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Unresolved Issues in Federal Reserved Rights

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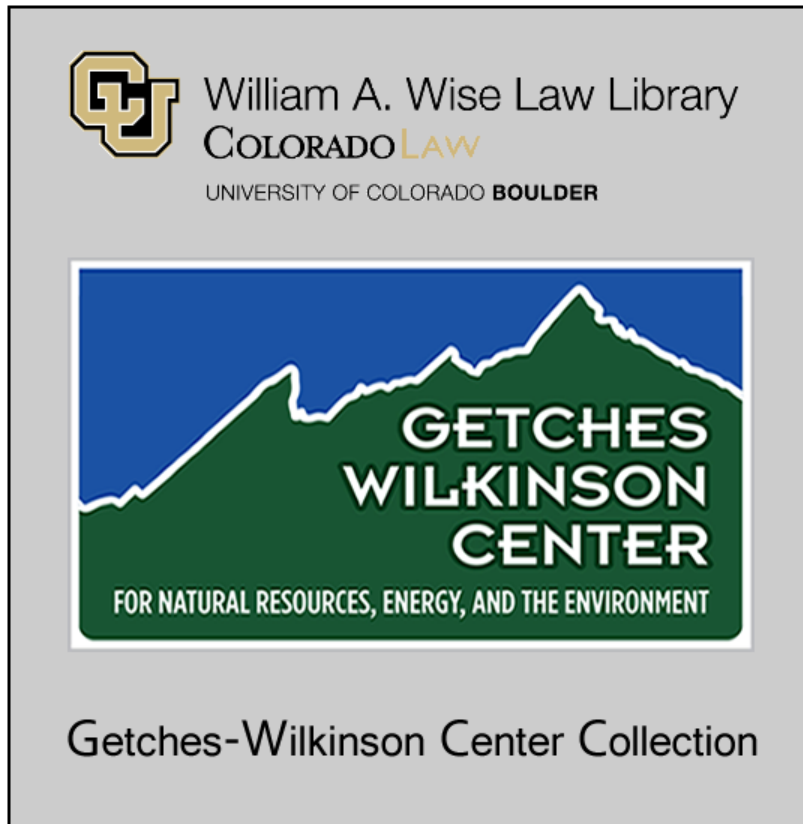
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UNRESOLVED ISSUES
IN
FEDERAL RESERVED RIGHTS

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Western Water Law
In Transition

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Seventy-nine years and four months ago today the Circuit Court of Appeals, Ninth Circuit, issued the first published opinion enunciating the doctrine of federal reserved rights. Winters v. United States, 143 Fed. 740 (9th Cir. 1906). Since that time, approximately 120 published and innumerable unpublished opinions and orders have issued on the subject. Until the mid-1970's, the doctrine virtually knew no bounds; since that time, however, it has been subjected to increasing limitations. Fisher, The Winters of Our Discontent: Federal Reserved Rights in the Western States, 69 Cornell L. Rev. 1077 (1984).

Today, we are faced with a remarkable puzzle. How are we to reconcile modern with historic precedent and, when reserved rights are negotiated, go to trial or go up on appeal, how do we approach the facts in light of that reconciliation. For the adventurous, one of the delights of a reserved rights practice is the ever increasing amount of uncharted territory remaining to be explored. Every new judicial opinion raises unanticipated issues. Every new fact situation demands yet another such opinion.

I. THE HORNBOOK LAW

For the uninitiated, reserved rights can be a bewildering subject since there is no root source of authority. Although the case law on this subject is increasingly plentiful and confusing, the generally accepted principle can be summarized as follows:

- A. Creation. When the United States reserves land for a particular purpose it may intend, expressly or impliedly, to reserve that unappropriated water which is necessary to carry out the primary purpose of the reserved land.
- B. Priority. Use of such water constitutes the exercise of a federal reserved right with a priority date as of the creation of that reservation purpose for the land to be served.
- C. Quantity. The amount of the reserved water is limited to the reservation's "minimal needs," for a particular purpose, i.e. that amount necessary to insure that the "primary" purpose(s) of the reservation are not "entirely defeated."

