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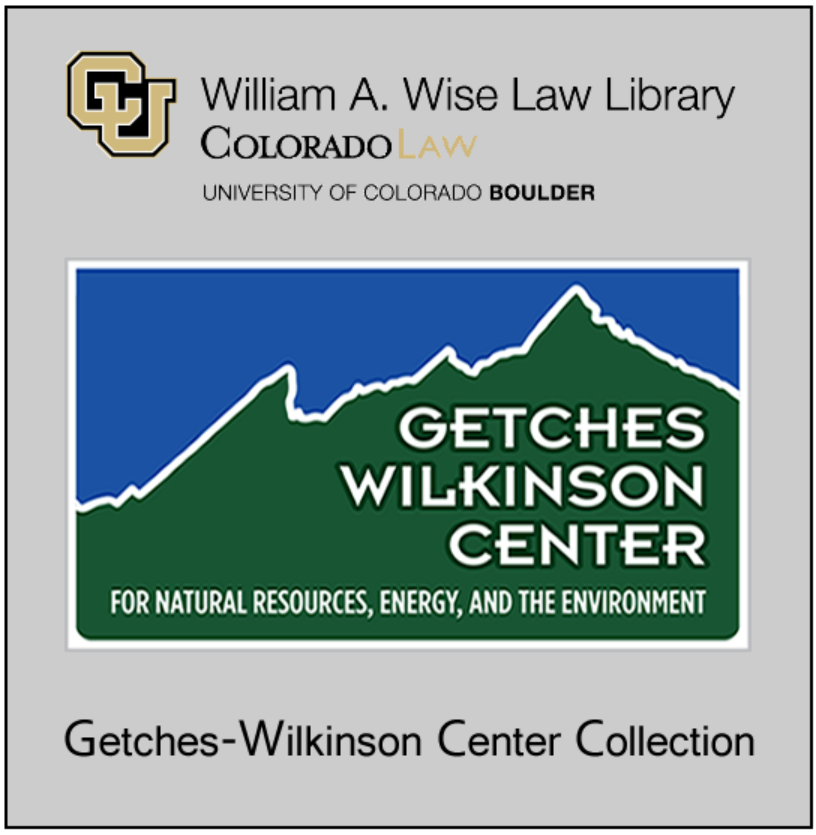

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OUTLINE

FEDERAL RESERVED WATER RIGHTS POLICY AND IMPROVING FEDERAL-STATE RELATIONS IN THE WEST

A DISCUSSION OF THE NEED FOR FEDERAL LEGISLATION ON RESERVED RIGHTS

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I. INTRODUCTION

A. Federal Water Rights Policy

1. There is no federal statute that sets forth, in comprehensive fashion, national water rights policy. That policy, to the extent that it can be divined, is embodied in a number of federal statutes and United States Supreme Court opinions sprinkled over the last century and more.

2. Two general national policy thrusts are well established.

   (a) Congressional policy has long emphasized the dominance of state water right laws as the primary vehicle to be used in establishing water rights in the western states. Andrus v. Charlestone Stone Products Co., 436 U.S. 604 (1978); and United States v. New Mexico, 438 U.S. 696 (1978).

   (b) By Supreme Court decisions announcing the doctrine of implied "reserved" rights, a national policy for establishing water rights operating outside of state water right laws also exists. Arizona v. California, 373 U.S. 546 (1963); and Winters v. United States 207 U.S. 564 (1908). That reserved rights doctrine was most recently defined in Cappaert v. United States, 426 U.S. 128, 138 (1976):

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.... The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams. Colorado River Water Conservation District v. United States, 424 U.S. 800-805 (1976); United States v. District Court for Eagle County, 401 U.S. 520, 522-523

(1971); Arizona v. California, 373 U.S. 546, 601 (1963); FPC v. Oregon, 349 U.S. 435 (1955); United States v. Powers, 305 U.S. 527 (1939); Winters v. United States, 207 U.S. 564 (1908).

3. A real and serious concern now exists that a conflict in the implementation of these two national policies may well cause disruption in long established water use patterns throughout the west. This disruption relates to the potential exercise of early priority impliedly reserved rights (primarily associated with Indian reserves) that have never been put to use in the past. The detrimental aspect of that potential exercise involves the displacement of historically used water rights established under state laws. For a recent example, see the reserved water right claims of the United States for fish spawning use in Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist. (Civil No. 21, E.D. Wn.)

