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

Harold A. Ranquist

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

*Harold A. Ranquist**

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

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INTRODUCTION

"Have you ever heard anything about God, Topsy?"

The child looked bewildered, but grinned as usual. "Do you know who made you?"

"Nobody, as I knows on," said the child, with a short laugh.

. . . [a]nd she added,

"I spect I grow'd."¹

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

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

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

I. THE HISTORICAL SETTING, ORIGIN, AND SCOPE OF THE *Winters* DOCTRINE

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

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

The following discussion of the appropriation doctrine is not

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

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

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

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

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

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

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

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

Shortly after the close of the Civil War, legislative proposals were made to have Congress withdraw the mines from the public domain of the West and either operate or sell them to obtain revenue to retire the Civil War debt. The opposition of western Senators and Congressmen resulted, however, in the enactment of legislation in 1866⁶ which expressly confirmed both the rights of the miners and the rights of the appropriators of water.⁷ A current water rights treatise explains the effect of the 1866 Act:

The Act of 1866 thus gave *formal* sanction of the Government to appropriations of water on public lands of the United States, whether made before or after passage of the act, and rights of way in connection therewith, provided that the appropriations conformed to principles established by customs of local communities, State or Territorial laws, and decisions of courts. The act contained no procedure by which such rights could be acquired from the United States while the lands remained part of the public domain. *What it did was to take cognizance of the customs and usages that had grown up on the public lands under State and Territorial sanction and to make compliance therewith essential to the enjoyment of the Federal grant.*

. . . The act merely recognized the obligation of the Government to respect private rights which had grown up under its tacit consent and approval. *Jennison v. Kirk*, 98 U.S. 453, 459 (1879). It proposed no new system, but sanctioned, regulated, and confirmed the system already established, to which the people were attached.⁸

An 1870 amendment⁹ to the 1866 Act provided that all federal patents, homestead rights, or rights of preemption would be subject to any vested and accrued water rights or rights-of-way for ditches or reservoirs acquired or recognized under the Act of 1866. The amendment clarified the intent of Congress

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

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

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

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

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

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

Seven years later, in 1877, Congress passed the Desert Land Act¹¹ which

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

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

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

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

10. 1 HUTCHINS 173.

11. Ch. 107, 19 Stat. 377 (1877), as amended 43 U.S.C. § 321 (1970).

12. 1 HUTCHINS 173 (citations omitted).

13. 295 U.S. 142, 160-63 (1935).

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

As the dispute raged between states and among citizens of the various states over which doctrine, riparian or appropriation, was best as a practical matter, or which was legally correct, the United States Supreme Court observed in dictum in *Kansas v. Colorado*,¹⁸ a 1907 stream apportionment suit, that each state could determine for itself which rules, whether riparian or appropriative, it would follow with respect to water rights. The Court stated further that Congress had no authority to force either rule upon a state. In 1935, in *California-Oregon Power Co. v. Beaver Portland Cement Co.*,¹⁹ the Court's earlier dictum was elevated to law when the Supreme Court held that a federal patent conveyed only the land and that the question of relative rights to water among the various citizens of a state is a question for state law. The Court explicitly relied upon the Act of 1866, as amended in 1870, and in part on the Desert Land Act of 1877.²⁰ It should be noted that this case dealt only with the respective rights to water among the various citizens of a state.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id.

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

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

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

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

The *Winters* case and its progeny have been used by the courts to define the already existing power of the federal sovereign over water, particularly the power of the sovereign to reserve unappropriated water to fulfill its purposes.³⁰ Indeed, with the *Winters* doctrine, the courts have filled the void in the law created when Congress gave the states authority to administer individual rights to the use of water within their boundaries³¹ without establishing a means whereby the federal sovereign could secure the water needed for its purposes. It should be remembered in this context that there is no body of statutory law governing the reservation of water by the federal sovereign—the doctrine rests solely in judicial decisions.

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

27. *Id.* at 600.

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

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

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

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

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

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

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

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

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

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

34. 373 U.S. at 601.

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

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

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

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

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

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

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

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

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

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

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

39. *Id.* at 522-23.

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

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

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

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

41. The definition is included in a proviso which gives Congress the power to: [E]xercise exclusive Legislation in all Cases whatsoever . . . over all places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings

U.S. CONST. art. I, § 8, cl. 17.

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

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

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

44. *Id.* at 444.

II. THE APPLICATION OF THE *Winters* DOCTRINE TO INDIAN RESERVATIONS, FEDERAL ENCLAVES AND OTHER RESERVATIONS, AND THE PUBLIC DOMAIN

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

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

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

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

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

48. The following is a representative sampling: Ely, *Federal-State Relations in Water Resources Development*, statement in behalf of the American Bar Association before the National Water Comm'n, November 6, 1969; F. TRELEASE, NATIONAL WATER COMM'N, LEGAL STUDY NO. 5: FEDERAL-STATE RELATION IN WATER LAWS (1971) [hereinafter cited as F. TRELEASE]; Bannister, *The Question of Federal Disposition of State Waters in Priority*

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

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

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

The doctrine of the implied reservation of nonnavigable waters was applied in the *Winters* case⁴⁹ to an Indian reservation created pursuant to a treaty antedating the admission of Montana to statehood. Since that decision, the courts have applied the doctrine to navigable and nonnavigable waters⁵⁰ and to Indian reservations created by treaty, statute, and executive order,⁵¹ both before and after statehood.⁵² The courts have not, to date, excluded any Indian reservations from the ambit of the doctrine,⁵³

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

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

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

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

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

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

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

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

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

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

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

56. Cases cited note 55 *supra*.

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

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

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

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

1. *The nature of the Indians' reserved water right*

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

The Indians' reserved water rights cannot be lost by nonuse under state laws, nor by legal action of the various states through condemnation, inverse condemnation, or statutory enactment,⁶³ nor by private appropriation.⁶⁴ The overriding power of the federal sovereign under the supremacy clause⁶⁵ of the Constitution is the source of the protection of Indian property and water rights against state and private encroachment.⁶⁶ The right protected

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

trine to Indian reservations.⁷² For example, in *Arizona v. California*, the Indian water rights were measured in terms of the "practicably irrigable acreage" on the five reservations involved.⁷³ The Supreme Court, however, based its decision on the special master's report⁷⁴ which stated in pertinent part:

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

. . . The measurement used in defining the magnitude of the water rights is the amount of water necessary for agricultural and related purposes because this was the initial purpose of the reservations⁷⁵

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

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

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

73. 373 U.S. at 596.

74. *Id.* at 595.

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

76. 373 U.S. at 595.

77. *Id.* at 600-01.

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

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

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

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

The first, or contemplated purposes standard, would permit

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The standard for determining the practicably irrigable acreage and the economic feasibility of proposed water projects on Indian reservations may differ substantially from the standard applied to irrigation projects on non-Indian lands; the policies and objectives underlying the two situations are substantially different. In *Arizona v. California*,⁸⁸ the special master used a Bureau of the Budget report⁸⁹ as a guide in determining the soil characteristics and economic considerations involved in establishing the practicably irrigable acreage of the five reservations. This guide, however, was promulgated for application to reclamation projects; it was not developed to accommodate the special circumstances of Indian reservations. That report has since been rescinded,⁹⁰ as has its successor. Recently, Congress provided that another report, the findings and recommendations of the Special Task Force of the United States Water Resources Council,⁹¹ should be used in proceedings for evaluation of water and related land resource projects. The standards in those subsequent reports were also promulgated without consideration of the peculiar nature of Indian reservations.

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

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

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

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

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

fitting Indian land was recognized by the Leavitt Act⁹² which permits the Secretary of the Interior to postpone repayment of the construction cost of such projects. That postponement may be continued as long as the land remains in Indian hands. Since construction costs, as a practical matter, are repaid out of the increased value of the land when it is sold and its trust status is terminated, an Indian irrigation project can be considered economically feasible if it generates a return in excess of the operation and maintenance charges. This standard of feasibility which disregards construction costs is being urged by the United States in cases adjudicating the irrigable acreage of various Indian reservations.⁹³

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

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

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

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

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

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

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

2. *Aboriginal water rights*

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

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

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

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

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

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

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

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

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

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

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

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

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

103. Authorities cited note 54 *supra*.

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

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

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

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

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

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

In order to provide "storage, diversion, and development of waters for the reclamation of arid and semi-arid lands of the West,"¹⁰⁸ Congress enacted the Reclamation Act of 1902¹⁰⁹ and acts amendatory and supplementary thereto.¹¹⁰ Section 8 of the Reclamation Act of 1902 requires the Bureau of Reclamation to proceed in conformance with state law for the acquisition and administration of water rights in the construction and operation of reclamation projects.¹¹¹

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

108. 43 U.S.C. § 391 (1970).

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

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

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

[N]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provision of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from

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

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

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

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

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

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

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

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

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

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

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

116. 43 U.S.C. § 615kk (1970).

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

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

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

The Wind River Act¹¹⁸ provided, in pertinent part, that certain funds be devoted to

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

Another act¹²⁰ established irrigation systems for the allotted lands of the Utes of the Uintah and Ouray Reservation and provided that

such irrigation systems shall be constructed and completed and held and operated and *water therefore [sic] appropriated under the laws of the State of Utah*, and the title thereto until otherwise provided by law shall be in the Secretary of the Interior in trust for the Indians¹²¹

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

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

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

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

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

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

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

124. In that case the court declared:

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

A federal statute also affects the water rights of the Pueblo Indians. On its face, the Pueblo Land Act¹²⁶ applies only to the middle Rio Grande pueblos. The Act authorizes the Secretary of the Interior to enter into a contract with the Middle Rio Grande Conservancy District, a political subdivision of New Mexico, requiring the District to recognize the Pueblo Indians' prior and paramount right to water for the purpose of irrigating the historically irrigated acreage of the middle pueblos (approximately 8,346 acres). The Act also states that land *reclaimed* for the Indians (now about 12,000 acres) should have water rights on the same basis as non-Indian lands of the same character.¹²⁷ In compliance with the Act, the Secretary entered into such a contract, which has been followed for the past 40 years.