- D. Adjudication. Pursuant to the McCarran Amendment, 43 U.S.C. 666, the United States has given its consent to the involuntary determination of reserved rights in general adjudications conducted by either state or federal courts.

III. THE YEAR IN REVIEW

In June of last year, the Natural Resources Law Center sponsored a program similar to this one. The following are those reported cases, as well as some unreported Colorado cases, which have subsequently appeared.

A. Post Adsit Proceedings in Disclaimer States

Following the United States Supreme Court decision in Adsit, et al., disclaimer states have begun to address the jurisdictional questions reserved to state courts.

1. Background: Akin and Adsit

In Colorado River Conservation District v. United States, 424 U.S. 800, 96 S. Ct. 1236, 47 L.Ed.2d 483 (1976), usually referred to as "Akin," the United States Supreme Court held that the McCarran Amendment, 43 U.S.C. § 666, provided state court jurisdiction to adjudicate reserved rights held by the United States in trust for its Indian wards. Arising in Colorado, however, Akin was decided without consideration of the provisions found in the constitutions of many other western states which disclaim subject matter jurisdiction over Indian lands. Subsequently, in Arizona v. San Carlos Apache Tribes, 103 U.S. 3201, 103 S. Ct. 3201, 77 L.Ed.2d 837 (1983), usually referred to as "Adsit" a companion case from Montana, the court held that the McCarran Amendment's waiver of sovereign immunity applied to proceedings in disclaimer states and concluded that the question of state court jurisdiction, based on state constitutional provisions, was one for the state courts to decide.

2. Montana

In Montana ex. rel. Greely v. Water Court of the State of Montana, 691 P.2d 833 (Mont. 1984), the attorney general asked the court to assume supervisory control over the state water court to determine (1) whether the state's constitutional disclaimer precluded state court jurisdiction and (2) whether the state's adjudication procedure was adequate to adjudicate reserved rights. Although troubled by the effect of its decision on ongoing negotiations with the United States and Tribes, the Montana Supreme Court nevertheless adopted a briefing schedule for which oral arguments were held on March 25, 1985.

3. Arizona

In United States v. Superior Court of the State of Arizona, Supreme Court of Arizona, Nos. 17623-SA and 17681-SA (consolidated), Slip Opinion, January 30, 1985, the court (1) concluded that neither the doctrine of sovereign immunity nor the Arizona Enabling Act constitutes an impediment to a general state court adjudication of water rights to streams within the State of Arizona," and (2) held, "as a matter of state law, that [the disclaimer] of the Arizona Constitution is not an impediment to a general adjudication of [Indian reserved rights] in state court...."

B. Colorado Litigation

Beginning in 1967, the United States has been joined in general adjudications in all parts of the state. Following three Colorado Supreme Court decisions and three United States Supreme Court decisions, the litigation continues to move at a snail's pace. Developments during the last year include:

1. Division 1 (South Platte)

U.S. has quantified its streamflow claims for national forest Organic Act purposes, reportedly amounting to approximately one-half average annual streamflow. Discovery ongoing. U.S. has also made entirely indefinite, though relatively small, quantified claims to fulfill certain future uses.

2. Division 2 (Arkansas)

Although claims remain unquantified, motion for summary judgment on instream flow claims set for hearing on May 28, 1985, based on decision in U.S. v. Denver, 656 P.2d 1, 22-27 (Colo. 1982).

3. Division 3 (Rio Grande)

Quantification expected by June 1; discovery ongoing.

4. Divisions 4 (Gunnison), 5 (Colorado Mainstem) and 6 (Yampa)

Agreement in principle, which has not been finally approved, for entry of a partial final judgment on all USFS claims, allowing further proceedings for appropriate right claims for the 5,000+ rights awarded 1960 priority by master-referee under MUSYA and deleted by Water Court and Colorado Supreme Court in U.S. v. Denver.

With respect to Dinosaur National Monument, the Water Court granted a motion for summary judgment, essentially denying instream flow claims. Rule 59 motion pending. For some fascinating behind the scenes gossip, see Bassin, Dinosaur National Monument: The Evolution of a Federal Reserved Water Right, 21 Water Resources Bulletin 145 (1985).

