ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 8672

4242 SRES SB 150 1122

It may now be a good time to bring up the subject of Indian Water Rights. Although this subject has never been applied to the State of Alaska, it may just as well start now. There are many case laws in regards to Indian Water Rights, all in favor of the tribe which brought it before a court. I suggest that your department research into this important subject because it is of not only, primary importance to Alaska Natives, but also their subsistence culture, and their future commercial development -- too important for the ambiguity and uncertainty surrounding this issue to continue. Native rights to water on their regional and village corporate lands, dating from time immemorial, remain intact. Native rights to water, in Alaska, must be recognized now, because Alaska Natives hold Indian title which, for your information, are legally enforceable against every other entity but the United States. The United States as sovereign and as fiduciary, is required to protect these interests.

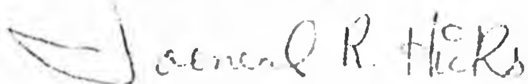
I as an Assistant Resource Manager for Ahtna, Inc., feels it is appropriate to clarify a few other areas. First of all, under Section 4 of ANCSA, there is no explicit mentioning of water rights. "Submerged lands underneath all water areas" is mentioned, but there is no reference to the right to use water. Given that fact, Native villages and regions should not be denied beneficial ownership of water resources within their boundaries, absent a clear impression congressional intent. A further, and perhaps, overriding purpose of ANCSA was to promote Natives self-reliance and self-sufficiency. As stated in ANCSA, Congress declared that, "there needed to be a fair and just settlement of all aboriginal land claims of Alaska Natives in conformity with the real economic and social needs of Alaska Natives and with [illegible] participation [illegible] in decisions affecting their [illegible] [illegible] including -- water right necessary to maintain a subsistence culture.

It must be noted that the State of Alaska claims to submerged lands under navigable waters could potentially be challenged on a wholesale basis. As you are aware, the Submerged Lands Act operated only to grant Alaska title to certain designated submerged lands at the time of statehood. It was a statute of general application, operable only on "public lands", and one which did not purport to extinguish title. Thus, title should pass to Native regional and village corporations. Water rights are paramount to subsequent competing users, and are critical of the maintenance of Native subsistence economies and continued commercial developments. These water rights can and must be established and secured now!

In conclusion, I want to express the concern Ahtna, Inc. holds to its property. Based upon a long standing use of water in our region, water rights in regards to any navigable decision, must be retained by the Ahtna Natives as a common law principle. The State of Alaska should treat water as a Alaska Native interest property right. The fact that the United States held legal title to aboriginal lands, means that the United States is under a moral and legal duty to preserve Native lands and protect them from third party intrusions. This guardianship role was continued under Section 11 of ANCSA.

We of Ahtna, Inc., will continue to pursue a good working relationship with you and your department. We welcome any opportunity in getting together to discuss this subject of navigability with you. Thank you for reading this letter and if I can be of further assistance or if you have questions, please do not hesitate to contact me. Have a nice Day!

Respectfully,



Joeneal R. Hicks
Assistant Resource Manager

JRH/ttn

cc: Michael Sewright, ASO
Gary Stein, BIDU
Senator [illegible]
Senator [illegible]
[illegible]
[illegible]
Robert [illegible], Legal Consultant
Larry [illegible], Ahtna Resource Manager
Roy S. Ewan, Ahtna President
Alaska Federation of Natives

```
****************************************************************
*                                                              *
* DELIVER TO: JPOM                                             *
*                                                              *
*                                                              *
* ORIGINAL                                                     *
* SENT:           02/19/85  TIME: 09:18                        *
* FROM:           PAULA GRAY                                   *
* SUBJECT:        POM                                          *
* PRINT DATE:     02/19/85  TIME: 09:18                        *
*                                                              *
****************************************************************
```

TO: SENATE RESOURCES COMMITTEE & HOUSE RESOURCES CMTE
SENS: STURGULEWSKI, FAHRENKAMP, ELIASON, ZHAROFF, HALFORD, COGHILL, V. FISCHER
REPS: HERRMANN, SHULTZ, WALLIS, SUND, THOMPSON, CATO, PEARCE, JENKINS

TO: INTERIOR DELEGATION
SENS: BENNETT
REPS: FRANK, DAVIS, KOPONEN, M.W. MILLER, RINGSTAD

FROM: "NGOOD-TOLOVANA MINING DISTRICT
JOX 73069
, AK 99707

FEB 19 1985

PHONE: ~~488-6453~~

RE: SB 150, MISC AMENDMENTS TO AK WATER USE ACT, ETC...

A BILL IS NEEDED TO ADDRESS ADJUDICATION OF FEDERAL RESERVED WATER RIGHTS. HOWEVER, SB150 FAILS TO DIRECT COMMISSIONER OF NATURAL RESOURCES TO COMPLETE APPROPRIATE HYDROLOGY STUDIES TO FACILITATE BASIN-WIDE ADJUDICATION, AND IT FAILS TO RECOGNIZE THAT AN INDIVIDUAL'S WATER RIGHT IS A PROPERTY RIGHT THAT CAN BE LEASED, BARTERED OR SOLD AND NOT BE DECLARED INVALID BY THE STATE. MORE DETAILED COMMENTS FOLLOW.

Alaska State Legislature

ARLISS STURGULEWSKI, Chairman
BETTYE FAHRENKAMP, Vice Chairman
JACK COGHILL
DICK ELIASON
VIC FISCHER
RICK HALFORD
FRED ZHAROFF

POUCH V
JUNEAU, ALASKA. 99811
(907) 465-4907

Senate
Committee on Resources

MEMORANDUM — March 7, 1985

TO: All Members
Senate Resources Committee

FROM: Staff FH
Senate Resources Committee

RE: SB 150 "An Act making miscellaneous amendments to the Alaska Water Use Act (AS 46.15); establishing a procedures for administrative and judicial adjudication of water rights under that Act; and providing for an effective date."

SB 150 establishes procedures for the administrative and judicial adjudication of water rights and make miscellaneous amendments to the Alaska Water Use Act (AS 46.15).

The bill is an attempt to clarify and simplify the procedure for the adjudication of water rights. In many western states, thousands of lawsuits have arisen where there were more appropriators than water available. The conflicts arose where federal reserves existed and as a result of the McCarran Amendment those cases against the federal government could be heard in state courts. This placed a tremendous burden on the court systems of the various states. SB 150 is designed to try to avoid those problems.

Substantial differences, however, exist among interested parties as specified in the attached correspondence received by the committee. A brief overview of those portions is outlined below:

Governor's Bill	Alaska Miners Association Comments	Livengood/Tolovana Mining District Comments
Section 1		
Disclaimer section asserting that water rights are not guarantee of quality, volume, pressure or cost.	Not Necessary	Not Necessary

Governor's Bill	Alaska Miners Association Comments	Livengood/Tolovana Mining District Comments
Section 2		
Clarifies relationship of pending declarations to proposed procedures.	No Comment	No Comment
Section 3		
If water rights not used for five years may be declared abandoned.	Should not be changed from present statutes.	Should not be changed from present statutes.
Section 4		
Clarifies how commissioner may terminate an in-stream flow reservation for best interest of state.	Opposed to words "best interest of state."	Opposed to words "best interest of state."
Section 5		
Allows commissioner of DNR to initiate an administrative adjudication for state and federal water rights.	Federal reserved water rights should be in separate statute.	An administrative adjudication of federal reserved water rights only after a complete hydrology study.
Section 6		
DNR has authority to remove unsafe or unpermitted works of appropriation.	Not Necessary	Should be deleted.

Included in this packet are:

1. Governor's transmittal letter;
2. Department of Natural Resources fiscal note which is zero;
3. Letter from the Alaska Miners Association;
4. Letter from the Livengood/Tolovana Mining District;
5. Letter from the Alaska Court System.
6. Alaska Water Resources Board Resolution 84-5.

ALASKA MINERS ASSOCIATION
Fairbanks Branch State Oversight Committee
P.O. Box 73069
Fairbanks, Ak 99707

FEB 27 1985

RE: SB 150

Dear Resource Committees;

We are concerned about the implications of SB 150. We agree with the Alaska Resources Boards findings that the current statutes and regulations are adequate to implement basinwide adjudication of federal reserved water rights. We feel that SB 150 addresses issues that should not be addressed, while not adequately addressing the issues that should be addressed.

We are also concerned about the reported Department of Natural Resources estimate that the fiscal note is zero. The bill, as currently written, contains at least two sections that will be very costly to manage. These two sections are contained in Section 6 and deal with "Enforcement" and "Data Collection Authority". Several other sections will certainly carry a high price tag if implemented. We fear that the Department of Natural Resources will be forced to shift their work load from other areas that are critical to orderly development of the State.

The following comments are addressed to specific sections of the bill:

SECTION 1: Since this specific "disclaimer" wording has never been upheld in a court of law, according to the Governor's transmittal letter, we feel that it is not necessary to include it in our statutes. It could lead to costly court battles that are extremely unnecessary.

SECTION 3: Sec. 46.15.140 (c) states that the Failure to use beneficially, etc. The word beneficially is a buzz word that is hard to define, and should be deleted from that section. We believe that the entire section should remain as it currently appears in the Statutes, and the proposed change should not be considered.

SECTION 4: The term "in the best interests of the state" is one that has been difficult to define. It leaves room for arbitrary and capricious decisions. We suggest that this term be deleted and the term "in accordance with AS 46.14.140(b)" be left in that section.

SECTION 5: We feel that the federal reserved water rights should be properly adjudicated. However, we believe that by adding the federal reserved water rights to the water use act, the Governor has only confused issues. We would suggest that the federal reserved water rights be addressed in a seperate statute. Thus Sec. 46.15.165, Sec. AS 46.15.166 Sec. AS 46.15.167, Sec. 46.15.168, and Sec. 46.15.169 could all be incorporated into a seperate statute dealing only with federal reserved water rights, and not infringe upon the current Water Use Bill and the rights and priviledges granted under it.

SECTION 6: This entire section should be deleted. Other agencies have enforcement powers, and the addition of this power to DNR would only be a duplication of effort.

MAR 1 1 1985

BURR, PEASE & KURTZ
A PROFESSIONAL CORPORATION

E. L. ARNELL 1913-1956
D. A. BURR
EDWARD G. BURTON
RONALD H. BUSSEY
RUSSELLYN S. CARRUTH
RALPH E. DUERRE
CHARLES P. FLYNN
RICHARD A. HELM
L. S. KURTZ, JR.
ANN C. LIBURD
THOMAS E. MEACHAM
KRISTI A. NELSON
ARDEN E. PAGE
NELSON G. PAGE
THEODORE M. PEASE, JR.
J. W. SEDWICK
JOHN C. SIEMERS
DAVID M. TRAVERSI

810 N STREET
ANCHORAGE, ALASKA 99501
(907) 276-6100
TELEX: (090) 26-405

February 28, 1985

Michael J. Frank, Esq.
Assistant Attorney General
Office of the Attorney General
Suite 200
1031 West Fourth Avenue
Anchorage, AK 99501

MAR - 4 1985
Director's Office

RE: Senate Bill No. 150
(Amendments to Alaska Water Use Act)
Our File No. 1515-1

Dear Mike:

I have reviewed Senate Bill No. 150, which has now been introduced at the request of the Governor, and I think that it represents a very desirable addition to the Alaska Water Use Act. Perhaps we both should have some satisfaction of authorship, and you have done an excellent job in refining it and including a number of housekeeping measures which should be addressed by the Legislature.

However, I have noted one possible ambiguity. The amendment to AS 46.15.140 sets forth the procedure for the Commissioner to deal with abandonment, forfeiture, and reversion of appropriations. Under this provision, all appropriations are subject to revocation if the appropriator does not make beneficial use or all of a part of the appropriation. As you know, the reservation of in stream flows is handled separately in AS 46.15.145, and there are separate standards for periodic review of these reservations, and their reduction or elimination based upon necessity and changing conditions.

However, as the amendment to AS 46.15.140 is now written, it applies to all "appropriations". AS 46.15.260(2) defines an "appropriation" as,

LIVENGOOD/TOLOVANA MINING DISTRICT

P. O. BOX 73069 - FAIRBANKS, ALASKA 99705

February 23, 1985

Dear Legislator:

The Livengood/Tolovana Mining District expressed concerns to you regarding SB 150 in a Public Opinion Message on February 19. This bill would have an impact upon the General Public of Alaska, as there are many different type of water appropriations issued for the State. We would like to submit the following comments on SB 150.

In the opening paragraph of the Governor's letter of transmittal dated February 12, 1985, he stated, "The bill comes as a result of the Alaska Water Resources Board resolution 84-5, dated March 14, 1984, recommending the adoption of specific statutory procedures for the administration and judicial adjudication of water rights, particularly federal reserved water rights."

In the minutes from the Alaska Water Board dated March 13-14, 1984, the following comments are made:

> Resolution to the Commissioner of DNR to propose legislation for basinwide adjudication. Current statutes and regulations are adequate to implement basinwide adjudication of federal reserved water rights. 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, since this type of case has not previously occurred in Alaska.

Although the Governor has the authority to introduce legislation resolving perceived problems such as the Water Board indicated, the proposed legislation goes far beyond the recommendations of the Board. The Board found that current statutes and regulations are adequate to implement a basinwide adjudication of federal reserved rights, and requested statutes only to establish the Superior Court's duties and responsibilities. We believe the recommendations of the Water Resource Board are valid, and SB 150 should only address the Superior Court's duties and responsibilities.

The February 12, 1985 Senate Journal, page 279, regarding SB 150 reads: "Department of Natural Resources fiscal note is zero." We are concerned that if the fiscal note is indeed zero, the Department of Natural Resources will be forced to shift their work load from critical areas into administration of the bill. We therefore feel the bill should be submitted to the Finance Committee for appropriate budgetary appropriations. Section 6 AS 46.15.255 (ENFORCEMENT) and 256 (DATA COLLECTION AUTHORITY) are extremely costly sections to administer.

The bill seriously amends the Water Use Act in established areas. The following comments are addressed to specific sections of the bill.

SECTION 1: In the letter of transmittal Governor Sheffield admitted that this concept had never been upheld in a court of law. Why waste the courts time with an indefensible law? If Section 1 is amended as suggested by SB 150, it makes an appropriation of a specific amount of water meaningless. How can a developer of any type proceed with engineering and funding a venture under such circumstances?

