Winters of Our Discontent: Federal Reserved Water Rights in the Western States

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

INTRODUCTION

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

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

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

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

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

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

3 See infra note 11 and accompanying text.

4 See infra notes 11-18 and accompanying text.

5 See infra note 14 and accompanying text.

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

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

# I Background

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

The doctrine of prior appropriation provides the basic framework for the statutory water use schemes of the western states. A complete understanding of the conflict between the federal reserved rights doc-
trine and prior appropriation necessitates some acquaintance with the workings of prior appropriation systems.

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

Prior appropriation works by strict chronological priority. A senior appropriator, whose priority date15 is earlier in time, may take his entire entitlement of water before a junior holder may take any water at all. In this priority system, junior holders bear the entire brunt of any shortage.16

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

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

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

13 5 R. Clark, supra note 11, §§ 413.1, 429.2.

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

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

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

17 The western states are again split into two groups. The Colorado system, employed only by Colorado and Montana, leaves the entire process of adjudication to the courts. An appropriative claimant files a petition in state court, and all other owners or claimants are served with notice as required by statute. See, e.g., Colo. Rev. Stat. § 37-92-302 (1973 &
rights of the appropriators participating in the hearing as against the entire world. A water adjudication strictly quantifies a holder’s rights and limits his entitlement to his original appropriation, unless he either claims further amounts of unappropriated water or purchases the rights of another appropriator.  

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

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

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

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

The Supreme Court first announced the doctrine of federal reserved water rights in the 1908 case of *Winters v. United States*. In 1888, one year before Congress admitted Montana to the Union, it established by treaty the Fort Belknap Indian Reservation in the Montana Territory. *Winters* and others sought to dam the Milk River, which flows...
through the Fort Belknap reservation. The Court recognized the conflicting inferences arising from the treaty’s silence as to the Indians’ water rights; nonetheless, the Court held that the treaty had implicitly reserved a sufficient quantity of water for the Indians to irrigate their land.

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

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24 *Id.* at 565.
25 *Id.* at 576-77. The Court declared that “[t]he power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. . . . That the Government did reserve them we have decided, and for a use which would be necessarily continued through years.” *Id.* at 577 (citations omitted). The Court also held that Montana’s subsequent admission to the Union had no effect on the treaty’s implicit reservation of water. *Id.*
27 See, e.g., Trelease, *Federal Reserved Water Rights Since PLLRC*, 54 DEN. L.J. 473 (1977). Professor Trelease was a practicing water lawyer when the Court decided *Pelton Dam* and his comments indicate the general chaos caused by the decision:

> At no time prior to 1955 did I ever hear a suggestion that the reserved rights doctrine was anything but a special quirk of Indian water law.

*Id.* at 475-77 (footnotes omitted).
28 *Pelton Dam*, 349 U.S. at 448.
29 *Id.* at 437-38.
31 *Pelton Dam*, 349 U.S. at 448.
32 *Id.* at 446-47.
33 *Id.* at 443-44.
34 *Id.* at 446-48.
35 *Id.* at 452.
thus implied that federal reserved lands, both Indian and non-Indian, are not subject to state water law.\textsuperscript{36}

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

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

\textsuperscript{36} \textit{Id.} at 448. The Court noted that:

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

\textit{Id.} (emphasis added).

\textsuperscript{37} 373 U.S. 546 (1963).

\textsuperscript{38} \textit{Id.} at 550-51 (the states involved were Arizona, California, Nevada, New Mexico, and Utah).

\textsuperscript{39} \textit{Id.} at 551 n.3, 595.

\textsuperscript{40} \textit{Id.} at 598. The Court had not previously had occasion to decide whether the executive could create a \textit{Winters} right.

\textsuperscript{41} \textit{Id.} at 600-01.

\textsuperscript{42} \textit{Id.}

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

\textsuperscript{44} \textit{Arizona I}, 373 U.S. at 600 (emphasis added).
quantity of the water guaranteed by the *Winters* right might also be increased.