Concerning the claims for the Naval Oil Shale Reserves, the U.S. attempted to amend its claim to make it clear that the Mainstem Colorado was included as a source. The Water Court ruled that the amended claim could not enjoy antedation. U.S. appealed, 84SA290, and briefing underway in the Colorado Supreme Court.

5. Division 7 (S.W. Colorado).

No significant activity.

C. Big Horn Adjudication, Wyoming.

Awaiting district court decree on Indian rights: expected approximately June 1, 1985.

D. Ninth Circuit Capers

1. Walton III

In Colville Confederated Tribes v. Walton, No. 83-4285, Slip Opinion (9th Cir., Jan. 21, 1985), the court revised the allocation of water between the Tribe, Indian allottees and a non-Indian allottee. The interesting part of the opinion is the use of state water law for guidance in determining diligence and interest. In addition, the Court denied an allocation for subirrigation.

2. Kittitas

In Kittitas Reclamation District v. Sunnyside Valley Irrigation District, 752 F.2d 1456 (1985), the Court refused: (1) to apply Akin in an ongoing federal district court declaratory judgment action (dating from the 1940's), in favor of a more recent state court adjudication; (2) to apply the doctrine of res judicata, since fishing rights were not considered in the declaratory judgment action; (3) to find a lack of retained jurisdiction in the district court to consider the release of fish flows from storage; and (4) to apply the doctrine of abrogation of Indian treaty rights.

3. Carson-Truckee

In Carson-Truckee Water Conservancy District, et al. v. Clark, et al., 741 F.2d 257 (9th Cir. 1984), the court vacated that portion of the trial court's decision in Carson-Truckee I that the Secretary of Interior is obligated to sell water from Stampede Dam which remains after satisfaction of ESA requirements and reserved rights.

4. Anderson

In United States, et al. v. Anderson, et al., 736 F.2d 1358 (9th Circ. 1984), the court dealt with priority dates for reserved rights appurtenant to lands of various status within the Spokane Indian Reservation as well as state regulatory jurisdiction over water

rights within the reservation. With respect to reacquired lands, the court reversed the trial court's award of a priority date as of the reacquisition and concluded that:

- a. For allotted lands which had been held by a non-Indian, the Tribes have a right only to that amount of water diligently used by the non-Indian with a priority as of the date of the original reservation.
- b. For lands opened for and entered by non-Indian homesteaders, the amount of the water right, if any, and its priority date are determined by state law.

The Court upheld state regulatory jurisdiction over the use of water by non-Indians within the reservation.

E. Arizona

1. In United States v. White Mountain Apache Tribe, United States District Court, District of Arizona, Slip Opinion (February 21, 1985), the court granted summary judgment in favor of the U.S. when it ruled that neither the Tribe nor its courts could not prevent entry onto the reservation by federal officials performing their official duties relating to the preparation and filing of reserved water right claims in a state court adjudication.
2. In The White Mountain Apache Tribe v. Clark, No. Civ. 83-2045 PCT CAM, United States District Court for the District of Arizona, Slip Opinion (October 12, 1984), the court (1) dismissed the Tribe's request for injunctive relief prohibiting the United States from claiming Indian water rights in an ongoing state adjudication based on an alleged conflict of interest and (2) declined to determine whether the state court had jurisdiction to adjudicate Indian reserved rights.

3. Gila River Adjudication

Getting rolling after Adsit and Arizona Supreme Court decision, non-federal entities have filed as of January 4, 1985, on San Pedro and Salt River. With respect to federal and Indian claims:

Claims already made:

Tentative:	White Mountain Apache by U.S. on Salt River
Final:	U.S. for San Carlos Reservation on Salt River

Claim deadlines:

Salt River:	9/16/85, San Carlos Tribes' Supplemental Claims 11/1/85, U.S. Final Claims for White Mountain Apache
Verde and Aqua Fria:	8/1/85: All claimants, including Fort McDowell Reservation
Upper Gila:	11/1/85: San Carlos Apache, by both U.S. and Tribes
Lower Gila:	12/30/86: All claimants, including Gila River, Salt River, Gila Bend Reservations

4. Little Colorado Adjudication

Navaho and Hopis claims due June 30, 1985.

