressional intent is clear enough to pass judicial muster. That debate, especially as it concerns the Federal Land Policy and Management Act of 1976, 43 USC Sec. 1701 et seq. (FLPMA) has waxed extensively in the federal legal establishment since 1979. See:

Krulitz view: Such rights probably exist under FLPMA, and other statutes, and, indeed, are not all that hard to find. FEDERAL WATER RIGHTS OF THE NATIONAL PARK SERVICE, FISH AND WILDLIFE SERVICE, BUREAU OF RECLAMATION, AND BUREAU OF LAND MANAGEMENT, 88 Interior Dec. 553 (1979).

Martz view: Such rights probably don't exist, and certainly not unless clearly mandated by Congress; FLPMA is too fuzzy to be the basis of such rights. MEMORANDUM OF THE SOLICITOR OF THE DEPARTMENT OF THE INTERIOR, 88 Interior Dec. 253 (1981).

Coldiron view: "There is no 'federal non-reserved water right.'" NON-RESERVED WATER RIGHTS--UNITED STATES COMPLIANCE WITH STATE LAW, 88 Interior Dec. 1055 (1981).

Olson view (Office of Legal Counsel): Such rights might well exist, but only where congress explicitly or clearly provides for them! U.S. Dept. of Justice, Office of Leg. Counsel, "Federal Non-Reserved" Water Rights (June 16, 1982).

WHAT IS THE DIFFERENCE BETWEEN RESERVED RIGHTS AND NON-RESERVED RIGHTS?

Coggins and Wilkinson suggest that non-reserved rights arise when Congress delegates to a federal agency authority to administratively claim the waters of a particular stream or lake, for a particular location and purpose, e.g., a campsite. These rights have a priority from the date "the public was given notice, probably through rulemaking." G.C. Coggins, C. F. Wilkinson, FEDERAL PUBLIC LAND AND RESOURCES LAW, 1983 Supp. p. 70.

FINIS

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

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Senate Bill 150

Testimony/Senate Resource Committee

Department of Natural Resources

Senator Sturgelewski, Members of the Committee:

Senate Bill 150, dealing with federal reserved water rights, was introduced during the past legislative session. This committee held a hearing on the bill in March of last year. We think it is crucial piece of water resources legislation for Alaska because it would establish procedures to adjudicate federal reserved water rights.

Currently, the Water Use Act, AS 46.15, does not have procedures for basin-wide adjudication of state administered water rights or claimed federal reserved water rights. The proposed bill would provide a state superior court procedure for efficiently adjudicating federal reserved water rights through the use of existing state agency expertise. The bill also sets up an administrative basin-wide adjudication procedure for state administered water rights when a controversy exists between appropriators, such as the scarcity of water within a river basin or ground water aquifer.

A federal reserved water right is one created either expressly or by implication when the federal government withdraws land for a specific purpose. The U.S. Supreme Court first recognized federal reserved water rights in Winters v. Unites States, in 1908. Since that time court cases have extended the doctrine to national forests, parks, refuges, and monuments. Since federal reserved water rights are most often created by implication, no specific quantity of water and no priority date for the water right is established until a court does so by decree. Congress passed the McCarren Amendment, to allow water adjudication suits to be brought against the federal government in state court to determine the quantity and priority date of these implied water rights. While allowing state court adjudication of federal reserved water quantities and priority dates, the McCarren amendment also requires a comprehensive adjudication of all rights within a hydrologic basin where a federal reserved water right may exist.

Federal land reservations make up almost 49 percent of Alaska's total land mass, and may have federal reserved water rights. While competition for water resources in the locale of many of Alaska's federal reservations is limited, we have recently encountered instances where a procedure for adjudication would improve opportunities for state economic development. Applications for additional hatchery water in Sitka were shelved pending study of federal rights to Indian River water. Of more immediate consequence are National Park Service requests for Nuka River appropriations which could reduce Bradley Lake power

production potential. These situations will continue to arise and require a resolution mechanism.

Legislation for basin-wide adjudication was first submitted to the Legislature in 1981. SB 150 was prepared by the Attorney General's Office after extensive review of that initial bill and other western states' laws dealing with federal reserved water rights adjudication. This bill is the best of the basin-wide adjudication legislation of the western states. Drafts of this bill were reviewed by the Departments of Fish and Game and Environmental Conservation, members of the Alaska Water Resources Board, the Western States Water Council, and the states of Idaho and Wyoming. During the past legislative session, there was one hearing by the Senate Resources Committee on SB 150 and we received a number of written comments. This fall we have worked with Senator Halford and the state and federal resource management agencies that participate on the Federal Reserved Water Rights Work Group, chaired by DNR. The committee substitute before you incorporates the changes suggested during this review.

A unique feature affecting federal reserve water rights in Alaska is that so much of Alaska's water resources are undeveloped and unappropriated. Thus, unlike the other western states, federal agencies in Alaska may encounter little competition for their water needs. For this reason, we may find that the courts in Alaska may be more lenient in adjudicating federal reserved water rights for the amounts claimed by the federal government. The

state's challenge will be to persuade the courts to apply the same standards in Alaska that have been applied outside--granting the minimum amount of water needed for the primary purposes of the land reservation. This is important to ensure that developable water resources are available for the continued growth and development of our state.

In summary, under the State's system of allocating water rights based on prior appropriation, there is no way that dealing with federal reserved water rights can be avoided. We will either adjudicate administratively, through the state courts, or in federal court -- these are the choices as we see them. Adjudication using the administrative and state court procedures that would be provided by enactment of SB 150 is the most efficient as well as the least expensive alternative.

Cyril R. Wanamaker
P.O. Box 2234
Juneau, Alaska 99803

Alaska Water Resources Board

January 22, 1986

Honorable Arliss Sturgulewski
Chairman, Senate Resources Committee
Pouch V
Juneau, Alaska 99811

RE: Committee Substitute for SB 150

Dear Senator Sturgulewski:

The Committee Substitute (Bradley/01/20/86) for SB 150 has been proposed as an act to make miscellaneous amendments to the Alaska Water Use Act (AS 46.15), to establish procedures for the administrative and judicial adjudication of water rights under the act and to provide for an effective date. The substitute bill appears to meet the concerns identified by the Alaska Water Resources Board, the administrative needs of the Alaska Department of Natural Resources (as identified to you in a letter from Commissioner Wunnicke dated January 9, 1986) and to provide the means to properly adjudicate any Federal Reserved Water Rights that may be asserted.

The Alaska Water Resources Board has had a long period of involvement with the development of SB 150 the predecessor to the Committee Substitute. Although the Board as a whole has not had an opportunity to review and comment on the Committee Substitute a member has had input into the substitute bill and previous Board suggestions have been incorporated as well. I think it meets the concerns of the Board and the needs of the State in its present form.