New Mexico contends¹²⁸ that all of the Pueblo Indians' water rights within the tributary areas of the Rio Grande, not merely those of the middle Rio Grande pueblos to which the statute expressly applies, are limited to an amount sufficient to irrigate the Pueblo Indians' historically irrigated acreage. The State interprets the Act's declaration, that the six middle Rio Grande pueblos are entitled to a first right to water for their historically irrigated acres, as an expression of congressional intent to define the extent of the water rights of all the Rio Grande pueblos.

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

Id. at 643.

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

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

127. *Id.* at 313.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. *Reserved and withdrawn lands.* With few exceptions, the national parks, monuments, and forests were created by Congress through the enactment of express statutes delineating the lands to be included; most of those lands were withdrawn from the public domain. Reservations, whether Indian reservations, parks, monuments, or forests, which have been exclusively or primarily created by withdrawal from *public* lands, have water rights under the reservation doctrine¹⁴¹ sufficient to fulfill the purposes for which the reservations were created. There is, however, one limitation on the reserved water rights of withdrawn lands that also limits any reserved rights for acquired lands. The reservation of water, either express or implied, by the federal sovereign is limited to the extent that water rights have already been acquired pursuant to state law. Thus, where private parties have gone upon the waterways or the public lands and acquired water rights under state law prior to the time of reservation or acquisition by the federal government, any federally reserved rights are subject to the prior state-granted rights held by those private parties.¹⁴²

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

147. 16 U.S.C. § 431 (1970).

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

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

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

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

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

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

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

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

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

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

151. 16 U.S.C. § 1 (1970).

152. 508 F.2d at 318.

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

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

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

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

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

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

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

1. Activities of the Bureau of Sport Fisheries and Wildlife

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

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

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

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

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

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

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

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

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

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

3. *Minimum stream flows*

Whether a right exists to maintain minimum stream flows for recreational fisheries and wild fowl habitats constituting part of a federal project¹⁵⁹ remains an unresolved issue. Its resolution is currently being sought by the Bureau of Sport Fisheries and Wildlife. The right to a maintained minimum flow has, in the past, been based on the language of the statute authorizing the project or on an agreement with the entity operating the project, such as the Bureau of Reclamation. As various streams, however, become the subject of adjudicative action, this right to a minimum stream flow should be asserted and then incorporated as part of the final decree in order to preserve the right and to establish its position in the ladder of priorities. The existence of this right may be contested because wildlife, fishery, and recreational uses historically have not been recognized as beneficial uses by most Western States. Recent developments in water law, however, may reverse this trend. Colorado and Washington have adopted statutes recognizing wildlife, fishery, and recreational uses as beneficial uses, thus enabling the state to establish a right to a minimum stream flow in various selected streams.¹⁶⁰

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

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

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

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

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

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

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

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

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

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

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

162. 43 U.S.C. § 971 (1970).

163. *Id.*

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

165. 43 U.S.C. § 315 (1970).

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

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

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

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

Another argument attempting to establish a federal reserved water right on the public domain is based on the Act of September 19, 1964.¹⁶⁹ The 1964 Act does not mention water; rather, it classifies lands for fish and wildlife development, outdoor recreation, timber production, watershed protection, and wilderness preservation. It has been argued that the 1964 Act impliedly reserves water, since the express purposes of the Act cannot otherwise be fulfilled. The Department of the Interior recently rejected that argument in a letter to the Department of Justice,¹⁷⁰ stating that the Act must be interpreted "consistent with and supplemental to" the entire Taylor Grazing Act, including the water clause in section 3.¹⁷¹ The Department of the Interior, in arriving at its decision, drew analogies to the water clause of the Reclamation Act¹⁷² and to section 27 of the Federal Power Act.¹⁷³

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

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

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

169. 43 U.S.C. §§ 1411-18 (1970).

170. Letter cited note 168 *supra*.

171. 43 U.S.C. § 315b (1970).

172. 43 U.S.C. § 383 (1970).

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

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

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

3. *Summary*

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

E. Application of the Winters Doctrine to Military Reservations

The Federal Constitution specifically provides for federal reservations for the use of the armed forces.¹⁷⁵ The right of the United States to use as much water as desired for these military reservations went uncontested for many years. The military is just becoming aware, however, of the many implications of applying the *Winters* doctrine to the operation of its various military reservations. This new awareness, demonstrated in part by recent articles in *The Army Lawyer* discussing the water rights of military reservations,¹⁷⁶ is the result of two recent occurrences. First, litigation in the Colorado state courts¹⁷⁷ is adjudicating all rights to the use of water in each watershed in that state. That adjudication involves the water rights of various military reservations, including the Air Force Academy. Second, there is a growing demand on the nation's water supply which may limit the water

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

The Congress shall have Power . . . [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings

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

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

available for military reservations. This demand is evidenced in part by a recent Environmental Protection Agency report¹⁷⁸ indicating that within a few years the flow of the Potomac River may be deficient for demands placed on it during several weeks each summer. Recognizing this increasing demand, one eastern state, Mississippi, has already adopted some aspects of the prior appropriation doctrine, and more are considering it.¹⁷⁹ Because of the rapidly increasing demand for water, issues concerning federal reserved water rights for military reservations will be increasingly important in the Eastern States, where the doctrine of riparian rights is applicable, as well as in the arid states of the West, where the appropriation doctrine has traditionally been applied.¹⁸⁰

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. *The military purposes for which water was reserved*

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

4. *The effect of nonuse, abandonment, or transfer*

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

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

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

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

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

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

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

191. The Montana Supreme Court stated:

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

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

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

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

After a measure of the amount of water impliedly reserved for use on an Indian reservation or enclave of the United States has been established by decree, permit, or otherwise, what may the Indian tribe or the United States do with the water? Are they restricted to that use contemplated at the time of the creation of the reservation as recognized in the permit or decree? Or may the Indians or the federal government change the place and nature of the use of the reserved water? The emerging development of Indian reservations, particularly in the field of energy resources, the extension of the *Winters* doctrine to other federal enclaves, and the current attempts to establish a national land and water use policy, such as that contemplated in the Water Resources Planning Act¹⁹² and the Western United States Water Plan Study,¹⁹³ are giving this issue increased importance.

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

III. LEGISLATIVE, JUDICIAL, AND ADMINISTRATIVE AUTHORITY OVER RESERVED WATER RIGHTS

Winters and its progeny recognize the power of the federal

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

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

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

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

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

sovereign to reserve the use of water to fulfill its purposes. Interestingly, the Constitution does not expressly address the power of the United States over water, nor has Congress adopted any legislation on the subject of the federal government's power to reserve water for its uses, other than perhaps the Wild and Scenic Rivers Act.¹⁹⁵ Nevertheless, the courts, for more than half a century, have held that the federal government derives the power to control and administer the water resources of the public lands from the property clause¹⁹⁶ of the Federal Constitution.¹⁹⁷ In 1963, the commerce clause was cited for the first time as an additional basis for the exercise of the power of the federal government to reserve water. The Supreme Court stated:

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

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

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

196. U.S. CONST. art. IV, § 3.

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

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

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

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

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

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

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

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

In summary, state law apparently controls the acquisition

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

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

203. Part of the uncertainty concerning the extent of the right arises because the federal or Indian user may expand the use of water to meet future needs within the purpose for which the reservation was created. *United States v. District Court for Eagle County*, 401 U.S. 520 (1971); *Arizona v. California*, 373 U.S. 546 (1963); *United States v. Ahtanum Irr. Dist.*, 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957), *rev'd*, 330 F.2d 897 (9th Cir.), *rehearing denied*, 338 F.2d 307 (9th Cir. 1964), *cert. denied*, 381 U.S. 924 (1965).

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

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

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

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

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

209. *Id.* at 522-23.

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

(1) Where a prior right to water from an interstate stream is acquired by a user in one state by compliance with that state's law, federal law will protect the prior right²¹⁰ against claims by a water user in another state to the extent that the right is within the amount of the first state's apportioned share of the stream.²¹¹

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

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

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

The following three subsections discuss legislative, judicial,

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

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

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

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

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

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

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

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

A. *Legislative Authority over Reserved Water Rights*

1. *Reserved water rights of Indians*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

231. *Id.* at 602-03.

may impose conditions on the use of reserved waters.²³² The trial court's dismissal of the state's complaint was affirmed by the Ninth Circuit Court of Appeals on the ground that the waiver of sovereign immunity provided by the McCarran Amendment²³³ did not apply to the relief sought by Nevada.

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

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

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

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

233. 43 U.S.C. § 666 (1970).

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

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

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

237. 401 F.2d at 546.

B. *Judicial Authority over Reserved Water Rights*

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

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

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

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

All reserved water rights were adjudicated in federal courts²⁴¹

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

239. *Id.* at 2756-57.

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

241. See, e.g., *Arizona v. California*, 373 U.S. 546 (1963); *United States v. Powers*, 305 U.S. 527 (1939); *Winters v. United States*, 207 U.S. 564 (1908); *United States v. Ahtanum Irr. Dist.*, 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957), *rev'd*, 330 F.2d 897 (9th Cir.), *rehearing denied*, 338 F.2d 307 (9th Cir. 1964), *cert. denied*, 381

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

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

U.S. 924 (1965); *United States v. McIntire*, 101 F.2d 650 (9th Cir. 1939); *United States v. Walker River Irr. Dist.*, 104 F.2d 334 (9th Cir. 1939); *Conrad Inv. Co. v. United States*, 161 F. 829 (9th Cir. 1908); *United States ex rel. Ray v. Hibner*, 27 F.2d 909 (D. Idaho 1928).

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

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

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

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

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

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

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

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

In *Eagle County*, the United States Supreme Court ruled that the states could subject reserved water rights for non-Indian reservations²⁴⁹ to judicial determination in state courts whenever the proceedings will result in a general adjudication of an entire watershed or a substantial portion thereof.²⁵⁰ The Court interpreted the McCarran Amendment in these terms:

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

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

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

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

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

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

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

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

The issue is currently being addressed in the adjudication of the waters of the San Juan River in Colorado.²⁵⁴

2. *The McCarran Amendment and state claims of jurisdiction over Indian reserved water rights*

A unique relationship between the federal government and the Indian people and their property rights originated in article I, section 8, clause 3 of the Constitution.²⁵⁵ That relationship is fundamental to the issue of jurisdiction over Indian water rights.

