REPORT ON THE RESERVATION DOCTRINE

Prepared for the

FEDERAL-STATE WATER RIGHTS SUBCOMMITTEE

of the

WESTERN STATES WATER COUNCIL

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I. INTRODUCTION

A. This Report

This report has been prepared pursuant to the request of the Western States Water Council to provide information on the current status of the reservation doctrine, encompassing a discussion of all significant cases, including unreported cases and dissenting opinions. The report analyzes both the legal and policy aspects of the reservation doctrine. It also considers the extent that claimed federal reserved water rights may be adjudicated as against non-federal rights pursuant to the McCarran Amendment of 1952. The scope of this report does not encompass a detailed examination of other sources of federal power over water resources such as the "navigation servitude" under which no compensation is paid for private rights. 1/

The reservation doctrine has been examined thoroughly by two earlier studies, the Public Land Law Review Commission study published in 1969 entitled, "The Development, Management, and Use of Water Resources on the Public Lands," 2/ and the report prepared for the National Water Commission published in 1971 entitled, "Federal-State Relations in the Law of Water Rights," by Frank J. Trelease. 3/ Both these studies examine both unreported cases and dissenting opinions with respect to the reservation doctrine and the McCarran Amendment. This report will, therefore, not attempt to duplicate the efforts involved in these studies, but rather will emphasize subsequent developments and still unresolved issues. The history and evolution of the reservation doctrine and the McCarran Amendment will, of course, be analyzed.

However, should further detail be desired, reference to the above studies is recommended.

B. The Reservation Doctrine

Transformation of the West into an economically productive and socially inhabitable region has been due in significant part to the security afforded by state-granted water rights. 4/ As the Public Land Law Review Commission stated in its report:

> ' In nearly 100 years of development, state water law has achieved a reasonable certainty of results which has permitted substantial public and private development in the west. While sometimes necessarily complex, the state administrative and judicial procedures have provided a means to determine security of rights to the use of water.' 5/

However, federal court decisions have served to becloud the status of state created water rights so that the continued orderly planning and development of western water resources is threatened. Although federal claims under the so called "navigation servitude" cause significant concern in this regard, "[n]othing has caused more controversy or been the subject of more uncertainty than the "reservation doctrine." 6/

II. HISTORY

Because in vast areas of the West rainfall is slight, and land is virtually worthless without an adequate supply of water, western water law came to be based on beneficial use of water rather than correlative rights and the appropriation theory rather than the riparian. 7/ Under the appropriation approach the first to make a beneficial use of water was protected in that right to the extent of its use. 8/ At this time in the development of the West, federal policy stressed the

disposition of the public domain to encourage homesteading and settlement. By a series of acts in 1866, 1870 and 1877, Congress legitimized the appropriation approach practiced in the western states and declared that the water on the public lands was open to use, and water rights thereto were to be obtained under the laws of the states and territories. Any doubts as to the effect of these acts were laid to rest in the Supreme Court decision of California-Oregon Power Company vs Beaver Portland Cement Co.[9] The plaintiff brought the action to enjoin interference with or lessening of the volume of the Rogue River, a non-navigable stream in the state of Oregon. The plaintiff had never made an appropriation of water from the stream but based his claim solely on his alleged rights as a riparian owner of land taken by United States patent pursuant to the Homestead Act of 1862. The defendant had obtained construction permits and certain adjudicated water rights from the State of Oregon in order to dam and divert water in the stream for a power plant. The issue, therefore, was whether the homestead patent carried with it common law water rights appurtenant to riparian ownership. In holding that the patent did not include such rights, the Court analyzed language in the Desert Land Act of 1877 and stated:

> " If this language is to be given its natural meaning...it effected a severance of all waters upon the public domain, not therefore appropriated, from the land itself. From that premise, it follows that a patent issued thereafter for land in a desert-land state or territory, under any of the land laws of the United States, carried with it, of its own force, no common law right to the water flowing through or bordering upon the lands conveyed."[10]

Furthermore, the Court stated that:

> "[F]ollowing the act of 1877, if not before, all non-navigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common law rule in respect of riparian rights should obtain." 11/

It was thus settled that even government patentees had only received land titles and had to acquire water rights in accordance with the state law. As a result, the states at this point had every reason to feel secure in their ability to legislate as they chose in relation to the non-navigable waters within their boundaries. 12/ This feeling of security, however, was soon to be diminished.

The emphasis on settlement and development of western lands by individuals embodied in the Acts of 1866, 1870 and the Desert Land Act of 1877 was no longer evident by the end of the 19th Century. Concern for conservation of natural resources resulted in a series of vast federal reservations of what had previously been public land. Thus, national monuments, national parks, national forests, Indian reservations and defense establishments were withdrawn from those lands open to public settlement. With respect to the water needs associated with the programs on these lands, however, it was customary for the federal government to appropriate water in accordance with state laws. 13/ Indeed, despite the increase of federal activity in the Western States, nothing in the federal enactments providing for these programs and projects precipitated concern on the part of state legislatures as they seem to demand compliance

with state law. Thus, the Taylor Grazing Act, under which most of the public lands are administered, preserves under state law all existing and future water rights on the lands. 14 / The Federal Power Act of 1920 requires the applicant for federal license to show "satisfactory evidence that the applicant has complied with the requirements of the law of the state or states within which the proposed project is to be located with respect to bed and bank and to the appropriation, diversion, and use of water...." 15 / Western States congressmen were repeatedly successful in securing the insertion in federal enactments that "nothing in this act shall be construed as effecting or intending to effect or to any way interfere with the laws of any state or territory relating to the control, appropriation, use, or distribution of water, or any vested right acquired thereunder." 16 /

However, notwithstanding such disclaimers in the federal acts, the withdrawal of public lands for which they provided established the basis for the reservation doctrine.

III. EMERGENCE AND EVOLUTION OF THE RESERVATION DOCTRINE

The reservation doctrine is based on the premise that since all of the land now in the Western States belonged at one time to the federal government (with the exception of Texas), the Western States did not acquire title to the public lands when they were admitted to the Union and, therefore, as to lands which have not been disposed of by the United States, the federal government is still the owner. 17/ Therefore, the federal government claims a right to dispose and regulate the use of the retained public domain lands and waters pursuant to the Property Clause of the Consititution which provides that "[t]he Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state." 18/ In exercising this power, the government may dispose of the land and water together or the land and water separately. 19/ The federal government did not dispose of its ownership rights to such waters by the Act of 1866, the Act of 1870, or the Desert Land Act of 1877, but merely chose to thereby defer control over the western waters to the states. When the federal government reserves a part of the public domain for its own purposes, it also reserves sufficient unappropriated waters to facilitate these purposes. As to this water, the states' authority to control it is revoked. In the words of one leading authority in explaining the doctrine:

"An appropriator complying with state law cannot obtain title to it and his right applies only to the surplus water, if any, remaining after the federal right is satisfied. The reserved water so withheld is the property of the United States, and the government exercising its proprietary powers and rights can put it to use without compliance with state law. The block of water that will ultimately be needed on the reserved lands may be used in the meantime by an appropriator who complies with the state laws, but if that water is later put to use by the government, it takes no property from the temporary user and owes him no compensation." 20/