> . . . the diversion, impounding or withdrawal of a quantity of water from a source of water for a beneficial use or the reservation of water in accordance with AS 46.15.145; . . .

Unless I am mistaken, I do not believe that your amendments dealing with abandonment, forfeiture and reversion were intended to apply both to "true" appropriations in which the water is applied to a beneficial use directly, and also to in-stream flow reservation, in which the mere reservation of the water in place is an "appropriation" and a beneficial use by statutory definition only. If my interpretation is correct, you may wish to add a proviso to AS 46.15.140 which will exempt reservations made pursuant to AS 46.15.145 from the coverage of the abandonment provisions of Section 140.

I would be interested to learn if this is your reading of the statute, and if my assumptions regarding the intended coverage of the abandonment provisions are correct.

Also, with regard to proposed AS 46.15.140(d), I presume that this paragraph does not, by ambiguity, imply that a state agency (DNR) may not declare the abandonment or forfeiture of any other water right (non-State public, or private) without prior public notice. In fact, perhaps there should be prior notice before DNR declares any abandonment or forfeiture. Also, shouldn't other water rights held in the name of the public (municipal, federal, etc.) be subject to the same protection given state-held water appropriations?

Sincerely yours,

BURR, PEASE & KURTZ

Thomas E. Meacham

TEM/lsf

cc: Mr. Thomas Hawkins
Mr. Larry Dutton

SECTION 3: This section does not appear to recognize that a water right is a property right that can be leased or sold. This section, by regulation, would divest the property owner of his entire water right, or an unused portion, if that appropriation, or portion thereof, were not used over a 5 year period. (See Sections 46.15.255 and 256). AS 46.15.140 as it currently appears in the Statutes is appropriate without change.

SECTION 4: We feel that by the addition of the words "best interests of the state" and deletion of "in accordance with AS 46.15.140 (b)" this section provides for arbritrary and capricious decisions.

SECTION 5: We feel that water should be adjudicated, especially with respect to federal reservations. We suggest the following change of wording:

> Sec. 46.15.165 ADMINISTRATIVE ADJUDICATIONS. (a) The commissioner may, by order, initiate an administrative adjudication to quantify and determine the priority of (ALL) Federal Reserved water rights and claims in a drainage basin, river system, ground water aquifer system, or other identifiable and distinct hydrologic regime, including any hydrologically interrelated surface and ground water systems following a complete hydrology study.

SECTION 6. This entire section should be deleted. Article VIII Section 16 of the Constitution of Alaska states, "No person shall be involuntarily divested of his right to the use of waters, his interests in lands, or improvements affecting either, except for a superior beneficial use or public purpose and then only with just compensation and by operation of law."

We sincerely appreciate your consideration of these comments. If we can be of assistance to you in any manner, please do not hesitate to call on us.

Sincerely yours

Rose Rybachek, President

MAR 4 1985

Alaska Court System
State of Alaska

OFFICE OF ADMINISTRATIVE DIRECTOR

KARLA L. FORSYTHE
General Counsel

303 K Street
Anchorage, AK 99501

February 26, 1985

Senator Arliss Sturgulewski
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Senator Sturgulewski:

I am writing to bring to your attention a minor concern with SB 150, an act establishing procedures for administrative and judicial adjudication of water rights under the Alaska Water Use Act.

Proposed Sec. 46.15.166(c) (page 7, lines 4- 14), provides that in an action, the court may initially appoint a designee of the commissioner as a master. The master may be an employee of the state.

If the master is a state employee, I assume that the costs of the master will be absorbed as part of the employee's regular salary. However, it would be helpful if the legislation provided that if the master is not a state employee, the costs of the master and any related expenses incurred by the master shall be paid by the parties to the adjudication.

Thank you for your consideration of this comment. If there are any questions, I will be glad to provide further information.

Sincerely,

Karla L. Forsythe

Karla L. Forsythe
General Counsel

KLF:smh

cc: Arthur H. Snowden, II
Art Peterson

TO: Governor Bill Sheffield

FROM: ~~David Vanderbrink~~ Cyril R. Wannamaker

Dear Governor Sheffield:

This letter comes to you in response to a matter that the Alaska Water Resources Board discussed during its March 4-7 meetings.

As you are no doubt aware, Alask_ has recently become a fully participating member of the Western States Water Council (WSWC). Our membership allows Alaska to send three delegates to the Council meetings. Representatives from the the Alaska Department of Natural Resources, the Alaska Departme Conservation and the Alaska Department of Law are the appropriate delegates to the Council. Nevertheless, numerous other state agencies have or should have a substantial interest in water issues addressed by the Council.

The members of the Alaska Water Resources Board have asked me to convey to you the importance of providing a vehicle to these agencies that they may participate with the appointed delegates in developing Alaska's positions at Council meetings.

Although we do not forsee the need for the creation of a special task force, it is recommended that:

1) The Governor's Office inform these various agencies of Alaska's involvement in the WSWC.

2) The Governor's Office urge these various agencies to become and remain actively involved in the development of these issues.

The Alaska Water Resources Board further recommends that one agency, the Alaska Department of Natural Resources, be assigned the responsibility to coordinate this activity. In addition this agency should be given the position as lead agency representing the Alaska Delegation at the Western States Water Council.

Sincerely,

David Vanderbrink

b. The State of Alaska's response to the EPA's proposed placer mining national standards are coordinated and expressed through the Office of the Governor.

Adopted this 8th day of March, 1985

ALASKA WATER RESOURCES BOARD

David Vanderbrink, Chairman

Resolution No. 85-9

EPA NATIONAL PLACER MINING STANDARDS

The U.S. Environmental Protection Agency will be issuing proposed national standards for placer mining in April, 1985. These proposed standards have never before been issued for this industry, and as a result the State of Alaska's minimum water quality standards have been applied to placer mining. The existing standards have not been technologically achievable, and do not reflect economic factors. The national placer mining standards will represent a very beneficial and realistic step forward. They should reflect the maximum of coordinated, thorough State response to EPA.

THE ALASKA WATER RESOURCES BOARD urges the Governor to insure that:

a. Every state agency with an interest in water allocation and quality, including the Department of Natural Resources, the Department of Environmental Conservation, the Department of Fish and Game, the Department of Commerce, the Attorney General's Office, the Department of Community and Regional Affairs and the Office of Management and Budget are encouraged to thoroughly review and respond to the proposed EPA placer mining standards.

Resolution No. 85-10

CLEAN WATER ACT FIELD LABORATORY

Placer mining and other industries have a long history in Alaska and have provided a large economic contribution to the state. These industries may no longer be viable due to recent EPA regulations.

Section 208 of the Clean Water Act (CWA) mandated EPA to conduct studies to provide alternatives to economically meet the goals of the Clean Water Act. Section 104E of the CWA states "The Administration shall establish, equip, and maintain field laboratory and research facilities, including, but not limited to . . . one in the State of Alaska for the conduction of research, investigations, experiments, field administration, and studies and training relating to the prevention, reduction and elimination of pollution."

Technology has not yet been developed under Section 208 or 104E to enable placer mining and other industries to meet current EPA permits. Concerned citizens meeting with Senator Murkowski in February, 1985, discussed this subject and the Senator recommended that a field laboratory under Section 104E of the CWA should be funded as a means of arriving at a solution to the problem facing water users in Alaska.

THE ALASKA WATER RESOURCES BOARD urges Federal funding of this project with 205 (j) monies or other appropriate funding.

Adopted this 8th day of March, 1985

ALASKA WATER RESOURCES BOARD

David Vanderbrink, Chairman

Resolution 85-11

ADMINISTRATION OF WATER APPROPRIATION PERMITS AND INSTREAM FLOW APPLICATIONS

An application to appropriate water by means of an instream flow reservation under AS 46.15.145 has in the past been treated differently from the more traditional water appropriation application for a diversionary use. While the traditional appropriator establishes his or her priority date at the time of initial application, the priority date for an instream flow applicant is not assigned until all data has been collected and a certificate has been issued. This, in practice, places the instream flow applicant at a disadvantage because there is no assurance, after the studies have been completed, that the water originally applied for will still be available.

The Department of Natural Resources has informally applied guidelines to the duration of water appropriation permits for various uses. after which the appropriation applied for, if it is not perfected, will lapse. However, the fact that these policies or guidelines have not been adopted as regulations raises questions about their validity.

THE ALASKA WATER RESOURCES BOARD resolves:

a. The Department of Natural Resources is encouraged to adopt regulations which set duration limits for perfecting the various types of water appropriation rights under all appropriation permits which the Department may issue.

b. The Department is encouraged to develop regulations treating instream flow applications under AS 46.15.145 as applications initiating the appropriation permit process, with a priority date from the date of initial application.

Adopted this 8th day of March, 1985

ALASKA WATER RESOURCES BOARD

David Vanderbrink, Chairman

Resolution No. 85-12

RECREATIONAL RIVERS BILL-HB93

Over the years The Alaska Water Resources Board has expressed concern about overuse and abuse of certain Recreational Rivers, and has supported improved management of recreation rivers by Division of Parks.

The Alaska Water Resources Board support HB93 which establishes a system of Recreation Rivers.

Adopted this 8th day of March, 1985

ALASKA WATER RESOURCES BOARD

David Vanderbrink, Chairman

Resolution No. 85-13

WATER MANAGEMENT STAFFING

Alaska's future is directly dependent upon its water resources. Many communities
are already expressing water shortages. and many capital projects, land disposals and resource development involve serious water ramifications.
Effective water management requires adequate, knowledgeable, and experienced personnel.

THE ALASKA WATER RESOURCES BOARD urges the Department of Natural Resources make every effort to reduce personnel turnover in the Water Section and to retain the existing positions within the section.

Adopted this 8th day of March, 1985

ALASKA WATER RESOURCES BOARD

David Vanderbrink, Chairman

Resolution No. 85-14

DAM SAFETY: SB 95

The Alaska Water Resources Board has followed the progress of the dam safety inspection program in Alaska. The continuation of the dam safety program is of vital importance to ensure the safety and well being of Alaskan citizens and property.

THE ALASKA WATER RESOURCES BOARD urges the Alaska legislature to pass SB 95, an act establishing a dam safety program for Alaska.

Adopted this 8th day of March, 1985

ALASKA WATER RESOURCES BOARD

David Vanderbrink, Chairman

BURR, PEASE & KURTZ
A PROFESSIONAL CORPORATION

E. L. ARNELL 1913-1958
D. A. BURR
EDWARD G. BURTON
RONALD H. BUSSEY
RUSSELLYN S. CARRUTH
RALPH E. DUERRE
CHARLES P. FLYNN
RICHARD A. HELM
L. S. KURTZ, JR.
ANN C. LIBURD
THOMAS E. MEACHAM
KRISTI A. NELSON
ARDEN E. PAGE
NELSON G. PAGE
THEODORE M. PEASE, JR.
J.W. SEDWICK
JOHN C. SIEMERS
DAVID M. TRAVERSI

810 N STREET
ANCHORAGE, ALASKA 99501
(907)276-6100
TELEX:(090)26-405

March 12, 1985

Honorable Arliss Sturgulewski, Chair
Senate Resources Committee
Pouch V
Juneau, AK 99811

RE: Senate Bill No. 150 (Amendments to Alaska Water Use Act, AS 46.15); Our File No. 1515-1

Dear Ms. Sturgulewski:

I am a member of the Alaska Water Resources Board, established under AS 46.15.190. I attended the semi-annual meeting of the Water Resources Board in Juneau on March 5-7, 1985. The Board met with the Senate Resources Committee on water resource matters (including SB 150) on March 8; however, I was unable to participate in that meeting because I had to return to Anchorage early.

In this letter, I would like to offer these observations concerning SB 150, and some proposed amendments. These views are my own, though they were discussed among the Water Resources Board. Some of them are, I believe, contained in a letter to you from the Board. The principal author of that letter is Mike Neimeyer, who is an attorney and a member of the Board.

I believe that the proposed amendments to the Alaska Water Use Act which are contained in SB 150 are necessary for the efficient administration of water rights in Alaska. These include federal reserved water rights which are presently

unquantified and pose the greatest unknown factor in the future allocation of water resources in Alaska. My involvement in water issues, and in the dilemma of unquantified federal reserved water rights, began during my service as an assistant attorney general for the State of Alaska in the late 1970's. I represented the State in litigating the case of Paug-Vik, Inc., Ltd. v. LeResche, 633 P.2d 1015 (Alaska 1981), which was the first Alaska case dealing with aboriginal-title and federal reserved right water claims.

In 1980, based in part upon the realization that the existing Alaska Water Use Act contained no procedures for the effective, binding adjudication of these claims in a manner which complies with the McCarran Amendment, 43 U.S.C. Sec. 666 (which grants the state jurisdiction over federal entities to determine their water rights), I drafted the precursor of Senate Bill 150. That bill has undergone significant refinement since that time, and has been modified to reflect other states' experiences in adjudicating federal reserved rights. At the present time, I believe the bill generally represents a "state of the art" procedural statute to enable the adjudication of federal water rights in state courts. I urge its adoption by the Legislature.

I do have some specific suggestions for amendments which would resolve the concerns raised by Water Board members at our recent meeting. As you know, Sections 1 through 4 of SB 150 are general, "housekeeping" measures which clarify existing portions of the Alaska Water Use Act, while Section 5 of the bill comprises the procedural measures to deal with basin-wide water adjudications, including federal reserved water rights within those basins. My proposed amendments are as follows:

Page 2, Section 46.15.140(d): This proposed amendment should be removed from the "abandonment" provision of the Water Use Act (46.15.140), and placed in AS 46.15.145, which deals with the administration of in-stream flow reservations. The proposed subparagraph (d) states,

> (d) A state agency may not abandon or forfeit a certificate of appropriation in whole or in part except after public notice.

I understand that this provision was originally intended to deal with in-stream flow reservations granted to the State under AS 46.15.145. If so, it should be moved to that section, as AS 46.15.145(g). I would recommend that the provision be

broadened to cover all in-stream flow appropriators, public and private, since their in-stream flow reservations are required to be made in the general public interest. I recommend that the provision, placed in Section 145, read as follows:

> (g) An in stream-flow certificate may not be abandoned or forfeited in whole or in part except after public notice.