F. Montana Intrastate Compacts

The state program for the negotiation of intra-state compacts appears to have borne fruit. This spring a draft compact was negotiated with the Assiniboine and Sioux Tribes of the Fort Peck Reservation, although as of this writing, none of the

parties had formally approved the compact. Under the draft, the Tribes received approximately 1,000,000 a.f. per year, of which at least roughly 50,000 a.f. is to come from groundwater. Apparently, the water may be used on the reservation for any purposes, which off-reservation uses must be beneficial under Montana law and must comply with the state's anti-export statute. Existing appropriators are grandfathered and, while administration of the Indians' rights is to be shared, changes of the Indian rights will be pursuant to state law.

G. Idaho

Expected that state may join U.S. in Snake River Adjudication.

H. Alaska

One small adjudication ongoing; state pondering larger bite.

I. Utah

U.S. has made claims in several adjudications claiming reserved rights for instream flows for both Organic Act and MUSYA purposes, claiming that there is no way to obtain such rights under state law.

IV. BIZARRE AND INTERESTING ISSUES

A. Is there a significant conceptual difference between Federal Reserved Rights and Indian Reserved Rights?

Probably not. United States v. New Mexico, 438 U.S. 696, 700, n.4 (1978); Arizona v. California, 103 S.Ct. 1382, 75 L.Ed. 318.

B. Can reserved rights simply be assumed to exist?

Probably not: Cappaert v. U.S., 426 U.S. 128, 138 (1976); U.S. v. New Mexico, 438 U.S. at 700-702 (1978); U.S. v. Denver, 656 P.2d 1, 18 (1982).

C. Is there a balancing of the equities in reserved right litigation?

Probably so. Cappaert v. United States, 426 U.S. 128, 138 (1976); United States v. New Mexico, 438 U.S. 696, 718 (1978); United States v. Denver, 656 P.2d 1, 19 n. 32 (1982).

D. What is the proper measure of quantification for the reserved rights of an agricultural Indian reservation?

Who knows:

1. PIA: Arizona v. California, 373 U.S. 546, 600 (1963).
2. Necessity: Cappaert v. United States, 426 U.S. 128, 141 (1976).
3. Minimal needs, entirely defeated: United States v. New Mexico, 438 U.S. 696, 700 (1978).
4. Moderate standard of living: Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 686 (1979).
5. Up for grabs? Arizona v. California, 103 S.Ct. 1382, 75 L.Ed. 318.

E. In what circumstances is the reserved right entitled to antedation?

First Claim: United States v. Denver, 656 P.2d 1, 15 (1982).

F. When is a flushing flow entitled to a reserved right?

Never? U.S. v. Denver, 656 P.2d 1, 22-27 (Colo. 1982).

G. When does "unappropriated" actually mean "unadjudicated?"

Depends on state law? U.S. v. Denver, 656 P.2d 1, 35 (Colo. 1982).

- H. Must U.S. pay filing fees?
Probably: U.S. v. Denver, 656, P.2d 1, 15 (1982).
- I. Will estoppel operate to defeat reserved rights?
Maybe: U.S. v. Denver, 656 P.2d 1, 14 (1982).
- J. Can others than U.S. use the reserved right?
Probably: U.S. v. Denver, 656 P.2d 1, 34 (1982).
- K. Is off-reservation water subject to reserved right?
No one knows: U.S. v. Denver, 656 P.2d 1, 35 (1982).
- L. Who administers reserved right?
Probably state: U.S. v. Denver, 656 P.2d 1, 35 (1982).
- M. Public springs and water holes include tributary water?
Unknown: U.S. v. Denver, 656 P.2d 1, 3-33 (1982);
Hyrup v. Kleppe, 406 F. Supp. 214 (D. Colo. 1976).
- N. When should reserved rights be quantified by negotiation?
When there is plenty of water.
- O. When should reserved rights be quantified by litigation?
When dealing with over-appropriated streams.
- P. What is the proper role of the state in dealing with reserved rights?
Depends: Contrast Montana, Colorado and Wyoming.
- Q. What law controls the change of reserved rights?
Perhaps state: U.S. v. Denver, 656 P.2d 1, 35 (Colo. 1983).

V. CONCLUSION

Is the reserved right doctrine a fraud? On whom?