The first indication of the reservation doctrine came in the 1899 Supreme Court decision in United States vs Rio Grande Dam & Irrigation Co. 21/ The issue before the Court was whether an irrigation company acting pursuant to state authorization could substantially diminish the navigability of a river. The Court first held that the states' power was limited by the federal government's superior power over navigable waters, and secondly noted in support of its conslusion, that ". . .in 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 at least as may be necessary for the beneficial uses of the government property." 22/

The real beginning of the doctrine came in the case of Winters v. United States 23/ in which the Supreme Court held that when Congress created an Indian reservation, an unspecified quantity of water, without which the land would be valueless, had been impliedly set aside for the Indians' use and that this reserved right was superior to the rights of subsequent appropriators who had obtained water rights under the

applicable state laws even though the Indians had not made a diversion for beneficial use. 24/ The Court therefore granted an injunction to prevent upstream diversions of water by the defendent settlers from the non-navigable Milk River for agricultural use, which had prevented the water of the river from flowing into the downstream Indian Reservation. In so doing, the court stated that, "[t]he power of the government to reserve the waters and exempt them from appropriation under state law is not denied, and could not be." 25/

The "Winters Doctrine", as it became known and accepted, was universally thought of as a special rule of Indian law, for there were special circumstances in the case of an Indian reservation that justified an implication of an intent to reserve water for the Indians that did not exist in the context of other federal establishments. As one commentator has stated in analyzing the Winters decision:

> "The tribe had enjoyed aboriginal dominion over an area much greater than that within the reservation boundaries. It's style of life had been nomadic; like virtually all of the tribes of the Great Plains. They had followed game throughout their hunting grounds. The government in 1888 clearly contemplated a very different future for them. The game animals of the plains were annihilated by the westward course of European settlement; the Indians were removed from the path of colonization with scarcely more ceremony. The confining of previously nomadic tribes within relatively small enclaves in their traditional hunting grounds, necessarily presupposed that they must find a new means of supporting life or lose it. The court in Winters refused to place upon the Indian policy of the United States in the latter part of the 19th Century so genocidal a construction as the second alternative would require. In a singular judicial effort to reclaim a measure of national self-respect out of the shambles of American policy toward American Indians, the court pronounced the Winters Doctrine." 26/

Thus, the Winters Doctrine was generally believed to be an exception to the general federal policy of recognizing state laws as controlling water rights in non-navigable streams; an exception which was necessary to enable the federal government to fulfill its obligation to the Indians. 27/

The first hint that the doctrine might be applicable to other withdrawals of the public domain came when the Supreme Court decided Federal Power Commission v. Oregon, known as the "Pelton Dam" case. In Pelton Dam, the Federal Power Commission had authorized the construction of a dam, one abutment of which was located on land withdrawn for a power site, the other of which was located on an Indian reservation. Oregon objected to the construction on the basis that the applicant had not complied with Oregon law. Oregon opposed the project because the proposed dam would interfere with the migration of salmon and steelhead in the Deschutes River which was conceded to be non-navigable. The court held that the Constitution gave the federal government the right to issue the license without the concurrence of the state, relying on the case of First Iowa Hydroelectric Co-op v. Federal Power Commission. That case held that the Constitution did not allow a state to duplicate regulatory control exercised by the federal government as such control might amount to a state veto power over a federal project. 28/ The Court also rejected Oregon's claim that the water sought to be impounded by the dam was under the exclusive control of the state under the provisions of the Desert Land Act of 1877. This act, according to the Court, did not apply to the lands in question, since they were reserved as opposed to public lands and were thus not open for sale and disposition to the public. 29/

Mr. Justice Douglas dissented in the Pelton Dam case on the basis that a federal dam could not be built on federal lands without obtaining its water rights under state law. 30 /

The Pelton Dam case became a subject of two major divergent constructions. 31/ The first in effect extended the Winters Doctrine principals for Indian reservations to all withdrawals of public land. Federal reserved lands would thus have a reserved water right as of the day of the withdrawal, which would be paramount to all non-federal uses and could be used for all implied purposes of the reservation present or future. The second construction of the case, which is much more limited, submits that all the Court determined was that the state could not subject the federal project to its regulatory power since this might result in a veto of a project over which the Federal Power Commission had been given jurisdiction by federal legislation. Under this view, the licensee did not obtain any reserved water rights, and any water rights required for its project would have to be obtained pursuant to state law or condemned according to the provisions of the Federal Power Act. Of the two constructions, the Public Land Law Review Commission study concludes that the second comports more with the actual holdings in the Court's prior decisions. 32 / Indeed, the study finds that the Pelton Dam case "on careful analysis gives no support or grounds for any extension of the reservation doctrine set forth in the Indian cases." 33 /

The next case to consider the reservation doctrine was Nevada ex rel Shamberger v. United States [34], in which the federal district court of Nevada held that the federal government could use underground waters located under a naval depot without obtaining a state permit. The court relied on the Pelton Dam decision, reasoning that because the United States possessed both ownership and control of the land within the scope of its delegated functions under the War Power, and since the federal government enjoyed a superior position under the Supremacy Clause, state laws need not be observed. A key fact in the case was a stipulation that the development and operation of the wells on a military base "does not interfere, and has at no time interfered, with anyone's vested rights." [35] Thus, nothing in the case established any reserved water right vis-a-vis non-reservation uses of water. Furthermore, on appeal, the Ninth Circuit Court of Appeals directed that the case be dismissed because the district court was without jurisdiction on the ground that the suit was barred by the sovereign immunity of the United States. The importance of the Shamberger case is thus limited. [36]

The next case after Pelton to consider the reservation doctrine was Glenn v. United States, an unreported order without opinion, issued in 1963 by a state district court of Utah. [37] The plaintiff had obtained an appropriative right pursuant to state law in 1933 to divert water from a spring arising on the Ashley National Forest for irrigation of her lands outside the forest. In 1961, U.S. Forest Service officials constructed a pipeline upstream from the plaintiff's point of diversion within the

forest and diverted the waters from the spring to a recreation area thus impairing plaintiff's use. The parties stipulated that the "waters arising on the Ashley National Forest are necessary to the accomplishment of the purposes for which that forest was established." 38/

The United State's brief in Glenn made little effort to establish any implied or expressed intent of Congress to reserve water for forests from appropriation or of any delegation of such authority to the executive. 39/ Indeed, the legislative history of the act creating the Ashley National Forest contains no support for the sweeping claim contained in the United State's brief that the government was entitled as a "settled proposition of law" to all of the unappropriated waters "which are appurtenant to the lands so withdrawn for the purposes of the reservation..." 40/ In fact, no court up to that time had ever adopted this proposition. Nevertheless, the district court ruled in favor of the federal government stating that it "has rights to the use of the water from sources arising on the Ashley National Forest by reason of its reservation with a priority date of February 22, 1897, and such rights include the right to increased use in the future in order to accomplish the purposes of the forest reserve." 41/ However, in view of the unusual stipulation by the parties in Glenn, and the many unconsidered problems involved in the decision, the Public Land Law Review Commission study concludes that the "case appears a slender reed on which to base the establishment of a Winters type unlimited reserve water right for all of the forest lands in the country." 42/

