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WSWC-WestFAST Non-Tribal Federal Water Rights Workgroup
Groundwater and Meeting Federal Water Needs
Workshop Materials

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Note: Many of the agreements, cases, and articles summarized in this document have electronic hyperlinks to a PDF of that document. Please be aware, particularly with the cases, that the PDF(s) is a combination of several documents and may be more than 700 pages. The hyperlink should take you directly to the correct page within the document where the referenced case begins. However, printing the combined PDF or scrolling quickly to the end of the document to view the case footnotes/endnotes can get tricky.

COMPACTS/AGREEMENTS/SETTLEMENTS

Idaho-National Park Service Yellowstone Agreement: In 1992, the United States and the State of Idaho entered into an agreement to quantify "the rights of the United States to the use of water, pursuant to both federal and Idaho law, for Yellowstone National Park."[1] For the purposes of this agreement, groundwater was defined as "any water contained in an aquifer."[2] The purpose of this agreement was expressly "to quantify all existing right of the United States under state and federal law for present and future use of water for the Park."[3] The agreement detailed various sources of surface water under the agreement and the United States' basis of each right. Additionally, the United States claimed "such ground water as is necessary to maintain the natural thermal features [...] of the Park."[4] The parties recognized that because of difficulties in quantifying or otherwise describing the amount of groundwater reserved to protect these natural thermal features, "this Agreement does not address this claim," and such "claim is left for resolution when the need arises."[5] As part of this agreement, the United States relinquished forever "any and all existing claims to water under federal and state law from any source for present and future use in the Park."[6]

Colorado-National Park Service Great Sand Dunes Agreement: In 2008, the United States sought "confirmation of an In-Place Ground Water Right for the Great Sand Dunes National Park," in order "to maintain, as nearly as possible, the water table elevations in the unconfined aquifer."[7] The source of this water was to be ground water "in the unconfined aquifer comprising the ground water system underlying the Great Sand Dunes National Park ('Park'), including surface flows that recharge the underlying aquifers and upward leakage from the unconfined aquifer."[8] The United States claimed an amount of water equal to all "ground water in the unconfined aquifer underlying the Great Sand Dunes National Park."[9] The Decree detailed changes to the borders of the unconfined aquifer and recent legislation affecting groundwater rights in the area, while noting the dangers of a decline in the water table elevation of the unconfined aquifer. The Decree also stated that the "primary value of the water right claimed by the United States (apart from its role in protection of the Park resources described herein) is the right to in-priority administration of the water right and to be protected from injury from a changed or expanded use of existing appropriative rights, or new junior appropriative rights."[10] Additionally, the United States was

[1] Water Rights Agreement Between the State of Idaho and the United States for Yellowstone National Park, Preamble 1.4.
[2] Water Rights Agreement Between the State of Idaho and the United States for Yellowstone National Park, Definitions .11.
[3] Water Rights Agreement Between the State of Idaho and the United States for Yellowstone National Park, Scope of Agreement 3.1.
[4] Water Rights Agreement Between the State of Idaho and the United States for Yellowstone National Park, Water Right of the United States for the Park, 5.8.
[5] Water Rights Agreement Between the State of Idaho and the United States for Yellowstone National Park, Water Right of the United States for the Park, 5.8.
[6] Water Rights Agreement Between the State of Idaho and the United States for Yellowstone National Park, Disclaimers and Reservation of Rights, 7.1.
[7] Application For Water Rights Of The United States Of America, Case No. 2004CW35, 2.
[8] Application For Water Rights Of The United States Of America, Case No. 2004CW35, 2.
[9] Application For Water Rights Of The United States Of America, Case No. 2004CW35, 3.
[10] Application For Water Rights Of The United States Of America, Case No. 2004CW35, 19.

to "provide water table elevation data from its piezometers" to the Division Engineer on a quarterly basis."[11]

Montana-National Forest Service Compact: The Compact found in Mont. Code Ann. § 85-20-1401,[12] was signed for the express purpose of "quantifying and securing water rights to meet National Forest System purposes" in Montana, and sought "cooperatively to accommodate the interests of the State and its citizens and to avoid the conflict and uncertainty inherent in litigating federal reserved water rights claims."[13] The parties specifically noted that the water rights described were "federal reserved water rights,"[14] while limiting the Compact to that specific settlement by stating that nothing in that Compact "may be construed or interpreted [...] as a precedent for the litigation of federal reserved water rights or the interpretation or administration of future compacts between the United States and the State or between the United States and any other state."[15] As legislative authority, the United States cited 28 U.S.C. 516 and 517[16] and 7 U.S.C. 2201 note, section 1(a),[17] while Montana relied on Mont. Code Ann. § 85-2-703.[18] The parties agreed that these were "appropriations under state law and, as such, [would] be administered by the State and enforced in accordance with state law."[19] The parties then distinguished between Discrete[20] and Dispersed[21] Administrative Uses, and decided that discrete uses could be changed without approval of the Montana Department of Natural Resources and Conservation, provided that "the purpose of use of the water remains a Discrete Administrative Use," the "quantity of water for Discrete Administrative Uses diverted or withdrawn" did not exceed the total amount set forth in the Compact, and the change did not "adversely affect a Water Right Recognized Under State Law."[22] Conversely, it was decided that the "United States' federal reserved water right to divert or withdraw water for Dispersed

[11] Application For Water Rights Of The United States Of America, Case No. 2004CW35, 21.
[12] Water Rights Compact, U.S., department of agriculture and forest service with Montana, Mont. Code Ann. § 85-20-1401.
[13] RECITALS.
[14] ARTICLE III C.1.
[15] ARTICLE VII B.1.
[16] Which specifically granted authority to the United States Attorney General to enter into such compacts with the states.
[17] Which Specifically granted authority to the Secretary of Agriculture to enter into such compacts with the states.
[18] RECITALS.
[19] ARTICLE V F.
[20] Therein defined as "a federal reserved water right to divert or withdraw water from a source of supply for use authorized under the Organic Administrative Act, 16, U.S.C. 473, et seq., necessary to fulfill the primary purposes of a National Forest at administrative sites on National Forest System Lands and includes but is not limited to federal reserved water rights for the following purposes: water for district offices, ranger stations, guard stations, work centers, and housing; water used for facilities operated for administrative purposes; water used for permanently established tree nurseries and seed orchards; and water for maintaining riding and pack stock used for administrative purposes." ARTICLE I (4).
[21] Therein defined as "a federal reserved water right to divert or withdraw water from time to time, as needed, from a source of supply for use authorized under the Organic Administrative Act, 16 U.S.C. 472, et seq., necessary to fulfill the primary purposes of a National Forest within a specified area on National Forest System Lands and includes but is not limited to federal reserved water rights for the following purposes: water for dust abatement and road construction; water for prescribed fire management; water for reclamation; water used to establish vegetation; water used temporarily for establishment of nursery stock and seed orchards; and water for other incidental administrative purposes." ARTICLE I (5).
[22] ARTICLE III D.1. (a)-(c)

Administrative Uses as described" in this Compact, could "not be changed to any other use."[23] Additionally, the parties decided that use of water for "emergency fire suppression" would not be "considered an exercise of the United States' federal reserved water rights for" Discrete Administrative Uses or Dispersed Administrative Uses.[24] As part of this compact, it was agreed that in "addition to any other process available under state law, the Forest Service may apply for a change of use from an appropriation right to divert or withdraw water on land owned by the United States that is located within or immediately adjacent to" National Forest lands to "an instream flow water right on National Forest System Lands within or immediately adjacent to" National Forest lands in "accordance with procedures required under state law."[25] Additionally, "any purpose authorized by federal law applicable to National Forest System Lands" would be "considered a beneficial use under state law for the purposes of this Compact."[26] Pursuant to this settlement, the United States relinquished forever "all said federal reserved water right claims."[27]

Nevada-Nellis AFB Settlement: In 1995, the State Engineer of the State of Nevada ("State Engineer") entered into a settlement with the United States Air Force ("USAF") regarding the "applicability or inapplicability of the reserved rights doctrine to groundwater"[28] supplying Nellis Air Force Base. Prior to this settlement, the State Engineer "issued a Preliminary Order of Determination in which he rejected the USAF's reserved rights claims, based upon the State Engineer's belief that reserved rights do not extend to groundwater"[29] However, in this settlement, the State Engineer recognized a "National Defense/National Security water right to groundwater [...] to support all operations and activities at Nellis Air Force Base, Nevada."[30] This water rights was in addition to any other water rights held by "the USA on behalf of the USAF and Nellis Air Force Base."[31] The settlement specifically quantified the amount of water reserved in a series of wells, and required the USAF to "utilize reasonable efforts to develop water conservation and well management plans,"[32] while permitting "well drilling training units to train in well drilling on Nellis Air Force Base and Nellis Range, upon notice to the State Engineer."[33] Although, the State Engineer could "inspect these training activities to assure no negative impact upon the water in the Las Vegas Artesian Basin."[34] In exchange for a recognized reserved groundwater right with a priority date of June 16, 1929, the USAF agreed to relinquish one of its revocable water permits to a well and to use "reasonable efforts to relinquish" rights to two other permits, with the water represented by these permits reverting "back to the benefit of the Las Vegas Artesian Basin."[35] At the end of the settlement, the State Engineer agreed "not to rule on the applicability of the Federal Reserved Rights Doctrine to groundwater

[23] ARTICLE III D.2.
[24] ARTICLE II C.
[25] ARTICLE IV B.2.
[26] ARTICLE VI A.
[27] ARTICLE VIII H.
[28] U.S. Air Force Nellis AFB Stipulated Settlement of Water Rights Claims.
[29] U.S. Air Force Nellis AFB Stipulated Settlement of Water Rights Claims, 1.
[30] U.S. Air Force Nellis AFB Stipulated Settlement of Water Rights Claims, 2.
[31] U.S. Air Force Nellis AFB Stipulated Settlement of Water Rights Claims, 2.
[32] U.S. Air Force Nellis AFB Stipulated Settlement of Water Rights Claims, 3.
[33] U.S. Air Force Nellis AFB Stipulated Settlement of Water Rights Claims, 3.
[34] U.S. Air Force Nellis AFB Stipulated Settlement of Water Rights Claims, 3.
[35] U.S. Air Force Nellis AFB Stipulated Settlement of Water Rights Claims, 3-4.