The United States is not the "owner" of rights reserved for the benefit of Indians in the same way it is the "owner" of water rights reserved for use on federal parks or forests held for the benefit of the general public. The Indians' right to the use of water, though held in trust by the United States, is equitably owned and exercised by individual Indians and Indian tribes in connection with their possession of reserved lands.²⁵⁶ These water

254. *United States v. Akin*, 504 F.2d 115 (10th Cir. 1974), *cert. granted*, 421 U.S. 946 (1975) (No. 74-949), *rev'g* Civil No. C-4497 (D. Colo., July 20, 1973). In this case the United States won the race to the courthouse. The government brought suit in federal district court to determine the reserved water rights of the Southern Ute and the Ute Mountain Ute Indian Reservations, as well as its other reserved rights, in a complete watershed adjudication of the San Juan River and its tributaries in Colorado. Colorado, following the precedent set in *United States v. District Court for Eagle County*, 401 U.S. 520 (1971), and its companion case, *United States v. District Court for Water Div. No. 5*, 401 U.S. 527 (1971), served the United States in its statutory proceedings before the state water judge pursuant to 43 U.S.C. § 666 (1970); service occurred after the federal government initiated the watershed adjudication in federal district court.

Colorado's motion to dismiss the federal court suit was granted under the doctrine of abstention. The district court decided that it was proper to abstain from exercising its jurisdiction and to permit the state to proceed with its statutory adjudication of the watershed. In reaching this decision, the federal judge decided that the state court had jurisdiction of the Indians' water rights as well as other reserved water rights by reason of 43 U.S.C. § 666 (1970). The Tenth Circuit Court of Appeals reversed on the ground that it was not proper to apply the doctrine of abstention in this case since the federal water rights involved were established by federal law and the United States had the right to adjudicate its rights in federal court. The Tenth Circuit did not reach the question of the state court's jurisdiction over Indian water rights.

The Supreme Court has granted certiorari. In the event the Supreme Court should reverse the circuit court's order, the parties have briefed the question of the state court's jurisdiction over Indian water rights. Numerous Indian tribes and the National Tribal Chairmen's Association have intervened as amici curiae. Brief on the merits for Southern Ute Indian Tribe *et al.* as Amicus Curiae, *United States v. Akin*, 421 U.S. 946 (1975) (No. 74-949), *granting cert. to* 504 F.2d 115 (10th Cir. 1974). That brief, prepared by Robert S. Pelcyger of the Native American Rights Fund, is the source of much of the material presented in section III, B, 2 *infra*.

255. *Squire v. Capoeman*, 351 U.S. 1, 6-7 (1956); *Seminole Nation v. United States*, 316 U.S. 286, 295 (1942); *United States v. Sandoval*, 231 U.S. 28, 38 (1913); *Choate v. Trapp*, 224 U.S. 665, 675 (1912); *United States v. Kagama*, 118 U.S. 375, 381-84 (1886); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17-18 (1831).

256. *United States v. Ahtanum Irr. Dist.*, 236 F.2d 321 (9th Cir. 1956), *cert. denied*,

rights are sufficient to fulfill the purposes for which the Indian reservations were created, regardless of when the water is put to beneficial use.²⁵⁷

The Indian tribes have always been fearful of losing their rights through the actions of state courts. The Supreme Court recognized long ago that the Indians had good cause to be apprehensive of state jurisdiction over their property.²⁵⁸ The adjudication of water rights reserved for the use and benefit of Indians and Indian reservations involves questions of federal law arising under the Constitution, statutes, and agreements of the United States, and Congress vested jurisdiction over such questions in the federal district courts.²⁵⁹ Thus, issues involved in the determination of the existence, scope, and measure of Indian water rights have historically been adjudicated in federal courts. In addition, state court jurisdiction has been denied where the title, right to use, or possession of any Indian property which the United States holds in trust is involved.²⁶⁰

To extend the scope of the McCarran Amendment to include Indian reserved water rights would dramatically alter this long-established relationship between federal and state jurisdiction over Indian property rights. Such an extension of the McCarran Amendment would be improper in light of the principle of tribal sovereignty, the relationship of that Amendment to other acts of

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

257. For a discussion of the nature of the Indians' reserved water rights, including the right to fulfill future needs, and the purposes for which water was reserved see section II, *A supra*.

258. In *United States v. Kagama*, 118 U.S. 375, 383-84 (1886), the Supreme Court stated:

These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feelings, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

The Ninth Circuit Court of Appeals recently repeated concern on this subject. *Santa Rosa Band of Indians v. Kings County*, No. 74-1565 (9th Cir., Nov. 3, 1975).

259. General federal question jurisdiction is conferred on the federal district courts by 28 U.S.C. § 1331 (1970).

260. 18 U.S.C. § 1162(b) (1970); 28 U.S.C. § 1360(b) (1970). For a discussion of these statutes and 28 U.S.C. § 1362 (1970), see note 223 *supra* and notes 273-78 *infra* and accompanying text.

Congress, the provisions of various state enabling acts and constitutions, and the Amendment's legislative history. Each of these factors is a bar to subjecting Indian water rights to state court jurisdiction, as discussed below.

a. *The principle of tribal sovereignty.* A major purpose for the creation of reservations was to preserve Indian sovereignty and provide a place where the tribes, as sovereign entities, could conduct their affairs and enjoy their property rights without interference. In recognition of this, the Supreme Court has described Indian tribes as distinct, independent political communities²⁶¹ and has shielded their property rights from state jurisdiction since at least 1832.²⁶² For example, in 1973, the Supreme Court held unanimously in *McClanahan v. Arizona State Tax Commission*²⁶³ that Arizona has no jurisdiction to levy income taxes on Indians who live and work on the Navajo Reservation. In its decision, the Court stated that questions involving state jurisdiction over Indian reservations must always be viewed against the "backdrop" of Indian tribal sovereignty.²⁶⁴ This tradi-

261. In *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168 (1973), the Supreme Court said:

The principles governing the resolution of this question are not new. On the contrary, "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945). This policy was first articulated by this Court 141 years ago when Mr. Chief Justice Marshall held that Indian nations were "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832). It followed from this concept of Indian reservations as separate, although dependent nations, that state law could have no role to play within the reservation boundaries.

262. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559-60 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 21-24 (1831). See generally *Solicitor's Opinion*, 55 Interior Dec. 14 (1934).

263. 411 U.S. 164 (1973).

264. The Court explained the principle of tribal sovereignty in these terms:

It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government. Indians today are American citizens. They have the right to vote, to use state courts, and they receive some state services. But it is nonetheless still true, as it was in the last century, that "[t]he relation of the Indian tribes living within the borders of the United States . . . [is] an anomalous one and of a complex character. . . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided." *United States v. Kagama*, 118 U.S. 375, 381-82 (1886).

Id. at 172-73.

tion of sovereignty and the unique nature of the Indian water rights are particularly important in determining whether the McCarran Amendment applies to the adjudication of such rights.

As political sovereigns, Indian tribes are immune from suit absent express congressional and tribal consent.²⁶⁵ To preserve that immunity, the Supreme Court has recently and repeatedly held that congressional intent to subject Indians to state jurisdiction will not be lightly implied, that Congress has always been very careful about subjecting Indians to state jurisdiction, and that courts should not impute such an intention to Congress in the absence of a clear, specific, and express conferral of jurisdiction.²⁶⁶ Thus, when Congress has wished the states to exercise civil or criminal jurisdiction over Indians, Congress has done so expressly.²⁶⁷ Both tribal sovereignty and the congressional policy of encouraging, preserving, and protecting that sovereignty, as manifested in such statutes as the Indian Reorganization Act,²⁶⁸ serve as principal reasons for requiring this kind of congressional exactitude before extending state jurisdiction over Indians.²⁶⁹

265. See *Turner v. United States*, 248 U.S. 354 (1919); *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529 (8th Cir. 1967); *Green v. Wilson*, 331 F.2d 769 (9th Cir. 1964); *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 443 P.2d 421 (1968); *FEDERAL INDIAN LAW*, *supra* note 219, at 492, 494 (1958). Where federal questions involving the rights of Indian tribes are involved, the Supreme Court in *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506, 514 (1940), stated as follows:

It has heretofore been shown that the suability of the United States and the Indian Nations, whether directly or indirectly or by cross action depends upon affirmative statutory authority. Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent the attempted exercise of judicial power is void.

266. Note, for example, the Supreme Court's reference in *Kennerly v. District Court of Mont.*, 400 U.S. 423, 427 (1971), to "[t]he comprehensive and detailed congressional scrutiny manifested in those instances where Congress has undertaken to extend the civil or criminal jurisdiction of certain States to Indian country." See also *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Seymour v. Superintendent*, 368 U.S. 351 (1962); *Williams v. Lee*, 358 U.S. 217 (1959).

267. *E.g.*, Act of August 15, 1953, ch. 505, 67 Stat. 588. See also *Williams v. Lee*, 358 U.S. 217 (1959); *Whyte v. District Court of Montezuma County*, 140 Colo. 334, 346 P.2d 1012 (1959), *cert. denied*, 363 U.S. 829 (1960).

268. 25 U.S.C. §§ 461 *et seq.* (1970). See also Indian Self-Determination and Education Assistance Act, 25 U.S.C.A. §§ 450, 450a-n, 455-58, 458a-e (Supp. 1, 1975).

269. As stated in *Williams v. Lee*, 358 U.S. 217, 223 (1959):

There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. . . . The cases in this court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it.