The major precedent for the reservation doctrine came in 1963 in the Supreme Court case of Arizona v. California in which the doctrine was expanded far beyond its original scope. [43] The Court agreed with the Master's conclusion that the principle underlying the reservation of water rights for Indians applies equally to other federal establishments. [44] As a result, the Court upheld reserved rights not only for Indian reservations, but for national forests, national recreation areas, and wildlife refuges. This extension of the reservation doctrine was accompanied by virtually no discussion in the Court's opinion. The report of the Special Master also failed to fully consider this development. [45] In fact, the Master's implication of an intent on the part of Congress to reserve water for non-Indian lands is subject to doubt. In the first place, the Acts of 1866, 1870 and the Desert Land Act of 1877 indicate a congressional disposition to defer to the states the task of regulating appropriations of water on the public domain. [46] Even assuming that the statutes do not apply to reserved lands, they nevertheless demonstrate a reluctance on the part of Congress to become involved in the water rights area. Secondly, as previously noted, the rationale for implying an intent to reserve water for Indian reservations - namely, that it would be unconscionable for the United States to have induced Indians onto a reservation where they were expected to develop an agricultural economy, without supplying them with an adequate supply of water for agricultural purposes - [47] does not apply in the case of non-Indian lands.

The Court also adopted the Master's recommendations that the quantities reserved for the Indian lands be measured by the practically irrigable lands within the reservations and thus permanently quantified the water rights of the Indian reservations in question. 48/ In making this recommendation, the Master specifically rejected a proposal that he issue a decree "stating that each reservation may divert at any particular time all the water reasonably necessary for agricultural and related uses as against those who appropriated water subsequent to its establishment." 49/ According to the Master's opinion such an open ended decree would "place all junior water rights in jeopardy of the uncertain and the unknowable." 50/ This response seems all the more persuasive in the case of non-Indian lands which occupy much more territory than Indian reservations and which contain some of the richest watershed in the West within their boundaries. 51/ Notwithstanding, the Master quantified the water rights of only two of the four non-Indian federal establishments. With respect to the Lake Mead National Recreational Area and the Gila National Forest, the Master recommended the same type of limitless decree he had condemned in the case of the Indian reservations concluding that each establishment could divert water "in quantities reasonably necessary to fulfill the purposes for which they were created. 52/ As one commentator has noted:

> "The Master did not attempt to define the specific purposes for which any of the non-Indian establishments were created or to determine the amount of water necessary to

> fulfill those purposes....As a consequence, state water agencies, state appropriators, and the federal establishments themselves...are left without guidelines to estimate accurately the magnitude of federal water rights, a situation that calls into question the wisdom of the Supreme Court's expansion of the reserved-rights doctrine in Arizona v. California." 53/

Another significant aspect of the decision in Arizona v. California is that the Court reserved water rights for the federal establishments from navigable waters. It is not clear from the opinion on what constitutional power the Court relied, whether the property power, the commerce power, or a combination of both. One commentator concludes that it makes little difference since, according to earlier Supreme Court pronouncements, "the power of the Unites States over navigable streams is so complete that in reality, if not in legal contemplation, the United States can deal with such streams as though it 'owned' them. It can take over the entire stream flow, dam it and distribute it inter- and intra-state under its own allocations and in disregard of state law." 54/

Arizona also contended in the case that executive orders did not reserve waters. This contention was rejected by the Court which noted that some of the reservations of Indian lands that were involved were made almost 100 years before. Congress and the executive had since such time recognized these as Indian reservations. The Court therefore felt that it could give "but short shrift" at this late date to the argument that the reservations either of land or water are invalid because they were originally set apart by the executive. 55/

In summarizing the impact of the Arizona v. California decision, the authors of the Public Land Law Review Commission study conclude that Arizona v. California extended the prior law in a number of ways:

> "(1) [t]he doctrine was determined applicable to navigable as well as non-navigable streams..., (2) the doctrine was deemed applicable to non-Indian withdrawn lands of the United States..., (3) the principle...recognizing an Indian reservation created by an executive order in 1859, prior to the Acts of 1866, 1870 and 1877, was extended to executive orders issued at anytime, without any clear finding as to the authority of such action to modify prior acts of Congress..., and (4) the doctrine was deemed applicable to reserve water for withdrawn lands not adjacent or riparian to the Colorado River..." 56/

In 1971, the Supreme Court in the case of United States v. District Court In and For the County of Eagle reaffirmed the reservation doctrine in holding that a state court adjudicating all water rights on the Eagle River could deal with reserved rights as well as state created appropriative water rights. 57/ The Court stated:

> "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,... 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.'...The federally reserved lands include any federal enclave. In Arizona v. California we were primarily concerned with Indian reservations....The reservation of waters may only be implied and their amount will reflect the nature of the federal enclave....Here the United States is primarily concerned with reserved waters for the White River National Forest, withdrawn in 1905, Colorado having been admitted to the Union in 1876." 58/

IV STATEMENT OF THE DOCTRINE

There have been relatively few cases on the reservation doctrine, and, as we shall see in more detail later, there are many unresolved issues concerning its scope. As to the established case law, the Public Land Law Review Commission study reviewed the decisions regarding the doctrine and concluded that a reserved water right, if validly established, has the following characteristics:

> "(1) The federal government has the reserved right to use a quantity of water in fulfillment of the purpose for which a reservation or withdrawal of land has been made;
>
> (2) The quantity of water reserved may be set at the total practicable of use, present and future, under current standards of economic feasibility, or if for practical reasons this cannot or need not be ascertained, the reservation will embrace an unquantified amount sufficient for the future requirements of the reservation;
>
> (3) The reservation of land for which the reservation of water is confirmed may be by act of Congress or by executive order;
>
> (4) The right has a proprietary-ownership of land and water - basis, (although Arizona v. California might provide the basis for a federal reservation doctrine independent of federal lands, under the Federal Government's commerce clause power over navigable waters);
>
> (5) The right is not dependent upon the application of water to beneficial use;
>
> (6) The right is not lost by nonuse;
>
> (7) The federal reserved water right has priority from the date of the creation of the reservation;
>
> (8) The right is subject to private appropriations that vested prior to the reservations's date;
>
> (9) The right is senior to all appropriations or other uses under state law thereafter made." 59 /

Dean Frank J. Trelease, in his study prepared for the National Water Commission, described the doctrine as follows: 60 /

> "If the United States, by treaty, act of Congress, or executive order reserves a portion of the public domain for a federal purpose which will ultimately

require water, and if at the same time the government intends to reserve unappropriated water for that purpose, then sufficient water to fulfill that purpose is reserved from appropriations by private uses. The effect of the doctrine is twofold: (1) when the water is eventually put to use the right of the United States will be superior to private rights in the source of water acquired after the date of the reservation, hence such private rights may be impaired or destroyed without compensation by the exercise of the reserved right, and (2) the federal use is not subject to state laws regulating the appropriation and use of water." 61/