The Board will meet in Juneau from February 26th through the 28th and additional comments may come from the Board after that meeting. I am sure that new revisions or amendments to this substitute or SB 150 will prompt additional Board comments or recommendations.

As the Chairman of the Alaska Water Resources Board I support the Committee Substitute. I recommend that it be passed this legislative session in its present form.

Respectfully,

Cyril R. Wanamaker

Cyril R. Wanamaker, Chairman
Alaska Water Resources Board

cc: All Board members

To: Senate Resour[illegible] Committee
Butrovich Roo[illegible]
205 Capitol Building
Juneau, Alaska

Re: Senate Bill 150

Senator Sturgulewski and Committee Members:

My name is Ann Puffer. I am the Regional Hydrologist for the USDA, Forest Service, Alaska Region. My comments reflect the position of Federal Land Management Agencies in Alaska (USDA - Forest Service; USDI - Bureau of Land Management, Park Service, and Fish and Wildlife Service).

Today you have before you a bill which proposes to establish procedures for adjudicating water rights under the Alaska Water Use Act. The current legislation has been thoroughly reviewed and agreed to by the recently formed State/Federal Water Rights Work Group. Of particular interest to the Federal government are the administrative procedures for general basin-wide adjudication. This landmark procedure will be a significant step forward to avoid costly and time consuming court battles currently occurring in other Western states such as Colorado and Wyoming. It provides a format of mutual benefit to all parties concerned to achieve a negotiated settlement of water rights within a defined basin. More significantly, it establishes a setting for conducting adjudications outside the more traditional antagonistic courtroom situation.

The members of the State/Federal Work Group feel this legislation provides an important tool for water resource management in the State. We, therefore, encourage this committee to recommend Senate Bill 150 to the general legislature for passage.

Thank you for your time.

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF FISH AND GAME

OFFICE OF THE COMMISSIONER

P.O. BOX 3-2000
JUNEAU, ALASKA 99802
PHONE: 907 . 465-4100

January 23, 1986

The Honorable Arliss Sturgulewski
Alaska State Legislature
P. O. Box V
Juneau, AK 99811

Dear Senator Sturgulewski:

The Department of Fish and Game supports the January 20 version of Senate Bill 150, which will allow the state to adjudicate Federal Reserved Water Rights.

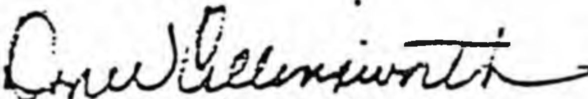
The adjudication process permits the state to ensure that proper consideration is given to reserving adequate water supplies for fish and wildlife when Federal Reserved Water Rights allocations are determined administratively or through the state court system.

As you may know, we have been working with the State/Federal Federal Reserved Water Rights Work Group to incorporate our input into this legislation.

We believe there is a critical need for this legislation and we urge you to support it.

If you have any questions pertaining to our comments, please do not hesitate to contact me.

Sincerely,



Don W. Collinsworth
Commissioner

cc: Commissioner E. Wunnicke, ADNR
Chairman C. Wanamaker, Alaska Water Board

ESTHER WUNNICKE,
COMMISSIONER

Fact Sheet: FEDERAL RESERVED WATER RIGHTS

JULY, 1985

WHAT ARE FEDERAL RESERVED WATER RIGHTS?

- Federal reserved water rights are created when federal lands are withdrawn from entry (by Congress or other lawful means) for federal use.

- Federal reserved water rights:

  - apply to both instream and out-of-stream use
  - may be created without actual diversion or beneficial use
  - are not lost by non-use
  - priority dates are established as the date the land is withdrawn for the primary purpose(s)
  - are created for the minimal amount of water reasonably necessary to satisfy both existing and reasonable foreseeable future uses of water for the primary purpose(s) for which the land is withdrawn

- Water rights for secondary purposes must be obtained under state law, AS 46.15.

WHY ARE FEDERAL RESERVED WATER RIGHTS IMPORTANT TO YOU?

- Water users in areas where there are federal land withdrawals should file for water rights with DNR in order to protect their use of water. If a basin wide adjudication is started for your river basin, you can then be assured of being included in the adjudication.

- Holders of water rights with priority dates established before the withdrawal of federal lands within a basin will have water rights senior to the federal government. Water users filing for water rights after the withdrawal of federal lands within a specific basin will have water rights with priority dates later than those of the federal government.

HOW ARE FEDERAL RESERVED WATER RIGHTS ADJUDICATED?

- Federal reserved water rights are a judicial creation. The United States Supreme Court first recognized federal reserved water rights in *Winters v. United States*, 207 U.S. 564 (1908), an Indian reservation case. Since that time, court cases have extended the Winters Doctrine to other types of federal land withdrawals.

- Federal law, the McCarren Amendment (43 U.S.C. 666), allows judicial adjudication of federal reserved water rights in state court.

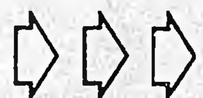
- The McCarren Amendment requires that state court adjudications include all water rights in a river basin, including all claimed federal reserved water rights and state administered water rights.

WHY ARE WE CONCERNED ABOUT FEDERAL RESERVED WATER RIGHTS?

- Because federal reserved water rights are unquantified, DNR does not know how much water is needed or used for the primary purposes of federal land withdrawals in Alaska. Because the unappropriated water available from a water source and the amount of water reserved by a federal withdrawal is unknown, water resources cannot be effectively managed.

- Alaska's growing population and development pressures have caused water supply and water rights conflicts in several areas of unquantified federal reserved water rights. Examples include Sitka's Indian River and Anchorage's Ship Creek.

- For DNR to effectively manage and allocate the state's water and adjudicate water rights, it is necessary to have the federal reserved water rights in Alaska inventoried and quantified by the appropriate federal land management agencies in cooperation with the State of Alaska. The state can then integrate federal reserved water rights with state administratively adjudicated water rights and manage water sources with greater certainty.



HOW MUCH LAND IN ALASKA HAS FEDERAL RESERVED WATER RIGHTS?

