

RESERVED WATER RIGHTS AND THE NATIONAL PARK SERVICE: THE PRESENT  
STATUS AND FUTURE PROBLEMS

by

John R. Little, Jr.  
and  
Ralph O. Canaday<sup>1</sup>  
Office of the Solicitor  
Rocky Mountain Region  
U.S. Department of Interior  
Denver, Colorado

INTRODUCTION

Since the subject is Reserved Rights, it would be well to define what Reserved Rights are. The best and most recent statement of this doctrine by the Supreme Court is found in Cappaert v. United States:

This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.

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In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.

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The implied-reservation-of-water doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more.<sup>2</sup>

This is from a 1976 case which is discussed later.

## HISTORY OF THE CASES

Federal reserved rights have been the object of great and voluminous analysis since the Pelton Dam case<sup>3</sup> was decided in 1955. Prior to this case, federal rights were considered in only two contexts--Reclamation projects and that peculiar "quirk of Indian water law"--reserved right.<sup>4</sup> During the period prior to these dates, water law "...was almost exclusively preoccupied with developing doctrines to settle private disputes between private claimants." Hence, there was no occasion to define rights inherent in federal ownership or federal sovereignty!<sup>5</sup>

Rio Grande Dam

The first case usually considered in a discussion of federal reserved rights is United States v. Rio Grande Dam and Irrigation Co.<sup>6</sup> That 1899 case involved a conflict between the navigation servitude and a proposed private dam at Elephant Butte, New Mexico. The Government sought an injunction based on the 1890 Rivers and Harbors Act.<sup>7</sup> Specifically, the Court was called upon to determine whether the project should be enjoined if the dam and related appropriations of water would substantially diminish navigability. In reaching its decision, the Court, in dictum, said:

[I]n the absence of specific authority from Congress, a state cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream to the continued flow of its waters, so far as least as may be necessary for the beneficial uses of the government property.

The Supreme Court's analysis in this case suggests that there are federal proprietary interests in water and, by implication, rejects state arguments of total federal divestment of its control over waters as a result of the Acts of 1866, 1870, and 1877.<sup>9</sup>

Winters

The Winters case followed in 1908.<sup>10</sup> This was an action brought to restrain upstream irrigators from preventing some of the water of the Milk River in Montana from flowing into the Fort Belknap Indian Reservation which had been created by an 1888 agreement ratified by Congress. At issue were claims by reservation Indians that their water rights were senior to those of private appropriators who had been using water under the authority of state law. The Court agreed with the Indians, finding that the creation of the Fort Belknap Indian Reservation preceded the appropriation for irrigation under state law. The Court said, "the power of Government to reserve waters and exempt them from appropriation under state laws is not denied, and could not be."<sup>11</sup>

Most view the Winters case as the beginning of the reserved rights doctrine, and its importance to federal assertions of control over unappropriated water is persuasive.

Beaver Portland Cement Co.

The next major case in this area occurred twenty-three years later, when Justice Sutherland wrote the famous decision in California Oregon Power Co. v. Beaver Portland Cement Co.<sup>12</sup> Plaintiff in this case was the Power Company. It asserted rights as a riparian owner of lands on Oregon's Rogue River and prayed for an injunction against defendant's upstream use which threatened to lower the level of the river as it passed through plaintiff's property. In holding for the defendant, the Court found that after the Desert Land Act of 1877 was passed, no Government patents (including that of plaintiff's predecessor dating from 1885) carried common law riparian rights with them. In other words, the Court injected a new factor into federal water rights

analysis by suggesting the 1877 Act "severed" the water from public lands and subjected water to the "plenary control" of the states. From 1935 to 1955 reserved water rights law seemed to be settled. Except for possible Indian claims under the Winters doctrine, the only federal water rights of consequence were those acquired from Reclamation projects and all non-Indian agencies--Forest Service, Bureau of Land Management, National Park Service, Fish and Wildlife Service and Reclamation--were acquiring water rights pursuant to state law.

#### Pelton Dam

Then in 1955 one of the most celebrated and controversial cases exploded on the water rights scene. This was the Pelton Dam case.<sup>13</sup> Portland General Electric had applied for a Federal Power Commission license on a site on the Deschutes River that had one abutment in the Warm Springs Indian Reservation and the other on public lands. Both abutments had been withdrawn for power purposes since about 1910. No consumptive use of water was contemplated because the dam was solely for power generation. Oregon challenged the application on the grounds that the structure would prevent anadromous fish from reaching upstream spawning grounds and that the sponsors of the project had no state license. The Court of Appeals set aside the Commission's order which had permitted construction of the dam with stipulations to protect the fish.