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

The Court again addressed the question of jurisdiction over reserved rights in *Colorado River Water Conservation District v. United States (Colorado River)*.50 The United States filed suit in federal district court in Colorado seeking a declaration of all reserved rights held by the federal government, in its own right and as a fiduciary for certain Indian tribes, in the San Juan River Basin.51 The government named as defendants private irrigators who presumably would claim appropriative rights to the same water.52 Several Colorado water conservation districts then intervened as defendants. One defendant subsequently filed suit in Colorado state court seeking adjudication of the same rights53 and joined the United States as a defendant under the McCarran Amendment.54

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45 401 U.S. 520 (1971).
47 The McCarran Amendment, 43 U.S.C. § 666 (1976), provides in part:

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.

See also infra note 96.
49 *Id.* at 524.
51 *Id.* at 805.
52 *Id.*
53 *Id.* at 806.
54 *Id.*
The water conservation districts then moved to dismiss the federal action, arguing that the McCarran Amendment vested the state courts with exclusive jurisdiction to determine the reserved rights of the United States.55

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

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

Two aspects of Chief Justice Burger’s opinion in Cappaert are noteworthy. First, although the Court’s narrow holding sustained a Winters right, the opinion announced a “minimal need” standard for determin-
ing the quantity of water reserved by the federal government. Second, the Court had a clear opportunity to extend the Winters doctrine to groundwater but refused to do so. The Cappaert case thus marked a turning point in the Court's reserved rights jurisprudence.

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

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

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66 Id. at 141. Chief Justice Burger noted that:

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

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

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

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

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

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

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

Although New Melones Dam did not deal directly with the doctrine of federal reserved rights, it did shed some light on the relationship between the western states and the federal government in the area of water law. The Supreme Court held that § 8 of the Reclamation Act of 1902 requires the United States to acquire its appropriative rights to water for projects in accordance with state law, even if the state imposes conditions upon the water's use. Id. at 665-75. This holding gave the states great control over federal reclamation projects, illustrating the Court's newfound concern for the states interest in controlling the water within their
Gila National Forest in New Mexico and flows through private land before “disappearing in a desert sink just north of the Mexican border.” The state of New Mexico initiated a general adjudication of water rights in the Rio Mimbres. The United States was joined as a party because it claimed Winters rights to the Rio Mimbres for use in the Gila National Forest. Justice Rehnquist, writing for a majority of five justices, affirmed the “minimal need” standard set forth in Cappaert and scrutinized the government’s proposed uses for the water. Contrary to its decision in Arizona I, the Court held that national forests exist for only two purposes: to preserve a supply of timber and to protect and maintain adequate water flow. Therefore, the government’s reservation of water from the Rio Mimbres could not exceed the amount necessary to accomplish these two purposes. The general tenor of the Mimbres opinion is quite unsympathetic to the government’s Winters rights claims.

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69 Mimbres, 438 U.S. at 697.
70 Id. at 697 & n.1.
71 Id. at 697-98. The United States was joined pursuant to the McCarran Amendment, 43 U.S.C. § 666 (1976). 438 U.S. at 697 n.1; see supra note 47 and accompanying text.
72 438 U.S. at 699-700; see supra note 66 and accompanying text.
73 438 U.S. at 698-718.
74 The Court in Arizona I expressly adopted the special master’s conclusion that the national forests are reserved for five purposes. Arizona v. California, 373 U.S. 546, 595 (1963). The special master found that the national forests exist for: “(1) the protection of watersheds and the maintenance of natural flow in streams below the sheds; (2) production of timber; (3) production of forage for domestic animals; (4) protection and propagation of wildlife; and (5) recreation for the general public.” Note, United States v. New Mexico: The Beginning of a Trend Toward Favoring State Water Rights over Federal Water Rights, 9 N.M.L. Rev. 361, 364 (1979) (quoting Special Master Report at 96, Arizona v. California, 373 U.S. 546 (1963)).
75 Mimbres, 438 U.S. at 705-13. The United States Forest Service’s enabling act, the Organic Administration Act of 1897, 16 U.S.C. §§ 473-78, 479-82, 551 (1982), provides in part: “No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber . . . .” Id. § 475. In Mimbres the government argued that the Act established national forests for three purposes: to preserve a supply of timber, to protect water flow, and additionally to improve and protect the forest in general. 438 U.S. at 707 n.14. This third objective would be accomplished by reserving “minimum instream flows for aesthetic, recreational, and fish-preservation purposes.” Id. at 705. The Court, construing the Act narrowly, however, recognized only the first two purposes: “Forests [will] be created only ‘to improve and protect the forest within the boundaries,’ or, in other words, ‘for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber.’” Id. at 707 n.14 (emphasis in original) (quoting 16 U.S.C. § 475 (1982)). The Court’s restrictive reading of the Act is certainly plausible, but persuasive arguments can be made from the legislative history of the Act in support of the government’s reading. See, e.g., Note, Water Rights and National Forests—Narrowing the Implied Reservation Doctrine: United States v. New Mexico, 40 Ohio St. L.J. 729, 743-47 (1979); Note, Reserved Water Rights on National Forests After United States v. New Mexico, 1979 Utah L. Rev. 609, 617-24.
76 Professor Trelease’s comments on the Mimbres case are illustrative: [The Court] emphasized that the quantities allowed would be limited to “only that amount of water necessary to fulfill the purpose of the reservation,
In 1983, the Supreme Court had three occasions to address the reserved rights doctrine. In *Arizona v. California (Arizona II)*, five Indian tribes represented by the United States petitioned for an increase in the quantity of water guaranteed by their *Winters* rights. The petitioners contended that the quantity of their rights did not conform to the Court's 1963 decree in *Arizona I*. That decree measured the Indians' reserved rights by the amount of water necessary to irrigate all of the "practicably irrigable acreage" on the reservations. In *Arizona II*, the tribes contended that the special master's report in *Arizona I* underestimated this acreage. The Court invoked principles of *res judicata* to bar the Indians from reopening the 1963 decree, citing a strong public interest in finality.