- Of the 367.7 million acres in Alaska, almost 49 percent, or more than 178 million acres are reserved federal lands which may have federal reserved water rights:

These federal lands are made up of:

Military land - 2.5 million acres
National Forests - 23.2 million acres
BLM lands - 26.1 million acres
National Parks - 51 million acres
Fish and Wildlife Refuges - 76 million acres

For more information about federal reserved water rights and application forms for water rights, please call, write, or come to one of the following Offices:

DEPARTMENT OF NATURAL RESOURCES
DIVISION OF LAND AND WATER MANAGEMENT

SOUTHEASTERN REGIONAL OFFICE
400 Willoughby Avenue
Suite 400
Juneau, Alaska 99801
465-3400

NORTHERN REGIONAL OFFICE
4420 Airport Way
Fairbanks, Alaska 99701
479-2243

SOUTHCENTRAL REGIONAL OFFICE
Frontier Building
3601 C Street, 10th Floor
Pouch 7-005
Anchorage, Alaska 99510
561-2020

Mat-Su Area Office
Century Plaza, Suite 202
Pouch 874008
Wasilla, Alaska 99510
376-4595

DIVISION OF FORESTRY

HAINES AREA OFFICE
Room 6, Gateway Building
Main Street
Post Office Box 263
Haines, Alaska 99827
766-2120

KETCHIKAN AREA OFFICE
318 NBA Building
Post Office Box 5220
Ketchikan, Alaska 99901
225-3070

PETERSBURG AREA OFFICE
Petersburg State Office Building
215 Sing Lee Alley
Box 1580
Petersburg, Alaska 99833
722-3236

DELTA AREA OFFICE
Mile 267.5 Richardson Highway
Post Office Box 1149
Delta Junction, Alaska 99737
895-4225

TOK AREA OFFICE
Mile 124.1 Glenn Highway
Post Office Box 10
Tok, Alaska 99780
883-5134

SOUTHWEST (McGRATH) AREA OFFICE
McGrath Airport
Box 130
McGrath, Alaska 99627
524-3010

KENAI PENINSULA AREA OFFICE
Mile 92.5 Sterling Highway
S.R. 2, Box 107
Soldotna, Alaska 99669
262-7559

COPPER RIVER AREA OFFICE
Mile 110 Richardson Highway
Post Office Box 185
Glennallen, Alaska 99588
822-5534

ESTHER WUNNICKE,
COMMISSIONER

Fact Sheet:
WATER RIGHTS IN ALASKA

SEPTEMBER 1985

WHAT ARE WATER RIGHTS?

A water right is a property right for the use of surface and subsurface waters by the public as provided by the Alaska Water Use Act (Alaska Statutes 46.15). This water right allows specified amounts of water from particular water sources to be diverted, impounded and withdrawn for specified uses. When a water right is granted, it becomes attached to the land where the water is being used for as long as you use it. If the land is sold, the water right goes with the land to the new owner, unless it is separated from the land with the approval of the Department of Natural Resources.

HOW DO I OBTAIN WATER RIGHTS?

To obtain water rights in Alaska you submit an Application for Water Rights to the Alaska Division of Land and Water Management. You are issued a permit to develop a water source and construct the means to use the water. Once you prove you are beneficially using the water, a certificate of appropriation is then issued. This is a legal document which conveys water rights once the water is being used. In Alaska, there are no automatic rights to ground water because of ownership of overlying land and there are no rights to surface waters because of ownership of adjoining or surrounding land. Use of water without a permit or certificate does not give the user defensible legal rights to the water, no matter how long the water use continues.

WHAT COSTS ARE INVOLVED?

To insure that the public is notified of the proposed water use, you are required to pay the cost of legal advertisement in at least one issue of a local newspaper in the vicinity of the proposed appropriation. However, if the proposed use will not exceed 1,000 gallons of water per day in a single-family domestic household there is no requirement to publish an advertisement. If there are more potential users than the source of water can supply, the Department may require legal advertisement of all types of water rights applicants.

WHY SHOULD I APPLY FOR WATER RIGHTS?

1. If you have established water rights, you have a legal standing to assert those rights against conflicting uses of water with people who do not have water rights.

2. A person with established water rights has priority to the use of water over persons who later file for water rights from the same water source.

3. Anyone who constructs works for the taking of water (an appropriation), or uses a significant amount of water without a permit or certificate of appropriation is guilty of a misdemeanor. (Alaska Statutes 46.15.180)

A significant amount of water as defined by regulation [Alaska Administrative Code 11 AAC 93.970(14)] is the:

- use of 5,000 or more gallons of water in a day from a single source, or:
- the regular daily or recurring seasonal use of 500 or more gallons of water per day for 10 days or more per year from a single source, or;
- any water use that may affect the water rights of other users or the public interest.

4. By filing for water rights, you provide valuable information about water use and consumption in Alaska. This is essential in estimating the present uses of water, predicting future withdrawals, protecting the rights of prior appropriators, and providing for proper management for this important resource.

WHAT OTHER WATER RESOURCES PERMITS MIGHT BE NEEDED FROM THE DEPARTMENT OF NATURAL RESOURCES?

A certificate of approval is required if you want to construct or modify a dam of 10 feet or more in height, or if the storage capacity exceeds 50 acre-feet. A separate application form along with a sliding filing fee applies for various size dams as set forth in the regulations (11 AAC 93.200).

An application for reservation of water may be filed to maintain a specified flow or level of water in a water body at a specified point for specified times. By statute, an instream flow reservation can be made to ensure sufficient water is maintained for protection of fish and wildlife, recreation and park purposes, navigation or transportation purposes, and sanitary and water quality purposes.

HOW DO I OBTAIN AUTHORIZATION FOR SHORT-TERM WATER USE?

Temporary authorization may be required for significant short-term water uses such as construction projects. This authorization does not establish a water right but may help avoid problems with fisheries or existing water right holders. Applications should be made in the form of a letter request to the Department with an associated map showing the location of the water take point and location and amount of water use.

Further information about water rights and copies of the application forms may be obtained from one of the following offices. Applications for water rights must be submitted to a Division of Land and Water Management regional office.

DEPARTMENT OF NATURAL RESOURCES
DIVISION OF LAND AND WATER MANAGEMENT

SOUTHEASTERN REGIONAL OFFICE
400 Willoughby Avenue
Suite 400
Juneau, Alaska 99801
465-3400

NORTHERN REGIONAL OFFICE
4420 Airport Way
Fairbanks, Alaska 99701
479-2243

SOUTHCENTRAL REGIONAL OFFICE
Frontier Building
3601 C Street, 10th Floor
Pouch 7-005
Anchorage, Alaska 99510
762-2277

Mat-Su Area Office
Central Plaza, Suite 202
Pouch 874008
Wasilla, Alaska 99687
376-4595

DIVISION OF FORESTRY

HAINES AREA OFFICE
Room 6, Gateway Building
Main Street
Post Office Box 263
Haines, Alaska 99827
766-2120

KETCHIKAN AREA OFFICE
318 NBA Building
Post Office Box 5220
Ketchikan, Alaska 99901
225-3070

PETERSBURG AREA OFFICE
Petersburg State Office Building
215 Sing Lee Alley
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DELTA AREA OFFICE
Mile 267.5 Richardson Highway
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SOUTHWEST (McGRATH) AREA OFFICE
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KENAI PENINSULA AREA OFFICE
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S.R.2, Box 107
Soldotna, Alaska 99669
262-7559

COPPER RIVER AREA OFFICE
Mile 110 Richardson Highway
Post Office Box 185
Glennallen, Alaska 99588
822-5534

THE *WINTERS* OF OUR DISCONTENT: FEDERAL RESERVED WATER RIGHTS IN THE WESTERN STATES

INTRODUCTION

Water is the life-blood of the American West. Like other people, westerners need water for basic human sustenance and for a variety of other purposes. But unlike most other Americans, westerners must fill their needs from an extremely limited supply of water.[1] As a result, westerners face a problem that may seem incomprehensible to nonwesterners who live in areas with abundant water supplies: they must decide how to allocate the limited quantity of available water among all the users and uses.