The Supreme Court reversed, holding that the Federal Power Commission had exclusive jurisdiction over authorization of a dam and this was based on the "ownership or control by the United States of reserved lands on which the licensed project is to be located."<sup>14</sup> The case really did not strictly involve water rights. The Court's

language, however, inferentially, suggested the Beaver Portland Cement severance analysis did not apply to federal reservations of land; and thus set the stage for possible assertion of non-Indian federal reserved rights. Almost every western water lawyer immediately saw this implication. In other words, the United States could step to the head of the line without paying compensation. It could and probably would assert prior, senior rights to water that had been and was being used by private parties under purportedly valid state water rights. It should be noted that Pelton concerned the power of the Federal Government to authorize the use of its own lands for a nonconsumptive, power production project and that the water rights of other parties were not directly affected.

#### Arizona vs. California II

In the meantime, a major case had begun in 1952 in the Supreme Court for apportionment of the waters of the lower Colorado among the states of Arizona, California and Nevada under the Colorado River Compact of 1922.<sup>15</sup> Also, in question was the authority of the Secretary of the Interior to manage the federal reservoirs on the river. In the process of settling these disputes, the Court also addressed certain water rights claims by the Government for both Indian and non-Indian reservations. These included the Lower Colorado Indian tribes, Lake Mead National Recreation Area, two wildlife refuges, and upstream forests. The Court, in ruling on the latter claims, relied heavily upon Winters in finding that both the Indians and the Federal Government had reserved rights in order to make the reservations involved viable. The importance of this case is the unequivocal holding that the reservation doctrine first enumerated for the Indians was "equally applicable" to non-Indian federal reservations.

Cappaert

In 1952, President Truman added the Devil's Hole Cavern to the Death Valley National Monument. The cavern contained the famous underground pool and its even more famous occupant--the desert pupfish. In 1970, the Cappaerts applied for a Nevada well permit. The Government protested that the well draft would compromise the water level in the pool. Nevada granted the permit and the United States sued in federal court. In Cappaert v. United States,<sup>16</sup> the Court held in 1976 that the Cappaert well was junior to the federal reservation which enjoyed a reserved right and that the United States accordingly was entitled to an injunction to protect its senior right against compromise from either surface or groundwater junior diversion.

Cappaert is regarded by some as the zenith of the reserved right doctrine being constitutionally founded on the property clause.<sup>17</sup> In most other ways, Cappaert is a very standard reserved rights case, but there are some twists. First, the Court applied the reservation doctrine to groundwater for the first time. Second, the decision required that the pool level be held at an elevation but permitted well or other diversions so long as that level was maintained. This is a compromise in that a minimum level in the pool is decreed thus implementing the Court's holding that a reserved right carries with it only the absolute minimum amount of water needed for the purposes of the reservation. Third, as noted by one commentator, the decree is intriguing to those who argue for instream flows since the minimum pool elevation decreed is essentially a stationary instream flow.<sup>18</sup>

New Mexico

Finally, in 1978, the Court decided United States v. New Mexico.<sup>19</sup> The Court concluded that Congress had consistently deferred to western state water law in the enactment of pertinent legislation starting with the 1866 Mining Act. This case involved claims for reserved rights for the Gila National Forest. The Court ruled that water was reserved only for the primary purposes of forests established under the 1897 Forest Service Organic Act--securing favorable watershed conditions for water flows and timber supply. All other needs were secondary purposes for which the Government would have to obtain rights like any other appropriator under state law.

The case is mainly important because of how the Court arrived at this conclusion rather than the interpretation itself. In other words, it is the utilization of a narrow, strict construction technique founded on "deference to state law" that is significant rather than the details of the reading given the 1897 Act. Under this "deference" principle, therefore, unless Congress has clearly provided that state law will not be applied to acquisition of water rights under a particular federal statute, it will be presumed that state law will govern.

This opinion is obviously very unfriendly in tone to federal water rights in general and reserved rights in particular. One senses that the Court may feel that its previous opinions have been overread and perceives that federal, tribal, conservational, and other interests may have gained too much encouragement from them. The Court may thus have been seeking to serve notice that it will not tolerate any attempt by the Federal Government, Indian tribes, or others to effect wholesale displacements of vested state water rights in the west through the

assertion of federal or tribal rights. Possibly, the Court may merely have also realized the full implication of the fire storm it first ignited in Pelton 23 years earlier and was attempting to bank the fire.