The McCarran Amendment speaks of the water rights of the United States and clearly waives sovereign immunity with respect to those rights owned by the federal government for the benefit of the public as a whole. However, the Amendment is silent as to those rights held by the United States as trustee for the use and benefit of the Indians. Since the Amendment is silent on that matter and does not *expressly* grant state court jurisdiction over the party (the individual Indian or the tribe) holding an Indian water right, it should not, in light of the above-stated principles, be construed as conferring such jurisdiction. Without an express statutory grant of personal jurisdiction, state courts cannot adjudicate Indian reserved water rights. Furthermore, state courts cannot adjudicate Indian water rights unless they also have *subject-matter* jurisdiction over such rights. Thus, unless the McCarran Amendment is interpreted not only as a waiver of sovereign immunity, but also as a conferral of subject matter jurisdiction, Indian reserved water rights cannot be adjudicated in state courts. The Supreme Court has held in a similar context, however, that a waiver of federal sovereign immunity *does not* confer subject-matter jurisdiction on state courts because the "judicial determination of controversies concerning [Indian lands] has been commonly committed exclusively to federal courts."²⁷⁰

b. *The relationship of the McCarran Amendment to other acts of Congress.* Congress has passed a number of statutes which, unlike the McCarran Amendment, 43 U.S.C. § 666 (section 666),²⁷¹ deal specifically with Indian rights. In ascertaining the congressional intent behind the waiver of sovereign immunity in section 666, that section should be considered in relation to these other acts.²⁷² Two are of particular importance and, taken together, show that Congress intended that disputes involving Indian property subject to the federal trust relationship, specifically water rights, are to be adjudicated in a federal forum.

In 1966, Congress enacted 28 U.S.C. § 1362, which provides:

270. *Minnesota v. United States*, 305 U.S. 382, 389 (1939).

For an in-depth discussion of this concept and the effect of the cited case on the applicability of the McCarran Amendment see Brief on the merits for Southern Ute Indian Tribe *et al.* as Amicus Curiae, *United States v. Akin*, 421 U.S. 946 (1975) (No. 74-949), *granting cert.* to 504 F.2d 115 (10th Cir. 1974).

271. Hereafter in the text the McCarran Amendment is sometimes referred to as section 666. The appellation comes from 43 U.S.C. § 666 (1970).

272. *Cf. Menominee Tribe v. United States*, 391 U.S. 404, 411 (1968).

The district courts shall have original jurisdiction of all civil actions, brought by an Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws or treaties of the United States.

According to the House report on section 1362, this statute's purpose is to provide a federal forum for trying issues dealing with Indian lands held in trust by the United States.²⁷³ The Senate report clarifies the House report by noting two reasons for providing a federal forum for such issues: (1) the tribes' fear of the states, and (2) the federal courts' superior expertise in dealing with treaties and applying the relevant body of federal law.²⁷⁴ The important point is not only that Indians fear having their rights adjudicated in state courts, but also that Congress considers the Indians' apprehensions justified and has, therefore, enacted a law vesting jurisdiction in the federal courts to determine federal questions involving tribal lands and property rights.

In interpreting the applicability of section 1362 in the context of state fish and game laws, the court in *Great Lakes Inter-Tribal Council, Inc. v. Voigt*²⁷⁵ stated:

To require exhaustion of state remedies, or to abstain from the exercise of jurisdiction until the state has undertaken to clarify the applicability of its fish and game laws to plaintiffs on Indian lands, would be to dilute the Congressional intention to provide to the Indians a federal forum for just such questions as those presented here.

The legal questions concerning reserved water rights are similar to those concerning reserved fishing rights. Therefore, the reason-

273. The House report states in part:

In its report to the Senate Committee, the Department of the Interior specifically pointed out that the issues involved in cases involving tribal lands that either are held in trust or were so held by the tribe subject to restriction against alienation imposed by the United States are federal issues. The Department therefore observed that particularly as to this class of cases it is appropriate that the actions be brought in a U.S. District Court.

H.R. REP. NO. 2040, 89th Cong., 2d Sess. 12713-16 (1966).

274. The Senate Report declares;

There is great hesitancy on the part of tribes to use State courts. This reluctance is founded partially on the traditional fear that tribes have had of the States in which their reservations are situated. Additionally, the Federal courts have more expertise in deciding questions involving treaties with the Federal Government, as well as interpreting the relevant body of Federal law that has developed over the years.

S. REP. NO. 1507, 89th Cong., 2d Sess. 2 (1966).

275. 309 F. Supp. 60, 64 (W.D. Wis. 1970).

ing and approach in *Voigt* should apply to cases involving Indian reserved water rights.

The second relevant statute is 28 U.S.C. § 1360, enacted by Congress on August 15, 1953, only 13 months after enactment of the McCarran Amendment. Section 1360 constitutes part of the statutory provision popularly called Public Law 280, which granted certain states authority to assume by appropriate legislation limited civil and criminal jurisdiction over Indians. Subsection (b) of that section reads:

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, *including water rights*, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; *or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.*²⁷⁶

This subsection is, therefore, a saving clause which reiterates the existing law and preserves it against encroachment by the states' assertion of jurisdiction under subsection (a). Subsection (b) specifically speaks of Indian water rights and denies state jurisdiction to adjudicate such rights.

Section 1360(b) should be read *in pari materia* with section 666.²⁷⁷ In light of the strong reiteration of federal jurisdiction over Indian water rights in section 1360(b) in 1953, Congress could not have intended to subject such rights to state court jurisdiction in 1952 by enacting section 666. The saving language of section 1360(b) would make no sense if Congress had recently subjected Indian water rights to adjudication in state courts. Section 1360(b) must therefore be read as a clear assertion that state courts did not have jurisdiction over Indian water rights prior to its enactment and could not place any encumbrance on nor adjudicate any such rights by assertions of state jurisdiction thereafter.²⁷⁸

The McCarran Amendment, when read (as it should be) in tandem with both 28 U.S.C. § 1360(b) and 28 U.S.C. § 1362, does

276. 28 U.S.C. § 1360(b) (1970) (emphasis added).

277. See *Menominee Tribe v. United States*, 391 U.S. 404, 411-13 (1970).

278. Congress reenacted § 1360(b) as a part of the Indian Civil Rights Act, Pub. L. No. 90-284, § 401, 82 Stat. 78 (1968).

not reveal a congressional intent to extend state jurisdiction to Indian reserved water rights.

c. *State enabling acts and constitutions.* The enabling acts and constitutions of the Western States further demonstrate the distinction between Indian reserved water rights and other reserved water rights, as they relate to the jurisdiction of state courts to effect water adjudications. Those acts and constitutions contain disclaimer clauses applicable to Indian lands and property rights, but not to other federal interests. The disclaimer clauses exist because Congress expressly conditioned the admission of new states with Indian reservations within their boundaries on a disclaimer of jurisdiction over Indian property rights. The enabling acts of Arizona, Washington, Montana, New Mexico, North Dakota, Utah, and South Dakota conditioned admission to the Union in these, or nearly identical, terms:

That the people inhabiting said proposed State do agree and declare . . . that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States²⁷⁹

This language is duplicated in each of the respective state constitutions.²⁸⁰ The courts have consistently held that states which have no disclaimer provision are subject to the same limitations on state jurisdiction as the states listed above.²⁸¹

When Congress has acted to extend state jurisdiction over

279. New Mexico Enabling Act, ch. 310, § 2, cl. 2, 36 Stat. 588 (1910); see Arizona Enabling Act, ch. 310, § 20, cl. 2, 36 Stat. 569 (1910); Utah Enabling Act, ch. 138, § 3, cl. 2, 28 Stat. 108 (1894); Enabling Act of North Dakota, South Dakota, Montana, and Washington, ch. 180, § 4, cl. 2, 25 Stat. 677 (1889).

Idaho and Wyoming have similar provisions in the Organic Acts that conditioned their admittance to the Union. See Organic Act of Wyoming, ch. 235, § 1, 15 Stat. 178 (1868); Organic Act of Idaho, ch. 17, § 1, 12 Stat. 809 (1863).

If there is ambiguity present in the statute, it must be construed liberally in favor of the Indians. *Squire v. Capoeman*, 351 U.S. 1, 6-7 (1956); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973).

280. See ARIZ. CONST. art. 20, § 4; MONT. CONST. art. 12, § 2; N.M. CONST. art. 21, § 2; N.D. CONST. art. 26, § 203; UTAH CONST. art. 3, § 2; S.D. CONST. art. 22, § 2; WASH. CONST. art. 26.

281. *Donnelly v. United States*, 228 U.S. 243 (1913); *United States v. Kagama*, 118 U.S. 375 (1886); *Whyte v. District Court of Montezuma County*, 140 Colo. 334, 346 P.2d 1012 (1959), cert. denied, 363 U.S. 829 (1960). In *Whyte*, the Colorado Supreme Court acknowledged this principle when it declared that

[T]he jurisdiction of the federal government over all Indian affairs is plenary and subject to no diminution by the states in the absence of specific congressional grant of authority to them to act.

140 Colo. at 337, 346 P.2d at 1014 (emphasis added).

Indian reservations, it has specifically waived the disclaimer provision in state enabling acts and authorized states with constitutional or statutory impediments to the assumption of such jurisdiction to remove the impediments and assume jurisdiction. An example is section 6 of Public Law 280,²⁸² which provides:

Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.²⁸³

Section 666, by contrast, is silent as to the disclaimer provisions in state enabling acts and constitutions. Congress enacted the McCarran Amendment knowing that extension of state jurisdiction to Indians or their property requires (1) waiver or repeal of the disclaimer clauses in the enabling acts, and (2) amendment, with the consent of the United States, of state constitutions or statutes. Nothing is more indicative of the congressional intent to exclude the reserved water rights of Indians from the sweep of section 666 than the absence in the McCarran Amendment of a repeal or waiver of the enabling acts and the absence of consent to the amendment of state constitutions or statutes.

Any argument for extension of state jurisdiction over Indian water rights under the authority of the McCarran Amendment would necessarily posit that the Amendment repeals by implication the disclaimer clauses in the enabling acts applying to the various states. An accepted principle of statutory construction, however, disfavors repeals by implication. In fact, the courts have elevated that disfavor to the level of a presumption: prior law is *not* repealed by implication.²⁸⁴

d. The legislative history of the McCarran Amendment. The express intent of Congress necessary to grant to the states jurisdiction over Indian water rights is lacking in section 666.²⁸⁵

282. Act of Aug. 15, 1953, ch. 505, § 6, 67 Stat. 590.

283. *Id.* For an example of the extension of jurisdiction to Indians by the State of Washington under this Act see *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648 (9th Cir. 1966).