Alternatively, if it is not the intention of SB 150 to confine the abandonment by a state agency of a water certificate to in-stream flow reservations, but instead to include all types of water rights held by the State (as the amendment presently implies), the amendment should remain in its existing Section 140. However, it should be broadened to cover both the state and municipalities. The provision would then read,

> (d) A certificate of appropriation may not be abandoned in whole or in part by a state agency or a municipality except after public notice.

This change would prevent the involuntary loss of a water appropriation held in the name of the general public, as a result of the errors or omissions of individual public officials. In other words, failure to timely use a water allocation, or to file some document with the State indicating an intention to maintain a use, should not result in the loss of water rights held by the State or by a municipality in the name of all of its residents.

Based upon these considerations of the public interest, it might be best to leave the provision in Section 140(d), as broadened to cover municipal governments, and at the same time to add the suggested provision concerning in-stream flow reservations at subsection (g) of Section 145.

Page 3, Section 46.15.165(c): This section should be amended by inclusion of the following additional category of persons entitled to receive service of notice of an administrative adjudication of basin-wide water rights.

> (5) Serve the order on any other person or corporation claiming a federal reserved water right;
>
> (renumber the existing subparagraph (5) as subparagraph (6)).

Page 4, AS 46.15.165(c)(5): I recommend that to prevent the inadvertent omission of notice to Native allotment owners in a basin-wide water rights adjudication, or to prevent the later default of these claimants, that the Native regional and village corporations which own land within the basin be notified of any general water rights adjudication (regardless of whether the corporations are themselves asserting a claim to water rights). The proposed amendment would read,

> (5) serve the order on each Native regional and village corporation organized under the Alaska Native Claims Settlement Act which owns any land within the adjudication area;

The Native regional and village corporations do not have the burden of keeping a Native allottee informed of the progress of a water rights adjudication. However, they have in many cases been helpful in guaranteeing that Native allottees within their area are not overlooked, and that they receive adequate legal and practical advice to protect their interests in such matters. Therefore, it is desirable that in addition to serving the Native allottee with notice, that the Native corporation within the area also receive notice, to better insure that the allottee's interests will be protected.

Page 6, Section 46.15.166: I suggest that the "judicial adjudications" section at AS 46.15.166 be similarly amended to add a category of persons whose federal reserve right claims may be adjudicated judicially in state court, as follows:

> (a)(3) by or on behalf of any person ~~or corporation~~ who claims a federal reserved water right.

These two changes, will permit the adjudication of any federal reserved water right claims which may be asserted by Alaska Native corporations, or by any other entity which is not already included in the proposed legislation (and which, by statutory interpretation, would otherwise be presumed to be excluded). Without this amendment, Alaska Native corporations and others who may claim federal reserve water rights will be forced to bring separate litigation in federal court, which defeats the entire purpose of a basin-wide state-court adjudication of all water rights, including federal reserved rights. The inclusion of this category in the legislation would not be an admission by the State that Native corporations legally possess federal reserved water rights, since the disclaimer in proposed AS 46.15.169 of the bill specifically denies that

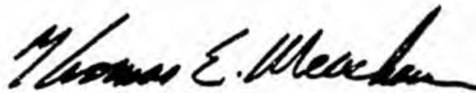
adoption of the legislation is an admission by the State that federal reserved water rights exist within the State.

Page 8, AS 46.15.168(b): I recommend that this provision be amended to require that any administrative adjudication on remand from a court be confirmed judicially, if federal reserved water rights are involved. This will complete the judicial adjudication requirements of the McCarran Amendment, 43 U.S.C. Sec. 666. Without this confirmation, a decision after administrative remand may not be binding upon the federal claimants. Therefore, I recommend that this subsection (b) be amended to read as follows:

> (b) The commissioner may accept a remand from a state or federal court of a water rights dispute, and may administratively adjudicate it under AS 46.15.165, subject to judicial confirmation of any federal rights which have been adjudicated.

I hope that my concerns with some details of SB 150 can be eliminated by adoption of the amendments I have listed in this letter. However, with or without these amendments, I believe that SB 150 is a vital piece of procedural legislation which is necessary to allow the State to take full advantage of its jurisdiction over federal water claims. When the need arises, the State will be able to react in a timely manner, without any question concerning the procedures to be applied. I urge that your committee recommend the passage of Senate Bill 150.

Sincerely yours,



Thomas E. Meacham

TEM/lsf

cc: Commissioner Esther C. Wunnicke

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

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

MAR 2 5 1985

March 19, 1985

Honorable Arliss Sturgulewski, Chair
Senate Resources Committee
Pouch V
Juneau, AK 99811

Re: SB 150, Thomas E. Meacham's March 12, 1985 letter

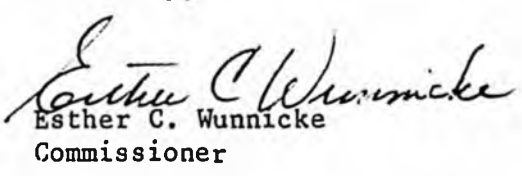
Dear Senator Sturgulewski:

The Department of Natural Resources fully endorses all of the suggestions in the subject letter without exception.

Referring to Section 3 of SB 150 and the proposed amendment to AS 46.15.140(d) on Pg. 2, Mr. Meacham offered alternative wording (see Pg. 3 of his letter). This particular subsection was discussed at some length at the recent Water Resources Board meeting. It was felt that the original intent of this section was to prevent state agencies from abandoning instream-flow reservations and thus the Board recommended that the subsection, in its present form, should be deleted from Section 46.15.140(d) and to be reinserted as Section 46.15.145(g). We now realize that, while our original intent with this subsection was to protect the public interest in instream flow reservations, many other forms of agency and municipal appropriations, e.g., public water supply, provide a direct public benefit. Therefore, we now agree that Mr. Meacham's alternative proposal to leave the subsection in 46.15.140(d) and covering municipal governments through use of the wording or similar wording to that in Mr. Meacham's suggestion is the better way to deal with this section and will best serve the public interest.

We believe the other amendments to the bill proposed by Mr. Meacham in his letter are excellent and their incorporation will greatly improve this proposed legislation.

Sincerely,



Esther C. Wunnicke
Commissioner

cc: Tom Meacham
Tom Hawkins
Mike Frank
L. A. Dutton
Water Resources Board

10-J9LH

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

WATER RESOURCES BOARD

555 Cordova Street
Pouch 7-005
Anchorage, AK 99510
(907) 276-2653

MAR 1 9 1985

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.

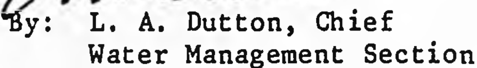
I would like to emphasize that this Board supports SB 150 provided the enclosed suggested changes are incorporated in the proposed legislation.

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,

For Cyril R. Wanamaker, Chairman
Alaska Water Resources Board



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

cc: Governor Sheffield
Senate Resources Committee

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.

APR 04 1985

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

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

OFFICE OF THE COMMISSIONER

April 3, 1985

The Honorable Arliss Sturgulewski
Chair, Senate Resources Committee
Pouch V
Juneau, AK 99811

Dear Senator Sturgulewski:

During your committee's meeting on March 8 for the Water Resources Board, and the hearing on SB 150, you asked if the committee wanted to consider this bill without a fiscal note because adoption would require funding for data collection and enforcement. We failed to address this in our previous correspondence on this bill.

The reason a fiscal note was not included with the bill when introduced was that, even though we are facing a period of declining revenue and the real likelihood of reduced budgets, it was important to have this proposed legislation enacted. We are concerned that the State could soon be forced into federal reserved water rights adjudication and without having judicial procedure established by law, the State could be at a great disadvantage. We hope to be able to complete the Indian River (Sitka) basinwide adjudication within the limits of our regular operating budget.

Considering the possible future application of this bill, we recognize that the cost of administrative and judicial basinwide adjudications for water rights will be expensive and our intention is to create separate budget projects for these adjudications in our annual budget requests. In this way, except for preliminary research and project planning, administrative and judicial basinwide adjudications will be subject to available funds specifically appropriated by the legislature for each separate project. The funds, when requested, will cover basin boundary determination, hydrology reports, data collection, information research, service of notice, special masters fees, attorneys fees, court costs, etc., -- all within DNR (DGGS and DLWM), the Department of law, and the Judicial Branch. Using this approach, funding for a particular project will expire when the project has been completed.

If the State does not enact this legislation and prepare itself to deal with federal reserved water rights, we will run grave risks of:

1. Having our water rights appropriation system come to a standstill in different areas around the State because we have failed to quantify the federal reserved rights through the adjudicative process (no other alternative is available to the State -- McCarren Amendment, 43 U.S.C. 666).

2. Losing state court jurisdiction over the adjudication of federal reserved water rights through the federal agencies filing in federal court.

Referring to the second of these two reasons, federal agency filings in federal court could be a real possibility within a very few years (2-5) if federal agencies are successful in obtaining funds to quantify their reserved rights. We know, for instance, that the Bureau of Land Management, the Fish and Wildlife Service, and possibly the Forest Service are actively seeking funds at this time. If the State does not take the initiative in developing a process for adjudicating federal reserved water rights, e.g., SB 150, it is unlikely that the federal courts will remand these cases to state court as they have done in other states.

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 through state courts, through the Legislature and Congress (state-federal compact), or in federal court -- those are the choices as we see them. Adjudication in state court using the procedures that would be provided by enactment of SB 150 is most likely the least expensive alternative.

Please let me know if there is additional information I might furnish you.

Sincerely,

Esther C. Wunnicke

Esther C. Wunnicke
Commissioner

If you would like to discuss this further, please give me a call. E.

cc: Tom Hawkins
Mike Frank
L. A. Dutton
Water Resources Board

APR 12 1985

BURR, PEASE & KURTZ
A PROFESSIONAL CORPORATION

E. L. ARNELL 1913-1958

D. A. BURR
EDWARD G. BURTON
RONALD H. BUSSEY
RUSSELLYN S. CARRUTH
RALPH E. DUERRE

CHARLES P. FLYNN
RICHARD A. HELM
L. S. KURTZ, JR.
ANN C. LIBURD
THOMAS E. MEACHAM
KRISTI A. NELSON
ARDEN E. PAGE

NELSON G. PAGE
THEODORE M. PEASE, JR.
J. W. SEDWICK
JOHN C. SIEMERS

810 N STREET
ANCHORAGE, ALASKA 99501
(907) 276-6100
TELEX: (090) 26-405

April 10, 1985

Honorable Esther C. Wunnicke,
Commissioner, Alaska Department of Natural Resources
Pouch M
Juneau, AK 99811

RE: Proposed Amendments to Alaska Water Use Act (SB 150)
Our File No. 1515-1

Dear Commissioner Wunnicke:

Thank you for sending me a copy of your April 3, 1985 letter to Senator Sturgulewski regarding Senate Bill 150. Apparently Senator Sturgulewski had asked some questions regarding the absence of a fiscal note for SB 150 at the March 8 meeting of the Senate Resources Committee, with the Water Board in attendance. (I had to leave Juneau a day early, and regret that I was unable to attend that meeting).

Your letter explains very well the disadvantages to the State if it is not ready with an enacted statutory procedure for adjudicating federal reserved water rights. Of the two disadvantages you stated, I believe that the loss of clear state-court jurisdiction for federal agencies and individuals who assert federal reserved water rights is the most disadvantageous to the State. Your letter explained that if SB 150 is adopted, administrative or judicial adjudications of water basins would be done through the creation of a separate budget project for each adjudication as it became necessary. Using this approach, the Department of Natural Resources, in conjunction with the Department of Law, could determine which water basins in Alaska were of such a priority (such as Ship Creek in the Anchorage area) as to require commencement of a basin-wide adjudication. As you know, there are only a handful of basins in the State which might require a basin-wide adjudication in the foreseeable future; in other words, this will not be an everyday occurrence, and would only happen when the State decides that there is a real possibility that the existing water demands exceeded the known supply.

One circumstance which was not mentioned in your letter, and which I believe is an important reason to enact SB 150, is that enactment of the bill will put the State in the "driver's seat" concerning state-court basin adjudications. In addition to offering a reasonable (and even advantageous) alternative to basin-wide litigation in federal court, SB 150 would give strong indication that any basin to be adjudicated will be one which is high on the priority list of the Departments of Natural Resources and Law -- and not merely any water basin which an individual may wish to have adjudicated, whether or not the circumstances in that basin deserves the expenditure of money and effort which a basin-wide adjudication entails.

In Washington State, I understand, the procedures for basin-wide adjudication in state court have been developed ad hoc, and may not be part of a well-considered procedural framework. As a result, regardless of the priorities of Washington's Department of Natural Resources concerning water management, any individual water appropriator may initiate a basin-wide adjudication in a Washington state court. The result is that the natural resources and legal efforts of the State are directed toward researching and defending basin-wide "brush fires" which pale in significance to the more pressing water allocation problems which face the State. Once begun, however, a basin-wide adjudication must be followed to a conclusion because the State and private appropriators may be disadvantaged if they do not participate fully.

Senate Bill 150 would avoid this result by giving the Commissioner (and no one else) the authority to initiate a basin-wide administrative or judicial adjudication under the procedures contained in the bill. Any person attempting to start an adjudication of basin-wide rights outside these procedures would, by definition not be initiating a legitimate, competent basin-wide adjudication.

I have taken the liberty of sending a copy of this letter to Senator Sturgulewski, to indicate this additional reason to support enactment of SB 150.

Sincerely yours,

Thomas E. Meacham
(Member, Alaska Water Resources Board)

TEM/lsf

cc: Michael J. Frank, Esq.
Thomas J. Hawkins, Esq.
Mr. Lawrence A. Dutton
Members, Water Resources Board
Honorable Arliss Sturgulewski

APR 19 1985

LIVENGOOD/TOLOVANA MINING DISTRICT

P. O. BOX 73069 - FAIRBANKS, ALASKA 99705

April 12, 1985

Senator Arliss Sturgulewski
Pouch V
Juneau, Ak 99811

Dear Arliss:

I have received copies of several letters to you regarding SB 150. I agree with most of the comments made regarding the wisdom in passing legislation dealing with federal reserved water rights. I believe the questions regarding the fiscal note,as well as other areas of the section dealing with fedeal reserved water rights have been sufficiently answered to move that section of the bill.

However, I still have the same concerns with section 1-4 of SB 150 as I previously had. This is the so-called housekeeping portion. This section would deprive Alaskans of rights granted to them under the Constitution as well as current water rights law. This portion of the bill still carries a major fiscal note. If the Department of Natural Resources covers the fiscal note internally, then there must be a portion of the duties they are currently budgeted to perform that will not get done...or else they are currently over-budgeted (which I find strange to believe). This portion of the bill should be deleted.