For whatever reason, clearly the Court was in a mood for "setting things right"<sup>20</sup> the day it decided New Mexico and California v. United States,<sup>21</sup> a case primarily concerned with the interpretation of Section 8 of the Reclamation Act,<sup>22</sup> and the decisions marked a stunning redirection of over 20 years of relatively steady expansion of basic concepts of federal water rights, particularly as to reserved rights. In retrospect, however, the retrenchment in reserved rights should have been anticipated and was perhaps even overdue. In nearly all of the previous cases, the facts were sympathetic to the Court finding an implication that water was intended to be reserved as well as land. The barren reservations, the refuges lacking purpose without water in Winters and Arizona v. California, and the pupfish pool of Cappaert evidenced relatively clear intention. It was, accordingly, inevitable that the Court would eventually be confronted with a case where it would say "enough" and find that evidence of inferred intention and implication was insufficient. Clearly, there is a point beyond which these two fuzzy concepts will not carry.

#### PRESENT PROBLEMS IN THE NATIONAL PARK SERVICE

Because of the McCarran Amendment<sup>23</sup> we have now had several years of experience with general adjudications of federal water rights in state courts. This Amendment provides for joinder of the United States in state courts for adjudication of federal water rights along with all other appropriators. Joinder of the Federal Government in the Eagle County case<sup>24</sup> (which includes Water Division, 4, 5, and 6 in Colorado)



occurred in 1969. The United States has been joined in all the water divisions now. The Eagle case is on appeal to the Colorado Supreme Court. The certified record on appeal consists of eight boxes of evidence for the federal claims alone. The briefs on appeal are over six inches thick. The report of the master referee to the District Court is over 1000 pages. The case is probably two years away from a decision by the Colorado Supreme Court. Undoubtedly it will be appealed to the United States Supreme Court which will take another two years before that court renders a decision.

In these general adjudications in Colorado there are two types of situations the National Park Service faces in claiming reserved rights. In Rocky Mountain National Park the problem has been fairly simple in that the source of the water originates in the park and no one can make use of it until it has left the boundaries of the park. This has been called "Highority" by the Park Service. The purposes for the water claimed by the National Park Service for Rocky Mountain are based on the Act of January 26, 1915, establishing the park and the Act of August 25, 1919, which created the Service. The Act creating the National Park Service provides:

...to conserve and maintain in an unimpaired condition their scenic, aesthetic, natural and historic objects, as well as the wildlife therein, in order that the monuments might provide a source of recreation for all generations of the citizens of the United States.

The Park Service claims the instream flows of all streams and rivers in the park for the above purposes. The two problems that have arisen here are the quantification of such flows and the priority date given the Park Service for those lands later transferred to the park from national forests. On the question of quantification, the Park

Service has claimed the natural flows, and this seems to have been accepted for Rocky Mountain. The other problem is more difficult because the park was created by transfer of previously reserved national forest lands to national park status in 1915 and a later transfer in 1930. The United States is arguing for a date when the forest was reserved originally and the State of Colorado is arguing that the priority date should be that date when the national forest was transferred to a national park. The rationale behind the United States' argument is that both the national forest and the park have similar uses and purposes.

The real struggle for the Park Service in the Eagle case is with Dinosaur National Monument where the claim for reserved rights is for instream flow in a park located in the middle of a stream. There is nonfederal land above and below the Monument so that the Yampa River passes through nonfederal land before it enters the Monument and flows through nonfederal land when it leaves the Monument.

We are advised that the average annual flow of the Yampa through the Monument is about 1.5 million acre-feet. Under the Upper Colorado Compact, Colorado is required to deliver to Utah an average of about 500,000 acre-feet annually. Between these two numbers is the water supply for the Bureau of Reclamation's proposed and authorized Savory-Pothooks project; a proposed diversion by the City of Cheyenne, Wyoming from the Little Snake tributary; the Colorado River Water Conservation District's proposed 1.3 million acre-foot storage capacity Juniper-Cross Mountain Project; a number of potential steam-fired powerplants; several possible coal gasification or liquefaction plants; and several other development plans. Most of these proposed projects have Colorado

conditional right decrees. The Dinosaur instream flow claim has been recognized as a matter of law by the lower court but has not been quantified. If the allowance of the claim as a matter of law stands, and if it is quantified at an amount above the required Colorado delivery to Utah under the Upper Colorado River Compact, the supply to some or all of the proposed projects will be compromised.