in the final Order of Determination to be prepared and filed in this adjudication."[36] A subsequent Addendum was signed that limited USAF claims for "present and future groundwater use on Nellis Air Force Base to a maximum of 4946 acre feet per year, including water from all groundwater sources."[37] This limit did not "include or refer to surface water obtained from the Colorado River," although the USAF would attempt to utilize its right to Colorado River water "prior to utilizing its National Defense/National Security water right" to groundwater.[38] Further, both the State Engineer and the USAF agreed "that to the extent the USAF is required to utilize its National Defense/National Security water right, such right will be treated as junior for administrative purposes to those water rights held by Coran Lane Water Users Association."[39] Following the original settlement and the Addendum, the parties agreed in state District Court to the terms in a Stipulation and Order signed in 1998.[40]

Utah-National Park Service Arches Agreement: Several statutory adjudications regarding reserved water rights in Arches National Park culminated in an agreement between Utah and the US in order "to remove any causes of present and future controversy over the use of water at the Park," and resulted "in the recognition of a federal reserved water right of the United States for the Park."[41] This federal reserved water right included "all naturally occurring water underlying, originating within, or flowing through the Park," including groundwater.[42] The agreement established priority dates for the reserved water rights and it was decided that after the administrative uses of the water had been fulfilled, the "remainder of the water reserved to the United States pursuant to its federal reserved water right" would remain in its "free flowing and natural condition for in situ and instream uses."[43] Further, the United States subordinated that "portion of its federal reserved water right held for in situ uses (but not administrative uses)."[44] Utah then recognized and established a Protection Zone to protect the flow of "naturally-occurring water within the Park whose source is surface water or groundwater from the Entrada aquifer,"[45] and the State Engineer was not to approve "any application to appropriate surface water or groundwater within the Protected Zone filed after the Effective Date."[46] Additionally, the US also possessed some state water rights that "upon the issuance of final, non-appealable decrees in the General Adjudications confirming and adjudicating the federal reserved water right recognized by this Agreement" would be merged into the portion of the United States' federal reserved water right held for administrative uses.[47] Broadly, it was decided that the federal reserved water right recognized in the agreement included "all water rights of every nature and description derived under federal law from the doctrine of federal reserved water rights

[36] U.S. Air Force Nellis AFB Stipulated Settlement of Water Rights Claims, 4.
[37] Addendum to "U.S. Air Force Nellis AFB Stipulated Settlement of Water Rights Claims."
[38] Addendum to "U.S. Air Force Nellis AFB Stipulated Settlement of Water Rights Claims."
[39] Addendum to "U.S. Air Force Nellis AFB Stipulated Settlement of Water Rights Claims."
[40] IN THE MATTER OF THE DETERMINATION OF THE RELATIVE RIGHTS IN AND TO WATERS OF THE LAS VEGAS VALLEY ARTESIAN BASIN (212) IN CLARK COUNTY, NEVADA (Exhibit 8, Case No. A382950, Dept. No. XV, Docket No. "L")
[41] Arches National Park Water Rights Agreement, Recitals A.
[42] Arches National Park Water Rights Agreement, 2.
[43] Arches National Park Water Rights Agreement, 3.2.
[44] Arches National Park Water Rights Agreement, 4.
[45] Arches National Park Water Rights Agreement, 5.
[46] Arches National Park Water Rights Agreement, 5.2.
[47] Arches National Park Water Rights Agreement, 6.2.

from all sources of water, both surface and underground,"[48] and that the federal reserved water right would be "administered and protected under State law in the same manner as any water right originating under State law."[49]

Article: Arches Park Water Rights Agreement, 2015, The Water Report, James Greer and Norman Johnson

> Using good scientific data, a willingness to cooperate, and an open public process, state and federal negotiators have learned they can negotiate a "win/win" result that meets all parties' needs, including local water users. Such agreements take a tremendous amount of time and resources to accomplish, but comprehensively resolve federal reserved water rights in relation to state-based rights in perpetuity. Utah officials hope to quantify all reserved water rights through negotiation and agreement. 4p.

Utah-National Park Service Zion Agreement: In 1996, the United States and the State of Utah entered into an agreement in "order to remove causes of present and future controversy over the waters of the Virgin River system without further litigation."[50] This agreement recognized "the reserved water rights of the United States for Zion National Park" along with the "agreement of the United States to subordinate its reserved water rights to existing State water rights."[51] Pursuant to this Agreement, Utah agreed to "abandon two major reservoir sites above Zion National Park."[52] The agreement stated that the "United States has a reserved right to all water underlying, originating within or flowing through Zion National Park, including [...] ground water."[53] However, a cap was placed on water available for administrative purposes, fixed at 1295 AFY. Additionally, the United States subordinated some of its "non-administrative federal reserved water rights" to all "valid existing perfected water rights and approved applications with priority dates" prior to the signing of this agreement.[54] A ground water protection zone was established for the drainage of certain basins, limiting ground water development within that zone to a diversion rate of 35 gallons per minute or less. Details including new diversions and the depletion of the North Fork of the Virgin River and certain streams were also discussed at some length.

Wyoming-National Park Service Yellowstone Settlement: In 2005, the State of Wyoming entered into a settlement with the United States in "an effort to settle disputes concerning the existence and extent of the non-Indian claims of the United States to water" in the Big Horn river system.[55] Through the settlement, the United States acquired water rights to maintain: the instream flows of Middle Creek and its tributaries, natural lake levels, the flow of springs and seeps, and the right to use groundwater to "maintain Yellowstone National Park in its natural condition" and water for domestic use at the East Entrance Ranger Station.[56] All water rights awarded had a priority date of March 1, 1929. In exchange for these

[48] Arches National Park Water Rights Agreement, 7.
[49] Arches National Park Water Rights Agreement, 11.
[50] Zion National Park Water Rights Settlement Agreement, Recital C.
[51] Zion National Park Water Rights Settlement Agreement, Recital D.
[52] Zion National Park Water Rights Settlement Agreement, Recital E.
[53] Zion National Park Water Rights Settlement Agreement, Agreement A.
[54] Zion National Park Water Rights Settlement Agreement, Article II A.
[55] Final Phase II Decree Covering The United States' Non-Indian Claims In The Big Horn River System, 1.
[56] Final Phase II Decree Covering The United States' Non-Indian Claims In The Big Horn River System, 8.

water rights, all "claims by the United States of reserved water rights in the Big Horn Canyon Recreation Area" were specifically denied by the Court.[57] This settlement specifically implicated federal groundwater rights because the source "and point of diversion of the water used to meet the domestic needs of the East Entrance Ranger Station is a spring tributary," and the settlement grants the United States an amount of groundwater required to maintain Yellowstone National Park in its natural condition."[58] The Court recognized the inherent ambiguity in the grant, noting "that it is not possible to quantify or describe the amount of groundwater that may be required to maintain Yellowstone National Park in its natural condition," conceding that it is "thus impossible to define or describe any such right in this Decree."[59]
Wyo. Stat. 41-3-930 on groundwater and permits for wells**.**

[57] Final Phase II Decree Covering The United States' Non-Indian Claims In The Big Horn River System, 49.
[58] Final Phase II Decree Covering The United States' Non-Indian Claims In The Big Horn River System, 48.
[59] Final Phase II Decree Covering The United States' Non-Indian Claims In The Big Horn River System, 48.

FEDERAL CASES

Article: 2-37 Waters and Water Rights §37.03 Federal Reserved Water Rights, 2015, Michael Blumm and Bret Birdsong

> Provides an annotated overview of laws addressing non-tribal federal water rights, including water rights for (1) National Forests, (2) National Parks and Monuments, (3) National Wildlife Refuges, (4) Wild and Scenic Rivers, (5) National Recreation Areas, (6) Wilderness Areas, (7) Bureau of Land Management Lands, and (8) Military Reservations. It also addresses priority dates, quantification, change in use, transferability, and waters reserved – including a brief discussion on off-reservation uses and groundwater as a source. 26p.

In *Winters v. United States*,[60] the government had reserved a tract of land[61] in Montana as an Indian reservation with one of the boundaries beginning at a point in the middle of the Milk River, a non-navigable stream. On behalf of the Tribes, the government sued settlers who were diverting the stream. The settlers argued that when Montana was admitted into the United States shortly after the land was reserved, the agreement was repealed. The court found that "by a rule of interpretation of agreements ments and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians."[62] The court held that only the United States could abrogate rights granted to the Indians under a treaty, and that all rights acquired by the Indians under the treaty were to be fully protected against invasion by other parties. Regarding reserved water rights, the Court ultimately concluded that "when the Federal Government reserves land, by implication it reserves water rights sufficient to accomplish the purposes of the reservation."[63]

In *United States v. New Mexico*,[64] the United States sought a reservation of surface-water rights from a river originating in the Gila National Forest for the aesthetic, recreational, and fish-preservation purposes outlined in the Multiple-Use Sustained-Yield Act of 1960. However, a sharply divided Supreme Court denied the reservation and determined that those were only secondary purposes, and that the primary purposes of national forests were limited to only timber production and watershed protection which were

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[60] 207 U.S. 564 (1908).
[61] 25 Stat. 113 (creation of the reservation).
[62] *Winters*, 207 U.S. 564, 576 (1908).
[63] *Cappaert v. United States*, 426 U.S. 128, 139 (1976). Citing to *Winters*, 207 U.S. 564 (1908). See also *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341 (7th Cir. 1983), where a circuit court held that a removal order did not abrogate an Indian tribe's water rights, but at most "*imply* that such an abrogation was intended. Treaty-recognized rights cannot, however, be abrogated by implication." *Id.* at 365; Also, in *United States v. Bouchard*, 464 F. Supp. 1316 (W.D. Wis. 1978), a federal district court held that by making a treaty with the United States that determined the borders of the Indian reservation, a tribe had ceded the right of its "individual members to hunt, fish and gather wild rice and maple sap in the area ceded" to the United States. *Id.* at 1361; In *In re Adjudication of Existing and Reserved Rights of Chippewa Cree Tribe*, 2002 Mont. Water LEXIS 1, a state court found that the United States "recognized Indian reserved water rights for Indian reservations even when the Indians 'had no rights which they might reserve, and none to surrender in exchange for those now claimed for them.' *Id.* at 40. Accordingly, the Court held "that Indian reserved water rights prevail over junior state-based rights in the same water source even when the settlers have made substantial investments in the land and water, developed entire communities, and generated substantial employment in reliance upon federal homestead and state water laws." *Id.* at 12.
[64] 438 U.S. 696 (1978).