Is there any possibility that you Committee could delete the section dealing with the housekeeping measures (sections 1-4), and pass the portion only dealing with federal reserved water rights? If that is a possibility, I would strongly urge that you do so.

If I can be of any type of assistance to you, please don't hesitate to call.

Keep up the good work.

Sincerely yours,

Rose Rybachek

Rose Rybachek, President

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

DIVISION OF LAND AND WATER MANAGEMENT

POUCH 7-005
ANCHORAGE, ALASKA 99510-7005
PHONE: (907) 561-2020

October 9, 1985

The Honorable Arliss Sturgulewski
1957 Sheldon Jackson
Anchorage, AK 99508

Re: Senate Bill 150

Dear Senator Sturgulewski:

Enclosed are four articles and our new Fact Sheet discussing federal reserved water rights. Senate Bill 150, dealing with federal reserved water rights, was introduced during the past legislative session. A copy of the bill is enclosed for your reference. SB 150 was not passed out of the Senate Resources Committee. None-the-less, we think it is a crucial piece of water legislation for Alaska because it would establish judicial procedures to adjudicate federal reserved water rights. We will encourage the legislature to give this issue a high priority next year.

Currently, the Water Use Act, AS 46.15, has no 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 agencies 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 <u>Winters v. United States</u>, 207 U.S. 564 (1908), an Indian reservation case. 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 McCarren Amendment, 43 U.S.C.§666, to allow water adjudication suits to be brought against the federal government in state courts to determine the quantity and priority date of federal reserved water rights.

While allowing state court adjudication of federal reserved water quantities and priority dates, the McCarren amendment also requires the adjudication of all rights within a hydrologic basin where a federal reserved water right may exist. This has created lawsuits involving literally thousands of defendants in some of the western states, where there are many appropriators and not enough water. The complexity and expense of such litigation has prompted many western states to enact legislation establishing procedures for determining federal reserved water rights. Our proposed bill draws from the experiences of other states and their statutory schemes.

Federal land reservations make up almost 49 percent, or more than 178 million acres 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 of Alaska 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 pop up 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 proposed bill clarifies how the commissioner may terminate an instream flow reservation.

Section 5 contains the body of the proposed basin-wide adjudication provisions. It creates a new AS 46.15.165, which would allow the Commissioner of Natural Resources to initiate an administrative adjudication to quantify and determine the priority of all water rights and claims in a particular hydrologic basin. Section 5 also creates a new AS 46.15.166 providing 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 McCarren Amendment. In that instance the proposed bill gives the Superior Court authority to appoint a designee of the commissioner as 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 granted and claimed federal reserved water rights, a new 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 a new AS 46.15.255 and AS 46.15.256, 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 basin-wide adjudication was first submitted to the Legislature in 1981, but it received little attention. 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. The drafts of this bill were reviewed by the Departments of Fish and Game and Environmental Conservation, members of the Alaska Water Resources Board, the U.S. Forest Service, 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. While some questions were raised about several housekeeping amendments included in the bill, the major portion dealing with administrative and judicial basin-wide adjudication was supported by the Alaska Water Resources Board as well as by individual Board members and by the Livengood/Tolovana Mining District.

The first of the enclosed articles, "The Winters of Our Discontent: Federal Reserved Water Rights in the Western States", presents background on the doctrine of prior appropriation and the development of the Winters Doctrine of Federal Reserved Rights. This article is relevant to Alaska because our system of allocating water is the doctrine of prior appropriation. The article presents an analysis of reconciling the prior appropriation doctrine and the Winters Doctrine. The second paper, "Introduction to Reserved Water Rights" by Ralph W. Johnson, discusses the origin of the reservation doctrine and decisions held in some of the major federal reserved water rights cases. These court cases are important to Alaska because federal reserved water rights are a judicial creation and Alaska will be bound by decisions made in courts outside our state.

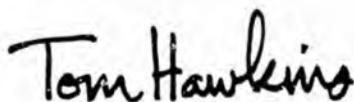
The final two articles, "Reserved Instream Flows in the National Forests: Round Two", and "The New Rules for National Forest Water" address federal reserved water rights on national forests. These articles are pertinent to Alaska because of the two national forests in Alaska, the Tongass and the Chugach, which are the two largest in the country. These reserved water rights will eventually be adjudicated.

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 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 through state courts, through the Legislature and Congress (state-federal compact), or in federal court — those are the choices as we see them. Adjudication in state court using the procedures that would be provided by enactment of SB 150 is most likely the least expensive alternative.

I hope you find these articles enlightening. Please contact us if we may provide more information to you on these subjects.

Sincerely,



Tom Hawkins
Director

Enclosures

cc: Esther C. Wunnicke
Mike Frank
Laura Davis

Alaska State Legislature

ARLISS STURGULEWSKI, Chairman
BETTYE FAHRENKAMP, Vice Chairman
JACK COGHILL
DICK ELIASON
VIC FISCHER
RICK HALFORD
FRED ZHAROFF

POUCH V
JUNEAU, ALASKA. 99811
(907) 465-4907

Senate
Committee on Resources

M E M O R A N D U M January 21, 1986

TO; All Members
Senate Resources Committee

FROM; Staff
Senate Resources Committee

RE; SB 150 "An Act making miscellaneous amendments to the Alaska Water Use Act (AS 46.15); establishing procedures for administrative and judicial adjudication of water rights under that Act; and providing for an effective date."

SB 150 establishes procedures for the administrative adjudication of water rights in Alaska and makes miscellaneous amendments to the Alaska Water Use Act (AS 46.15).

Section 1 adds a disclaimer to the Water Use Act asserting that a right to appropriate water is not a state guarantee of a particular water quality, volume or pressure, or that water may be withdrawn at a particular cost.

Section 2 adds a new subsection setting out procedures for handling water right declarations existing before 1966.

Section 3 clarifies the existing abandonment and forfeiture provisions.

Section 4 clarifies how the commissioner may terminate an instream flow reservation.

Section 5 allows the Commissioner to initiate an administrative adjudication to quantify and determine the priority of all water rights and claims in a particular hydrologic basin.

Section 6 clarifies the enforcement authority of the Department of Natural Resources.

This bill was heard last session. During the interim the Department of Natural Resources chaired the Federal Reserve Water Rights Work Group, and based on those meetings has suggested several amendments which are included in the proposed committee substitute. In addition, amendments are included from the Alaska Water Resources Board and from Tom Meacham, a member of the Alaska Water Resources Board, whose amendments were concurred in by the Commissioner of Natural Resources.

Enclosures:

Date	Enclosure
Feb. 12, 85	Transmittal letter from Governor
Jan. 31, 85	Fiscal Note
Mar. 04, 84	Resolution from Alaska Water Resources Board
Mar. 14, 85	Letter of support from AWRB with amendments
Mar. 12, 85	Letter from Thomas Meacham with amendments
Mar. 19, 85	Letter from DNR supporting Meacham letter
Apr. 03, 85	Letter from DNR explaining fiscal note
Apr. 10, 85	Letter from Tom Meacham supporting SB 150
Apr. 12, 85	Letter from Rose Rybachek opposing sect. 1-4
Oct. 09, 85	Letter from DNR with further data
Jan. 09, 86	Letter from DNR with amendments
	Excerpt from Western Energy Newsletter
	DNR Fact Sheet - Water Rights in Alaska
	DNR Fact Sheet - Federal Reserve Water Rights
	DNR Fact Sheet - Reserving Water for Instream Use

Alaska State Legislature

ARLISS STURGULEWSKI, Chairman
BETTYE FAHRENKAMP, Vice Chairman
JACK COGHILL
DICK ELIASON
VIC FISCHER
RICK HALFORD
FRED ZHAROFF

POUCH V
JUNEAU, ALASKA. 99811
(907) 465-4907

Senate
Committee on Resources

M E M O R A N D U M   January 27, 1986

TO: All Members
Senate Resources Committee

FROM: Staff, Senate Resources Committee

RE: CSSB 150

Based on the SRC recommendation of January 22, 1986, the following amendments were prepared for CSSB 150:

1) AS 46.15.040 is amended to clarify that this section does not preclude actions against the state or later appropriators.

2) AS 46.15.165(c) is amended to add that all mining claimants be served notice. This amendment will be subsection 7.

3) AS 46.15.165(c)(6) is also amended to clarify that land under ANCSA means selected and conveyed.

4) AS 46.15.165(c)(3) is amended to clarify that holders of Native allotments are notified including those government agencies holding allotments in trust.

Two other items that were discussed are:

1) Line 27 page 4 states that a person must respond in a timely manner. No amendment is offered here because this section will require the adoption of regulations, and these regulations will be the subject of public hearings. It is felt that the public hearing process will provide opportunity for the determination of the appropriate time frame.

2) Concern was raised that AS 46.15.140(a) might be cause for some appropriators to lose their water rights. Section (b) clarified that water rights can only be forfeited if an appropriator voluntarily fails or neglects to make use of water. As it is now written, this failure has to be for a period of five years before the commissioner can declare water rights abandoned. The legal advice is that a person must walk away from a water right without any intent to return before it can be considered abandoned.

Enclosures:
Letter from AWRB supporting CS
Letter from Dept. of Fish and Game supporting CS

JAN 24 1986

ALASKA WATER RESOURCES BOARD
P.O. BOX 2234
JUNEAU, ALASKA 99803

January 24, 1986

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

RE: Committee Substitute for SB 150 Testimony

Dear Senator Sturgulewski:

Senator Fahrenkamp asked if the Water Resources Board had been polled and if the majority supported the testimony in favor of the Committee Substitute for SB 150 that I gave on January 22, 1986. I indicated that all but one member had been polled by phone and all but that one member supported the testimony and the Committee Substitute.

Since that testimony the one member who was not available called and discussed the Committee Substitute with me. I am pleased to confirm in writing that all of the voting members of the Alaska Water Resources Board supports the testimony and the Committee Substitute.

Respectfully,

Cyril R. Wanamaker

Cyril R. Wanamaker, Chairman
Alaska Water Resources Board

cc: Alaska Water Resources Board

STATE OF ALASKA

DEPARTMENT OF FISH AND GAME

OFFICE OF THE COMMISSIONER

BILL SHEFFIELD, GOVERNOR

JAN 24 1986

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

11-K11LH

BILL SHEFFIELD
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

2/12/85

The Honorable Don Bennett
President of the Senate
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Senator Bennett:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to the adjudication of water rights and making miscellaneous amendments to the Alaska Water Use Act (AS 46.15). The bill comes as a result of the Alaska Water Resources Board resolution 84-5, dated March 14, 1984, recommending the adoption of specific statutory procedures for the administrative and judicial adjudication of water rights, particularly federal reserved water rights.

A federal reserved water right is one created by implication when the federal government withdraws land for a specific purpose, such as for a national forest, Indian reservation, or national monument. 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 doctrine to many other types of federal withdrawals. Since a federal reserved water right is 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. To facilitate the ascertainment of the existence of a federal reserved water right, its quantity, and its priority date, Congress passed the McCarran Amendment, 43 U.S.C. sec. 666, allowing water adjudication suits to be brought against the federal government in state courts. The statute requires the adjudication of all rights within a hydrologic basin where a federal reserved water right may exist. This has created lawsuits involving literally thousands of defendants in some of the western states, where there are many appropriators and not enough water. The complexity and expense of such litigation has prompted many western states to enact specific adjudication legislation to facilitate the determination of water rights. The attached bill accord-

SB 50

ingly draws from the experience of other states and their adjudication statutory schemes.

Section 1 of the bill amends AS 46.15.040 to add a disclaimer to the Water Use Act, asserting that a right to appropriate water which the state grants is not a state guarantee of a particular water quality, volume, or pressure, or that water may be withdrawn at a particular cost. Appropriators in adjudications in other western states have raised this "guarantee" argument. While courts that have reached the issue have rejected the argument, nonetheless it would serve the expeditious resolution of water disputes in Alaska if the lack of guarantee were specified in the Water Use Act.

Section 2 of the bill adds a new subsection to AS 46.15.065, the current statute setting out the procedures for handling individual declarations of water rights existing before July 1, 1966. Under AS 46.15.065(b)(1), the commissioner of natural resources set the deadline for filing those declarations, and approximately 15 are pending. This new subsection makes clear the relationship between the procedures for handling those declarations and the proposed procedures (AS 46.15.165 and 46.15.166 in the bill) for handling basinwide water rights adjudications.

Section 3 of the bill amends AS 46.15.140 to clarify the existing abandonment and forfeiture provisions and to create a rebuttable presumption that if an appropriator does not beneficially use the water covered under a certificate for a period of five successive years, it is the appropriator's 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 in-stream flow reservation.

Section 5 contains the body of the adjudication provisions. It first creates a new AS 46.15.165, which would allow the commissioner of the Department of Natural Resources to initiate an administrative adjudication to quantify and determine the priority of all water rights and claims in a particular hydrologic basin. Under AS 46.15.165, the commissioner would give notice to all relevant appropriators and landowners, including governmental agencies. When the hydrologic basin includes land or water held in trust by the United States for Alaska Natives, such as the Annette Island Reserve, notice would also be sent to relevant authorities in order to protect the Natives' interests, if any, in a federal reserved

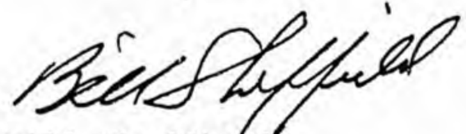
water right. A person or entity claiming a federal reserved water right who is served with notice, but who fails to consent to an administrative adjudication, would be excluded as a participant. Under AS 46.15.165 the commissioner would have authority to adopt procedural regulations and to appoint a master to preside over the adjudication; to hold hearings; to take testimony; to collect evidence; and to make recommendations to the commissioner. Any final determination of water rights the commissioner makes would be subject to an administrative appeal to superior court. Section 5 also creates a new AS 46.15.166 providing 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, 43 U.S.C. sec. 666. In that instance, the bill gives the superior court authority to appoint a designee of the commissioner as a master to perform the same functions a master would 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 non-federal and federal reserved water rights, a new 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 a new AS 46.15.255 and 46.15.256, to clarify the Department of Natural Resources' authority to take action to remove unsafe, as well as unpermitted, works of appropriation if the appropriator refuses to do so, and to inspect records of an appropriator pertinent to the permitted or certificated use of water under the Water Use Act.