The specific requests for reserved rights for Dinosaur were based on uses including: recreational uses; wilderness preservation uses; uses for the preservation of scenic, aesthetic and other public values; and uses for fish culture, conservation, habitat, protection, and management, including, but not limited to, minimum stream and lake levels as are necessary to do the above.

One of the biggest arguments in Dinosaur is over whether these reserved rights for minimum stream flows included water necessary for recreational boating, and if so, what was the date of the reservation for recreational boating. The claim for the above uses has also led to the involvement of other Acts such as the Wild and Scenic Rivers Act and the Endangered Species Act. Yes, we have two or possibly three endangered species (fish) in the Yampa River. Again, the Court has to decide what uses or purposes were included in the reservation, and then the even tougher question must be answered of how much water was reserved. This, as has been mentioned, will affect many projects up and down the stream from Dinosaur.

Another National Park which involves the question of reserved rights is Yellowstone National Park in Wyoming. It is in the same situation as Rocky Mountain since it is the source of the streams and lakes within it so no one can divert water before it leaves the park.

This is part of another McCarran Amendment general adjudication in Wyoming called the Big Horn Adjudication. As in Rocky Mountain the Park Service is claiming the natural flows which leads to an argument over quantification. The State of Wyoming wants the Park Service to quantify all streams and springs and identify the level of ponds and lakes. The Park Service argues that since it is claiming the natural flows for instream uses which are nonconsumptive, quantification would be a waste of time and money, and in some cases might destroy the feature that was being quantified. There is some hope that the claims for non-Indian reserved rights in Wyoming, including those of the National Parks, may be settled.

#### THE FUTURE OF FEDERAL RESERVED WATER RIGHTS

When the notion that there may be federal reserved water rights apart from Indian Reservations first surfaced in the 1955 Pelton case there was an immediate, and strongly felt, response. The doctrine was described as "a first mortgage of undetermined and undeterminable magnitude which hangs like a Sword of Damocles over every title to water rights on every stream which touches a federal reservation."<sup>25</sup> There were, and are, widespread fears that advancement of priority dates, through the use of reserved rights, not only would permit displacement of present water users by allowing the Government to "go to the head of the line," but also that such action would be "free." Soon after the Pelton case the first so-called "Barrett Bills" or "Western Water Rights Settlement Acts" was introduced. The Congress, however, has not seen fit to provide a remedy for the alleged displacements.

We suspect the reason Congress has gone slowly in enacting legislative responses to federal reserved rights is the one recently

expressed by Professor Trelease: the experience in Colorado has suggested that the "Sword of Damocles" rhetoric is hyperbolic; substantial displacement of previous users has not occurred."<sup>26</sup> In all of the northwestern third of the State of Colorado, the current uses by forests and parks add up to only 12.981 cubic feet per second of stream flow and 2044.2 acre-feet of stored water."<sup>27</sup> Professor Trelease suggests that Congress will wait for a "case of real and substantial harm from the implied reservation doctrine" before it enacts legislation addressing redress of alleged displacements from assertions of federal reserved rights.<sup>28</sup> This is not to suggest such "real and substantial harm" may not occur.

Whatever the virtues of the debate and whatever the legislative response may be, the theoretical underpinnings of the doctrine are well known. The traditional basis some commentators assert is the property clause of the United States Constitution<sup>29</sup> pursuant to which the water remaining unappropriated under state law is subject to the control of the Federal Government. Some commentators have suggested, however, that the theory actually used by the courts in developing the reserved rights doctrine is based upon the supremacy clause.

The federal functions exercised in the name of the reservation doctrine rests instead on the supremacy clause, coupled with the power exercised in making the reservation of land or with some other power incidentally exercised on the reserved land.

The Supremacy Clause allows Congress, while acting pursuant to a constitutionally delegated power, to take water without regard for state precedural or substantive law. Congress may not, of course, take private property in the form of appropriated water without payment of just compensation,<sup>30</sup> but if the water is unappropriated when taken, questions of compensation do not arise.