the only purposes in national forests for which the Government had a reserved water right. In making this determination, the Court looked at the specific language of the Organic Administration Act of 1897, which provides that "no national forest shall be established, except […] for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States."[65] In response, the United States unsuccessfully argued that the additional purposes provided for in the Multiple-Use Sustained-Yield Act represent an expansion of the reserved water rights of the United States,[66] however, the act itself provides that the purposes therein are "supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in the [Organic Administration Act of 1897]".[67] Accordingly, the court concluded that while "the Multiple-Use Sustained-Yield Act of 1960 was intended to broaden the purposes for which national forests had previously been administered […], Congress did not intend to thereby expand the reserved rights of the United States."[68] The court went on to further emphasize the distinction between primary and secondary purposes, noting that "Congress did not intend in enacting the Multiple-Use Sustained-Yield Act of 1960 to reserve water for the *secondary* purposes there established,"[69] and that "where water is only valuable for a secondary use of the reservation" it appears that Congress intended that "the United States would acquire water in the same manner as any other public or private appropriator."[70] Ultimately, the Court held that "Congress intended that water would be reserved only where necessary to preserve the timber or to secure favorable water flows for private and public uses under state law."[71]

In *Arizona v. California*,[72] "Arizona sought to confirm its title to water in the Colorado River system and to limit California's annual consumptive use of the river's waters."[73] During the course of the litigation Nevada, New Mexico and Utah were added as parties. The United States also intervened, seeking "water rights on behalf of various federal establishments, including the reservations of five Indian Tribes."[74] The Court awarded enough water to the Tribes to irrigate all "practicably irrigable acreage" in order to "satisfy the future as well as present needs of the Indian Reservations."[75] The Court reasoned that how "many Indians there will be and what their future needs will be can only be guessed," and therefore concluded "that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage."[76] This award also "included water for at least one reservation that did not border on the

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[65] 438 U.S. 696, 706 (1978); 30 Stat. 34, 16 U.S.C. § 473 et seq. (1976 ed.).
[66] 438 U.S. 696, 714-715.
[67] 438 U.S. 696, 713; 30 Stat. 34, 16 U.S.C. § 473 et seq. (1976 ed.).
[68] 438 U.S. 696, 713.
[69] 438 U.S. 696, 715 (emphasis in original). See also *Fish & Wildlife Serv. v. State (in Re Srba Case No. 39576)*, 23 P.3d 117 (Idaho 2001), where a state court held that the United States must acquire water for reclamation "in the same manner as any other public or private appropriator," because the "reservations at issue in this case were not primary to that land in the the sense that implied federal reserved water rights are applied." *Id.* at 666.
[70] 438 U.S. 696, 702.
[71] 438 U.S. 696, 718.
[72] 373 U.S. 546 (1963) (this case was originally filed in 1963, but additional litigation followed in 1983. A synthesis of both cases is included here).
[73] *Arizona v. California*, 460 U.S. 605, 608 (1983).
[74] *Arizona*, 460 U.S. 605, 608 (1983).
[75] *Arizona*, 373 U.S. 546, 600 (1963).
[76] *Arizona*, 373 U.S. 546, 601 (1963). But See *United States v. Anderson*, 591 F. Supp. 1 (E.D. Wash. 1982), where a federal district court allowed a tribe to expand its previously quantified water reservation to include hatchery,

Colorado River, thus suggesting that reserved rights may be drawn from water sources that do not traverse or border on reservations."[77] This holding was limited by a later decision,[78] where the Supreme Court held that subsequent litigation could not reopen the the Court's prior calculation of practicably irrigable acreage. In that case, the Tribes asked that omitted lands within recognized reservation boundaries for which water rights were not claimed in the earlier litigation and boundary lands which had subsequently been determined to lie within the reservations be included in a new calculation of Practicably Irrigable Acreage.[79] The Court declined, reasoning that recalculating the "amount of practicably irrigable acreage runs directly counter to the strong interest in finality in this case," noting that a "major purpose of this litigation, from its inception to the present day, has been to provide the necessary assurance to States of the Southwest and to various private interests, of the amount of water they can anticipate to receive from the Colorado River system."[80] The Court also worried about the possibility "that the irrigable-acreage standard itself should be reconsidered" if parties were allowed to relitigate Practicably Irrigable Acreage.[81] However, Practicably Irrigable Acreage was ultimately replaced in Arizona by a multi-factor test in Gila river.[82] After granting tribal water rights, the Court also chose to extend the holding to include some other federal reservations of water rights, reasoning that "the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests."[83] Accordingly, the Court concluded that "the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest."[84] Arizona also contended that after Arizona became a state, the Federal Government did not have the power to reserve waters for the use and benefit of federally reserved lands.[85] However, in response the Court held that "the federal government could reserve water after statehood, and that it could do so by executive order as well as by treaty or statute."[86]

In *Cappaert v. United States*,[87] it was determined that irrigation using groundwater pumped off-reservation was depleting water levels in Devil's Hole National Monument. The Court ruled that by reserving Devil's Hole as a National Monument, the Government had reserved "water rights sufficient to

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because fishing grounds at the time of the reservation had been destroyed by the construction of upstream dams. However, as here, the tribe was not allowed to reopen an investigation of Practicably Irrigable Acreage. Additionally, the Tribe was not allowed to use the water outside of the reservation.

[77] 2-37 Waters and Water Rights § 37.01 (Amy K. Kelley, ed., 3rd ed. LexisNexis/Matthew Bender 2016).

[78] 460 U.S. 605 (1983).

[79] 460 U.S. 605, 617 (1983).

[80] 460 U.S. 605, 620 (1983).

[81] 460 U.S. 605, 625 (1983).

[82] *In Re The General Adjudication Of All Rights To Use Water In The Gila River Sys. & Source*, 35 P.3d 68 (Ariz. 2001) (the state court reasoned that a "permanent homeland requires water for multiple uses, which may or may not include agriculture," and that limiting "the applicable inquiry to a PIA analysis not only creates a temptation for tribes to concoct inflated, unrealistic irrigation projects, but deters consideration of actual water needs based on realistic economic choices." *Id*. at 78).

[83] 373 U.S. 546, 601.

[84] 373 U.S. 546, 601.

[85] 373 U.S. 546, 597.

[86] 2-37 Waters and Water Rights § 37.01 (Amy K. Kelley, ed., 3rd ed. LexisNexis/Matthew Bender 2016).

[87] 426 U.S. 128 (1976).

accomplish the purposes of the reservation,"[88] and that these rights to unappropriated water became vested "on the date of the reservation and [were] superior to the rights of future appropriators."[89] In defining the purposes of the reservation, the Court looked to a 1952 Proclamation which stated that that "Devil's Hole was reserved for the preservation of the unusual features of scenic, scientific, and educational interest" and that the "pool… should be given special protection."[90] The proclamation specifically noted the "outstanding scientific importance" of the pool as it contained a unique species of fish.[91] When specifically discussing implied reservation of groundwater rights, the Court recognized that although it had never "applied the doctrine of implied reservation of water rights to groundwater,"[92] groundwater and surface water are interrelated and Nevada recognized this as well because it applied the law of prior appropriation to both.[93] Accordingly, the Court held that to protect the purpose of the federal reservation, the United States "can protect its water from subsequent diversion, whether the diversion is of surface or groundwater."[94] However, the Court noted that the reservation only reserves the "amount of water necessary to fulfill the purpose of the reservation, no more."[95] As a result of this ruling, the Court enjoined the off-reservation groundwater pumping that was depleting water levels in the monument.[96]

Prior to *Nev. v. United States*,[97] the United States sued landowners to determine water rights to the Truckee River. Here, the United States and a Native American tribe sought additional water rights. Defendants claimed that this suit was precluded by the previous by res judicata– the fact that the issue had already been adjudicated. The Court held that because the Tribe's interests were represented in the previous litigation by the United States, the Tribe could be bound by that decree, even though it was not a party in the previous litigation.[98]

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[88] 426 U.S. 128, 139.
[89] 426 U.S. 128, 138.
[90] Proclamation No. 2961 (66 Stat c 18).
[91] 426 U.S. 128, 141.
[92] 426 U.S. 128, 142.
[93] C. Corker, Groundwater Law, Management and Administration, National Water Commission Legal Study No. 6, p. xxiv (1971); The Nevada statutes specifically mentioned by the Court are: Nev. Rev. Stat. §§ 533.010 et seq., 534.020, 534.080, 534.090 (1973).
[94] 426 U.S. 128, 143. See also *O'Leary v. Herbert,* 55 P.2d 834 (Cal. 1936), where a state court held that "percolating waters and [...] the rights of all landowners over a common basin, saturated strata, or underground reservoir, are coequal or correlative, and [...] one landowner cannot extract more than his share of the water, even for use on his own lands, where the rights of others are injured thereby." *Id*. at 838. Compare with *In Re Wai'ola O Moloka'i, Inc.*, 103 Haw. 401 (Haw. 2004)., where a state court in Hawaii held that "an applicant for a water use permit bears the burden of establishing that the proposed use will not interfere with any public trust purposes." *Id.* at 441.
[95] 426 U.S. 128, 141.
[96] Later courts struggled with other complex questions dealing with federal reserved water in national parks and monuments. For example, *United States v. California*, 436 U.S. 32 (1978), the Court was asked to decide whether submerged lands located within a national monument belong to the state or to the United States. There, the Court held that "by operation of the Submerged Lands Act [43 U.S.C.S. § 1301], the Government's proprietary and administrative interests in these areas passed to the State of California in 1953." *Id.* at 41.
[97] 463 U.S. 110 (1983).
[98] 463 U.S. 110, 135.