To deal with this problem, the western states[2] developed the doctrine of prior appropriation as a basic scheme for allocating the available surface water among various users.[3] This prior appropriation system, based on continued beneficial use of appropriated water and strict quantification of the rights of users,[4] insists that water may not be wasted or go unused. In the land-rich and water-poor West, any other system would probably be wasteful and inefficient.[5]

Through application of the prior appropriation doctrine, the western states seek to apportion their limited water resources in a fair and

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[1] The United States Water Resources Council's Second National Water Assessment graphically illustrates the critical water shortage in the western states. For example, in 1975, the Rio Grande water resources region showed 78% present streamflow depletion from all demands, and the Lower Colorado region showed 82% depletion. 2 WATER RESOURCES COUNCIL, THE NATION'S WATER RESOURCES: 1975-2000 (pt. 4), at 48 (1978). The Water Resources Council projects that 91% of the surface water in the Rio Grande region will be in use by 1985. More dramatically, the council predicts that the surface water supply in the Lower Colorado region will be overdrawn by 26% in 1985. The council summarized its concern over western water supply:

> Competing offstream uses of water for energy, agricultural, domestic, and industrial needs coupled with associated environmental and instream flow uses have resulted in basinwide and local problems throughout the United States . . . . The problem of inadequate surface-water supply is or will be severe by the year 2000 in 17 [water resources] subregions located mainly in the Midwest and Southwest.

1 WATER RESOURCES COUNCIL, THE NATION'S WATER RESOURCES: 1975-2000, at 56 (1978). For additional discussion of the water shortage in the western states, see generally NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE (1973).

[2] The "western" states referred to in this Note are: Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.

[3] *See infra* note 11 and accompanying text.

[4] *See infra* notes 11-18 and accompanying text.

[5] *See infra* note 14 and accompanying text.

rational way. The prior appropriation doctrine conflicts, however, with the doctrine of federal reserved water rights, which the United States Supreme Court announced in *Winters v. United States*.[6] The *Winters* doctrine provides that in reserving public land for a federal enclave such as an Indian reservation, national forest, or military reservation, the federal government also implicitly reserves a sufficient quantity of water to carry out the purpose of the reservation of land.[7] Federal reserved rights exist independently of beneficial use or quantification; they are therefore fundamentally different in character from rights established by prior appropriation.

From 1908 through the 1970s, the Supreme Court expanded the scope of the *Winters* doctrine of federal reserved rights, thereby aggravating the inherent conflict between appropriative rights and reserved rights.[8] More recently, however, the Court has attempted to ease the conflict by narrowly defining the *Winters* doctrine's scope.[9] Both reserved rights and prior appropriation serve important purposes, and therefore both doctrines, and their conflict, will persist.[10] By strictly defining federal reserved rights to make them mesh as smoothly as possible with the water law systems of the various states, the Court's well-directed efforts to harmonize the two doctrines can ease the tension between the *Winters* doctrine and the prior appropriation doctrine.

I
Background

A. Water Rights in the Western States: The Doctrine of Prior Appropriation

The doctrine of prior appropriation provides the basic framework for the statutory water use schemes of the western states.[11] A complete understanding of the conflict between the federal reserved rights doc-

6 207 U.S. 564 (1908).

7 *See infra* notes 23-25 and accompanying text.

8 *See infra* notes 20-57 and accompanying text.

9 *See infra* notes 58-96 and accompanying text.

10 *See infra* note 122 and accompanying text.

11 The western states can be divided into two doctrinal categories: the Colorado doctrine states and the California doctrine states. The nine Colorado doctrine states (Alaska, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming) recognize only appropriative rights to surface water. 5 R. Clark, Waters and Water Rights § 405, at 50 (1972). The nine California doctrine states (California, Kansas, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Washington) recognize some riparian rights as well as appropriative rights to surface water. *Id.* § 420, at 232.

The statutory water law systems in the West vary considerably from state to state. A detailed examination of these different systems is beyond the scope of this Note. For a thorough comparative discussion, see *id.* §§ 400-33.

For a basic discussion of the riparian system, see 7 R. Clark, Waters and Water Rights § 610, at 28 (1976).

trine and prior appropriation necessitates some acquaintance with the workings of prior appropriation systems.

The foundation of the prior appropriation doctrine is its requirement of beneficial use.[12] A user acquires an appropriative right by putting the water he claims to some beneficial use. Moreover, he loses his right if he does not continue to use his appropriated water beneficially.[13] In this respect, the appropriative rights system differs strikingly from the English common law riparian system generally employed in the eastern states. Riparian rights accrue to an owner of land adjoining a stream merely by virtue of his property ownership and thus exist independently of any use at all.[14]

Prior appropriation works by strict chronological priority. A senior appropriator, whose priority date[15] is earlier in time, may take his entire entitlement of water before a junior holder may take any water at all. In this priority system, junior holders bear the entire brunt of any shortage.[16]

All appropriative rights are determined by means of an *in rem* proceeding called a water adjudication,[17] which determines the priority

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[12] Mining, irrigation, industrial power production, and sanitary and municipal uses are generally recognized as "beneficial." Ranquist, *The* Winters *Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water,* 1975 B.Y.U. L. REV. 639, 646 n.21.

Because appropriative rights accrue by virtue of beneficial use, they need not be appurtenant to land. *Id.* Ownership of land adjoining a stream is not considered a basis for an appropriative right. *Id.* Water obtained by appropriation may generally be used at any place, regardless of its distance from the stream, so long as the use is beneficial. *Id.*

All of the western states except Montana and Colorado impose the additional statutory requirement that the appropriator must obtain a permit from the proper state administrator before he may acquire an appropriative right. *See, e.g.,* WYO. STAT. §§ 41-4-501 to -516 (1977). For an extended discussion of these permit schemes, see 5 R. CLARK, *supra* note 11, § 409, at 99-107.

[13] 5 R. CLARK, *supra* note 11, §§ 413.1, 429.2.

