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Federal and Indian Reserved Rights to Groundwater [outline]

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Citation Information

Pelcyger, Robert S., "Federal and Indian Reserved Rights to Groundwater [outline]" (1983). *Groundwater: Allocation, Development and Pollution (Summer Conference, June 6-9)*.
<https://scholar.law.colorado.edu/groundwater-allocation-development-and-pollution/16>

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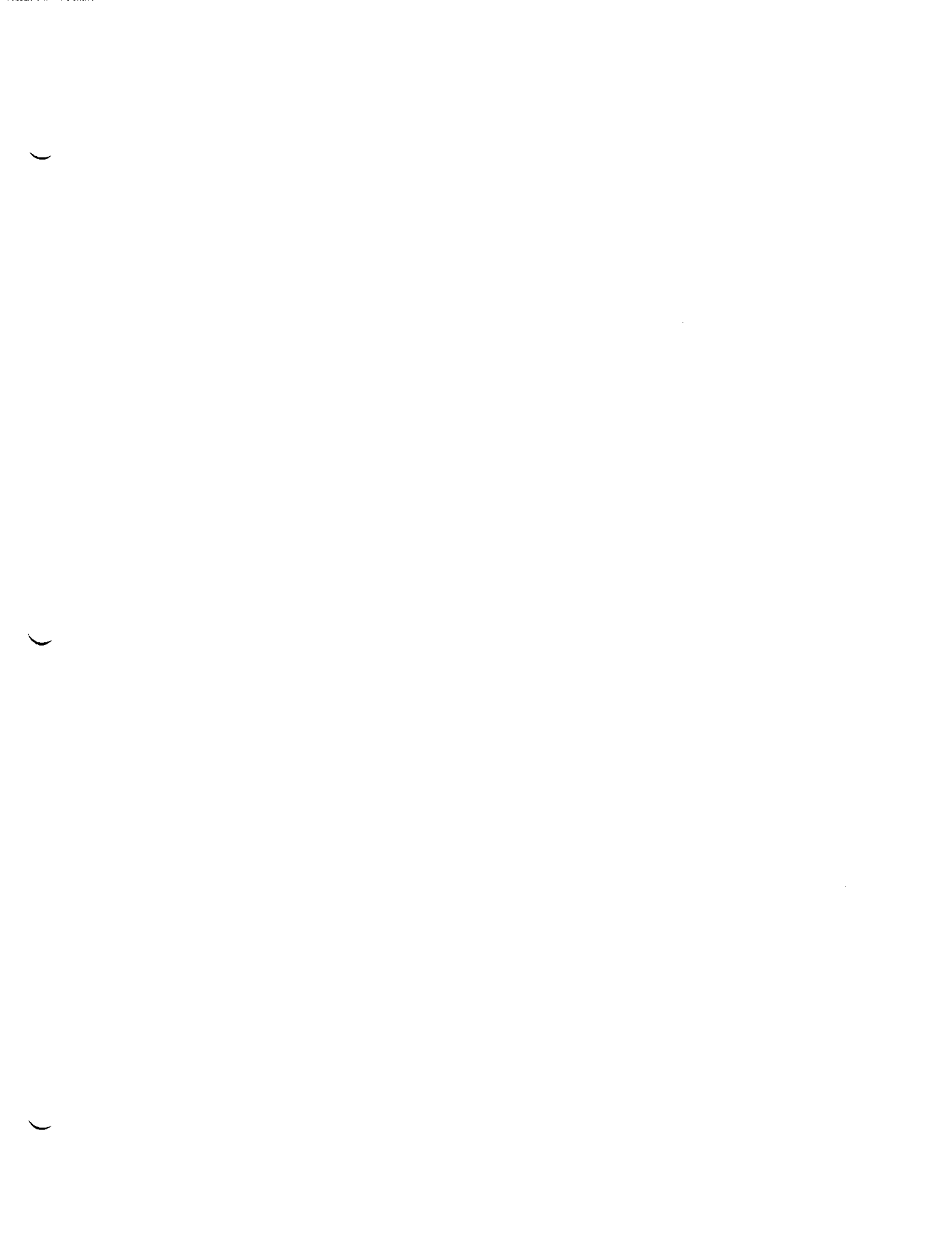
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FEDERAL AND INDIAN RESERVED RIGHTS
TO GROUNDWATER

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Groundwater:
Allocation - Development - Pollution

a short course sponsored by the
Natural Resources Law Center
University of Colorado School of Law
June 6-9, 1983



I. Reserved Rights in General

A. Distinctive Characteristics

1. Priority Date - *date is no later than date withdrawal was established*
2. Measure
3. Principal Authorities:
 - a. Winters v. United States,
207 U.S. 564 (1908);
 - b. Arizona v. California, *Applied Winters's Doctrine to Reservations other than Indian*
373 U.S. 546, 595-601
(1963);
 - c. Cappaert v. United States, *Water Rights re: endangered species.*
426 U.S. 128 (1976);
 - d. United States v. New Mexico, *Water Rights in National Forests*
438 U.S. 696 (1978).