In *Colville Confederated Tribes v. Walton*,[99] confederated Indian Tribes sought to enjoin a non-Indian landowner from using certain surface and ground waters. The Court held that in light of *Winters*,[100] "water was reserved when the Colville Reservation was created"[101] to "fulfill the purposes of the reservation."[102] The Court then moved on to the question of the amount of water reserved. The Court concluded that "when the Colville reservation was created, sufficient appurtenant water was reserved to permit irrigation of all practicably irrigable acreage on the reservation,"[103] along with an implied reservation of water for the "development and maintenance of replacement fishing grounds."[104] The Court also considered the rights of non-Indian purchasers of lands that had been part of the original reservation. The Court concluded that the "non-Indian successor acquires a right to water being appropriated by the Indian allottee at the time title passes," and additionally "a date-of-reservation priority date, to water that he or she appropriates with reasonable diligence after the passage of title."[105] However, the Court cautioned that if the "full measure of the Indian's reserved water right is not acquired by this means and maintained by continued use, it is lost to the non-Indian successor."[106] The Court further concluded that non-Indian successors "may not retain the right to that quantity of water despite non-use."[107] Lastly, the Court considered what power state water permits carried in regulating groundwater contained exclusively within the borders of an Indian reservation. Here, the Court held that "the state has no power to regulate water in the No Name System, and the permits are of no force and effect"[108] because "the No Name System is located entirely within the reservation," and "state regulation of some portion of its waters would create the jurisdictional confusion Congress has sought to avoid."[109]

In *United States v. Anderson*,[110] the United States filed a suit on behalf of the Spokane Tribe of Indians seeking adjudication of water rights in a groundwater basin. Some of the land in the reservation and had been homesteaded by or sold to non-Indians, although some land unclaimed by homesteaders on the reservation had be reacquired by the tribe and returned to trust status. Regarding the priority dates of the water rights involved, the Court held that perfected "water rights appurtenant to lands reacquired by the Tribe following allotment and sale to non-indians or homesteading" would "carry a priority as determined under state law." Further, the Court held that non-perfected or lost water rights on homesteaded lands would have a priority date "as of the date of reacquisition,"[111] and that rights appurtenant to lands

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[99] 647 F.2d 42 (9th Cir. 1981).
[100] *Winters v. US*, 207 U.S. 564 (1908) held that "when the Federal Government reserves land, by implication it reserves water rights sufficient to accomplish the purposes of the reservation." *Cappaert v. United States*, 426 U.S. 128, 139 (1976), *citing* 207 U.S. 564).
[101] 647 F.2d 42, 47.
[102] 647 F.2d 42, 46.
[103] 647 F.2d 42, 48.
[104] 647 F.2d 42, 48.
[105] 647 F.2d 42, 51.
[106] 647 F.2d 42, 51.
[107] 647 F.2d 42, 51.
[108] 647 F.2d 42, 51.
[109] 647 F.2d 42, 53.
[110] 736 F.2d 1358 (9th Cir. 1984).
[111] 736 F.2d 1358, 1361.

reacquired after allotment and sale to non-Indians would carry a priority date "as of the date of the creation of the reservation."[112]

Several cases arising out of the Ninth Circuit deal directly with subsistence fishing on federal water reserves, however, these seem to have little influence over federal reserves of groundwater.[113] Most recent among these cases is *John v. United States*,[114] where Congress had previously enacted the Alaska National Interest Lands Conservation Act ("ANILCA"),[115] while also seeking "to protect the 'subsistence way of life for rural residents' and the resources upon which they depend."[116] The Secretary of the Interior and the Secretary of Agriculture ("Secretaries") subsequently promulgated rules to implement parts of the act "concerning subsistence fishing and hunting rights," delegating some authority to a Federal Subsistence Board.[117] However, the plaintiffs argued that these rules "sweep too narrowly, in that they fail to designate certain navigable waterways as 'public lands' subject to the federal rural subsistence priority" outlined in ANILCA.[118] The Court first held that "it was 'lawful and reasonable' for the Secretaries to delegate authority to the Federal Subsistence Board to decide which Native allotments falling outside of federal reservations, if any, give rise to federal reserved water rights which justify imposing ANILCA's rural subsistence priority on appurtenant waters,"[119] and next, that "there is no shortage of water on the ANILCA reservations, so any need for additional water beyond adjacent waters for general purposes of wilderness preservation is too remote to require the Secretaries to identify upstream and downstream waters as subject to a reserved right."[120] The Court then discussed "whether ANILCA's priority for rural subsistence uses somehow requires a more expansive identification of reserved rights."[121] The Court concluded that it does not.[122]

In *United States v. Orr Water Ditch Co.*,[123] an Indian Tribe appealed a decision of the State Engineer allocating water in a basin, which the Tribe claimed adversely affected its water rights under decree. The Court held "that the [decree] forbids groundwater allocations that adversely affect the Tribe's decreed rights to water flows in the river."[124] Additionally, the Court held "that the district court has subject matter

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[112] 736 F.2d 1358, 1362.
[113] See generally *Native Village of Quinhagak v. United States*, 35 F.3d 388 (9th Cir. 1994); *Alaska v. Babbit*, 72 F.3d 698 (9th Cir. 1995) (where the court held that by "virtue of its reserved water rights, the United States has interests in some navigable waters." *Id*. at 703).
[114] 720 F.3d 1214 (9th Cir. 2013).
[115] 16 USCS § 3113.
[116] 720 F.3d 1214, 1218.
[117] 720 F.3d 1214, 1218.
[118] 720 F.3d 1214, 1218.
[119] 720 F.3d 1214, 1243.
[120] 720 F.3d 1214, 1235.
[121] 720 F.3d 1214, 1235.
[122] See also *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).
[123] 600 F.3d 1152 (9th Cir. 2010).
[124] 600 F.3d 1152, 1154. See also *Cappaert v. United States*, 426 U.S. 128 (1976) (where the Supreme Court enjoined off-reservation groundwater pumping because it was deemed to be adversely affecting a federal reserved water right).

jurisdiction to hear the Tribe's appeal from the State Engineer's Ruling" as far as "the allocation of groundwater rights is alleged to affect adversely the Tribe's decreed water rights."[125]

In *Ctr. for Biological Diversity v. United States BLM*,[126] environmental groups and an Indian Tribe petitioned to set aside orders from the Bureau of Land Management ("BLM") and the Fish and Wildlife Service ("FWS") authorizing a natural gas pipeline. They challenged FWS's "no jeopardy" Biological Opinion ("BO") conclusion. The Court found that under the endangered species act,[127] the BLM has a duty to "ensure that its actions are not likely to jeopardize the continued existence of the listed fish or result in destruction or adverse modification of critical habitat."[128] Expressly, arbitrarily "and capriciously relying on a faulty Biological Opinion violates this duty."[129] Ultimately, the Court held that the "Biological Opinion here was both legally flawed" and "inadequate with regard to evaluating the potential impacts of the Project's groundwater withdrawals," and that as such the BLM had violated its duty to not "jeopardize the survival of listed fish."[130] The case was remanded to allow the agency to formulate a "revised Biological Opinion that" would address the impacts of "groundwater withdrawals on listed fish species."[131]

In *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist*.,[132] a tribe claimed that the "establishment of the Reservation pursuant to federal law impliedly reserved to the Tribe and its members the right to surface water and groundwater sufficient to accomplish the purposes of the reservation."[133] The defendants argued that the Winters rights impliedly reserved for the Tribe did "not extend to groundwater,"[134] or alternatively, that "the purposes of the Agua Caliente's reservation [would] not 'entirely fail' without a reserved right to groundwater."[135] However, the court found that "the reservation implied at least some water use."[136] Further, the court stated that "no case interpreting Winters draws a principled distinction between surface water physically located on a reservation and other appurtenant water sources," relying instead only on whether "(1) the reserved water is necessary to fulfill the purposes of the reservation and (2) the reserved water is appurtenant to the reserved land."[137] The Court specifically stated that "California law recognizes that groundwater rights are inextricably linked to the overlying land,"[138] continuing to clarify that an "overlying right, analogous to that of the riparian owner in a surface

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[125] 600 F.3d 1152, 1161.
[126] 698 F.3d 1101 (9th Cir. 2012).
[127] 16 U.S.C. § 1536.
[128] 698 F.3d 1101, 1127.
[129] 698 F.3d 1101, 1127.
[130] 698 F.3d 1101, 1128.
[131] 698 F.3d 1101, 1128.
[132] 2015 U.S. Dist. LEXIS 49998.
[133] 2015 U.S. Dist. LEXIS 49998, 5.
[134] Citing to *Winters v. United States*, 207 U.S. 564 (1908).
[135] 2015 U.S. Dist. LEXIS 49998, 6. see *New Mexico*, 438 U.S. 696 (1978) (where a divided Supreme Court held that reserved water rights only extend to the minimum amount of water necessary to accomplish the primary purposes of a reservation).
[136] 2015 U.S. Dist. LEXIS 49998, 18.
[137] 2015 U.S. Dist. LEXIS 49998, 17.
[138] 2015 U.S. Dist. LEXIS 49998, 18, citing to *City of Barstow v. Mojave Water Agency*, 5 P.3d 853, 863 (Cal. 2000). In *City of Barstow*, the Court was particularly concerned with the connection between the surface water of the Mojave River and the basins it fed, finding that "some of the surface inflow to one basin is outflow from

stream, is the owner's right to take water from the ground underneath for use on his land within the basin or watershed; it is based on the ownership of the land and is appurtenant thereto."[139] Regarding distinguishing surface water and groundwater, the court felt that any "attempt to limit appurtenant water sources to surface water fails as a matter of law and logic."[140] "Appurtenance [...] must provide some legal limitation to impliedly reserved water rights," the court continued, "but persuasive authority suggests that limit should not be drawn between surface and groundwater sources."[141] Uncomfortable with the lack of specific precedent, the court noted that this case falls outside of the holding in *Cappaert* because it is undisputed here "that the groundwater at issue is not hydrologically connected to the reservation's surface water."[142] Ultimately, the Court concluded that "the federal government impliedly reserved groundwater, as well as surface water, for the [tribe] when it created the reservation."[143]

In *Riverside Irrigation Dist. v. Andrews*,[144] the Army Corp of Engineers refused to provide a permit to Colorado and the water districts which would allow them to continue with the construction of an earth fill dam on a creek that was a tributary of a navigable river. The Army Corp of Engineers was concerned that a species of crane downstream might be adversely affected were construction to proceed. The state and water districts argued that denying the permit was inconsistent with the Clean Water Act.[145] However, the Court found that "the Clean Water Act allows federal agencies to consider deleterious downstream environmental effects from a project."[146] The Court additionally appealed to the Endangered Species Act,[147] which "requires federal agencies to take whatever measures are necessary, within their authority, to protect an endangered species and its habitat."[148] Accordingly, the Court held that "the defendant in the present case was required to halt the plaintiffs from proceeding under the nationwide permit when their project had the potential of adversely affecting the whoopers and their habitat downstream from the project."[149]

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another," and that the "groundwater and surface water within the entire Mojave River Basin constitute a single interrelated source." *Id.* at 858. Importantly, *City of Barstow* was a lawsuit between upstream and downstream parties and did not specifically implicate tribal water reserves.