284. C. SANDS, *STATUTES AND STATUTORY CONSTRUCTION* § 23.10 (4th ed. 1973). See also *Morton v. Mancari*, 417 U.S. 535 (1974).

285. See notes 265-269 and accompanying text *supra*.

Where a statute on its face is unambiguous, no resort to its legislative history should be necessary.²⁸⁶ Nevertheless, support for state jurisdiction over Indian water rights cannot be found in the history of section 666.²⁸⁷

3. *Removal of Indian water rights cases to federal court*

If it were determined for any reason, either by legislation or court decree, that the McCarran Amendment does apply to reserved water rights held in trust for Indian reservations and that state courts do have authority to adjudicate Indian water rights along with all other claims in a given stream, the question arises whether the Indians or the United States can remove the adjudication to federal court pursuant to 28 U.S.C. § 1441, the general federal removal statute.²⁸⁸ Section 1441(b) provides:

Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

As discussed earlier, Indian reserved water rights are created pursuant to the Constitution, treaties, and statutes of the United States.²⁸⁹ While there has never been a determination that an issue involving an Indian water right poses the type of federal question which will permit removal from state to federal court, a number of actions involving other types of Indian trust property rights have been so removed. For example, Indians have removed contested probate proceedings,²⁹⁰ proceedings concerning allotted

286. *United States v. Zion Sav. & Loan Ass'n*, 313 F.2d 331, 336 (10th Cir. 1963); *Diamond A Cattle Co. v. C.I.R.*, 233 F.2d 739, 742 (10th Cir. 1956); *Nicholas v. Denver & R.G.W.R.R.*, 195 F.2d 428, 431 (10th Cir. 1952); *cf. Gay v. Ruff*, 292 U.S. 25, 31 (1933).

287. For a discussion of the legislative history of § 666 see Brief on the merits for Southern Ute Indian Tribe *et al.* as Amicus Curiae at 16-19, *United States v. Akin*, 421 U.S. 946 (1975) (No. 74-949), *granting cert. to* 504 F.2d 115 (10th Cir. 1974).

288. It should be remembered that the federal court's jurisdiction in the event of a removal is *derivative*; i.e., on removal a federal court can adjudicate only those issues which the state court could have adjudicated in the case if no removal had occurred. *Minnesota v. United States*, 305 U.S. 382 (1939). If the state court had no jurisdiction over Indian water rights, removal of the action to federal court would apparently not give jurisdiction to the federal court, and another case would have to be filed in the federal court.

289. See notes 195-209 and accompanying text *supra*.

290. *E.g., Berry v. Brakeshoulder*, 162 F.2d 651 (10th Cir. 1947).

Indian lands,²⁹¹ and suits to cancel oil and gas leases.²⁹² An effort to remove cases involving Indian water rights may be anticipated in most cases because the Indians fear that their rights will be prejudiced by rulings on evidence and procedural questions in antagonistic state courts.

Both state and federal interests could be protected if cases involving Indian water rights were initially filed in state courts and later removed to federal courts. 28 U.S.C. § 1441(c) grants a federal court the option in a removed case to determine only those separate or independent claims which present federal questions, and in the meantime to remand all other matters to the state court for determination.²⁹³ Accordingly, a state could initiate a proceeding in its own court to adjudicate all rights in a given stream system. The federal questions and issues concerning reserved water rights held for the benefit of Indian reservations could be removed for determination in federal court with all other issues being remanded to the state court. Proceedings in state court could continue on non-federal rights until the point is reached where the ladder of priorities must be matched against the available water supply. At that point, the federal court's ruling could be returned and incorporated into the state decree.²⁹⁴ By this means, all the rights in a stream system could be established and incorporated in one decree and enforced by one court.²⁹⁵

Whether cases affecting reserved water rights can be removed is another unanswered question. The Supreme Court did not address the question of removal in the *Eagle County* case.²⁹⁶

291. *E.g.*, *House v. United States*, 144 F.2d 555 (10th Cir. 1944), *cert. denied*, 323 U.S. 781 (1944).

292. *E.g.*, *Jackson v. Gates Oil Co.*, 297 F. 549 (8th Cir. 1924).

293. 28 U.S.C. § 1441(c) provides:

Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or in its discretion, may remand all matters not otherwise within its original jurisdiction.

294. The federal court, however, may retain jurisdiction to enforce its decree if the reserved right is not adequately protected by the state court.

295. There is a risk involved in using this procedure, however. 28 U.S.C. § 1447(d) provides that if the federal court remands the case back to the state court from which it was removed, that remanding order is not reviewable. Therefore, under the present state of the law, there is the risk that the federal court may remand the entire case to the state court for determination of the measure and extent of both the federal reserved rights and the Indians' reserved water rights. In such a case there would be no remedy to the remand order by appeal.

296. 401 U.S. 520 (1971). For a discussion of the removal question see *In re Green River Drainage Area*, 147 F. Supp. 127 (D. Utah 1956).

Although the legislative history of the McCarran Amendment reveals that a provision concerning removal of federal questions by the United States was eliminated from the Amendment,²⁹⁷ the implications of that elimination are unknown.

4. *The Supreme Court's original jurisdiction over interstate stream apportionments*

The determination and enforcement of reserved water rights, including Indian water rights, are suits in the nature of quiet title actions²⁹⁸ except to the extent interstate stream apportionments under the original and exclusive jurisdiction of the Supreme Court are involved.²⁹⁹ There the action is to apportion the waters between the several states involved. Such an apportionment action may include establishing the measure and priority of the water rights reserved by the federal government in the various streams and quieting the title thereto against all other users.³⁰⁰ In such proceedings, each state represents the interests of all water users claiming under its law.³⁰¹

Interstate apportionment suits may be filed by the states against each other³⁰² or initiated by the United States.³⁰³ An initiating petition is addressed on motion to the discretion of the Supreme Court. The bases upon which the United States may urge the Court to exercise its jurisdiction are fivefold:

(1) The United States is a necessary party in an interstate stream adjudication; therefore, it should be able to initiate the action.

297. *Hearings on S. 18 Before the Subcomm. on the Study of Adjudication of Water Rights of the Senate Comm. on the Judiciary*, 82d Cong., 1st Sess. 5 (1951).

298. See 3 KINNEY, *supra* note 238, at 2756-57.

299. See 28 U.S.C. § 1251(a) (1970).

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

301. *Kansas v. Colorado*, 206 U.S. 46 (1907); 3 KINNEY, *supra* note 238, § 1224.

302. See *Arizona v. California*, 373 U.S. 546 (1963); *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Colorado v. Kansas*, 322 U.S. 708 (1944); *Washington v. Oregon*, 297 U.S. 517 (1936); *Connecticut v. Massachusetts*, 282 U.S. 660 (1931); *New Jersey v. New York*, 283 U.S. 805 (1931), *modified*, 347 U.S. 995 (1954); *Wyoming v. Colorado*, 259 U.S. 496 (1922), *vacated and new decree entered*, 353 U.S. 953 (1957); *Kansas v. Colorado*, 185 U.S. 125 (1902); 28 U.S.C. § 1251(a) (1970).

303. 28 U.S.C. § 1251(b)(2) (1970) permits the Court in the exercise of its discretion to accept suits initiated by the United States against a state. *United States v. Nevada*, 412 U.S. 534 (1973), brought under the above-cited statute, involved federal claims for the reserved right to the use of water out of the Truckee River, an interstate stream that runs from California into Nevada. It included the claim of reserved rights for the Pyramid Lake Paiute Tribe to sufficient water in the Truckee River to maintain Pyramid Lake, a large desert lake, and its fishery. The lake is within the Indian reservation boundary. The Supreme Court, however, refused to accept jurisdiction.

(2) An interstate stream is involved; therefore, the Supreme Court is the only court in which jurisdiction can be obtained over all the parties and all the water in one action. The multiplicity of suits in separate states that could occur should be avoided.

(3) Extensive efforts at compromise by the means of a federal-interstate compact have been unsuccessful.

(4) Determination of the measure and priority of a federal right is necessary before a solution dividing the waters of the stream can be reached.

(5) An apportionment action would be a less expensive and time-consuming method for determining the reserved right involved.

If the Supreme Court refuses to accept jurisdiction of an adjudication involving an interstate stream, separate actions would be required in each state; in the absence of special legislation, the state and federal courts would not have the requisite jurisdiction to adjudicate all rights in a single action.³⁰⁴ In effect, water rights in an interstate stream would remain uncertain where there has been no apportionment of the waters of that stream between the various states. This would be so in spite of the desire of the states and their water users for a final adjudication.

C. Administrative Authority and a Proposal for Federal Administrative Action to Determine Reserved Water Rights

Water rights in the Western States are either acquired pursuant to the laws of the states where use occurs or are expressly or impliedly reserved by the federal government to fulfill the purposes underlying withdrawal or reservation of land.³⁰⁵ Both the federal and state sovereigns have the authority to administer and control the waters within the scope of their respective jurisdictions.³⁰⁶ The states received their authority over a hundred years

304. *E.g.*, *United States v. Alpine Land & Reservoir Co.*, Equity No. D-183 (D. Nev., filed May 11, 1925) (the court obtained jurisdiction in both California and Nevada pursuant to a special statute). In the absence of such a statute, the jurisdiction of both federal and state courts stop at the state boundary.

305. This assumes that the Indians' aboriginal water rights discussed in section II, A, 2 *supra* are a portion of the water right impliedly reserved by the federal sovereign for the Indians when the reservations were created.