[14] The riparian system would be inappropriate as the *primary* means of allocating available water resources in the West because riparian rights do not depend on beneficial use of the water, and the West can ill afford the luxury of owned but unused stream flow. Riparian law evolved in England, where water is plentiful. The English (and the Americans living in the water-rich East) had no incentive to develop a more thrifty and efficient water use scheme. *See* McGowen, *The Development of Political Institutions on the Public Domain,* 11 WYO. L.J. 1, 14 (1956).

[15] The priority date of a holder's right is usually the date on which the holder initially diverted the water. Although such an appropriation is not technically "complete" until the appropriator actually puts the water to some beneficial use, the relation back doctrine provides that if he completes the appropriation with due diligence, the appropriator's priority date is the date of the initial act of diversion. *See, e.g.,* COLO. REV. STAT. § 37-92-305(1) (1973); *see also* Ellis, *Water Rights: What They Are and How They Are Created,* 13 ROCKY MTN. MIN. L. INST. 451, 458-59 (1967); Comment, *Determining Priority of Federal Reserved Rights,* 48 COLO. L. REV. 547, 551 (1977).

[16] Ranquist, *supra* note 12, at 646 n.21.

[17] The western states are again split into two groups. The Colorado system, employed only by Colorado and Montana, leaves the entire process of adjudication to the courts. An appropriative claimant files a petition in state court, and all other owners or claimants are served with notice as required by statute. *See, e.g.,* COLO. REV. STAT. § 37-92-302 (1973 &

rights of the appropriators participating in the hearing as against the entire world. A water adjudication strictly quantifies a holder's rights and limits his entitlement to his original appropriation, unless he either claims further amounts of unappropriated water or purchases the rights of another appropriator.[18]

Principles of strict quantification and rigid control underlie the prior appropriation systems employed by the western states. Federal reserved water rights, on the other hand, are usually awarded without quantification and may exist independent of any use. Thus, when federal reserved rights are imposed upon these appropriative water use schemes, fundamental incongruities appear.[19]

B. The Development of the *Winters* Doctrine of Federal Reserved Rights

1. *Expansion of the Reserved Rights Doctrine: From* Winters *to* Cappaert

From 1908 through the 1970s, the United States Supreme Court steadily expanded the scope of the *Winters* doctrine of federal reserved water rights.[20] By nature, federal reserved rights differ fundamentally from appropriative rights established under state law.[21] The Court's expansive application of the reserved rights doctrine during this period aggravated this inherent conflict between the two types of water rights.[22]

The Supreme Court first announced the doctrine of federal reserved water rights in the 1908 case of *Winters v. United States.*[23] In 1888, one year before Congress admitted Montana to the Union, it established by treaty the Fort Belknap Indian Reservation in the Montana Territory. Winters and others sought to dam the Milk River, which flows

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Supp. 1983). Each participant is responsible for producing his own evidence at trial to protect or establish his water right. Ellis, *supra* note 15, at 462.

The other states, which employ permit systems, *see supra* note 12, use the New Mexico system of adjudication. This system also involves the courts, but the state engineer's office makes an initial determination of fact as to the rights of the parties. *See, e.g.,* ARIZ. REV. STAT. ANN. § 45-257 (Supp. 1983). This determination is then subject to challenge by the parties at the adjudication. Ellis, *supra* note 15, at 462.

18 Only a small amount of unappropriated water remains in the West. Many streams are overappropriated, which means that the aggregate quantity of all the water rights claimed from the stream exceeds the actual stream flow. *See supra* note 1 and accompanying text; Comment, *supra* note 15, at 551 n.26. Junior holders unable to draw water must wait until stream flow increases or until senior holders relinquish their rights. *See id.* at 551-52 & n.26.

19 *See infra* notes 102-15 and accompanying text.

20 *See infra* notes 23-57 and accompanying text.

21 *See infra* notes 102-15 and accompanying text.

22 *See infra* notes 116-20 and accompanying text.

23 207 U.S. 564 (1908).

through the Fort Belknap reservation.[24] The Court recognized the conflicting inferences arising from the treaty's silence as to the Indians' water rights; nonetheless, the Court held that the treaty had *implicitly* reserved a sufficient quantity of water for the Indians to irrigate their land.[25]

In *Federal Power Commission v. Oregon (Pelton Dam),*[26] to the astonishment of western water lawyers,[27] the Court indicated that the *Winters* doctrine might extend to non-Indian federal lands.[28] In *Pelton Dam*, the Federal Power Commission issued a license to the Northwest Power Supply Company, allowing it to build the Pelton Dam on the Deschutes River in Oregon. One terminus of the dam was to be on federal Indian land, and the other terminus was to be on federal non-Indian land.[29] The state of Oregon argued that under the Desert Land Act of 1877,[30] which requires the federal government to obtain water rights for federal lands in accordance with state law,[31] the state must give its consent before the dam could be built.[32] The Court distinguished between *public* lands, which belong to the federal government because no one has yet claimed them, and *reserved* lands, which the federal government has withdrawn from the public realm and which are no longer subject to private appropriation or disposal.[33] The Court then held that the Desert Land Act of 1877 applied only to *public* lands, and not to *reserved* lands.[34] Therefore, the sponsors of the Pelton Dam project did not need the permission of the state of Oregon to build the dam.[35] The Court

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24 *Id.* at 565.

25 *Id.* at 576-77. The Court 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." *Id.* at 577 (citations omitted). The Court also held that Montana's subsequent admission to the Union had no effect on the treaty's implicit reservation of water. *Id.*

26 349 U.S. 435 (1955).

27 *See, e.g.,* Trelease, *Federal Reserved Water Rights Since PLLRC,* 54 DEN. L.J. 473 (1977). Professor Trelease was a practicing water lawyer when the Court decided *Pelton Dam* and his comments indicate the general chaos caused by the decision:

> At no time prior to 1955 did I ever hear a suggestion that the reserved rights doctrine was anything but a special quirk of Indian water law.
>
> . . . .
>
> This case was a real bombshell, and it certainly lit a fire under western water lawyers. . . . [A] number of western state water officials and others raised a chorus of protest at this reversal of what they had always thought to be the law.

Id. at 475-77 (footnotes omitted).

28 *Pelton Dam,* 349 U.S. at 448.

29 *Id* at 437-38.

30 43 U.S.C. §§ 321-39 (1976).

31 *Pelton Dam,* 349 U.S. at 448.

32 *Id.* at 446-47.

33 *Id.* at 443-44.

34 *Id.* at 446-48.