Given the experience of states other than Alaska in adjudicating water rights and the large number of federal reservations in Alaska, a sound statutory system for adjudication is imperative. Therefore, I urge your prompt action on this bill.

Sincerely,



Bill Sheffield
Governor

STATE OF ALASKA 1985 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date:

REQUEST
~~Bill/Resolution No.:~~ SB 150
Title: Water Use Act

Sponsor:
Requestor:
Date of Request:

FISCAL DETAIL
Agency Affected: Natural Resources
Program Category Affected: NRMEC
BRU, Program or Subprogram(s) Affected:
Land and Water Management

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL		-0-	-0-	-0-	-0-	-0-

POSITIONS:

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

No fiscal impact.

Prepared By: Ned Farquhar
Phone: 465-2400
Division: Commissioner's Office
Date: January 31, 1985

Approved by Commissioner:
Date: January 31, 1985
Agency: Natural Resources

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

7/1/84

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.

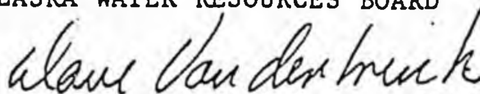
Of the 367.7 million acres in Alaska, federal reserve water rights exist on almost 60 percent of the land mass or over 215 million acres. From a miniscule 2.5 million acres of military land, to 50 and 75 million acres of land for national parks and fish and wildlife refuges respectively, federal reserve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



David Vanderbrink, Chairman

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

---

[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.

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

---

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 &

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

---

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

---

[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 th[illegible]itional statutory requirement that the appropriator must obtain a permit from the pro[illegible]te 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

---

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 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 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]

---

[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 determine 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-

---

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

[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,

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

---

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.

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

---

> 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).

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

---

[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 to 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

---

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.

---

[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" but 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

---

[130] 103 S. Ct. 1382 (1983).

[131] 103 S. Ct. 2906 (1983).

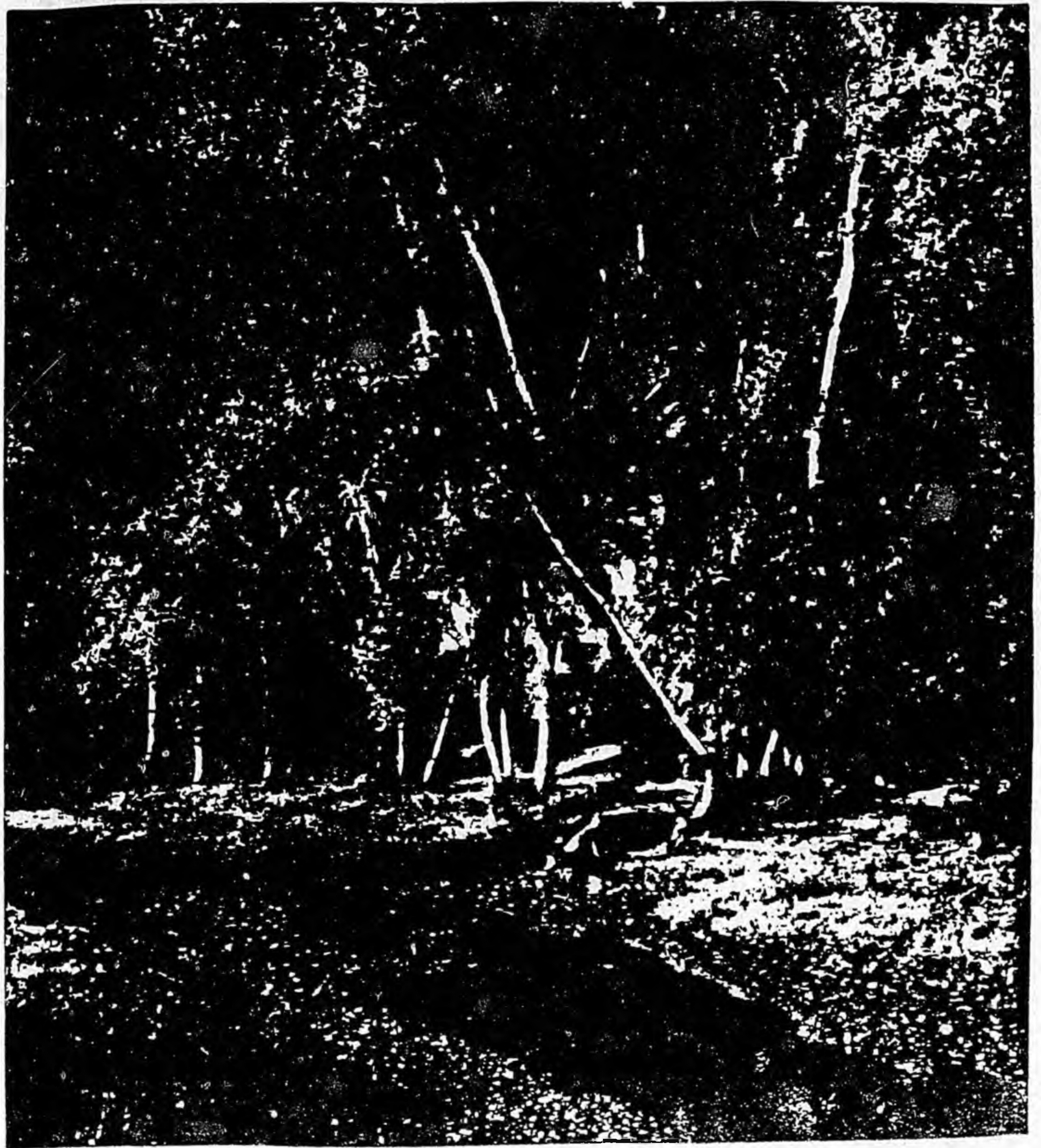
[132] *See, e.g.*, Ranquist, *supra* note 12, at 710-24.

[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.

The New Rules For NATIONAL FOREST WATER



By Jeff Romm and Kathleen Bartoloni

The Forest Service responds after the Supreme Court weakens its powers for multiple use.

In 1978, the U.S. Supreme Court handed down a decision that has profound implications for future management of national forestlands.

Commonly known as the Rio Mimbres decision, it arose from conflict for water in the highlands of New Mexico, where the Rio Mimbres flows through the Gila National Forest and interspersed agricultural areas. The Forest Service had claimed rights to the river's water for stock watering and for fisheries, wildlife, aesthetics, and recreation on the Gila.

The upstream Mimbres Valley Irrigation Company, which had used the river since the 1920s, successfully contested the Forest Service claim in the court system of New Mexico. The company based its claim on the principle of "first in time, first in right," on which New Mexico's "appropriative rights" doctrine of water law is based. When the Forest Service appealed to the Supreme Court in the case known legally as *U.S. v. New Mexico* (438 U.S. 696), the agency argued its entitlement to the water by virtue of the "federal reserved water right." In short, the Forest Service claimed the legal right to enough water to satisfy the purposes for which Congress had authorized reservation of forestland from the public domain. The Court disagreed and, in doing so, substantially changed the legal basis for multiple-use planning on the national forests.

The federal reserved right, said the Court, applied to the explicit purposes for which Congress had authorized forest reserves. The Court interpreted the original authorization, the Organic Act of 1897, to mean that Congress had intended reserves only for the purposes of maintaining timber supplies and favorable water flows; the reserved right did not apply to other purposes of national forest management. The Court opined that this judgment held after 1960 as well for purposes that Congress had added to the Forest Service mandate in the Multiple Use–Sustained Yield Act of that year, although the irrigators' pre-1960 claim rendered the act irrelevant to the Rio Mimbres case. If the Forest Service needed water for such purposes, it would have to obtain it through state water-rights procedures (Fairfax and Andrews 1979).

The Rio Mimbres reversed a trend in decisions that had expanded the application of the federal reserved right, at the apparent expense of state power, over the course of this century. The Supreme Court first used the reserved rights doctrine in its 1908 *Winters v. U.S.* decision (207 U.S. 564), which said that the federal government would not create an Indian reservation without implicitly reserving rights to the water for the purposes required, claims under state law notwithstanding. The Court [illegible] this doctrine [illegible] forest reserves in its 1963 decision of *Arizona v. California* (373 U.S. 564). Using that decision, the Forest Service had subsequently asserted federal rights to water that had not been claimed under state law before the date of a forest's reservation and that was needed to accomplish the purposes of the reserve.

As a land manager, the agency's interpretation of these purposes had broadened as public demands upon the national forests had grown and diversified. The Multiple Use Act transformed into law the longstanding administrative policy of managing national forestlands for recreation, range, fisheries, and wildlife, as well as for timber and watershed quality. The National Forest

Jeff Romm is acting associate professor and Kathleen Bartoloni is research assistant, Department of Forestry and Resource Management, University of California, Berkeley.

The Rio Mimbres, which flows through the Gila National Forest, sparked the case leading to the Supreme Court decision.

Arkansas River, San Isabel National Forest. States have been given greater authority over water—authority lost by the federal government.

Management Act of 1976 strengthened this policy by establishing a system for multiple-use planning on each national forest. But in 1978, the Rio Mimbres decision shifted water powers back toward the states and, in the process, appeared to sever the link between the uses of a national forest and the federal rights to water that those uses required.

As foresters know, uses of land depend on the availability of water; a land-use plan is also a prescription of water needs. An agency that loses rights to water loses some of its power to manage land. After the Rio Mimbres decision, the Forest Service apparently was no longer able to claim reserved rights to water for recreation, grazing, fish, or wildlife. Instead, the agency was required either to procure needed water within the procedures of state law, possibly in competition with other applicants for water rights, or to obtain water through its powers of eminent domain, compensating existing rightsholders. Since Rio Mimbres, the Forest Service has been applying for state permits to secure water for uses from which the Court withdrew the reserved right. Where national forest plans cannot be implemented without state permits for water, future state influence on national forest management could be significant.

As for most laws and policies, however, the effects of a court decision may rely less upon what the decision says than upon the responses it provokes. The Rio Mimbres decision has been provocative: it reversed the expansion of federal water rights at a time in history when the politics were sympathetic, but did so upon questionable interpretations of congressional intent. For good or ill, the Supreme Court has thrown the institutions of forest water rights into considerable disarray. In what follows, we explore one set of responses to Rio Mimbres—those of the Forest Service.

The agency has used four strategies thus far to recover the security of water rights that it had previously enjoyed, each with different implications for the agency.

Hydrological Argument

In the Rocky Mountain states, the Forest Service has used a hydrological argument to enlarge the federal reserved water right within the Court's narrow interpretation of the 1897 Organic Act.

The Rio Mimbres decision denied reserved rights to instream uses of water for fisheries, aesthetic, or recreational purposes. But the Court also stated that "securing favorable conditions of water flows" was one of the two explicit purposes of forest reservations, and therefore carried an implied federal right to sufficient water to satisfy that purpose. Responding to this interpretation, the Forest Service has attempted to define the amount of instream flow that is necessary, as Justice Department lawyer John Hill has written, "to maintain the national water collection and delivery system in a condition to deliver water to appropriators under 'favorable conditions' " (Hill 1982). If instream flows are shown to merit the reserved right for this purpose, then other forest uses that depend upon them will gain some degree of associated protection.

To validate the relationship between levels of instream flow and qualities of forest drainage systems, Region 2 hydrologists have determined the annual streamflow regime—the distribution of flows over the year—that would maintain the existing condition of stream channels. Because the capacity of a channel changes when streamflows deposit more or less sediment than they remove, the hydrologists have used general principles of geomorphology and fluid mechanics to identify the regimes that balance sediment removal and deposition over the course of the year. Lesser flows would cause channel filling, vegetative encroachment, and consequent loss of drainage capacity. By determining the flow regime that would maintain the existing balance, the hydrologists have been able to estimate the amount of water that is required to prevent a decline in the drainage capacities of several basins (Rosgen and Silvey 1983). The amount forms the basis for claims of instream flows under federal reserved water rights.

The Forest Service first tested this hydrological approach in the 1982 adjudication of Wyoming's Big Horn River, where the agency estimated that about 78 percent of average annual water yields was necessary for maintenance of the drainage system (Rosgen and Silvey 1983). The Forest Service settled its claims out of court after several months of negotiation with the state of Wyoming because the agency did not think the method of measurement was ready to withstand a court test. Although the Forest Service settled for only 25 percent of the amount of water that it had claimed, the settlement established a precedent for acceptance of the instream flow principle. The principle would protect Forest Service water from upstream private claims and would use the Rio Mimbres interpretation of purpose to broaden the uses to which the federal reserved right applies.

Measurements of physical instream flow requirements are likely to become increasingly influential in the future. The Forest Service feels that the method may now be strong enough to withstand legal scrutiny, and the agency is testing it in adjudications of the Rio Grande River (Rio Grande National Forest) and the Arkansas River (Pike and San Isabel national forests) in Colorado.

Riparian Rights

The Forest Service has pursued a second strategy in California, where property owners have "riparian rights" to make reasonable use of water that flows through or adjacent to their lands. The agency has argued that national forestlands qualify for riparian rights.

Riparian rights have significant advantages over the "appropriative rights" the Forest Service would other-

Rio Grande, Santa Fe National Forest: "After the Rio Mimbres decision, the Forest Service apparently was no longer able to claim reserved rights to water for recreation, grazing, fish, or wildlife."

wise have to obtain under state law. Appropriative rights are established by the "beneficial use" of water wherever the use occurs. Their strength in the event of scarcity depends on when they were established relative to others on the same stream. They are formalized by a permit from the state Water Resources Control Board, which certifies the actual quantity that is used beneficially and the date on which the use was confirmed. Riparian rights do not require a state permit; they attach to land ownership rather than to water use, and their entitlement in times of scarcity is usually not determined by a permit date. Although subject to administrative and adjudicative proceedings of the Water Resources Control Board, riparian rights can be defended in the courts—the state board does not have ultimate jurisdiction over them, as it does for appropriative rights. Finally, riparian rights can be applied to any use, as long as it is reasonable under state law. This provides an advantage over the narrowly interpreted reserved right of the Rio Mimbres decision.