306. Dividing water reserved for a federal reservation or enclave, other than Indian reservations, among various uses to fulfill the purposes of that reservation is strictly a federal prerogative. See notes 313-318 and accompanying text *infra*. Where Indian reservations are concerned, the amount, period, place, and nature of water use is a matter for the Secretary of the Interior and the affected Indian tribe, band, or group to decide and

ago when the federal government authorized them to administer and control the use of water among their citizens.³⁰⁷ During the past century, Congress, with only a few exceptions,³⁰⁸ has permitted the states to establish, administer, and control water rights within their borders without interference. Nevertheless, without the consent of the federal government, the states cannot adjudicate, administer, or control the use of reserved water rights.³⁰⁹

The independent federal and state water systems may at times overlap and conflict when both allocate waters in the same stream. The only machinery that has been used to date to resolve questions of conflicts between water rights protected by state and federal law is the interminable, expensive, and often inconclusive stream adjudication proceeding.³¹⁰ The inadequacy of this method is one reason that the scope and measure of the Indians' reserved water right has remained undefined for so many years. Since present adjudicative methods are inadequate or ineffective, the question arises whether a more effective method can be devised to quantify the water rights reserved for federal enclaves and Indian reservations and thereby establish the amount of water remaining in the various watersheds for the states to administer and control among their water users. This question presents the most important unmet challenge in American water law.

At present, there is no federal administrative machinery in existence that can control and administer the use of reserved water rights *within* the various federal enclaves and reservations or set the measure of the total use for each enclave. Nevertheless, this author believes that the authority to establish such adminis-

administer, subject to court review. See notes 334-343 and accompanying text *infra*. Use, control, and administration of water among the citizens of the various states under state law is a matter for the states to decide and administer. *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935).

307. See notes 6-20 and accompanying text *supra*.

308. One exception, embodied in § 8 of the Reclamation Act, is set forth in note 111 *supra*. That section requires that water rights of reclamation projects be established pursuant to state law, but also provides that such water rights are appurtenant to the land upon which the water is used regardless of state law.

309. *United States v. Cappaert*, 508 F.2d 313 (9th Cir. 1974), *cert. granted*, 422 U.S. 1041 (1975) (Nos. 74-1107, 74-1304); *United States v. McIntire*, 101 F.2d 650 (9th Cir. 1939); *Nevada ex rel. Shamberger v. United States*, 165 F. Supp. 600 (D. Nev. 1958), *aff'd on other grounds*, 279 F.2d 699 (9th Cir. 1960).

310. For example, *United States v. Alpine Land & Reservoir Co.*, Equity No. D-183 (D. Nev., filed May 11, 1925) is still pending. Another example is *United States v. Orr Water Ditch Co.*, Equity No. A-3 (D. Nev., Sept. 8, 1944) which was filed on March 3, 1913; the stipulated decree entered in that case is the subject of a current suit, *United States v. Truckee Carson Irr. Dist.*, Civil No. 2987 JBA (D. Nev., filed Dec. 21, 1973), because the court failed to consider a reserved water right in the Truckee River for the preservation of Pyramid Lake and its fishery.

trative machinery currently exists. This subsection discusses that authority and the need to establish the measure of the reserved right on a use-by-use basis in each watershed. It proposes that the various federal administrative agencies, particularly the Department of the Interior, acting jointly with the Indian tribes where Indian reservations are involved, establish administrative machinery to quantify the reserved water rights of all federal reservations and enclaves. Further, it explains how that machinery could relatively rapidly identify the various uses of reserved water required to fulfill the purpose of each reservation or enclave. The amount of water remaining for the use of other water users under state administration will then be apparent. Because of the important differences between non-Indian and Indian reserved water rights, federal action with respect to these rights will be treated separately.

1. Administrative authority for and proposed action to determine non-Indian reserved water rights

An administrative mechanism for determining non-Indian reserved water rights is clearly needed. Consider, for example, the reserved water rights of military enclaves. Presently, there are no Army regulations instructing commanders of posts, camps, and stations concerning the quantification and protection of water rights reserved for their installations.³¹¹ The cost of water is increasing daily and acquisition of congressional appropriations for condemnation or inverse condemnation procedures is difficult and time consuming. Further, if the military fails to act, presently unused reserved waters may be utilized by others pursuant to state law. The inequity of eventually taking those waters from users who were without notice of the reserved right could result in the diminution or loss of the water rights of many military reservations. Similar problems now exist for other federal reservations and enclaves including national parks, monuments, and forests, and fish and wildlife areas. It is therefore imperative that the federal departments involved establish the priority, amount, and location of each of the uses of reserved water rights benefitting their reservations.³¹²

311. DEP'T OF THE ARMY, MILITARY RESERVATIONS, PAMPHLET No. 27-164 (1965) (no section therein discusses establishing or protecting the military's water rights).

312. It is the author's opinion that the United States Supreme Court may interpret the McCarran Amendment (see section III, *B supra*) to grant authority to the states to do this task if the federal government does not quickly make a concerted effort to do the job.

Allocating the water reserved for a non-Indian federal reservation or enclave among the various uses necessary to fulfill the purpose of that reservation is strictly a federal prerogative.³¹³ The prerogative may be exercised by each federal department or agency with respect to reserved lands subject to its control. This authority is derived from the responsibility of each department to effectuate the purposes for which the lands under its jurisdiction were reserved. For example, the Department of the Interior has sufficient authority under the act establishing the National Park Service³¹⁴ to fulfill the "fundamental purpose" of all national parks and monuments which includes the authority to do those things necessary ". . . to conserve the scenery . . . and the wildlife therein . . . by such means as will leave them unimpaired for the enjoyment of future generations."³¹⁵ That authority reinforced the Ninth Circuit Court of Appeals' decision in *United States v. Cappaert*³¹⁶ that the federal sovereign intended to reserve water for the Devil's Hole addition to Death Valley National Monument. Thus, a statute which supports an implied reservation of water to fulfill the purposes stated therein also impliedly grants the authority to quantify the amount of the reserved water and to provide for the administration and control of its use.³¹⁷ Because the various federal departments administer the property of the United States by congressional directive, the secretaries of those departments have the authority to accomplish the purposes of the reservations which they are charged with administering,

313. Cases cited note 309 *supra*; *FPC v. Oregon*, 349 U.S. 435 (1955). See generally *Arizona v. California*, 373 U.S. 546 (1963).

314. 16 U.S.C. § 1 (1970).

315. *Id.*

316. 508 F.2d 313, 318 (9th Cir. 1974), *cert. granted*, 422 U.S. 1041 (1975) (Nos. 74-1107, 74-1304). For a discussion of the authority of the Department of the Interior, acting jointly with the affected tribe, band, or group, to administer and control the use of water on Indian reservations see section III, C, 2, *b infra*.

317. The extent of such administrative power must be determined by the purpose of the act granting the power and the difficulties that might be encountered in its execution. *United States v. Antikamnia Chem. Co.*, 231 U.S. 654 (1914); *Certified Color Indus. Comm. v. Flemming*, 283 F.2d 622 (2d Cir. 1960). An early case stated: "It is a general principle of law, in the construction of [grants of administrative power], that where the end is required, the appropriate means are given." *United States v. Bailey*, 34 U.S. (9 Pet.) 238, 253 (1835). It has also been stated that

[W]hen a statute imposes a mandatory duty upon a governmental agency to carry out the express and specifically defined purposes and objectives stated in the law, such statute carries with it by necessary implication the authority to do whatever is reasonably necessary to effectuate the legislative mandate and purpose. *Corzeliuss v. Railroad Com.* (Tex Civ App) 182 SW2d 412.

73 AM. JUR. 2d *Statutes* § 311 (1974).

without further delegation from Congress.³¹⁸ Thus, the Department of Defense has authority over the reserved water rights of military reservations and enclaves; the Department of Agriculture, the reserved water rights of national forests; and the Department of the Interior, the reserved water rights of fish and wildlife areas, national parks, monuments and recreation areas, and the public domain.

It is proposed that each of these departments immediately exercise that authority by completing an inventory of the potential land and water uses necessary to accomplish the purposes for which each reservation and enclave under its jurisdiction was created. These inventories should determine on a use-by-use basis the measure and scope of all water rights reserved for non-Indian reservations and federal enclaves. Acting in conformity with the Administrative Procedure Act,³¹⁹ the Departments of Interior, Agriculture, and Defense can, within existing authority, promulgate regulations that establish water use permit systems on a use-by-use basis with appropriate notice, hearing, and appeal procedures. Pursuant to those regulatory systems, the departments can quantify the amount, and determine the priority date, of reserved water rights. The states and their water users can appear, participate in the proceedings, and, if necessary to protect their rights, appeal to the courts. In this context, the states can be encouraged to appear as *parens patriae* on behalf of all water users claiming water rights under state law.³²⁰ All three departments have existing administrative machinery for holding hearings, reaching decisions, and processing appeals.³²¹ That machinery could be modified to manage the proposed administrative systems. For example, the Department of the Interior, which is responsible for administering most reserved water rights, could authorize its Office of Hearings and Appeals to con-

318. In general, the official duties of the head of an executive department of government, whether imposed by act of Congress or by resolution, require the continual exercise of judgment and discretion. This exercise is especially important in interpreting the laws and resolutions of Congress under which the department head is required to act. *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 518 (1840).

319. 5 U.S.C. §§ 551 *et seq.* (1970).

320. The states have been appearing in this manner in stream apportionment suits. *Arizona v. California*, 373 U.S. 546 (1963); *Kansas v. Colorado*, 206 U.S. 46 (1907). Nothing would prevent the states from rendering the same service to their water users in the administrative proceedings to be established under this proposal. The state could be assisted by those water users who feel a need to participate.

321. For example, within the Department of the Interior there are several administrative boards which could be modified, including a Board of Land Appeals and a Board of Indian Appeals.

duct hearings and make decisions on water matters. With an expanded staff and a revised description of its duties in the *Code of Federal Regulations*, that office, with its various appeal boards, could readily handle appeals concerning the measure and scope of reserved water rights. It is imperative that these departments take the necessary steps to establish the priority, amount, and location of each of the uses of the reserved water rights which they are charged with administering for the benefit of those reservations which are used by the public as a whole.