V. EFFECTS OF THE DOCTRINE

As a result of federal reservations and withdrawals from those lands open to public settlement, as of June 30, 1963, approximately 48% of the total acreage within those states (with the exception of North and South Dakota) included in the Desert Land Act is under the responsibility of federal agencies: a total of 360,789,045 acres in the eleven contiguous Western States. 62/ Approximately 61% of the total surface water run-off in these states is derived from federally reserved lands. 63/ It is, therefore, obvious that the states would be concerned by the doctrine's unquantified and indefinite claims on unappropriated water. Such claims deter future water resource planning and development, and pose the threat that new federal uses will be given turn-of-the-century priorities that can take water from currently valuable uses established pursuant to state law without paying any compensation. As Floyd Bishop, the State Engineer of Wyoming, stated before the National Water Commission hearings:

> "One of the most important problems today relates to the so-called "reservation doctrine" and the related question of jurisdiction over water use and water rights. We feel that federal claims of reservation of unlimited quantities of water for use on federal reservations, with a priority as of the date of the reservation, create a cloud over state-granted water rights which is intolerable. Such unquantified reservations would limit future development and discourage investment in water projects. National forest reserves in Wyoming cover most of the high water producing areas, and these forests were reserved prior to many of our state-granted water rights. The potential impact of the Reservation Doctrine on our State is significant. At its extreme it could seriously damage existing water users, and as a minimum it creates a cloud over future water development which needs to be removed." 64/

Motivated by these concerns, the states sought legislation to either abrogate or significantly limit the reservation doctrine as it applies to non-Indian reservations. These attempts have been met with vigorous federal opposition, primarily on the basis that the reservation doctrine is necessary for the federal government to carry out its water related activities on federal reserved lands. As one Department of Justice attorney expressed it:

> "To require now that water rights be acquired under state law in order that the purposes of the reservations may be carried out would put the United States in the administration of each reservation in a position subordinate to every state recognized water right in a source common to that of the reservation having a priority date ahead of the priority date the United States could now obtain in proceeding to acquire under state law the water rights it needs." 65/

As several authorities have pointed out, however, this argument fails to consider the basis of the reservation doctrine: the Supremacy Clause coupled with the power exercised in making the reservation of land.66/ According to Dean Trelease, for example:

> "...[T]he reservation doctrine adds nothing to the power of the United States to take and use the water it needs for any constitutional purpose or power. If a constitutionally enacted statute gives an agency of the United States the power to perform a federal function on any federal land in any state, whether public land, reservation or acquired land, and that function requires the use of water, no state's law can block or limit the use of water or acquisition of water right. No theory of federal ownership of reservation is required. The only difference resulting from reliance on the reservation doctrine instead of on a more basic federal power is that in some cases where the water is taken from persons who have previously put it to use the United States need not pay for the taking. The reservation doctrine is a financial doctrine and nothing more." 67/

This financial aspect of the doctrine - no compensation - is deemed one of its significant advantages by some federal officials and agencies. They argue that if the United States lost its reserved rights because the doctrine was abolished it might have to buy back a water right which, under the doctrine, it might have been able to prove it already owned.[68] It has been submitted, however, that this argument takes too narrow a view. An assessment of the maximum net benefits of a federal project must balance the losses and resulting adverse effects against the benefits whether or not compensation is involved.[69] Thus, if the government initiates a water use on a national park or monument on reserved lands, and thereby deprives a farmer of water used for irrigation and development, thus causing the land to return to desert, the loss is a cost of the new use for the national park or monument. This is so regardless of whether the government pays the farmer compensation. Moreover, it is not only a loss to the farmer but results in a decrease in gross national product. Therefore, although the new use may cost more in terms of dollar prices if the present private uses are paid for, economically, the cost is the same in any case. The question thus becomes one of who should bear the loss, the nation who receives the benefit from the national park or monument, or the farmer alone for the public good.[70]

The federal government's argument may also be susceptible to the response that the net cost that would result from eliminating the doctrine would be de minimus. As one commentator has noted,

> "[a] cost accounting would show, I am sure, that except for Indian reservations, all the water so far adjudicated to the United States under the reservation

doctrine could be repurchased at a fraction of the cost already spent defending the doctrine in legislative and judicial forums." 71/

There is also a fundamental issue of fairness involved in the government's argument. Even if the government were not required to pay compensation, should it do so in the interests of justice? For years, the federal government emphasized and encouraged the settlement and development of the western lands under the homestead, public sale, and other settlement and disposal laws. In effect, the land was "given away," but this resulted in increasing the gross national product and promoting the national welfare. These early federal statutes and their judicial interpretaion suggested that the acquisition of water rights was entirely a matter of local law. 72/ "The states at this point had every reason to feel secure in their ability to legislate as they chose in regard to the non-navigable waters within their boundaries." 73/ Now, if the government's arguments are accepted, many of the water rights acquired in reliance upon this ability may be taken and the land thereby turned from farms and orchards to desert without compensation.

VI. MCCARRAN AMENDMENT

Although the Western States have been unsuccessful in obtaining legislation to abolish the reservation doctrine as to non-Indian lands, they were successful in limiting a major obstacle in settling western water rights - the doctrine of sovereign immunity.

As part of the Department of Justice Appropriation Act of July 10, 1952, Congress passed the McCarran Amendment 73A/ which granted a limited waiver of sovereign immunity in the field of adjudication

of water rights. It thus provided the only means available to bring the United States into court to ascertain its claims under the reservation doctrine.[74] The McCarran Amendment provides as follows:

> "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...shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain a review thereof, in the same manner and to the same extent as a private individual under like circumstances..." [75]

Because of its ambiguities, the McCarran Amendment was initially a disappointing means of determining the scope of the government's reserved rights. Many of the ambiguities in the statute were, however, resolved in the case of United States v. District Court for the County of Eagle.[76]

The case arose when the United States was served with a standard notice to file a statement of claim and to present evidence in regard thereto in an adjudication of the Eagle River, a tributary of the Colorado River in Western Colorado. The government moved to dismiss on the basis of sovereign immunity. The Colorado court found that the United States was properly joined in the action and the government appealed directly to the United States Supreme Court.

The Supreme Court in Eagle County affirmed the lower court's decision and in so doing resolved several of the major questions surrounding the McCarran Amendment. The government argued that the federal court had exclusive jurisdiction under the McCarran Amendment. The Supreme Court, while agreeing that any federal

question presented could be preserved and taken to federal court for review, nevertheless ruled that the original decision could be rendered in the state courts. 77 /

Another major issue was whether the Amendment's waiver of immunity applied to the government's reserved rights as well as appropriative rights acquired under state law. The Court ruled that the term "otherwise" in the phrase, "where...the United States is the owner of...water rights by appropriation under state law, by purchase, by exchange or otherwise," referred also to reserved rights in view of the all-inclusive nature of the statute.