The Forest Service has asserted riparian rights in about 65 percent of its claims to the state of California since Rio Mimbres. In recent adjudications of Hallett Creek (Plumas National Forest) and Roaring Creek (Shasta-Trinity National Forest), for example, the agency claimed riparian rights for enhanced flows on a high-country spring for wildlife and for watering a protected elk herd. The state Water Resources Control Board rejected these claims in its 1983 decision on Hallett Creek. The Forest Service appealed the decision in the state superior court (Lassen County Superior Court Case 16291) and gained a favorable judgment in June, 1984. The state is planning its appeal.

This quiet dispute over a small spring displays how much national forest management has become influenced by state law since the Rio Mimbres decision. The Forest Service argues that a federal reservation possesses at least the same water rights as a private landholding and that its nonconsumptive uses are therefore protected by the riparian doctrine. The agency's position is supported by California court rulings since 1886, which evolved the principle that "the United States, with respect to the lands which it owns in this state, is a riparian proprietor as to the streams running through such lands" (*Palmer v. Railroad Commission*, 167 Cal. 162 [1917]).

The Water Resources Control Board argues a contrary legal principle based on California's assertion at statehood of full powers to govern the rights that apply to property, whether federal or private: "Riparian rights do not attach to lands held by the government until such land has been transmitted to private ownership," or unless they are explicitly granted by the state [*McKinley Bros. v. McCauley*, 215 Cal. 229 (1932)]. Although riparian rights attach to land that was once public domain and now is privately owned, the Water Resources Control Board rejects the Forest Service view that the reservation of a national forest from the public domain is analogous. If the Forest Service wins its point in the Hallett Creek case, the agency would recover much of the security that it lost in Rio Mimbres for uses that are deemed reasonable under state law.

The final decision on this issue will affect the legal status of about 20 million acres of federal reserved land in California and the water that drains from it. Interpreted more broadly, the outcome could affect federal water rights on reserved forestlands throughout the nation. It may clarify the extent to which the federal government "owned" water prior to reservation or relinquished its rights upon granting statehood and when opening the public domain to private settlement.

In short, a small spring has resurrected some basic issues about relationships within a federal system of government.

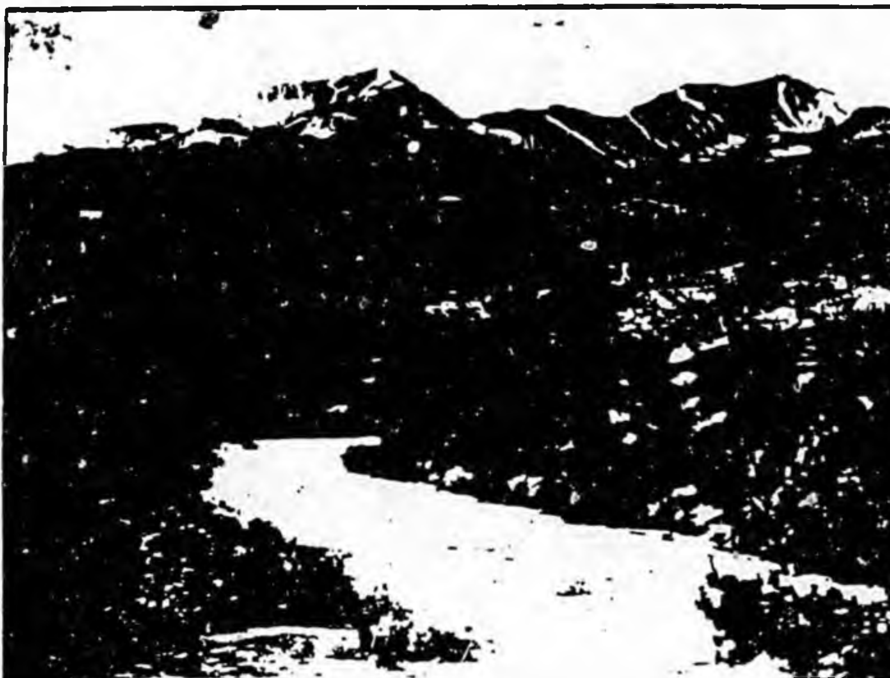
Controlled Access

As a third strategy, the Forest Service is testing the extent of its powers to regulate private uses of national forest water under the Federal Land Policy and Management Act of 1976. That act authorized the agency to permit or deny private access to water and other natural resources for uses on sites within national forest boundaries. The Forest Service grants special-use permits on the basis of projects' environmental soundness. The permit authority may allow the Forest Service to confine the scope of private water rights and to expand its control of water allocation.

Small-scale hydroelectric developments in the Pacific Coast states, and trans-mountain diversions of national forest water to urban areas in the Rocky Mountain states, are the major water projects that require Forest Service special-use permits. The agency has denied permits for trans-mountain diversions that did not meet environmental standards. Thus far, no one has challenged a denial. The Forest Service has also stipulated conditions before granting a permit. Although these have been challenged as a "taking" of private water rights, all such cases have been settled out of court with the conditions intact. The agency has not yet denied permits for hydroelectric projects, except in one case where a site had been selected in a primitive area. Officials may be reluctant to test the possibly superior authority of the Federal Energy Regulatory Commission.

The Forest Service has thus far considered applications for permits on a case-by-case basis. Some permit-granting personnel know which sites in their forest are suited or not for various water projects, and have a mental map that helps them respond to or guide permit requests. Nevertheless, the approach places the initiative for water and related land-management decisions with the applicant rather than the agency. The policy also makes it difficult to assess the cumulative environmental and management effects of individual projects.

As an alternative, the Forest Service might identify opportunities for water projects that do not conflict with its management objectives. The agency might specify these opportunities in national forest plans. It could also treat water development as an explicit objective in the forest planning process. Both alternatives may advertise opportunities for water development and thereby increase pressures on national forest resources to an extent that the Forest Service would prefer to avoid. But identifying or planning prospective water developments would also allow the agency to grant permits that conform with its national forest plans and to strengthen the power of its permits with whatever authority forest plans have or may gain in the future. The choice between maintaining management flexibility and increasing control of water management decisions would seem to depend on how strongly state and other federal authorities attempt to modify the agency's options on the national forest domain.



Arkansas River, San Isabel National Forest: The Colorado supreme court decided against federal reserved water rights for "supplemental" uses.

Subsequent Reserved Rights

The fourth Forest Service strategy seeks reserved rights for purposes of the national forests that Congress legislated subsequent to the 1897 Organic Act. According to the Multiple Use–Sustained Yield Act:

> It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of this Act are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in the Act of June 4, 1897 [the Organic Act].

The Supreme Court, in its Rio Mimbres decision, interpreted the "supplemental" purposes to be "secondary" to those specified in the Organic Act. The Court stated further that these other purposes were not entitled to reserved rights because they were not specified as reasons for the original forest reservation.

However, the Multiple Use Act was not directly at issue in the Rio Mimbres case, and need not have been interpreted to achieve the decision. This aspect of the Court's opinion, therefore, seems particularly vulnerable to challenge.

The Forest Service contends that the Multiple Use Act implied the same reserved rights for "supplemental" purposes after 1960 as the Organic Act implied for the maintenance of timber supplies and favorable stream flows

The agency has challenged, or has implied potential challenges to, the Court's interpretation wherever [illegible] courts have considered Forest Service water rights.

The Forest Service brief for the 19[illegible] adjudic[illegible] Riv[illegible] fo[illegible] lif[illegible] w[illegible] priority subsequent to June [illegible], 1960, the day that Congress passed the Multiple Use Act. The agency's briefs for California's Hallett and Roaring Creek adjudications refer to the act's provisions as a basis for possible Forest Service claims in the future. Although the Colorado Supreme Court relied on Rio Mimbres and decided against federal reserved water rights for "supplemental" uses [*U.S. v. City and County of Denver*, 656 Pacific 2d 1 (1982)], the Forest Service has continued to press its claim in Utah, in adjudications of the Bear (Cache National Forest) and San Rafael (Manti National Forest) rivers and of the Lower Colorado tributaries (Fish Lake, Dixie, and Manti national forests).

[illegible]rande, New Mexico: "An agency that loses rights to water loses some of its power to manage land."

Implications

When the Supreme Court decided that the Mimbres Valley Irrigation Company had greater right to the limited flows of the Rio Mimbres than did the Gila National Forest for stock watering and the maintenance of instream uses, the court removed the absolute security of federal water claims for multiple uses. In requiring that future claims be governed by state law, the court put them to test against the losses they might cause to private and state interests. The decision increased the costs of fulfilling a multiple-use plan.

Responses that the Rio Mimbres decision provokes will almost certainly moderate its effects. The liberties of judicial interpretation that the decision contains make it vulnerable to future court challenge, to clarifying legislation and, as the Forest Service is demonstrating, to administrative reaction.

The Forest Service has responded in diverse and imaginative ways to regain control, and reduce the costs, of water that it requires to fulfill its long-term mission. In addition to the four strategies described, the agency may apply others as well—depending upon the responses of the states, the courts, Congress, other federal agencies, and the administration. The agency could exercise its power of eminent domain, paying just compensation to buy rights to the water it needs. It might charge or share costs with the states for watershed management services. State and Forest Service officials might form water councils for joint planning of forest water management and of the financial allocations management requires. The Forest Service might develop cooperative arrangements with the Federal Energy Regulatory Commission for joint land- and water-management planning on the national forests.

The Forest Service may curtail the planned mix of outputs to match the availability of water—or it may propose to shift the mix toward timber production, for which the agency's reserved right remains undiminished. The Forest Service may possibly use its authority for such decisions to gain state concession of water for purposes that the national forests satisfy on the states' behalf. The current administration's emphasis on timber and its exceptionally large cuts of water-related Forest Service budgets—which are responsive to the conservative winds that shaped the Rio Mimbres decision in the first place—may have the ironic effect of discouraging states from aggressively pursuing the potential expansion of states' rights that the Rio Mimbres offers.

Whatever the responses to it, the Rio Mimbres has had one effect that seems certain to endure: It closed a previously open-ended federal reserved right that had become an anachronism in water-scarce and increasingly populated states of the West. The most successful attempts to expand Forest Service rights will not regain the scope and security that those rights previously enjoyed. In adjusting to the constraint of the new rules, the Forest Service can shift or reduce its planned outputs, develop water-related arrangements with state, private and other federal interests, or increase its allocations of staff and funds to secure the water conditions that its national forest plans require. The agency's choices among these possibilities are bound to affect the future character of its organization as well as its management of national forestlands. ■

Literature Cited

FAIRFAX, S.K., and P.T. ANDREWS. 1979. National forests and reserved water rights in the western United States. J. For. 77:648–651.

HILL, J.R. 1982. Reserved rights for national forests after *New Mexico*. R-4 Hydrograph [illegible] 1982:9–11.

ROSGEN, D., and L. SILVEY. 1983. Procedure and rationale for securing favorable conditions of water flows on National Forest System lands. [illegible] Rocky Mountain Regional Office, Lakewood [illegible]

Ted Spiegel Black Star

THE WATER WARS

From the Missouri River to the Pacific Ocean, Lawyers for Indians, Industries and Inhabitants Are Struggling Over Dwindling Liquid Resources

BY JOHN RILEY

THE BATTLE IS FOR the future — a battle over too many dreams and too little water that threatens to make a shambles of the American West's system of water law.

From the Missouri to the Pacific, in the 17 states where an arcane legal doctrine called "prior appropriation" has allocated Western water's power and wealth for more than a century, lawyers for miners, farmers, Indians and governments are in the midst of a changing historical moment which is testing that system as never before.

Demand is gradually outstripping supply. In state after state, the water bar is grappling with complex new groundwater issues, regulatory schemes and complicated "general adjudications" of conflicting water rights in stream basins. Established water rights are suddenly threatened by environmental and conservationist restraints. Traditions of state hegemony are being tested by grandiose plans for out-of-state water export.

And all those issues are merely lightning bolts and thunder to the West's darkest and most tumultuous legal storm cloud: Indian water-rights claims.

About 60 of those cases, large and small, are already in court. Combined with potential claims in virtually every major Western stream basin, the estimated total — 45 million acre feet annually, equivalent to three times the flow of the Colorado River — could, quite simply, undercut many existing rights and profoundly affect the balance of economic power in the resource-rich West.

That, however, won't happen easily. The tribal claims are being hotly contested in litigation that some compare, in its acrimony and complexity, to a "Civil War battlefield."

In that sense, lawyers agree, the high-

© Copyright 1985, National Law Journal, reprinted with permission.

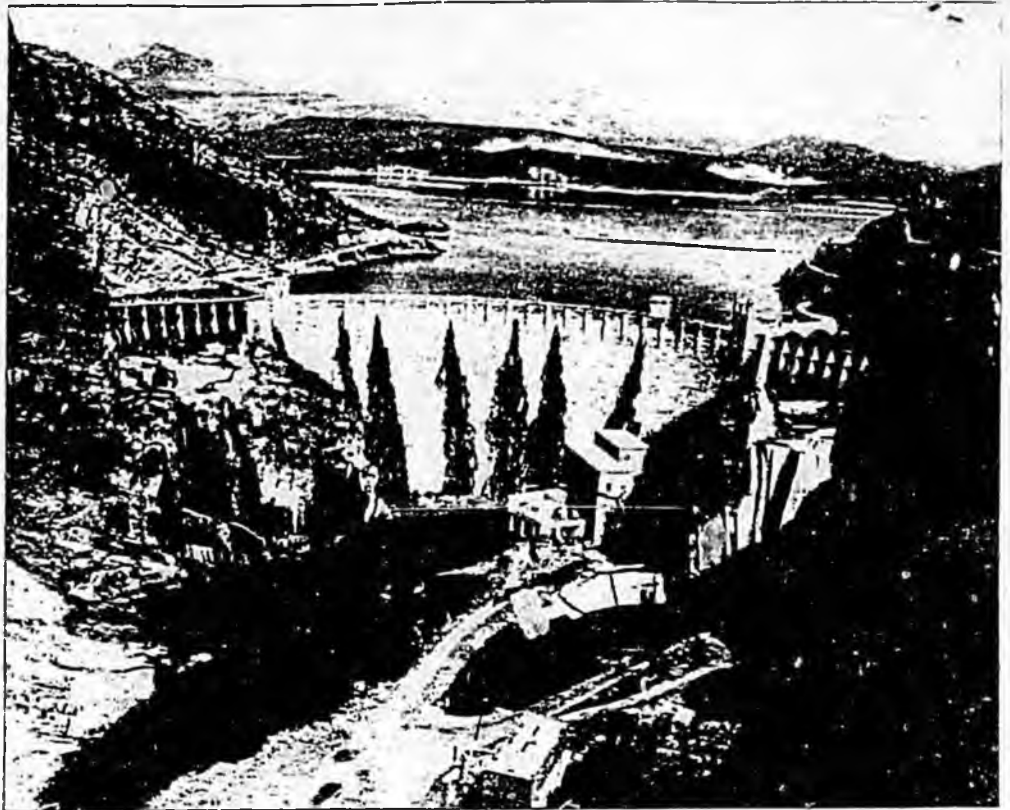
THE THEODORE Roosevelt Dam (right), 80 miles northeast of Phoenix, Ariz., is part of the Salt River Project — a good example, lawyers say, of the massive federal public works that fueled Western growth but now are turning out to be a double-edged sword.