2. *Administrative authority for and proposed action to determine Indian reserved water rights*

Since non-Indians cannot acquire rights in water reserved for the tribal and allotted lands of Indian reservations, except as prescribed by Congress,³²² efforts to appropriate water under state law for use on or around Indian reservations cannot interfere with the Indians' reserved rights.³²³ How then can an Indian and a non-Indian using water from the same source determine their relative rights to water other than by initiating a complete stream adjudication?³²⁴ Except in those few instances involving lands served by Indian irrigation projects,³²⁵ there is no administrative or other legal machinery in existence that provides an adequate alternative to the stream adjudication proceeding. It is contended herein that a need exists for such an administrative alternative for determining the measure and scope of the reserved water rights of Indian reservations. This need, and the reason the water right must be established on a use-by-use basis, are the first matters considered in this subsection. The authority of the Secretary of the Interior, acting jointly with the affected tribe, band, or group,

322. *United States v. McIntire*, 101 F.2d 650 (9th Cir. 1939).

323. *Id.* at 654. In particular, see the claims of the United States in *United States v. Bel Bay Community & Water Ass'n*, Civil No. 303-71C2 (W.D. Wash., filed Nov. 23, 1971). The case concerns the rights of non-Indians to use ground waters of the Lummi Indian Reservation. The water rights of non-Indian transferees of Indian allotments are discussed in section II, A, 5 *supra*.

324. The non-Indian who desires to resolve the problem by initiating a stream adjudication cannot find a state forum with jurisdiction over Indian water rights for the reasons discussed in section III, B, 2 *supra*. Even the federal court may lack jurisdiction over the Indians and their water rights for the reasons discussed in section III, C, 2, *a infra*.

325. *E.g.*, Act of April 23, 1904, ch. 1495, 33 Stat. 302, as amended Act of May 29, 1908, ch. 216, § 15, 35 Stat. 444 (authorizing the Flathead Irrigation Project). The Secretary of the Interior has adopted regulations and administrative procedures for the management of the various irrigation projects operated under the auspices of the Bureau of Indian Affairs. 25 C.F.R. Subchapters R, S, T & W (1975). These regulations cover only a small portion of the lands of the various reservations.

to establish such a system for each reservation, is then discussed. Finally, the operation and benefits of an integrated Indian-Interior administrative water permit system are examined in light of the current lack of a workable system.

a. *The need for administrative machinery.* The earlier discussion of reserved water rights establishes that such rights exist, and have certain identifiable characteristics. There are many significant legal questions, however, that remain undecided.³²⁶ Fur-

326. A review of the decisions regarding the *Winters* doctrine reveals that reserved water rights for use upon lands withdrawn from the public domain have the following established characteristics:

- (1) The federal government holds the reserved right to use a quantity of water to fulfill the purpose for which a reservation or withdrawal of public lands has been made. In the case of Indian reservations, the United States holds the legal title as a fiduciary, and the Indians hold the equitable title to the right to use water.
- (2) The quantity of water reserved may be set at the amount that is reasonably necessary for all present and future needs under current standards of economic feasibility. The same standard applies to Indian reservations except that economic feasibility is determined without requiring repayment of the construction cost of Indian irrigation projects until the land passes out of Indian ownership. If for practical reasons this amount cannot or need not be ascertained, and the amount of reserved water is de minimus with respect to the supply, the reservation will embrace an unquantified amount sufficient for the future requirements of the reservation.
- (3) The reservation of water is inferred from the purposes sought to be achieved in the treaties, acts of Congress, executive orders, or executive agreements which reserved the land.
- (4) The reserved water right appears to have a proprietary—ownership of land and water—basis under the property clause of the Constitution, although *Arizona v. California* provides the basis for a reservation doctrine independent of ownership of federal lands under the commerce clause powers over navigable waters and Indian tribes.
- (5) The water right is not dependent upon the application of water to beneficial use at any specified point in time.
- (6) The water right is not lost by nonuse, laches, or prescription under state law.
- (7) The reserved water right has priority from the date of the creation of the reservation involved.
- (8) The right is subject to private appropriations under state law that vested prior to the date the reservation was created.
- (9) The right is senior to all appropriations or other uses under state law thereafter made.

A number of questions concerning the measure and scope of the reserved water right have not been clearly and entirely decided, including:

- (1) What showing is required to establish the sovereign's implied intent to reserve the waters when the reservation was created?
- (2) What are the nature and scope of those purposes for which the use of water will be deemed to be reserved?
- (3) May the original purposes for which water will be impliedly reserved be expanded, and if so, how?

ther, the factual questions involved in determining the measure and scope of the reserved rights of specific reservations will remain unanswered until the *Winters* doctrine is judicially or administratively applied in each situation on a use-by-use basis. The measure to be established should include the amount, period, place, and nature of each use. Until that occurs, no one can determine the amount of return flow. Only when the return flow is known can the amount of water available in a watershed for use by nonfederal water users pursuant to state law be determined.

The only existing method for quantifying the reserved water rights of an Indian reservation, a complete stream adjudication suit, is an inadequate means of quantifying these rights for four reasons. First, stream adjudication suits are interminable, expensive, and often inconclusive. Second, if the Indian water rights are in an interstate watershed, only the Supreme Court has jurisdiction to adjudicate the entire matter in one proceeding, unless the stream has been apportioned by a prior adjudication or by an interstate compact.³²⁷ If the Supreme Court declines to exercise its jurisdiction, all of the water rights in the watershed cannot be adjudicated vis-à-vis other rights—regardless of the desire of all affected water users to have their rights determined—unless one

(4) May nonstatutory withdrawals by the President *without express congressional authorization* validly reserve a right to water?

(5) May the quantities of water reserved under the *Winters* doctrine for a given use based on current standards of economic feasibility be altered upon changed future feasibility standards?

(6) Can the holder of a reserved water right change the place or nature of his use of reserved waters? If so, what rules or limitations will apply?

(7) Does the federal government in its own right or as trustee of Indian reservation lands have the right to unappropriated water, independent of its ownership of the lands, for domestic and industrial uses?

(8) Will the reserved right be implied to fulfill the needs of both Indian and non-Indian communities established on Indian reservations?

(9) Does the termination of a withdrawal of land as a reservation also terminate the reserved water rights?

(10) Does the reservation doctrine apply to acquired lands or is it confined to original public domain lands?

(11) What is the effect of the construction of an authorized reclamation project conflicting with reserved water rights?

(12) Does the reserved right include aboriginal uses of water by the Indians, such as the farming of the pueblos on the Rio Grande, and the preservation of the environment of the various reservations for fish, wildlife, and related uses, such as the protection of minimum stream flows?

Some of the established characteristics of the reserved water right and the unresolved questions were paraphrased from the itemization in WHEATLEY, *supra* note 29, at 135-36. Those characteristics and questions were further discussed in NATIONAL WATER COMM'N, *supra* note 29, at 459-83.

327. See section III, B, 4 *supra*.

state agrees to appear in the federal court sitting in the other state. Third, judicial forums for such suits are limited. As demonstrated by discussion of the McCarran Amendment in section III, *B*, 2 *supra*, state courts and state administrative bodies have no jurisdiction over Indian reserved water rights. Therefore, if the Indians have rights in a particular stream, only a federal court may entertain an action to adjudicate those rights. Fourth, the sovereignty of Indian tribes, discussed in section III, *B*, 2, *a supra*, may bar suit against a nonconsenting Indian tribe, band, or group. This could prevent any judicial forum from adjudicating Indian water rights without the tribe's consent. Rights in the watershed would remain uncertain because any suit to establish them would be dismissed for lack of jurisdiction over an indispensable party—the affected Indian tribe. The problem cannot be avoided even if the federal government is deemed, as a matter of law, to have authority to consent on behalf of the Indians. As a matter of policy, the government will not give that consent if the affected tribe objects. While Indian tribes may not be able to successfully argue in court that the United States cannot submit their water rights to adjudication without the approval of the affected tribe, it has been the policy of the Department of the Interior to obtain the agreement of the tribes prior to requesting the Department of Justice to adjudicate Indian property or water rights. This policy is based on the Department's interpretation of the Indian Reorganizations Act³²⁸ and the new Indian Self-Determination and Education Assistance Act.³²⁹

It should be noted here that the first two reasons obtain in the adjudication of all reserved rights, whether Indian or non-Indian. The third and fourth reasons, on the other hand, are unique problems concerning the use of stream adjudication suits to quantify Indian reserved water rights, and demonstrate the unique difficulty of using such existing procedures to establish the measure and scope of Indian reserved water rights. This discussion of the difficulty of using the present judicial system in Indian water rights cases is not intended as an argument for extension of the McCarran Amendment to Indian water rights. Rather, it is intended to highlight the crucial need for the integrated administrative system proposed below.

The four reasons presented above demonstrate that in many instances it may be impossible to quantify the rights in a stream

328. 43 U.S.C. §§ 315 *et seq.* (1970).

329. 25 U.S.C.A. §§ 450, 450a-n, 455-58, 458a-e (Supp. 1, 1975).

system until the Department of the Interior and the Indian tribes establish a mechanism to identify the amount, place, and nature of each use in order that the amount of water remaining for use by non-federal, private users can be determined. The Secretary and the Indian tribes, however, have never promulgated water regulations or instituted procedures that would determine the amount of water reserved, except for those regulations dealing with constructed irrigation projects.³³⁰ The void left by this inaction has provoked varying responses. Some states have made an administrative determination that waters appropriated by non-Indians under state law are surplus to the needs of the Indians.³³¹ Also, the federal courts have held on occasion that *they* have a duty to fill the void.³³² Judicial action in the face of administrative inaction, however, is not the rule. In one case, the Ninth Circuit Court of Appeals held, on the facts presented to it, that it was not justified in interfering with the Secretary's duty to administer reserved waters.³³³ There is, therefore, a clear need for the Department of the Interior and the affected Indian tribes to create, under existing authority, administrative machinery that will establish the measure and scope of Indian reserved water rights.

b. *The authority to establish administrative machinery.* The Secretary of the Interior is charged with administering the trust responsibilities of the United States with regard to Indians.³³⁴ Congress, however, holds plenary power over Indians and their property,³³⁵ and may withdraw the duties of guardianship and entrust them to any agency it chooses.³³⁶ By the adoption of the General Allotment Act in 1887,³³⁷ Congress gave the Secretary of the Interior specific responsibilities in the administration of

330. 25 C.F.R. Subchapters R, S, T & W (1975).