Another issue concerned the phrase "river system" Some earlier cases indicated that less than a complete river system was unacceptable; 78 / Due to the practical impossibility of joining and obtaining jurisdiction over the thousands of water rights holders on any major stream system, this construction would have negated any remedy of those wishing to solve the problems in this area. 79 / However, the Court dismissed this argument as almost "frivolous," stating that "a river system" must be read as one in the particular state's jurisdiction. 80/

The government also urged that the form of the proceeding was not a "general adjudication" within the purview of the Amendment. The Court ruled, however, that the proceeding was not a private one where named claimants assert priority over the United States, but involved the entire community of claims. As such, it was general and thus within

the scope of the statute giving consent to join the United States as a defendant in suits involving the adjudication of water rights. 81/

The McCarran Amendment thus became a much more useful tool in determining the scope of the government's claims under the reservation doctrine. Many unresolved questions remain, however, as we shall see.

VII. UNRESOLVED ISSUES

A. Scope of the McCarran Amendment

Eagle County did not determine whether a state can adjudicate federal water claims in an administrative proceeding rather than a judicial proceeding. In some states like Wyoming, the administrative determination is "final", but of course the parties may appeal to the courts. 82/ In others the administrative procedure is similar but the methods of transferring the proceedings into court differ. 83/ One court, in construing the McCarran Amendment stated that "[i]n view of the meaning of the word "suit", the words "adjudication" or "administration" of rights in a "suit" clearly contemplate judicial action." 85/ Although the issue was not before the court and thus no determination was made that a suit is the exclusive remedy, one writer has concluded from the case that a state administrative proceeding does not come within the purview of the McCarran Amendment. 86/ Another authority contends, however, that the Congress could not have intended that a state like Colorado or Montana (by virtue of their special statutes) should adjudicate water rights with

the United States while at the same time intending that states like Wyoming (with a water rights administration system) should be precluded from doing so because its initial proceeding is administrative rather than judicial. [87] Hope has been expressed that the lack of sympathy which the Supreme Court showed in Eagle County for "frivolous" objections of the United States may dispose of the "suit" problem and that any proceeding which is "not a private one to determine whether named claimants have priority over the United States," but a public one which "reaches all claims", may be a suit for adjudication under the Amendment. [88]

While Eagle County sanctioned state court jurisdiction to adjudicate federal water rights claims, it did not hold that state courts had exclusive jurisdiction to do so. In United States v. Akin, et. al. [89] the Tenth Circuit Court of Appeals recently held that state and federal courts have concurrent jurisdiction to adjudicate United States water rights claims. The case arose when a Colorado federal district court dismissed a suit filed by the United States to adjudicate water rights in the San Juan River including Indian reserved rights claims. Subsequent to the filing of the federal action, the Mancos and Southeastern Colorado Water Conservancy Districts had brought suit in state court seeking judicial determination of the same water rights involved in the federal action and joined the United States as a defendant. Judge Finesilver of the federal district court dismissed the action on the basis of the doctrine of abstention and for reasons of "comity." His decision was reversed by the Tenth Circuit Court of Appeals.

The Tenth Circuit first addressed the jurisdictional question. It held that the McCarran Amendment does not preclude federal courts from assuming jurisdiction in an action to adjudicate federal water rights claims. The court stated that "[i]f Congress had intended to force the United States to litigate its water cases in state courts, it could have done so by creating a water rights exception to Section 1345 (28 U.S.C. § 1345 gives to district courts original jurisdiction of all civil actions commenced by the United States except as otherwise provided). This it did not do either expressly or impliedly." 90/ The court distinguished other earlier cases in concluding that the McCarran Amendment permitted but does not necessarily require, the United States being subjected to state jurisdiction.

The court next found that the lower court erred in applying the doctrine of abstention since (1) the doctrine of abstention is to be narrowly construed; (2) this was not a case in which further state proceedings might obviate the necessity for a constitutional law decision; (3) the federal court in this case would not be short circuiting or interfering with the efforts of a state administrative regulatory system; and (4) this case did not present a novel and important issue of state law. The court was not impressed with the argument that its decision would result in jurisdiction of water rights disputes being obtained by a race to the court house. While admitting that the race idea had no intrinsic attractiveness, the court concluded that it was a necessary result where, as here, concurrent jurisdiction exists. Finally, the court felt that the United States was involved in the federal action as a plaintiff "seeking

to establish rights which have a national and sovereign character, ... a factor which militates strongly against the applicability of abstention." 91 /

As an additional argument in support of reversing the lower court's decision to abstain, the United States urged on appeal that the state court lacked jurisdiction to join the United States as a defendant in state court actions to adjudicate Indian water rights claims. Many thought this issue was resolved by Eagle County. 92 / In that case the Supreme Court stated that the statute was "all inclusive" and included "appropriated rights, riparian rights and reserved rights." The Court in Arizona v. California had indicated that the principal underlying the reservation doctrine applied to Indian as well as non-Indian rights. Thus, the language of Eagle County which covered reserved rights with no identifiable exceptions was construed to mean that state courts had jurisdiction to adjudicate Indian water rights as well. 93 / However, the United States argued that the McCarran Amendment, which deals with water rights of which "the United States is the owner" does not apply to water rights the United States holds as trustee for the Indian tribes. 94 / The Tenth Circuit avoided this issue by finding that the lower courts decision to abstain was in error on other grounds. The opinion does indicate, however, that the state court would have had jurisdiction to adjudicate the water rights in question had it been first to obtain jurisdiction.

This issue will be more directly decided in the case of New Mexico v. Lewis et al. and a companion case. 95 / This case was initiated in the Chaves County Court of New Mexico by the state to adjudicate all water right claims to divert and use waters of the Rio Hondo stream system. The United States was joined as a defendant as to both its reserved

rights claims for forest lands and for the Mescalero Apache Tribe. The district court dismissed the suit as to the Indian water rights claims, but retained the United States as a defendant as to its forest land claims. This decision is now on appeal.

Another issue left unresolved by Eagle County was whether or not federally reserved water rights must be quantified at the time of a general adjudication under the McCarran Amendment. In a recent decision, the Idaho Supreme Court held that such federal claims must be quantified or the purpose of the McCarran Amendment to instill certainty into water rights by way of a general water adjudication would be frustrated. 96/ The United States had intervened in an action to adjudicate water rights in Hayden Lake, Kootenai County, Idaho, and filed a notice of claim of water right stating that "[t]he reserved right claimed by the United States is in amounts reasonably necessary and sufficient to carry out the limited purposes for which the forest service lands were reserved; namely timber management and production and related purposes, including fish and wildlife management, livestock grazing and recreational activities." 97/ The Idaho district court concluded that the United States held reserved water rights with a priority of November 6, 1906, but insisted that such reserve rights must be quantified. The United States appealed from that decision.