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

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*See supra* notes 37-44 and accompanying text.

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

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

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

*Res judicata* was technically inapplicable because *Arizona II* was a continuation of the *Arizona I* litigation, rather than a separate action. *See C. Wright, The Law of Federal Courts* 680 (4th ed. 1983); *see also* *Restatement (Second)* of *Judgments* §§ 17(1), 18(1) (1980). The Court found, however, that the principles of finality behind the doctrine of *res judicata* compelled its holding in *Arizona II*. 103 S. Ct. at 1392-95. The Court said:

Recalculating the amount of practicably irrigable acreage runs directly counter to the strong interest in finality in this case. . . .

. . . The record demonstrates that it was the understanding of the parties and Master Rifkind's intention that the calculation of practicably irrigable acreage be final. That was our understanding as well. . . .

. . . Our long history of resolving disputes over boundaries and water rights reveals a simple fact: This Court does not reopen an adjudication in an original action to reconsider whether initial factual determinations were correctly made. . . .

. . . [W]e have determined that the principles of *res judicata* advise against reopening the calculation of the amount of practicably irrigable acreage. . . .

*Id.* (citations and footnotes omitted).

that a *Winters* right, once quantified, cannot be increased. In 1913, the United States instituted an action to adjudicate the reserved rights of the Pyramid Lake Indian Reservation and the planned Newlands Reclamation Project. These rights were finally quantified in a 1944 consent decree.\(^8\) The United States sued again in 1973 to obtain additional rights for both federal enclaves.\(^9\) Justice Rehnquist, speaking for a unanimous Court, invoked res judicata to bar relitigation of the United States' reserved rights.\(^10\)

The Court's most recent decision in the area of federal reserved rights, *Arizona v. San Carlos Apache Tribe of Arizona (San Carlos Apache)*,\(^11\) is essentially a sequel to *Colorado River*.\(^12\) Several water rights claimants initiated general water adjudications in Arizona state courts in the mid-1970s.\(^13\) The United States, on behalf of itself and various Indian tribes, was joined as a defendant.\(^14\) Later, some of the Indian tribes whose rights were implicated in the state proceedings removed the state court actions to federal court and sought declaratory and injunctive relief to block further adjudication of their reserved rights in state court.\(^15\) The federal district court, relying on *Colorado River*, remanded the removed actions back to state court and dismissed the other federal actions without prejudice.\(^16\) The tribes appealed from these dismissals and the Ninth Circuit reversed, holding that the Arizona statehood enabling act deprived Arizona state courts of jurisdiction over the Indians' water claims.\(^17\)