In litigation in southern Arizona that began a decade ago and now encompasses an estimated 80,000 parties in the Salt and Gila river basins, Indian tribes are claiming the federal project used their water as the engine of growth for cities like Phoenix and Tucson.

The litigation is among the most complex in the West, and some speculate it could continue for decades. 'The tensions between Indians and non-Indians are very high, and it would be very difficult to structure a negotiated settlement,' says Rodney T. Lewis, general counsel to the Gila River Indian Community, a major tribal claimant. 'We're committed to following it down to the end.'

'If they think for one minute they're going to get all that water, they're crazy,' answers James M. Bush of Phoenix's Evans, Kitchel & Jenckes, P.C., which represents major mining interests in the region. 'If you granted all the claims and they took the water someplace else, Phoenix would dry up,' adds Salt River Project attorney Jon L. Kyl of Phoenix's Jennings, Strouss and Salmon.

Mr. Lewis faults such 'hysteria.' He says the real fight is future growth, between Indians 'and people from Minnesota who want to retire here.'



The West: Whose Water Is It?

profile tribal claims merely reflect the pervasive effects of growing Western water conflicts on the legal profession.

"You can't really talk about any activity — real estate, mining, electricity, agriculture — without being concerned about water," says James M. Bush, managing partner at the Phoenix, Ariz.'s Evans, Kitchel & Jenckes, P.C.

"It's an increasingly contentious, difficult field," adds Paul L. Bloom, a prominent Washington, D.C., water lawyer who counsels both public and private clients and law firms lacking water expertise. "The conflicts are increasing, and that's what keeps lawyers' kids in college."

FEW LEGAL RULES are so marbled into the political and social history of a region as the West's "prior appropriation" doctrine.

Eastern water law employed the "riparian" doctrine, which gave owners of land adjoining a water body the right to its shared use — so long as they did not unreasonably interfere with one another — and also gave some protection to water as an environmental resource.

The West was different. It was built around water-intensive industries — mining first, then irrigated farming. Water was short, and both industries required assured, certain supplies for locations that were often distant from the water, rather than supplies subject to future developments by other landowners along a stream.

The catchwords of the doctrine that emerged — "use it or lose it" and "first in time, first in right" — encouraged consumption by providing certainty. The more you used the more you owned, and junior users would be cut off in times of drought.

"The doctrine just flat out ignored any environmental values," adds Prof. Charles F. Wilkinson, an Indian and water law expert currently teaching at the University of Colorado School of Law. "Under prior appropriation, you can just take water out of a stream and drain it."

As the West developed, federal policies encouraged the consumptive philosophy. Federal law deferred to the state doctrines. The federal government left the states to work out their own disputes through interstate water compacts, and encouraged development with massive, subsidized dam, reclamation and irrigation projects.

Now, lawyers say, the hands that fed the West are turning around to bite it.

After a century of stimulating agricultural, industrial and population growth through water projects, the federal spigot is running dry. And, with water supplies already strained, the freewheeling approach of prior appropriation is proving to be a double-edged sword.

Indeed, by most accounts the new tight-water legal landscape in the West is filled with assaults on most of prior appropriation's most sacred themes: certainty and stability, state control and encouragement of consumption.

NOWHERE IS THAT clearer than in the Indian claims fight — an issue that, lawyers say, has made a mockery of stability and certainty.

"We have more than 50 lawsuits that impact on every major water system," says Mr. Bush, who heads an Indian water-rights committee of the Western Regional Council, a consortium of major resource-oriented businesses. "Those lawsuits will result in the slowing down if not the complete frustration of every economic development proposal in the West — Indian and non-Indian — because of uncertainty [illegible] at who owns what."

"What's new," adds Susan M. Williams, an Indian law specialist with Fried, Frank, Harris Shriver & Kampelman in Washington, D.C., "is that tribes are increasingly aware that they have these rights and are making claims in greater numbers than ever before at exactly the time when development interests are becoming keenly aware of possible shortages. We're in the eye of the storm."

Ironies abound in the history of the claims. In the 1908 case of *Winters v. U.S.*, 207 U.S. 564, the Supreme Court ruled that Indian reservations carried with them a "reserved right" to all water necessary to fulfill the reservation's purpose, and gave the tribal rights a priority date as of the creation of the reservation.

That made them senior and superior to most state-recognized prior-appropriation rights. Moreover, the tribal claims assert, at the same time the federal government should have been protecting Indian water rights in its capacity as "trustee" for the tribes, it instead was using Indian water in the massive reclamation projects that fueled non-Indian Western development.

The result, says Professor Wilkinson, has been a "shadow body of law" clouding the validity of non-Indian water rights throughout the West — and a barely submerged resentment against the federal government on all sides of the fight. "The West ought to be walking hand in hand to Washington and saying, 'You created this problem. Now solve it,'" says Mr. Bush.

Washington hasn't, and the vacuum has been filled with litigation — ranging from damage suits by tribes against non-Indian development interests for past and ongoing misappropriation of their water to a rising number of massive "general adjudications" of all rights in a stream basin initiated by states or private parties to clear up uncertainties.

WHATEVER THEIR form, the cases frequently turn into legal nightmares. One reason is disagreement over the proper forum. Tribes invariably prefer to have their claims heard in federal courts while states and non-Indians press with equal vigor for state court general adjudications. The battles can last for years and the result, says Mr. Bloom, is that "enormous resources are expended over what is essentially a very sterile issue."

In southern Arizona, for example, Indian claims in the Gila and Salt river basin near Phoenix and Tucson exceed all available water, by some estimates, by a factor of three. Those claims spawned one of the nation's largest adjudications, now involving an estimated 80,000 parties.

It began in 1974. But it was just two weeks ago that the Arizona Supreme Court brought jurisdictional wrangling close to an end — subject only to an expected petition for certiorari — by resolving the key remaining issue in favor of a state forum. *U.S. v. Superior Court of the State of Arizona*, 17623-SA.

"We've been fighting over where we're going to fight for 10 years," notes Evans Kitchel's Alvin H. Shrago, who has represented two mining companies, ASARCO Inc. and Phelps Dodge Corp., in the case.

Although recent Supreme Court decisions clearing the way for state court adjudications may limit jurisdictional wrangling in the future, lawyers say, water adjudications promise to remain lengthy. In northern New Mexico's major Indian rights case, *New Mexico v. Aamodt*, CIV 6639-M (D.N.M.), for example, lawyers in the state engineer's office filed in federal court for the express purpose of avoiding a laborious fight over jurisdiction. That was in 1966 — more than 18 years ago.

Part of the problem is their historical complexity. In New Mexico, for example, the status of land and water rights under Spanish colonial administration is a pivotal issue, and the Arizona case involves challenges to 1910 and 1935 decrees agreed to by the Depart

ment of Justice on behalf of some Indian tribes.

But observers and participants in Indian claims suits agree that the key cause of delays is uncertainty — both legal and technical — about how to quantify Winters rights.

The clearest standard came in a 1963 case, when the Supreme Court declared that Indians were entitled to all water needed to irrigate the "practicably irrigable acreage" on their reservations. *Arizona v. California*, 343 U.S. 546. And debate over that standard is at the core of the massive tribal claims currently before the courts.

Putting numbers to a standard that is equal parts agricultural economics and hydrological science, lawyers say, usually turns into a costly war of experts that, in the context of a general stream adjudication, is fought between hundreds or thousands of parties with conflicting claims.

"It's like a free-for-all," explains Mr. Shrago.

AND THE COMPLEX technical issues are mirrored by vigorous legal debate over what the Supreme Court actually meant.

One unresolved issue, for example, is whether the water needed to cultivate all "practicably irrigable acreage" is to be measured by today's technology and economic circumstances, or those prevailing on reservations 80 years ago.

Such issues aside, however, lawyers for non-Indians generally acknowledge that if the 1963 standard were "cast in stone," the Indians would have a very strong case.

"Those who really understand the situation understand that the Winters claims are very, very serious," says Jon L. Kyl, a lawyer at Phoenix's Jennings, Strouss and Salmon who represents a major non-Indian water user in the southern Arizona litigation. "And under the Supreme Court's clearest enunciation of the standard to date they would be very substantial. But reality has to filter into this somewhere."

"Reality," to Mr. Kyl and others, means some recognition that the Supreme Court "didn't know how little water there was compared to the number of claims that might be made." And recent Supreme Court cases, while not overturning the old standard, have referred to Indian rights as a "reasonable apportionment" of water necessary to ensure their livelihood.

"My hunch," says Prof. Albert E. Utton, who teaches Indian and water law at the University of New Mexico School of Law, "is that the court is moving from strict adherence to the practicably irrigable standard to a more equitable, balancing approach."

While Indian advocates acknowledge the bad omens, they are a long way from giving up on the Winters claims. "I understand the concerns," says John E. Echohawk, a lawyer and director of the Native American Rights Fund in Boulder, Colo., "because of the growing conservatism of the court. But whether they will actually back down I don't know because it's a very clear precedent, and it's rare that they back down from a precedent."

"We're certainly going to press our claims," adds Rodney T. Lewis, general counsel to the Gila River Indian Community, one of several major tribal claimants in the southern Arizona adjudication. "But the court may change the law."

The uncertainties on all sides of the Indian claims issue have generated considerable talk in the West of negotiated settlements. Many feel that what the Indians really need is "wet water" — the Western term for water that can be used — and that can come only through settlements that would compromise the paper rights in return for federal, state, local and private financial assistance for development projects.

"The needs for wet water and clear title have the potential for bringing people together," says Ms. Williams of Fried Frank, who is currently involved in a negotiation in South Dakota. But the problem, she and others say, is the federal government. Although official policy is to encourage negotiated settlements, lawyers on all sides complain that the policy is not being backed up with money.

One issue is Indian representation. The federal government often has proprietary water claims as a major landowner and fiduciary responsibilities to multiple tribes with competing claims in the same stream basin. As a result, Indians don't trust the Justice Department and the Department of the Interior's Bureau of Indian Affairs to represent their interests effectively.

They say it's almost impossible for them to negotiate intelligently without more funding to hire their own independent lawyers and experts. The government, on the other hand, feels it neither can nor should delegate its trust responsibilities and can't afford to "duplicate" efforts, according to Timothy Vollmann, associate solicitor for Indian affairs at the Interior Department.

But the biggest problem, most agree, is budgetary restraint on money for Indian development projects.

"The Interior Department is steadfastly refusing to put any money on the table," says Randall T. Cox, a Wyoming assistant attorney general who has been trying to work out a settlement of Indian claims in the Big Horn River stream basin. "Their people come to seminars and continuing legal education meetings out here and give great speeches about settlement, but then when we try to put a solution together it's just categorically ruled out."

Indians, Expor

Riparian and Prior Appropriation States

Map: Water Policy Report of the Western Governors Association

James M. Bush

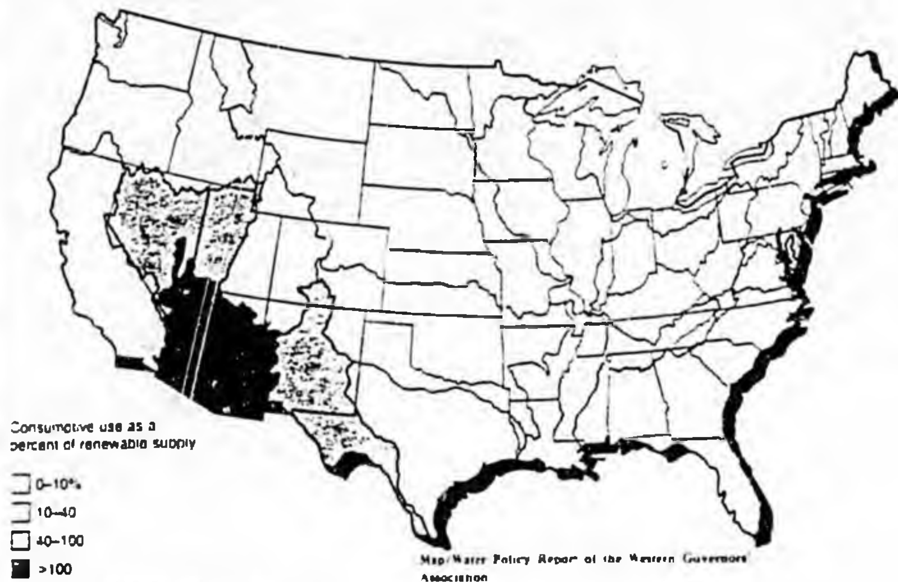
Mr. Bush, the managing partner at the Phoenix, Ariz., firm of Evans, Kitchel & Jenckes, P.C., heads an Indian water-rights committee of the Western Regional Council, a consortium of major resource-oriented companies. He urges negotiation and says pending lawsuits 'will result in the slowing down if not the complete frustration of every economic development proposal in the West because of uncertainty about who owns what.'

Randall T. Cox

An assistant attorney general in Wyoming who has been trying to work out a settlement of Indian claims in the Big Horn River basin, Mr. Cox's comments are typical of many who say the federal government created the problem and now isn't doing enough to solve it. 'The Interior Department is steadfastly refusing to put any money on the table,' he says. 'Their people come out here and give great speeches about settlement, but then when we try to put a solution together it's just categorically ruled out.'

Test Water Law

Use as Percentage of Renewable Water Supply



Map/Water Policy Report of the Western Governors' Association

John E. Echohawk

Mr. Echohawk, a lawyer and director of the Native American Rights Fund, says the Indian water claims will be vigorously pursued but shares the concerns of others that the Supreme Court may be back-pedaling on its standards for quantifying Indian water rights. 'Whether they will actually back down I don't know,' he says, 'because it's a very clear precedent and it's rare that they back down from a precedent.'