B. National Water Policy - The Roles of Congress and the Federal Courts.

1. Congress is, unquestionably, the body in our federal system with the primary responsibility for determining national policies pertaining to natural resources allocation and regulation.

2. However, today announcements of national policy, as they pertain to water rights, are largely left to three and nine member panels of the federal judiciary. This condition is largely due to the disinclination of Congress to examine carefully the bits and pieces of federal law enacted from time to time over the years, and develop legislation clarifying and modifying national policy, including the elimination of the unsatisfactory inconsistencies of national policy that now exist.

C. This paper sets forth areas of federal reserved rights law and federal-state relations that may well be appropriate for congressional examination and legislative action in the 1980's. (For discussions of the various "Water Right Settlement Acts" introduced in Congress in the 1950's and 1960's, see Hanks, Peace West of the 98th Meridian - A Solution to Federal-State Conflicts over Western Waters, 23 Rutgers L. Rev. 33 (1968) and Morrealle, Federal-State Conflicts Over Western Waters - A Decade of Attempted "Clarifying Legislation," 22 Rutgers L. Rev 423 (1966).

II. AREAS SUGGESTED FOR CONGRESSIONAL EVALUATION AND ACTION

A. Inquiry - The Need For Establishment of National Policy Emphasizing Quantification

1. Is there a need? The answer, at least for water short areas, is normally "yes." This response is based on requirements for specific information pertaining to: (1) regulation according to existing rights during times of shortages, and (2) planning necessary to determine any future water rights allocations.

2. How may quantifications of reserved rights be accomplished? Alternatives include:

a. "General adjudications" - the standard procedure of the water rights laws of the western states. See 43 U.S.C. § 666; and Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976).

b. Negotiations - a technique used from time to time, and most recently advocated in President Carter's water policy initiatives. See Water Policy Initiative No. 5(a). See, e.g., the water rights allocation agreement that was the subject of the litigation in United States v. Ahtanum Irrigation District, 236 F.2d 321 (9th Cir. 1956), cert. denied 352 U.S. 988 (1957).

c. Declarations of specific formulae, to be used in quantifications of reserved rights, developed by either (1) the Congress (through enactment of legislation) or (2) a federal agency (through adoption of regulations).

B. Inquiry - The Continued Need by the United States to Rely Upon the Reserved Rights Doctrine to Satisfy National Water Right Requirements.

1. Would reliance upon state water rights law satisfy all future water right needs of the United States?

2. If state laws will not fully satisfy these needs, what role should the reserved rights doctrine play in satisfying that federal requirement?

a. Should the implied reserved right doctrine be jettisoned?

b. If the answer to (a) is yes, should an express variation of the reserved right doctrine be statutorily developed to satisfy federal needs that cannot be satisfied by state law?

C. Inquiry - The Need to Continue The Existence of Established (But Never Exercised) Reserved Water Rights?

1. Existing, but never exercised, impliedly reserved rights provide the greatest potential for displacing long established water uses based on state law. The inquiry here is to determine whether always dormant reserved rights should be terminated. The answers may well depend upon whether such reserved rights are reserved for non-Indian or Indian uses with the latter raising the much more difficult policy considerations.

2. Dealing with dormant Indian reserved rights poses difficult policy considerations not only because these rights have arisen primarily out of agreements with Indian tribes, but because they deal with a small group of specially designated humans who benefit directly from the rights. The following inquiries are pertinent here:

   a. Should these dormant reserved rights be subject, under any circumstances, to the western water rights law concept of forfeiture - use it or lose it?

   b. If the answer is "yes," should the forfeiture of these rights (unlike state-law-based-rights) be associated with a policy of compensation for their termination. (This assumes that reserved rights held by or for an Indian tribe are not entitled to compensation under due process provisions of the federal constitution.)