[139] 2015 U.S. Dist. LEXIS 49998, 18, quoting *City of Barstow v. Mojave Water Agency*, 5 P.3d 853, 863 (Cal. 2000). Prior to *Agua Caliente*, California cases implicating overlying landowner use of groundwater approached disputes much as the Supreme Court did in *Cappaert v. United States*, recognizing that one type of water rights can adversely affect another while protecting the most senior interest. 426 U.S. 128 (1976). See *California Water Service Co. v. Edward Sidebotham & Son, Inc.*, 37 Cal. Rptr. 1 (Cal. Ct. App. 1964); *Pasadena v. Alhambra*, 207 P.2d 1 (Cal. 1949); *Hillside Water Co. v. Los Angeles*, 76 P.2d 681 (Cal. 1938); *Miller v. Bay Cities Water Co.*, 107 P. 115 (Cal. 1910).

[140] 2015 U.S. Dist. LEXIS 49998, 18.

[141] 2015 U.S. Dist. LEXIS 49998, 20.

[142] 2015 U.S. Dist. LEXIS 49998, 35.

[143] 2015 U.S. Dist. LEXIS 49998, 21.

[144] 568 F. Supp. 583 (D. Colo. 1983).

[145] 33 U.S.C.S. § 1344 provides that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this chapter." 33 U.S.C. § 1251(g).

[146] 568 F. Supp. 583, 589.

[147] 16 U.S.C. § 1536.

[148] 568 F. Supp. 583, 589.

[149] 568 F. Supp. 583, 589.

In *Tweedy v. Texas Co.*,[150] a lessee had been granted the right to use surface water on land within, but no longer belonging to, an Indian reservation in its oil recovery operations. However, the lessee drilled wells and used that groundwater water for the operations. The landowners claimed that the right to surface water did not extend to groundwater. The Court concluded that because the land had once been part of an Indian reservation, the water rights were governed by federal law. Citing to *Winters v. United States*,[151] the Court reasoned that "the same implications which led the Supreme Court to hold that surface waters had been reserved would apply to underground waters as well. The land was arid—water would make it more useful, and whether the waters were found on the surface of the land or under it should make no difference."[152] Accordingly, the Court held that need and use are prerequisite to any water rights on Indian reservations, and that these prerequisites apply to groundwater and surface water equally.[153] However, the Court cautioned that "in cases where the underground water is being used at a rate faster than it is being replenished some other considerations might come into play."[154]

In *United States v. Walker River Irrigation Dist.*,[155] the Walker River and its tributaries had been the subject of multiple pieces of litigation since 1902.[156] Here, Mineral County filed a motion to intervene in a 1987 suit, arguing that because of diminishing water levels in Walker Lake, which is held in public trust by the State of Nevada, the most recent adjudication Decree[157] should be amended to adjust the priority of the appropriation in the Walker River Basin to aid Walker Lake. However, the Court held that Mineral County "lacks the sovereignty to maintain a suit" because it "can identify no statute granting it standing to sue to vindicate the public trust."[158] Further, the Court held that although "the State of Nevada or any of its citizens would have standing to sue pursuant to the public trust doctrine in this case, Mineral County does not have standing to sue pursuant to the public trust doctrine."[159] Additionally, the Court held that allowing the motion would also be inappropriate because although "the State [not the County] may presumably invoke the public trust doctrine to justify takings of water rights in the Walker River to aid Walker Lake,"[160] the "Court will not command the State to enact such takings."[161]

In *United States v. Washington*,[162] the Lummi Indian Nation sought a declaration that a treaty[163] between the Tribe and the United States impliedly reserved groundwater for the use and benefit of the Lummi Nation. Here, the Court was forced to answer three questions: first, "whether the reserved water rights

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[150] 286 F. Supp. 383 (D. Mont. 1968).
[151] *Winters v. United States*, 207 U.S. 564 (1908).
[152] 286 F. Supp. 383, 385 (1968); Cited by *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist*., 2015 U.S. Dist. LEXIS 49998, 19.
[153] 286 F. Supp. 383, 386.
[154] 286 F. Supp. 383, 386.
[155] 2015 U.S. Dist. LEXIS 69160.
[156] *Rickey Land & Cattle Co. v. Miller & Lux*, 218 U.S. 258 (1910).
[157] In Equity No. C-125, No. 3:73-cv-125.
[158] 2015 U.S. Dist. LEXIS 69160, 23-24.
[159] 2015 U.S. Dist. LEXIS 69160, 25.
[160] 2015 U.S. Dist. LEXIS 69160, 43.
[161] 2015 U.S. Dist. LEXIS 69160, 45.
[162] 2003 U.S. Dist. LEXIS 28980.
[163] 12 Stat. 927.

doctrine should be extended to groundwater,"[164] which the Court answered in the affirmative, holding that "as a matter of law" the "reserved water rights doctrine extends to groundwater even if groundwater is not connected to surface water."[165] Second, "whether there was an implied intent to reserve groundwater in the Treaty [...] when the use of the groundwater arguably was, and is, not necessary to fulfill the purpose of the Lummi Reservation,"[166] with the Court holding that the opposing party "failed to show that the reservation of groundwater under the Lummi Peninsula is unnecessary to fulfill the purpose of the Lummi Reservation as a matter of law."[167] Third, "whether it is inequitable to extend the reserved water rights doctrine to groundwater when it would deprive non-Indian homeowners of their state law rights to withdraw groundwater."[168] The Court declined to answer this last question because it could not "engage in a balancing of equities in determining the issue of reserved water rights at this time," recognizing that "even if the Court were to balance the equities, the incomplete and contested facts would preclude the Court from finding in favor of [the opposing party] on summary judgment as a matter of law."[169]

Ten years earlier, in *United States v. Washington*,[170] the United States brought a similar suit on behalf of the Lummi Indian Nation seeking a declaration that the Treaty of Point Elliott[171] impliedly reserved certain groundwater for the use and benefit of the Lummi Nation. There, the Court held that the language of the Treaty did not evidence a "primary homeland or community purpose, for which water was reserved at the time of the Treaty,"[172] and that water rights "stemming from a reservation of public land are implied only where 'without the water the purposes of the reservation would be entirely defeated.'"[173] The Court found that no purpose "beyond agriculture and domestic use." The Court then used the Practicably Irrigable Acreage method to apportion the groundwater.[174]

STATE CASES

In *San Carlos Apache Tribe v. Superior Court*,[175] Indian tribes and the United States challenged the constitutionality of two legislative measures that revised certain aspects of Arizona surface water law. The Indian tribes argued that the changes were to be enforced retroactively which would violate the due process clause of the Arizona Constitution.[176] The Court ultimately agreed, holding that some portions of the legislation "clearly and unequivocally demonstrated the Legislature's intention to apply both

[164] 2003 U.S. Dist. LEXIS 28980, 36.
[165] 2003 U.S. Dist. LEXIS 28980, 41.
[166] 2003 U.S. Dist. LEXIS 28980, 36.
[167] 2003 U.S. Dist. LEXIS 28980, 45-46.
[168] 2003 U.S. Dist. LEXIS 28980, 36.
[169] 2003 U.S. Dist. LEXIS 28980, 49.
[170] 375 F. Supp. 2d 1050 (W.D. Wash. 2005).
[171] 12 Stat. 927.
[172] 375 F. Supp. 2d 1050, 1066.
[173] 375 F. Supp. 2d 1050, 1066, citing to *New Mexico*, 438 U.S. 696, 700 (1978).
[174] Compare with *Arizona v. California*, 373 U.S. 546 (1963).
[175] 972 P.2d 179 (Ariz. 1999) ("Gila River III").
[176] Article II, section 4 of the Arizona Constitution.

substantive and procedural changes retroactively."[177] The Court also held that several other provisions violated the separation of powers doctrine[178] by removing "all possibility of meaningful judicial conclusions based on findings of fact. This the Legislature cannot do."[179]

In *In Re The General Adjudication Of All Rights To Use Water In The Gila River System And Source*,[180] various parties filed petitions for interlocutory review of the trial court's order regarding several questions concerning the relationship of groundwater and surface water. The Court faced two main questions: 1) do "federal reserved water rights extend to groundwater (underground water) that is not subject to prior appropriation under Arizona law?"[181] 2) Are "federal reserved rights holders entitled to greater protection from groundwater pumping than are water users who hold only state law rights?"[182] The Court answered both questions in the affirmative. In answering the first question, the Court reasoned that the "significant question for the purpose of the reserved rights doctrine is not whether the water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation,"[183] extending this doctrine explicitly to "national parks, forests, monuments, military bases, and wildlife preserves."[184] The Court ultimately held that "federal reserved rights extend to groundwater to the extent groundwater is necessary to accomplish the purpose of a reservation."[185] However, the Court chose to limit this holding and expressly did not decide "that any particular federal reservation, Indian or otherwise, has a reserved right to groundwater," but that a "reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation."[186] While discussing the second question regarding whether federal reserved rights holders are entitled to greater protection from groundwater pumping, the state law parties argued that there had "never been a need to reserve groundwater in a state that provides all overlying landowners an equal right to pump as much groundwater as they can put to reasonable use upon their land."[187] However, the Court noted that the reasonable use doctrine had been insufficient in protecting federal reserved rights, citing lowering groundwater tables in the area and that some "Indian reservations [had] been entirely 'dewatered' by off-reservation pumping."[188] Ultimately, the Court held that "once a federal reservation establishes a reserved right to groundwater, it may invoke federal law to protect its groundwater from subsequent diversion to the extent such protection is necessary to fulfill its reserved right,"[189] and "accomplish the purpose of a reservation."[190]

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[177] 972 P.2d 179, 204.
[178] Article III of the Arizona Constitution.
[179] 972 P.2d 179, 212.
[180] 989 P.2d 739 (Ariz. 1999).
[181] 989 P.2d 739, 741.
[182] 989 P.2d 739, 741.
[183] 989 P.2d 739, 747. Cited by *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist*., 2015 U.S. Dist. LEXIS 49998, 20.
[184] 989 P.2d 739, 745.
[185] 989 P.2d 739, 751.
[186] 989 P.2d 739, 748.
[187] 989 P.2d 739, 747-48.
[188] 989 P.2d 739, 748.
[189] 989 P.2d 739, 750.
[190] 989 P.2d 739, 751.