The Idaho Supreme Court examined the legislative history of the McCarran Amendment and concluded that Congress sought thereby to remedy the casting of doubt on the amount and validity of state created water rights by federal claims. The court reasoned that to accept the

claim of the United States to amounts "reasonably necessary to carry out the limited purposes for which the forest reserve lands were reserved" would exacerbate the element of uncertainty the Congress sought to eliminate in enacting the McCarran Amendment. 98 /

A similar issue is involved in a case now pending in the Luna County State District Court for New Mexico 98A / which involves United State's reserved water rights claims for certain Gila National Forest lands and certain parts of the Fort Bayard military reservation. In this case the Special Master has determined not only that federal reserved water rights must be quantified, but, in addition, the Master has: (1) established the priority dates for the federal reservations; (2) declared the purpose for which the reserved waters may be used; (3) listed the present uses on the reserved land adjudicated to the United States; (4) required that the uses in Gila National Forest which had been made under a United States Forest Service permit requiring uses to be undertaken in compliance with state law be adjudicated to the permitee and not to the United States; and (5) with the respect to rights of the United States to water for future needs, required the United States to specify such future needs within one year after the date of the order, including priority, amount, purpose, period, and place of use of all such claimed future requirements to be followed within 30 days by notice to the state of New Mexico and all other parties in the lawsuit, who would then have the right to object to any and all of the claims at the hearing before the Special Master, at which time the rights of the United States would be finally adjudicated. If the Special Master's findings are adopted by the trial court and upheld, they should provide the State of New Mexico with a valuable means to quantify the reserved water rights of the United States and fix their relationship to water rights acquired under that state's laws.

B. Scope of the Reservation Doctrine

There are relatively few cases that deal with reservation doctrine and a number of questions remain undecided. In its report, the Public Land Law Review Commission listed the following:

> "(1) The detailed nature of the showing required to establish an implied intent to reserve waters upon the creation of a reservation;
>
> (2) The nature and scope of the permissible purposes for the use of water that may be deemed to be within the implied intent on establishment of the reservation;
>
> (3) Whether the original purposes for reservation of water may be expanded by the subsequent addition of new purposes or new programs;
>
> (4) The full range of the type of withdrawals to which the reservation doctrine is applicable and whether nonstatutory withdrawals by the executive without congressional authorization are valid;
>
> (5) Whether maximum quantities reserved under the doctrine based on current standards of economic feasibility may be opened and increased upward or downward upon changed future feasibility standards;
>
> (6) Whether the use of the reserved water is confined to the watershed;
>
> (7) Whether the federal government has the right to unappropriated water independent of its ownership of lands;
>
> (8) Whether the reservation doctrine is applicable to acquired lands or is confined to original public domain lands; and
>
> (9) Whether the termination of a withdrawal also terminates the reserved water right." 99/

To this list should be added the question of whether the reservation doctrine extends to groundwater as well as surface water. 100/

With the exception of a decision by the Federal District Court for Nevada upheld by the 9th Circuit, but still being further appealed, no cases have been found since the publication of the Public Land Law Review Commission study in 1969 which deal with the above questions. Nevertheless, the government's position on the status of the law seems to be that many of these issues are settled. For example, the government attorneys contend that:

(1) There is no legal basis for any limitation on Winters Doctrine rights to the watershed in which the government land is situated. Moreover, the laws of the state could not thus restrict the powers of the Congress over the properties of the nation. William H. Veeder, Bureau of Indian Affairs, Department of the Interior. 101/

(2) Where circumstances warrant the use of Indian lands for recreational, commercial, or industrial rather than for agricultural purposes, reserved water rights remain available for those other purposes. (Solicitor of the Department of the Interior - 1964). 102/

(3) The quantity of the right is not necessarily dependent on what was foreseen or foreseeable at the time the reservation was established. Uses of water which may not have been contemplated when the reservation was established are properly included in the reserved right so long as they are reasonably necessary or appropriate for the purposes of the reservation. (David Warner, Dept. of Justice) 103/

(4) In practice and principle Winters Doctrine Rights have been and may be exercised for any beneficial use including but not limited to

recreation and fishery. ...They are in no way affected by the fact that the stream involved rises off the reservation. ...Where groundwaters are the source of supply the Indian rights necessarily attach to them." William H. Veeder, Bureau of Indian Affairs, Dept. of the Interior. 104/

(5) Water may be claimed on forest lands under the reserved rights doctrine for the benefit of such special use permitees as loggers and resort operators, where to do so will enhance the benefits that the public derives from the National Forest system. (Forest Service Manual Section 2541.12. Region 5 Supp. 2, 1966)

Some of the government's contentions will presently be tested in cases now pending in courts in the Western States. For example, a federal district court in New Mexico is now adjudicating a claim by the United States that it is entitled to such rights as may be needed to maintain a minimum stream flow in the lower four miles of the Red River so that its wild and scenic character may be maintained. The priority date claimed is Oct. 2, 1968, the date on which this segment of the Red River was designated as a component of the national wild and scenic river system pursuant to the Wild & Scenic Rivers Act. 105/ Also, in the Federal District Court for the Eastern District of Washington, the court is confronted with a federal claim to sufficient water to maintain Chamokane Creek as a fishery, a natural habitat for wild fowl and game, a free-flowing recreational stream, and an aesthetic and natural resource for the Spokane Tribe of Indians. 106/

The government was recently successful in asserting one of its contentions before the United States District Court for the District of Nevada and the 9th Circuit Court of Appeals in the case of United States v. Cappaert. [107] However, both the private defendant and the state of Nevada are pursuing the case further via a petition for rehearing en banc and then a petition for writ of certiorari if necessary. The case raised the question of whether or not the reservation doctrine applies to percolating water. The defendants had been pumping water from underneath privately owned land in compliance with all relevant Nevada regulations. The United States brought an action to enjoin further pumping in the wells, claiming that the pumping was lowering the water level in Devil's Hole, a detached addition to the Death Valley National Monument. The pool in Devil's Hole is fed by underground water passing through a large cavern. In the pool there is a species of small fish called the Devil's Hole Pupfish which has been found to be a rare and endangered species. As the pumping on the defendant's ranch continued, the water level in Devil's Hole allegedly lowered exposing a natural rock shelf upon which the Pupfish feed and reproduce. Since this allegedly posed a threat to their survival, the court permanently enjoined the defendants from pumping from underground waters, except for domestic purposes, to the extent required to achieve and to maintain at Devil's Hole, a daily mean water level of 3 feet below a copper washer placed there for reference, a level which is deemed sufficient to allow the propagation of the Pupfish. [108]

The first case to deal with "reserved lands" in deciding groundwater rights was State ex. rel. Shamberger v. United States. [109] The Federal District Court of Nevada held in that case that the federal government

could use underground waters located under a Naval Depot without obtaining a permit from the state. The court relied on the Pelton Dam decision in reasoning that since the United States possessed both ownership and control of the land within the scope of its delegated functions under the War Power, it enjoyed a superior position under the Supremacy Clause and state laws need not be observed.

However, the significance of Shamberger is,as previously noted, limited. In the first place, the court was not dealing with federal claims to reserved groundwater rights as against private users adjacent to the reserved property. 110/ Secondly, the Ninth Circuit Court on appeal directed that the case be dismissed because the district court was without jurisdiction. Shamberger thus has little or no value as a precedent applicable in deciding the issues in the Cappaert case.

The case of Tweedy v. Texas Company 111/ also referred to the reservation doctrine with respect to percolating water. The owners of land within an Indian reservation brought an action for damages against the holder of a gas and oil lease for all groundwater drawn by the lessees and used in the extraction of oil. The plaintiff claimed that it had rights to the groundwater as an incident of ownership of land. The court noted in dictum that the reservation of waters for the Indian lands would apply both to surface or to underground water. 112/ Nevertheless, the reservation doctrine was not the basis of the decision, but rather the fact the plaintiffs had failed to show any damage caused by the defendant's use. Again, the issue of whether the owner of federal

reserved water rights may prevent the use of water by adjacent private parties in order to protect his own underground water supply was not before the court in Tweedy. There was thus no firm precedent before the Court in Cappaert for extending the reservation doctrine to ground waters. Moreover, the rationale for the reservation doctrine - the implied intent of Congress to provide water for the purposes of the reservation - does not support an extension of the doctrine to percolating waters.