3. Interrelated with any national policy of forfeiture of Indian reserved rights is the issue of federal support of a special water projects construction program designed to turn dormant "paper" water rights into rights capable of use by Indians. There are several proposals being explored in several western states for "physical solutions" (federal water storage and distribution projects) designed to resolve Indian reserved water right controversies; e.g., Utah's Central Utah Project

and Washington's Yakima River Basin Water Enhancement Project.] Is there a justification for such projects - especially if they would not only provide for long dormant Indian rights to be exercised but would improve environmental quality as well as avoid any displacement of long established water uses based on state law?

D. Inquiry - The Need to More Precisely Define the Scope and Nature of Reserved Water Rights.

Throughout the west courts are now attempting to resolve major issues involving the nature of reserved rights, especially those established for the benefit of Indian tribes and Indians, with almost no express legislative guidance. The answers developed by the courts are the product of the difficult task of trying to derive coherent meaning and clarity from blurry guideposts consisting of federal statutes, legislative histories, administrative interpretations, and imprecise prior court opinions. This approach is used because normally Congress has not considered the issue being litigated in any detail, let alone dealt with it with precise statutory wording. Thus, the Courts are left to make what must be characterized, at most, as an educated guess on major national public policy issues. Examples of such issues are:

1. May an Indian reserved right held by an Indian be changed in purpose of use from the use for which it was originally reserved to a non-reserved use?

2. Whether a non-tribal member, who purchases an allotment from a tribal member, acquires the reserved right appurtenant to the allotment when owned by the allottee?

3. If that purchaser (in 2 above) did acquire a reserved water right, may he change the purpose of use from the originally reserved purpose?

4. May that purchaser transfer the place of use of the reserved right outside of the reservation?

The answers to these questions, and many others presently pending in the courts, bear on a wide range of policy issues including, from a state's standpoint, whether the basic integrity of a state's water right law program will remain intact.

E. Inquiry - The Need to Allow Continued Advocacy of the Recent Federal Executive Branch Discovery Known as the Federal Non-reserved Water Rights Doctrine.

F. Inquiry - The Need for Centralizing Greater Responsibility for Water Rights Regulation and Administration in the States.

III. CONCLUSION

Over the past two decades relations between the federal government and the states in the field of water rights have been deteriorating at an ever increasing rate. The basis for this area of confrontation relates to competing national policies: (1) longstanding Congressional policy that emphasizes the primacy of state water right laws, and (2) United States Supreme Court created federal "reserved" rights policy which operates outside of, and often in conflict with, the operation of state laws. The real threat is that, absent Congressional action, these policies will collide in an explosive fashion throughout the west. These collisions harbor the very real potential for creation of a wide range of detrimental effects. Not only are established economic units threatened, but divisive social frictions as well as political displacements are clearly in the offing.

Congress should initiate a serious law-making effort designed to achieve the development of a reasoned federal-state relationship in the field of water rights that, through a balanced accommodation of national and state interests, not only brings order to federal water policy but eliminates threats to desired policies of economic, social, and political tranquility.

The major elements of that effort should include evaluation of a statute with the following basic elements:

1. Quantification Emphasized. Certainty, in terms of scope and extent of all water rights, is required if regulation of existing rights and planning for future water allocations are to be performed properly. A national policy emphasizing quantification of federal reserved rights and state law-based rights in water short areas, through negotiation and general adjudication mechanisms, should be the basic element.

2. Establishment of New Rights by the United States. From time to time in the performance of its duties, the federal executive branch requires new water rights. Legislation should provide for establishment of new water rights by the United States to satisfy its requirements through a combination of reliance upon state laws backed-up by an express reserved rights doctrine.

3. Centralized State Administration. Centralized state administration of the regulation of all water rights, including all federal-law based rights, should be included.

4. Dormant Non-Indian Reserved Rights. All dormant (i.e., never exercised) non-Indian federal reserved rights existing should be terminated.

5. Dormant Indian Reserved Rights. A combination of mechanisms leading primarily to either (1) the exercise of dormant Indian reserved rights within a reasonable time or (2) their extinguishment should be established. Whenever rights are extinguished, easily understood and administered procedures should be provided to obtain compensation from the federal government when required by federal constitutional mandates.

6. Construction of Water Projects. Provisions should be included to provide for physical solutions involving construction of water projects that are designed to transfer long-dormant "paper" rights of Indians into valuable exercised rights without injuring established water based economies and water uses.