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

\(\text{\textsuperscript{83}}\) Id. at 2909-10.\\\(\text{\textsuperscript{84}}\) Id.\\\(\text{\textsuperscript{85}}\) Id. at 2925. The Ninth Circuit held below that the Tribe and the Project were neither parties nor coparties to the original action: "They were non-parties who were represented simultaneously by the same government attorneys." *United States v. Truckee-Carson Irrigation Dist.*, 649 F.2d 1286, 1309 (9th Cir. 1981). The court of appeals reasoned that the Tribe and the Project were not adverse parties bound by the first action because "[a]s a general matter, a judgment does not conclude parties who were not adversaries under the pleadings." *Id.* The Ninth Circuit further cautioned that "[i]n representative litigation we should be especially careful not to infer adversity between interests represented by a single litigant." *Id.* Therefore, the court reasoned, the earlier litigation did not conclude the dispute in the later action between the Tribe and the Project. *Id.* at 1309-11.

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

\(\text{\textsuperscript{86}}\) 103 S. Ct. 3201 (1983).\\\(\text{\textsuperscript{87}}\) See supra notes 50-58 and accompanying text.\\\(\text{\textsuperscript{88}}\) *San Carlos Apache*, 103 S. Ct. at 3209.\\\(\text{\textsuperscript{89}}\) Id.\\\(\text{\textsuperscript{90}}\) Id.\\\(\text{\textsuperscript{91}}\) Id.\\\(\text{\textsuperscript{92}}\) Act of June 20, 1910, ch. 310, 36 Stat. 557, 569 (1910).\\\(\text{\textsuperscript{93}}\) *San Carlos Apache Tribe v. Arizona*, 668 F.2d 1093 (9th Cir. 1982), rev'd, 103 S. Ct. 3201 (1983); see *San Carlos Apache*, 103 S. Ct. at 3209.
over Indian lands in Arizona, the McCarran Amendment\textsuperscript{94} gave the state courts jurisdiction in comprehensive water rights adjudications.\textsuperscript{95} The Court also reiterated the \textit{Colorado River} doctrine, which established state courts as the preferred fora for water adjudications involving federal reserved rights.\textsuperscript{96}

### II

**ANALYSIS: RECONCILING THE PRIOR APPROPRIATION DOCTRINE AND THE \textit{WINTERS} DOCTRINE**

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

#### A. The Inherent Conflict Between Prior Appropriation and the \textit{Winters} Doctrine

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

\footnotesize{\textsuperscript{94} 43 U.S.C. § 666 (1976); see supra note 47.}
\footnotesize{\textsuperscript{95} 103 S. Ct. at 3212. The Court stated that "we are convinced that, whatever limitation the Enabling Acts or federal policy may have originally placed on state court jurisdiction over Indian water rights, those limitations were removed by the McCarran Amendment." \textit{Id.} (footnotes omitted).}
\footnotesize{\textsuperscript{96} \textit{Id.} at 3212-16. The Court summarized the policy behind the \textit{Colorado River} doctrine and applied it to the instant case:}

\begin{quote}
The McCarran Amendment, as interpreted in \textit{Colorado River}, allows and encourages state courts to undertake the task of quantifying Indian water rights in the course of comprehensive water adjudications. . . .

. . . [A]ssuming that the state adjudications are adequate to quantify the rights at issue in the federal suits, and taking into account . . . the expertise and administrative machinery available to the state courts, the infancy of the federal suits, the general judicial bias against piecemeal litigation, and the convenience to the parties, we must conclude that the District Courts were correct in deferring to the state proceedings.
\end{quote}

\textit{Id.} at 3214-15 (footnotes omitted); see also supra note 57 and accompanying text.
\footnotesize{\textsuperscript{97} See supra notes 11-19 and accompanying text.}
\footnotesize{\textsuperscript{98} See \textit{id.}}
\footnotesize{\textsuperscript{99} See infra notes 101-21 and accompanying text.}
\footnotesize{\textsuperscript{100} See infra notes 122-35 and accompanying text.}
\footnotesize{\textsuperscript{101} See Trelease, supra note 27, at 474.}
right established under the prior appropriation doctrine.\textsuperscript{102}