Surface waters flowing through or by reserved lands should have been apparent to Congress at the time of the withdrawal; thus, courts could reasonably assert that Congress had "impliedly" reserved this surface water for use on reserved lands. In the case of ground water, however, the existence, extent, and flow of groundwaters underneath the reserved lands could not have been apparent to Congress. 113/

There is also another fundamental difference between surface and percolating waters. Since surface water moves rapidly over a stream bed, an upstream diversion can effect the downstream user within a matter of hours. Percolating water, on the other hand, moves very gradually through no defined channel and because of false non-porous materials, and other natural factors, it is often impossible to predict the effect of the drawing of groundwaters on other water supplies. Thus, a ground water user adjacent to a reservation might pump water for years before the total effect of the reservation would be known. By that time, he could have made a substantial investment in the land and water use. Under such circumstances, application of the reservation doctrine would be especially onerous. 114/

Ground water is a significant resource in the United States. In 1963 1/5 of the nations water needs were met from underground sources and this proportion is projected to reach 1/2 in the near future. 115/ It is not known to what extent that groundwater supplies are derived from federally reserved lands. However, the amount will probably parallel surface water in percentages. 116/ It is obvious, therefore, that the application of the reservation doctrine to groundwaters such as in Cappaert could have serious consequences.

VIII CONCLUSION

It must be conceded that the reservation doctrine rests on firm footing in the case law. There are, however, many unresolved questions concerning its scope, some of which will be decided in cases now pending in courts in the Western States. It is also undeniable that federal reservation doctrine claims to substantial rights in water resources in the Western States render uncertain the fate of appropriations on the streams arising or flowing through federal lands in those states. Up to now, however, those seeking to solve the problem have been met with the effective argument that they have failed to provide concrete evidence of the harm that will result if the present situation is allowed to continue. Thus, Ramsey Clark, then Attorney General of the United States, in hearings before a Senate Committee, made the following statement:

> "For all the hue and cry arising from the federal-states water rights controversy, not one state, not one county, not one municipality, not one irrigation district, not one corporation, not one individual, has come forward to plead and prove that the United States, exercising alledged proprietary rights in the unappropriated water of the public domain, has destroyed any private property right or has interferred with any state or local government regulation. Why? Because it hasn't happened." 117/

Two cases now pending in Nevada, however, exemplify the fact that this response no longer has any merit, if indeed, it ever did.

The plaintiff in the Cappaert case, previously discussed, had invested over $7,000,000 for land development and irrigation prior to the commencement of the suit. 118/ If the United States prevails

on appeal, the defendant's investment will be substantially lost, crops will be destroyed, and hundreds of acres of reclaimed land will revert to desert. 119/

Another Nevada case has the potential of even greater damage to private rights. In United States v. Truckee-Carson Irrigation District et. al., 120/ the federal government contends in the United States District Court for the District of Nevada that it is entitled to reserved rights in the Truckee River sufficient to maintain the level of the Pyramid Lake, a desert lake which is enclosed within the Pyramid Lake Paiute Indian Reservation, and which is the natural terminus of the Truckee River with no outlet. The government claims that diversions from the Truckee River by state permittees and holders of federal district court decreed rights have resulted in a drastic reduction of the level of the lake thus threatening the Tribe which depends on the lake for fisheries, for food and barter, for fees from fishermen for fish licenses, and for irrigation and domestic supplies.

The government previously made Winters Doctrine claims on behalf of the Tribe in 1913 in the Orr Water Ditch Company case. 121/ The Orr Water Ditch decree which became final in 1944, determined the separate rights of thousands of private and public water users in the state of Nevada, including rights for the use of the reservation Indians. 122/ Subsequently, as a result of reliance upon the continued validity of the Orr Water Ditch decree, the number of people dependent on the water increased dramatically. 123/ The government nevertheless contends that it is not barred by the decree from now making a claim to additional water

necessary to maintain Pyramid Lake. If the government prevails in its contention, hundreds of state permittees and holders of Federal district court decreed rights may be forced to relinquish their rights without compensation.

Even if the government does not prevail in these two Nevada cases; they exemplify the inhibiting effect that federal claims under the reservation doctrine can have on water resource planning and development in many western areas. After the government succeeded in enjoining the defendant in Cappaert from further pumping, the defendant, pending appeal suspended further land development and reduced his work force from 81 men down to 16 men. 124/ It would also seem unwise to initiate any project in Nevada or California which would have to rely on Truckee River water until such time as the Pyramid Lake case is settled, which may be many years. Surely, these cases demonstrate that the reservation doctrine does not present us with a mere theory, as some have contended, 125/ but rather a condition in need of remedy.

FOOTNOTES

1. For a discussion of the "navigation servitude", see F.J. Trelease, Federal-State Relations in Water Law 175-196 (1971) [hereinafter referred to as the National Water Commission Study].

2. C. Wheatley & C. Corker, Study of the Development, Management, and Use of Water Resources on the Public Lands (1969) [hereinafter referred to as the PLLRC Study].

3. National Water Commission Study, supra note 1.

4. R. Moses, Federal-State Water Problems, 47 Denver L.J. 194 (1970).

5. Public Land Law Review Commission, One Third of the Nation's Land 142 (1970).

6. PLLRC Study 80.

7. Note, Western Water and the Reservation Theory - The Need for a Water Rights Settlement Act, 26 Mont. L.Rev. 199, 200 (1965).

8. Id.

9. 295 U.S. 142 (1935).

10. Id. at 158.

11. Id. at 163-164.

12. Note, supra note 7 at 203.

13. C. O. Martz, The Role of the Government in State Water Law, 5 Kan L. Rev. 626, 633 (1957).

14. National Water Commission Study 78.

15. 16 U.S.C. § 802 (1964).

16. E.g., Reclamation Act of 1902, § 8, 32 Stat. 390, 43 U.S.C. §§ 372, 383 (1962); Federal Power Act of 1920, § 27 Stat. 1077, 16 U.S.C. § 821 (1952).

(For a detailed discussion of federal statutes requiring compliance with state laws respecting water rights, see National Water Commission Study 74-80).

17. R.J. Moses, supra note 4 at 197.

18. U.S. Const. art. IV § 3(2).

19. National Water Commission Study 111

20. Id. at 114.

21. 174 U.S. 702 (1899).

22. Id. at 703.

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

24. Id. at 576-77.

25. Id. at 577

26. P. L. Bloom, Indian "Paramount" Rights to Water Use, 16 Rocky Mtn. Min. Law Insti. 669, 672 (1971).

27. PLLRC Study 105.

28. 328 U.S. 152 (1946).