In re Gen. Adjudication of All Rights to Use Water,[191] arose "from the ongoing adjudication of rights to the use of Gila River water and the impact of recent federal legislation facilitating the resolution of tribal water claims subject to the adjudication."[192] Under this legislation,[193] the Pascua Yaqui Tribe was allowed to file objections to the judgment and decree regarding a recent settlement involving the Tohono O'odham Nation. The Tribe argued that "the adjudication court unconstitutionally prevented it from proving material harm in the proceedings," and that the agreement deprived the Tribe of its federal reserved water rights, "violating the Tribe's due process rights."[194] However, the Court held that because "the Tribe is not bound by the judgment and decree approving the settlement, and the Nation will not receive more water than it could have proved at trial, the Tribe's argument that the settlement violates its due process rights is unfounded."[195]

In *United States v. State Water Resources Control Bd.*,[196] the Water Resources and Control Board adopted a plan establishing "new water quality standards for salinity control and for protection of fish and wildlife."[197] Consequently, the Board "modified the permits held by the U.S. Bureau and the [California Department of Water Resources], compelling the operators of the projects to adhere to the water quality standards as set out in the Plan."[198] The Court was asked to review the validity of "the Board's establishment of water quality objectives in the Plan and its modification of the water-use permits."[199] Ultimately, the Court held that in "formulating a water quality control plan, the Board is invested with wide authority to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.[200] The Court accordingly also concluded that "the Board's power to prevent unreasonable methods of use should be broadly interpreted to enable the Board to strike the proper balance between the interests in water quality and project activities in order to objectively determine whether a reasonable method of use is manifested."[201]

In *Coordinated v. Diamond Farming Co. L.A. County Superior Court Case*,[202] the United States sought to have a claim dismissed that involved the adjudication of groundwater rights in the Antelope Valley Groundwater Basin. The United States argued that the McCarran Amendment[203] requires "adjudication of all hydrologically related water sources" for the United States to be included as a party in state court as it was here.[204] The United States therefore contended that "all owners of lands on the watershed and all appropriators who use water from the river must be joined in this action" for the state court to have

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[191] 173 P.3d 440 (Ariz. 2007).
[192] 173 P.3d 440, 441.
[193] A.R.S. §§ 45-2701 to -2702, 45-2711 to -2712 (Supp. 2007).
[194] 173 P.3d 440, 445.
[195] 173 P.3d 440, 446.
[196] 227 Cal. Rptr. 161 (Cal. Ct. App. 1986).
[197] 227 Cal. Rptr. 161, 166.
[198] 227 Cal. Rptr. 161, 166.
[199] 227 Cal. Rptr. 161, 166.
[200] 227 Cal. Rptr. 161, 174.
[201] 227 Cal. Rptr. 161, 188.
[202] 2006 Cal. Super. LEXIS 193.
[203] 43 U.S.C. § 666
[204] 2006 Cal. Super. LEXIS 193, 9.

jurisdiction, and that adjudication of only "groundwater claims would result in piecemeal resolution of water rights in the watershed."[205] However, the Court found that Congress did not intend "to carry the requirement of comprehensiveness as far as the United States" suggested,[206] and held that through "the McCarran Amendment, Congress has waived sovereign immunity of the United States in suits involving the adjudication of water rights."[207] Although the Court held that the United States had waived its sovereign immunity in this situation, the Court went on to note that other California cases have recognized a connection between ground and surface water rights[208] and agreed that to "the extent the hydrology supports an assumption that there may be interlocking or correlative rights regarding groundwater in the basin and other water, this action should be expanded as suggested by the United States."[209]

In *United States v. City and County of Denver*,[210] the Colorado Supreme Court determined the Federal Government's reserved water rights in that state regarding five types of reservations: national forests, national monuments, national parks, public springs and waterholes, and mineral hot springs. After determining that federal reserved water rights existed, the court held that for "each federal claim of a reserved water right, the trier of fact must examine the documents reserving the land from the public domain and the underlying legislation authorizing the reservation; determine the precise federal purposes to be served by such legislation; determine whether water is essential for the primary purposes of the reservation; and finally determine the precise quantity of water -- the minimal need […] required for such purposes."[211] To acquire additional water for secondary purposes, the court required that "the federal government proceed under state law in the same manner as any other public or private appropriator."[212] The analysis for the different types of reserved surface water and springs differed as follows:

> National Forests
>
> The Court held that the United States did not have an instream flow claim for reserved water rights because "the Organic Act of 1897 does not provide for instream flows for recreational, wildlife, and scenic purposes."[213] Further, the court recognized that many "public and private appropriators -- cities, industries, farmers, and ranchers -- have depended on water diversions from national forest lands high in the Rocky Mountains. Minimum flow rights would upset these

[205] 2006 Cal. Super. LEXIS 193, 14.
[206] 2006 Cal. Super. LEXIS 193, 9.
[207] 2006 Cal. Super. LEXIS 193, 4.
[208] Citing to *O'Leary v. Herbert*, 55 P.2d 834 (Cal. 1936).
[209] 2006 Cal. Super. LEXIS 193, 21. In a later decision on the same issue, the Court seemed to reverse its previous decision, finding that because a "determination of an individual party's water rights (whether by an action to quiet title or one for declaratory relief) cannot be decided in the abstract but must also take into consideration all other water rights within a single aquifer," consolidation "is not only necessary but desirable." *Coordination Proceeding Special Title Rule 1550b v. Diamond Farming*, 2010 Cal. Super. LEXIS 752, 2. Accordingly, the Court held that the "McCarran Amendment provides a limited waiver of immunity for joinder in *comprehensive* adjudications of all rights to a given water source," and that in "order for there to be a *comprehensive* adjudication all parties who have a water rights claim must be joined in the action and the judgment must bind all the parties." *Id.* at 4-5.
[210] 656 P.2d 1 (Colo. 1982) (in compliance with the McCarran Amendment, 43 U.S.C.S. § 666a).
[211] 656 P.2d 1, 20. See also *Cappaert*, 426 U.S. 128 (1976); *New Mexico*, 438 U.S. 696 (1978).
[212] 656 P.2d 1, 27.
[213] 656 P.2d 1, 22. See also *New Mexico*, 438 U.S. 696 (1978).

long-held expectations in favor of junior appropriators downstream and outside the national forest reservations."[214]

National Monuments

The United States claimed that it possessed a reserved instream flow water right in the Yampa river for recreational boating within Dinosaur National Monument, however, the court held that the federal government was not entitled to a reserved water right for minimum stream flows because recreational boating was not "a purpose for which the 1938 acreage was implicitly or explicitly reserved"[215] The court noted that "National monuments may be created by presidential proclamation to preserve public lands of outstanding historic or scientific interest,"[216] and that allowing recreational boating to be considered a primary purpose of the monument would be "to treat monuments as having the same recreational and aesthetic purposes as national parks."[217] After reviewing the statutory and legislative record, the court concluded that "Congress intended national monuments to be more limited in scope and purpose than national parks."[218]

National Parks

The Rocky Mountain National Park was created from previously reserved national forest and the United States sought a priority date from the time the national forest was reserved. The court found that the "lands reserved for national parks have purposes consistent with the lands reserved for national forests,"[219] namely protecting watershed and timber resources.[220] Accordingly, the court held that "to the extent that the purposes of the national forests and national parks overlap, the federal government has reserved water rights in the amount minimally necessary to effectuate the purposes of the national forest lands."[221] However, reservation of water for other purposes would "have a priority date from the time the national park was established."[222]

Public Springs and Waterholes

The federal government claimed a reserved water right for the entire yield of all waterholes and springs located on lands withdrawn from the public domain by a 1926 executive order.[223] The court found that the executive order did not "expressly state an intention to reserve water in public springs or waterholes."[224] However, "subsequent Department of the Interior regulations enacted pursuant to 43 U.S.C. § 300 reserved an amount of water minimally necessary to 'prevent the monopolization of vast land areas in the arid states by providing a source of drinking water

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[214] 656 P.2d 1, 23.
[215] 656 P.2d 1, 29.
[216] 656 P.2d 1, 27; 16 U.S.C. § 431 (1976).
[217] 656 P.2d 1, 28.
[218] 656 P.2d 1, 28.
[219] 656 P.2d 1, 30.
[220] See *New Mexico*, 438 U.S. 696 (1978). See also *Avondale Irrigation Dist. v. North Idaho Properties*, 577 P.2d 9 (Idaho 1978), where the United States claimed that the entire flow of certain streams was necessary to "preserve the forest ecosystems and fish and wildlife, to serve as fire barriers, and for recreational and aesthetic purposes" in Caribou National Forest. *Id*. at 32. However, the state court held that these purposes "were not the purposes for which the national forest was created and therefore the United States was not entitled to water rights for those purposes under the federal reserved water rights doctrine." *Id*. at 33-34.
[221] 656 P.2d 1, 30.
[222] 656 P.2d 1, 30.
[223] Public Water Reserve No. 107
[224] 656 P.2d 1, 31.

for animal and human consumption.'"[225] Therefore, the court held that the United States did have a reserved water right for public springs and waterholes, but only to the extent necessary to prevent "the monopolization of water needed for domestic and stock watering purposes."[226]

Mineral Hot Springs

The United States claimed that the Geothermal Steam Act of 1970 reserved geothermal water resources in all federal lands with a 1970 appropriation date.[227] However, the court found that the Geothermal Steam Act was "principally a leasing statute and [was] not a reservation of water for energy production purposes," and that no reservation of water "was implied by Congress or [was] necessary to accomplish the purposes of the Act."[228] Accordingly, the court held that the United States did not have a reserved water right to mineral hot springs in Colorado.