35 *Id.* at 452.

thus implied that federal reserved lands, both Indian and non-Indian, are not subject to state water law.[36]

The Court explicitly extended the *Winters* doctrine to non-Indian federal reservations in *Arizona v. California* (*Arizona I*).[37] *Arizona I* began as a dispute among several western states over each state's share of the waters of the Colorado River.[38] The United States intervened to protect its claims to water for five Indian reservations and several wildlife refuges, recreational areas, and national forests.[39] Writing for the Court, Justice Black declared that the federal government, through Congress and the executive,[40] had implicitly reserved a sufficient quantity of water to accommodate the purposes of the Indian reservations and the non-Indian federal lands.[41] Thus, the Court not only reaffirmed the viability of the reserved rights doctrine, but also expanded the doctrine's scope by applying it to non-Indian federal lands.

In *Arizona I*, the Court also questioned whether the special master appointed to the case correctly determined the quantity of water that the government intended to reserve for the federal enclaves.[42] In earlier reserved rights cases, the Court had not closely examined what quantity of water was necessary to satisfy the purposes of the reservations, perhaps because those purposes were clearly limited. Furthermore, in examining the purposes of the reservation, the Court seemed to stress the present purposes.[43] In *Arizona I*, however, the Court noted that the water set aside for the Indian reservations "was intended to satisfy the *future* as well as the present needs of the Indian Reservations and . . . that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations."[44] The Court's language could mean that the "purpose" of a federal reservation might be expanded; thus, the

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36 *Id.* at 448. The Court noted that:

> The lands before us in this case are not "public lands" but "reservations." Even without [the] express restriction of the Desert Land Act to sources of water supply on public lands, these Acts would not apply to reserved lands. . . . [I]t is enough . . . to recognize that these Acts do not apply to this license, which relates only to the use of waters on *reservations* of the United States.

Id. (emphasis added).

37 373 U.S. 546 (1963).

38 *Id.* at 550-51 (the states involved were Arizona, California, Nevada, New Mexico, and Utah).

39 *Id.* at 551 n.3, 595.

40 *Id.* at 598. The Court had not previously had occasion to decide whether the executive could create a *Winters* right.

41 *Id.* at 600-01.

42 *Id.*

43 *See, e.g.*, United States v. Powers, 305 U.S. 527 (1939) (Indians and their successors in interest needed water for irrigation of limited acreage); Winters v. United States, 207 U.S. 564 (1908).

44 *Arizona I*, 373 U.S. at 600 (emphasis added).

quantity of the water guaranteed by the *Winters* right might also be increased.

The Court next addressed the reserved rights doctrine in the case of *United States v. District Court in and for the County of Eagle* (*Eagle County*).[45] In that case, the Court first showed concern with the federal-state tensions generated by judicial recognition of *Winters* rights. At issue was the scope of the McCarran Amendment,[46] which provides for a limited waiver of the United States' sovereign immunity in water rights adjudication.[47] The amendment allows the United States to be joined as a party defendant in state water adjudications, but in *Eagle County,* the government contended that this waiver of sovereign immunity applied only to water rights acquired under state law and not to reserved water rights.[48] Writing for a unanimous Court, Justice Douglas stated that the McCarran Amendment was an "all-inclusive statute" which made no exception for reserved rights and that the waiver of sovereign immunity therefore applied to federal reserved rights as well as nonreserved rights.[49] This case made the United States amenable to suit in *state* water adjudications and thus marked the Court's first step toward allowing the states to determine federal reserved water rights.

The Court again addressed the question of jurisdiction over reserved rights in *Colorado River Water Conservation District v. United States* (*Colorado River*).[50] The United States filed suit in federal district court in Colorado seeking a declaration of all reserved rights held by the federal government, in its own right and as a fiduciary for certain Indian tribes, in the San Juan River Basin.[51] The government named as defendants private irrigators who presumably would claim appropriative rights to the same water.[52] Several Colorado water conservation districts then intervened as defendants. One district subsequently filed suit in Colorado state court seeking adjudication of the same rights[53] and joined the United States as a defendant under the McCarran Amendment.[54]

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45 401 U.S. 520 (1971).

46 43 U.S.C. § 666 (1976) (also known as the McCarran Water Rights Suits Act).

47 The McCarran Amendment, 43 U.S.C. § 666 (1976), provides in part:

> Consent is 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.

See also infra note 96.

48 *Eagle County,* 406 U.S. at 523-24.

49 *Id.* at 524.

50 424 U.S. 800 (1976).

51 *Id.* at 805.

52 *Id.*

53 *Id.* at 806.

54 *Id.*

The water conservation districts then moved to dismiss the federal action, arguing that the McCarran Amendment vested the state courts with exclusive jurisdiction to detemine the reserved rights of the United States.[55]

The Supreme Court held that the McCarran Amendment merely created *concurrent* jurisdiction in the state courts to determine federal water rights and did not divest the federal courts of jurisdiction.[56] Nevertheless, the Court held that dismissal of the federal proceeding was proper. The Court reasoned that if the state has a comprehensive system for water rights adjudication, federal water rights are more appropriately determined in state court for reasons of judicial efficiency and expertise.[57] The *Colorado River* doctrine thus creates a presumption that when both federal and state actions are pending for adjudication of federal reserved water rights, the federal action should be dismissed.[58]

Later in the same Term, the Court decided *Cappaert v. United States.*[59] The dispute in *Cappaert* centered on a pool of water, located fifty feet down inside a huge cavern that the President had reserved in 1952 as the Devil's Hole National Monument.[60] This pool was fed by groundwater and was the only known habitat of a rare species of desert fish known as the Devil's Hole pupfish.[61] In 1968, the Cappaerts, owners of a nearby ranch, began pumping groundwater from the same aquifer that fed the pool.[62] As a result of the Cappaerts' extensive pumping, the water level in the pool dropped, endangering the pupfish.[63] The United States filed suit seeking an injunction to limit the Cappaerts' pumping to an amount that would save the pupfish from extinction.[64] The Supreme Court unanimously decided for the pupfish and affirmed the modified injunction.[65]

Two aspects of Chief Justice Burger's opinion in *Cappaert* are noteworthy. First, although the Court's narrow holding sustained a *Winters* right, the opinion announced a "minimal need" standard for determin-

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55 *Id.*

56 *Id.* at 807-09.

57 *Id.* The Court noted that "[t]he clear federal policy evinced by [the McCarran Amendment] is the avoidance of piecemeal adjudication of water rights in a river system." *Id.* at 819. The Court further recognized "the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals." *Id.*

58 *Id.* at 818-20.

59 426 U.S. 128 (1976).

60 *Id.* at 131 & n.1.

61 *Id.* at 132.

62 *Id.* at 133.

63 *Id.* at 133-34.

64 *Id.* at 135.

65 The district court permanently enjoined Cappaert from lowering the water level of the pool below 3.0 feet, but the court of appeals modified the injunction to allow the Cappaerts to pump as long as the water level did not drop below 3.3 feet. *Id.* at 137 n.3, 138

ing the quantity of water reserved by the federal government.[66] Second, the Court had a clear opportunity to extend the *Winters* doctrine to groundwater but refused to do so.[67] The *Cappaert* case thus marked a turning point in the Court's reserved rights jurisprudence.