29. Id.

30. Id.

31. PLLRC Study 108.

32. Id. at 109.

33. Id. at 112.

34. 165 F. Supp. 600 (D. Nev. 1958), affirmed on other grounds, 279 F. 2d 699 (9th Cir. 1960).

35. Id.

36. W.H. Veeder, Pelton Decision: A Symbol - A Guarantee That the Development and Conservation of Our Nation's Resources Will Keep Pace With Our National Demands, 27 Mont.L. Rev. 137 (1965).

37. Civil No. C-153-61 (D. Utah, Mar. 16, 963).

38. PLLRC Study at 117

39. Id. at 118

40. Id.

41. Id.

42. Id. at 121.

43. 373 U.S. 546 (1963), decree at 376 U.S. 340 (1964).

44. Note, Federally Reserved Rights to Underground Water - A Rising Question in the Arid West, 1973 Utah L. Rev. 43-54.

45. Note, Water in the Woods: The Reserved Rights Doctrine and National Forest Lands, 20 Stan.L. Rev. 1187 (1968).

46. Id. at 1188.

47. Id.

48. Id. at 1190.

49. Report of the special master in Arizona v. California 263-64 (1960).

50. Id.

51. Note, supra note 45 at 1191.

52. Report of the special master in Arizona v. California 295, 343 (1960).

53. Note, supra note 45 at 1191-92.

54. E.H. Morreale, Federal-State Conflicts Over Western Waters - A Decade of Attempted "Clarifying Legislation", 20 Rutgers L. Rev. 423 (1966).

55. Arizona v. California, 373 U.S. 546, 598 (1963).

56. PLLRC Study 131-32.

57. 91. S. Ct. 998 (1971).

58. Id. at 1001.

59. PLLRC Study 131-32.

60. National Water Commission Study.

61. Id. at 109.

62. Note, supra note 7 at 204-5, n. 31.

63. Note, supra note 44 at 46.

64. Hearings Before the National Water Commission, sitting in Denver (1969).

65. D.R. Warner, Federal Reserved Water Rights & Their Relationship to Appropriative Rights in the Western States, 15 Rocky Mtn. Min. Law Insti. 412 (1969).

66. National Water Commission Study 139.

67. Id. at 147M; see also C.E. Corker, Federal-State Relations In Water Rights Adjudication And Administration, 17 Rocky Mtn. Min. Law Insti. 579 (1972).

68. C.E. Corker, supra note 67 at 587

69. F.J. Trelease, Water Rights of Various Levels of Government - State Rights vs National Powers, 19 Wyo. L.J. 189, 200-1 (1965).

70. Id.

71. C.E.Corker, supra note 67 at 587

72. W.A. Hillhouse, Public Land Law Review Commission Report: Ice Breaking in Reserved Waters?, 4 Nat. Res. Law. 368, 371 (1971).

73. Note, supra note 7 at 203.

73A. Dept. of Justice Appropriation Act of July 10, 1952, Ch. 51 § 208 (a)-(c), 66 Stat. 560, 43 U.S.C. §666 (1970).

74. Note, McCarran Amendment - A Method of Clarifying the Implied Reservation Doctrine, 7 Land & Water L. Rev. 587 (1972).

75. Dept. of Justice Appropriation Act of July 10, 1952, Ch. 51, § 208 (a)-(c), 66 Stat. 560, 43 U.S.C. § 666 (1970).

76. 401 U.S. 520 (1971).

77. Note, supra note 74 at 587.

78. E.g., Miller v. Jennings, 243 F. 2d 157 (5th Cir. 1957); California v. United States, 235 F. 2d 647 (9th Cir. 1956).

79. Note, supra note 74 at 591-2.

80. 401 U.S. 520, 523 (1971).

81. Id.

82. National Water Commission Study 206.

83. Id.

85. Rank v. Krug, 142 F. Supp. 1, 73 (1956).

86. Note, supra note 74 at 587.

87. F. J. Trelease, Reclamation Water Rights, 32 Rocky Mtn. L. Rev. 464, 495 (1960).

88. National Water Commission 207.

89. Civil No. 73-1807 (10th Cir. 1974).

90. Id.

91. Id.

92. National Water Commission 210.

93. Id. at 211

94. Brief for Appellant, United States v. Akin, Civil No. 73-1807 (10th Cir. 1974).

95. Civil No. 20294 (D. Chaves County, New Mex. 1974).

96. Avondale Irrigation District v. North Idaho Properties, Inc. et al., No. 11370 (Idaho 1974).

97. Id.

98. Id.

98A. Mimbres Valley Irrigation Co. v. Salopek, et al., Civil No. 6326 (D. Luna County, New Mex. 1974).

99. PLLRC Study 136.

100. Note, supra note 44.

101. W. H. Veeder, supra Note 36 at 170.

102. H.A. Ranquist, Effect of Changes in Place & Nature of Use of Indian Rights to Water Reserved Under the "Winters Doctrine", 5 Nat. Res. Law. 34, 36 (1971).

103. D. R. Warner, supra note 65 at 408-9.

104. W. H. Veeder, Indian Prior and Paramount Rights to the Use of Water, 16 Rocky Mtn. Min. Law Insti. 631, 658 (1971).

105. New Mexico v. Molybdenum Corp. of America, et al., Civil No. 9780 (U.S. D. Ct New Mex. 1974).

106. United States v. Anderson, Civil No. 3643 (U.S.D. Ct., E.D. Wash. 1974).

107. United States v. Cappaert, Civil LV-1687 (U.S.D. Ct. Nev., filed August 19, 1971

108. Id.

109. 165 F. Supp. 600 (D. Nev. 1958), aff'd on other grounds, 279 F. 2d 699 (9th Cir. 1960).

110. Note, supra note 44 at 49

111. 286 F. Supp. 383 (D. Mont. 1968).

112. Id. at 385

113. Note, supra note 44

114. Id.

115. Comment, Appropriation and Colorado's Groundwater: A Continuing Dilemma, U. Col. L. Rev. 133, 134-35 (1967).

116. Note, supra note 44 at 46.

117. Hearings on S. 1275 before a subcommittee of the Senate Committee on Interior and Insular Affairs, 88th Congress, 2nd Session 72 (1964).

118. Post-hearing brief for defendant at 42, United States v. Cappaert, Civil No. LV-1687 (U.S.D. Ct. Nev., filed Aug. 19, 1971).

119. See id.

120. Civil No. 2506-70 (U.S.D. Ct. Nev., filed Dec. 21, 1973).

121. United States v. Orr Water Ditch Co., et al., Equity No. A-3.

122. Brief for the State of Nevada in Opposition to Motion For Leave to File Complaint, United States v. Nevada & California, No. 59 Orig. (U.S. Sup. Ct. 1973); Motion for Leave to File Complaint, Complaint and Brief in Support of Motion, United States v. Nevada & California, No. 59 Orig. (U.S. Sup. Ct. 1973).

123. Id.

124. Affidavit of B.L. Barnett filed June 6, 1973, United States v. Cappaert, Civil No. LV-1687 (U.S. D. Ct. Nev., filed Aug. 19, 1971).

125. B.A. Goldberg, Interposition - Wild West Water Style, 17 Stan. L. Rev. 1 (1965).