Charles F. Wilkinson

An Indian law and water law specialist currently teaching at the University of Colorado School of Law, Professor Wilkinson points out that Indian rights is not the only area of conflict in Western water law. A growing environmental ethic, he says, is making the water bar less monochromatic and challenging the consumptive philosophy that has long held sway. 'The pressures for development are creating scarcity, but so are the pressures for non-development,' he explains.

The result, argues Mr. Bloom, who was an attorney in the state engineer's office when New Mexico filed its Aamodt case in 1966, is "a mammoth Westwide legal gridlock."

WHILE IT ATTRACTS the most attention, the Indian water claims fight is hardly the only major legal battleground in Western water. Another key emerging issue, lawyers agree, is water export. With increasing regularity, proposals to take water from one state and use or sell it in another are challenging prior appropriation's tradition of state control.

"With increased water shortages, it has increased prominence," says Prof. Douglas L. Grant, who teaches water rights at the University of Idaho College of Law.

The area already has seen considerable controversy. A 1982 proposal, now on hold, to use available water from South Dakota in a coal-slurry pipeline to the East raised threats of litigation from downstream states.

A pending application from water-starved El Paso, Texas, to pump groundwater from southeastern New Mexico already has resulted in recent federal court decisions on two different anti-export statutes. And there is growing debate over a private consortium's plan to obtain water rights in Colorado and sell 300,000 to 500,000 acre feet a year to San Diego.

In 1982, the Supreme Court gave impetus to such plans with a ruling that water was an article of interstate commerce. Since then, lawyers say, it has become clear that long-standing "embargo" laws will be struck down, and the fate of subtler restrictions is increasingly unclear.

The trend has states with available water increasingly worried that they won't be able to husband it for their own future needs, and that prior appropriation — untrammeled by export restrictions — will allow the water to be gobbled up by out-of-state markets.

The prospect is not a popular one. In New Mexico, for example, Peter T. White, counsel to the state engineer, contends the El Paso plan will "undermine sovereignty," making his state's economic future a vassal to faster growth and poorer water management in Texas. So far, however, El Paso has had the better of the court battles. *El Paso v. Reynolds*, 80-730 (D. N.M.).

"If you put it in sovereignty terms, it was settled 200 years ago [when the interstate commerce clause was drafted] that you can not allow each state to be sovereign in economic terms," answers El Paso's lawyer, Pieter M. Schenkkan of the Austin, Texas, office of Houston's Vinson & Elkins. "We're going to get the water."

ALTHOUGH INDIAN RIGHTS and interstate export lead almost everyone's list of concerns, anticipated shortages have had broader effects on Western water law and lawyers.

In Arizona, for example, a comprehensive water-management code was adopted in 1980 as a condition for federal funding of the Central Arizona Project, an aqueduct bringing water from the Colorado River to the Tucson and Phoenix areas.

It includes mandatory conservation requirements for water users, notes Kathy Ferris, chief counsel to the state's Department of Water Resources, "and it's those kinds of things that create more need for lawyers."

In Texas, Mr. Schenkkan says shortages are creating "a lot of water-related business, and it's more and more varied." For example, he notes, as water costs have gone up, water rate cases — a mixture of contract law, utility law and water law — are "growing a great deal in importance."

To some, the changes represent the emergence of a conservationist and environmental ethic to challenge the consumptive philosophy that once held sway. "We are seeing an environmental perception of water clashing with the prior appropriation doctrine," says Professor Wilkinson.

He points, for example, to the gradual intrusion of federal environmental laws and policies into water quantity issues, and to a 1983 California Supreme Court case imposing a "public trust," senior to existing prior appropriation rights, to protect the environmental values of watercourses. *National Audubon Society v. Superior Court of Alpine County*, 656 P.2d 709 (1983).

"For people who see other uses than consumptive uses," he says, "it's a central case. The pressures for development are creating scarcity, but so are the pressures for non-development."

Mr. Bloom, who worked for a client on the losing side of the California case, agrees on its importance. "It could have a destabilizing, rippling effect throughout the West," he says. "I would be very surprised if environmental groups don't attempt to use it in other states."

And both men agree, as well, that such cases reflect the broader changes in what was once a narrow specialty.

"Even the nomenclature is changing," says Professor Wilkinson. "The water bar used to include only development lawyers, but now it includes lawyers for environmental groups, Indian tribes, all kinds of different people."

"When you serve notices on 1,000 people in Santa Fe [N.M.] for a general stream adjudication, lots of lawyers start getting questions and sooner or later they get a water practice," adds Mr. Bloom. "And that's what's happening throughout the West."

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

Cyril R. Wanamaker, Chairman

SB 150 PROPOSED AMENDMENTS RESULTING FROM JANUARY 22, 1986

SENATE RESOURCES COMMITTEE HEARING

Section 46.15.040 (Note: Mike Frank is sending a letter clarifying the state liability question)

Amend subsection (d) to read: The commissioner's issuance of a permit under AS 46.15.080, or of a certificate under AS 46.15.065 or AS 46.15.120, does not represent a guarantee by the state to the permittee or certificate holder that water will be available for appropriation at a certain volume, quality, artesian pressure, or cost. This subsection does not, however, alter any rights a permittee or certificate holder may have against later appropriators, including governmental agencies.

Section 46.15.165(c)

Add a new subsection (7) to read: serve the order on all mining claimants of record with the United States and the State as of the date of the order initiating the administrative adjudication. Failure of the commissioner to notify mining claimants under this subsection shall not disable the commissioner from otherwise adjudicating the rights of parties in the adjudication

(Note: If there is a way to avoid opening the door to notice to special interests groups, we should do so. Records of mining claimants are fairly easy to obtain; however, title searches for other landowners within a basin would be very time consuming and expensive. However, Frank Homan advised me he doesn't believe Senator Fahrenkamp will accept the bill without this. The last sentence is to provide for the situation where DNR may miss a mining claimant during the record search and to allow the adjudication to continue given the omission.)

Section 46.15.165(c)(3)

Amend this subsection to read: (3) serve the order on any person who owns or claims land within the adjudication area if the land is held in trust by the United States for the person or if the patent, deed or certificate to the land from the United States was issued pursuant to 25 U.S.C. 334 (Indian General Allotment Act of February 8, 1887, 24 Stat. 389, as amended and supplemented), 25 U.S.C. 372 (the Allotment Act of June 25, 1910, 36 Stat. 855), 43 U.S.C. 270-1, 270-2 (the Allotment Act of May 17, 1906, 34 Stat. 197), or any other allotment act, or the Alaska Native Townsite Act of May 25, 1926, 44 Stat. 629, and serve the order on the United States on behlf of any such person;

(Note: Bruce Landon, U.S. Dept. of Justice, worked with Mike Frank and has approved this language. We should explain in the letter that notice to specifically named agencies, such as the Bureau of Indian Affairs (BIA) can be named in the implementing regulations to keep the statute uncluttered by numerous references to numerous federal agencies. In any case, notice to the federal government of any trust land that might have federal reserved water rights must be served primarily on the U.S. Justice Department.

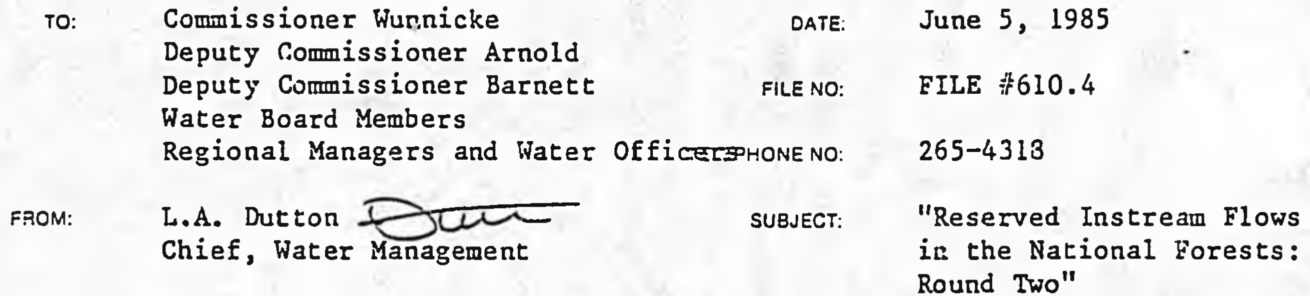
Section 46.15.165(c)(6)

Amend this subsection to read: (6) serve any regional corporation or village corporation established under the Alaska Native Claims Settlement Act, 43 U.S.C. §§1601-1628, which has pending land selections or acquired ownership to lands under that Act which are located within the adjudication area; and

FRANK

MEMORANDUM State of Alaska

Department of Natural Resources, Division of Land and Water Management



TO: Commissioner Wunnicke
Deputy Commissioner Arnold
Deputy Commissioner Barnett
Water Board Members
Regional Managers and Water Officers

DATE: June 5, 1985

FILE NO: FILE #610.4

TELEPHONE NO: 265-4318

FROM: L.A. Dutton
Chief, Water Management

SUBJECT: "Reserved Instream Flows in the National Forests: Round Two"

This article, reprinted with permission from the Western Natural Resources Litigation Digest, provides some valuable insights to instream flow reservations as federal reserved water rights. The article is pertinent to Alaska's water resource managers because of the two national forests in Alaska (the two largest in the country) and because the federal reserved water rights in these national forests will eventually be adjudicated.

We thought you would find it of interest.

LAD:kmb

Enclosure

cc: Tom Hawkins
Mike Frank
Bob Martin
Dan Easton
Christopher Estes
Ann Puffer
Bill Long
Mike Vediner

RESERVED INSTREAM FLOWS IN THE NATIONAL FORESTS: Round Two

by Steven J. Shupe*

INTRODUCTION

The role of water arising upon federally owned lands is of critical importance to the economy and the environment of the Western states. It has been estimated that 61 percent of the West's water supply originates on federal land, with more than 95 percent of the population depending upon such water to some extent. 1/ In certain regions, this dependency is nearly absolute. For instance, in the Rio Grande area 77 percent of the average runoff originates on federal reservations, while 96 percent of the Upper Colorado River derives from such lands. 2/

The lands reserved within the National Forest system are by far the most significant factor in this water supply picture. Runoff from the National Forests account for nearly nine-tenths of the total water originating upon federal lands in the West 3/ — runoff that is critical to supplying the thirsty cities, farms, and industries throughout this region. Not only have water users come to depend upon utilizing this water after it flows down from the forests, but many users have also invested in diversion works that withdraw water from within the National Forest land itself. Traveling through the mountains of the West, thousands of such reservoirs, ditches, and canals are encountered in the National Forests of the region.

In 1970, the seeds of a threat to these diversions were planted during a general stream adjudication in New Mexico, wherein the United States claimed a reserved right to flows in the Gila National Forest for the purpose of maintaining the stream environment. Such instream flow rights were claimed to have a senior

1/ Public Land Law Review Commission, "One Third of the Nation's Land," A Report to the President and to the Congress, (1970) at 141.
2/ United States v. New Mexico, 438 U.S. 696, 699 (1978).
3/ Public Land Law Review Commission, (n.1) at 141.

* *Mr. Shupe is a water lawyer and consultant based out of Denver. He was formerly an Associate at the Denver law firm of Davis, Graham & Stubbs, before joining the Natural Resources Section of the Colorado Attorney General's Office, where he was involved in researching issues discussed in this article. He has also worked as an engineer for the Water and Land Resources Department of Battelle Northwest, Richland, Washington. He received a B.S. in Civil Engineering (1974) and an M.S. in Environmental Engineering (1975) from Stanford University. and a J.D. from the University of Oregon (1982).*

Reprinted with permission from the Western Natural Resource Litigation Digest, WNRL, Spring, 1985. For further information please contact Tish

priority relating back to the date when the forest reservation was created. As a consequence, during times of water shortages, they would preclude continued diversions by those users who subsequently had come to rely upon withdrawing streamflows above or within the forest boundary. Such a claim for senior instream rights, if successful, would have had enormous implications upon Western water users. It is not surprising that many states joined as amica curiae when the case reached the Supreme Court.

A collective sigh of relief was breathed by numerous water interests in the West when the Supreme Court issued its decision in **United States v. New Mexico.** 4/ The Court held that no reserved instream flow rights for environmental purposes existed within the National Forests, since the primary purpose of the forest reservations was statutorily limited to protecting the watershed and the timber resources. This ruling appeared to free both current and future water development from the potential constraints and uncertainties posed by reserved instream flow rights within the National Forests. Such a conclusion, however, was soon to prove false.

In Colorado, Round Two of the battle for reserved instream flows is currently taking shape. This article describes that battle, detailing both the technical and legal bases for the new claims of the Forest Service to instream flow rights. The article begins by presenting a background for these claims, summarizing the reserved rights doctrine and the historical role of water in the establishment of the National Forest system. It then describes the status of the federal claims to instream flows in the National Forests, including the current battle in Colorado. The discussion concludes with an analysis of the probable outcome of Round Two of this conflict, and with some suggested alternatives to protracted litigation.

WATER IN THE ESTABLISHMENT OF THE NATIONAL FOREST SYSTEM

Based on military needs, the first forest legislation in the United States in 1817 gave authority to the president to preserve oak timber on public lands for the Department of the Navy. 5/ It was not until the middle of that century, however, that general concern developed in Washington over the destruction and waste of the nation's timber. The first official federal concern was expressed in 1849 in the Report of the Commissioner of Patents:

"The waste of valuable timber in the United States will hardly begin to be appreciated until our population reaches 50 million. Then the folly and shortsightedness of this age will meet with a degree of censure and reproach not pleasant to contemplate." 6/

Although much lip service was paid to the idea of forest protection, and a bit of weak legislation was enacted over the subsequent decades, it took until 1891 for a federal bill to pass which authorized the president to withdraw lands from the public domain as timber reserves. 7/ This legislation was superceded by the Organic Administration Act of 1897 (30 Stat. 34) which defined the parameters upon which forest reservations could be established:

"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

4/ 438 U.S. 696 (1978).
5/ 3 Stat. 347 (1817), as amended by 3 Stat. 607 (1820).
6/ Report, Com'r of Patents, 1849, Part II, p. 41.
7/ Creative Act of March 3, 1891; 26 Stat. 1095.