2. *Narrowing the Scope of the* Winters *Doctrine: Reserved Rights after* Cappaert

In 1978, the Supreme Court decided *United States v. New Mexico (Mimbres)*.[68] At issue was the Rio Mimbres, which originates in the

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[66] *Id.* at 141. Chief Justice Burger noted that:

> The implied-reservation-of-water-rights doctrine . . . reserves only that amount of water *necessary* to fulfill the purpose of the reservation, no more . . . . Devil's Hole was reserved "for the preservation of the unusual features of the scenic, scientific, and educational interest." . . . The pool need only be preserved . . . to the extent necessary to preserve its scientific interest . . . . Thus . . . the level of the pool may be permitted to drop to the extent that the drop does not impair the scientific value of the pool. . . . The District Court thus tailored its injunction, very appropriately, to *minimal need* . . . .

Id. (emphasis added) (citation omitted) (quoting the presidential proclamation that established the national monument).

[67] The Ninth Circuit had explicitly held below that the *Winters* doctrine applied to groundwater as well as to surface water. United States v. Cappaert, 508 F.2d 313, 317 (9th Cir. 1974), *aff'd*, 426 U.S. 128 (1976).

The Supreme Court essentially evaded this issue by dealing with it ambiguously:

> No cases of this Court have applied the doctrine of implied reservation of water rights to groundwater . . . . Here, however, the water in the pool is surface water. The federal water rights were being depleted because . . . the "[g]roundwater and surface water are physically interrelated as integral parts of the hydrologic cycle" . . . . [S]ince the implied-reservation-of-water-rights doctrine is based on the necessity of water for the purpose of the federal reservation, we hold that the United States can protect its water from subsequent diversion, whether the *diversion* is of surface or ground water.

426 U.S. at 142-43 (emphasis added) (citations and footnote omitted).

[68] 438 U.S. 696 (1978). On the same day, Justice Rehnquist, the author of the *Mimbres* majority opinion, also announced the opinion of the Court in California v. United States (*New Melones Dam*), 438 U.S. 645 (1978). In *New Melones Dam*, the United States applied to the state of California for permits to appropriate water for the New Melones Dam, a new reclamation project on the Stanislaus River. *Id.* at 651-52. California issued the permits but limited the amount of water that the project could impound. *Id.* at 652-53. The federal government then sought a declaratory judgment in federal district court to allow the United States to impound all of the previously unappropriated water it needed for the project without obtaining state permission. *Id.* at 647. The district court held that, as a matter of comity, the federal government should seek a permit from California, but that California should unconditionally grant the permit if sufficient unappropriated water existed. *Id.* The Ninth Circuit affirmed but held that § 8 of the Reclamation Act of 1902, 43 U.S.C. §§ 372, 383 (1976), compelled the federal government to seek state approval before making the appropriation. *Id.*

Although *New Melones Dam* did not deal directly with the doctrine of federal reserved rights, it did shed some light on the relationship between the western states and the federal government in the area of water law. The Supreme Court held that § 8 of the Reclamation Act of 1902 requires the United States to acquire its appropriative rights to water for projects in accordance with state law, even if the state imposes conditions upon the water's use. *Id.* at 665-75. This holding gave the states great control over federal reclamation projects, illustrating the Court's newfound concern for the states interest in controlling the water within their

Gila National Forest in New Mexico and flows through private land before "disappearing in a desert sink just north of the Mexican border."[69] The state of New Mexico initiated a general adjudication of water rights in the Rio Mimbres.[70] The United States was joined as a party because it claimed *Winters* rights to the Rio Mimbres for use in the Gila National Forest.[71] Justice Rehnquist, writing for a majority of five justices, affirmed the "minimal need" standard set forth in *Cappaert*[72] and scrutinized the government's proposed uses for the water.[73] Contrary to its decision in *Arizona I*,[74] the Court held that national forests exist for only two purposes: to preserve a supply of timber and to protect and maintain adequate water flow.[75] Therefore, the government's reservation of water from the Rio Mimbres could not exceed the amount necessary to accomplish these two purposes. The general tenor of the *Mimbres* opinion is quite unsympathetic to the government's *Winters* rights claims.[76]

borders. *See* Winston, *Reborn Federalism in Western Water Law: The* New Melones Dam *Decison*, 30 HASTINGS L.J. 1645, 1672-73 (1979).

[69] *Mimbres*, 438 U.S. at 697.

[70] *Id.* at 697 & n.1.

[71] *Id.* at 697-98. The United States was joined pursuant to the McCarran Amendment, 43 U.S.C. § 666 (1976). 438 U.S. at 697 n.1; *see supra* note 47 and accompanying text.

[72] 438 U.S. at 699-700; *see supra* note 66 and accompanying text.

[73] 438 U.S. at 698-718.

[74] The Court in *Arizona I* expressly adopted the special master's conclusion that the national forests are reserved for five purposes. Arizona v. California, 373 U.S. 546, 595 (1963). The special master found that the national forests exist for: "(1) the protection of watersheds and the maintenance of natural flow in streams below the sheds; (2) production of timber; (3) production of forage for domestic animals; (4) protection and propagation of wildlife; and (5) recreation for the general public." Note, United States v. New Mexico: *The Beginning of a Trend Toward Favoring State Water Rights over Federal Water Rights*, 9 N.M.L. REV. 361, 364 (1979) (quoting Special Master Report at 96, Arizona v. California, 373 U.S. 546 (1963)).

[75] *Mimbres*, 438 U.S. at 705-13. The United States Forest Service's enabling act, the Organic Administration Act of 1897, 16 U.S.C. §§ 473-78, 479-82, 551 (1982), provides in part: "No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber . . . ." *Id.* § 475. In *Mimbres* the government argued that the Act established national forests for three purposes: to preserve a supply of timber, to protect water flow, and additionally to improve and protect the forest in general. 438 U.S. at 707 n.14. This third objective would be accomplished by reserving "minimum instream flows for aesthetic, recreational, and fish-preservation purposes." *Id.* at 705. The Court, construing the Act narrowly, however, recognized only the first two purposes: "Forests [will] be created only 'to improve and protect the forest within the boundaries,' or, *in other words*, 'for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber.'" *Id.* at 707 n.14 (emphasis in original) (quoting 16 U.S.C. § 475 (1982)). The Court's restrictive reading of the Act is certainly plausible, but persuasive arguments can be made from the legislative history of the Act in support of the government's reading. *See, e.g.*, Note, *Water Rights and National Forests—Narrowing the Implied Reservation Doctrine:* United States v. New Mexico, 40 OHIO ST. L.J. 729, 743-47 (1979); Note, *Reserved Water Rights on National Forests After* United States v. New Mexico, 1979 UTAH L. REV. 609, 617-24.