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

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

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

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

\textsuperscript{102} Id.
\textsuperscript{104} See Trelease, \textit{supra} note 27, at 474.
\textsuperscript{105} Trelease, \textit{supra} note 76, at 756; see Comment, \textit{supra} note 15, at 560; Comment, \textit{Federal Reserved Rights in Water: The Problem of Quantification}, 9 TEX. TECH L. REV. 89, 93 (1977) ("Most reservations were created around the turn of the century and have that time as a priority date.").
\textsuperscript{106} Trelease, \textit{supra} note 76, at 756.
\textsuperscript{107} See \textit{supra} notes 12-13 and accompanying text.
\textsuperscript{108} Trelease, \textit{supra} note 27, at 474.
\textsuperscript{109} See, e.g., \textit{Cappaert v. United States}, 426 U.S. 128, 141 (1976) ("The implied-reservation-of-water-rights doctrine . . . reserves only that amount of water necessary to fulfill the purposes of the reservation, no more.").
\textsuperscript{110} Comment, \textit{supra} note 105, at 93-94.
\textsuperscript{111} Trelease, \textit{supra} note 76, at 756; Comment, \textit{supra} note 15, at 560; Comment, \textit{supra} note 105, at 93.
\textsuperscript{112} See \textit{supra} notes 17-18 and accompanying text.
\textsuperscript{113} Trelease, \textit{supra} note 27, at 474.
\textsuperscript{115} See \textit{supra} notes 17-18 and accompanying text; see also Comment, \textit{supra} note 15, at 551.
exist “in a state of uncorrelated mystery,” and appropriative rights, which are strictly quantified and controlled, is all too clear. Winters rights threaten the West in two ways: because they are not based on use, Winters rights allow water to go unused; because they are uncertain, they interfere with public and private decisions. The resulting uneasiness and frustration that western water users feel has led to melodramatic descriptions of the Winters doctrine as “‘a first mortgage of undetermined and indeterminable magnitude’” and as a “‘sword of Damocles’ hanging over ‘every title to water rights to every stream which touches a federal reservation.’” The reserved rights doctrine has not yet caused western appropriative water users any substantial harm. Nevertheless, future assertion of reserved rights may cause serious problems in the West, as more users compete for less available water.

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

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

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

117 Address by Northcutt Ely to the National Water Commission (Nov. 6, 1969), quoted in Trelease, supra note 27, at 475.
118 Id.
120 See supra note 1.
121 See supra notes 45-49, 56-96 and accompanying text.
122 Numerous bills have been proposed since 1955, but Congress has passed none of them. See Morreale, Federal-State Conflicts Over Western Waters—A Decade of Attempted “Clarifying Legislation,” 20 Rutgers L. Rev. 423 (1966); Trelease, supra note 27, at 475.
Federal reserved rights and appropriative rights conflict in three major areas: use, quantification, and adjudication and recordation. By molding reserved rights to make them resemble ordinary appropriative rights as closely as possible, the Court can protect both the interests of the United States in supplying its reservations and the states' interest in controlling their water supplies.

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

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

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123 See supra notes 103-07 and accompanying text.
124 See supra notes 108-12 and accompanying text.
125 See supra notes 113-15 and accompanying text.
126 See supra notes 103-07 and accompanying text.
128 See United States v. New Mexico, 438 U.S. 696, 705-13 (1978) (The Court noted that Congress intended to reserve water for "domestic, mining, milling, or irrigation purposes" but not for recreational purposes (quoting 16 U.S.C. § 481 (1976))).
129 See supra note 66.
Court's lead in *Arizona II* and *Truckee-Carson*, and invoke principles of strict finality to deny reopening the issue of quantification of *Winters* rights.

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

**CONCLUSION**

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

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133 See, e.g., U.S. Dep't of Justice, A Proposed Bill for the Inventorying and Quantification of the Reserved, Appropriative and Other Rights to the Use of Water by the United States (June 20, 1974 draft); see also Little, Administration of Federal Non-Indian Water Rights, 27B ROCKY MTN. MIN. L. INST. 1709, 1772-79 (1982) (discussing adjudication alternatives).
134 424 U.S. 800 (1976); see also supra notes 55, 58 and 96 and accompanying text.
135 401 U.S. 520 (1971); see also supra notes 47-49 and accompanying text.