Ultimately, the court concluded that "the United States possesses reserved rights for its federal reservations in Colorado in waters unappropriated upon the date of reservation of the federal lands from the public domain, and in the amount necessary to achieve the primary purposes of the reservations."[229]

In *Chatfield East Well Co. v. Chatfield East Prop. Owners Ass'n*,[230] a private well company appealed a court order dismissing its application for a decree to use groundwater from the Arapahoe aquifer. The company claimed that their deed reserved to them "all underground nontributary water."[231] However, the Court held that the "aquifer water is a public resource, the ownership of which cannot be reserved in a deed conveying the surface estate to another person."[232] Accordingly, the deed "conveyed no water right to the Well Company," and "retained, at most, only the inchoate right to extract and use nontributary ground water."[233]

In *American Water Dev., Inc. v. City of Alamosa*,[234] a corporation tried to establish the right to withdraw groundwater, deriving the right from the land's previous owners. A related property at one point belonged to both the Spanish and Mexican governments, so the corporation argued that Spanish and Mexican law should apply in the determination of its groundwater rights. Under the Treaty of Guadalupe Hidalgo,[235] Mexico ceded certain lands to the United States. Shortly thereafter, Congress allowed the owners the option "to select instead of the land claimed by them, an equal quantity of vacant land."[236] The owners exercised this option and selected this property and the corporation then tried to claim water rights based on previous Mexican ownership of the plot ceded as part of the treaty. However, the Court held that by accepting a different property, the owners "waived that claim and accepted a grant from the United States to public domain lands not within the boundaries of any Mexican land grant."[237] Accordingly, the Court

[225] 656 P.2d 1, 31.
[226] 656 P.2d 1, 36.
[227] 43 U.S.C. §§ 1001 et seq. (1976) (Geothermal Steam Act of 1970).
[228] 656 P.2d 1, 34.
[229] 656 P.2d 1, 20. See also *Cappaert*, 426 U.S. 128 (1976); *New Mexico*, 438 U.S. 696 (1978).
[230] 956 P.2d 1260 (Colo. 1998).
[231] 956 P.2d 1260, 1265.
[232] 956 P.2d 1260, 1265.
[233] 956 P.2d 1260, 1274.
[234] 874 P.2d 352 (Colo. 1994).
[235] Mex., 9 Stat. 922.
[236] 874 P.2d 352, 362.
[237] 874 P.2d 352, 364.

concluded that title to this property "did not derive from the Mexican government or its Spanish predecessor."[238]

In *Hells Canyon Nat'l Rec. Area v. United States (in Re Srba)*,[239] the United States claimed that the Wilderness Act[240] entitled it to an implied reserved right to all unappropriated water in a river and certain wilderness areas. However, the Court noted that the "Wilderness Act states that 'nothing in this Act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws.'"[241] Thus, the Court held that the "Wilderness Act does not expressly reserve water to fulfill any purpose of the Act."[242] The Court then asked whether federal water rights could "be implied in the absence of an express reservation in the Act,"[243] but found that a "clear indication of the creation of implied water rights as claimed by the United States does not exist in the language of the Wilderness Act or in its legislative history,"[244] and "that Congress could not and would not have passed a bill that implied a water right that would prevent the appropriation of water under state law beyond the boundaries of the wilderness areas."[245] Appealing finally to the Hells Canyon National Recreational Area Act,[246] the Court found language to suggest that the express reservation of water contained therein applied "only to the tributaries of the Snake River originating in the Hells Canyon National Recreational Area."[247]

In *A & B Irrigation Dist. v. Idaho Conservation League (in Re Srba Case Nos. 39576)*,[248] the Court faced two issues: 1) whether "general provisions regarding interconnection and conjunctive management of surface" and groundwater in certain basins are "necessary to define or to efficiently administer the water rights decreed by the [Snake River Basin Adjudication] district court,"[249] and 2) whether "water rights for irrigation shall set the period of use as the 'irrigation season' or whether such rights must be for a specific date subject to general provisions regarding early and late season irrigation."[250] The Court ultimately remanded the case, instructing the District Court to determine "whether general provisions regarding early and late season use are necessary for the efficient administration of a water right or are necessary to define a water right."[251] Additionally, the Court required that "the period of use for each irrigation water right be identified by specific dates [...] and not merely by reference to an 'irrigation season.'"[252]

[238] 874 P.2d 352, 364.
[239] 12 P.3d 1260 (Idaho 2000).
[240] 16 U.S.C. §§ 1131.
[241] 12 P.3d 1260, 1266.
[242] 12 P.3d 1260, 1263.
[243] 12 P.3d 1260, 1263.
[244] 12 P.3d 1260, 1268.
[245] 12 P.3d 1260, 1268.
[246] 16 U.S.C. §§ 460gg(1)-(13).
[247] 12 P.3d 1260, 1269.
[248] 958 P.2d 568 (Idaho 1998).
[249] 958 P.2d 568, 578.
[250] 958 P.2d 568, 578.
[251] 958 P.2d 568, 582.
[252] 958 P.2d 568, 581.

In *Confederated Salish & Kootenai Tribes v. Clinch*,[253] tribes of the Flathead Indian Reservation petitioned the court to enjoin the Montana Department of Natural Resources and Conservation from "issuing water use permits on the Flathead Indian Reservation until such time as the tribe's water rights have been quantified."[254] The Tribes argued that "because they possess reserved water rights which are pervasive, have not been quantified [...] the Tribes have the right to prevent other appropriators from depleting the stream's waters below a protected level which has not yet been determined."[255] The Court reasoned that "use of water which may have been reserved by federal law to the Tribes is no less impermissible simply because it is temporary and can be terminated following final quantification of the Tribes' right by adjudication or negotiation."[256] Therefore, the Court found that "the Department cannot determine whether water is legally available on the Flathead Indian Reservation, because the Department cannot determine whether the issuance of those permits would affect existing water rights until the Tribe's rights are quantified by compact negotiation."[257] Accordingly, the court enjoined the Department from issuing further water use permits on the Flathead Reservation "until the Tribes' rights have been quantified."[258]

In *Confederated Salish & Kootenai Tribes v. Clinch*,[259] the non-Indian owners of two appropriative water rights on a reservation applied to change the use of the water rights from irrigation to recreation. Tribes on the reservation resisted. When considering a change in water use, the Court held that two factors must be contemplated: first, "off-Reservation effects must be assessed," and second, "the impact that the processing of these applications may have on the Tribes' political integrity, economic security, health, or welfare must be determined."[260] The Court ultimately held that the non-Indian owners must be permitted "to attempt to prove by a preponderance of the evidence that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons,"[261] Accordingly, the permanent injunction preventing consideration of the change in use was removed.

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[253] 992 P.2d 244 (Mont. 1999).
[254] 992 P.2d 244, 246.
[255] 992 P.2d 244, 249.
[256] 992 P.2d 244, 250.
[257] 992 P.2d 244, 250.
[258] 992 P.2d 244, 250. See also *Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Stults*, 59 P.3d 1093 (Mont. 2002), where a landowner applied for a beneficial water use permit to commercially bottle water on his land. The tribes objected because their water rights had not yet been quantified and sought to enjoin the permit from being issued. The State Court similarly held that beneficial use permits could not be issued "until such time as the prior pre-eminent reserved water rights of [the tribes] have been quantified." *Id.* at 1099. The court saw "no reason to limit the scope of [the] prior holdings by excluding groundwater from the Tribes' federally reserved water right in this case." *Id.* at 1099.
[259] 158 P.3d 377 (Mont. 2007).
[260] 158 P.3d 377, 386.
[261] 158 P.3d 377, 389. Compare with *In re General Adjudication of All Rights to Use Water in Big Horn River*, 835 P.2d 273 (Wyo. 1992), where a tribe was previously allowed to change a right to maintain an instream flow for agricultural purposes to a right for fishery purposes unilaterally, without State Engineer approval. The sharply divided state court held that the "state engineer remains responsible to distribute the water within the Big Horn River System according to the nature, extent, and priority of right," and presented several situations where the State Engineer may be required to seek clarification from the district court. *Id.* at 283.

In *Pyramid Lake Paiute Tribe of Indians v. Ricci*,[262] the Court reviewed a State Engineer's decision to grant a company's "change application for its water rights in Washoe County's Dodge Flat Hydrologic Basin," from "mining and milling to industrial power generating purposes."[263] The Pyramid Lake Paiute Tribe opposed the application, arguing that the "State Engineer erred by granting the change application without taking into account the Tribe's current use of Dodge Flat groundwater."[264] All water rights in the Pyramid Lake Indian Reservation had already been adjudicated as part of an earlier case,[265] preventing the Tribe from asserting an implied water right. The Court held that because the Tribe's use was "without the benefit of a permit or implied right," the "Tribe's unauthorized use does not have priority over [the company's] permits and the proposed change."[266]

Leading up to *In re General Adjudication of All Rights to Use Water in Big Horn River Sys.*,[267] an appointed special master recognized certain reserved water rights for the Tribal reservations and quantified them, but the district court approved only the portion of the special master's report awarding reserved water rights for practicably irrigable acreage ("PIA"). The tribes along with the United States appealed, seeking increased water rights extending to a federal reservation of groundwater. Central to the Court's analysis was the Court's finding that the legislative intent at the time the reservation was formed was to "create a reservation with a sole agricultural purpose,"[268] even though the "logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater."[269] The Court also noted that "not a single case applying the reserved water doctrine to groundwater" had been cited in court,[270] and therefore concluded that "the reserved water doctrine does not extend to groundwater."[271] The Court ultimately held that the "measure of the Tribes' reserved water right is the water necessary to irrigate the practicably irrigable acreage on the reservation"[272] and described the analysis necessary for the determination of PIA.[273]

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[262] 245 P.3d 1145 (Nev. 2010).
[263] 245 P.3d 1145, 1146.
[264] 245 P.3d 1145, 1146.
[265] *United States v. Orr Water Ditch Co.*, 600 F.3d 1152 (9th Cir. 2010).
[266] 245 P.3d 1145, 1146.
[267] 753 P.2d 76 (Wyo. 1988), *rev'd*, *Vaughn v. United States*, 962 P.2d 149 (Wyo. 1998), *aff'd*, *Wyoming v. United States*, 492 U.S. 406 (1989) (cited in *Agua Caliente*, 2015 U.S. Dist. LEXIS 49998 as being the "one exception" to a perceived consensus that tribal water rights extend to groundwater, as "every [other] court to address the issue agrees that Winters rights encompass groundwater resources, as well as surface water, appurtenant to reserved land." *Id.* at 19.). Only part of this decision was overruled based on an antiquated definition of "abuse of discretion."
[268] 753 P.2d 76, 96.
[269] 753 P.2d 76, 99.
[270] 753 P.2d 76, 99.
[271] 753 P.2d 76, 100.
[272] 753 P.2d 76, 100-01.
[273] The Court stated that the "determination of practicably irrigable acreage involves a two-part analysis, i.e., the PIA must be susceptible of sustained irrigation (not only proof of the arability but also of the engineering feasibility of irrigating the land) and irrigable 'at reasonable cost.'" 753 P.2d 76, 101. This Court specifically considered arability of the land, engineering feasibility, and economic feasibility.