331. See *Tulalip Tribes v. Walker*, No. 71421 (Super. Ct. for Snohomish County, Wash., Feb. 7, 1963). Until the Indians' water needs are determined, the amount of water surplus to their needs cannot be known. This requires a determination of the purposes for which each reservation was created, and a determination of the measure of the water right which will be implied to fulfill those purposes. See section II, A, 1, *a supra*.

332. *E.g.*, *Segundo v. United States*, 123 F. Supp. 554, 558 (S.D. Cal. 1954), *appeal dismissed*, 221 F.2d 296 (9th Cir. 1955).

333. *United States v. Pierce*, 235 F.2d 885, 892 (9th Cir. 1956).

334. 25 U.S.C. § 2 (1970); *FEDERAL INDIAN LAW*, *supra* note 219, at 220.

335. *Choate v. Trapp*, 224 U.S. 665 (1912); *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902). See notes 217-23 and accompanying text *supra*.

336. *United States v. Hellard*, 322 U.S. 363, 367 (1944). Note the transfer of responsibility for Indian affairs from the War Department to the Department of the Interior. Act of March 3, 1849, ch. 108, § 5, 9 Stat. 395.

337. Ch. 119, 24 Stat. 388 (1887).

water rights for on-reservation uses.³³⁸ The Act gave the Secretary authority to prescribe rules and regulations to secure just and equal distribution of the water supply among the Indians.³³⁹ Thus, the Secretary may promulgate rules and regulations to provide for the just and equal distribution of reserved waters. The place, nature, and amount of each use could be determined by the system so established, and the amount of water remaining for use by non-Indians will become apparent as the system is implemented.

Since the General Allotment Act must be interpreted and implemented with due consideration for the sovereign power and authority of the Indian tribes,³⁴⁰ the authority of the Secretary under that statute is not absolute. Although the Act has been interpreted by the courts and the Department of the Interior to provide that the United States has retained jurisdiction and control over waters on Indian reservations,³⁴¹ current administrative policy and recent legislation³⁴² have established the principle that the right of self-determination of organized Indian tribes, bands, and groups will not be interdicted by government officials. Hence, exercise of the Department's jurisdiction over reserved water rights must occur jointly with the exercise of jurisdiction by the Indian tribes, bands, and groups that reside on the various reservations.³⁴³

c. Proposed administrative action. The first requirement

338. *Id.* § 7 (codified at 25 U.S.C. § 381 (1970)).

339. *United States v. Powers*, 305 U.S. 527, 533 (1939); *United States v. Alexander*, 131 F.2d 359, 361 (9th Cir. 1942); *United States v. McIntire*, 101 F.2d 650, 654 (9th Cir. 1939). The courts have construed the statute to indicate "Congressional recognition of equal rights among resident Indians," and to require the just and equal distribution of water when water is in short supply. *United States v. Powers*, 305 U.S. 527, 533 (1939). This equal right apparently extends to surface waters, *United States v. Alexander*, 131 F.2d 359 (9th Cir. 1942) (dictum), and ground waters, *Tweedy v. Texas Co.*, 286 F. Supp. 383 (D. Mont. 1968) (by implication).

340. The sovereignty of the Indian tribes is discussed in section III, B, 2, *a supra*.

341. See note 339 *supra*.

342. Indian Self-Determination and Education Assistance Act, 25 U.S.C.A. §§ 450, 450a-n, 455-58, 458a-e (Supp. 1, 1975).

343. Congress has never acted to restrict the authority of Indian tribes in the administration of water except by 25 U.S.C. § 381 (1970). Hence, full power and authority would reside in the joint action of the tribes and the Secretary of the Interior. This authority of the Indian tribes has only recently received attention. *E.g.*, *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Lomayaktewa v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975). For another example, see the claims of the United States in *United States v. Bel Bay Community & Water Ass'n*, Civil No. 303-71C2 (W.D. Wash., filed Nov. 23, 1971). For an early expression of this concept see Solicitor's Memorandum to the Department of Justice, May 5, 1938 (concerning petition for certiorari in *United States v. Powers*, 94 F.2d 783 (1938)).

for action is a complete inventory of the existing and potential land and water uses on each reservation. Such inventories are already being conducted on many reservations.³⁴⁴ These, when completed, will provide the detailed data from which the amount, period, place, and nature of each use, as well as the return flow, can be established.

The administrative machinery necessary to quantify Indian reserved water rights could be created by federal regulations promulgated by the Secretary of the Interior pursuant to 25 U.S.C. § 2 and 25 U.S.C. § 381. Those regulations should establish standards for departmental approval of tribal water codes, including: (1) guidelines for using the information contained in the inventory of existing and potential land and water uses to establish the amount, period, place, and nature of each use through a permit system on a use-by-use basis; (2) due process requirements for notice and hearings before tribal water boards; and (3) procedures for appeal to the Department of the Interior's Board of Indian Appeals.

Once the Department's regulations are promulgated, the Indian tribes, bands, and groups should take the lead. In accordance with the regulations, a tribal water board on each reservation, created by and acting under a tribal ordinance, could establish a tribal water code that would provide for the issuance of a permit for each existing and potential use. Under this permit system, the various uses of the reserved waters could be established in detail and administered by each tribe, band, or group on its own reservation by its own tribal water board pursuant to its own water code.

Once established and implemented with appropriate administrative procedures, these water codes would solve many important unresolved questions concerning the Indians' claims under the *Winters* doctrine. Each tribe could take the lead and establish the position which the tribe or the individual Indian believed to be correct. Other water users could object to any particular use, or the measure thereof, by appearing before the tribal water board. In each case, the action of the tribal water board would be subject to administrative review in the Office of Hearings and Appeals of the Department of the Interior. Eventually, the deci-

344. The Office of Trust Responsibilities in the Bureau of Indian Affairs is responsible for this program. The Director of that Office stated that as of December 1, 1975, there were land and water resource studies in various stages of completion in a three phase program on 96 Indian reservations. These studies will provide much of the information needed to quantify the Indians' reserved water rights.

sion in contested cases would be subject to court review.³⁴⁵

If the authority of the tribe over the non-Indian transferee of an allotment is questioned, or if the water rights exercised by entrymen owning private lands within reservation boundaries are in conflict with the Indians' reserved right, the Secretary of the Interior can delegate his authority over these issues and the non-Indian parties to the Indian tribe for an initial determination which would be subject to administrative review. In this manner, the problem that arises when the non-Indian transferee of former allotted Indian land desires to establish the amount of his water right is solved by providing him with a forum in which to bring his case. Similarly, when a non-Indian entryman or non-Indian neighbor to an Indian reservation wishes to establish his right in relation to the Indians' right in a particular stream or groundwater basin, he can request a determination by the tribal water board and then appeal if dissatisfied.

It is contemplated by the author that each of the uses of water established as feasible in the land and water inventory of a reservation, and each of the existing uses of water, would be subject to a permit issued upon completion of the inventory. When that is done on each reservation, the scope and measure of the Indians' water right will be established on a use-by-use basis in each watershed.

Assuming the proposed water codes, regulations, and administrative machinery are provided, a problem arises in integrating

345. 5 U.S.C. § 702 (1970). Some may claim that it is unjust to make non-Indians appear before Indian water boards. However, this will be no more of an injustice than to make the Indians appear in state proceedings.

Arguably, a conflict of interest problem could arise in this context. The reserved water rights of the various Indian reservations are protected by the Department of the Interior. The Secretary is the trustee who has the duty to assert and protect the Indians' water rights. 25 U.S.C. § 2 (1970); *Winters v. United States*, 207 U.S. 564 (1908). The performance of that duty will be judged by the most exacting fiduciary standards. *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1972); *Navajo Tribe of Indians v. United States*, 364 F.2d 320, 322 (Ct. Cl. 1966). It could be claimed, therefore, that it is inconsistent for officers of the Department of the Interior to sit as administrative judges in hearings to decide conflicting Indian and non-Indian claims to water. The states' administrative proceedings, however, cannot be used unless Congress so provides. If Congress provided such jurisdiction, the claimants' appeal from state administrative proceedings would be to state courts. The author believes that state court jurisdiction to adjudicate the Indian rights should be denied. See section III, *B*, 2 *supra*. Conducting the Department of the Interior's proceedings pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (1970), and participation by the state should be adequate protection for the interests of the non-Indian. If not, another possible solution to the conflict is to create an independent review board within the federal government, but outside the Department of the Interior.

this federal system with the states' administrative systems.³⁴⁶ The problem could be resolved by the adoption of two proposals. First, the state should appear in hearings before a tribal water board as *parens patriae* for all persons who claim water rights under state law. Second, copies of all permits issued on a use-by-use basis by a tribe to itself, its members, or to any other holder of a reserved right, should, after approval by the Secretary, or resolution on appeal, be filed with the state.

3. *Summary: proposed administrative action*

If the administrative approach proposed herein is adopted for Indian and non-Indian reservations, administrative law judges could immediately begin establishing precedents on the unresolved legal questions of the *Winters* doctrine. Although the determination of certain issues would require judicial review, many other questions involved in establishing reserved water rights are not subject to controversy. Having these matters disposed of by administrative action would result in a needed economy of judicial effort. Failure to resolve these controversies administratively may create a substantial workload which would overtax the currently overcrowded federal courts and might necessitate the establishment of a special federal water court.

Although non-Indian reserved rights are important, the Indians' reserved right is by far the largest and most controversial of the reserved water rights. The administrative machinery proposed herein would bring an early end to much of the controversy by establishing not only the amount of water available to each reservation and each Indian user at the place of each use, but also the amount remaining to non-Indian users from the same water source. The administrative system would accomplish this result by bringing the United States, the Indian water user, and the non-Indian water user (or the state) into one forum having jurisdiction over the water and all the parties. The system would permit the United States and the Indian tribes, bands, and groups to have the maximum input concerning their claims to water while at the same time permitting judicial review for those who seriously disagree. This mechanism is a feasible method for quantifying reserved water rights in the immediate future. The

346. A single integrated record system of water uses is urgently needed so that the public can look to one source to determine the extent of water available for their use at any given water site. See II WHEATLEY, *supra* note 29, at 570-71.

necessity of determining relative rights to the nation's water supply mandates adoption of this or a similar administrative approach.