Under either of the above formulations, the Supreme Court has consistently upheld federal reserved rights. The Court has done so in Arizona v. California, Eagle County, Cappaert and New Mexico cases. In a word, reserved rights are, in my view, firmly established as a matter of law. As a matter of personal preference, I tend to favor the Supremacy rationale as being the more logical explanation for the doctrine.

The critical questions now are not the theoretical or speculative arguments discussed above, but rather: how much and for what? These questions raise the difficult problem of interpreting Congressional or administrative intent. The key cases -- New Mexico, Cappaert, and Arizona v. California, involved situations where the intention to withdraw some water as well as land was reasonably clear. The importance of New Mexico, in my view, lies not in the details of the court's consideration of the Forest Service Act of 1897, but in the narrow and strict construction technique utilized in that analysis. The point made is that reserved rights arise by implication. The Court said, "The question posed in this case... is a question of intent and not power."<sup>31</sup> Moreover, by pointing to California v. United States, decided the same day, the Court emphasized the primary state law in this area and indicated that exceptions to that rule, such as federal reserved rights, would be carefully examined and strictly construed. In New Mexico the Court, therefore, distinguished between the primary and secondary purposes of the reservations and held that only the primary purpose water needs are reserved. This deference to state law is phrased in terms suggesting something like a presumption. Whether it will amount to this or something less remains to be seen. In any event, the message in New Mexico is clear: Reserved rights claims will be strictly construed to

be successful, such assertions must be solidly tied to primary purposes of the act, treaty, or withdrawal which reserves the water. Further, water quantity claims must find clear support within a reasonable construction of the intent of the reservation.

#### FOOTNOTES

1. Mr. Little is Regional Solicitor, Rocky Mountain Region, Department of the Interior, Denver, Colorado. Mr. Canaday is an attorney-advisor in the Solicitor's Office, Rocky Mountain Region. The views and observations expressed in this article do not necessarily represent those of the Office of the Solicitor or the Department of the Interior.
2. 426 U.S. 128, 138-39 (1976).
3. Federal Power Comm'n. v. Oregon, 349 U.S. 435 (1955).
4. Trelease, Federal Reserved Water Rights Since PLLRC, 54 Den. L.J. at 475.
5. E. Morreale, Federal-State Rights and Relations in 2 Waters and Water Rights, Sec. 102 (r. Clark, ed., 1967).
6. 174 U.S. 690 (1899).
7. Act of September 19, 1890, Ch. 907, Sec. 10, 26 Stat. 454 (1890); (superseded by the Act of March 3, 1899, Ch. 425, Sec. 10, 30 Stat. 1151 (1899); current version 33 U.S.C. Sec. 403).
8. 174 U.S. 690 at 703 (1899).
9. 14 Stat. 253 (Act of July 26, 1866), 43 U.S.C. Sec. 661; 16 Stat. 218 (Act of July 9, 1870), 43 U.S.C. Sec. 661; 19 Stat. 377 (Act of July 3, 1877), 43 U.S.C. Sec. 321.
10. Winters v. United States, 207 U.S. 564 (1908).
11. ID. at 577.
12. 295 U.S. 142 (1935).
13. Federal Power Comm'n. v. Oregon, 349 U.S. 435 (1955).
14. ID. at 442.
15. Colorado River Compact, 1 Federal Reclamation Laws Annotated 441 (1972).
16. 426 U.S. 128 (1976).

17. Address by Northcutt Ely to the Nat'l Water Comm'n. (Nov. 6, 1981), quoted in Trelease, Federal Reserved Water Rights Since PLLRC, 54 Den. L.J. 473 at 485 (1977).
18. Id. at 486-87.
19. 438 U.S. 696 (1978).
20. California v. United States, 438 U.S. 645 (1978) at 695 (White, J. dissenting).
21. 438 U.S. 645 (1978).
22. Act of June 17, 1902, Ch. 1093, 32 Stat. 388.
23. Act of July 10, 1952, Ch. 650, Sec. 208, 66 Stat. 650 (1952) (43 U.S.C. Sec. 666 (1976)).
24. United States v. District Court in and for the County of Eagle, 401 U.S. 520 (1971).
25. Supra fn. 17.
26. See, Trelease, "Federal Reserved Water Rights Since PLLRC," 54 Denver L.J. 473, 487-492 (1977).
27. Id. at 487.
28. Id. at 492.
29. U.S. Const. Art. IV, Sec. 3, Cl. 2
30. U.S. Const. Art. 5.
31. United States v. New Mexico, 438 U.S. 696, 698 (1978).