B. Doctrinal Basis

1. Indian Reserved Rights
2. Federal Reserved Rights
3. Principal Authorities:

- a. Worcester v. Georgia, 31 *State law does not apply to Indians or Indian land*
U.S. (6. Pet.) 515 (1832);
- b. United States v. Rio Grande Dam & Irrig. Co.,
174 U.S. 690 (1899);
- c. United States v. Winans,
198 U.S. 371 (1905);

Kleppe v. New Mexico
State Law applies to federal reservations other than Indian Reservations.

- d. McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973);
- e. Bryan v. Itasca County, 426 U.S. 373 (1976);
- f. Kleppe v. New Mexico, *see note p 1* 426 U.S. 529 (1976);
- g. California v. United States, 438 U.S. 645 (1976);
- h. United States v. New Mexico, 438 U.S. 696 (1978);
- i. White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

II. Reserved Rights to Groundwater

A. The Cappaert case (United States v. Cappaert, 426 U.S. 128 (1976))

1. What did it hold?
2. Where does it lead?
3. Hydrologic connection between ground and surface waters

B. Pre-Cappaert Lower Court Decisions

1. State of Nevada ex rel. Shamburger v. United States, 165 F. Supp. 600 (D. Nev. 1958), aff'd, 279 F.2d 699 (9th Cir. 1960);

Dist. Ct - Federal Gov't not subject to State procedures so could drill wells w/out getting permit
Aff'd
 Result: fed gov't subject to state substantive law they are not required to follow state procedure unless clear congressional mandate.

→ Hancock v. Cain 426 U.S. 127
 → EPA v. 426 U.S.
 -2- Fed. Power Com. v. Oregon FPC Case

2. Tweedy v. Texas Co., 286 F. Supp. 383 (D. Mont. 1968); *Same principals apply to ground as surface waters*
3. United States v. Cappaert, 375 F. Supp. 456 (D. Nev. 1974), aff'd, 508 F.2d 313 (9th Cir. 1974).

C. Recent Post-Cappaert Decision - Big Horn Dist Ct
 Wyoming District Court's decision in the Big Horn River Adjudication (May 10, 1983, not reported) *Groundwater was owned by State, so Fed. must apply to state + doctrine of prior approp. applies only to groundwater on the reservations.*

- D. Congressional Treatment of Indian Rights to Groundwater
1. Ak-Chin legislation - 92 Stat. 409 (1978)
 2. Papago legislation - 96 Stat. 1261, 1274 (1982) *excepted wells less than 35,000 gpm*

- E. Summary and Conclusions
1. Indian Reservations
 2. Federal Reservations
 3. Primary-Secondary Distinction *(see below)*
 4. See Meyers, "Federal Groundwater Rights: A Note on Cappaert v. United States," 13 Land & Water L. Rev. 377 (1978)

Real question on Fed. Res. Rts - is groundwater necessary for the purpose for which land was withdrawn.

U.S. v. New Mexico:
Only when needed for primary purpose; if secondary purpose, must apply for state permit. (unique here, Nat'l forests) -3-

Water Quality - same test as quantity (purpose of reservation)

III. Alternative Rules for the Application
of Reserved Rights to Groundwater

- A. Prior Appropriation
- B. Overlying Uses
- C. Apportionment
- D. Safe Yield Limitation
- E. Relationship to Surface Flows
- F. Ground Water Hydrologically Connected to Surface Water
- G. Fossil Water not Hydrologically Connected to Surface Water
- H. De Minimus Exception for Essential and Small Domestic Uses?

IV. Jurisdictional Considerations

- A. Groundwater Basins Confined to Reservations
 - 1. State Jurisdiction
 - 2. Federal Jurisdiction
 - 3. Tribal Jurisdiction
- B. Groundwater Basins That Are Not Confined to Reservations
 - 1. State Jurisdiction
 - 2. Federal Jurisdiction
 - 3. Tribal Jurisdiction

Kootenai Case 380 F. Supp 582 (?)
when non-Ind. purchased riparian rights adjacent to Flathead Lake, they had an implied right to use wharfs