[76] Professor Trelease's comments on the *Mimbres* case are illustrative:

> [The Court] emphasized that the quantities allowed would be limited to "only that amount of water necessary to fulfill the purpose of the reservation,

In 1983, the Supreme Court had three occasions to address the reserved rights doctrine. In *Arizona v. California (Arizona II),*[77] five Indian tribes represented by the United States petitioned for an increase in the quantity of water guaranteed by their *Winters* rights. The petitioners contended that the quantity of their rights did not conform to the Court's 1963 decree in *Arizona I.*[78] That decree measured the Indians' reserved rights by the amount of water necessary to irrigate all of the "practicably irrigable acreage" on the reservations.[79] In *Arizona II,* the tribes contended that the special master's report in *Arizona I* underestimated this acreage.[80] The Court invoked principles of res judicata to bar the Indians from reopening the 1963 decree, citing a strong public interest in finality.[81]

In *Nevada v. United States (Truckee-Carson)*,[82] the Court again held

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> no more"; it held that reserved rights exist not for "secondary" or "supplemental" purposes, but only for those that qualified as "direct." "Necessary" was amplified to "essential"; the test applied was whether, if water were not provided, "the purposes of the reservation would be entirely defeated."
>
> This was a substantial victory for the water users of the West.

Trelease, *Uneasy Federalism—State Water Laws and National Water Uses,* 55 WASH. L. REV. 751, 759 (1980) (footnotes omitted) (quoting from the *Cappaert* and *Mimbres* opinions).

[77] 103 S. Ct. 1382 (1983). *Arizona II* is a continuation of *Arizona I,* 373 U.S. 546 (1963). *See supra* notes 37-44 and accompanying text.

[78] *Arizona II,* 103 S. Ct. at 1385.

[79] In the original action, the Court, endorsing the master's conclusion, held that the federal government had implicitly reserved enough water to allow the Indians to irrigate all of the "practicably irrigable acreage" on the reservations. *Arizona I,* 373 U.S. at 600-01.

[80] The Indian tribes claimed that certain irrigable lands had been "omitted" from the master's calculations. *Arizona II,* 103 S. Ct. at 1391. The United States contended that these omissions had occurred inadvertently due to "the complexity of the case." *Id.* at 1391 n.6. The states claimed, however, that the omission was a deliberate "tactical decision made to portray the irrigable acreage standard as a reasonable basis for calculating the reservations' water needs." *Id.*

[81] Res judicata was technically inapplicable because *Arizona II* was a continuation of the *Arizona I* litigaton, rather than a separate action. *See* C. WRIGHT, THE LAW OF FEDERAL COURTS 680 (4th ed. 1983); *see also* RESTATEMENT (SECOND) OF JUDGMENTS §§ 17(1), 18(1) (1980). The Court found, however, that the principles of finality behind the doctrine of res judicata compelled its holding in *Arizona II.* 103 S. Ct. at 1392-95. The Court said:

> Recalculating the amount of practicably irrigable acreage runs directly counter to the strong interest in finality in this case. . . .
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> . . . .
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> . . . The record demonstrates that it was the understanding of the parties and Master Rifkind's intention that the calculation of practicably irrigable acreage be final. That was our understanding as well . . . .
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> . . . Our long history of resolving disputes over boundaries and water rights reveals a simple fact: This Court does not reopen an adjudication in an original action to reconsider whether initial factual determinations were correctly made. . . .
>
> . . . .
>
> . . . [W]e have determined that the principles of res judicata advise against reopening the calculation of the amount of practicably irrigable acreage. . . .

Id. (citations and footnotes omitted).

[82] 103 S. Ct. 2906 (1983).

that a *Winters* right, once quantified, cannot be increased. In 1913, the United States instituted an action to adjudicate the reserved rights of the Pyramid Lake Indian Reservation and the planned Newlands Reclamation Project. These rights were finally quantified in a 1944 consent decree.[83] The United States sued again in 1973 to obtain additional rights for both federal enclaves.[84] Justice Rehnquist, speaking for a unanimous Court, invoked res judicata to bar relitigation of the United States' reserved rights.[85]

The Court's most recent decision in the area of federal reserved rights, *Arizona v. San Carlos Apache Tribe of Arizona (San Carlos Apache),*[86] is essentially a sequel to *Colorado River.*[87] Several water rights claimants initiated general water adjudications in Arizona state courts in the mid-1970s.[88] The United States, on behalf of itself and various Indian tribes, was joined as a defendant.[89] Later, some of the Indian tribes whose rights were implicated in the state proceedings removed the state court actions to federal court and sought declaratory and injunctive relief to block further adjudication of their reserved rights in state court.[90] The federal district court, relying on *Colorado River,* remanded the removed actions back to state court and dismissed the other federal actions without prejudice.[91] The tribes appealed from these dismissals and the Ninth Circuit reversed, holding that the Arizona statehood enabling act[92] deprived Arizona state courts of jurisdiction over the Indians' water claims.[93]

The Supreme Court held that despite the statehood enabling act's provision that the federal government reserved exclusive jurisdiction

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83 *Id.* at 2909-10.

84 *Id.*

85 *Id.* at 2925. The Ninth Circuit held below that the Tribe and the Project were neither parties nor coparties to the original action: "They were non-parties who were represented simultaneously by the same government attorneys." United States v. Truckee-Carson Irrigation Dist., 649 F.2d 1286, 1309 (9th Cir. 1981). The court of appeals reasoned that the Tribe and the Project were not adverse parties bound by the first action because "[a]s a general matter, a judgment does not conclude parties who were not adversaries under the pleadings." *Id.* The Ninth Circuit further cautioned that "[i]n representative litigation we should be especially careful not to infer adversity between interests represented by a single litigant." *Id.* Therefore, the court reasoned, the earlier litigation did not conclude the dispute in the later action between the Tribe and the Project. *Id.* at 1309-11.

The Supreme Court disagreed: "We hold that . . . the interests of the Tribe and the Project landowners were sufficiently adverse so that both are now bound by the final decree entered in the [first] suit." *Truckee-Carson,* 103 S. Ct. at 2925.

86 103 S. Ct. 3201 (1983).

87 *See supra* notes 50-58 and accompanying text.

88 *San Carlos Apache,* 103 S. Ct. at 3209.

89 *Id.*

90 *Id.*

91 *Id.*

92 Act of June 20, 1910, ch. 310, 36 Stat. 557, 569 (1910).

93 San Carlos Apache Tribe v. Arizona, 668 F.2d 1093 (9th Cir. 1982), *rev'd,* 103 S. Ct. 3201 (1983); *see San Carlos Apache,* 103 S. Ct. at 3209.