Federal and Indian Reserved Rights to Groundwater [outline]

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Robert S. Pelcyger, *Federal and Indian Reserved Rights to Groundwater* [outline], in *GROUNDWATER: ALLOCATION, DEVELOPMENT AND POLLUTION* (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1983).

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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 Winter's Doctrine to Reserves other than Indian (1963);

B. Doctrinal Basis

1. Indian Reserved Rights

2. Federal Reserved Rights

3. Principal Authorities:
   a. Worcester v. Georgia, 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);
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, 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);

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


Dist. Fed. Gov't not subject to state procedures so could drill wells without getting permit; Aff'd

Result: fed gov't not subject to state substantive law; they are not required to follow state procedure unless clear congressional mandate.

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


C. Recent Post-Cappaert Decision - Wyoming District Court's decision in the Big Horn River Adjudication (May 10, 1983, not reported)

D. Congressional Treatment of Indian Rights to Groundwater

2. Papago legislation - 96 Stat. excepted wells less than 35,000 gpm
   1261, 1274 (1982)

E. Summary and Conclusions

1. Indian Reservations
2. Federal Reservations
3. Primary-Secondary Distinction (see below)

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 is groundwater 'necessary' for the purpose for which land was withdrawn.

Use in new-Mexico:
- Only when needed for primary purpose; if secondary purpose must apply for state permit. (unique here, Nat'l forests)
- 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 water