McCARRAN AMENDMENT CASES

In *Arizona v. San Carlos Apache Tribe*,[274] several Indian Tribes asserted the right to have certain Indian water rights adjudicated in federal court. The Tribes contended that although the McCarran Amendment "waived United States sovereign immunity in state comprehensive water adjudications, [it] did not waive *Indian* sovereign immunity,"[275] and that a substantial majority of Indian land lies in States subject to Enabling Acts or constitutional disclaimers that prohibit them "from exercising even adjudicatory jurisdiction over Indian water rights"[276] However, the Court held that whatever limitations "Enabling Acts or federal policy may have originally placed on state-court jurisdiction over Indian water rights, those limitations were removed by the McCarran Amendment."[277] The Court assumed that "state adjudications are adequate to quantify the rights at issue in the federal suits" considering "the expertise and administrative machinery available to the state courts, the infancy of the federal suits, the general judicial bias against piecemeal litigation, and the convenience to the parties."[278] The Court reasoned that although adjudication of Indian water rights in federal court "might in the abstract be practical, and even wise, it will be neither practical nor wise as long as it creates the possibility of duplicative litigation, tension and controversy between the federal and state forums, hurried and pressured decisionmaking [sic], and confusion over the disposition of property rights."[279] However, the Court cautioned that there were exceptions to this holding: for example, "the federal courts need not defer to the state proceedings if the state courts expressly agree to stay their own consideration of the issues raised in the federal action pending disposition of that action," or if "at the time a motion to dismiss is filed, the federal suit at issue is well enough along that its dismissal would itself constitute a waste of judicial resources and an invitation to duplicative effort."[280]

In *Colo. River Water Conservation Dist. v. United States*,[281] water users questioned a Federal District Court's jurisdiction to hear federal water suits. The United States was seeking adjudication of reserved water rights on behalf of itself and certain Indian Tribes and brought this suit against water users in Colorado in a Federal District Court. The Government invoked federal jurisdiction under 28 U.S.C. § 1345, which provides that except "as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."[282] Shortly thereafter, one of the federal-suit defendants filed a competing suit in state court pursuant to the McCarran Amendment seeking the adjudication of all of the Government's claims.[283] The Court first considered "whether the McCarran Amendment provided consent to determine federal reserved rights held on behalf of Indians in state court," and immediately concluded that "the state court had jurisdiction over Indian water rights under the

[274] 463 U.S. 545 (1983).
[275] 463 U.S. 545, 566 (emphasis in original).
[276] 463 U.S. 545, 556.
[277] 43 U.S.C.S. § 666. *Arizona*, 463 U.S. 545, 564.
[278] 463 U.S. 545, 570.
[279] 463 U.S. 545, 569.
[280] 463 U.S. 545, 569.
[281] 424 U.S. 800 (1976).
[282] 28 USCS § 1345.
[283] 43 U.S.C. § 666.

Amendment."[284] The Court then considered whether the federal district court had jurisdiction to hear the case. The Court concluded that the McCarran Amendment "did not constitute an exception 'provided by Act of Congress' that repealed the jurisdiction of district courts under 28 U.S.C. § 1345,"[285] and that the statutes were not mutually exclusive which ultimately gave "consent to jurisdiction in the state courts concurrent with jurisdiction in the federal courts over controversies involving federal rights to the use of water. Accordingly, the court held "that the McCarran Amendment in no way diminished federal-district-court jurisdiction under 28 U.S.C. § 1345 and that the District Court" as well as the state court "had jurisdiction to hear this case."[286] However, although both courts had jurisdiction, the Court decided not to allow concurrent federal proceedings in favor of the state court. In making this determination, the Court looked at a variety of factors including "the apparent absence of any proceedings in the District Court," the "extensive involvement of state water rights occasioned by this suit naming 1,000 defendants," and "the 300-mile distance between the District Court in Denver" and the state court.[287]

In *United States v. District Court of County of Eagle*,[288] the United States moved to dismiss a suit brought in state court, asserting that the McCarran Amendment[289] did not constitute consent to have the reserved water rights of the United States adjudicated in state courts.[290] However, the Court held that section 666 (a)(1) of the McCarran Amendment was "broad enough to embrace 'reserved' waters,"[291] and that section 666 (a)(2) "obviously includes water rights previously acquired by the United States through appropriation" or "in the process of being so acquired."[292] Effectively, the Court held that the McCarran Amendment "waived the sovereign immunity of the United States as to comprehensive state water rights adjudications."[293]

[284] 424 U.S. 800, 810.
[285] 424 U.S. 800, 808.
[286] 424 U.S. 800, 808.
[287] 424 U.S. 800, 820.
[288] 401 U.S. 520 (1971).
[289] 43 U.S.C. § 666.
[290] 401 U.S. 520, 522.
[291] 401 U.S. 520, 523.
[292] 401 U.S. 520, 524.
[293] *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 549 (1983) (Where the Court further held that the McCarran Amendment waived a tribe's sovereign immunity as well with regard to state adjudications of water rights). See also *United States v. Oregon, Water Resources Dep't*, 44 F.3d 758 (9th Cir. 1994). Other Courts have expressly held that the tribes cannot bring water rights suits in federal courts as torts, as these claims are more properly categorized as "as claims that the United States violated its obligations under [...] Treaty." *Skokomish Indian Tribe v. United States*, 401 F.3d 979, 983 (9th Cir. 2005). In other cases, state parties such as in *In re General Adjudication of All Rights to use Water & Water Rights etc.*, 531 F. Supp. 449 (D.S.D. 1982) have used the McCarran Amendment successfully to involve the United States in litigation in an effort to keep suits in state courts. In *Park Center Water Dist. v. United States*, 781 P.2d 90 (Colo. 1989), a state court was asked to consider "whether the United States is entitled to antedation of its reserved water right in the well." *Id.* at 97. The Court concluded that because the other parties were put on notice already, the United States should be allowed "to amend its more general application by a specific application to a reserved water right" and the amendments should be allowed to "relate back." *Id.* at 98..

FEDERAL STATUTES

The United States in *Hells Canyon Nat'l Rec. Area v. United States (in Re Srba)*[294] cited the National Wilderness Act[295] as legislative authority. The purpose "of the Wilderness Act is to provide long range planning for wilderness areas in order to preserve and protect the wilderness character of the reserved areas, and to fulfill other preexisting purposes."[296] However, the Court in Hells Canyon did not find a "clear indication of the creation of implied water rights as claimed by the United States [...] in the language of the Wilderness Act or in its legislative history,"[297] and therefore declined to grant the United States an implied water right based on the Wilderness Act.

43 U.S.C.S. §666 (McCarran Amendment)
16 U.S.C. §528 (Multiple Use and Sustained Yield Act)
16 U.S.C. §475 (National Forest Organic Act)
16 U.S.C. §1 (National Park System Organic Act)
16 U.S.C. §1271, §1273 §1284 (Wild and Scenic Rivers Act)
16 U.S.C. §431 (Antiquities Act)
16 U.S.C. §460n-460qq (National Recreation Areas)
16 U.S.C. §1131, 1133 (Wilderness Areas)

16 U.S.C. §410fff-8(b) (Black Canyon National Monument)

101 Stat. 1539 (El Malpais National Monument)
102 Stat. 4575 (Hagerman Fossil Beds National Monument)
102 Stat. 4571 (San Pedro Riparian National Conservation Area)

30 C.F.R. §758, Executive Order ___ (Public Water Reserve No. 107)

[294] 12 P.3d 1260 (Idaho 2000).
[295] 16 USCS § 1131.
[296] 12 P.3d 1260, 1278.
[297] 12 P.3d 1260, 1268.

STATE STATUTES AND PERSPECTIVES

State Water Laws and Federal Water Uses: the History of Conflict, the Prospects for Accommodation, 1990, WSWC Craig Bell and Norman Johnson

Notes the federal government's growing interest in the management of scarce western water resources, and the importance of primary state authority to manage water resources in the western appropriation states to accomplish effective cooperation. Includes a history of western water management, the protection of public interest and public trust under the appropriation doctrine, state instream flow laws (through 1990), and a history of conflicts created by various federal statutes (FPA, ESA, CWA, Superfund, Migratory Bird) and the reserved rights doctrine, with citations to state and federal statutes and cases. It presents six approaches to reduce conflicts, synthesizing western states experiences and illustrating those methods with case histories. 115 p.

Groundwater Management in the West, 2004, WSWC Tony Willardson

Report compiled from presentations given at the WSWC meeting in Amarillo, Texas by the following states: AZ, CA, CO, ID, KS, MT, NE, NV, NM, OK, OR, SD, TX, UT, WA. Provides some historical context, perspectives, and evolution of groundwater laws and management for each of the 15 states through 2004. 17p.

State Tools to Preserve Instream Flows, 2008, WSWC Craig Bell and Jeff Taylor

A variety of state laws and programs (tools) have developed to preserve instream flows, which can be exercised during administrative, judicial, or legislative determinations over water allocation. In one form or another, all western states have laws that allow at least some instream flow protection. Many states statutorily authorize instream appropriations. Some create minimum flow protections or instream flow rights. Yet others provide indirect mechanisms to preserve instream flows. In addition, al states may utilize their administrative agencies to protect instream flows, e.g., some states condition the approval of new appropriations applications on meeting minimum flows. Includes citations to state statutes and cases. Excerpt of Chapter 4, Section 1, from *Western Laws and Policies for a Sustainable Future: A Western States' Perspective*. 71p.

Exempt Well Issues in the West, 2010, WSWC Nathan Bracken

Every WSWC member state, with the exception of Utah and California, exempts certain groundwater uses from its permitting procedures, its adjudication procedures, or both. These exemptions generally allow landowners to withdraw small amounts of water for domestic or livestock purposes. This report examines state laws, regulations, and institutions relating to domestic and livestock well exemptions; the ways exempt wells can compromise water resource allocation; relative challenges, costs and benefits; and potential approaches to mitigating the adverse impacts of exempt wells. Includes citations to state constitutions, statutes, and case law. 99p.

Mont. Code Ann. §85-20-1701 (Compact – Charles M. Russell National Wildlife Refuge)
Wyo. Stat. 41-3-930 on groundwater and permits for wells**.**